FEDERAL REGISTER

Vol. 82 Friday,

No. 221 November 17, 2017

Book 1 of 2 Books

Pages 54289–54470

OFFICE OF THE FEDERAL REGISTER

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402 is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.ofr.gov.*

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge at *www.fdsys.gov*, a service of the U.S. Government Publishing Office.

The online edition of the **Federal Register** is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6:00 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 59, 1 (January 2, 1994) forward. For more information, contact the GPO Customer Contact Center, U.S. Government Publishing Office. Phone 202-512-1800 or 866-512-1800 (toll free). E-mail, *gpocusthelp.com.*

The annual subscription price for the **Federal Register** paper edition is $749 plus postage, or $808, plus postage, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $165, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Publishing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 82 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Publishing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**202–512–1806**
General online information	**202–512–1530; 1–888–293–6498**

Single copies/back copies:

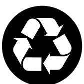
Paper or fiche	**202–512–1800**
Assistance with public single copies	**1–866–512–1800 (Toll-Free)**

FEDERAL AGENCIES

Subscriptions:

Assistance with Federal agency subscriptions:

Email	*FRSubscriptions@nara.gov*
Phone	**202–741–6000**


Printed on recycled paper.

Contents

Federal Register
Vol. 82, No. 221
Friday, November 17, 2017

Agriculture Department
See Forest Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 54316

Bureau of Consumer Financial Protection
RULES
Payday, Vehicle Title, and Certain High-Cost Installment Loans, 54472–54921

Census Bureau
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
American Community Survey Methods Panel Tests, 54317–54320

Centers for Medicare & Medicaid Services
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 54344–54345

Children and Families Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Community Services Block Grant State Plan Application, 54348
Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery, 54345–54346
Variations in Implementation of Quality Interventions Project, 54346–54348

Coast Guard
PROPOSED RULES
Anchorage Areas:
Captain of the Port Puget Sound Zone, WA; Withdrawal, 54307

Commerce Department
See Census Bureau
See Foreign-Trade Zones Board
See International Trade Administration
See National Oceanic and Atmospheric Administration

Education Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Freedom of Information Act Third Party Perjury Form, 54337–54338
Gainful Employment Program—Subpart R—Cohort Default Rates, 54337
Gainful Employment Program—Subpart Q—Appeals for Debt to Earnings Rates, 54336–54337
Gainful Employment Programs—Subpart Q, 54335–54336

Employment and Training Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Workforce Flexibility Plan Submission and Reporting Requirements, 54414–54415

Energy Department
See Federal Energy Regulatory Commission

Environmental Protection Agency
RULES
Air Quality State Implementation Plans; Approvals and Promulgations:
Iowa; Elements of the Infrastructure SIP Requirements for the 2010 Nitrogen Dioxide National Ambient Air Quality Standard; Withdrawal, 54299
Iowa; Elements of the Infrastructure SIP Requirements for the 2010 Sulfur Dioxide National Ambient Air Quality Standard; Withdrawal, 54300
Kansas; Construction Permits and Approvals Program; Withdrawal, 54300
Maryland; 2011 Base Year Inventory for the 2008 8-Hour Ozone National Ambient Air Quality Standard for the Maryland Portion of the Philadelphia-Wilmington-Atlantic City Nonattainment Area; Withdrawal, 54298–54299
Maryland; Direct Final Rule for the Approval of an Alternative Volatile Organic Compound Emission Standard; Withdrawal, 54300–54301
Nebraska; Infrastructure SIP Requirements for the 2010 Nitrogen Dioxide and Sulfur Dioxide and the 2012 Fine Particulate Matter National Ambient Air Quality Standards; Withdrawal, 54299
PROPOSED RULES
Air Quality State Implementation Plans; Approvals and Promulgations:
California Air Plan Revisions, Mojave Desert Air Quality Management District, 54307–54314
NOTICES
Adequacy Status:
Motor Vehicle Emissions Budgets in Submitted Reasonable Further Progress Plan for San Diego 8-hour Ozone for Transportation Conformity Purposes; California, 54339–54340
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
SmartWay Transport Partnership, 54338–54339
Environmental Impact Statements; Availability, etc., 54340

Equal Employment Opportunity Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 54340–54341

Federal Aviation Administration
PROPOSED RULES
Airworthiness Directives:
Bombardier, Inc., Airplanes, 54304–54306
The Boeing Company Airplanes, 54302–54304

Federal Communications Commission
RULES
Television Broadcasting Services:
Anchorage, AK, 54301

Federal Emergency Management Agency
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Revisions to National Flood Insurance Program Maps: Application Forms and Instructions for (C)LOMAs and (C)LOMR–Fs, 54402–54403
Disaster Declarations:
Alabama; Amendment 1, 54403–54404
Meetings:
Technical Mapping Advisory Council, 54402

Federal Energy Regulatory Commission
NOTICES
Combined Filings, 54338

Federal Maritime Commission
NOTICES
Petitions for Exemptions:
COSCO Shipping Lines Co., Ltd., Orient Overseas Container Line Limited, and OOCL (Europe) Limited, 54341–54342

Federal Trade Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 54342–54344

Fish and Wildlife Service
NOTICES
Import Permits:
Zimbabwe Elephant Trophies Taken On or After January 21, 2016, and On or Before December 31, 2018, 54405–54408

Food and Drug Administration
RULES
Guidance:
Regulatory Considerations for Human Cells, Tissues, and Cellular and Tissue-Based Products: Minimal Manipulation and Homologous Use, 54290–54292
Same Surgical Procedure Exception: Questions and Answers Regarding the Scope of the Exception, 54289–54290
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Food and Drug Administration Recall Regulations, 54359–54361
Generic Clearance for the Collection of Qualitative Data on Tobacco Products and Communications, 54351–54353
Guidance for Industry, Researchers, Patient Groups, and Food and Drug Administration Staff on Meetings With the Office of Orphan Products Development, 54357–54359
Premarket Notification for a New Dietary Ingredient, 54355–54357
Emergency Use Authorizations:
In Vitro Diagnostic Devices for Detection of Zika Virus, 54361–54385
Guidance:
Controlled Correspondence Related to Generic Drug Development; Correction, 54386–54387
Evaluation of Devices Used With Regenerative Medicine Advanced Therapies, 54349–54351
Expedited Programs for Regenerative Medicine Therapies for Serious Conditions, 54385–54386
Unique Device Identification: Direct Marking of Devices, 54387–54388
Meetings:
Cardiac Troponin Assays; Public Workshop, 54348–54349
Medical Gas Regulation; Public Workshops, 54353–54355

Foreign Assets Control Office
NOTICES
Blocking or Unblocking of Persons and Properties, 54466–54469

Foreign-Trade Zones Board
NOTICES
Proposed Production Activities:
Estee Lauder Inc., Foreign-Trade Zone 52, Suffolk County, NY, 54320

Forest Service
NOTICES
Meetings:
Black Hills National Forest Advisory Board, 54316–54317

Health and Human Services Department
See Centers for Medicare & Medicaid Services
See Children and Families Administration
See Food and Drug Administration
See National Institutes of Health
See Substance Abuse and Mental Health Services Administration
PROPOSED RULES
Foreign Quarantine Regulations, Proposed Revision of HHS/CDC Animal Importation Regulations, 54314
Possession, Use, and Transfer of Select Agents and Toxins:
Addition of Certain Influenza Virus Strains to the List of Select Agents and Toxins, 54314–54315
Total Inward Leakage Requirements for Respirators, 54315

Historic Preservation, Advisory Council
NOTICES
Proposed Draft Program Comment to Exempt Effects of Transportation-Related Undertakings within Rail Rights-of-Way, 54390–54402

Homeland Security Department
See Coast Guard
See Federal Emergency Management Agency
See Transportation Security Administration

Housing and Urban Development Department
NOTICES
Revocation of Orders of Succession for the Office of the Deputy Secretary, 54404–54405

Institute of Museum and Library Services
NOTICES
Meetings; Sunshine Act, 54420

Interior Department
See Fish and Wildlife Service
See Land Management Bureau
See Surface Mining Reclamation and Enforcement Office

International Trade Administration
NOTICES
Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
Certain Steel Nails from the Socialist Republic of Vietnam, 54320–54321
Light-Walled Rectangular Pipe and Tube from Mexico, 54322–54324
Narrow Woven Ribbon with Woven Selvedge from the People's Republic of China, 54325–54326
Steel Wire Garment Hangers from the People's Republic of China, 54324–54325
Meetings:
Summit on Trade-Related Standards Issues, 54321–54322

International Trade Commission
NOTICES
Complaints:
Certain Microperforated Packaging Containing Fresh Produce, 54411–54412
Investigations; Determinations, Modifications, and Rulings, etc.:
Certain Mobile Device Holders and Components Thereof, 54413–54414
Tin- and Chromium-Coated Steel Sheet from Japan, 54412

Labor Department
See Employment and Training Administration
See Labor Statistics Bureau
See Mine Safety and Health Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Hazard Communication Standard, 54416
Meetings:
Labor Advisory Committee for Trade Negotiation and Trade Policy, 54415–54416

Labor Statistics Bureau
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 54416–54419

Land Management Bureau
NOTICES
Environmental Impact Statements; Availability, etc.:
Draft Ray Land Exchange/Plan Amendment, AZ, 54408–54409
Records of Decisions:
Boardman to Hemingway Transmission Line Project and Approved Land-use Plan Amendments, Oregon, 54409–54411

Merit Systems Protection Board
NOTICES
FY 2015 Service Contract Inventory, 54420

Mine Safety and Health Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Permissible Equipment Testing, 54419–54420

National Foundation on the Arts and the Humanities
See Institute of Museum and Library Services

National Institutes of Health
NOTICES
Meetings:
National Cancer Institute, 54389–54390
National Heart, Lung, and Blood Institute, 54388–54389
National Institute of Mental Health, 54388
National Institute on Alcohol Abuse and Alcoholism, 54389

National Oceanic and Atmospheric Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 54330–54332
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Alaska Commercial Operator's Annual Report, 54335
Endangered Species:
File Nos. 20590 and 20610, 54334–54335
Meetings:
Caribbean Fishery Management Council, 54331–54332
Mid-Atlantic Fishery Management Council, 54334
New England Fishery Management Council, 54329–54331, 54333–54334
North Pacific Fishery Management Council, 54332–54333
South Atlantic Fishery Management Council, 54327–54329
Western Pacific Fishery Management Council, 54326–54327

National Science Foundation
NOTICES
Meetings:
Advisory Committee for Integrative Activities, 54420–54421

Nuclear Regulatory Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Licenses and Radiation Safety Requirements for Irradiators, 54421–54422

Pipeline and Hazardous Materials Safety Administration
NOTICES
Hazardous Materials:
Proposed Termination of M-Number and R-Number Approvals Issued Without an Expiration Date, 54465–54466

Postal Regulatory Commission
NOTICES
New Postal Products, 54422

Presidential Documents
PROCLAMATIONS
Special Observances:
Vietnam War; Commemoration of the 50th Anniversary (Proc. 9674), 55023–55026

Securities and Exchange Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 54422–54423
Petitions:
Virtu Financial Inc., Virtu Americas, LLC; Susquehanna International Group, et al., 54439–54440
Self-Regulatory Organizations; Proposed Rule Changes:
Cboe EDGA Exchange, Inc., 54440–54441

Cboe EDGX Exchange, Inc., 54442–54448, 54453–54455
ICE Clear Europe Limited, 54423–54425
Investors Exchange, LLC, 54425–54430
Municipal Securities Rulemaking Board, 54455–54457
Nasdaq BX, Inc., 54460–54463
NYSEArca, Inc., 54434–54437
The Nasdaq Stock Market LLC, 54437–54439, 54457–54460
The Options Clearing Corp., 54430–54434, 54448–54453

Small Business Administration
NOTICES
Major Disaster Declarations:
Puerto Rico; Amendment 4, 54463

State Department
NOTICES
Investigations; Determinations, Modifications, and Rulings, etc.:
Central Government of Nicaragua, 54463

Substance Abuse and Mental Health Services Administration
NOTICES
Meetings:
Interdepartmental Serious Mental Illness Coordinating Committee, 54390

Surface Mining Reclamation and Enforcement Office
RULES
Congressional Nullification of the Stream Protection Rule under the Congressional Review Act, 54924–55022
Texas Regulatory Program, 54292–54295

Surface Transportation Board
NOTICES
Discontinuance of Service Exemptions:
CSX Transportation, Inc. in Dickenson County, VA, 54463–54464

Susquehanna River Basin Commission
NOTICES
Projects Approved for Consumptive Uses of Water, 54464
Projects Approved for Minor Modifications, 54464–54465
Projects Rescinded:
Consumptive Uses of Water, 54465

Transportation Department
See Federal Aviation Administration
See Pipeline and Hazardous Materials Safety Administration

Transportation Security Administration
NOTICES
Meetings:
Aviation Security Advisory Committee, 54404

Treasury Department
See Foreign Assets Control Office

Veterans Affairs Department
RULES
Vocational Rehabilitation and Employment Nomenclature Change for Position Title, 54295–54298
NOTICES
Meetings:
National Academic Affiliations Council, 54469

Separate Parts In This Issue

Part II
Bureau of Consumer Financial Protection, 54472–54921

Part III
Interior Department, Surface Mining Reclamation and Enforcement Office, 54924–55022

Part IV
Presidential Documents, 55023–55026

Reader Aids

Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents electronic mailing list, go to https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new, enter your e-mail address, then follow the instructions to join, leave, or manage your subscription.

CFR PARTS AFFECTED IN THIS ISSUE

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

3 CFR

Proclamations:

9674 55025

12 CFR

1041 54472

14 CFR

Proposed Rules:

39 (2 documents) 54302, 54304

21 CFR

1271 (2 documents) 54289, 54290

30 CFR

700 54924
701 54924
773 54924
774 54924
777 54924
779 54924
780 54924
783 54924
784 54924
785 54924
800 54924
816 54924
817 54924
824 54924
827 54924
943 54292

33 CFR

Proposed Rules:

110 54307

38 CFR

21 54295

40 CFR

52 (6 documents) 54298, 54299, 54300

Proposed Rules:

52 (2 documents) 54307, 54309

42 CFR

Proposed Rules:

71 54314
73 54314
84 54315

47 CFR

73 54301

Rules and Regulations

Federal Register

Vol. 82, No. 221

Friday, November 17, 2017

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

The Code of Federal Regulations is sold by the Superintendent of Documents.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 1271

[Docket No. FDA–2014–D–1584]

Same Surgical Procedure Exception: Questions and Answers Regarding the Scope of the Exception; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notification of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a document entitled ''Same Surgical Procedure Exception under 21 CFR 1271.15(b): Questions and Answers Regarding the Scope of the Exception.'' The guidance document provides tissue establishments and health care professionals with FDA's current thinking on the scope of an exception set forth in the human cells, tissues, and cellular and tissue-based products (HCT/Ps) regulations.

DATES: The announcement of the guidance is published in the **Federal Register** on November 17, 2017.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2014–D–1584 for ''Same Surgical Procedure Exception under 21 CFR 1271.15(b): Questions and Answers Regarding the Scope of the Exception.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the guidance to the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist the office in processing your requests. The guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 240–402–8010. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Lori J. Churchyard, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a document entitled ''Same Surgical

Procedure Exception under 21 CFR 1271.15(b): Questions and Answers Regarding the Scope of the Exception.'' The guidance provides tissue establishments and health care professionals with FDA's current thinking on the scope of the exception set forth in part 1271 (21 CFR part 1271), specifically the exception set forth in § 1271.15(b) (21 CFR 1271.15(b)). This guidance does not address the other exceptions in § 1271.15. The guidance, presented in question and answer format, provides FDA's current interpretation of this regulation and includes examples based on inquiries received by the Agency since the final rule entitled ''Human Cells, Tissues, and Cellular and Tissue-Based Products; Establishment Registration and Listing'' published in the **Federal Register** of January 19, 2001 (66 FR 5447).

In the **Federal Register** of October 23, 2014 (79 FR 63348), FDA announced the availability of the draft guidance of the same title. Additionally, in the **Federal Register** of December 24, 2014 (79 FR 77414), FDA announced the availability of the draft guidance entitled ''Human Cells, Tissues, and Cellular and Tissue-Based Products (HCT/Ps) from Adipose Tissue: Regulatory Considerations; Draft Guidance for Industry'' dated December 2014 (Adipose Draft Guidance).

In the **Federal Register** of October 30, 2015, FDA reopened the comment period for three HCT/P-related draft guidances (80 FR 66847, 66849, and 66844, respectively) and announced the availability of another HCT/P-related draft guidance (80 FR 66850). Comments on the four HCT/P-related guidances were requested by April 29, 2016. Lastly, in the **Federal Register** of October 30, 2015 (80 FR 66845), FDA announced a 1-day part 15 (21 CFR part 15) public hearing to obtain input on the four HCT/P-related guidances to be held on April 13, 2016.

Due to considerable interest in the public hearing and to give stakeholders additional time to provide comments to the Agency, on February 29, 2016, FDA announced that the hearing was postponed. In the **Federal Register** of April 22, 2016 (81 FR 23661 and 81 FR 23664, respectively), FDA announced the rescheduled part 15 hearing date of September 12 and 13, 2016, and an extension of the comment period from April 29, 2016, until September 27, 2016, on the four HCT/P-related guidances. Also in the **Federal Register** of April 22, 2016 (81 FR 23708), FDA announced a public workshop to be held on September 8, 2016, on the ''Scientific Evidence in Development of HCT/Ps Subject to Premarket Approval.''

FDA received numerous comments on the draft guidance and the Adipose Draft Guidance in response to the request for comments, and those comments were considered in developing the final guidance. The guidance announced in this notification finalizes the draft guidance of the same title dated October 2014. This guidance also finalizes certain material related to adipose tissue that was included in the Adipose Draft Guidance.

The material in this guidance related to adipose tissue, together with the material in the final guidance entitled ''Regulatory Considerations for Human Cell, Tissues, and Cellular and Tissue-Based Products: Minimal Manipulation and Homologous Use; Guidance for Industry and Food and Drug Administration Staff'' dated November 2017 (Minimal Manipulation and Homologous Use Guidance) related to adipose tissue, supersedes the Adipose Draft Guidance. Accordingly, FDA does not intend to finalize the Adipose Draft Guidance, which is now withdrawn.

Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of the Minimal Manipulation and Homologous Use Guidance.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on ''Same Surgical Procedure Exception under 21 CFR 1271.15(b): Questions and Answers Regarding the Scope of the Exception.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations. This guidance is not subject to Executive Order 12866.

II. Paperwork Reduction Act of 1995

The guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in part 1271 have been approved under OMB control number 0910–0543.

III. Electronic Access

Persons with access to the internet may obtain the guidance at either *https://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *https://www.regulations.gov.*

Dated: November 13, 2017.

Anna K. Abram,

Deputy Commissioner for Policy, Planning, Legislation, and Analysis.

[FR Doc. 2017–24839 Filed 11–16–17; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 1271

[Docket No. FDA–2017–D–6146]

Regulatory Considerations for Human Cells, Tissues, and Cellular and Tissue-Based Products: Minimal Manipulation and Homologous Use; Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notification of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a document entitled ''Regulatory Considerations for Human Cells, Tissues, and Cellular and Tissue-Based Products: Minimal Manipulation and Homologous Use; Guidance for Industry and Food and Drug Administration Staff.'' The guidance provides human cells, tissues, and cellular and tissue-based product (HCT/P) manufacturers, healthcare providers, and FDA staff, with FDA's current thinking on the regulatory criteria of minimal manipulation and homologous use. The guidance is intended to improve stakeholders' understanding of the definitions of minimal manipulation and homologous use and how the regulatory criteria apply to their HCT/Ps. It also informs manufacturers, healthcare providers, and other interested persons that the Agency generally intends to exercise enforcement discretion over the next 36 months under limited conditions, with respect to the investigational new drug (IND) application and premarket approval (biologics license application (BLA)) requirements, for certain HCT/Ps.

DATES: The announcement of the guidance is published in the **Federal Register** on November 17, 2017.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov*. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov*.
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2017–D–6146 for ''Regulatory Considerations for Human Cells, Tissues, and Cellular and Tissue-Based Products: Minimal Manipulation and Homologous Use; Guidance for Industry and Food and Drug Administration Staff.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov*. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf*.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the guidance to the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002; or to the Office of the Center Director, Guidance and Policy Development, Center for Devices and Radiological Health (CDRH), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002; or you may send an email request to the Office of Combination Products (OCP) at *combination@fda.gov*. If you are submitting a written request, send one self-addressed adhesive label to assist that office in processing your request. The guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 240–402–8010. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Lori J. Churchyard, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911; or Angela Krueger, Office of Device Evaluation, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1676, Silver Spring, MD 20993–0002, 301–796–6380; or Leigh Hayes, Office of Combination Products, Office of the Commissioner, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5129, Silver Spring, MD 20993–0002, 301–796–8938.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a document entitled ''Regulatory Considerations for Human Cells, Tissues, Cellular and Tissue-Based Products: Minimal Manipulation and Homologous Use; Guidance for Industry and Food and Drug Administration Staff.'' The guidance provides HCT/P manufacturers, healthcare providers, and FDA staff, with our current thinking on the criteria under part 1271 (21 CFR part 1271), specifically the § 1271.10(a)(1) (21 CFR 1271.10(a)(1)) criterion of minimal manipulation and the § 1271.10(a)(2) criterion of homologous use. The interpretation of the minimal manipulation and homologous use criteria and definitions of related key terms have been of considerable interest to industry stakeholders since the criteria and definitions were first proposed.[1] The guidance document is intended to improve stakeholders' understanding of the definitions of minimal manipulation in § 1271.3(f) and homologous use in § 1271.3(c). It will also facilitate stakeholders' understanding of how the regulatory criteria in § 1271.10(a)(1) and (2) apply to their HCT/Ps. The guidance document explains the regulatory scope of the regulations, as well as the Agency's compliance policy regarding certain regulatory requirements relating to HCT/Ps. In addition, the guidance document informs manufacturers, health care providers, and other interested persons that over the next 36 months, we intend to exercise enforcement discretion under limited

[1] ''Establishment Registration and Listing for Manufacturers of Human Cellular and Tissue-Based Products'' 63 FR 26744 at 26748–49 (May 14, 1998) *https://www.gpo.gov/fdsys/pkg/FR-1998-05-14/pdf/98-12751.pdf*.

conditions with respect to the IND application or premarket approval (BLA) requirements, for certain HCT/Ps.

In the **Federal Register** of December 23, 2014 (79 FR 77012), FDA announced the availability of the draft guidance entitled ''Minimal Manipulation of Human Cells, Tissues, and Cellular and Tissue-Based Products; Draft Guidance for Industry and Food and Drug Administration Staff'' dated December 2014 (Minimal Manipulation Draft Guidance), and in the **Federal Register** of December 24, 2014 (79 FR 77414), FDA announced the availability of draft guidance entitled ''Human Cells, Tissues, and Cellular and Tissue-Based Products (HCT/Ps) from Adipose Tissue: Regulatory Considerations; Draft Guidance for Industry'' dated December 2014 (Adipose Draft Guidance). Additionally, in the **Federal Register** of October 30, 2015 (80 FR 66850), FDA announced the availability of the draft guidance entitled ''Homologous Use of Human Cells, Tissues, and Cellular and Tissue-Based Products; Draft Guidance for Industry and FDA Staff'' dated October 2015 (Homologous Use Draft Guidance).

Also in the **Federal Register** of October 30, 2015, FDA reopened the comment period on the Minimal Manipulation Draft Guidance (80 FR 66844), Adipose Draft Guidance (80 FR 66849), and a third HCT/P-related guidance addressing the same surgical procedure exception in § 1271.15(b) (80 FR 66847) (Same Surgical Procedure Exception Draft Guidance). Comments on these three HCT/P-related guidances, as well as the Homologous Use Draft Guidance, were requested by April 29, 2016. Lastly, the **Federal Register** of October 30, 2015 (80 FR 66845), FDA announced a 1-day part 15 (21 CFR part 15) public hearing to obtain input on the four HCT/P-related guidances to be held on April 13, 2016.

Due to considerable interest in the public hearing and to give stakeholders additional time to provide comments to the Agency, on February 29, 2016, FDA announced that the hearing was postponed. In the **Federal Register** of April 22, 2016 (81 FR 23661 and 81 FR 23664, respectively), FDA announced the rescheduled part 15 hearing date of September 12 and 13, 2016, and an extension of the comment period from April 29, 2016, until September 27, 2016, on the four HCT/P-related guidances. Also in the **Federal Register** of April 22, 2016 (81 FR 23708), FDA announced a public workshop on the ''Scientific Evidence in Development of HCT/Ps Subject to Premarket Approval.''

FDA received numerous comments on the Minimal Manipulation Draft Guidance, Homologous Use Draft Guidance, and the Adipose Draft Guidance in response to the request for comments, and those comments were considered in developing the final guidance in this notification.

The guidance document announced in this notification finalizes the Minimal Manipulation Draft Guidance and the Homologous Use Draft Guidance. The guidance document also finalizes certain material related to adipose tissue that was included in the Adipose Draft Guidance. The material in this guidance document related to adipose tissue, together with the material related to adipose tissue included in the guidance finalizing the Same Surgical Procedure Exception Draft Guidance, the availability of which is announced elsewhere in this issue of the **Federal Register**, supersedes the Adipose Draft Guidance. Accordingly, FDA does not intend to finalize the Adipose Tissue Guidance, which is now withdrawn. Finally, this guidance supersedes the guidance entitled ''Minimal Manipulation of Structural Tissue (Jurisdictional Update) Guidance for Industry and FDA Staff'' dated September 2006.

FDA is also announcing via this **Federal Register** notification that, with the publication of this guidance document, it will cease posting the Tissue Reference Group (TRG) annual reports on FDA's Web site. The TRG was created as specified in the ''Proposed Approach to the Regulation of Cellular and Tissue-Based Products'' dated February 28, 1997 (March 4, 1997; 62 FR 9721). The purpose of the TRG is to provide a single reference point for product specific questions received by FDA (either through the Centers, or from the Office of Combination Products) concerning jurisdiction and applicable regulation of HCT/Ps.

In 1998, the TRG began publishing its recommendations in an annual report that was posted on FDA's Web site. Originally intended to assist industry in understanding the scientific rationale for the TRG recommendations, the recommendations are stated in general terms in order to protect proprietary information. As a result, FDA has received feedback from stakeholders that the annual reports do not provide helpful information. Therefore, we are announcing that although the TRG will continue to provide recommendations, the TRG annual reports will no longer be posted on FDA's Web site. We note that this final guidance is intended to help clarify the minimal manipulation and homologous use criteria in § 1271.10(a)(1) and (2), and thus addresses many of the questions that had been posed to the TRG.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on ''Regulatory Considerations for Human Cells, Tissues, and Cellular and Tissue-Based Products: Minimal Manipulation and Homologous Use.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations. This guidance is not subject to Executive Order 12866.

II. Paperwork Reduction Act of 1995

The guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in part 1271 have been approved under OMB control number 0910–0543.

III. Electronic Access

Persons with access to the internet may obtain the guidance at either *https://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/default.htm;* or *https://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm;* or *https://www.fda.gov/CombinationProducts/GuidanceRegulatoryInformation/default.htm;* or *https://www.regulations.gov.*

Dated: November 13, 2017.

Anna K. Abram,

Deputy Commissioner for Policy, Planning, Legislation, and Analysis.

[FR Doc. 2017–24838 Filed 11–16–17; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 943

[SATS No. TX–067–FOR; Docket ID: OSM–2016–0001; S1D1S SS08011000 SX064A000 189S180110; S2D2S SS08011000 SX064A000 18XS501520]

Texas Regulatory Program

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

ACTION: Final rule.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are approving an amendment to the Texas regulatory program (Texas program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Texas proposed revisions to its regulations regarding annual permit fees. Texas revised its program at its own initiative to raise revenues sufficient to cover its anticipated share of costs to administer the coal regulatory program and to encourage mining companies to more quickly reclaim lands and request bond release, thereby fulfilling SMCRA's purpose of assuring the reclamation of mined land as quickly as possible.

DATES: The effective date is December 18, 2017.

FOR FURTHER INFORMATION CONTACT: William L. Joseph, Director, Tulsa Field Office. Telephone: (918) 581–6430. Email: *bjoseph@osmre.gov.*

SUPPLEMENTARY INFORMATION:

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

I. Background on the Texas Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, State laws and regulations that govern surface coal mining and reclamation operations in accordance with the Act and consistent with the Federal regulations. See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Texas program, effective February 16, 1980. You can find background information on the Texas program, including the Secretary's findings, the disposition of comments, and the conditions of approval, in the February 27, 1980, **Federal Register** (45 FR 12998, 13008). You can find later actions on the Texas program at 30 CFR 943.10, 943.15, and 943.16.

II. Submission of the Amendment

By letter dated November 17, 2015 (Administrative Record No. TX–705), and on its own initiative, Texas sent us an amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*). We announced receipt of the proposed amendment in the April 08, 2016, **Federal Register** (81 FR 20591). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the adequacy of the amendment. We did not hold a public hearing or meeting because no one requested one. The public comment period ended on May 09, 2016. We did not receive any public comments.

III. OSMRE's Findings

The following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment as described below.

16 Texas Administrative Code (TAC) Section 12.108 Permit Fees

Texas proposed to revise its regulations at 16 TAC Sections 12.108(b)(1)–(3), adjusting the annual coal mining permit fees for calendar years 2015 and 2016. Fees for mining activities during calendar years 2015 and 2016 were to be paid by coal mine operations by March 15th of the year following the calendar year for which the fees are applicable.

By this amendment, Texas has:

(1) Repealed paragraph (b)(1) regarding a fee for each acre of land within the permit area on which coal or lignite was actually removed during the calendar year;

(2) Renumbered existing paragraphs (b)(2) and (3) to read as (b)(1) and (2) respectively;

(3) Increased the fee in the new paragraph (b)(1) from $12.00 to $13.05 for each acre of land within a permit area covered by a reclamation bond on December 31st of the year; and

(4) Increased the fee in the new paragraph (b)(2) from $6,540.00 to $6,600.00 for each permit in effect on December 31st of the year.

The Federal regulations at 30 CFR 777.17 provide that applications for surface coal mining permits must be accompanied by a fee determined by the regulatory authority. The Federal regulations also provide that the fees may be less than, but not more than, the actual or anticipated cost of reviewing, administering, and enforcing the permit.

Texas' amendment describes how its coal mining regulatory program is funded. Texas operates on a biennial budget which appropriates general revenue funds for permitting and inspecting coal mining facilities within the state. This appropriation is contingent on the Railroad Commission of Texas (Commission) assessing fees sufficient to generate revenue to recover the general revenue appropriation. When calculating anticipated costs to the Commission for regulating coal mining activity, Texas anticipates OSMRE providing some grant funding for regulatory program costs based on Section 705(a) of SMCRA. Texas estimated that annual fees at the revised amounts in this amendment would result in revenue that, when coupled with permit application fees, was not expected to provide for more than 50 percent of the anticipated regulatory program costs during each year of the biennium. OSMRE agrees that this is a reasonable expectation in light of recent reductions in overall funding to states that have resulted in them receiving less than fifty percent of their anticipated regulatory program costs.

Texas adjusts its fees biennially to recover the amounts expended from state appropriations in accordance with a formula and schedule agreed to in 2005 by the coal mining industry and the Commission. This amendment represents the sixth adjustment to surface mining fees based upon that agreement.

We find that Texas' fee changes are consistent with the discretionary authority provided by the Federal regulation at 30 CFR 777.17. Therefore, OSMRE approves Texas' permit fee changes, recognizing that Texas has a process to adjust its fees to cover the cost of its regulatory program not covered by the Federal grant.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendment but did not receive any.

Federal Agency Comments

On February 11, 2016, pursuant to 30 CFR 732.17(h)(11)(i) and Section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Texas program (Administrative Record No. TX–705.01). We did not receive any comments.

Environmental Protection Agency (EPA) Concurrence and Comment

Under 30 CFR 732.17(h)(11)(ii), we are required to get written concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). None of the revisions that Texas proposed to make in this amendment pertain to air or water quality standards. Therefore, we did not ask EPA to concur on the amendment. However, on February 11,

2016, under 30 CFR 732.17(h)(11)(i), we requested comments from the EPA on the amendment (Administrative Record No. TX–705.1). The EPA did not respond to our request.

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

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On February 11, 2016, we requested comments on Texas' amendment (Administrative Record No. TX–705.01), but neither the SHPO nor ACHP responded to our request.

V. OSMRE's Decision

Based on the above findings, we approve the amendment Texas submitted to the OSMRE on November 17, 2015 (Administrative Record No. TX–705).

To implement this decision, we are amending the Federal regulations at 30 CFR part 943 that codify decisions concerning the Texas program. In accordance with the Administrative Procedure Act, this rule will take effect 30 days after the date of publication. Section 503(a) of SMCRA requires that the State's program demonstrate that they have the capability of carrying out the provisions of the Act and meeting its purposes. SMCRA requires consistency of State and Federal standards.

VI. Procedural Determinations

Executive Order 12630—Takings

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

Executive Order 12866—Regulatory Planning and Review

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

Executive Order 12988—Civil Justice Reform

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

Executive Order 13132—Federalism

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

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rulemaking on Federally-recognized Indian tribes and have determined that the rulemaking does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. The basis for this determination is that our decision is on a State regulatory program and does not involve Federal regulations involving Indian lands.

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

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

National Environmental Policy Act

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

Paperwork Reduction Act

This rulemaking does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

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

Small Business Regulatory Enforcement Fairness Act

This rulemaking is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rulemaking: (a) Does not have an annual effect on the economy of $100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the State submittal, which is the subject of this rulemaking, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

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

List of Subjects in 30 CFR Part 943

Intergovernmental relations, Surface mining, Underground Mining.

Dated: October 31, 2017.

Alfred L. Clayborne,

Regional Director, Mid-Continent Region.

For the reasons set out in the preamble, 30 CFR part 943 is amended as set forth below:

PART 943—TEXAS

■ 1. The authority citation for Part 943 continues to read as follows:

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

■ 2. In § 943.15, the table is amended by adding a new entry in chronological order to read as follows:

§ 943.15 Approval of Texas regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
* * *	* *	* *
November 17, 2015	November 17, 2017	16 TAC 12.108(b)(1)–(3).

[FR Doc. 2017–24620 Filed 11–16–17; 8:45 am]
BILLING CODE 4310–05–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 21

RIN 2900–AQ11

VA Vocational Rehabilitation and Employment Nomenclature Change for Position Title—Revision

AGENCY: Department of Veterans Affairs.

ACTION: Interim final rule.

SUMMARY: The Department of Veterans Affairs (VA) published a final rule in the **Federal Register** on May 2, 2016, which amended a number of regulations in the Code of Federal Regulations (CFR) to authorize personnel hired by VA's Vocational Rehabilitation and Employment (VR&E) Service under the title ''Vocational Rehabilitation Counselor'' (VRC) to make the same determinations with respect to Chapter 31 services and benefits as personnel who had been hired under the title ''Counseling Psychologist'' (CP). The preamble to that final rule cited supporting documents inaccurately and failed to properly explain the qualifications for and duties of this VR&E position responsible for making determinations with respect to Chapter 31 services and benefits. This interim final rule corrects those inaccuracies, more clearly explains the basis for the final rule, and invites public comment on the changes made to VA's regulations in the May 2, 2016, final rule.

DATES: *Effective Date:* This interim final rule is effective November 17, 2017. VA must receive comments on or before December 18, 2017.

ADDRESSES: Submit written comments through *http://www.Regulations.gov;* by mail or hand-delivery to: Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Ave. NW., Room 1063B, Washington, DC 20420; or by fax to (202) 273–9026. (This is not a toll-free telephone number.) Comments should indicate that they pertain to ''RIN 2900–AQ11, VA Vocational Rehabilitation and Employment Nomenclature Change for Position Title—Revision.'' Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. (This is not a toll-free telephone number.) In addition, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov*.

FOR FURTHER INFORMATION CONTACT: C.J. Riley, Senior Policy Analyst, Vocational Rehabilitation and Employment Service (28), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, *Christi.Hellard@va.gov,* (202) 461–9600. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION: In a final rule published in the **Federal Register** on May 2, 2016, at 81 FR 26130, VA amended a number of regulations in Part 21, CFR, to add the title ''VRC'' for the position responsible for making certain determinations with respect to Chapter 31 services and benefits. In the preamble to the final rule, we stated that the revisions were non-substantive and intended to reflect the fact that the CP and VRC position titles are synonymous because the positions have the same job duties and qualifications. We also stated that the final rule was necessary to ensure consistency. The preamble referenced a performance plan that was purportedly implemented on December 16, 2003, that described how the job duties of and qualifications for a CP and VRC were the same. However, the performance plan was implemented on July 1, 2004, rather than on December 16, 2003, and does not provide that the two positions have the same qualifications. Nonetheless, VRCs are fully qualified to perform the duties specified in Chapter 31 regulations. Therefore, because reversing the changes published in the **Federal Register** on May 2, 2016, would be harmful to Veterans seeking vocational rehabilitation services for reasons discussed below, we are not reversing those changes at this time. However, VA is seeking public comment on those changes, as further explained in this document. The explanation that follows corrects the inaccuracies in the preamble to the final rule and more clearly explains the basis for the rule.

VA's VR&E program serves an important function: To assist Veterans who have service-connected disabilities and barriers to employment in obtaining and maintaining suitable employment and achieving maximum independence in daily living. In 1996, VA began to allow use of Office of Personnel Management (OPM) classification series GS–0101, Social Science, to hire personnel under the title ''VRC'' to provide rehabilitation services. Such services include, but are not limited to, deciding eligibility and entitlement, developing rehabilitation plans, and delivering case management services. VA's VR&E program had previously hired personnel under the title ''CP,'' OPM classification series GS–0180, Psychology, to provide these types of rehabilitation services. Since 1996, after

use of the GS–0101 series was allowed, the VR&E program had hired personnel under either series to provide the same types of rehabilitation services and perform the same work. In 2015, VA's Office of Human Resources and Administration concluded that use of the GS–0180 series was not as appropriate as use of the GS–0101 series for personnel whom VA hires to provide rehabilitation services, because the majority of the duties these VR&E personnel perform most closely meets the standards associated with the GS–0101 series. Accordingly, VA discontinued use of the GS–0180 series for these VR&E positions. Although the VR&E program began to fill vacant positions using the GS–0101 series under the ''VRC'' title, the personnel who had been hired using GS–0180 series under the ''CP'' title kept their title and continued to perform under their existing position descriptions.

VR&E Service had updated a few, but not all, regulations governing the delivery of Chapter 31 services and benefits to reflect the hiring of personnel under the title ''VRC'' for the position responsible for making certain determinations. Specifically, on April 11, 1997 (62 FR 17706), VA issued a final rule defining VRC in 38 CFR 21.35. On March 26, 2007 (72 FR 14041), VA issued a final rule revising 38 CFR 21.50, 21.51, and 21.52 to describe determinations that a VRC may make during an initial evaluation, including the existence of an employment handicap and a serious employment handicap. On January 20, 2010 (75 FR 3165), VA issued a final rule revising 38 CFR 21.42, 21.44, and 21.45 to specify determinations that a VRC may make regarding a claimant's eligibility period to receive Chapter 31 services.

In September 2014, a Veteran advocate contacted VR&E Service and indicated that he believed that VA had erroneously denied benefits because VA improperly interpreted regulations regarding the roles of CPs and VRCs when making specific determinations. Additionally, the Board of Veterans' Appeals has remanded cases to regional offices with instructions for a CP to make determinations that a VRC already made, noting that regulations require CPs to make these determinations. Because the VR&E program stopped hiring under the ''CP'' title, the VR&E program's national workforce does not have enough CPs to comply with these instructions. Thus, on May 2, 2016, we amended the remainder of our regulations regarding the roles of CPs and VRCs to ensure consistency with respect to position titles and to clarify that VRCs are authorized to make the same determinations as CPs with regard to Chapter 31 services and benefits.

The shift towards staffing the VR&E positions responsible for making certain determinations with respect to Chapter 31 services and benefits under the VRC title rather than under the CP title reflects a more appropriate classification based on OPM standards and the type of work performed. This shift does not reflect a material change in the duties of or qualifications for the position. Regardless of the classification, VRCs perform the same duties as CPs perform in the VR&E program, and VRCs are fully qualified to perform these duties.

Section 3118(c) of title 38, United States Code, requires VA to establish the necessary and appropriate qualifications for personnel providing evaluation and rehabilitation services under Chapter 31, and to take into account the qualifications established for comparable personnel under the Rehabilitation Act of 1973 (29 U.S.C. Chapter 16). Under this Act, comparable personnel are required to have a baccalaureate degree in a field of study reasonably related to vocational rehabilitation and at least one year of experience working with individuals with disabilities, providing direct service or advocacy, or having direct experience as an employer. In lieu of the experience, personnel may obtain a master's or doctoral degree in a field of study such as vocational rehabilitation counseling, law, social work, psychology, disability studies, or special education. *See* 29 U.S.C. 721(a)(7)(B)(ii).

VA implemented section 3118(c) by prescribing the qualifications for VRCs in VA's Staffing Handbook (VA Handbook 5005/6, Part II, Appendix F2 (June 3, 2004)). The VR&E program requires all personnel hired as VRCs to hold a master's degree in rehabilitation counseling, including an internship, or in counseling psychology, or a related field, including at least 30 semester hours of course work in the foundations of rehabilitation counseling, human growth and development, counseling theories and techniques, vocational assessment, career development, job placement, case management, or medical/psycho-social aspects of disability. In addition, total graduate study must have included or been supplemented by a supervised internship or successful professional experience following the completion of the master's degree. These requirements are comparable to the requirements applicable to CP positions but are more accurately aligned with the needs of the VR&E program, which is focused on helping Veterans obtain and maintain suitable employment. See the OPM Web site describing general qualifications for CP classification, *https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/0100/psychology-series-0180/* (last visited August 10, 2017). Requiring VRCs to have these qualifications puts them in a similar position to CPs, who are required to have comparable qualifications. With comparable qualifications and experience in the closely related fields of counseling psychology and/or rehabilitation counseling, both VRCs and CPs have the same skills and capabilities necessary to perform the duties required for this program, such as counseling, rehabilitation, and employment assistance.

Additionally, as indicated in the most recent VRC position description released with VR&E Letter 28–14–13 on February 20, 2014, VRCs must possess knowledge of psychological, rehabilitation, and counseling theory and principle, as well as special knowledge of rehabilitation counseling skills, techniques, and resources needed to work with Veterans with multiple serious disabilities, Veterans who are largely confined to their homes due to disabilities, Veterans who have serious mental disabilities, and Veterans who have problems adjusting to social and occupational demands. VRCs must also have knowledge of the principles and procedures of psychological and vocational testing and research statistics used to assess a Veteran's interests, aptitudes, abilities, and personality characteristics. In addition, VRCs must know the requirements for independent living, and understand the limitations of, and services required by, individuals with severe disabilities. Finally, VRCs must know career development theory and job placement, and understand current labor market conditions and occupational trends and how to improve employability using the information obtained from transferable work-skills analyses.

Staffing the program with VRCs is a valid programmatic choice because, equipped with such knowledge, VRCs can capably and competently perform the required counseling, rehabilitation, and employment assistance tasks. For example, VRCs have knowledge of psychological, rehabilitation, and counseling theory and principle, and possess rehabilitation counseling skills and techniques to work with emotionally and physically-disabled individuals and prepare them for suitable employment. They understand the requirements for independent living and the services individuals with severe

disabilities require, and they possess the skills and qualifications to effectively perform initial evaluations and make accurate eligibility determinations. Additionally, they know the principles and procedures of psychological and vocational testing and research statistics to competently assess a Veteran's interests, aptitudes, abilities, and personality characteristics to provide the most appropriate rehabilitation planning services. Finally, they have a comprehensive understanding of current labor market conditions and occupational trends to identify the appropriate employment options for each individual they counsel. Requiring VRCs to have such knowledge ensures that VRCs have the capability to assist Veterans with service-connected disabilities in achieving maximum independence in daily living and obtaining and maintaining suitable employment.

Because VRCs are fully qualified to perform the duties of this VR&E position, and because the VR&E program's national workforce does not have enough CPs to fulfill all the required duties of this position, we amended our regulations to authorize VRCs to make the same determinations as CPs with regard to Chapter 31 services and benefits. Accordingly, we adopt, without change, the rule published in the **Federal Register** on May 2, 2016.

Administrative Procedure Act

In accordance with 5 U.S.C. 553(b)(B) and (d)(3), the Secretary finds that there is good cause to dispense with the opportunity for prior notice and comment and good cause to publish this rule with an immediate effective date. The Secretary finds that it is impracticable and contrary to the public interest to delay this rule for the purpose of soliciting prior public comment or to have a delayed effective date, or to reverse the changes made on May 2, 2016, while public comment is being received. The Secretary is issuing this rule to clear up confusion among Veterans and prevent a detrimental impact with regard to the VR&E program. Failure to incorporate the VRC position title in VR&E regulations would result ultimately in a long delay in the processing of Veterans' cases and the provision of VR&E services and assistance.

The VR&E program no longer hires employees under the CP title. This is the unavoidable result of the conclusion that the GS–0101 classification series is more appropriate than the GS–0180 classification series. Accordingly, the overwhelming majority of the VR&E program's national workforce providing vocational rehabilitation and employment services are VRCs, with only 10 CPs remaining in the VR&E workforce. Therefore, the program does not have enough CPs to meet workload demands. If we did not maintain the May 2, 2016, changes to our regulations while public comment is being received, and CPs were required to make decisions in every VR&E case as part of the rehabilitation process, many decisions would be delayed and processing Veteran cases would be greatly impacted. As a result, there would be a significant delay in Veterans receiving the VR&E services and assistance to which they are entitled.

The VR&E program provided evaluation and counseling services to 173,599 Veterans in 2016. Although some regulations had already been updated to allow VRCs to perform some VR&E program duties, the regulations governing the majority of evaluation, counseling, and case management services were updated to allow VRCs to provide these services in the May 2, 2016, rulemaking. If we did not maintain the May 2, 2016, changes to our regulations, most of the 173,599 Veterans the VR&E program serves annually would not receive evaluation, counseling, and case management services in a timely manner because the 10 CPs the VR&E program employs could not possibly provide these services to so many Veterans. It would not be in the best interest of veterans to limit hundreds of VRCs to highly circumscribed duties while thousands of Veterans seeking employment services from VA wait for service from the 10 CPs VA still has in its workforce.

Additionally, the rule clears up confusion among VR&E program participants regarding the two positions titles, VRC and CP, and the respective roles of the two positions within the VR&E program. Because of this confusion, it was necessary to update the VR&E regulations to specify that these two positions are both authorized to perform the same duties.

Because this interim final rule will serve to clarify roles with regard to two position titles used within the VR&E program, and alleviate confusion related to the titles, and because it will serve to prevent delay in Veterans receiving the VR&E services and assistance to which they are entitled, the Secretary finds that it is impracticable and contrary to the public interest to delay this rule for the purpose of soliciting advance public comment or to have a delayed effective date. Accordingly, VA is issuing this rule as an interim final rule with an immediate effective date. We will consider and address any comments received within 60 days of the date this interim final rule is published in the **Federal Register**.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a "significant regulatory action" requiring review by the OMB, unless OMB waives such review, as "any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order."

VA has examined the economic, interagency, budgetary, legal, and policy implications of this regulatory action and determined they are not significant under Executive Order 12866. VA's impact analysis can be found as a supporting document at *http://www.regulations.gov,* usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's Web site at *http://www.va.gov/orpm* by following the link for "VA Regulations Published From FY 2004 Through Fiscal Year To Date."

Paperwork Reduction Act

This rule contains no collections of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this interim final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This rule will not directly affect any small entities; only individuals will be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This interim final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number and title for the program affected by this document is 64.116, Vocational Rehabilitation for Disabled Veterans.

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 October 23, 2017 for publication.

List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Armed forces, Civil rights, Claims, Colleges and universities, Conflict of interests, Education, Employment, Grant programs—education, Grant programs—veterans, Health care, Loan programs—education, Loan programs—veterans, Manpower training programs, Reporting and recordkeeping requirements, Schools, Travel and transportation expenses, Veterans, Vocational education, Vocational rehabilitation.

Dated; November 14, 2017.

Michael Shores,

Director, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

■ For the reasons set out in the preamble, the regulatory amendments in the final rule published in the **Federal Register** on May 2, 2016, at 81 FR 26130, and incorporated in the CFR are affirmed. Only the preamble originally published on May 2, 2016, at 81 FR 26130, is hereby replaced.

[FR Doc. 2017–24949 Filed 11–16–17; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2017–0149; FRL–9970–82–Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; 2011 Base Year Inventory for the 2008 8-Hour Ozone National Ambient Air Quality Standard for the Maryland Portion of the Philadelphia-Wilmington-Atlantic City Nonattainment Area; Withdrawal

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: Due to the receipt of an adverse comment, the Environmental Protection Agency (EPA) is withdrawing the September 25, 2017 direct final rule that approved the 2011 base year inventory for the Maryland portion of the Philadelphia-Wilmington-Atlantic City marginal nonattainment area for the 2008 8-hour ozone national ambient air quality standard (NAAQS). EPA stated in the direct final rule that if EPA received adverse comments by October 25, 2017, the rule would be withdrawn and not take effect. EPA subsequently received an adverse comment. EPA will address the comment received in a subsequent final action based upon the proposed action also published on September 25, 2017. EPA will not institute a second comment period on this action.

DATES: As of as of November 17, 2017, the direct final rule published at 82 FR 44522 on September 25, 2017 is withdrawn.

FOR FURTHER INFORMATION CONTACT: Sara Calcinore, (215) 814–2043, or by email at *calcinore.sara@epa.gov*.

SUPPLEMENTARY INFORMATION: On May 21, 2012, the Philadelphia-Wilmington-Atlantic City area was designated as marginal nonattainment for the 2008 8-hour ozone NAAQS. 77 FR 30088. The Philadelphia-Wilmington-Atlantic City nonattainment area is comprised of Cecil County in Maryland, as well as counties in Delaware, New Jersey, and Pennsylvania. Under section 172(c)(3) of the Clean Air Act (CAA), Maryland is required to submit a comprehensive, accurate, and current inventory of actual emissions from all sources of the relevant pollutants, *i.e.* the ozone precursors nitrogen oxides (NO_X) and volatile organic compounds (VOCs), in its marginal nonattainment area, *i.e.,* the Maryland portion of the Philadelphia-Wilmington-Atlantic City nonattainment area. On January 19, 2017, the State of Maryland, through the Maryland Department of the Environment (MDE), submitted a formal revision (state implementation plan (SIP) # 16–15) to its SIP. The SIP revision consists of the 2011 base year inventory for the Maryland portion of the Philadelphia-Wilmington-Atlantic City nonattainment area for the 2008 8-hour ozone NAAQS.

EPA approved Maryland's 2011 base year inventory for the Maryland portion of the Philadelphia-Wilmington-Atlantic City nonattainment area for the 2008 8-hour ozone NAAQS in the direct final rule published on September 25, 2017 (82 FR 44522). In this direct final rule, we stated that if we received adverse comment by October 25, 2017, the rule would be withdrawn and not take effect. EPA subsequently received an adverse comment. On September 25, 2017 (82 FR 44522), EPA simultaneously proposed to approve Maryland's 2011 base year inventory for the Maryland portion of the Philadelphia-Wilmington-Atlantic City nonattainment area for the 2008 8-hour ozone NAAQS. EPA will address the comment received in a subsequent final action based upon this proposed action and will not institute a second comment period on this action.

As a result of the comment received, EPA is withdrawing the direct final rule approving Maryland's 2011 base year inventory for the Maryland portion of the Philadelphia-Wilmington-Atlantic City nonattainment area for the 2008 8-hour ozone NAAQS.

List of Subjects in 40 CFR Part 52

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

Dated: November 3, 2017.

Cosmo Servidio,

Regional Administrator, Region III.

■ Accordingly, the amendment to § 52.1070(e) published on September 25, 2017 (82 FR 44522), which were to become effective November 24, 2017, is withdrawn.

[FR Doc. 2017–24885 Filed 11–16–17; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2017–0477; FRL–9970–97–Region 7]

Air Quality Implementation Plans; Nebraska; Infrastructure SIP Requirements for the 2010 Nitrogen Dioxide and Sulfur Dioxide and the 2012 Fine Particulate Matter National Ambient Air Quality Standards; Withdrawal

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: Due to adverse comments, the Environmental Protection Agency (EPA) is withdrawing the direct final rule Approval of Nebraska Air Quality Implementation Plans; Infrastructure SIP Requirements for the 2010 Nitrogen Dioxide and Sulfur Dioxide and the 2012 Fine Particulate Matter National Ambient Air Quality Standards, published in the **Federal Register** on September 20, 2017. The direct final rule approved elements of a State Implementation Plan (SIP) submission from the State of Nebraska addressing the applicable requirements of Clean Air Act (CAA) section 110 for the 2010 Nitrogen Dioxide (NO_2) and Sulfur Dioxide (SO_2) National Ambient Air Quality Standards (NAAQS), and the 2012 Fine Particulate Matter ($PM_{2.5}$) NAAQS. Section 110 of the CAA requires that each state adopt and submit a SIP to support implementation, maintenance, and enforcement of each new or revised NAAQS promulgated by EPA. These SIPs are commonly referred to as ''infrastructure'' SIPs.

DATES: As of November 17, 2017, the direct final rule published at 82 FR 43848, September 20, 2017, is withdrawn.

FOR FURTHER INFORMATION CONTACT: Gregory Crable, Environmental Protection Agency, Air Planning and Development Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219 at (913) 551–7391, or by email at *crable.gregory@epa.gov*

SUPPLEMENTARY INFORMATION: Due to adverse comments, EPA is withdrawing the direct final rule to approve three Infrastructure SIPs submitted by the State of Nebraska pertaining to the 2010 NO_2 and SO_2 NAAQS and the 2012 $PM_{2.5}$ NAAQS. In the direct final rule published in the **Federal Register** on September 20, 2017, (82 FR 43848), we stated that if we received adverse comment by Octber 20, 2017, the rule would be withdrawn and not take effect. EPA received adverse comments. EPA will address those comments in a subsequent final action based upon the proposed action also published in the **Federal Register** on September 20, 2017 (82 FR 43926). EPA will not institute a second comment period on this action.

List of Subjects in 40 CFR Part 52

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

Dated: November 8, 2017.

Cathy Stepp,

Acting Regional Administrator, Region 7.

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ Accordingly, the direct final rule amending 40 CFR 52.1420 published in the **Federal Register** on September 20, 2017 (82 FR 43848), is withdrawn.

[FR Doc. 2017–24893 Filed 11–16–17; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2017–0208; FRL–9970–99–Region 7]

State of Iowa; Elements of the Infrastructure SIP Requirements for the 2010 Nitrogen Dioxide National Ambient Air Quality Standard (NAAQS) Withdrawal

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: Due to an adverse comment, the Environmental Protection Agency (EPA) is withdrawing the direct final rule for Approval of Implementation Plans; State of Iowa; Elements of the Infrastructure SIP Requirements for the 2010 Nitrogen Dioxide National Ambient Air Quality Standard (NAAQS) published in the **Federal Register** on September 20, 2017. Infrastructure SIPs address the applicable requirements of Clean Air Act (CAA) section 110, which requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each new or revised NAAQS promulgated by the EPA. These SIPs are commonly referred to as ''infrastructure'' SIPs. The infrastructure requirements are designed to ensure that the structural components of each state's air quality management program are adequate to meet the state's responsibilities under the CAA.

DATES: The direct final rule published at 82 FR 43846, September 20, 2017, is withdrawn effective November 17, 2017.

FOR FURTHER INFORMATION CONTACT: Heather Hamilton, Environmental Protection Agency, Air Planning and Development Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219 at (913) 551–7039, or by email at *Hamilton.heather@epa.gov.*

SUPPLEMENTARY INFORMATION: Due to an adverse comment, EPA is withdrawing the direct final rule to approve revisions to the Iowa State Implementation Plan (SIP). In the direct final rule published on September 20, 2017, (82 FR 43846), we stated that if we received adverse comment by October 20, 2017, the rule would be withdrawn and not take effect. EPA received an adverse comment. EPA will address the comment in a subsequent final action based upon the proposed action also published on September 20, 2017. EPA will not institute a second comment period on this action.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Reporting and recordkeeping requirements.

Dated: November 7, 2017.

Cathy Stepp,

Acting Regional Administrator, Region 7.

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ Accordingly, the amendment to 40 CFR 52.820(e) published in the **Federal Register** on September 20, 2017, (82 FR 43846) is withdrawn effective November 17, 2017.

[FR Doc. 2017–24891 Filed 11–16–17; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2017–0267; FRL–9970–98–Region 7]

Approval of Implementation Plans; State of Iowa; Elements of the Infrastructure SIP Requirements for the 2010 Sulfur Dioxide National Ambient Air Quality Standard (NAAQS); Withdrawal

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: Due to an adverse comment, the Environmental Protection Agency (EPA) is withdrawing the direct final rule for Approval of Implementation Plans; State of Iowa; Elements of the Infrastructure SIP Requirements for the 2010 Sulfur Dioxide National Ambient Air Quality Standard (NAAQS) published in the **Federal Register** on September 29, 2017. Infrastructure SIPs address the applicable requirements of Clean Air Act (CAA) section 110, which requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each new or revised NAAQS promulgated by the EPA. These SIPs are commonly referred to as ''infrastructure'' SIPs. The infrastructure requirements are designed to ensure that the structural components of each state's air quality management program are adequate to meet the state's responsibilities under the CAA.

DATES: As of November 17, 2017, the direct final rule published on September 29, 2017 (82 FR 45497), is withdrawn.

FOR FURTHER INFORMATION CONTACT: Heather Hamilton Environmental Protection Agency, Air Planning and Development Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219 at 913–551–7039, or by email at *hamilton.heather@epa.gov.*

SUPPLEMENTARY INFORMATION: Due to an adverse comment, EPA is withdrawing the direct final rule to approve revisions to the Iowa State Implementation Plan (SIP). In the direct final rule published on September 29, 2017, (82 FR 45497), we stated that if we received adverse comment by October 30, 2017, the rule would be withdrawn and not take effect. EPA received an adverse comment. EPA will address the comment in a subsequent final action based upon the proposed action also published on September 29, 2017 (82 FR 45550). EPA will not institute a second comment period on this action.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, sulfur dioxide, Reporting and recordkeeping requirements.

Dated: November 8, 2017.

Cathy Stepp,

Acting Regional Administrator, Region 7.

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ Accordingly, the direct final rule amending 40 CFR 52.820 published in the **Federal Register** on September 29, 2017 (82 FR 45497), is withdrawn.

[FR Doc. 2017–24903 Filed 11–16–17; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2017–0512; FRL–9971–00-Region 7]

Approval of Kansas Air Quality State Implementation Plans; Construction Permits and Approvals Program; Withdrawal

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: Due to an adverse comment, the Environmental Protection Agency (EPA) is withdrawing the direct final rule for Approval of Kansas Air Quality State Implementation Plans; Construction Permits and Approvals Program, published in the **Federal Register** on September 21, 2017. Kansas's SIP revisions included revisions to Kansas' construction permit rules. Specifically, these revisions implemented the revised National Ambient Air Quality Standard (NAAQS) for fine particulate matter; clarified and refined applicable criteria for sources subject to the construction permitting program; updated the construction permitting program fee structure and schedule; and made minor revisions and corrections.

DATES: As of November 17, 2017, the direct final rule published at 82 FR 44103, on September 21, 2017, is withdrawn.

FOR FURTHER INFORMATION CONTACT: Deborah Bredehoft, Environmental Protection Agency, Air Planning and Development Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219 at (913) 551–7164, or by email at *Bredehoft.Deborah@epa.gov.*

SUPPLEMENTARY INFORMATION: Due to adverse comments, EPA is withdrawing the direct final rule to approve revisions to the Kansas State Implementation Plan (SIP). In the direct final rule published on September 21, 2017 (82 FR 44103), we stated that if we received adverse comment by October 23, 2017, the rule would be withdrawn and not take effect. EPA received adverse comments. EPA will address the comments in a subsequent action.

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: November 8, 2017.

Cathy Stepp,

Acting Regional Administrator, Region 7.

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ Accordingly, the amendment to 40 CFR 52.870 published in the **Federal Register** on September 21, 2017 (82 FR 44103), on page 44105 is withdrawn.

[FR Doc. 2017–24894 Filed 11–16–17; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2017–0394; FRL–9970–69–Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Direct Final Rule for the Approval of an Alternative Volatile Organic Compound Emission Standard; Withdrawal

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: Due to adverse comments received, the Environmental Protection Agency (EPA) is withdrawing the August 28, 2017 direct final rule that approved a revision to the Maryland state implementation plan (SIP) to incorporate by reference a Maryland Department of the Environment (MDE) order that establishes an alternative volatile organic compound (VOC) emission standard for National Gypsum

Company (NGC) to ensure that it remains a minor VOC source. EPA stated in the direct final rule that if EPA received adverse comments by September 27, 2017, the rule would be withdrawn and not take effect. EPA subsequently received one adverse comment. EPA will address the comment received in a subsequent final action based upon the proposed action also published on August 28, 2017. EPA will not institute a second comment period on this action.

DATES: As of November 17, 2017, the direct final rule published at 82 FR 40715, August 28, 2017, is withdrawn.

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

SUPPLEMENTARY INFORMATION: On June 24, 2016, MDE submitted a formal revision to the Maryland SIP. The SIP revision consisted of a request to incorporate by reference a MDE departmental order that establishes an alternative VOC emission standard for NGC as it appears in the permit-to-construct conditions issued by MDE in order to ensure that it remains a minor stationary source of VOCs. The alternative VOC emissions limit of 195 pounds per operating day with at least a 99% overall VOC control efficiency will achieve a stringent emissions discharge reduction and is more stringent than any established standard for reasonably available control technology (RACT) for major stationary sources of VOCs in Code of Maryland Regulations (COMAR) 26.11.19. Under COMAR 26.11.06.06E—''Exceptions,'' a source may request an exception to a VOC emissions limit from MDE if the source is not subject to new source review (NSR) and if the source is unable to comply with COMAR 26.11.06.06B—''Control of VOC from Installations.'' In the direct final rule published on August 28, 2017 (82 FR 40715), EPA stated that if EPA received adverse comments by September 27, 2017, the rule would be withdrawn and not take effect. EPA subsequently received one adverse comment from an anonymous commenter.

As a result of the comment received, EPA is withdrawing the direct final rule approving the revision to the Maryland SIP that incorporates by reference a MDE order establishing a VOC emission standard for NGC.

List of Subjects in 40 CFR Part 52

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

Dated: October 31, 2017.

Cosmo Servidio,

Regional Administrator, Region III.

■ Accordingly, the amendment to § 52.1070(d) published on August 28, 2017 (82 FR 40715), which were to become effective November 27, 2017, are withdrawn.

[FR Doc. 2017–24889 Filed 11–16–17; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 17–187; RM–11792; DA 17–1062]

Television Broadcasting Services; Anchorage, Alaska

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission grants the request by Gray Television License, LLC (Gray) to substitute channel 7 for channel 5 for station KYES–TV, Anchorage, Alaska. Gray filed comments reaffirming its interest in the proposed channel substitution and stating that if the proposal is granted, it will promptly file an application for the facilities specified in the rulemaking petition and construct the station. As Gray explained in its petition, the antenna currently used by KYES–TV is a repurposed analog antenna the previous station owner built which provides an inefficient signal. In addition, the current remote transmission site does not have a generator and KYES–TV goes silent when there is a power outage. By moving to sister station KTUU's location, and operating with an existing modern broadband antenna on a high-VHF channel, the station will be able to deliver an improved signal. Gray will also add the KYES–TV signal to the translator network used by KTUU, which will reduce most of the loss of service that would result from the proposed move, which will serve the public interest.

DATES: This rule is effective December 18, 2017.

FOR FURTHER INFORMATION CONTACT: Joyce Bernstein, *Joyce.Bernstein@fcc.gov,* Media Bureau, (202) 418–1647.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Order,* MB Docket No. 17–187, adopted October 31, 2017, and released October 31, 2017. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street SW., Washington, DC 20554. This document will also be available via ECFS (*http://fjallfoss.fcc.gov/ecfs/*). To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). Provisions of the Regulatory Flexibility Act of 1980, *see* 5 U.S.C. 601–612, do not apply to this proceeding.

The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Television.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

Final Rule

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 309, 310, 334 336, and 339.

§ 73.622 [Amended]

■ 2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Alaska is amended by removing channel 5 and adding channel 7 at Anchorage.

[FR Doc. 2017–24944 Filed 11–16–17; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 82, No. 221
Friday, November 17, 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.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2017–1022; Product Identifier 2017–NM–098–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain The Boeing Company Model 787–8 and 787–9 airplanes. This proposed AD was prompted by reports of failures of the lip heater assemblies of the inlet ice protection system of the cabin air compressor (CAC) due to chafing. This proposed AD would require changing the airplane electrical connectors and the routes of certain wire bundles, and installing new or modified left and right CAC inlet duct assemblies. We are proposing this AD to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by January 2, 2018.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

For service information identified in this NPRM, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; Internet *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Standards Branch, 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–2017–1022.

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–2017–1022; 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 NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Joe Salemeh, Aerospace Engineer, Systems and Equipment Section, FAA, Seattle ACO Branch, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6454; fax: 425–917–6590; email: *joe.salameh@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2017–1022; Product Identifier 2017–NM–098–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. We will consider all comments received by the closing date and may amend this NPRM because of those comments.

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

Discussion

We have received reports of failures of the inlet lip heater assemblies of the inlet ice protection system of the CAC due to chafing of the CAC inlet ice protection system (CIPS) inlet lip heater wire harness against adjacent structures. The damage to the wires caused the CIPS lip heater to set a fault. This condition, if not corrected, could result in an electrical short and potential loss of functions essential for safe flight of the airplane.

Related Service Information Under 1 CFR Part 51

We reviewed Boeing Alert Service Bulletin B787–81205–SB300019–00, Issue 001, dated March 22, 2017. The service information describes procedures for changing the airplane electrical connectors and the routes of certain wire bundles, and installing new or modified left and right CAC inlet duct assemblies. 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.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require accomplishment of the actions identified as ''RC'' (required for compliance) in the Accomplishment Instructions of Boeing Alert Service Bulletin B787–81205–SB300019–00, Issue 001, dated March 22, 2017, described previously, except for any differences identified as exceptions in the regulatory text of this proposed AD.

For information on the procedures and compliance times, see this service information at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2017–1022.

Costs of Compliance

We estimate that this proposed AD affects 66 airplanes of U.S. registry. We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Change and installation	20 work-hours × $85 per hour = $1,700	$32,937	$34,637	$2,286,042

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

Authority for This Rulemaking

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

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

This proposed AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes to the Director of the System Oversight Division.

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2017–1022; Product Identifier 2017–NM–098–AD.

(a) Comments Due Date

We must receive comments by January 2, 2018.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 787–8 and 787–9 airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin B787–81205–SB300019–00, Issue 001, dated March 22, 2017.

(d) Subject

Air Transport Association (ATA) of America Code 30, Ice/Rain protection system wiring.

(e) Unsafe Condition

This AD was prompted by reports of failures of the Cabin Air Compressor (CAC) inlet ice protection system (CIPS) inlet lip heater assemblies due to chafing of the CIPS inlet lip heater wire harness against adjacent structures. We are issuing this AD to prevent any damage to the CIPS inlet lip heater wire bundle, which could cause an electrical short and potential loss of functions essential for safe flight of the airplane.

(f) Compliance

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

(g) Required Actions

Within 36 months after the effective date of this AD, do all applicable actions identified as ''RC'' (required for compliance) in, and in accordance with, the Accomplishment Instructions of Boeing Alert Service Bulletin B787–81205–SB300019–00, Issue 001, dated March 22, 2017.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle ACO Branch, 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 certification office, send it to the attention of the person identified in paragraph (i)(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 Branch, 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 RC, the provisions of paragraphs (h)(4)(i) and (h)(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 substep is labeled ''RC Exempt,'' then the RC requirement is removed from that step or substep. 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.

(i) Related Information

(1) For more information about this AD, contact Joe Salemeh, Aerospace Engineer, Systems and Equipment Section, FAA, Seattle ACO Branch, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6454; fax: 425–917–6590; email: *joe.salameh@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; Internet *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Standards Branch, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

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

Jeffrey E. Duven,

Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2017–24809 Filed 11–16–17; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2017–1025; Product Identifier 2017–NM–137–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc., Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Bombardier, Inc., Model CL–600–2C10 (Regional Jet Series 700, 701, & 702), CL–600–2D15 (Regional Jet Series 705), CL–600–2D24 (Regional Jet Series 900), and CL–600–2E25 (Regional Jet Series 1000) airplanes. This proposed AD was prompted by several incidents of electrical shorting and sparks caused by de-icing fluid leaks between flight deck windshields and side windows. This proposed AD would require water spray tests and general visual inspections for water in the flight compartment, and water removal and sealant application if necessary. We are proposing this AD to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by January 2, 2018.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

For service information identified in this NPRM, contact Bombardier, Inc., 400 Côte Vertu Road West, Dorval, Québec H4S 1Y9, Canada; Widebody Customer Response Center North America toll-free telephone 1–866–538–1247 or direct-dial telephone 1–514–855–2999; fax 514–855–7401; email *ac.yul@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may view this service information at the FAA, Transport Standards Branch, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2017–1025; 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 NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone 800–647–5527) is in the ADDRESSES section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Steven Dzierzynski, Aerospace Engineer, Avionics and Administrative Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7367; fax 516–794–5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the ADDRESSES section. Include ''Docket No. FAA–2017–1025; Product Identifier 2017–NM–137–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. We will consider all comments received by the closing date and may amend this NPRM based on those comments.

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

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2017–28, dated August 23, 2017 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Bombardier, Inc., Model CL–600–2C10 (Regional Jet Series 700, 701, & 702), CL–600–2D15 (Regional Jet Series 705), CL–600–2D24 (Regional Jet Series 900), and CL–600–2E25 (Regional Jet Series 1000) airplanes. The MCAI states:

> Several incidents of electrical shorting and sparks have been reported in the cockpit of CL–600–2C10 and CL–600–2D24 aeroplanes. De-icing fluid can leak between the windshields and side windows, leading to possible damage to the cockpit floodlight wires and electrical connections. If not corrected, this condition may result in a flight compartment fire.
>
> This [Canadian] AD is issued to mandate a water spray test and [general visual] inspection for evidence of fluid ingress into the flight compartment. It also provides mandatory instructions for sealant application if required.

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–2017–1025.

Related Service Information Under 1 CFR Part 51

Bombardier, Inc., has issued Service Bulletin 670BA–56–003, Revision A, dated April 13, 2016. This service information describes procedures for doing water spray tests on the flight deck windows, doing general visual inspections for water in the flight compartment, removing water, and applying sealant to the flight deck windows. 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.

FAA's Determination and Requirements of This Proposed AD

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

Costs of Compliance

We estimate that this proposed AD affects 543 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Spray tests and inspections	2 work-hours × $85 per hour = $170	$0	$170	$92,310

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Water removal and sealant application	4 work-hours × $85 per hour = $340	$308	$648

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.

This proposed AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes to the Director of the System Oversight Division.

Regulatory Findings

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

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

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

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

3. Will not affect intrastate aviation in Alaska; and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Bombardier, Inc.: Docket No. FAA–2017–1025; Product Identifier 2017–NM–137–AD.

(a) Comments Due Date

We must receive comments by January 2, 2018.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the airplanes identified in paragraphs (c)(1), (c)(2), and (c)(3) of this AD, certificated in any category.

(1) Bombardier, Inc., Model CL–600–2C10 (Regional Jet Series 700, 701, & 702) airplanes, serial numbers 10003 through 10342 inclusive.

(2) Bombardier, Inc., Model CL–600–2D15 (Regional Jet Series 705) and Model CL–600–2D24 (Regional Jet Series 900) airplanes, serial numbers 15001 through 15367 inclusive.

(3) Bombardier, Inc., Model CL–600–2E25 (Regional Jet Series 1000) airplanes, serial numbers 19001 through 19041 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 56, Windows.

(e) Reason

This AD was prompted by several incidents of electrical shorting and sparks caused by de-icing fluid leaks between flight deck windshields and side windows. We are issuing this AD to detect and correct de-icing fluid entering the flight deck, which could damage the flight deck floodlight wires and electrical connections, and ultimately could lead to a fire in the flight compartment.

(f) Compliance

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

(g) Left Flight Deck Windshield and Side Window Spray Test, Inspection, Water Removal and Sealant Application

For airplanes on which a left flight deck windshield or a left flight deck side window was replaced as specified in Bombardier Aircraft Maintenance Manual (AMM) task 56–11–01–400–801, Revision 48, dated March 25, 2015, or any previous revision of that task; or Bombardier AMM task 56–12–01–400–801, Revision 48, dated March 25, 2015, or any previous revision of that task: At the applicable time specified in paragraph (g)(1) or (g)(2) of this AD, perform a water spray test and do a general visual inspection of the left flight deck windshield and left flight deck side window for evidence of water ingress into the flight deck, in accordance with Part A of the Accomplishment Instructions of Bombardier Service Bulletin 670BA–56–003, Revision A, dated April 13, 2016. If water is found in the flight compartment: Before further flight, remove the water, and apply sealant on the left flight deck windows in accordance with Part C of the Accomplishment Instructions of Bombardier Service Bulletin 670BA–56–003, Revision A, dated April 13, 2016.

(1) For airplanes on which Bombardier in-service ModSum IS67033110181 has not been incorporated: Within 2,500 flight hours after the effective date of this AD.

(2) For airplanes on which Bombardier in-service ModSum IS67033110181 has been incorporated: Within 6,600 flight hours after the effective date of this AD.

(h) Right Flight Deck Windshield and Side Window Spray Test, Inspection, Water Removal and Sealant Application

For airplanes on which a right flight deck windshield or a right flight deck side window was replaced as specified in Bombardier AMM task 56–11–01–400–801, Revision 48, dated March 25, 2015, or any previous revision of that task; or Bombardier AMM task 56–12–01–400–801, Revision 48, dated March 25, 2015, or any previous revision of that task: At the applicable time specified in paragraph (h)(1) or (h)(2) of this AD, perform a water spray test and do a general visual inspection of the right flight deck windshield and right flight deck side window for evidence of water ingress into the flight deck, in accordance with Part B of the Accomplishment Instructions of Bombardier Service Bulletin 670BA–56–003, Revision A, dated April 13, 2016. If water is found in the flight compartment: Before further flight, remove the water, and apply sealant on the right flight deck windows in accordance with Part D of the Accomplishment Instructions of Bombardier Service Bulletin 670BA–56–003, Revision A, dated April 13, 2016.

(1) For airplanes on which Bombardier in-service ModSum IS67033110181 has not been incorporated: Within 2,500 flight hours after the effective date of this AD.

(2) For airplanes on which Bombardier in-service ModSum IS67033110181 has been incorporated: Within 6,600 flight hours after the effective date of this AD.

(i) Credit for Previous Actions

(1) This paragraph provides credit for actions required by paragraph (g) of this AD, if those actions were performed before the effective date of this AD using the service information specified in paragraphs (i)(1)(i), (i)(1)(ii), or (i)(1)(iii) of this AD; provided that the left flight deck side window or left flight deck windshield have not been subsequently replaced as specified in Bombardier AMM task 56–11–01–400–801, Revision 48, dated March 25, 2015, or any previous revision of that task; or Bombardier AMM task 56–12–01–400–801, Revision 48, dated March 25, 2015, or any previous revision of that task.

(i) Bombardier Alert Service Bulletin A670BA–56–002, dated January 7, 2008.

(ii) Bombardier Alert Service Bulletin A670BA–56–002, Revision A, dated February 26, 2008.

(iii) Part A and Part C, as applicable, of the Accomplishment Instructions of Bombardier Service Bulletin 670BA–56–003, dated May 28, 2015.

(2) This paragraph provides credit for actions required by paragraph (h) of this AD, if those actions were performed before the effective date of this AD using the service information specified in paragraphs (i)(2)(i), (i)(2)(ii), or (i)(2)(iii) of this AD; provided that the right flight deck side window or right flight deck windshield have not been subsequently replaced as specified in Bombardier AMM task 56–11–01–400–801, Revision 48, dated March 25, 2015, or any previous revision of that task; or Bombardier AMM task 56–12–01–400–801, Revision 48, dated March 25, 2015, or any previous revision of that task.

(i) Bombardier Alert Service Bulletin A670BA–56–002, dated January 7, 2008.

(ii) Bombardier Alert Service Bulletin A670BA–56–002, Revision A, dated February 26, 2008.

(iii) Part B and Part D, as applicable, of the Accomplishment Instructions of Bombardier Service Bulletin 670BA–56–003, dated May 28, 2015.

(j) Parts Installation Limitations

(1) As of the effective date of this AD, no person may install on any airplane a left or right flight deck windshield as specified in Bombardier AMM task 56–11–01–400–801, Revision 48, dated March 25, 2015, or any previous revision of that task.

(2) As of the effective date of this AD, no person may install on any airplane a left or right flight deck side window as specified in Bombardier AMM task 56–12–01–400–801, Revision 48, dated March 25, 2015, or any previous revision of that task.

(k) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York ACO Branch, 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 certification office, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; fax 516–794–5531. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(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, New York ACO Branch, FAA; or Transport Canada Civil Aviation (TCCA); or Bombardier, Inc.'s TCCA Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(l) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian Airworthiness Directive CF–2017–28, dated August 23, 2017, 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–2017–1025.

(2) For more information about this AD, contact Steven Dzierzynski, Aerospace Engineer, Avionics and Administrative Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7367; fax 516–794–5531.

(3) For service information identified in this AD, contact Bombardier, Inc., 400 Côte Vertu Road West, Dorval, Québec H4S 1Y9, Canada; Widebody Customer Response Center North America toll-free telephone 1–866–538–1247 or direct-dial telephone 1–514–855–2999; fax 514–855–7401; email *ac.yul@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may view this service information at the FAA, Transport Standards Branch, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on November 8, 2017.

Dionne Palermo,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2017–24814 Filed 11–16–17; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 110

[Docket Number USCG–2016–0916]

RIN 1625–AA01

Anchorages; Captain of the Port Puget Sound Zone, WA

AGENCY: Coast Guard, DHS.

ACTION: Notification of intent to withdraw proposed rule; request for comments.

SUMMARY: The Coast Guard intends to withdraw the proposed anchorage rule entitled ''Anchorages; Captain of the Port Puget Sound Zone, WA'' that we published on February 10, 2017. The Coast Guard does not currently plan to pursue this rulemaking and consequently does not intend to schedule tribal consultation on the proposed rule. Given the Coast Guard's intent to withdraw, in this request for comment, the Coast Guard is asking if withdrawal is appropriate and if tribal consultation specific to this rulemaking is still appropriate.

DATES: Your comments and related material must reach the Coast Guard on or before January 16, 2018.

ADDRESSES: You may submit comments identified by docket number USCG–2016–0916 using the Federal portal at *http://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notification of intent, call or email LCDR Christina Sullivan, U.S. Coast Guard Sector Puget Sound; telephone 206–217–6042, email *SectorPugetSoundWWM@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

FR Federal Register
NPRM Notice of Proposed Rulemaking

II. Background and Purpose

We published a notice of proposed rulemaking (NPRM) in the **Federal Register** on February 10, 2017 (82 FR 10313), entitled ''Anchorages; Captain of the Port Puget Sound Zone, WA.'' In the NPRM, we proposed the creation of several new anchorages, holding areas, and a non-anchorage area as well as the expansion of one existing general anchorage in the Puget Sound area, as detailed in the proposed regulatory text. The Coast Guard received input from a number of tribes expressing concern about the current rulemaking and based on that input, we intend to withdraw the proposed anchorage rule.

Four months after publishing the NPRM, the Coast Guard provided notice of its intent to conduct a government to government consultation with the tribes on the proposed rulemaking. In that published notification of tribal consultation (82 FR 25207, June 1, 2017), the Coast Guard stated that it would post a written summary of the government to government tribal consultation to the docket, and that members of the public would have time to submit further comments between the posting of the summary of the tribal consultation and the closing of the comment period. The tribal consultation was postponed at the request of the participants, and has not been rescheduled.

Because the Coast Guard published a notice of formal tribal government to government consultation on this proposed rule, the Coast Guard wants to ensure that tribal governments have an opportunity to indicate whether they believe tribal consultation is necessary in light of our intent to withdraw the proposed rule. Tribal governments that believe consultation on this proposed rule is necessary should comment in the docket, and may also contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

Canceling tribal consultation on this specific proposed rule does not prevent other consultation from occurring. The Coast Guard supports a separate government to government consultation with the tribes regarding tribal treaty rights and broader issues of waterways usage outside of the rulemaking process. Accordingly, the Coast Guard will conduct outreach regarding the scope of a potential separate government to government consultation independently of this notification of intent and request for comment.

If the Coast Guard decides to withdraw the proposed rule, we will issue a notification of withdrawal.

III. Information Requested

We are requesting comment from interested persons, particularly from tribal officials, tribal governments, tribal organizations, and tribal members on whether withdrawal is appropriate, and whether a government to government consultation on this anchorages rulemaking is desired in light of the Coast Guard's intent to withdraw from the rulemaking. Because the Coast Guard intends to withdraw from this rulemaking, the Coast Guard believes that tribal government to government consultation on this proposed anchorages rulemaking is no longer necessary.

IV. Public Participation and Request for Comments

We encourage you to submit comments through the Federal 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. In your submission, please include the docket number for this notification of intent and provide a reason for each suggestion or recommendation.

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, visit *http://www.regulations.gov/privacyNotice.*

Documents mentioned in this notification of intent as being available in the docket, and all public comments, will be in our online docket at *http://www.regulations.gov* and can be viewed by following that Web site's instructions.

This document is issued under authority of 5 U.S.C. 552(a).

Dated: November 9, 2017.

David G. Throop,

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

[FR Doc. 2017–24942 Filed 11–16–17; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2017–0573; FRL–9970–86-Region 9]

Approval of California Air Plan Revisions, Mojave Desert 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 Mojave Desert Air Quality Management District (MDAQMD) portion of the California State Implementation Plan (SIP). This revision concerns emissions of volatile organic compounds (VOCs) from marine

and pleasure craft coating operations. We are proposing to approve a local rule 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 December 18, 2017.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2017–0573 at *http://www.regulations.gov,* or via email to Arnold Lazarus, Rulemaking Office at *lazarus.arnold@epa.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be removed or edited from *Regulations.gov*. For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the Web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: 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.

Table of Contents

I. The State's Submittal
A. What rule did the State submit?
B. Are there other versions of this rule?
C. What is the purpose of the submitted rule revision?
II. The EPA's Evaluation and Action
A. How is the EPA evaluating the rule?
B. Does the rule meet the evaluation criteria?
C. EPA Recommendations To Further Improve the Rule
D. Public Comment and Proposed Action
III. Incorporation by reference
IV. Statutory and Executive Order Reviews

I. The State's Submittal

A. What rule did the State submit?

Table 1 lists the rule addressed by this proposal with the date that it was adopted by the local air agency and submitted by the California Air Resources Board (CARB).

TABLE 1—SUBMITTED RULE

Local agency	Rule #	Rule title	Amended	Submitted
MDAQMD	1106	Marine and Pleasure Craft Coating Operations	10/24/2016	02/24/2017

On August 2, 2017, the EPA determined that the submittal for MDAQMD Rule 1106 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 this rule?

We approved an earlier version of Rule 1106 into the SIP on July 16, 2008 (73 FR 40754). The MDAQMD adopted revisions to the SIP-approved version on October 24, 2016 and CARB submitted them to us on February 24, 2017.

C. What is the purpose of the submitted rule revision?

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. Rule 1106 was revised primarily to implement reasonably available control technology (RACT) recommendations to strengthen the overall VOC capture and control efficiency from 85 to 90%, and to generally adopt more stringent VOC content limits for marine and pleasure craft coatings. The EPA's technical support document (TSD) has more information about this rule.

II. The EPA's Evaluation and Action

A. How is the EPA evaluating the rule?

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 must require RACT for each category of sources covered by a Control Techniques Guidelines (CTG) document as well as each major source of VOCs in ozone nonattainment areas classified as moderate or above (see CAA section 182(b)(2)). The MDAQMD regulates an ozone nonattainment area classified as Severe for the 1997 and the 2008 8-Hour Ozone National Ambient Air Quality Standards (40 CFR 81.305). In addition, Rule 1106 regulates activities covered by two different CTGs: *Control Techniques Guidelines for Shipbuilding and Ship Repair Operations* (61 FR 44050), August 1996, and *Control Techniques Guidelines for Miscellaneous Metal and Plastic Parts Coatings* EPA–453/R–08–003, September 2008. Therefore, this rule 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,'' EPA, May 25, 1988 (the Bluebook, revised January 11, 1990).
3. ''Guidance Document for Correcting Common VOC & Other Rule Deficiencies,'' EPA Region 9, August 21, 2001 (the Little Bluebook).
4. ''Control Techniques Guidelines for Shipbuilding and Ship Repair Operations'' (61 FR 44050), August 27, 1996.
5. ''Alternative Control Techniques Document: Surface Coating Operations at Shipbuilding and Ship Repair Facilities EPA 453/R–94–032, April 1994.
6. ''Control Techniques Guidelines for Miscellaneous Metal and Plastic Parts Coatings'' EPA–453/R–08–003, September 2008.

B. Does the rule meet the evaluation criteria?

Rule 1106 adds several new marine and pleasure craft specialty coating

categories, lowers the VOC content limit of other specialty coating categories, and lowers the VOC content limit for solvents used for surface preparation. Under the District's October 23, 2006 SIP-approved rule, some of these new specialty coating categories such as Topcoats, Pleasure Craft, One Component, and Two Component, would have been covered under the ''General Use'' category and been subject to a more stringent VOC limit when compared to the October 24, 2016 amended rule. The EPA reviewed the potential gross emissions increase associated with the new specialty coating limits and estimates that total VOC emissions associated with these coatings may increase by approximately 250 pounds per year or approximately 0.001% of MDAQMD's VOC inventory. We conclude that this is a negligible increase and would not impact attainment. Because the potential gross increase is minimal, we have not calculated the net impact of the rule revisions, including the emission reductions from strengthened limits. Our evaluation shows this rule is consistent with CAA requirements and relevant guidance regarding enforceability, RACT, and SIP revisions. The TSD has more information on our evaluation.

C. EPA Recommendations To Further Improve the Rule

The TSD describes additional rule revisions that we recommend for the next time the local agency modifies the rule.

D. Public Comment and Proposed Action

As authorized in section 110(k)(3) of the Act, the EPA proposes to fully approve the submitted rule because we believe it fulfills all relevant requirements. We will accept comments from the public on this proposal until December 18, 2017. If we take final action to approve the submitted rule our final action will incorporate this rule 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 MDAQMD rule described in Table 1 of this preamble. The EPA has made, and will continue to make, these materials available through *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 (Public Law 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, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: November 6, 2017.

Alexis Strauss,

Acting Regional Administrator, Region IX.

[FR Doc. 2017–25015 Filed 11–16–17; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2017–0564; FRL–9970–87–Region 9]

Approval of California Air Plan Revisions, Mojave Desert Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve and conditionally approve revisions to the Mojave Desert Air Quality Management District (MDAQMD or ''District'') portion of the California State Implementation Plan (SIP). These revisions concern the District's demonstration regarding Reasonably Available Control Technology (RACT) requirements for the 1997 8-hour ozone and the 2008 8-hour ozone National Ambient Air Quality Standards (NAAQS or ''standard'') in the portion of the Western Mojave Desert ozone nonattainment area under the jurisdiction of the MDAQMD. The EPA is also proposing to approve MDAQMD negative declarations into the SIP for the 2008 ozone standards. We are proposing action on local SIP revisions under the Clean Air Act (CAA or Act). We are taking comments on this proposal and plan to follow with a final action.

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

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2017–0564 at *https://www.regulations.gov/,* or via email to

Nancy Levin, Rulemaking Office at *levin.nancy@epa.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be removed or edited from *Regulations.gov*. For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the Web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Nancy Levin, EPA Region IX, (415) 942–3848, *levin.nancy@epa.gov.*

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

Table of Contents

I. The State's Submittal
  A. What documents did the State submit?
  B. Are there other versions of these documents?
  C. What is the purpose of the submitted documents?
II. The EPA's Evaluation and Proposed Action
  A. How is the EPA evaluating the submitted documents?
  B. Do the documents meet the evaluation criteria?
  C. EPA Recommendations To Further Improve the RACT SIPs
  D. Public Comment and Proposed Action
III. Statutory and Executive Order Reviews

I. The State's Submittal

A. What documents did the State submit?

Table 1 lists the documents addressed by this proposal with the dates that they were adopted by the local air agency and submitted to the EPA by the California Air Resources Board (CARB).

TABLE 1—SUBMITTED DOCUMENTS

Local agency	Document	Adopted	Submitted
MDAQMD	MDAQMD 8-Hour Reasonably Available Control Technology—State Implementation Plan Analysis (RACT SIP Analysis) "2006 RACT SIP".	9/25/06	7/11/2007
MDAQMD	MDAQMD 2015 8-Hour Reasonably Available Control Technology —State Implementation Plan Analysis (2015 RACT SIP Analysis) "2015 RACT SIP".	2/23/15	9/9/2015
MDAQMD	MDAQMD Federal Negative Declarations for Nineteen Control Techniques Guidelines Source Categories "Negative Declarations for 19 CTGs".	2/23/15	9/9/2015

In addition to these SIP submittals, the District and CARB transmitted commitment letters to the EPA to adopt and submit specific enforceable measures within a year of our anticipated approval date that would remedy the deficiencies identified in the 2017 MDAQMD and CARB letters to the EPA.[1]

On January 11, 2008, the submittal for MDAQMD's RACT SIP for the 1997 8-hour ozone NAAQS (2006 RACT SIP) was deemed by operation of law to meet the completeness criteria in Title 40 of the Code of Federal Regulations (CFR) part 51 Appendix V, which must be met before formal EPA review. On March 9, 2016, the submittal for the MDAQMD's 2015 RACT SIP, including negative declarations for 19 CTGs, was found to meet the completeness criteria.

B. Are there other versions of these documents?

There are no previous versions of these documents in the MDAQMD portion of the California SIP for the 1997 or 2008 8-hour ozone standards.

C. What is the purpose of the submitted documents?

Volatile Organic Compounds (VOCs) and nitrogen oxides (NO_X) help produce ground-level ozone and smog, which harm human health and the environment. Section 110(a) of the CAA requires states to submit regulations that control VOCs and NO_X emissions. Sections 182(b)(2) and (f) require that SIPs for ozone nonattainment areas classified as Moderate or above implement RACT for any source covered by a Control Techniques Guidelines (CTG) document and for any major source of VOCs or NO_X. The MDAQMD is subject to this requirement as it regulates the San Bernardino portion of the Western Mojave Desert ozone nonattainment area that was previously designated and classified as a Moderate nonattainment area for the 1997 NAAQS and is currently classified as a Severe-15 ozone nonattainment area for the 1997 and the 2008 8-hour ozone NAAQS.[2] Therefore, the MDAQMD must, at a minimum, adopt RACT-level controls for all sources covered by a CTG document and for all major non-CTG sources of VOCs or NO_X within the nonattainment area. Any stationary source that emits or has the potential to emit at least 100 tons per year of VOCs or NO_X is a major stationary source in a Moderate ozone nonattainment area (CAA section 182(b)(2), (f) and 302(j)), and any stationary source that emits or has the potential to emit at least 25 tons per year of VOCs or NO_X is a major stationary source in a Severe ozone nonattainment area (CAA sections 182(d) and (f)).

Section IV.G of the preamble to the EPA's final rule to implement the 1997 8-hour ozone NAAQS (70 FR 71612, November 29, 2005) discusses RACT

[1] Letters from Brad Poiriez, Mojave Desert Air Quality Management District (MDAQMD) to Alexis Strauss, U.S. Environmental Protection Agency (EPA) and Richard Corey, California Air Resources Board (CARB), dated September 25, 2017 and September 27, 2017. Letter from Jon Taylor, CARB, to Alexis Strauss, EPA, dated October 3, 2017.

[2] 40 CFR 81.305; 69 FR 23858 at 23884 (April 30, 2004) (final rule designating and classifying Western Mojave Desert as a Subpart 2/Moderate nonattainment for the 1997 8-hour ozone NAAQS); 77 FR 26950 (May 8, 2012) (final rule reclassifying Western Mojave Desert as Severe-15 nonattainment for the 1997 8-hour ozone NAAQS); and 77 FR 30088 at 30100 (May 21, 2012) (final rule designating and classifying Western Mojave Desert as Severe-15 nonattainment for the 2008 8-hour ozone NAAQS). Western Mojave Desert is listed in the final rulemaking under ''Los Angeles-San Bernardino Cos (W Mojave Desert), CA: Los Angeles County (part).'' The EPA evaluated MDAQMD's 2006 RACT SIP submittal as a Moderate ozone nonattainment area since the District adopted its 2006 certification based on that classification. On March 13, 2014, the MDAQMD provided additional information to supplement its 2006 RACT SIP, to address the EPA's September 11, 2006 comments on the 2006 RACT SIP.

requirements. It states in part that where a RACT SIP is required, states implementing the 8-hour standard generally must assure that RACT is implemented, either through a certification that previously required RACT controls still represent RACT for 8-hour implementation purposes or through a new RACT determination. Section III.D of the preamble to the EPA's final rule to implement the 2008 ozone NAAQS (80 FR 12264, March 6, 2015) discusses similar requirements for RACT. The submitted documents provide MDAQMD's analyses of its compliance with the CAA section 182 RACT requirements for the 1997 and 2008 8-hour ozone NAAQS. The EPA's technical support documents (TSDs) [3] have more information about the District's submissions and the EPA's evaluations thereof.

II. The EPA's Evaluation and Proposed Action

A. How is the EPA evaluating the submitted documents?

SIP rules must require RACT for each category of sources covered by a 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 MDAQMD regulates a Severe ozone nonattainment area (see 40 CFR 81.305), so the District's rules must implement RACT.

States should also submit for SIP approval negative declarations for those source categories for which they are not adopting CTG-based regulations (because they have no sources above the CTG recommended threshold) regardless of whether such negative declarations were made for an earlier SIP.[4] To do so, the submittal should provide reasonable assurance that no sources subject to the CTG requirements currently exist or are planned for the MDAQMD.

The District's analysis must demonstrate that each major source of NO_X or VOCs in the nonattainment area is covered by a RACT-level rule. In addition, for each CTG source category, the District must either demonstrate that a RACT-level rule is in place, or submit a negative declaration. Guidance and policy documents that we use to evaluate CAA section 182 RACT requirements include the following:

1. ''Final Rule to Implement the 8-hour Ozone National Ambient Air Quality Standard—Phase 2'': (70 FR 71612; November 29, 2005).
2. ''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).
3. ''Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations,'' EPA, May 25, 1988 (the Bluebook, revised January 11, 1990).
4. ''Guidance Document for Correcting Common VOC & Other Rule Deficiencies,'' EPA Region 9, August 21, 2001 (the Little Bluebook).
5. ''State Implementation Plans; Nitrogen Oxides Supplement to the General Preamble; Clean Air Act Amendments of 1990 Implementation of Title I; Proposed Rule,'' (the NO_X Supplement), 57 FR 55620, November 25, 1992.
6. Memorandum from William T. Harnett to Regional Air Division Directors, (May 18, 2006), ''RACT Qs & As—Reasonably Available Control Technology (RACT) Questions and Answers.''
7. RACT SIPs, Letter dated March 9, 2006 from EPA Region IX (Andrew Steckel) to CARB (Kurt Karperos) describing Region IX's understanding of what constitutes a minimally acceptable RACT SIP.
8. RACT SIPs, Letter dated April 4, 2006 from EPA Region IX (Andrew Steckel) to CARB (Kurt Karperos) listing EPA's current CTGs, ACTs, and other documents which may help to establish RACT.
9. ''Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements'' (80 FR 12264; March 6, 2015).

With respect to major stationary sources, because the Western Mojave Desert ozone nonattainment area was classified as ''Moderate'' nonattainment for the 1997 8-hour ozone NAAQS at the time that California submitted the 2006 RACT SIP to the EPA, the EPA evaluated this submission in accordance with the 100 ton per year (tpy) threshold for ''major stationary sources'' of VOCs or NO_X emissions in Moderate ozone nonattainment areas. (see CAA sections 182(b)(2) and (f)).

MDAQMD's 2015 RACT SIP submittal contains the District's RACT evaluation for major stationary sources in accordance with the 25 tpy threshold for major stationary sources of VOCs or NO_X emissions in Severe ozone nonattainment areas. (see CAA sections 182(d) and (f)). The EPA also evaluated MDAQMD's submittals for compliance with the additional RACT requirements that became applicable following the EPA's reclassification of the Western Mojave Desert ozone nonattainment area from ''Moderate'' to ''Severe'' nonattainment for the 1997 8-hour ozone NAAQS and classification as a Severe ozone nonattainment area for the 2008 8-hour ozone NAAQS.

B. Do the documents meet the evaluation criteria?

We find that the District's submissions are largely consistent with the applicable CAA requirements. The District has identified rule deficiencies for certain rules, and in light of the District's commitment to adopt specific enforceable measures to remedy the identified rule deficiencies, the EPA will propose to conditionally approve portions of the submittals.

The SIP submittals and supplementary material demonstrate that all of the identified SIP rules implement RACT for the applicable CTG categories and for the major non-CTG stationary sources of VOCs and NO_X for the 1997 and 2008 8-hour ozone NAAQS, with the exception of the following rules: Rule 461, *Gasoline Transfer and Dispensing;* Rule 462, *Organic Liquid Loading;* Rule 463, *Storage of Organic Liquids;* Rule 1104, *Organic Solvent Degreasing;* Rule 1106, *Marine Coating Operations;* Rule 1114, *Wood Products Coating Operations;* Rule 1115, *Metal Parts & Product Coating Operations;* Rule 1157, *Boilers and Process Heaters;* Rule 1160, *Internal Combustion Engines;* Rule 1161, and *Portland Cements Kilns;* Rule 1162, *Polyester Resin Operations.*

On February 24, 2017, CARB submitted an updated version of Rule 1106, *Marine Coating Operations.* The EPA has concluded that the District's revisions of this rule cure the deficiencies identified by the District in its 2015 RACT SIP Analysis. We are proposing approval of this rule in parallel with the present proposed action.

On September 25, 2017 and September 27, 2017, the District transmitted to CARB and the EPA commitments to adopt new or revised rules that will resolve the identified rule deficiencies in the remaining rules, and to transmit these rules to CARB no later than December 31, 2018. On October 3, 2017, CARB committed to submit these rules to the EPA no later than January 31, 2019.[5] These letters commit the District to adopt specific enforceable measures to correct the rule deficiencies, commit the state to submit them to the EPA by a date certain, and are clear and enforceable. Accordingly, we believe these commitment letters are consistent with CAA requirements regarding conditional approval for the

[3] The docket for this proposed action contains two TSDs, one addressing the 2006 RACT SIP, and one addressing the 2015 RACT SIP and Negative Declarations for 19 CTGs.

[4] 57 FR 13498, 13512 (April 16, 1992). The EPA previously approved several negative declarations submitted by MDAQMD. *See* 76 FR 29153 (May 20, 2011).

[5] Letters from Brad Poiriez, Mojave Desert Air Quality Management District (MDAQMD) to Alexis Strauss, U.S. Environmental Protection Agency (EPA) and Richard Corey, California Air Resources Board (CARB), dated September 25 and September 27, 2017. Letter from Jon Taylor, CARB, to Alexis Strauss, EPA, dated October 3, 2017.

2006 and 2015 RACT SIPs with respect to the rules cited above.[6] See CAA section 110(k)(4).

Where there are no existing sources covered by a particular CTG document, states may, in lieu of adopting RACT requirements for those sources, adopt negative declarations certifying that there are no such sources in the relevant nonattainment area. On September 9, 2015, CARB submitted for SIP inclusion MDAQMD's negative declarations for 19 CTG source categories. The District certified that it examined its permit files, emissions inventory and other documentation and determined that there are no sources in the CTG source categories listed in Table 2.[7] The District adopted the negative declarations on February 23, 2015, after reasonable notice and public comment.[8] We searched CARB's emissions inventory database and verified that there did not appear to be facilities in the MDAQMD that might be subject to the 19 CTG categories. We conclude that these negative declarations are consistent with the relevant policy and guidance regarding RACT. The TSDs for today's action have more information on our evaluation.

TABLE 2—NEGATIVE DECLARATIONS

CTG source category	CTG reference document
Large Petroleum Dry Cleaners	EPA 450/3–82–009, 9/82 Control of VOC Emissions from Large Petroleum Dry Cleaners.
Manufacture of High-Density Polyethylene, Polypropylene, and Polystyrene Resins.	EPA–450/3–83–008, 11/83 Control of Volatile Organic Compound Emissions from Manufacture of High-Density Polyethylene, Polypropylene, and Polystyrene Resins.
Manufacture of Pneumatic Rubber Tires	EPA–450/2–78–030, Control of Volatile Organic Emissions from Manufacture of Pneumatic Rubber Tires.
Surface Coating of Cans	EPA–450/2–77–008, 5/77 Control of Volatile Organic Emissions from Existing Stationary Sources—Vol. II: Surface Coating of Cans, Coils, Paper, Fabrics, Automobiles, and Light-Duty Trucks.
Surface Coating of Coils	EPA–450/2–77–008, 5/77 Control of Volatile Organic Emissions from Existing Stationary Sources—Vol. II: Surface Coating of Cans, Coils, Paper, Fabrics, Automobiles, and Light-Duty Trucks.
Surface Coating Operations at Automotive and Light Duty Truck Assembly Plants.	EPA 453/R–08–006, 09/08, Control Technique Guidelines for Automobile and Light-Duty Truck Assembly Coatings.[9] EPA–450/2–77–008, 5/77 Control of Volatile Organic Emissions from Existing Stationary Sources—Vol. II: Surface Coating of Cans, Coils, Paper, Fabrics, Automobiles, and Light-Duty Trucks.
Large Appliances, Surface Coatings	EPA–450/2–77–034, 12/77 Control of Volatile Organic Emissions from Existing Stationary Sources—Volume V: Surface Coating of Large Appliances. EPA 453/R–07–004, 09/07, Control Techniques Guidelines for Large Appliance Coatings.
Surface Coating of Magnet Wire	EPA–450/2–77–033, 12/77 Control of Volatile Organic Emissions from Existing Stationary Sources, Volume IV: Surface Coating of Insulation of Magnet Wire.
Vacuum Producing Devices or Systems	EPA–450/2–77–025, 10/77 Control of Refinery Vacuum Producing Systems, Wastewater Separators, and Process Unit Turnarounds.
Leaks from Petroleum Refinery Equipment	EPA–450/2–77–025, 10/77 Control of Refinery Vacuum Producing Systems, Wastewater Separators, and Process Unit Turnarounds.
Process Unit Turnarounds	EPA–450/2–77–025, 10/77 Control of Refinery Vacuum Producing Systems, Wastewater Separators, and Process Unit Turnarounds.
Equipment Leaks from Natural Gas/Gasoline Processing Plants.	EPA–450/3–83–007,12/83 Control of Volatile Organic Compound Equipment Leaks from Natural Gas/Gasoline Processing Plants.
Manufacture of Synthesized Pharmaceutical Products.	EPA–450/2–78–029, 12/78 Control of Volatile Organic Emissions from Manufacture of Synthesized Pharmaceutical Products.[10]
Air Oxidation Processes (SOCMI)	EPA–450/3–84–015, 12/84 Control of Volatile Organic Compound Emissions from Air Oxidation Process in Synthetic Organic Chemical Manufacturing Industry (SOCMI).
Reactor and Distillation Processes (SOCMI)	EPA–450/4–91–031, 08/93 Control of Volatile Organic Compound Emissions from Reactor Process and Distillation Operations in SOCMI.
Equipment used in Synthetic Organic Chemical Polymers and Resin Manufacturing.	EPA–450/3–83–006, 03/84 Control of Volatile Organic Compound Leaks from Synthetic Organic Chemical Polymer and Resin Manufacturing Equipment.
Leaks from Petroleum Refinery Equipment	EPA–450/2–78–036, 06/78 Control of Volatile Organic Compound Leaks from Petroleum Refinery Equipment.
Metal Furniture Coating	EPA–450/2–77–032, 12/77 Control of Volatile Organic Emissions from Existing Stationary Sources—Volume III: Surface Coating of Metal Furniture. EPA 453/R–07–005, 09/07 Control Techniques Guidelines for Metal Furniture Coatings.
Flat Wood Paneling	EPA–450/2–78–032, 06/78 Control of Volatile Organic Emissions from Existing Stationary Sources—Volume VII: Factory Surface Coating of Flat Wood Paneling. EPA–453/R–06–004, 09/06 Control Techniques Guidelines for Flat Wood Paneling Coatings.

Accordingly, the District's 2006 and 2015 RACT SIP submittals satisfy the CAA section 182 RACT requirements, with the exception of the rules identified above, which the District has either already corrected, or has committed to correct.

[6] We note that the District has begun acting on its commitment. MDAQMD has drafted revisions to Rules 461, 462, 463 and 1115 and is in the process of responding to EPA's comments on the preliminary draft amendments.

[7] Mojave Desert Air Quality Management District Federal Negative Declaration (8 hr Ozone Standard) for Nineteen CTG Categories, signed by Eldon Heaston, Executive Officer, signed on January 13, 2015, and Board adopted on February 23, 2015.

[8] See Resolution 15–03; February 23, 2015.

[9] The District also lists ''Protocol for Determining the Daily VOC Emission Rate of Automobile and Light-Duty Truck Primer-Surfacer and Topcoat Operations (EPA 453/R–08–002, 09/08),'' however, this document is not a CTG.

[10] The District also lists ''Control Techniques for VOC Emissions from Stationary Sources: Industrial Manufacturing Processes (EPA–453/R–92–018, 12/92, NTIS PB–93–150–258),'' however, this is not a CTG document.

Our 2006 and 2015 RACT SIP TSDs have more information on our evaluation.

C. EPA Recommendations To Further Improve the RACT SIPs

The 2015 RACT SIP TSD describes recommendations if additional emission reductions are needed for the next time the local agency modifies its rules.

D. Public Comment and Proposed Action

If a portion of a plan revision meets all the applicable CAA requirements, section 110(k)(3) authorizes the EPA to approve the plan revision in part. 42 U.S.C. 7410(k)(3). In addition, section 110(k)(4) authorizes the EPA to conditionally approve a plan revision based on a commitment by the state to adopt specific enforceable measures by a date certain but not later than one year after the date of the plan approval. 42 U.S.C. 7410(k)(4). In this instance, the enforceable measures that the state must submit are new or revised rules that correct the rule deficiencies identified above. On October 3, 2017, the state transmitted a commitment letter dated September 25, 2017 from the MDAQMD to adopt and transmit rules or rule revisions to the state that correct the deficiencies identified in Rule 461, *Gasoline Transfer and Dispensing;* Rule 462, *Organic Liquid Loading;* Rule 463, *Storage of Organic Liquids;* Rule 1104, *Organic Solvent Degreasing;* Rule 1114, *Wood Products Coating Operations;* Rule 1115, *Metal Parts and Product Coating Operations;* Rule 1157, *Boilers and Process Heaters;* Rule 1160, *Internal Combustion Engines;* Rule 1161, *Portland Cement Kilns;* and Rule 1162, *Polyester Resin Operations* no later than December 31, 2018. The state also transmitted a second commitment letter from MDAQMD dated September 27, 2017 to adopt and transmit revised Rule 1104, *Organic Solvent Degreasing* and Rule 1162, *Polyester Resin Operations* no later than December 31, 2018. The state's transmittal letter commits the state to submit to the EPA these rules no later than January 31, 2019.

If the MDAQMD or the state fail to comply with this commitment, this proposed conditional approval would convert to a disapproval and start an 18-month clock for sanctions under CAA section 179(a)(2) and a two-year clock for a federal implementation plan under CAA section 110(c)(1).

As authorized in section 110(k)(3) and (4) of the Act, the EPA proposes to partially conditionally approve MDAQMD's 2006 and 2015 RACT SIPs with respect to Rule 461, *Gasoline Transfer and Dispensing;* Rule 462, *Organic Liquid Loading;* Rule 463, *Storage of Organic Liquids;* Rule 1104, *Organic Solvent Degreasing;* Rule 1114, *Wood Products Coating Operations;* Rule 1115, *Metal Parts and Product Coating Operations;* Rule 1157, *Boilers and Process Heaters;* Rule 1160, *Internal Combustion Engines;* Rule 1161, *Portland Cement Kilns;* and Rule 1162, *Polyester Resin Operations.* Simultaneously, EPA proposes to partially approve the remainder of MDAQMD's 2006 and 2015 RACT SIPs, and to fully approve MDAQMD's negative declarations, submitted on September 9, 2015.

We will accept comments from the public on this proposal until December 18, 2017. If we take final action to approve the submitted documents, our final action will incorporate these documents into the SIP.

III. Statutory and Executive Order Reviews

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. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 regulatory action because actions such as SIP approvals are exempted under Executive Order 12866.

C. 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.

D. 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.

E. 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.

F. 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.

G. 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.

H. 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.

I. 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.

J. 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.

K. 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, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: November 6, 2017.

Alexis Strauss,

Acting Regional Administrator, Region IX.

[FR Doc. 2017–25017 Filed 11–16–17; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 71

RIN 0920–AA14

Foreign Quarantine Regulations, Proposed Revision of HHS/CDC Animal Importation Regulations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Advance notice of proposed rulemaking; withdrawal.

SUMMARY: The Centers for Disease Control and Prevention (CDC), located within the Department of Health and Human Services (HHS) announces the withdrawal of its 2007 advance notice of proposed rulemaking (ANPRM). The 2007 ANPRM was issued to begin the process of revising the regulations concerning importation of animals and animal products.

DATES: As of November 17, 2017, the ANPRM published on July 31, 2007, at 72 FR 41676, is withdrawn.

FOR FURTHER INFORMATION CONTACT: Anne E. O'Connor, M.S., MT(ASCP), Office of the Chief of Staff, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–A14, Atlanta, GA 30329; email: *cdcregulations@cdc.gov.*

SUPPLEMENTARY INFORMATION: On July 31, 2007, HHS/CDC published an advance notice of proposed rulemaking (72 FR 41679) requesting input and background information from the public on revisions to HHS/CDC's animal importation regulations found at 42 CFR part 71. The ANPRM had a 60-day comment period. On October 1, 2007, HHS/CDC published another notice (72 FR 55729) that extended the public comment period to December 1, 2007.

In response to the ANPRM, HHS/CDC received 20 public comments including from individuals, organizations, three animal-rescue advocacy groups, one private pet business, and one state government entity. Some commenters asserted that the current regulations fail to take into account the increasing volume of animal imports and new threats to human health and safety posed by these imports. Other commenters asserted that the same rules and fees applicable to commercial importers should be extended to non-profit animal shelters, rescue groups, and animal sanctuaries that effectively function as pet stores. The topics that received the most comments were changing the rabies regimen and requiring health certificate and unique identifiers for dogs, cats, and ferrets; and other strategies for preventing the introduction, spread, and transmission of zoonotic disease in the United States.

HHS/CDC believes the public interest is best served by withdrawing the ANPRM identified in this document from rulemaking. The withdrawal of the ANPRM identified in this document does not preclude HHS/CDC from initiating future rulemaking to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the United States and from one State or possession into another.

The ANPRM published on July 31, 2007 (72 FR 41676), is hereby withdrawn.

Dated: November 13, 2017.

Eric D. Hargan,

Acting Secretary, Department of Health and Human Services.

[FR Doc. 2017–24951 Filed 11–16–17; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 73

[Docket No. CDC–2015–0050]

RIN 0920–AA58

Possession, Use, and Transfer of Select Agents and Toxins; Addition of Certain Influenza Virus Strains to the List of Select Agents and Toxins

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of proposed rulemaking; withdrawal.

SUMMARY: The Centers for Disease Control and Prevention (CDC), located within the Department of Health and Human Services (HHS) announces the withdrawal of its 2015 notice of proposed rulemaking (NPRM). The 2015 NPRM proposed to add certain influenza virus strains to the list of HHS select agents and toxins.

DATES: The proposed rule published on July 16, 2015 (80 FR 42079), is withdrawn as of November 17, 2017.

FOR FURTHER INFORMATION CONTACT: Samuel S. Edwin, Director, Division of Select Agents and Toxins, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–A46, Atlanta, GA 30329. Telephone: (404) 718–2000.

SUPPLEMENTARY INFORMATION: On July 16, 2015, HHS/CDC published a proposed rule (80 FR 42079) to add certain influenza virus strains to the list of HHS select agents and toxins. Specifically, HHS/CDC proposed to add the influenza viruses that contain the hemagglutinin (HA) from the Goose Guangdong/1/96 lineage (the influenza viruses that contain the hemagglutinin (HA) from the A/Gs/Gd/1/96 lineage), including wild-type viruses as a non-Tier 1 select agent. HHS/CDC also proposed to add any influenza viruses that contain the HA from the A/Gs/Gd/1/96 lineage that were made transmissible among mammals by respiratory droplets in a laboratory as a Tier 1 select agent.

In response to the NPRM, HHS/CDC received 24 comments from industry, academic institutions, professional organizations, and the public. Commenters expressed concern about balancing the risk of impeding research against the risk of an accidental laboratory incident or act of terrorism. Other commenters were concerned that regulation might further limit the ability of veterinarians, researchers, and farmers to identify and respond to influenza outbreaks. Finally, some commenters pointed out that highly pathogenic avian influenza viruses are already regulated as a Department of Agriculture/Animal and Plant Health Inspection Service (USDA/APHIS) select agent. HHS/CDC agreed with the commenters. Since the publication of the NPRM, the U.S. Government has put in place additional controls regarding the funding and approval of dual use research. In addition, HHS/CDC has worked with USDA/APHIS to ensure that biosafety and biosecurity protocols/measures are in place for regulated entities working with highly pathogenic

avian influenza viruses to mitigate the risk to public health and safety. Thus, HHS/CDC believes the public interest is best served by the withdrawal of the NPRM identified in this document. The withdrawal of the proposed rule identified in this document does not preclude HHS/CDC from initiating future rulemaking concerning the influenza viruses that contain the hemagglutinin (HA) from the Goose Guangdong/1/96 lineage (the influenza viruses that contain the hemagglutinin (HA) from the A/Gs/Gd/1/96 lineage), including wild-type viruses or influenza viruses that contain the HA from the A/Gs/Gd/1/96 lineage that were made transmissible among mammals by respiratory droplets.

The NPRM published on July 16, 2015 (82 FR 42079), is hereby withdrawn.

Dated: November 13, 2017.

Eric D. Hargan,

Acting Secretary, Department of Health and Human Services.

[FR Doc. 2017–24952 Filed 11–16–17; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 84

[Docket No. HHS–OS–2009–0019; NIOSH–0137]

RIN 0920–AA33

Total Inward Leakage Requirements for Respirators

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of proposed rulemaking; withdrawal.

SUMMARY: The National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC), located within the Department of Health and Human Services (HHS) announces the withdrawal of its 2009 notice of proposed rulemaking (NPRM). The 2009 NPRM proposed to establish total inward leakage requirements for half-mask, air-purifying particulate respirators approved by NIOSH.

DATES: As of November 17, 2017, the proposed rule published on October 30, 2009, at 74 FR 56141, is withdrawn.

FOR FURTHER INFORMATION CONTACT: Rachel Weiss, Office of the Director, National Institute for Occupational Safety and Health, 1090 Tusculum Avenue, MS–C46, Cincinnati, OH 45226. Telephone: (855) 818–1629 (this is a toll-free number); email: *NIOSHregs@cdc.gov.*

SUPPLEMENTARY INFORMATION: On October 30, 2009, HHS published an NPRM (74 FR 56141) that proposed to establish total inward leakage requirements for half-mask, air-purifying particulate respirators approved by NIOSH under regulations found in 42 CFR part 84. The NPRM included a 60-day comment period closing on December 29, 2009, which was eventually extended to September 30, 2010 (April 20, 2010, 75 FR 20546).

In response to the proposed rule, HHS received comments from five respirator manufacturers, one manufacturer of laboratory test equipment, two labor unions, one trade organization, one state's departments of public health and occupational safety and health, three consulting firms, and three private individuals in the field of respiratory protection. Stakeholders presented evidence that the approval decision outcomes could vary significantly between human subject panels that would be constituted according to the proposed test protocol, and expressed concern that the proposed approval requirements would not improve the performance of NIOSH-approved respirators on the market and might eliminate good-performing respirators from the market. Stakeholders also expressed concern that the cost of conducting inward leakage testing using the protocol proposed by NIOSH would be prohibitive and that costs would likely outweigh benefits.

As a result of the stakeholder input submitted to the docket and during public meetings, NIOSH decided instead to pursue improved inward leakage performance of this class of respirators through participation in national and international consensus standard development efforts, rather than rulemaking. Thus, HHS finds that the public interest is best served by withdrawing the 2009 total inward leakage NPRM. The withdrawal of the 2009 total inward leakage NPRM does not preclude HHS from initiating future rulemaking concerning total inward leakage requirements for half-mask, air-purifying particulate respirators.

The NPRM published on October 30, 2009 (74 FR 56141) is hereby withdrawn.

Dated: November 13, 2017.

Eric D. Hargan,

Acting Secretary, Department of Health and Human Services.

[FR Doc. 2017–24950 Filed 11–16–17; 8:45 am]

BILLING CODE 4163–18–P

Notices

Federal Register

Vol. 82, No. 221

Friday, November 17, 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

Submission for OMB Review; Comment Request

November 14, 2017.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by December 18, 2017 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@omb.eop.gov* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: Summer Meal Study.

OMB Control Number: 0584–NEW.

Summary of Collection: The USDA Summer Food Service Program (SFSP) and the National School Lunch Program Seamless Summer Option (SSO) provide healthy meals and snacks to children through 18 years of age, in low-income areas during summer months when school is not in session. Legislation requires programs participating in the SFSP or SSO to participate in program research and evaluation (Section 305 of the Healthy Hunger Free Kids Act).

Need and Use of the Information: In July 2016, the programs served 3.85 million summer meals to participating children. However, summer meals reach only a small percent of the children receiving free or reduced price meals during the school year. This study will help identify strategies to increase participation in summer meals as well as assess the nutritional quality of the meals served to children.

Description of Respondents: Individuals/Households (112,783); Business-not-for-profit (734) and State, Local & Tribal agencies (1,142).

Number of Respondents: 114,659.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 215,196.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2017–24940 Filed 11–16–17; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Black Hills National Forest Advisory Board

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Black Hills National Forest Advisory Board (Board) will meet in Rapid City, South Dakota. The Board is established consistent with the Federal Advisory Committee Act of 1972, the Forest and Rangeland Renewable Resources Planning Act of 1974, the National Forest Management Act of 1976, and the Federal Public Lands Recreation Enhancement Act. Additional information concerning the Board, including the meeting summary/minutes, can be found by visiting the Board's Web site at: *http://www.fs.usda.gov/main/blackhills/workingtogether/advisorycommittees.*

DATES: The meeting will be held on Wednesday, January 10, 2018, at 1:00 p.m.

All meetings are subject to cancellation. For updated status of meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: The meeting will be held at the Forest Service Center, 8221 Mount Rushmore Road, Rapid City, South Dakota.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION.** All comments, including names and addresses, when provided, are placed in the record and available for public inspection and copying. The public may inspect comments received at the Black Hills National Forest Supervisor's Office. Please call ahead to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Scott Jacobson, Committee Coordinator, by phone at 605–440–1409 or by email at *sjjacobson@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 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to provide:

(1) Information Topic: FY 2018 Forest Budget Overview;

(2) Pile burning update;

(3) Over snow use;

(4) Recreation Site Analysis (RSA) update;

(5) Black Hills Resilient Landscape Project update; and

(6) Mountain pine beetle brood survey report.

The meeting is open to the public. If time allows, the public may make oral statements of three minutes or less. Individuals wishing to make an oral statement should submit a request in writing by December 26, 2017, to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the Board may file

written statements with the Board's staff before or after the meeting. Written comments and time requests for oral comments must be sent to Scott Jacobson, Black Hills National Forest Supervisor's Office, 1019 North Fifth Street, Custer, South Dakota 57730; by email to *sjjacobson@fs.fed.us,* or via facsimile to 605–673–9208.

Meeting Accommodations: If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices, or other reasonable accommodation for access to the facility or proceedings by contacting the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case by case basis.

Dated: October 24, 2017.

Chris French,

Associate Deputy Chief, National Forest System.

[FR Doc. 2017–24914 Filed 11–16–17; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF COMMERCE

Census Bureau

Proposed Information Collection; Comment Request; American Community Survey Methods Panel Tests

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 January 16, 2018.

ADDRESSES: Please 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*). You may also submit comments, identified by Docket number USBC–2017–0006, to the Federal e-Rulemaking Portal: *http://www.regulations.gov.* All comments received are part of the public record. No comments will be posted to *http://www.regulations.gov* for public viewing until after the comment period has closed. Comments will generally be posted without change. All Personally Identifiable Information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Robin A. Pennington, U.S. Census Bureau, Decennial Census Management Division, 4600 Silver Hill Rd., Washington, DC 20233, or email at *Robin.A.Pennington@census.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The American Community Survey (ACS) collects detailed socioeconomic data from about 3.5 million addresses in the United States and 36,000 in Puerto Rico each year. The ACS also collects detailed socioeconomic data from about 195,000 residents living in Group Quarters (GQ) facilities. Resulting tabulations from this data collection are provided on a yearly basis. The ACS allows the Census Bureau to provide timely and relevant housing and socioeconomic statistics, even for small geographies.

An ongoing data collection effort with an annual sample of this magnitude requires that the ACS continue research, testing, and evaluations aimed at improving data quality, achieving survey cost efficiencies, and improving ACS questionnaire content and related data collection materials. The ACS Methods Panel is a research program designed to address and respond to survey issues and needs. From 2018 to 2021, the ACS Methods Panel may include testing methods for increasing survey efficiencies, reducing survey cost, lessening respondent burden, improving response rates, and improving data quality.

At this time, plans are in place to propose several tests: Self-response mail messaging tests, a respondent burden field test, testing the use of administrative data, GQ testing, and two content tests. Since the ACS Methods Panel is designed to address emerging issues, we may conduct additional testing as needed. Any additional testing would focus on methods for reducing data collection costs, improving data quality, improving the respondent experience, revising content, or testing new questions that have an urgent need to be included on the ACS.

In response to declining response rates and increasing costs, the Census Bureau plans to study methods to increase self-response, the least expensive mode of data collection. The Census Bureau currently sends up to five mailings to a sampled address to inform the occupants that their address has been selected and to encourage them to respond to the ACS. The proposed tests would include changes to messages included in the mailings to motivate the public to respond to the ACS. The proposed tests would also include modifications to the materials, including the mailing type (for example, sending letters versus postcards). Changes to the number of mailings or the timing of the mailings may be explored. The Census Bureau is also considering testing automated phone reminders.

In 2014, the ACS conducted a comprehensive content review to ensure that only the information needed is requested and that the justifications provided by federal agencies for the ACS questions are current and valid (Chappell and Obenski, 2014). The Census Bureau takes very seriously respondent burden and concerns and recognizes that the content review process was only an initial step to addressing them. The Census Bureau has worked hard to identify a range of possibilities for reducing perceived respondent burden while still maintaining the irreplaceable quality and richness of ACS data (Hughes et al., 2015, Griffin and Hughes, 2013, Hughes et al., 2016, Heimel et al., 2016, Oliver et al., 2016). In a workshop held in 2016, the National Academies of Science Committee on National Statistics recommended identifying a way to quantify or measure respondent burden (National Academies of Sciences, Engineering, and Medicine, 2016). The Census Bureau has begun work to understand respondents' experience responding to the ACS through focus groups and cognitive testing. The next step for this work is to conduct a field test, implementing questions to measure respondent burden.

The Census Bureau has made significant progress exploring the use of administrative data in surveys and censuses, potentially as a substitute for questions asked of respondents. Administrative data refer to data collected by government agencies for the purposes of administering programs or providing services. The Census Bureau has evaluated the availability

and suitability of several different data sources for use in the ACS on telephone service, the year a residence was built, condominium status, income, residence one year ago, and self-employment income. We are currently exploring administrative data use for property values, property taxes, and acreage. Additionally, we plan to evaluate the quality, coverage, and feasibility of using administrative records in lieu of enumeration for institutional GQs (U.S. Census Bureau, 2017). In addition to replacing questions on the survey, administrative data may be used to reduce burden of existing questions by allowing for modification of the questions. For example, the ACS currently asks respondents to provide their total income for the past 12 months as well as income received from various sources (for example, wages, interest, retirement income). We are currently cognitively testing modifications to the income questions, including changing the reference year from the past 12 months to the previous calendar year, as well as only asking respondents if income was received from various sources rather than the amount. As a continuation of this research, the Census Bureau proposes a field test of revised content, for income as well as other topics both for the housing unit questionnaire as well as the GQ questionnaire. Some questions may be modified while others would be removed.

The ACS samples about 18,000 GQ facilities each year. A GQ is a place where people live or stay, in a group living arrangement, which is owned or managed by an entity or organization providing housing and/or services for the residents. There are two categories of GQs: Institutional and non-institutional. Institutional GQs include places such as correctional facilities and nursing homes. Non-institutional GQs include college housing, military barracks, and residential treatment centers. Most interviews conducted in GQs are interviewer-administered (over 90 percent of interviews in institutional GQs and just under 75 percent in non-institutional GQs), but some GQ respondents self-respond using a paper questionnaire. The Census Scientific Advisory Committee Working Group on Group Quarters in the ACS recommended that the Census Bureau consider making an ''internet version of the ACS available to non-institutional GQ residents, especially in college dorms, military barracks, and group homes'' (National Academies of Sciences, Engineering, and Medicine, 2016). Additional support was identified for this in a workshop held in 2016 with the National Academies of Science Committee on National Statistics. The Census Bureau proposes a field test of an internet self-response GQ form for residents in non-institutional GQs.

Working through the Office of Management and Budget (OMB) Interagency Committee for the ACS, the Census Bureau will solicit proposals from other Federal agencies to change existing questions or add new questions to the ACS. The Census Bureau proposes testing any new or revised questions in one of two content tests. A content test using all modes of data collection will be conducted in 2021. Conducting a self-response only content test prior to 2021 allows the Census Bureau to be more agile in reacting to changes in society and legislation. The objective of both content tests is to determine the impact of changing question wording and response categories, as well as redefining underlying constructs, on the quality of the data collected. The Census Bureau proposes to evaluate changes to current questions by comparing the revised questions to the current ACS questions. For new questions, the Census Bureau proposes to compare the performance of two versions of any new questions and benchmark results to other well-known sources of such information.

References

Chappell, Gary and Sally Obenski. 2014. *American Community Survey Fiscal Year 2014 Content Review.* U.S. Census Bureau. Accessed 8/1/2017 at, *https://www.census.gov/programs-surveys/acs/operations-and-administration/2014-content-review.html.*

Griffin, Deborah and Todd Hughes. 2013. *Effect of Changing Call Parameters in the American Community Survey's Computer Assisted Telephone Interviewing Operation.* ACS13–RER–17. U.S. Census Bureau. Accessed 8/1/2017 at, *http://www.census.gov/library/working-papers/2013/acs/2013_Griffin_03.html.*

Heimel, Sarah, Dorothy Barth, and Megan Rabe. 2016. ''*Why We Ask*'' *Mail Package Insert Test.* ACS16–MP–07. U.S. Census Bureau. Accessed 8/1/2017 at, *https://www.census.gov/library/working-papers/2016/acs/2016_Heimel_01.html.*

Hughes, Todd, Michael Beaghen, and Mark Asiala. 2015. Reducing Respondent Burden in the American Community Survey. Accessed 8/1/2017 at, *https://www.census.gov/content/dam/Census/programs-surveys/acs/operations-and-administration/2015-16-survey-enhancements/Reducing_Burden_ACS_Feasibility_Assessment.pdf.*

Hughes, Todd, Eric Slud, Robert Ashmead, and Rachael Walsh. 2016. *Results of a Field Pilot to Reduce Respondent Contact Burden in the American Community Survey's Computer Assisted Personal Interviewing Operation.* ACS16–RER–07. U.S. Census Bureau. Accessed 8/1/2017 at, *https://www.census.gov/library/working-papers/2016/acs/2016_Hughes_01.html.*

National Academies of Sciences, Engineering, and Medicine. (2016). *Reducing Response Burden in the American Community Survey: Processing of a Workshop.* Washington, DC: *The National Academies Press.* Accessed 8/1/2017 at, *https://doi.org/10.17226/23639.*

Oliver, Broderick, Michael Risley, and Andrew Roberts. 2016. *2015 Summer Mandatory Messaging Test.* ACS16–RER–5–R1. U.S. Census Bureau. Accessed 8/1/2017 at, *https://www.census.gov/library/working-papers/2016/acs/2016_Oliver_01.html.*

U.S. Census Bureau. 2017. *Agility in Action 2.0: A Snapshot of enhancements to the American Community Survey.* Accessed 8/8/2017 at, *ht*tps://www.census.gov/programs-surveys/acs/operations-and-administration/agility-in-action/agility-in-action-2.html.

II. Method of Collection

Self-Response Mail Messaging Tests—We will use the same self-response modes we offer in ACS production data collection, that is, internet and a mail-back paper questionnaire. No interviewer-administered interviews are necessary for these tests. Different strategies to encourage self-response may be used, including changes to the number and timing of the mailings, the messages and materials included in each mailing, as well as automated telephone reminders. Testing is usually conducted with split-sample experiments, using current ACS production materials as the control. The Census Bureau expects to conduct up to four self-response mail messaging tests each year.

Respondent Burden Field Test—The Census Bureau proposes adding several optional questions about the respondent's perception of burden at the end of the ACS interview. The questions would allow respondents the opportunity to give feedback after completing the ACS and are intended to measure the burden of the survey, including the contacts we made to reach the respondent, the time it took to complete the survey, and how difficult and sensitive it was for the respondent to answer the questions. The questions would be asked of respondents across all modes of data collection: Internet, paper questionnaires, and interviewer-administered.

Testing the Use of Administrative Data in Housing Units (HUs) and GQs—We will test replacing or substituting all or parts of the ACS with administrative

data, which could make it possible to remove or modify the existing questions on the questionnaire. Respondents could be presented with a new version of the questionnaire with some questions not asked and others modified, as compared to production ACS. Evidence suggests that respondents who respond to the ACS using different modes of data collection (internet, paper questionnaire, and interviewer-administered) have different socioeconomic characteristics. Therefore, this test will include all modes of data collection. This test would include respondents in both HUs and GQs.

Group Quarters Test—A sample of GQ respondents will be given the option of completing the survey via self-response using an internet instrument. We would evaluate the quality of the data received from the internet compared to traditional data collection methods for GQs (paper questionnaires and interviewer-administered) as well as assess operational issues with offering the internet option, including feedback from interviewers.

Content Tests—The self-response content test will include internet and paper-questionnaires for data collection. Additionally, assistance over the phone will be offered to respondents, which can result in an interview being conducted. These interviews are considered self-response in the ACS. The test will be a split-sample experiment with some respondents assigned to receive current production ACS content and some respondents assigned to receive new and revised content. Additionally, a follow-up reinterview may be conducted with all households who responded to measure response burden as well as response bias or response variance. Comparisons will be made between the experimental treatments to determine whether the new or revised content produces better data quality and/or reduces respondent burden. The 2021 ACS Content Test will be similar to the self-response content test in that it will be a split-sample experiment with a follow-up reinterview. However, this test will include all modes of data collection (internet, mail, and interviewer-administered).

III. Data

OMB Control Number: 0607–0936.

Form Number(s): ACS–1, ACS–1(GQ), ACS–1(PR)SP, ACS CAPI(HU) and ACS RI(HU).

Type of Review: Regular submission.

Affected Public: Individuals and households.

Estimated Number of Respondents:

Self-Response Mail Messaging Tests—We estimate that each of the self-response mail messaging tests will include 60,000 respondents. We anticipate there will be up to 14 tests across the 3-year period.

Respondent Burden Field Test—100,000.

Testing the Use of Administrative Data—100,000.

Self-Response Content Test—100,000 respondents plus 63,000 respondents in the follow-up reinterview.

2021 ACS Content Test—100,000 respondents plus 83,000 respondents in the follow-up reinterview.

Estimated Time per Response:

Self-Response Mail Messaging Tests—40 minutes.

Respondent Burden Field Test—50 minutes (10 minutes for the optional follow-up questions).

Testing the Use of Administrative Data in HUs and GQs—40 minutes.

Group Quarters Test—40 minutes (includes both the interview with the facility manager and the interview itself).

Self-Response Content Test—40 minutes for the initial interview plus 20 minutes for the follow-up reinterview.

2021 ACS Content Test—40 minutes for the initial interview plus 20 minutes for the follow-up reinterview.

Estimated Total Annual Burden Hours: 297,445.

Test	Estimated number of respondents	Estimated time per response (in minutes)	Total burden hours
2018 Self-Response Mail Messaging Tests.	Test A—60,000	Test A—40	Test A—40,000.
	Test B—60,000	Test B—40	Test B—40,000.
2019 Self-Response Mail Messaging Tests.	Test A—60,000	Test A—40	Test A—40,000.
	Test B—60,000	Test B—40	Test B—40,000.
	Test C—60,000	Test C—40	Test C—40,000.
	Test D—60,000	Test D—40	Test D—40,000.
2020 Self-Response Mail Messaging Tests.	Test A—60,000	Test A—40	Test A—40,000.
	Test B—60,000	Test B—40	Test B—40,000.
	Test C—60,000	Test C—40	Test C—40,000.
	Test D—60,000	Test D—40	Test D—40,000.
2021 Self-Response Mail Messaging Tests.	Test A—60,000	Test A—40	Test A—40,000.
	Test B—60,000	Test B—40	Test B—40,000.
	Test C—60,000	Test C—40	Test C—40,000.
	Test D—60,000	Test D—40	Test D—40,000.
Respondent Burden Field Test	100,000	50	83,334.
Testing the Use of Administrative Data in HUs and GQs.	100,000	40	66,667.
Group Quarters Test	500	40	334.
Self-Response Content Test	Initial Interview—100,000	Initial Interview—40	Initial Interview—66,667.
	Follow-up Reinterview—63,000	Follow-up Reinterview—20	Follow-up Reinterview—21,000.
2021 ACS Content Test	Initial Interview—100,000	Initial Interview—40	Initial Interview—66,667.
	Follow-up Reinterview—83,000	Follow-up Reinterview—20	Follow-up Reinterview—27,667.
Total	1,386,500		892,336 (over 3 years).

Estimated Total Annual Cost to Public: Except for their time, there is no cost to respondents.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13 U.S.C. Sections 141 and 193.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including

whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Sheleen Dumas,

Departmental PRA Lead, Office of the Chief Information Officer.

[FR Doc. 2017–24943 Filed 11–16–17; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–69–2017]

Foreign-Trade Zone (FTZ) 52—Suffolk County, New York; Notification of Proposed Production Activity; Estee Lauder Inc., (Hair Straightening Styling Balm), Melville, New York

Estee Lauder Inc. (Estee Lauder) submitted a notification of proposed production activity to the FTZ Board for its facilities in Melville, New York within FTZ 52. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on November 2, 2017.

Estee Lauder already has authority to manufacture and distribute skin care, fragrance, and cosmetic products within FTZ 52. The current request would add a finished product (hair straightening styling balm) to the scope of authority. Pursuant to 15 CFR 400.14(b), additional FTZ authority would be limited to the finished product described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt Estee Lauder from customs duty payments on the foreign-status materials/components used in export production. On its domestic sales, for foreign-status materials/ components in the existing scope of authority, Estee Lauder would be able to choose the duty rate during customs entry procedures that applies to hair straightening styling balm (duty-free). Estee Lauder would be able to avoid duty on foreign-status components which become scrap/waste. Customs duties also could possibly be deferred or reduced on foreign-status production equipment.

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is December 27, 2017.

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

For further information, contact Juanita Chen at *Juanita.Chen@trade.gov* or (202) 482–1378.

Dated: November 13, 2017.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2017–24972 Filed 11–16–17; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–552–819]

Certain Steel Nails From the Socialist Republic of Vietnam: Notice of Rescission of Countervailing Duty Administrative Review, 2016

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

SUMMARY: The Department of Commerce (the Department) is rescinding the administrative review of the countervailing duty (CVD) order on certain steel nails (steel nails) from the Socialist Republic of Vietnam (Vietnam) for the period January 1, 2016, to December 31, 2016, based on the timely withdrawal of the request for review.

DATES: Applicable November 17, 2017.

FOR FURTHER INFORMATION CONTACT: Yasmin Bordas, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3813 and (202) 482–7438, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 3, 2017, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of the CVD order on steel nails from Vietnam for the period January 1, 2016, to December 31, 2016.[1] On July 31, 2017, the Department received a timely request, in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), from Mid Continent Steel & Wire Inc. (the petitioner) to conduct an administrative review of this CVD order with respect to 14 companies.[2] Based upon this request, on September 13, 2017, in accordance with section 751(a) of the Act, the Department published in the **Federal Register** a notice of initiation of administrative review for this CVD order.[3] On September 28, 2017, the petitioner timely withdrew its request for an administrative review for each of the 14 companies.[4]

Rescission of Review

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if a party who requested the review withdraws the request within 90 days of the date of publication of the notice of initiation of the requested review. As noted above, the petitioner withdrew its request for review by the 90-day deadline. No other party requested an administrative review. Accordingly, we are rescinding the administrative review of the CVD order on steel nails from Vietnam covering the period January 1, 2016, to December 31, 2016.

Assessment

The Department will instruct U.S. Customs and Border Protection (CBP) to assess CVDs on all appropriate entries at a rate equal to the cash deposit of estimated CVDs required at the time of entry, or withdrawal from warehouse, for consumption, during the period January 1, 2016, to December 31, 2016, in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of this notice in the **Federal Register**.

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 82 FR 30833 (July 3, 2017).

[2] *See* Letter from the petitioner re: Certain Steel Nails from Vietnam: Request for Administrative Reviews, dated July 31, 2017.

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 82 FR 42974 (September 13, 2017) (Initiation Notice).

[4] *See* Letter from the petitioner re: Certain Steel Nails from Vietnam: Withdrawal of Request for Administrative Reviews, dated September 28, 2017.

Notification to Importers

This notice serves as the only reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the presumption that reimbursement of the countervailing duties occurred and the subsequent assessment of doubled countervailing duties.

Notification Regarding Administrative Protective Order

This notice also serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under an APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction. This notice is issued and published in accordance with sections 751 of the Act and 19 CFR 351.213(d)(4).

Dated: November 13, 2017.

James Maeder,

Acting Deputy Assistant Secretary for Antidumping/Countervailing Duty Operations Enforcement and Compliance (E&C).

[FR Doc. 2017–24967 Filed 11–16–17; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Notice of Meeting: Summit on Trade-Related Standards Issues

ACTION: Request for public comments and notice of opportunity to apply to participate in an internal International Trade Administration summit on trade-related standards issues.

SUMMARY: The Department of Commerce International Trade Administration (ITA) is seeking input from U.S. stakeholders (companies, private sector organizations and trade associations active in trade-related standards work) on standards, conformity assessment and regulatory trends and challenges in foreign markets and the assistance they require from ITA to effectively address standards-related trade barriers and trends to take advantage of export opportunities. ITA will use this input in reviewing how to improve services and programs to best meet the needs of U.S. stakeholders in the standards area. In addition, ITA will convene an internal summit on how to improve such services and programs on March 6–7, 2018 in Washington, DC, and is soliciting private sector requests for limited opportunities to participate in portions of the summit.

DATES: Although input is always welcome, for consideration as part of the immediate review, submit comments by December 18, 2017. Requests to participate in the March 6–7, 2018 ITA internal summit also must be received by COB on December 18, 2017.

ADDRESSES: Comments can be submitted online or in writing. Written submissions should be directed to Renee Hancher, Office of Standards and Investment Policy, Industry and Analysis, U.S. Department of Commerce, Room 28019, 14th and Constitution Avenue NW., Washington, DC 20230. Online submissions should be submitted using *http://www.regulations.gov.* To ensure the timely receipt and consideration of comments, ITA strongly encourages commenters to make online submissions using *http://www.regulations.gov.* Comments should be submitted under docket ITA–2017–0007.

FOR FURTHER INFORMATION CONTACT: Contact Renee Hancher in the Office of Standards and Investment Policy, Industry and Analysis, International Trade Administration, by telephone at (202) 482–3493 (this is not a toll-free number) or email at *Renee.Hancher@trade.gov.*

SUPPLEMENTARY INFORMATION:

Background: The International Trade Administration (ITA) is the premier resource for American companies competing in the global marketplace. ITA has more than 2,200 employees assisting U.S. exporters in more than 100 U.S. cities and 75 markets worldwide. For more information on ITA visit *www.trade.gov.* Additional information about ITA's standards activities is available at *http://www.trade.gov/td/standards/index.html.*

Request for Input: ITA is currently reviewing its trade-related standards services and programs in support of U.S. stakeholders to ensure that the services and assistance provided best meet the needs of U.S. stakeholders and support the expansion of the U.S. economy and creation of U.S. jobs. Trade-related standards work includes work related to the adoption and recognition of standards; standards dialogues and other bilateral and regional engagements with trading partners; preparation of standards information in ITA publications such as Top Market reports and Country Commercial Guides; and work to address adoption, implementation, and enforcement of technical regulations and conformity assessment procedures inconsistent with World Trade Organization and free trade agreement obligations. ITA is specifically seeking information on trade-related standards trends in foreign markets, the challenges U.S. exporters are encountering in those markets, and the assistance needed from the U.S. Government, and specifically ITA, to address those challenges and take advantage of export opportunities. ITA will use this input in reviewing how to improve ITA standards-related services and programs to best meet the needs of U.S. stakeholders, including during an internal summit of ITA staff working on trade-related standards issues on March 6–7, 2018 in Washington, DC.

Comments submitted may include information about key standards trends affecting the global competitiveness of U.S. industry; stakeholder experiences, if any, with ITA services that aid stakeholders in understanding and acting on standards-related trade and regulatory issues; and suggestions for improving ITA services in the standards area. Respondents do not need to have detailed knowledge of or experience with ITA standards-related services, but those that do may note this in their submissions.

Submitting Comments Using http://www.regulations.gov: To find the correct docket, enter ITA–2017–0007 in the ''Enter Keyword or ID'' window at the *http://www.regulations.gov* home page and click ''Search.'' The site will provide a search-results page listing all documents associated with the docket number. Find a reference to this notice by selecting ''Notice'' under ''Document Type'' on the search-results page, and click on the link entitled ''Comment now!'' The *http://www.regulations.gov* Web site provides the option of making submissions by filling in a comment field, or by attaching a document. ITA prefers submissions to be provided in an attached document. (For further information on using *http://www.regulations.gov,* please consult the resources provided on the Web site by clicking on the ''Help'' tab.)

Do not include any privileged or confidential business information in comments submitted. The file name should begin with the character ''P''

(signifying that the comments contain no privileged or confidential business information and can be posted publicly), followed by the name of the person or entity submitting the comments. Written submissions should include an original and five (5) copies.

Please do not attach separate cover letters to electronic submissions; rather, include any information that might appear in a cover letter in the comments themselves. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments in the same file as the submission itself, not as separate files.

Opportunity to present during the ITA Internal Summit: The Summit will convene ITA staff from headquarters and the domestic and foreign fields to develop recommendations for improving standards-related services and programs for ITA stakeholders. It will include ''open sessions'' with private sector stakeholders where they may share their priorities and recommendations for ITA's work on trade-related standards issues. To accommodate as many stakeholders as possible, the time per stakeholder will be limited. Stakeholders interested in presenting during a summit open session must apply by December 18, 2017, identifying the name and address of the proposed speaker and including a brief description of the stakeholder interest and intended remarks. Stakeholders are limited to one presenter per company or organization.

In seeking private sector presenters, ITA will consider factors such as: (1) Frequency and type of standards-related trade barriers experienced with the goal of selecting presenters with significant experience working to overcome standards-related barriers in foreign markets, and whose experience represents the spectrum of such barriers experienced by U.S. exporters (*e.g.,* challenges with standards development, testing and conformity assessment, and meeting standards-related regulatory requirements in foreign markets); and (2) balance of industries and roles with the goal of selecting presenters that represent a mix of industries affected by standards-related trade barriers, and who are conversant on issues affecting U.S. stakeholders/exporters (standards development, conformity assessment, and technical regulations).

Chris Rosettie,

Director, Office of Standards and Investment Policy.

[FR Doc. 2017–24605 Filed 11–16–17; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–836]

Light-Walled Rectangular Pipe and Tube From Mexico: Initiation and Expedited Preliminary Results of Changed Circumstances Review

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

SUMMARY: The Department of Commerce (Department) is simultaneously initiating and issuing the preliminary results of a changed circumstances review (CCR) of the antidumping duty order on light-walled rectangular pipe and tube (LWRPT) from Mexico, consistent with section 751(b) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.216 and 351.221(c)(3)(ii). Based on the information on the record, we preliminarily determine that Perfiles LM, S.A. de C.V. (Perfiles) is the successor-in-interest to Perfiles y Herrajes LM, S.A. de C.V. (Perfiles y Herrajes). Interested parties are invited to comment on these preliminary results.

DATES: Applicable November 17, 2017.

FOR FURTHER INFORMATION CONTACT: Madeline R. Heeren, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–9179.

SUPPLEMENTARY INFORMATION:

Background

On August 5, 2008, the Department published the antidumping duty order on LWRPT from Mexico.[1] On July 31, 2017, Perfiles y Herrajes informed the Department that, effective July 11, 2017, it had changed its name to '' Perfiles LM, S.A. de C.V.,'' (*i.e.,* Perfiles) and requested that the Department conduct a CCR under 19 CFR 351.216(b) to determine that Perfiles is the successor-in-interest to Perfiles y Herrajes for purposes of determining Perfiles' antidumping duty cash deposits and liabilities.[2]

On August 17, 2017, the Department declined to initiate the CCR that Perfiles y Herrajes requested, citing the need for additional information pertaining to any changes in management, production facilities, customers, and suppliers.[3] Therefore, the Department issued Perfiles y Herrajes a questionnaire. On October 2, 2017, Perfiles y Herrajes filed its response, in which it provided additional information to support its request.[4] We have received no comments from any other interested party.

Scope of the Review

The merchandise subject to this order is certain welded carbon-quality light-walled steel pipe and tube, of rectangular (including square) cross section, having a wall thickness of less than 4 mm.

The term carbon-quality steel includes both carbon steel and alloy steel which contains only small amounts of alloying elements. Specifically, the term carbon-quality includes products in which none of the elements listed below exceeds the quantity by weight respectively indicated: 1.80 percent of manganese, or 2.25 percent of silicon, or 1.00 percent of copper, or 0.50 percent of aluminum, or 1.25 percent of chromium, or 0.30 percent of cobalt, or 0.40 percent of lead, or 1.25 percent of nickel, or 0.30 percent of tungsten, or 0.10 percent of molybdenum, or 0.10 percent of niobium, or 0.15 percent vanadium, or 0.15 percent of zirconium.

The description of carbon-quality is intended to identify carbon-quality products within the scope. The welded carbon-quality rectangular pipe and tube subject to this order is currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7306.61.50.00 and 7306.61.70.60. While HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this order is dispositive.[5]

[1] *See Light-Walled Rectangular Pipe and Tube from Mexico, the People's Republic of China, and the Republic of Korea: Antidumping Duty Orders; Light-Walled Rectangular Pipe and Tube from the Republic of Korea: Notice of Amended Final Determination of Sales at Less Than Fair Value,* 73 FR 45403 (August 5, 2008) (*Order*).

[2] *See* Letter, ''Light-Walled Rectangular Pipe and Tube from Mexico—Notice of Change in Company Name,'' dated July 31, 2017 (CCR Request).

[3] *See* Letter, ''Light-Walled Rectangular Pipe and Tube from Mexico: Antidumping Duty Changed Circumstances Review Deficiency Questionnaire,'' dated August 17, 2017 (CCR Questionnaire).

[4] *See* Letter, ''Light-Walled Rectangular Pipe and Tube from Mexico—Response to August 17 Questionnaire,'' dated October 2, 2017 (CCR Questionnaire Response).

[5] For a complete description of the scope of the order, *see* Memorandum, ''Light-Walled Rectangular Pipe and Tube from Mexico: Initiation and Expedited Preliminary Results of Changed Circumstances Review,'' dated concurrently with, and hereby adopted by, these preliminary results (Preliminary Decision Memorandum).

Initiation of Changed Circumstances Review

Pursuant to section 751(b)(1) of the Act and the Department's regulations (19 CFR 351.216 and 351.221(c)(3)), the Department will conduct a CCR upon receipt of information concerning, or a request from an interested party for a review of, an order which shows changed circumstances sufficient to warrant a review of the order. Generally, in the past, the Department has used CCRs to address the applicability of cash deposit rates after there have been changes in the name or structure of a respondent, such as a merger or spinoff (*i.e.,* successor-in-interest, or successorship determinations).[6]

Perfiles y Herrajes states that, effective July 11, 2017, Perfiles y Herrajes changed its name to Perfiles.[7] Consistent with Department practice, as further discussed in the Preliminary Decision Memorandum, we find that the information submitted by Perfiles y Herrajes demonstrates changed circumstances sufficient to warrant a review.[8] Therefore, in accordance with section 751(b)(1) of the Act and 19 CFR 351.216(d), the Department is initiating a CCR to determine whether Perfiles is the successor-in-interest to Perfiles y Herrajes.

Preliminary Results

When it concludes that expedited action is warranted, the Department may publish the notice of initiation and preliminary results of a CCR in a single notice.[9] The Department has combined the notice of initiation and preliminary results in successor-in-interest cases when sufficient documentation has been provided supporting the request to make a preliminary determination.[10] In this instance, because the record contains information necessary to support the request for a preliminary determination, we find that expedited action is warranted, and we are combining the notice of initiation and the notice of preliminary results, in accordance with 19 CFR 351.221(c)(3)(ii).

In a CCR, we generally consider a company to be the successor-in-interest to another company for antidumping cash deposit purposes if the operations of the successor-in-interest are not materially dissimilar from those of its predecessor.[11] In making this determination, the Department examines a number of factors including, but not limited to, changes in: (1) Management; (2) production facilities; (3) suppliers; and (4) customer base.[12] While no one or several of these factors will necessarily provide a dispositive indication of succession, the Department will generally consider one company to be the successor-in-interest to another company if its resulting operation is essentially the same as that of its predecessor.[13] Thus, if the evidence demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as the prior company, the Department will assign the new company the cash deposit rate of its predecessor.[14]

In its CCR Questionnaire Response, Perfiles y Herrajes provided evidence demonstrating that Perfiles' operations are not materially dissimilar from those of its predecessor, Perfiles y Herrajes.[15] Specifically, the record indicates that there have not been any material changes to management,[16] production facilities,[17] suppliers,[18] or customer base.[19] Based on the foregoing findings, which are explained in greater detail in the Preliminary Decision Memorandum,[20] the Department preliminarily determines that Perfiles is the successor-in-interest to Perfiles y Herrajes and, as such, it is entitled to Perfiles y Herrajes' antidumping cash deposit rate with respect to entries of subject merchandise. Should our final results remain the same as these preliminary results, we will instruct U.S. Customs and Border Protection to suspend liquidation of entries of LWRPT produced and/or exported by Perfiles and apply the antidumping cash deposit rate applicable to Perfiles y Herrajes, effective the date of publication of the final results.

Public Comment

Interested parties may submit case briefs not later than 30 days after the date of publication of this notice.[21] Rebuttal briefs, limited to issues raised in the case briefs, may be filed by no later than five days after the deadline for filing case briefs.[22] Parties who submit case or rebuttal briefs in this CCR are requested to submit with each argument: (1) A statement of the issue; and (2) a brief summary of the argument with an electronic version included.[23]

Any interested party may request a hearing within 30 days of publication of this notice.[24] Hearing requests should contain the following information: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations at the hearing will be limited to issues raised in the briefs. If a request for a hearing is made, parties will be notified of the time and date for the hearing to be held at the U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230 in a room to be determined.[25]

All submissions, with limited exceptions, must be filed electronically using Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). An electronically filed document must be received successfully in its entirety by 5 p.m. Eastern Time (ET) on the due date. Documents excepted from the electronic submission requirements must be filed manually (*i.e.,* in paper form) with the APO/Dockets Unit in Room 18022 and stamped with the date and time of receipt by 5 p.m. ET on the due date.[26]

Unless extended, consistent with 19 CFR 351.216(e), we intend to issue the final results of this CCR no later than 270 days after the date on which this review was initiated or within 45 days if all parties agree to the outcome of the review. We intend to issue and publish this initiation and preliminary results

[6] *See, e.g., Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Changed Circumstances Review,* 81 FR 91909 (December 19, 2016) (*Solar Cells PRC 2016 CCR Final*).

[7] *See* CCR Request at 1.

[8] *See* 19 CFR 351.216(d).

[9] *See* 19 CFR 351.221(c)(3)(ii).

[10] *See, e.g., Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China,* 81 FR 76561 (November 3, 2016), unchanged in *Solar Cells PRC 2016 CCR Final.*

[11] *Id.*

[12] *See Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review: Multilayered Wood Flooring from the People's Republic of China,* 79 FR 48117, 48118 (August 15, 2014), unchanged in *Multilayered Wood Flooring from the People's Republic of China: Final Results of Changed Circumstances Review,* 79 FR 58740 (September 30, 2014).

[13] *Id.*

[14] *See Solar Cells PRC 2016 CCR Final,* 81 FR at 91910.

[15] *See* Letter, ''Light-Walled Rectangular Pipe and Tube from Mexico—Response to August 17 Questionnaire,'' dated October 2, 2017 (CCR Questionnaire Response).

[16] *Id.* at 5–6, Appendices A–3–A, A–3–B, A–4–A, and A–4–B.

[17] *Id.* at 9–10, Appendices A–7–A, A–7–B, and A–7–C.

[18] *Id.* at 11, Appendices A–8–A, and A–8–B.

[19] *Id.* at 8, Appendices A–6–A, and A–6–B.

[20] *See* Preliminary Decision Memorandum.

[21] *See* 19 CFR 321.309(c)(1)(ii).

[22] *See* 19 CFR 351.309(d)(1).

[23] *See* 19 CFR 351.309(c)(2) and (d)(2).

[24] *See* 19 CFR 351.310(c).

[25] *See* 19 CFR 351.310(d).

[26] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures: Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011).

notice in accordance with sections 751(b)(1) and 777(i)(1) of the Act and 19 CFR 351.216 and 351.221(c)(3) of the Department's regulations.

Dated: November 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. 2017–24965 Filed 11–16–17; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–918]

Steel Wire Garment Hangers From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2015–2016

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

SUMMARY: On August 9, 2017, the Department of Commerce (Department) published in the **Federal Register** the *Preliminary Results* of the administrative review of the antidumping duty order on Steel Wire Garment Hangers from the People's Republic of China (PRC) covering the period October 1, 2015, through September 30, 2016. This review covered Hangzhou Yingqing Material Co. Ltd. and Hangzhou Qingqing Mechanical Co. Ltd. (collectively, Yingqing), and Shanghai Wells Hanger Co., Ltd./Hong Kong Wells Ltd. (collectively, Shanghai Wells).

The Department gave interested parties an opportunity to comment on the *Preliminary Results,* but we received no comments. Hence, the final results are unchanged from the *Preliminary Results* and we continue to find that Shanghai Wells sold merchandise at prices below the normal value and Yingqing is not eligible for a separate rate during the period of review.

DATES: Applicable November 17, 2017.

FOR FURTHER INFORMATION CONTACT: Katrina Clemente, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–0783.

SUPPLEMENTARY INFORMATION:

Background

On August 9, 2017, the Department published the *Preliminary Results* and gave interested parties an opportunity to comment.[1] The Department received no comments. The Department conducted this review in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order

The merchandise subject to the order is steel wire garment hangers, fabricated from carbon steel wire, whether or not galvanized or painted, whether or not coated with latex or epoxy or similar gripping materials, and/or whether or not fashioned with paper covers or capes (with or without printing) and/or nonslip features such as saddles or tubes. These products may also be referred to by a commercial designation, such as shirt, suit, strut, caped, or latex (industrial) hangers. Specifically excluded from the scope of the order are wooden, plastic, and other garment hangers that are not made of steel wire. Also excluded from the scope of the order are chrome-plated steel wire garment hangers with a diameter of 3.4 mm or greater. The products subject to the order are currently classified under HTSUS subheadings 7326.20.0020, 7323.99.9060, and 7323.99.9080.

Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise is dispositive.

Final Results of Review

In the *Preliminary Results,* the Department determined the following: (1) Shanghai Wells sold merchandise at prices below normal value; and (2) Yingqing is not eligible for a separate rate and, therefore, is a part of the PRC-wide entity.[2] We have not received information contradicting our preliminary finding; thus, the Department finds there is no reason to modify its analysis. Accordingly, no decision memorandum accompanies this **Federal Register** notice. For further details of the issues addressed in this proceeding, *see* the *Preliminary Results.*[3]

PRC-Wide Entity

The Department's policy regarding the conditional review of the PRC-wide entity applies to this administrative review.[4] Under this policy, the PRC-wide entity will not be under review unless a party specifically requests, or the Department self-initiates, a review of the entity. Because no party requested a review of the PRC-wide entity in this review, the entity is not under review and the entity's rate is not subject to change (*i.e.,* 187.25 percent).[5]

Methodology

The Department conducted this review in accordance with section 751(a)(1)(B) of the Act. In the *Preliminary Results,* the Department calculated constructed export prices and export prices in accordance with section 772 of the Act. Because the PRC is a nonmarket economy (NME) within the meaning of section 771(18) of the Act, normal value is calculated in accordance with section 773(c) of the Act. We have not received any information since the issuance of the *Preliminary Results* that provides a basis for reconsidering this determination. For a full description of the methodology underlying our conclusions, *see* the *Preliminary Decision Memorandum,* available at *http://enforcement.trade.gov/frn/.*

Final Results of Review Margin

The Department determines that the following weighted-average dumping margin exists for the POR from October 1, 2015, through September 30, 2016:

Exporter	Weighted-average dumping margin (%)
Shanghai Wells Hanger Co., Ltd./Hong Kong Wells Ltd.[6]	5.02

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b), the Department has determined, and CBP shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review.

---

[1] *See Steel Wire Garment Hangers from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2015–2016,* 82 FR 37194 (September 9, 2017) (*Preliminary Results*) and the accompanying Preliminary Decision Memorandum.

[2] *See Preliminary Results,* 82 FR at 37194–95.

[3] *Id.*

[4] *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).

[5] *See Steel Wire Garment Hangers from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 2012–2013,* 80 FR 13332, (March 13, 2015), and accompanying Issues and Decision Memorandum; see also Preliminary Decision Memorandum.

[6] As previously stated, we continue to find Shanghai Wells Hanger Co., Ltd. and Hong Kong Wells Ltd. (collectively Shanghai Wells) to be a single entity.

The Department applied the assessment rate calculation method adopted in *Final Modification for Reviews, i.e.,* on the basis of monthly average-to-average comparisons using only the transactions associated with that importer with offsets being provided for non-dumped comparisons.[7] Pursuant to the Department's NME practice, for sales that were not reported in the U.S. sales data submitted by companies individually examined during this review, the Department instructs CBP to liquidate entries associated with those sales at the rate for the PRC-wide entity.[8]

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 from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) For the company listed above, Shanghai Wells, the cash deposit rate will be that established in the final results of this review (except, if the rate is zero or *de minimis,* then zero cash deposit will be required); (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recently completed segment of this proceeding in which they were reviewed; (3) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be equal to the weighted-average dumping margin for the PRC-wide entity (*i.e.,* 187.25 percent); and (4) for all non-PRC exporters of subject merchandise which have not received their own separate rate, the cash deposit rate will be the rate applicable to the PRC exporter(s) that supplied that non-PRC exporter. These cash 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.

Notification Regarding Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under the APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This notice of the final results of this administrative review is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5) and 19 CFR 351.213(h).

Dated: November 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. 2017–24964 Filed 11–16–17; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–952]

Narrow Woven Ribbon With Woven Selvedge From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2015–2016

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

SUMMARY: On July 19, 2017, the Department of Commerce (the Department) published the preliminary results of the 2015–2016 antidumping duty administrative review (AR) of the antidumping duty order on narrow woven ribbon with woven selvedge from the People's Republic of China (PRC), in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended (the Act). The period of review (POR) is September 1, 2015, through August 31, 2016. We received no comments from any interested parties. Accordingly, our final results remain unchanged from the preliminary results.

DATES: Effective November 17, 2017.

FOR FURTHER INFORMATION CONTACT: Aleksandras Nakutis, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3147.

SUPPLEMENTARY INFORMATION:

Background

As stated above, on July 19, 2017, the Department published the *Preliminary Results*[1] of the AR of the antidumping duty order on narrow woven ribbon with woven selvedge from the PRC covering the period September 1, 2015, through August 31, 2016, and invited parties to comment on these preliminary results. No parties submitted comments on the *Preliminary Results.*

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; 5907.00.60l 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.[2]

---

[7] *See Antidumping Proceeding: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification,* 77 FR 8101, 8103 (February 14, 2012) (*Final Modification for Reviews*).

[8] For a full discussion of this practice, *see Assessment Practice Refinement,* 76 FR at 65694 (October 24, 2011).

[1] *See 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,* 82 FR 33059 (July 19, 2017) (*Preliminary Results*).

[2] 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 Operations, to 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

Continued

Analysis

In the *Preliminary Results,* the Department preliminarily determined that the two companies under review, Huzhou Kingdom Coating Industry Co., Ltd. (Huzhou Kingdom) and Huzhou Unifull Label Fabric Co., Ltd. (Huzhou Unifull), did not establish their eligibility for separate rate status and would be treated as part of the PRC-wide entity. In these final results of review, we have continued to treat these two companies as part of the PRC-wide entity. For further discussion of the issues addressed in this proceeding, *see* the *Preliminary Results* and Preliminary Decision Memorandum. The Preliminary 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 *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 and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act, and 19 CFR 351.212(b), the Department has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review. We intend to instruct CBP to liquidate POR entries of subject merchandise exported by Huzhou Kingdom and Huzhou Unifull at the PRC-wide entity rate, which is 247.26 percent.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this review for shipments of the subject merchandise from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date in the **Federal Register** of the final results of the review, as provided by section 751(a)(2)(C) of the Act: (1) For previously investigated or reviewed PRC and non-PRC exporters not named above that received a separate rate in a prior segment of this proceeding, the cash deposit rate will continue to be the existing exporter-specific rate; (2) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, including Huzhou Kingdom and Huzhou Unifull, the cash deposit rate will be the rate for the PRC-wide entity, which is 247.26 percent; (3) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter that supplied that non-PRC exporter.

These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this 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.

Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under the APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

This notice of the final results of this antidumping duty administrative review is issued and published in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.213 and 19 CFR 351.221(b)(5).

Dated: November 9, 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. 2017–24966 Filed 11–16–17; 8:45 am]

BILLING CODE 3510–DS–P

Compliance (Preliminary Decision Memorandum), dated July 12, 2017.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF824

Western Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting and hearing.

SUMMARY: The Western Pacific Fishery Management Council (Council) will hold Hawaii Regional Ecosystem Advisory Committee (REAC) meeting to discuss and make recommendations on fishery management issues in the Western Pacific Region.

DATES: The Hawaii REAC will meet on Friday, December 1, 2017, between 9 a.m. and 4 p.m. Hawaii Standard Time. For specific times and agendas, see **SUPPLEMENTARY INFORMATION.**

ADDRESSES: The Hawaii REAC meeting will be held at the Council office, 1164 Bishop St., Suite 1400, Honolulu, HI 96813 and by teleconference and webinar. The teleconference will be conducted by telephone and by web. The teleconference numbers are U.S. toll-free: 1–888–482–3560 or International Access: +1 647 723–3959, and Access Code: 5228220. The webinar can be accessed at: *https://wprfmc.webex.com/join/info.wpcouncilnoaa.gov.*

FOR FURTHER INFORMATION CONTACT: Kitty M. Simonds, Executive Director, Western Pacific Fishery Management Council; telephone: (808) 522–8220.

SUPPLEMENTARY INFORMATION: Public comment periods will be provided in the agenda. The order in which agenda items are addressed may change. The meetings will run as late as necessary to complete scheduled business.

Schedule and Agenda for the Hawaii REAC Meeting

Friday, December 1, 2017, 9 a.m.—4 p.m.

1. Welcome and Introductions

2. Essential Fish Habitat (EFH)
A. Update on Habitat Program
B. Review of Non-Fishing Impacts to EFH
C. Precious Coral EFH Review
3. Aquaculture Management
4. Public Comment
5. Other Business
6. Discussion and Recommendations

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, (808) 522–8220 (voice) or (808) 522–8226 (fax), at least 5 days prior to the meeting date.

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

Dated: November 14, 2017.

Tracey L. Thompson,

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

[FR Doc. 2017–24960 Filed 11–16–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF846

South Atlantic Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold meetings of the Personnel Committee (Closed Session); Habitat Protection and Ecosystem-Based Management Committee; Spiny Lobster Committee; Citizen Science Committee; Data Collection Committee; Snapper Grouper Committee; Southeast Data, Assessment and Review (SEDAR) Committee (Partially Closed); Mackerel Cobia Committee, Information and Education Committee; Standard Operating, Policy and Procedure (SOPPs) Committee, and the Executive Finance Committee. The Council will meet as a Committee of the Whole to address the Acceptable Biological Catch (ABC) Control Rule and a meeting of the full Council. A Recreational Reporting Workshop will also be held during the meeting week. The Council will also hold a formal public comment session and take action as necessary.

DATES: The Council meetings will be held from 8 a.m. on Monday, December 4, 2017 until 1 p.m. on Friday, December 8, 2017.

ADDRESSES:

Meeting address: The meeting will be held at the DoubleTree by Hilton Atlantic Beach Oceanfront, 2717 W. Fort Macon Road, Atlantic Beach, NC 28512; phone: (252) 240–1155; fax: (252) 222–4065.

Council address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, SAFMC; phone (843) 571–4366 or toll free (866) SAFMC–10; fax: (843) 769–4520; email: *kim.iverson@safmc.net.* Meeting information is available from the Council's Web site at: *http://safmc.net/meetings/council-meetings/.*

SUPPLEMENTARY INFORMATION:

Public comment: Written comments may be directed to Gregg Waugh, Executive Director, South Atlantic Fishery Management Council (see **ADDRESSES**) or electronically via the Council's Web site at *http://safmc.net/safmc-meetings/council-meetings/.* The public comment form is open for use when the briefing book is posted to the Web site on the Friday, two weeks prior to the Council meeting (11/17/17). Comments received by close of business the Monday before the meeting 11/27/17) will be compiled, posted to the Web site as part of the meeting materials, and included in the administrative record; please use the Council's online form available from the Web site. For written comments received after the Monday before the meeting (after 11/27/17), individuals submitting a comment must use the Council's online form available from the Web site. Comments will automatically be posted to the Web site and available for Council consideration. Comments received prior to noon on Thursday, December 7, 2017 will be a part of the meeting administrative record.

The items of discussion in the individual meeting agendas are as follows:

Personnel Committee (Closed Session), December 4, 2017, 8 a.m. Until 9 a.m.

1. The Personnel Committee will meet in Closed Session to discuss personnel issues and provide recommendations for Council consideration.

Habitat Protection and Ecosystem-Based Management Committee, Monday, December 4, 2017, 9 a.m. Until 11 a.m.

1. The Committee will receive a report from the Habitat Protection and Ecosystem-Based Management Advisory Panel.

2. The Committee will review and approve the Implementation Plan for the Fishery Ecosystem-Based Management Plan (FEP II), review and approve the Road Map for the FEP II, review the Dashboard and Tools for the FEP II, receive an update on the Conservation Blueprint 2.2, and provide guidance.

3. The Committee will receive updates on other Habitat-related issues and provide recommendations as appropriate.

Committee Meeting of the Whole—Acceptable Biological Catch (ABC) Control Rule, Monday, December 4, 2017, 11 a.m. Until 12:00 noon.

1. The Council will meet as a Committee of the Whole to discuss the ABC Control Rule Amendment currently under development and provide guidance to staff.

Spiny Lobster Committee, Monday, December 4, 2017, 1:30 p.m. Until 3 p.m.

1. The Committee will receive an update on the status of 2016/17 catches versus the annual catch limit (ACLs), and review draft options for Spiny Lobster Amendment 13 addressing bullynets and measures recommended by the Florida Fish and Wildlife Conservation Commission (FWC), and provide recommendations as appropriate.

Citizen Science Committee, Monday, December 4, 2017, 3 p.m. Until 4:30 p.m.

1. The Committee will address policy on the Citizen Science Advisory Panel Pool and Action Team appointments and approve for recommendation to Council.

2. The Committee will receive reports from the Citizen Science Action Teams, discuss items brought forward by the Action Teams, and provide guidance to staff as appropriate.

3. The Committee will receive an update on the Citizen Science Program partnerships and Pilot Project and provide guidance to staff as needed.

Data Collection Committee, Monday, December 4, 2017, 4:30 p.m. Until 5:30 p.m.

1. The Committee will receive status reports on the For-Hire Electronic Reporting Amendment, and the Council's Data Collection Pilot Project and Outreach Plan relative to For-Hire Electronic Reporting. The Committee will provide guidance to staff as necessary.

Recreational Reporting Workshop, Tuesday, December 5, 2017 From 8:30 a.m. Until 12 p.m.

1. The Council will receive an update on the red snapper mini-season, and hold a workshop on recreational reporting with presentations on electronic reporting for big game, the iSnapper voluntary reporting program, Tails'n'Scales mandatory reporting program, and state involvement in reporting for the Marine Recreational Informational Reporting Program (MRIP). Discussion of these programs will be held as part of the workshop.

Snapper Grouper Committee, Tuesday, December 5, 2017, 1:30 p.m. Until 5:30 p.m. and Wednesday, December 6, 2017 From 8:30 a.m. Until 4:30 p.m.

1. The Committee will receive updates from NOAA Fisheries on commercial and recreational catches versus quotas for species under ACLs and the status of amendments under formal Secretarial review.
2. The Committee will receive a Report from the Snapper Grouper Advisory Panel.
3. The Committee will receive an overview of draft Amendment 46 addressing measures for red snapper, review options, and provide guidance to staff.
4. The Committee will receive an overview Vision Blueprint Regulatory Amendment 26 addressing recreational management actions and alternatives as identified in the 2016–2020 Vision Blueprint for the Snapper Grouper Fishery Management Plan. The Committee will review the revised actions and alternatives, updated analyses, and purpose and need. The Committee will modify the document as necessary and provide guidance to staff.
5. The Committee will review Vision Blueprint Regulatory Amendment 27 addressing commercial management actions and alternatives, as identified in the 2016–2020 Vision Blueprint for the Snapper Grouper Fishery. The Committee will review recommendations from the Scientific and Statistical Committee (SSC), review revised actions and alternatives, updated analyses, and the purpose and need, modify the document as necessary, and provide guidance to staff.
6. The Committee will receive presentations from NOAA Fisheries on proposed Exempted Fishing Permits for lionfish and provide recommendations as appropriate.
7. The Committee will receive an overview on options for draft Amendment 38 addressing management measures for blueline tilefish, receive a presentation on the benchmark stock assessment (SEDAR 50), review fishing level recommendations from the SSC, modify the amendment as necessary, and provide guidance to staff.
8. The Committee will receive an overview of options for the draft For-Hire Moratorium Amendment, discuss and provide guidance to staff.
9. The Committee will receive SSC fishing level recommendations for red grouper, review management options, and approve the abbreviated framework document for formal Secretarial Review.
10. The Committee will receive an overview from staff on golden tilefish management, review recommendations from the SSC, and provide guidance to staff.
11. The Committee will receive an update on the Wreckfish Individual Transferable Quota (ITQ) review and provide guidance to staff.
12. The Committee will receive an overview of management issues relative to yellowtail snapper, review a response from the Gulf of Mexico Fishery Management Council on a potential joint amendment to examine jurisdictional annual catch limits, and provide guidance to staff.

Formal Public Comment, Wednesday, December 6, 2017, 4:30 p.m.—Public comment will be accepted on items on the Council agenda. The Council is also accepting public comment on Executive Order 13771 (2 for 1 regulations) to identify regulations that are (1) outdated, (2) unnecessary, or (3) ineffective. The Council Chair, based on the number of individuals wishing to comment, will determine the amount of time provided to each commenter.

SEDAR Committee (Partially Closed), Thursday, December 7, 2017, 8:30 a.m. Until 9:30 a.m.

(Closed Session)

1. The Committee will make recommendations for appointments to the Cobia Stock Identification Workshop and for appointments to stock assessments for greater amberjack and red porgy.

(Open Session)

2. The Committee will receive a report from the SSC.
3. The Committee will review Terms of Reference and schedules for greater amberjack and red porgy stock assessments and provide recommendations as appropriate.
4. The Committee will review the SEDAR Steering Committee Report, discuss, and provide guidance as appropriate.

Mackerel Cobia Committee, Thursday, December 7, 2017, 9:30 a.m. Until 12 p.m.

1. The Committee will receive an update on commercial and recreational catches versus quotas for species managed under ACLs and an update on the status of amendments currently under Secretarial review.
2. The Committee will receive an update on development of the Interstate Atlantic Cobia Management Plan from the Atlantic States Marine Fisheries Commission (ASMFC).
3. The Committee will receive an update on the status of a request for recalculation of the 2015 and 2016 recreational landings for Atlantic cobia.
4. The Committee will receive an overview of Coastal Migratory Pelagics Framework Amendment 6 addressing Atlantic king mackerel trip limits, discuss, and provide recommendations for approval for public scoping.
5. The Committee will receive an overview Coastal Migratory Pelagics Amendment 31 addressing proposed management measures for Atlantic cobia, discuss, and provide recommendations for approval for public hearings.

Information and Education Committee, Thursday, December 7, 2017, 1:30 p.m. Until 2 p.m.

1. The Committee will receive a report from the Information and Education Advisory Panel, discuss and provide recommendations to staff as appropriate.

SOPPs Committee, Thursday, December 7, 2017, 2 p.m. Until 3:30 p.m.

1. The Committee will review policies for inclusion in the SOPPs and/or Council Handbook, discuss and provide direction to staff as appropriate.

Executive/Finance Committee, Thursday, December 7, 2017, 3:30 p.m. Until 5:30 p.m.

1. The Committee will receive an overview of the current Magnuson-Stevens Reauthorization efforts, discuss and provide guidance and approval as needed.
2. The Committee receive an update on the current budget status and outlook, discuss and provide guidance as needed.
3. The Committee will receive an overview on materials available for Council meetings, discuss, and provide guidance to staff.
5. The Committee will receive an overview of the System Management Plan Advisory Panel, discuss and provide additional guidance as needed.

Council Session: Friday, December 8, 2017, 8:30 a.m. Until 1 p.m. (Partially Closed Session if Needed)

The Full Council will begin with the Call to Order, adoption of the agenda, announcements and introductions, and presentations.

The Council will receive a Legal Briefing on Litigation from NOAA General Counsel (if needed) during Closed Session. The Council will receive the Executive Director's Report and an update on results from the Northeast Regional Coordinating Council meeting in November. Updates will be provided by NOAA Fisheries including a discussion with Dr. Francisco ''Cisco'' Werner, Chief Science Advisor and Director of Scientific Programs, reports on the status of commercial and recreational catches versus ACLs for species not covered during an earlier committee meeting, status of Recreational and Commercial Quota Monitoring Tables on the NOAA Fisheries' Southeast Regional Office Web site, a turtle release presentation, and discussion of other issues as necessary. The Council will also receive an update on the status of Bycatch Collection Programs and the pending voluntary commercial electronic logbook reporting effort from NOAA Fisheries' Southeast Fisheries Science Center. The Council will review any Exempted Fishing Permits received by NOAA Fisheries as necessary. The Council will receive Committee reports from the Snapper Grouper, Mackerel Cobia, Spiny Lobster, SEDAR, Data Collection, Habitat and Ecosystem-Based Management, Information and Education, Citizen Science, SOPPs, and Executive Finance Committees; a report from the Committee of the Whole (ABC Control Rule); a report from the Recreational Reporting Workshop; review recommendations; and take action as appropriate.

The Council will receive agency and liaison reports; and discuss other business and upcoming meetings.

Documents regarding these issues are available from the Council office (see **ADDRESSES**).

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice 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 final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the council office (see **ADDRESSES**) 3 days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: November 14, 2017.

Tracey L. Thompson,

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

[FR Doc. 2017–24955 Filed 11–16–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF839

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council (Council, NEFMC) will hold a three-day meeting to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

DATES: The meeting will be held on Tuesday, Wednesday, and Thursday, December 5, 6, and 7, 2017, beginning at 9 a.m. on December 5, 8:30 a.m. on December 6, and 8:30 a.m. on December 7.

ADDRESSES: The meeting will be held at the Hotel Viking, 1 Bellevue Avenue, Newport, RI 02840; telephone: (401) 847–3300; online at *www.hotelviking.com.*

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950; telephone: (978) 465–0492; *www.nefmc.org.*

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492, ext. 113.

SUPPLEMENTARY INFORMATION:

Agenda

Tuesday, December 5, 2017

After introductions and brief announcements, the meeting will begin with reports from the Council Chairman and Executive Director, NMFS's Regional Administrator for the Greater Atlantic Regional Fisheries Office (GARFO), liaisons from the Northeast Fisheries Science Center (NEFSC) and Mid-Atlantic Fishery Management Council, representatives from NOAA General Counsel and the Office of Law Enforcement, and staff from the Atlantic States Marine Fisheries Commission (ASMFC) and U.S. Coast Guard. Next, the Council will receive a short briefing from the Northeast Regional Ocean Council on upgrades to the Northeast Ocean Data Portal. The Skate Committee will report next with a final item related to Framework Adjustment 5 to the Northeast Skate Complex Fishery Management Plan (FMP). The Council addressed most of the framework components during its September meeting. During this December meeting, the Council will: (1) Consider options to exempt vessels from skate regulations when fishing exclusively within the Northwest Atlantic Fisheries Organization (NAFO) Regulatory Area; and (2) take final action on the entire framework. Then, ASMFC will brief the Council on the Commission's Draft Addendum XXVI to the Interstate Fishery Management Plan for American Lobster and Addendum III to the Jonah Crab plan. The Council will discuss data collection needs for these fisheries. The Habitat Committee then will provide a short progress report on the Council's Coral Amendment and Clam Dredge Framework, which will be followed by a Bureau of Ocean Energy Management overview of proposed and ongoing offshore wind energy projects in the Northeast.

After the lunch break, GARFO will provide a presentation on the North Atlantic Right Whale Five-Year Review and the reinitiation of formal consultation due to new information on the changed status of right whales. Next, the Atlantic Herring Committee will report on Draft Amendment 8 to the Atlantic Herring FMP. The Council will select preferred alternatives for localized depletion and user conflicts for the amendment and then approve the document for public hearing. The Council debated acceptable biological catch (ABC) control rule alternatives—the other major component of Amendment 8—during its September meeting. The Council also will approve 2019–2021 research priorities for the Atlantic Herring Research Set-Aside

Program. Following these actions, the Council will adjourn for the day.

Wednesday, December 6, 2017

The second day of the meeting will begin with a report from the Northeast Fisheries Science Center on the results of the 2017 operational assessments for 19 of the 20 groundfish stocks managed under the Council's Northeast Multispecies FMP. The Scientific and Statistical Committee (SSC) will report next with overfishing limits (OFLs) and ABCs for the following stocks and fishing years (FY): Atlantic sea scallops for FY 2018 with defaults for FY 2019; northern and southern silver hake and red hake for FY 2018–2020; and all groundfish stocks for 2018–2020 except Georges Bank yellowtail flounder and Atlantic halibut. The Council then will begin its Groundfish Committee report, during which it will take final action on Framework Adjustment 57 to the Northeast Multispecies FMP. The framework includes: (1) 2018–2020 fishery specifications and other management measures; (2) 2018 TACs for U.S./Canada stocks of Eastern Georges Bank cod, Eastern Georges Bank haddock, and Georges Bank yellowtail flounder; (3) Atlantic halibut accountability measures (AMs); (4) recreational management measures; (5) common pool trimester TAC adjustments; (6) southern windowpane flounder AMs; and (7) potential consideration of a Georges Bank cod sub-annual catch limit for the recreational fishery. Also under groundfish, the Council may consider requesting emergency action to reduce catches of Georges Bank cod by implementing additional measures for the recreational fishery.

Following a lunch break, members of the public will have the opportunity to speak during an open comment period on issues that relate to Council business but are not included on the published agenda for this meeting. The Council asks the public to limit remarks to 3–5 minutes. Then, the Groundfish Committee report will resume and continue until related business is concluded. The Council next will discuss its plan to provide input to NMFS on regulatory reform as mandated by Executive Orders 13777, 13771, and 13565. At the conclusion of this discussion, the Council will adjourn for the day.

Thursday, December 7, 2017

The third day of the meeting will begin with a discussion of and final action on 2018 Council priorities covering tasks and actions for all committees. Next, the Council will hear from its Scallop Committee and take final action on Framework Adjustment 29 to the Atlantic Sea Scallop FMP. This framework contains: (1) Fishery specifications for the 2018 fishing year and default specifications for 2019; (2) scallop fishery AMs for yellowtail flounder and windowpane flounder; (3) Northern Gulf of Maine Management Area modifications; and (4) measures to modify and/or create access area and open area boundaries consistent with potential changes to habitat and groundfish closed areas under the Council's Omnibus Essential Fish Habitat Amendment 2.

Following a lunch break, the Scallop Committee discussion will continue until business is concluded. The Whiting Committee will report next. The Council will take final action on 2018–2020 specifications for small-mesh multispecies, which include red, silver, and offshore hakes, and then will deliberate Amendment 22 to the Northeast Multispecies FMP, which was developed to consider limiting access to the small-mesh multispecies fishery. The Council will: (1) Consider whether to pursue or drop consideration of triggered possession limit adjustments in the amendment; and (2) approve the draft amendment for public hearing. Next, the Council will take up spiny dogfish to review the previously set 2018 specifications for the fishery and discuss whether to recommend modifications. Finally, the Council will close out the meeting with ''other business.''

Although non-emergency issues not contained on this agenda may come before the Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies (see **ADDRESSES**) at least 5 days prior to the meeting date.

Dated: November 14, 2017.

Tracey L. Thompson,

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

[FR Doc. 2017–24961 Filed 11–16–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Scientific Research, Exempted Fishing, and Exempted Activity Submissions.

OMB Control Number: 0648–0471.

Form Number(s): None.

Type of Request: Regular (extension of a currently approved information collection).

Number of Respondents: 49.

Average Hours per Response: 2 hours for a scientific research plan; 40 minutes for an application for an EFP, Display Permit, SRP, LOA, or Shark Research Permit; 1 hour for an interim report; 40 minutes for an annual fishing report; 15 minutes for an application for an amendment; 5 minutes for notification of departure phone calls to NMFS Enforcement; 10 minutes for calls to request and observer; and 2 minutes for ''no-catch'' reports.

Burden Hours: 143.

Needs and Uses: Exempted fishing permits (EFPs), scientific research permits (SRPs), display permits, letters of acknowledgment (LOAs), and shark research fishery permits are issued under the authority of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (Magnuson-Stevens Act) (16 U.S.C. 1801 *et seq.*) and/or the Atlantic Tunas Convention Act (ATCA) (16 U.S.C. 971 *et seq.*). Issuance of EFPs and related permits is necessary for the collection of Highly Migratory Species (HMS) for public display and scientific research that requires exemption from regulations (*e.g.,* seasons, prohibited species, authorized gear, and minimum sizes) that otherwise may prohibit such collection. Display permits are issued for the collection of HMS for the purpose of public display, and a limited

number of shark research fishery permits are issued for the collection of fishery-dependent data for future stock assessments and cooperative research with commercial fishermen to meet the shark research objectives of the Agency.

Affected Public: Business or other for-profit organizations; not-for-profit institutions; state, local or tribal government; federal government.

Frequency: Annually and within 5 days of fishing.

Respondent's Obligation: Required to obtain or retain benefits.

This information collection request may be viewed at *reginfo.gov*. Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov* or fax to (202) 395–5806.

Dated: November 14, 2017.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2017–24990 Filed 11–16–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF819

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Scallop Committee to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Thursday, November 30, 2017 at 9 a.m.

ADDRESSES: The meeting will be held at the Hilton Garden Inn Logan Airport, 100 Boardman Street, Boston, MA 02128; Phone: (617) 567–6789.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Scallop Committee will review Framework 29 (FW 29) alternatives and analyses, and make final recommendations. FW 29 will set specifications including acceptable biological catch/annual catch limit (ABC/ACLs), Days at Sea (DAS), access area allocations for Limited Access (LA) and Limited Access General Category (LAGC), Total Allowable Catch (TAC) for Northern Gulf of Maine (NGOM) management area, target-TAC for LAGC incidental catch and set-asides for the observer and research programs for fishing year 2018 and default specifications for fishing year 2019. Make final recommendations for potential FW 29 specifications that includes areas that may open through Omnibus Habitat Amendment 2 (OHA2). The committee will also review FW 29 management measures and make final recommendations. These measures may include, but are not limited to: (1) NGOM management measures; (2) Flatfish accountability measures for Northern windowpane flounder, Georges Bank yellowtail flounder, and Southern New England yellowtail flounder; (3) Measures to modify and/or create access area and open area boundaries, consistent with potential changes to habitat and groundfish closed areas; (4) measures to allocate unused CAI carryover pounds under certain scenarios of OHA2 approval. Other business may be discussed as necessary.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

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

Dated: November 14, 2017.

Tracey L. Thompson,

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

[FR Doc. 2017–24957 Filed 11–16–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF823

Caribbean 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 Caribbean Fishery Management Council's (Council) Scientific and Statistical Committee (SSC) will hold a 5-day meeting in December to discuss the items contained in the agenda in the **SUPPLEMENTARY INFORMATION**.

DATES: The meetings will be held from December 4 to December 8, 2017, from 9 a.m. to 5 p.m. These are new dates due to the passing of hurricanes Irma and Maria through Puerto Rico.

ADDRESSES: The meetings will be held at the Council Office, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico.

FOR FURTHER INFORMATION CONTACT: Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico 00918–1903, telephone: (787) 766–5926.

SUPPLEMENTARY INFORMATION:

—Call to Order
—Adoption of Agenda
—Overview
  Review outcomes from previous meeting
—Review Acceptable Biological Catch (ABC) Control Rule Language
  Review suggestions from General Counsel and Southeast Fisheries Science Center (SEFSC) on text of Tier 4 of the control rule
  Develop language to define ''consensus'' as used in determining Tier assignments (or otherwise alter language to remove the term)
—*Action 2:* Finalize establishment of stock/stock complexes for each of the Puerto Rico, St. Croix, St. Thomas/St. John Fishery Management Plans (FMPs)
—Determine use of Indicator Species to recommend to the Council
—*Finalize recommendations on:*

—Criteria used to select indicator species
—How indicator species will be used to determine management reference points for stock complexes
—*Action 3:* Management Reference Points for Stocks/Stock complexes in each of the Puerto Rico, St. Thomas/St. John and St Croix FMPs

Tiered ABC Control Rule:
—*Review and finalize Tier assignments (4a or 4b):* Puerto Rico, St. Croix, St. Thomas/St. John
—Define process for determining the scalars used in Tiered ABC Control Rule
—Define process for determining the buffer from the overfishing limit (OFL) to ABC (scientific uncertainty buffer) used in the Tiered ABC Control Rule.
—Choice of scalar and scientific uncertainty buffer for Tiers 4a and 4b for the applicable stocks.

Stocks/stock complexes to which the Tiered ABC CR cannot be applied:
—Recommendations on time series of landings data (year sequences) to establish reference points for the applicable stocks/stock complexes.
—Recommendations on the establishment of the maximum sustainable yield proxy (*e.g.,* mean, median, following the Caribbean Annual Catch Limit Amendments' approach) for the applicable stocks/stock complexes.
—Recommendations on the scientific uncertainty buffer to determine the ABC for the applicable stocks/stock complexes.
—Recommendations to the Caribbean Fishery Management Council
—Other Business

The order of business may be adjusted as necessary to accommodate the completion of agenda items. The meeting will begin on December 4, 2017 at 9 a.m. Other than the start time, interested parties should be aware that discussions may start earlier or later than indicated. In addition, the meeting may be extended from, or completed prior to the date established in this notice.

Special Accommodations

These meetings are physically accessible to people with disabilities. For more information or request for sign language interpretation and other auxiliary aids, please contact Mr. Miguel A. Rolón, Executive Director, Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico 00918–1903, telephone: (787) 766–5926, at least 5 days prior to the meeting date.

Dated: November 14, 2017.

Tracey L. Thompson,

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

[FR Doc. 2017–24958 Filed 11–16–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Economic Value of the Research in the Olympic Coast and Stellwagen Bank National Marine Sanctuaries.

OMB Control Number: 0648–xxxx.

Form Number(s): None.

Type of Request: Regular (request for a new information collection).

Number of Respondents: 106.

Average Hours Per Response: 15 minutes.

Burden Hours: 27.

Needs and Uses: This request is for a new information collection.

NOAA is conducting research to: (1) Identify if the sanctuary helps to attract research or creates value-added to researchers; (2) estimate the economic impacts (jobs, income, output) supported by research that occurs in sanctuaries because of expenditures occurring within local region. Two sites, Olympic Coast National Marine Sanctuary (OCNMS) and Stellwagen Bank National Marine Sanctuary (SBNMS) will be evaluated. The information will aide in SBNMS and OCNMS condition reports. Further, the research will help to provide baseline data for economic impact and contribution of sanctuaries to local area economies.

The required information will involve surveys of researchers (from profit, non-profit and government agencies including local, state, federal and tribal). Information will be obtained on expenditures, sources of funds, non-market value, type of research, technologies used, use of NOAA equipment, reasons for the chosen location, and the researcher's involvement with sanctuary staff.

ONMS will work to identify all researchers who worked within the sanctuary within the past ten years. This will be the population of interest. Sanctuary site staff, literature reviews and the research permit database will be used to identify the population of researchers for each site.

Affected Public: Business or other for-profit; not-for-profit institutions; state, local or tribal government; federal government.

Frequency: Annually.

Respondent's Obligation: Voluntary.

This information collection request may be viewed at *reginfo.gov.* Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov* or fax to (202) 395–5806.

Dated: November 14, 2017.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2017–24989 Filed 11–16–17; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF840

North Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meetings.

SUMMARY: The North Pacific Fishery Management Council (Council) and its advisory committees will meet in December in Anchorage, AK.

DATES: The Council will hold meetings from Monday, December 4 through Tuesday, December 12, 2017. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: The meeting will be held at the Anchorage Hilton Hotel, 500 W. 3rd Ave, Anchorage, AK 99501.

Council address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252; telephone: (907) 271–2809.

FOR FURTHER INFORMATION CONTACT: Diana Evans, Council staff; telephone: (907) 271–2809.

SUPPLEMENTARY INFORMATION: The Council will begin its plenary session at 8 a.m. in the Aleutian Room on Wednesday, December 6, continuing

through Tuesday, December 12, 2017. The Scientific and Statistical Committee (SSC) will begin at 8 a.m. in the King Salmon/Iliamna Room on Monday, December 4 and continue through Wednesday, December 6, 2017. The Council's Advisory Panel (AP) will begin at 8 a.m. in the Dillingham/Katmai Room on Tuesday, December 5, and continue through Saturday, December 9, 2017. The Halibut Charter Management Committee will meet Monday, December 4, from 9 a.m. to 4 p.m. (Room TBD). The Legislative Committee will meet Tuesday, December 5, 2017, from 1 p.m. to 4 p.m. (Room TBD).

Agenda

Monday, December 4, 2017 Through Tuesday, December 12, 2017

Council Plenary Session: The agenda for the Council's plenary session will include the following issues as well as an executive session. The Council may take appropriate action on any of the issues identified.

(1) Executive Director's Report
(2) Legislative Report
(3) NMFS Management Report (including year-end inseason management report, Final 2018 Observer Annual Deployment Plan, Draft EM Policy Directive (T))
(4) NOAA GC report (including conflict of interest report (T))
(5) NOAA Enforcement Report
(6) ADF&G Report
(7) USCG Report
(8) USFWS Report
(9) Protected Species Report (including bowhead whale entanglement review)
(10) IPHC Report (T)
(11) 2018 Charter Halibut Management Measures
(12) Charter Halibut Permits: Latent Capacity, RQE Ownership Caps
(13) Self-guided Halibut Rental Boats
(14) BSAI Groundfish Harvest Specifications—Final Specs
(15) GOA Groundfish Harvest Specifications—Final Specs
(16) Small Sideboards
(17) Bering Sea Cod Trawl CV Participation
(18) Western GOA Pcod A Season Halibut PSC Rates
(19) Western GOA Pollock C/D Season Timing Chinook PSC
(20) Western GOA Pollock Trip Limits
(21) Stranded Cod in GOA Trawl B Season
(22) Fixed Gear CV Rockfish Retention
(23) Chinook Salmon Excluder EFP Consultation
(24) Staff Tasking

The Advisory Panel will address most of the same agenda issues as the Council.

The SSC agenda will include the following issues:

(1) BSAI Groundfish Harvest Specifications—Final Specifications
(2) GOA Groundfish Harvest Specifications—Final Specifications
(3) Small Sideboards
(4) Chinook Salmon Excluder EFP

In addition to providing ongoing scientific advice for fishery management decisions, the SSC functions as the Council's primary peer review panel for scientific information as described by the Magnuson-Stevens Act section 302(g)(1)(e), and the National Standard 2 guidelines (78 FR 43066). The peer review process is also deemed to satisfy the requirements of the Information Quality Act, including the OMB Peer Review Bulletin guidelines.

The Agenda is subject to change, and the latest version will be posted at *http://www.npfmc.org/*.

Although other non-emergency issues not on the agenda may come before this group for discussion, those issues may not be the subject of formal action during these meetings. Actions will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Shannon Gleason at (907) 271–2809 at least 7 working days prior to the meeting date.

Dated: November 14, 2017.

Tracey L. Thompson,

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

[FR Doc. 2017–24962 Filed 11–16–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF825

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Groundfish Advisory Panel to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Tuesday, November 28, 2017 at 9 a.m.

ADDRESSES: The meeting will be held at the Courtyard Marriott Boston Logan Airport, 225 McClellan Highway, Boston, MA; phone: (617) 569–5250.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Advisory Panel will review Framework Adjustment 57/Specifications and Management Measures, review the draft alternatives under consideration, the Groundfish Plan Development Team's (PDT) impact analysis, and make recommendations on preferred alternatives to the Groundfish Committee. They will also disucss Amendment 23/Groundfish Monitoring and review an updated draft outline prepared by the PDT of the likely range of alternatives and make recommendations to the Committee. The Advisory Panel will also hold a discussion of possible groundfish priorities for 2018 and make recommendations to the Committee. They also plan to discuss several recent Executive Orders that have been issued about streamlining current regulations, and NOAA is seeking public input on the efficiency and effectiveness of current regulations and whether they can be improved. Discuss whether there are any regulations in the Northeast Multispecies fishery management plan that could be eliminated, improved, or streamlined. Other business will be discussed as necessary.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action

under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date. This meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

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

Dated: November 14, 2017.

Tracey L. Thompson,

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

[FR Doc. 2017–24959 Filed 11–16–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF804

Mid-Atlantic Fishery Management Council (MAFMC); Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (MAFMC) Ecosystem and Ocean Planning Committee will hold a public meeting.

DATES: The meeting will be held on Friday, December 1, 2017, from 10 a.m. to 4 p.m. For agenda details, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The meeting will be held at the Hilton Garden Inn BWI Airport, 1516 Aero Drive, Linthicum, MD 21090; telephone: (410)-691–0500.

Council address: Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331 or on their Web site at *www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council; telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to review and approve the EAFM based risk assessment for the Mid-Atlantic fishery resources which has been under development since early 2017. The Committee will review the final list of elements and the evaluation of risk posed by each element as recommended by Council staff. The Committee will make recommendations to the full Council for consideration at its December meeting in Annapolis, MD.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to M. Jan Saunders, (302) 526–5251, at least 5 days prior to the meeting date.

Dated: November 14, 2017.

Tracey L. Thompson,

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

[FR Doc. 2017–24956 Filed 11–16–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF801

Endangered Species; File Nos. 20590 and 20610

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

ACTION: Notice; receipt of applications.

SUMMARY: Notice is hereby given that Nicole Phillips, Ph.D., The University of Southern Mississippi, Department of Biological Sciences, 118 College Drive #5018, Hattiesburg, MS 39406 (File No. 20590) and David Portnoy, Ph.D., Texas A&M University, Corpus Christi, TX 78412 (File No. 20610), have applied in due form for permits to receive and import sawfish and scalloped hammerhead shark samples for purposes of scientific research.

DATES: Written, telefaxed, or email comments must be received on or before December 18, 2017.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the ''Features'' box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File Nos. 20590 or 20610 from the list of available applications.

These documents are also available upon written request or by appointment in the Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by email to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Jennifer Skidmore (File Nos. 20590 or 20610), Malcolm Mohead (File No. 20590), or Erin Markin (File No. 20610), (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

File No. 20590: The applicant (Dr. Phillips) is requesting authorization to import tissue samples from 5 species of listed sawfish including the smalltooth sawfish (*Pristis pectinata*), largetooth sawfish (*P. pristis*), green sawfish (*P. zijsron*), dwarf sawfish (*P. clavata*), and narrow sawfish (*Anoxypristis cuspidate*) to assess the impact of population decline through genetic diversity. This study will use tissue samples obtained opportunistically from saws with known location data held in museums, educational and private collections to: (1) Assess whether there has been a recent loss of genetic diversity in sawfishes globally, and (2) evaluate the long-term survival outlook for sawfishes. The applicant proposes to import tissue samples from up to a total of 500 sawfish specimens, from all species, annually from at least Mexico, Belize, United Arab Emirates, United Kingdom, and Australia to The University of Southern Mississippi for analysis. The requested duration of the permit is five years.

File No. 20610: The applicant (Dr. Portnoy) is requesting authorization to import scalloped hammerhead (*Sphyrna lewini*) tissue in the form of fin clips or small muscle biopsies from Belize (Central & SW Atlantic DPS, up to 50 samples), Trinidad (Central & SW Atlantic DPS, up to 50 samples), Mexico (Eastern Pacific DPS, up to 100 samples; NW Atlantic & GOM DPS, up to 50

samples), Cuba (Central & SW Atlantic DPS, up to 50 samples), and Sierra Leone (Eastern Atlantic DPS, up to 50 samples) for genetic analysis at Texas A&M University in Corpus Christi. These samples would be used as part of a larger project to characterize the stock structure of *S. lewini* populations within the western Atlantic, as well as between the western Pacific and Atlantic, using next generation sequencing techniques. Tissue samples would be from animals that have been previously collected, or will be taken opportunistically as scalloped hammerheads are encountered in fish markets. The requested duration of the permit is five years.

Dated: November 14, 2017.

Julia Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2017–24946 Filed 11–16–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Alaska Commercial Operator's Annual Report (COAR)

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before January 16, 2018.

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 and instructions should be directed to Suja Hall, (907) 586–7462.

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of a currently approved information collection.

The Alaska Commercial Operator's Annual Report (COAR) is a report that collects harvest and production information broken out by specific criteria such as gear type, area, delivery and product type, and pounds and value. The COAR is due by April 1 of the year following any buying or processing activity.

Any person or company who received a Fisheries Business License from the Alaska Department of Revenue and an Intent to Operate Permit by Alaska Department of Fish and Game (ADF&G) is required to annually submit the COAR to the ADF&G, under Alaska Administrative Code (AAC), chapter 5 AAC 39.130. In addition, any person or company who receives an Exclusive Economic Zone (EEZ)-only permit from ADF&G annually must submit a COAR to ADF&G. Any owner of a catcher/processor or mothership with a Federal permit operating in the EEZ off Alaska is required to annually submit a COAR to ADF&G under 50 CFR 679.5(p).

The COAR contains data on seafood purchasing, production, ex-vessel values, and first wholesale values for seafood products. Containing information from shoreside processors, stationary floating processors, motherships, and catcher/processors, this data collection yields equivalent annual product value information for all respective processing sectors and provides a consistent time series according to which groundfish resources may be managed more efficiently. Use of the information generated by the COAR is coordinated between NMFS and the ADF&G.

II. Method of Collection

The COAR is available in pdf and Microsoft Word formats on the ADF&G Web site at *http://www.adfg.alaska.gov/index.cfm?adfg=fishlicense.coar.* Respondents complete either a paper form or the fillable file available online and submit the form by mail to the ADF&G.

III. Data

OMB Control Number: 0648–0428.

Form Number(s): None.

Type of Review: Regular submission (extension of a current information collection).

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 179.

Estimated Time per Response: 8 hr.

Estimated Total Annual Burden Hours: 1,432.

Estimated Total Annual Cost to Public: $716 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: November 14, 2017.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2017–24991 Filed 11–16–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2017–ICCD–0116]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Gainful Employment Programs—Subpart Q

AGENCY: Federal Student Aid (FSA), 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 December 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–0116. 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 216–34, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

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: Gainful Employment Programs—Subpart Q.

OMB Control Number: 1845–0123.

Type of Review: A revision of an existing information collection.

Respondents/Affected Public: Private Sector; Individuals or Households; State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 42,303,576.

Total Estimated Number of Annual Burden Hours: 3,777,952.

Abstract: The Student Assistance General Provisions regulations were amended by adding Subpart Q to Part 668, to establish measures for determining whether certain postsecondary educational programs lead to gainful employment in recognized occupations, and the conditions under which these educational programs remain eligible for student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended (HEA).

On June 16, 2017, the Department of Education (the Department) published a notice in the **Federal Register** announcing the intention to establish a negotiated rulemaking committee to revise the gainful employment regulations published on October 31, 2014. The Department anticipates scheduling the negotiated rulemaking sessions beginning in November or December 2017. There have been no changes to the regulations since the October 31, 2014 regulatory approval.

This clearance package includes §§ 668.405, 668.410, 668.411, 668.413, and 668.414. The burden related to § 668.412 was removed from this collection and applied to information collection 1845–0107 in February 2017 to more accurately associate the requirements of the regulations with the correct collection package.

Dated: November 14, 2017

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2017–24976 Filed 11–16–17; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2017–ICCD–0117]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Gainful Employment Program—Subpart Q—Appeals for Debt to Earnings Rates

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before December 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–0117. 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 216–34, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

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: Gainful Employment Program—Subpart Q—Appeals for Debt to Earnings Rates.

OMB Control Number: 1845–0122.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: Private Sector; State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 792.

Total Estimated Number of Annual Burden Hours: 23,860.

Abstract: The Student Assistance General Provisions regulation was amended by adding Subpart Q to Part 668. This subpart applies to postsecondary educational programs that lead to gainful employment (GE) in recognized occupations. 1845–0122 pertains to § 668.406—Appeals for Debt to Earnings (D/E) rates. The regulations allow an institution to submit alternate earnings appeals to challenge the Secretary's determination of a GE program that is failing or in the zone based on the D/E rates calculated for a specific GE program.

On June 16, 2017, the Department of Education (the Department) published a notice in the **Federal Register** announcing the intention to establish a negotiated rulemaking committee to revise the gainful employment regulations published on October 31, 2014. The Department anticipates scheduling the negotiated rulemaking sessions beginning in November or December 2017.

The Department is requesting an extension without change of burden to the currently approved information collection as any new regulations will not be available before the expiration of this current package. There have been no changes to the regulations since the initial approval of the information collection on November 3, 2014.

Dated: November 14, 2017.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2017–24977 Filed 11–16–17; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2017–ICCD–0118]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Gainful Employment Program—Subpart R—Cohort Default Rates

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before December 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–0118. 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 216–34, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

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: Gainful Employment Program—Subpart R—Cohort Default Rates.

OMB Control Number: 1845–0121.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: Private Sector; State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 1,559.

Total Estimated Number of Annual Burden Hours: 5,656.

Abstract: The Student Assistance General Provisions regulation was amended by adding Subpart R to 34 CFR part 668. Subpart R—Program Cohort Default Rates mirrors Subpart N—Cohort Default Rates where applicable. Subpart R established a programmatic cohort default rate (pCDR) for gainful employment (GE) programs, whereas Subpart N established an institutional cohort default rate (iCDR).

On June 16, 2017, the Department of Education (the Department) published a notice in the **Federal Register** announcing the intention to establish a negotiated rulemaking committee to revise the gainful employment regulations published on October 31, 2014. The Department anticipates scheduling the negotiated rulemaking sessions beginning in November or December 2017.

The Department is requesting an extension without change of burden to the currently approved information collection as any new regulations will not be finalized before the expiration of this current package. There have been no changes to the regulations since the initial collection approval.

Dated: November 14, 2017.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2017–24978 Filed 11–16–17; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2017–ICCD–0140]

Agency Information Collection Activities; Comment Request; Freedom of Information Act (FOIA) Third Party Perjury Form

AGENCY: Office of Management (OM), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before January 16, 2018.

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–0140. 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 Elise Cook, 202–401–3769.

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: Freedom of Information Act (FOIA) Third Party Perjury Form.

OMB Control Number: 1880–0545.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 62,000.

Total Estimated Number of Annual Burden Hours: 31,000.

Abstract: This collection is necessary to certify the identity of individuals requesting information under the Freedom of Information Act (FOIA) and Privacy Act (PA). This certification is required under 5 U.S.C. Section 552a(b). The form is used by Privacy Act requesters to obtain personal records via regular mail, fax or email. The department will use the information to help identify first-party or third party requesters with same or similar name when requesting retrieval of their own documents.

Dated: November 14, 2017

Stephanie Valentine,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2017–24941 Filed 11–16–17; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP18–147–000.

Applicants: Gulf South Pipeline Company, LP.

Description: § 4(d) Rate Filing: Remove Expired and Expiring Agmts from Tariff to be effective 11/7/2017.

Filed Date: 11/7/17.

Accession Number: 20171107–5021.

Comments Due: 5 p.m. ET 11/20/17.

Docket Numbers: RP17–1138–001.

Applicants: Texas Gas Transmission, LLC.

Description: Compliance Filing: Compliance Filing in Docket No. RP17–1138–000 to be effective 11/1/2017.

Filed Date: 11/6/17.

Accession Number: 20171106–5212.

Comments Due: 5 p.m. ET 11/20/17.

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: November 7, 2017.

Nathaniel J. Davis, Sr.

Deputy Secretary.

[FR Doc. 2017–24988 Filed 11–16–17; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2007–0482–0012; FRL—9969–76–OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; SmartWay Transport Partnership (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), ''SmartWay Transport Partnership'' (EPA ICR No. 2265.03, OMB Control No. 2060–0663) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a reinstatement of the ICR, which was currently approved through July 31, 2017. Public comments were previously requested via the **Federal Register** on July 7, 2017 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. 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.

DATES: Additional comments may be submitted on or before December 18, 2017.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OAR–2007–0482–0012 to (1) EPA online using *www.regulations.gov* (our preferred method), by email to *martz.kathleen@epa.gov,* or by mail to:

EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460, and (2) OMB via email to *oira_submission@omb.eop.gov.* Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Kathleen Martz, U.S. Environmental Protection Agency, 2000 Traverwood Drive, S–68, Ann Arbor, MI 48105; telephone number: 734–214–4335; Fax: 734–214–4906; email address: *martz.kathleen@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: SmartWay is a voluntary program that focuses on increasing efficiency and lowering air pollution generated by goods movement that is open to organizations that own, operate, or contract with fleet operations, including truck, rail, barge, air and multi-modal carriers, logistics companies, and shippers. Organizations that do not operate fleets, but that are working to strengthen the freight industry, such as industry trade associations, state and local transportation agencies and environmental groups, also may join as SmartWay affiliates. All organizations that join SmartWay are asked to provide EPA with information as part of their SmartWay registration to annually benchmark their transportation-related operations and improve the environmental performance of their freight activities.

A company joins SmartWay when it completes and submits a SmartWay Excel-based tool (''reporting tool'') to EPA. The data outputs from the submitted tool are used by partners and SmartWay in several ways. First, the data provides confirmation that SmartWay partners are meeting established objectives in their Partnership Agreement. The reporting tool outputs enable EPA to assist SmartWay partners as appropriate, and to update them with environmental performance and technology information that empower them to improve their efficiency. This information also improves EPA's knowledge and understanding of the environmental and energy impacts associated with goods movement, and the effectiveness of both proven and emerging strategies to lessen those impacts.

In addition to requesting annual freight transportation-related data, EPA may ask its SmartWay partners for other kinds of information which could include opinions and test data on the effectiveness of new and emerging technology applications, sales volumes associated with SmartWay-recommended vehicle equipment and technologies, the reach and value of partnering with EPA through the SmartWay Partnership, and awareness of the SmartWay brand. In some instances, EPA might query other freight industry representatives (not just SmartWay partners), including trade and professional associations, nonprofit environmental groups, energy and community organizations, and universities, and a small sampling of the general public.

Form Numbers: None.

Respondents/affected entities: Private and public organizations that join SmartWay Transport Partnership; freight industry representatives who engage in activities related to the SmartWay Partnership; and representative samplings of consumers in the general public.

Respondent's obligation to respond: Voluntary.

Estimated number of respondents: 4,605.

Frequency of response: Once, on occasion and annually.

Total estimated burden: 13,224 hours.

Total estimated cost: $909,828, which includes no capital or operation and maintenance costs.

Changes in the Estimates: There is an increase of 1,720 hours in the total estimated respondent partner burden compared with the ICR currently approved by OMB. This increase reflects the following adjustments and program changes:

(1) Adjustments increase associated with increased interest in SmartWay, and thus, an increase in new annual respondents, as well as robust program retention practices, leading to increased number of existing respondent partners reporting annually, increase in the number of applications for the SmartWay Excellence Awards and the affiliate challenge annually;

(2) Program change increase associated with the new SmartWay Affiliate Program and new requirements under SmartWay Tractor and Trailer program; and,

(3) Adjustment decrease due to EPA's change in policy for submitting Awards materials electronically, rather than by mail.

Courtney Kerwin,

Acting Director, Collection Strategies Division.

[FR Doc. 2017–24971 Filed 11–16–17; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–R09–OAR–2017–0507; FRL–9970–42–Region 9]

Adequacy Status of Motor Vehicle Emissions Budgets in Submitted Reasonable Further Progress Plan for San Diego 8-Hour Ozone for Transportation Conformity Purposes; California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of adequacy.

SUMMARY: The Environmental Protection Agency (EPA or ''Agency'') is notifying the public that the Agency has found that the motor vehicle emissions budgets (''budgets'') for the Reasonable Further Progress (RFP) milestone year 2017 from the ''2008 Eight-Hour Ozone Attainment Plan for San Diego County (December 2016)'' (''2016 San Diego Ozone Plan'' or ''plan''), are adequate for transportation conformity purposes for the 2008 ozone national ambient air quality standards (NAAQS). The California Air Resources Board (CARB) submitted the 2016 San Diego Ozone Plan to the EPA on April 12, 2017, as a revision to the California State Implementation Plan (SIP). Upon the effective date of this notice of adequacy, the previously-approved budgets for the 1997 8-hour ozone standards will no longer be applicable for transportation conformity purposes, and the San Diego Association of Governments (SANDAG) and the U.S. Department of Transportation must use these adequate budgets in future transportation conformity determinations.

DATES: This finding is effective December 4, 2017.

FOR FURTHER INFORMATION CONTACT: John Kelly, EPA, Region IX, Air Division AIR–2, 75 Hawthorne Street, San

Francisco, CA 94105–3901; (415) 947–4151 or *kelly.johnj@epa.gov.*

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

Today's notice is simply an announcement of a finding that we have already made. The EPA sent a letter to CARB on October 19, 2017 stating that the motor vehicle emissions budgets in the submitted 2016 San Diego Ozone Plan for the RFP milestone year 2017 are adequate for transportation conformity purposes.[1] We announced availability of the plan and related budgets on the EPA's transportation conformity Web site on July 20, 2017, requesting comments by August 21, 2017. We received no comments in response to the adequacy review posting. The finding is available at the EPA's conformity Web site: *https://www.epa.gov/state-and-local-transportation/state-implementation-plans-sip-submissions-epa-has-found-adequate-or.* The adequate motor vehicle emissions budgets are provided in the following table:

ADEQUATE MOTOR VEHICLE EMISSIONS BUDGETS

Budget year	Volatile organic compounds (tons per summer day)	Nitrogen xides (tons per summer day)
2017	23	42

Transportation conformity is required by Clean Air Act section 176(c). The EPA's conformity rule requires that transportation plans, transportation improvement programs, and transportation projects conform to a state's air quality SIP and establishes the criteria and procedures for determining whether or not they conform. Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the NAAQS.

The criteria we use to determine whether a SIP's motor vehicle emission budgets are adequate for conformity purposes are outlined in 40 CFR 93.118(e)(4), promulgated on August 15, 1997.[2] We have further described our process for determining the adequacy of submitted SIP budgets in our final rule dated July 1, 2004, and we used the information in these resources in making our adequacy determination.[3] Please note that an adequacy review is separate from the EPA's completeness review and should not be used to prejudge the EPA's ultimate action on the SIP. Even if we find a budget adequate, the SIP could later be disapproved.

Pursuant to 40 CFR 93.104(e), within 2 years of the effective date of this notice, SANDAG and the U.S. Department of Transportation will need to demonstrate conformity to the new budgets if the demonstration has not already been made.[4] For demonstrating conformity to the budgets in this plan, the on-road motor vehicle emissions from implementation of the transportation plan or program should be projected consistently with the budgets in this plan, *i.e.,* by taking the county's emissions results derived from CARB's EMFAC model (short for EMission FACtor) and then rounding the emissions up to the nearest ton.

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

Dated: October 25, 2017.

Alexis Strauss,

Acting Regional Administrator, Region IX.

[FR Doc. 2017–25020 Filed 11–16–17; 8:45 am]

BILLING CODE 6560–50–P

[1] *See* letter from Matthew J. Lakin, Acting Director, Air Division, EPA Region IX, to Richard Corey, Executive Officer, CARB, dated October 19, 2017.

[2] *See* 62 FR 43780 (August 15, 1997).

[3] *See* 69 FR 40004 (July 1, 2004).

[4] *See* 73 FR 4419 (January 24, 2008).

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9036–2)]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7146 or *http://www2.epa.gov/nepa/.*

Weekly receipt of Environmental Impact Statements (EISs)

Filed 11/06/2017 Through 11/10/2017

Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *https://cdxnodengn.epa.gov/cdx-nepa-public/action/eis/search.*

EIS No. 20170219, Draft Supplement, FRA, CA, California High-Speed Rail: Fresno to Bakersfield Section, *Comment Period Ends:* 01/16/2018, *Contact:* Stephanie Perez (202) 493–0388.

EIS No. 20170222, Final, NMFS, OR, Analyze Impacts of NOAA's National Marine Fisheries, Service joining as a signatory to a new U.S. v. Oregon, Management Agreement for the Years 2018–2027, *Review Period Ends:* 12/18/2017, *Contact:* Jeromy Jording (360) 753–9576.

EIS No. 20170223, Draft, NCPC, DC, South Mall Campus Master Plan, *Comment Period Ends:* 01/16/2018, *Contact:* Matthew Flis (202) 482–7236.

EIS No. 20170224, Draft, USACE, VA, Draft Integrated City of Norfolk Coastal Storm Risk Management Feasibility Study, *Comment Period Ends:* 01/02/2018, *Contact:* Kathy Perdue (757) 201–7218.

EIS No. 20170225, Final, DOS, DC, Foreign Missions Center at the Former Walter Reed Army Medical Center, *Review Period Ends:* 12/18/2017, *Contact:* Geoffrey Hunt (202) 647–7530.

EIS No. 20170226, Draft Supplement, BLM, AZ, Ray Land Exchange Plan Amendment, *Comment Period Ends:* 02/16/2018, *Contact:* Michael Werner (602) 417–9561.

EIS No. 20170227, Draft, TVA, TN, Cumberland Fossil Plant Coal Combustion Residual Management Operations, *Comment Period Ends:* 01/02/2018, *Contact:* Anita Masters (423) 751–8697.

EIS No. 20170228, Final, FHWA, NY, New York State Route 198 (Scajaquada Expressway) Corridor Project, *Review Period Ends:* 12/19/2017, *Contact:* Peter Osborn (518) 431–4127.

Dated: November 14, 2017.

Kelly Knight,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2017–24973 Filed 11–16–17; 8:45 am]

BILLING CODE 6560–50–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Agency Information Collection Activities: Proposed Collection; Comment Request; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

AGENCY: Equal Employment Opportunity Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of a Federal Government-wide effort to streamline the process to seek feedback from the public on service delivery, the U.S. Equal Employment Opportunity

Commission (EEOC) has submitted a Generic Information Collection Request (Generic ICR): ''Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery'' to OMB for approval under the Paperwork Reduction Act (PRA).

DATES: Written comments on this notice must be submitted on or before December 18, 2017.

ADDRESSES: Comments on this notice must be submitted to Joseph B. Nye, Policy Analyst, Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, email *oira_submission@omb.eop.gov.* Commenters are also encouraged to send comments to the EEOC online at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions on this Web site for submitting comments. In addition, the EEOC's Executive Secretariat will accept comments in hard copy. Hard copy comments should be sent to Bernadette Wilson, Acting Executive Officer, EEOC, 131 M Street NE., Washington, DC 20507. Finally, the Executive Secretariat will accept comments totaling six or fewer pages by facsimile (''fax'') machine before the same deadline at (202) 663–4114. (This is not a toll-free number.) Receipt of fax transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663–4070 (voice) or (202) 663–4074 (TTY). (These are not toll-free telephone numbers.) The EEOC will post online at *http://www.regulations.gov* all comments submitted, regardless of whether they are submitted via the Web site, in hard copy, or by fax to the Executive Secretariat. These comments will be posted without change, including any personal information you provide. However, the EEOC reserves the right to refrain from posting libelous or otherwise inappropriate comments including those that contain obscene, indecent, or profane language; that contain threats or defamatory statements; that contain hate speech directed at race, color, sex, national origin, age, religion, disability, or genetic information; or that promote or endorse services or products. All comments received, including any personal information provided, also will be available for public inspection during normal business hours by appointment only at the EEOC Headquarters Library, 131 M Street NE., Washington, DC 20507. Upon request, individuals who require assistance viewing comments will be provided appropriate aids such as readers or print magnifiers. To schedule an appointment, contact EEOC Library staff at (202) 663–4630 (voice) or (202) 663–4641 (TTY). (These are not toll-free numbers.)

FOR FURTHER INFORMATION CONTACT: Erin Norris, Senior Attorney, EEOC Office of Legal Counsel, 129 W. Trade Street, Charlotte, NC 28202, 704–954–6491, *erin.norris@eeoc.gov.*

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

Abstract: The information collection activity will garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the government's commitment to improving service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

Feedback collected under this generic clearance will provide useful information, but it will not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: The target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

No comments were received by the agency in response to the 60-day notice published in the **Federal Register** of December 22, 2010 (75 FR 80542).

Below we provide EEOC's projected average estimates for the next three years:

Current Actions: New collection of information.

Type of Review: New collection.

Affected Public: Individuals and households, businesses and organizations, State, Local or Tribal Government.

Average Expected Annual Number of Activities: 5.

Respondents: 8,020.

Annual Responses: 11,020.

Frequency of Response: Once per respondent for four activities, twice per respondent for one activity.

Average Minutes per Response: 6.5.

Burden Hours: 1194.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget control number.

For the Commission.

Dated: November 9, 2017.

Victoria A. Lipnic,

Acting Chair.

[FR Doc. 2017–24979 Filed 11–16–17; 8:45 am]

BILLING CODE 6570–01–P

FEDERAL MARITIME COMMISSION

[Petition No. P2–17]

Petition of COSCO Shipping Lines Co., Ltd., Orient Overseas Container Line Limited, and OOCL (Europe) Limited for an Exemption From Agreement Filing; Notice of Filing And Request for Comments

Notice is hereby given that COSCO Shipping Lines Co., Ltd., Orient Overseas Container Line Limited, and OOCL (Europe) Limited (''Petitioners''), have petitioned the Commission pursuant to Section 16 of the Shipping Act of 1984, 46 U.S.C. 40103(a), 46 CFR 502.92, and 46 CFR 535.301, for an exemption from agreement filing requirements Petitioners request an exemption ''to replicate as to Cosco and OOCL the exemption automatically applicable to wholly-owned subsidiaries pursuant to 46 CFR 535.307, including its exemption from the provisions of Section 10(c) of the Act, 46 U.S.C. 41105.''

The Petitioners state that a pending business transaction will make them

''. . . part of a single, common business enterprise . . .'' though they will retain the brands as separate legal entities. The Petitioners speculate that ''the transaction will be completed . . . potentially as early as mid-December 2017.'' Petitioners state that ''the exemption would apply to all agreements and activities between Cosco and OOCL that would otherwise be subject to filing under the Act, so long as the parties are commonly owned and controlled.'' The Petitioners claim that ''the requested exemption will not result in a substantial reduction in competition and will not be detrimental to commerce.''

In order for the Commission to make a thorough evaluation of the exemption requested in the Petition, pursuant to 46 CFR 502.92, interested parties are requested to submit views or arguments in reply to the Petition no later than December 1, 2017. Replies shall be sent to the Secretary by email to *Secretary@fmc.gov* or by mail to Federal Maritime Commission, 800 North Capitol Street NW., Washington, DC 20573–0001, and replies shall be served on Petitioners' counsels, David F. Smith, Cozen O' Connor, 1200 Nineteenth Street NW., Suite 300, Washington, DC 20036, *dsmith@cozen.com,* Robert B. Yoshitomi, Nixon Peabody LLP, 300 South Grand Avenue, Suite 4100, Los Angeles, CA 90071–3151, *ryoshitomi@nixonpeabody.com,* and Eric C. Jeffrey, 799 9th Street NW., Suite 500, Washington, DC 20001–5327, *ejeffrey@nixonpeabody.com.*

Non-confidential filings may be submitted in hard copy to the Secretary at the above address or by email as a PDF attachment to *Secretary@fmc.gov* and include in the subject line: P2–17 (Commenter/Company). Confidential filings should not be filed by email. A confidential filing must be filed with the Secretary in hard copy only, and be accompanied by a transmittal letter that identifies the filing as ''Confidential-Restricted'' and describes the nature and extent of the confidential treatment requested. The Commission will provide confidential treatment to the extent allowed by law for confidential submissions, or parts of submissions, for which confidentiality has been requested. When a confidential filing is submitted, there must also be submitted a public version of the filing. Such public filing version shall exclude confidential materials, and shall indicate on the cover page and on each affected page ''Confidential materials excluded.'' Public versions of confidential filings may be submitted by email. The Petition will be posted on the Commission's Web site at *http://www.fmc.gov/P2-17.* Replies filed in response to the Petition will also be posted on the Commission's Web site at this location.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2017–25007 Filed 11–16–17; 8:45 am]

BILLING CODE 6731–AA–P

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Submission for OMB Review; Comment Request

AGENCY: Federal Trade Commission (''FTC'' or ''Commission'').

ACTION: Notice.

SUMMARY: The information collection requirements described below will be submitted to the Office of Management and Budget (''OMB'') for review, as required by the Paperwork Reduction Act (''PRA''). The FTC seeks public comments on proposed information requests sent pursuant to compulsory process to a combined ten or more of the largest domestic cigarette manufacturers and smokeless tobacco manufacturers. The information sought would include, among other things, data on annual sales and marketing expenditures. The current FTC clearance from the Office of Management and Budget (''OMB'') to conduct such information collection expires January 31, 2018. The Commission intends to ask OMB for renewed three-year clearance to collect this information.

DATES: Comments on the proposed information requests must be received on or before December 18, 2017.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write: ''Tobacco Reports: Paperwork Comment, FTC File No. P054507'' on your comment, and file the comment online at *https://ftcpublic.commentworks.com/ftc/tobaccoreportspra* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC–5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex J), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed collection of information should be addressed to Michael Ostheimer, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW., Mailstop CC–10603, Washington, DC 20580. Telephone: (202) 326–2699.

SUPPLEMENTARY INFORMATION:

Title: FTC Cigarette and Smokeless Tobacco Data Collection.

OMB Control Number: 3084–0134.

Type of Review: Extension of currently approved collection.

On August 10, 2017, the Commission sought comment on the information collection requirements associated with the Cigarette and Smokeless Tobacco Data Collection. 82 FR 37440 (''August 10, 2017 Notice''). Pursuant to the OMB regulations, 5 CFR part 1320, that implement the PRA, 44 U.S.C. 3501 *et seq.,* the FTC is providing a second opportunity for the public to comment while seeking OMB approval to renew the existing clearance for the information the FTC proposes to seek from the largest domestic cigarette manufacturers and smokeless tobacco manufacturers.

In response to the August 10, 2017 Notice, the Commission received comments from the Campaign for Tobacco-Free Kids (''CTFK'') and Altria Client Services (''Altria'').

The CTFK comment specifically noted the utility and importance of the Commission's Cigarette and Smokeless Tobacco Reports, and urged the agency to continue collecting and reporting industry sales and marketing expenditure data, which CTFK stated provide ''critical data to researchers, policymakers, advocates and the general public.'' CTFK additionally observed:

> The FTC is currently the primary source for data on cigarette and smokeless tobacco companies' marketing and promotional expenditures. No other agency collects and publishes such information directly from the companies, making the FTC reports the most accurate and reliable assessment of tobacco marketing and promotion expenditures available.

CTFK at 1.

CTFK, however, suggested certain modifications to the Commission's reports. Specifically, CTFK recommended that the Commission: (1) Report separately price discount expenditures for retailers and wholesalers; (2) clarify the definitions of certain expenditure categories—specifically, in which category coupons that consumers obtain online are to be counted; (3) report data on a company-

specific or brand-specific basis, rather than on a fully-aggregated basis; (4) require manufacturers to report expenditures related to corporate sponsorships and advertisements; and (5) provide an option to download the published report data in spreadsheet format. *Id.* at 2.

The Commission agrees that collecting and reporting separately price discount expenditures for retailers and wholesalers is useful. Beginning with its 6(b) Orders for 2014, the Commission has been separately collecting and reporting information about price discounts paid to retailers and price discounts paid to wholesalers.

The Commission will clarify in future Orders that expenditures on coupons delivered online should be reported together with coupons delivered by other means. The full impact of couponing by the major cigarette and smokeless tobacco manufacturers can only be seen if expenditures for all coupons are reported together, regardless of how those coupons are delivered to consumers.

Regarding CTFK's suggestion that data be reported on other than a fully-aggregated, nationwide basis, the cigarette and smokeless tobacco companies assert that those data are confidential and, as CTFK acknowledges, the Commission cannot publicly release trade secrets or certain commercial or financial information. *Id.* at 2 n.2.

As for requiring manufacturers to report expenditures related to corporate sponsorships and advertisements, the Commission already requires the recipients of its 6(b) Orders to report certain expenditures made in the name of the company, rather than any of its brands.[1] However, the Commission does not include those data in its Cigarette and Smokeless Tobacco Reports. The Commission will consider whether those expenditures should be reported in the future or whether to cease collecting this information.

The Commission agrees that it would be helpful to provide an option to download the published report data in spreadsheet format and will begin doing so with its next published reports.

Altria stated that the Commission should no longer collect any information from cigarette and smokeless tobacco manufacturers ''in light of the Food and Drug Administration's . . . extensive, active regulatory authority over tobacco products under the Family Smoking Prevention and Tobacco Control Act,'' calling such collections ''superfluous'' and ''unnecessary burdens.'' Altria at 1, 3. Altria contends that the FTC's most recent requests seek ''not only information that the companies already produce to FDA, but also information unrelated to the advertising and promotion of tobacco products.'' *Id.* at 3–4. It gives the following examples:

> (a) cigarette design data, including cigarette length, style, flavor, and filter type; (b) constituent data, including nicotine, carbon monoxide, and tar; (c) lists of cigarettes first sold or discontinued in 2016; and (d) lists of other product information, including brand varieties, pack size, and package type.

Id. at 4 n.15. Altria also suggests that the FTC has recently expanded its requests to seek information on expenditures from parent companies that do not sell or advertise tobacco products. *Id.* at 3.

The FTC staff and FDA staff have a long tradition of working together on the many areas where the two agencies share jurisdiction. The FDA is not collecting cigarette or smokeless tobacco sales and marketing expenditure data like that required by the Commission's 6(b) Orders, so there is no overlap or duplication with respect to such data. Moreover, to the extent there might be some overlap in the collection of information about whether brand styles of cigarettes are filtered or unfiltered, menthol or non-menthol, and their cigarette length, the Commission needs those data so it can combine them with sales information for each brand style in order to report the percentages of cigarettes sold by the leading manufacturers falling into each product type category (*e.g.,* 26% of the cigarettes sold by these manufacturers in 2015 were menthol). FDA is not collecting cigarette sales information, so it cannot calculate sales percentages by product types. The Commission intends to continue collecting cigarette and smokeless tobacco sales and marketing expenditure data, together with cigarette length, flavor, and filter information. To the extent that in the future the FDA duplicates the FTC's data collection, the FTC can modify or cease its collection.

Until 2000, the Commission collected cigarette tar, nicotine, and carbon monoxide yields and published that information by brand style. Because of concerns that the yield information was misleading consumers, the Commission ceased publishing that information, but it has continued to collect tar, nicotine, and carbon monoxide yields to the extent recipients of the 6(b) Orders possess it, and the Commission releases the data to researchers in response to Freedom of Information Act requests. In recent years, however, there have been very few requests for the data. Given that the Commission no longer publishes tar, nicotine, and carbon monoxide reports and the limited interest in these data, the Commission intends to cease collecting tar, nicotine, and carbon monoxide yield data.

There are other information fields that the Commission no longer needs to collect, including information about cigarette package type, cigarette package size, cigarette styles, and whether a cigarette variety's tar yield and its nicotine yield are disclosed on its package. The Commission intends to continue to collect UPC-Codes in order to distinguish one variety from another, but does not need any other variety descriptors beyond cigarette length, flavor, and filter information. The Commission also no longer needs lists of cigarettes first sold or discontinued in a calendar year.

Contrary to Altria's suggestion, the FTC did not recently expand its requests to seek information from parent companies. More than a decade ago, the Commission began directing its orders to the ultimate domestic parents of the cigarette and smokeless tobacco manufacturers because some parent companies owned more than one subsidiary selling those products and the Commission wanted to ensure that no relevant data from affiliated companies went unreported. Moreover, the 6(b) Orders ask several questions about whether the recipient engages in certain practices, such as paying for cigarette or smokeless tobacco product placement in movies, and the Commission wants to be sure that such practices by any related company are reported, even if that company does not itself sell cigarette or smokeless tobacco products. The Commission intends to continuing directing its 6(b) Orders to the parent companies of the leading cigarette and smokeless tobacco manufacturers.

Burden Statement:[2]

Estimated Annual Burden: 1,980 hours.[3]

---

[1] Both the cigarette and smokeless tobacco Orders require the recipients to report expenditures on ''public entertainment events (including, but not limited to, concerts and sporting events) bearing or otherwise displaying the name of the Company or any variation thereof but not bearing or otherwise displaying the name, logo, or an image of any portion of the package'' of any of its cigarettes or smokeless tobacco products, or otherwise referring to those products.

[2] The details and assumptions underlying these estimates were set forth in the August 10, 2017 **Federal Register** notice.

[3] The Commission intends to use this PRA clearance renewal to collect information from the companies concerning their marketing and sales activities for the years 2017, 2018, and 2019. The Commission expects to issue compulsory process orders seeking this information annually, but it is

Continued

Estimated Number of Respondents: 15 maximum.

These estimates include any time spent by separately incorporated subsidiaries and other entities affiliated with the ultimate parent companies that receive the information requests.

Estimated Average Burden per Year per Respondent: 180 hours.

(a) Information requests to the four largest cigarette companies and five largest smokeless tobacco companies, at a per company average each year of 180 hours = 1,620 hours, cumulatively, per year; and

(b) Information requests to six additional respondents, of smaller size, at a per company average each year of 60 hours = 360 hours, cumulatively, per year.

Estimated Annual Labor Cost: $198,000.

Estimated Capital or Other Non-Labor Cost: De minimis.

Request for Comment: You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before December 18, 2017. Write ''Tobacco Reports: Paperwork Comment, FTC File No. P054507'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.*

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online, or to send them to the Commission by courier or overnight service. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/tobaccoreportspra,* by following the instructions on the web-based form. When this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that Web site.

If you file your comment on paper, write ''Tobacco Reports: Paperwork Comment, FTC File No. P054507'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC–5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex J), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible FTC Web site at *https://www.ftc.gov/*, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the public FTC Web site—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from the FTC Web site, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before December 18, 2017. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

Comments on the information collection requirements subject to review under the PRA should additionally be submitted to OMB. If sent by U.S. mail, they should be addressed to Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission, New Executive Office Building, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503. Comments sent to OMB by U.S. postal mail are subject to delays due to heightened security precautions. Thus, comments instead can also be sent via email to *wliberante@omb.eop.gov.*

David C. Shonka,

Acting General Counsel.

[FR Doc. 2017–24915 Filed 11–16–17; 8:45 am]

BILLING CODE 6750–01–P

possible that orders might not be issued in any given year and that orders seeking information for two years would be issued the next year. The figures set forth in this notice for the estimated hours and labor costs associated with this information collection represent average annual burden over the course of the prospective PRA clearance.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–102 and CMS–105]

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 December 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/PaperworkReductionActof1995/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 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:* Reinstatement without change of a previously approved collection; *Title of Information Collection:* Clinical Laboratory Improvement Amendments of 1988 (CLIA) Budget Workload Reports and Supporting Regulations; *Use:* We will use the collected information to determine the amount of Federal reimbursement for surveys conducted. Use of the information includes program evaluation, audit, budget formulation and budget approval. Form CMS–102 is a multi-purpose form designed to capture and record all budget and expenditure data. Form CMS–105 captures the annual projected CLIA workload that the State survey agency will accomplish. Our regional offices also use the information to approve the annual projected CLIA workload. The information is required as part of the section 1864 agreement with the state. *Form Numbers:* CMS–102 and CMS–105 (OMB control number: 0938–0599); *Frequency:* Quarterly; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 50; *Total Annual Responses:* 50; *Total Annual Hours:* 1,700. (For policy questions regarding this collection contact Jeffrey Pleines at 410–786–0684.)

Dated: November 14, 2017.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2017–25008 Filed 11–16–17; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects:

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

OMB No.: 0970–0401.

Description: Executive Order 12862 directs Federal agencies to provide service to the public that matches or exceeds the best service available in the private sector. In order to work continuously to ensure that the Administration for Children and Families' programs are effective and meet our customers' needs we use a generic clearance process to collect qualitative feedback on our service delivery. This collection of information is necessary to enable ACF to garner customer and stakeholder feedback in an efficient timely manner, in accord with our commitment to improving service delivery. The information collected from our customers and stakeholders will help ensure that users have an effective, efficient and satisfying experience with the programs. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or change in operation might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between ACF and its customer and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

This request is an extension of the ''generic fast-track'' process offered to all government agencies by OMB in 2010. Fast-tack means each request receives approval five days after submission, if no issues are brought to ACF's attention by OMB within the five days.

Respondents:

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Survey	10,000	1	0.5	5,000

Estimated Total Annual Burden Hours:

In compliance with the requirements of Section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. Email address: *infocollection@acf.hhs.gov*. All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2017–24902 Filed 11–16–17; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Variations in Implementation of Quality Interventions (VIQI) Project: Data Collection.

OMB No.: New Collection.

Description: The Administration for Children and Families (ACF), Office of Planning, Research and Evaluation (OPRE) proposes to collect information as part of the Variations in Implementation of Quality Interventions (VIQI): Examining the Quality-Child Outcomes Relationship in Child Care and Early Education Project.

The VIQI Project will inform policymakers, practitioners, and stakeholders about effective ways to support the quality and effectiveness of early care and education (ECE) centers for promoting young children's learning and development. In partnership with ECE centers across the United States that serve young children with diverse economic backgrounds, the VIQI Project aims to (1) identify dimensions of quality within ECE settings that are key levers for promoting children's outcomes; (2) inform what levels of quality are necessary to successfully support children's developmental gains; (3) identify drivers that facilitate and inhibit successful implementation of interventions aimed at strengthening quality; and (4) understand how these relations vary across different ECE settings, staff, and children. To achieve these aims, the VIQI Project will include a year-long pilot study that will pilot up to three curricular and professional development models, followed by a year-long impact evaluation and process study that involve testing the effectiveness of two curricular and professional development models that aim to strengthen teacher practices, the quality of classroom processes, and children's outcomes. The study will include up to 189 community-based and Head Start ECE centers spread across seven different metropolitan areas in the United States.

To test the effectiveness of the curricular and professional development models, the VIQI project will consist of a 3- or 4-group experimental design in the pilot study and a 3-group experimental design in the impact evaluation and the process study in which the initial quality and other characteristics of ECE centers are measured. The centers then will be stratified based upon select information collected—by setting type (*e.g.,* Head Start and community-based ECE centers) and initial levels of quality—and randomly assigned to one of the intervention conditions where they will be offered curricular and professional development supports aimed at strengthening the quality of classroom and teacher practices, or to a business-as-usual comparison condition.

In the pilot study, 24 centers in one metropolitan area will participate in the VIQI Project. Information about center and staff characteristics and classroom and teacher practices will be collected (1) to stratify and randomly assign centers; (2) to describe how the different interventions are implemented and are experienced by centers and teachers; and (3) to document the treatment differentials across research conditions. The information will then be used to adjust and to refine the research design and measures that will be used in the impact evaluation and process study.

In the impact evaluation and process study, 165 centers in seven metropolitan areas will participate in the VIQI Project. Information about center and staff characteristics and classroom and teacher practices will be collected (1) to stratify and randomly assign centers; (2) to identify subgroups of interest; (3) to describe how the interventions are implemented and are experienced by centers and teachers; (4) to document the treatment differentials across research conditions; and (5) to assess the impacts of each of the interventions on different dimensions of quality and teacher practices when compared to a business-as-usual comparison condition for the impact evaluation sample and separately for subgroups of interest. In addition, information about the background characteristics of families and children being served in the centers will be collected, as well as measures of children's skills at the beginning and end of the year-long impact evaluation for a subset of children in these centers. This information will also be used (1) to define subgroups of interest defined by family and child characteristics, and (2) to assess the impacts of each of the interventions on children's skills for the full impact evaluation sample and separately for subgroups of interest. Lastly, the information on quality, teacher practices and children's skills will be used in a set of analyses that will rigorously examine the nature of the quality-to-child outcomes relationship by exploring the effects of different dimensions and thresholds (or levels) of quality on child outcomes for the full impact evaluation sample and separately for subgroups of interest.

The data collection instruments for the VIQI Project include the following:

(1) *Instruments for Screening and Recruitment of ECE Centers* will be used in the pilot study, impact evaluation, and process study to assess ECE centers' eligibility, to inform the sampling strategy, and to recruit ECE centers to participate in the VIQI Project;

(2) *Baseline Instruments for the Pilot Study, Impact Evaluation, and Process Study* will be used to collect background information about centers, classrooms, center staff, and families and children being served in the centers. All of the instruments will be administered at the beginning of the pilot study, impact evaluation, and process study, with the exception of the baseline survey administered to parents of children enrolled in participating ECE centers and the protocol for

baseline assessments of children's skills at the beginning of the impact evaluation and process study;

(3) *Follow-Up Instruments for the Pilot Study, Impact Evaluation, and Process Study* will be used to inform how centers, classrooms, teachers, and children changed and to assess the impacts of each of the interventions over the course of the pilot study, impact evaluation, and process study. All of the instruments will be administered at the end of the pilot study, impact evaluation, and process study, with the exception of the protocol for follow-up assessments of children's skills at the end of the impact evaluation and process study; and,

(4) *Fidelity of Implementation Instruments for Pilot Study and Process Study* will be used to document how the curricular and professional development models are delivered and experienced by staff, to document treatment differentials across research conditions, and to provide context for interpreting the findings of the impact evaluation.

Respondents: The target population of the VIQI Project will include staff members working in Head Start grantee and community-based child care oversight agencies, staff members working in 189 ECE centers in seven metropolitan areas across the United States, and parents and children being served in these centers.

ANNUAL BURDEN ESTIMATES

Instrument	Total number of respondents	Annual number of respondents	Number of responses per respondent	Average burden hours per response	Annual burden hours
Instruments for Screening and Recruitment of ECE Centers					
Landscaping protocol with Stakeholder Agencies (staff burden in Head Start (HS) *grantee* and community-based child care *agencies*)	100	33	1	1.50	50
Screening protocol for phone calls (staff burden in HS *grantees* and community-based child care *agencies*)	110	37	1	2	74
Screening protocol for phone calls (HS and community-based child care *center* staff burden)	280	93	1	1.20	112
Protocol for in-person visits for screening and recruitment activities (staff burden in HS *grantees* and community-based child care *agencies*)	488	163	1	1.50	245
Protocol for in-person visits for screening and recruitment activities (HS and community-based child care *center* staff burden)	760	253	1	1.20	304
Baseline Instruments for the Pilot Study, Impact Evaluation, and Process Study					
Baseline administrator survey	236	79	1	0.60	47
Baseline coach survey	223	74	1	0.60	44
Baseline teacher/assistant teacher survey	1,358	453	1	0.60	272
Baseline parent/guardian information form in Impact Evaluation only	8,568	2,856	1	0.20	571
Baseline classroom observation protocol (teacher burden)	543	181	1	0.30	54
Baseline protocol for child assessments in Impact Evaluation only (child burden)	1,980	660	1	0.50	330
Follow-Up Instruments for Pilot Study, Impact Evaluation, and Process Study					
Follow-up administrator survey	189	63	1	0.50	32
Follow-up coach survey	178	59	1	0.50	30
Follow-up teacher/assistant teacher survey	1,086	362	1	0.75	272
Teacher reports to questions about children in classroom (administered as part of the follow-up teacher survey)	543	181	1	0.67	121
Follow-up classroom observation protocol (teacher burden)	543	181	2	0.30	109
Follow-up protocol for child assessments in Impact Evaluation only (child burden)	1,980	660	1	1	660
Fidelity of Implementation Instruments for Pilot Study and Process Study					
Coach log	117	39	55	0.25	536
Teacher/assistant teacher log	1,086	362	36	0.25	3258
Implementation fidelity observation protocol (teacher burden)	72	24	1	0.30	7
Interview/Focus group protocol (administrator, teacher/assistant teacher and coach burden)	322	107	1	1.5	161

Estimated Total Annual Burden Hours: 7,289.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 330 C Street, SW., Washington, DC 20201, Attn: OPRE Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *OPREinfocollection@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the

collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Email: *OIRA_SUBMISSION@OMB.EOP.GOV*, Attn: Desk Officer for the Administration for Children and Families.

Mary Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2017–24901 Filed 11–16–17; 8:45 am]

BILLING CODE 4184–23–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity: Comment Request

Proposed Projects:

Community Services Block Grant (CSBG) State Plan Application for States
Community Services Block Grant (CSBG) Eligible Entity Master List
Community Services Block Grant (CSBG) ACSI Survey of Eligible Entities

Title: Community Services Block Grant (CSBG) State Plan Application

OMB Number: 0970–0382

Description: Section 676 of the Community Services Block Grant (CSBG) Act requires states, including the District of Columbia and the Commonwealth of Puerto Rico, and U.S. territories applying for CSBG funds to submit an application and plan (CSBG State Plan). The CSBG State Plan must meet statutory requirements prior to states and territories being funded with CSBG funds. Applicants have the option to submit a detailed plan annually or biannually. Entities that submit a biannual plan must provide an abbreviated plan the following year if substantial changes to the initial plan will occur.

This request is to revise the automated CSBG State Plan format for states and territories by revising questions for clarity and system compatibility. It is not anticipated that these revisions will cause any additional burden to states as they have been completing the automated plan for three years. It is anticipated that the burden will continue to diminish in subsequent years due to improved automation.

In addition to the CSBG State Plan, states will be requested to complete a CSBG Eligible Entity Master List in year one, and then make updates as necessary in subsequent years. As the states have the information about their eligible entities (or sub-grantees), the burden will be minimal to the states to complete this the first year.

Lastly, the request includes a survey for the CSBG eligible entities (or sub-grantees). The survey focuses on the customer service that the eligible entities receive from the CSBG states. The survey is optional, and this will be the third time that the eligible entities that chose to submit will complete it.

Respondents: State Governments, including the District of Columbia and the Commonwealth of Puerto Rico, and U.S. territories, and local level sub-grantees.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
CSBG State Plan Application for States	56	1	31	1,736
CSBG State Plan Eligible Entity List	56	1	1	56
CSBG ACSI Survey of Eligible Entities	1,019	1	.15	152.85

Estimated Total Annual Burden Hours: 1,792 hours for states and territories; 152.85 for eligible entities.

In compliance with the requirements of the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chap. 35), the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 330 C Street SW., Washington, DC 20201. Attn: ACF Reports Clearance Officer. Email address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2017–24905 Filed 11–16–17; 8:45 am]

BILLING CODE 4184–27–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–N–4179]

Cardiac Troponin Assays; Public Workshop; Request for Comments; Extension of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA or Agency) is extending the comment period provided in the notice entitled ''Cardiac Troponin Assays; Public Workshop; Request for Comments'' that appeared in the **Federal Register** on July 31, 2017. That notice announced the public workshop and requested comments by November 28, 2017; FDA is extending the public

workshop's comment period by 30 days to December 28, 2017, in response to requests for an extension to allow interested persons additional time to submit comments.

DATES: FDA is extending the comment period for the public workshop ''Cardiac Troponin Assays'' published on July 31, 2017 (82 FR 35532). Submit either electronic or written comments by December 28, 2017.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before December 28, 2017. The *https://www.regulations.gov* electronic filing system will accept comments until midnight Eastern Time at the end of December 28, 2017. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions''

Instructions: All submissions received must include the Docket No. FDA–2017–N–4179 for ''Cardiac Troponin Assays; Public Workshop; Request for Comments.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Paula Caposino, Food and Drug Administration, Center for Devices and Radiological Health, 10903 New Hampshire Ave., Bldg. 66, Rm. 4644, Silver Spring, MD 20993, 301–796–6160, *Paula.Caposino@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In the **Federal Register** of July 31, 2017 (82 FR 35532), FDA published a notice announcing the public workshop entitled ''Cardiac Troponin Assays; Public Workshop; Request for Comments'' with a 120-day comment period to request comments.

The Agency has received requests for a 30-day extension of the comment period for the public workshop. The request conveyed concern that the current 120-day comment period does not allow sufficient time to develop a meaningful or thoughtful response to the public workshop.

FDA has considered the request and is extending the comment period for the public workshop for 30 days, until December 28, 2017. The Agency believes that a 30-day extension allows adequate time for interested persons to submit comments.

Dated: November 13, 2017.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2017–24922 Filed 11–16–17; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–D–6154]

Evaluation of Devices Used With Regenerative Medicine Advanced Therapies; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft document entitled ''Evaluation of Devices Used with Regenerative Medicine Advanced Therapies; Draft Guidance for Industry.'' The draft guidance document, when finalized, will provide device manufacturers, applicants, and sponsors engaged in the development of regenerative medicine therapies, with our current thinking regarding evaluation of devices used in the recovery, isolation or delivery of regenerative advanced therapies, which FDA generally refers to as ''regenerative medicine advanced therapies'' or ''RMATs.'' Specifically, as required by the 21st Century Cures Act (Cures Act),

the draft guidance addresses how FDA intends to simplify and streamline its application of regulatory requirements for combination device and cell or tissue products; what, if any, intended uses or specific attributes would result in a device used with a regenerative therapy product to be classified as a class III device; when a device may be limited to a specific intended use with only one particular type of cell; and application of the least burdensome approach to demonstrate how a device may be used with more than one cell type.

DATES: Submit either electronic or written comments on the draft guidance by February 15, 2018 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2017–D–6154 for ''Evaluation of Devices Used with Regenerative Medicine Advanced Therapies; Draft Guidance for Industry.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

• *Confidential Submissions*—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist the office in processing your requests. The draft guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 240–402–8010. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Tami Belouin, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft document entitled ''Evaluation of Devices Used with Regenerative Medicine Advanced Therapies; Draft Guidance for Industry.'' The draft guidance, when finalized, will provide device manufacturers, applicants, and sponsors engaged in the development of regenerative medicine therapies, with our current thinking regarding evaluation of devices used in the recovery, isolation or delivery of regenerative advanced therapies, which FDA generally refers to as ''regenerative medicine advanced therapies'' or ''RMATs''. Specifically, as required by section 3034 of the 21st Century Cures Act (Pub. L. 114–255) (Cures Act), the draft guidance addresses how FDA intends to simplify and streamline its application of regulatory requirements for combination device and cell or tissue products; what, if any, intended uses or specific attributes would result in a device used with a regenerative therapy product to be classified as a class III device; when a device may be limited to a specific intended use with only one particular type of cell; and application of the least burdensome approach to demonstrate how a device may be used with more than one cell type.

The issuance of this draft guidance fulfills the statutory requirement set forth in section 3034(a) of the Cures Act. Furthermore, the Agency intends for this document, when finalized, to serve as a source of information about the Agency's current thinking about a wide range of concepts related to the regulation of devices, as they apply to devices used in the recovery, isolation, and delivery of RMATs. FDA has provided general information in the

draft guidance in lieu of specific examples because the Agency does not yet possess a wide body of experience regarding the evaluation of devices used with RMATs, given the recent establishment of the RMAT designation program in the Cures Act.

As we gain more experience with such devices, we intend to incorporate such information into the final guidance. To that end, although you are welcome to comment on any aspect of the guidance, we encourage commenters to support their comments with information related to specific marketed devices or types of devices that are used in the recovery, isolation, and delivery of RMATs.

Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of a document entitled ''Expedited Programs for Regenerative Medicine Therapies for Serious Conditions; Draft Guidance for Industry.'' Among other things, that document provides information about the RMAT designation program.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on Evaluation of Devices Used with Regenerative Medicine Advanced Therapies. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations. This guidance is not subject to Executive Order 12866.

II. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 807 have been approved under OMB control number 0910–0120; the collections of information in 21 CFR part 812 have been approved under OMB control number 0910–0078; the collections of information in 21 CFR part 814 have been approved under OMB control number 0910–0231; and the collections of information in 21 CFR part 1271 have been approved under OMB control number 0910–0543.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at either *https://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *https://www.regulations.gov.*

Dated: November 13, 2017.

Anna K. Abram,

Deputy Commissioner for Policy, Planning, Legislation, and Analysis.

[FR Doc. 2017–24836 Filed 11–16–17; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–0987]

Agency Information Collection Activities; Proposed Collection; Comment Request; Generic Clearance for the Collection of Qualitative Data on Tobacco Products and Communications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. 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 of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the Generic Clearance for the Collection of Qualitative Data on Tobacco Products and Communications.

DATES: Submit either electronic or written comments on the collection of information by January 16, 2018.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before January 16, 2018. The *https://www.regulations.gov* electronic filing system will accept comments until midnight Eastern Time at the end of January 16, 2018. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- Mail/Hand delivery/Courier (for written/paper submissions): Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2014–N–0987 for ''Generic Clearance for the Collection of Qualitative Data on Tobacco Products and Communications.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- *Confidential Submissions*—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The

Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Amber Sanford, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–8867, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Generic Clearance for the Collection of Qualitative Data on Tobacco Products and Communications

OMB Control Number 0910–0796—Extension

Under section 1003(d)(2)(D) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 393(d)(2)(D)), FDA is authorized to conduct educational and public information programs.

In conducting studies relating to the regulation and communications related to tobacco products, FDA will need to employ formative qualitative research including focus groups, usability testing, and/or indepth interviews (IDIs) to assess knowledge and perceptions about tobacco-related topics with specific target audiences. The information collected will serve three major purposes. First, formative research will provide critical knowledge about target audiences. FDA must first understand people's knowledge and perceptions about tobacco related topics prior to developing survey/research questions as well as stimuli for experimental studies. Second, by collecting communications usability information, FDA will be able to serve and respond to the ever-changing demands of consumers of tobacco products. Additionally, we will be able to determine the best way to present messages. Third, initial testing will allow FDA to assess consumer understanding of survey/research questions and study stimuli. Focus groups and/or IDIs with a sample of the target audience will allow FDA to refine the survey/research questions and study stimuli while they are still in the developmental stage. FDA will collect, analyze, and interpret information gathered through this generic clearance in order to: (1) Better understand characteristics of the target audience—its perceptions, knowledge, attitudes, beliefs, and behaviors—and use these in the development of appropriate survey/research questions, study stimuli, or communications; (2) more efficiently and effectively design survey/research questions and study stimuli; and (3) more efficiently and effectively design experimental studies.

FDA is requesting approval of this new generic clearance for collecting information through the use of qualitative methods (*i.e.,* individual interviews, small group discussions, and focus groups) for studies involving all tobacco products regulated by FDA. This information will be used as a first step to explore concepts of interest and assist in the development of quantitative study proposals, complementing other important research efforts in the Agency. This information may also be used to help identify and develop communication messages, which may be used in education campaigns. Focus groups play an important role in gathering information because they allow for an indepth understanding of individuals' attitudes, beliefs, motivations, and feelings. Focus group research serves the narrowly defined need for direct and informal public opinion on a specific topic.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Type of interview	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
In-Person Individual Indepth Interviews	1,092	1	1,092	1	1,092
Indepth Interview (IDI) Screener	1,800	1	1,800	0.083 (5 minutes)	150
Focus Group Interviews	4,701	1	4,701	1.5	7,052
Focus Group Screener	3,996	1	3,996	0.25 (15 minutes)	999
Usability Testing	2,322	1	2,322	0.50 (30 minutes)	1,161

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]—Continued

Type of interview	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Usability Testing Screener	2,028	1	2,028	0.083 (5 minutes)	168
Total					10,622

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The number of respondents to be included in each new pretest may vary, depending on the nature of the material or message being tested and the target audience. Table 1 provides examples of the types of studies that may be administered and estimated burden levels during the 3-year period. Time to read, view, or listen to the message being tested is built into the ''Hours per Response'' figures.

The burden for this collection has decreased by 18,437 hours from 29,059 to 10,622. FDA attributes this decrease to assessing the planned studies for the next 3 years.

Dated: November 9, 2017.

Anna K. Abram,

Deputy Commissioner for Policy, Planning, Legislation, and Analysis.

[FR Doc. 2017–24924 Filed 11–16–17; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–N–0001]

Medical Gas Regulation; Public Workshops; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshops; request for comments.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is announcing two public workshops entitled ''Medical Gas Regulation: Workshop I'' and ''Medical Gas Regulation: Workshop II.'' The topic to be discussed is potential areas of Federal drug regulation that should be revised with respect to medical gases.

DATES: The first public workshop will be held on December 15, 2017, from 9 a.m. to 5 p.m. The second public workshop will be held on February 9, 2018, from 9 a.m. to 5 p.m. However, depending on the level of public participation, the workshops may end early. FDA may announce additional public workshop dates in the future, if needed.

Submit either electronic or written comments on these public workshops by March 15, 2018, for Workshop I, and by May 10, 2018, for Workshop II. See the **SUPPLEMENTARY INFORMATION** section for registration dates and information.

ADDRESSES: The public workshops will be held at FDA's White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, Rm. 1503 B–C (sections B and C of the ''Great Room''), Silver Spring, MD 20993–0002. Entrance for public workshop participants (non-FDA employees) is through Building 1 where routine security-check procedures will be performed. For parking and security information, please refer to *https://www.fda.gov/AboutFDA/WorkingatFDA/BuildingsandFacilities/WhiteOakCampusInformation/ucm241740.htm.*

You may submit comments as follows. Please note that late, untimely filed comments may not be considered. For timely consideration, we request that electronic comments on workshop topics be submitted before or within 90 days after each workshop (*i.e.,* comments should be submitted by or before March 15, 2018, for Workshop I, and May 10, 2018, for Workshop II). FDA will have one shared docket for all workshops. The *https://www.regulations.gov* electronic filing system will accept comments until midnight Eastern Time at the end of May 10, 2018. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before the relevant date.

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2017–N–0001 for ''Medical Gas Regulation.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including

the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT:

Christine Kirk, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 301–796–2465, Fax: 301–847–8440, email: *MedgasPublicWorkshops@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On May 5, 2017, President Trump signed the Consolidated Appropriations Act, 2017 (Pub. L. 115–31). Section 756 of the Consolidated Appropriations Act, 2017 requires FDA to issue final regulations revising Federal drug regulations with respect to medical gases. These public workshops are being held as part of FDA's implementation of the requirements of section 756.

Since the 2012 enactment of the Food and Drug Administration Safety and Innovation Act (FDASIA) (Pub. L. 112–144), FDA has engaged in multiple activities related to medical gases, including rulemaking. For example, in 2016, FDA issued the final rule ''Medical Gas Containers and Closures: Current Good Manufacturing Practice Requirements'' (81 FR 81685, November 18, 2016). Other activities include FDA's June 2017 revised draft guidance for industry on current good manufacturing practice for medical gases,[1] updated guidance for FDA inspectors regarding medical gases (March 2015),[2] an extensive review of Federal drug regulations related to medical gases from 2012 to 2014 (a report on the review was submitted to Congress in 2015),[3] and implementation of FDASIA's requirements regarding certification of medical gases (to date, over 70 certifications have been granted).

FDA intends to engage in additional rulemaking in this area in accordance with section 756 of the Consolidated Appropriations Act, 2017. To conduct rulemaking as efficiently as possible, FDA intends to build on the information and stakeholder input received since FDASIA's enactment. As noted in more detail below, FDA invites comments from stakeholders on specific medical gas issues that could or should be addressed in regulation.

II. Topics for Discussion at the Public Workshops

We are holding these workshops to provide an opportunity for medical gas manufacturers and any other interested members of the public to provide input on potential areas of Federal drug regulation that should be revised with respect to medical gases.

We are asking stakeholders to comment on existing medical gas issues which, in their view, should be addressed by regulation change (rather than through other means, such as revisions to guidance or inspection practices). Commenters should include concrete and specific reasons that rulemaking is preferable to other options. Commenters' views regarding the prioritization of particular rulemaking proposals would also be helpful. If a stakeholder would like a comment to be discussed at a particular public workshop, it should be submitted with a discussion request by no later than 1 week before the date of the workshop. If a stakeholder would like a comment to be included in FDA's consideration of public comments presented and received for a particular workshop, it should be submitted no later than 90 days after the date of the workshop. As noted above, the *https://www.regulations.gov* electronic filing system will accept comments until midnight Eastern Time at the end of May 10, 2018. Late comments will not be considered.

During Workshop I (December 2017), FDA intends to discuss the anticipated scope of the medical gas rulemaking, as well as three regulations to which stakeholders have previously requested changes: 21 CFR part 201 (labeling generally and labeling for medical air specifically), 21 CFR part 207 (registration and listing), and 21 CFR parts 210 and 211 (current good manufacturing practice). Depending on the number of speakers and time available, we may also consider comments on additional regulations.

During Workshop II (February 2018), FDA intends to discuss 21 CFR part 314 (adverse event reporting) and the intersection of regulations for medical gases and regulations for medical devices and animal drugs. Depending on the number of speakers and time available, we may also consider comments on additional regulations and medical gas issues not currently addressed in regulation. FDA is considering whether to schedule one or more additional public workshops in 2018 to hear from stakeholders regarding any remaining topics.

III. Participating in the Public Workshops

Registration: The workshops are free and seating will be on a first-come, first-served basis. Attendees who do not wish to make an oral presentation do not need to register.

If you need special accommodations because of a disability, please contact *MedgGasPublicWorkshops@fda.hhs.gov* (or see **FOR FURTHER INFORMATION CONTACT**) at least 7 days in advance of each workshop.

Requests for Oral Presentations: If you wish to a make an oral presentation, you must register by submitting your name, title, firm name, address, telephone, email address, and Fax number to *MedgasPublicWorkshops@fda.hhs.gov* (see **FOR FURTHER INFORMATION CONTACT**) by December 8, 2017, for Workshop I, or February 2, 2018, for Workshop II. Please also indicate the type of organization you represent (*e.g.,* industry, consumer organization) and a brief summary of your remarks (including the discussion topic(s) that you would like to address).

FDA will try to accommodate all persons who wish to make a presentation; however, the duration of each speaker's presentation may be limited by time constraints. FDA will notify registered presenters of their

[1] Available at: *https://www.fda.gov/ucm/groups/fdagov-public/@fdagov-drugs-gen/documents/document/ucm070270.pdf.*

[2] Available at: *https://www.fda.gov/downloads/ICECI/ComplianceManuals/ComplianceProgramManual/UCM125417.pdf.*

[3] Available at: *https://www.fda.gov/downloads/regulatoryinformation/lawsenforcedbyfda/significantamendmentstothefdcact/fdasia/ucm453727.pdf.*

scheduled presentation times. Persons registered to speak should check in before the workshops and are encouraged to arrive early to ensure their designated order of presentation. Participants who are not present when called may not be permitted to speak at a later time. An agenda will be made available at least 3 days before each workshop at *https://www.fda.gov/Drugs/NewsEvents/ucm582091.htm.* FDA may also post specific questions for consideration at the meeting Web page; these will be made available at least 3 days before each workshop at *https://www.fda.gov/Drugs/NewsEvents/ucm582091.htm.*

Streaming Webcast and Video of the Public Workshops: These public workshops will be webcast; the URL will be posted at *https://www.fda.gov/Drugs/NewsEvents/ucm582091.htm* at least 1 day before each workshop. A video record of the public workshops will be available at the same Web site address for 1 year.

Dated: November 13, 2017.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2017–24918 Filed 11–16–17; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0878]

Agency Information Collection Activities; Proposed Collection; Comment Request; Premarket Notification for a New Dietary Ingredient

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. 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 of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the procedure by which a manufacturer or distributor of a new dietary ingredient or of a dietary supplement containing a new dietary ingredient is to submit to FDA information upon which it has based its conclusion that a dietary supplement containing the new dietary ingredient will reasonably be expected to be safe.

DATES: Submit either electronic or written comments on the collection of information by January 16, 2018.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before January 16, 2018. The *https://www.regulations.gov* electronic filing system will accept comments until midnight Eastern Time at the end of January 16, 2018. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2013–N–0878 for ''Premarket Notification for a New Dietary Ingredient.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Ila Mizrachi, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD

20852, 301–796–7726, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Premarket Notification for a New Dietary Ingredient—21 CFR 190.6

OMB Control Number 0910–0330—Extension

This information collection supports Agency regulations. Specifically, section 413(a) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 350b(a)) provides that at least 75 days before the introduction or delivery for introduction into interstate commerce of a dietary supplement that contains a new dietary ingredient, the manufacturer or distributor of the dietary supplement or of the new dietary ingredient is to submit to FDA (as delegate for the Secretary of Health and Human Services) information upon which the manufacturer or distributor has based its conclusion that a dietary supplement containing the new dietary ingredient will reasonably be expected to be safe. FDA's implementing regulation, § 190.6 (21 CFR 190.6), requires this information to be submitted to the Office of Nutrition, Labeling, and Dietary Supplements (ONLDS) in the form of a notification. Under § 190.6(b), the notification must include the following: (1) The name and complete address of the manufacturer or distributor; (2) the name of the new dietary ingredient; (3) a description of the dietary supplement(s) that contain the new dietary ingredient, including the level of the new dietary ingredient in the dietary supplement and the dietary supplement's conditions of use; (4) the history of use or other evidence of safety establishing that the new dietary ingredient will reasonably be expected to be safe when used under the conditions recommended or suggested in the labeling of the dietary supplement; and (5) the signature of a responsible person designated by the manufacturer or distributor.

These premarket notification requirements are designed to enable us to monitor the introduction into the marketplace of new dietary ingredients and dietary supplements that contain new dietary ingredients in order to protect consumers from ingredients and products whose safety is unknown. FDA uses the information collected in new dietary ingredient notifications to evaluate the safety of new dietary ingredients in dietary supplements and to support regulatory action against ingredients and products that are potentially unsafe.

FDA has developed an electronic portal that respondents may use to electronically submit their notifications to ONLDS via FDA Unified Registration and Listing System (FURLS). Firms that prefer to submit a paper notification in a format of their own choosing still have the option to do so; however, Form FDA 3880 prompts a submitter to input the elements of a new dietary ingredient notification (NDIN) in a standard format and helps the respondent organize its NDIN to focus on the information needed for FDA's safety review. Safety information may be submitted via a supplemental form entitled ''New Dietary Ingredient Safety Information.'' This form provides a standard format to describe the history of use or other evidence of safety on which the manufacturer or distributor bases its conclusion that the new dietary ingredient is reasonably expected to be safe under the conditions of use recommended or suggested in the labeling of the dietary supplement, as well as related identity information that is necessary to demonstrate safety by showing that the new dietary ingredient and dietary supplement(s) that are the subject of the notification are the same or similar to the ingredients and products for which safety data and information have been provided. We invite comment on Form FDA 3880 and the supplemental safety information form, which may be found on our Web site at *https://www.fda.gov/Food/DietarySupplements/NewDietaryIngredientsNotificationProcess/default.htm.*

Description of Respondents: The respondents to this collection of information are manufacturers and distributors in the dietary supplement industry; specifically, firms that manufacture or distribute new dietary ingredients or dietary supplements that contain a new dietary ingredient.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response (in hours)	Total hours
190.6; Dietary Supplements	55	1	55	20	1,100

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

We have made no adjustments to the currently approved burden estimate for the information collection. While we have received previous comments suggesting our burden estimate may be too low, the comments did not discuss the basis for such a conclusion. We therefore specifically invite those commenters offering an alternative

burden estimate to include the methodology or reasoning used to do so.

Based on our experience with the information collection over the past 3 years, we estimate that 55 respondents will submit 1 premarket notification each. We estimate that extracting and summarizing the relevant information from what exists in the company's files and presenting it in a format that meets the requirements of § 190.6 will take approximately 20 hours of work per notification. We have carefully considered the burden associated with the premarket notification requirement and believe that estimates greater than 20 hours are likely to include burden associated with researching and generating safety data for a new dietary ingredient. We also believe that the burden of the premarket notification requirement on industry is minimal and reasonable because we are requesting only safety and identity information that the manufacturer or distributor should already have developed to satisfy itself that a dietary supplement containing a new dietary ingredient is in compliance with the FD&C Act. Under section 413(a)(2) of the FD&C Act, a dietary supplement that contains a new dietary ingredient is deemed to be adulterated unless there is a history of use or other evidence of safety establishing that the new dietary ingredient will reasonably be expected to be safe under the conditions of use recommended or suggested in the labeling of the dietary supplement. This requirement is separate from and additional to the requirement to submit a premarket notification for the new dietary ingredient. FDA's regulation on new dietary ingredient notifications, § 190.6(a), requires the manufacturer or distributor of the dietary supplement or of the new dietary ingredient to submit to FDA the information that forms the basis for its conclusion that a dietary supplement containing the new dietary ingredient will reasonably be expected to be safe. Thus, § 190.6 only requires the manufacturer or distributor to extract and summarize information that should have already been developed to meet the safety requirement in section 413(a)(2) of the FD&C Act.

Dated: November 9, 2017.

Anna K. Abram,

Deputy Commissioner for Policy, Planning, Legislation, and Analysis.

[FR Doc. 2017–24925 Filed 11–16–17; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–D–0313]

Agency Information Collection Activities; Proposed Collection; Comment Request; Guidance for Industry, Researchers, Patient Groups, and Food and Drug Administration Staff on Meetings With the Office of Orphan Products Development

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. 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 of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the Guidance for Industry, Researchers, Patient Groups, and FDA Staff on Meetings with the Office of Orphan Products Development.

DATES: Submit either electronic or written comments on the collection of information by January 16, 2018.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before January 16, 2018. The *https://www.regulations.gov* electronic filing system will accept comments until midnight Eastern Time at the end of January 16, 2018. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2014–D–0313 for ''Agency Information Collection Activities; Proposed Collection; Comment Request; Guidance for Industry, Researchers, Patient Groups, and Food and Drug Administration Staff on Meetings with the Office of Orphan Products Development.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information

redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Amber Sanford, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–8867, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Guidance for Industry, Researchers, Patient Groups, and Food and Drug Administration Staff on Meetings With the Office of Orphan Products Development

OMB Control Number 0910–0787—Extension

This information collection supports Agency guidance regarding staff meetings with the Office of Orphan Products Development. Each year, the Office of Orphan Products Development (OOPD) staff participates in meetings with stakeholders who seek guidance or clarification relating to orphan drug or humanitarian use device (HUD) designation requests, OOPD grant programs, or other rare disease issues. These meetings can be ''informal'' or ''formal'' and help build a common understanding on FDA's thoughts on orphan products, which may include drugs, biological products, devices, or medical foods for a rare disease or condition. These meetings may represent critical points in the orphan product development process and may even have an impact on the eventual availability of products for patients with rare diseases and conditions. It is important that these meetings be scheduled within a reasonable time, conducted effectively, and documented where appropriate.

Topics addressed in this guidance include: (1) Clarification of what constitutes an ''informal'' or ''formal'' meeting, (2) program areas within OOPD that may be affected by this draft guidance, (3) procedures for requesting and scheduling meetings with OOPD, (4) description of what constitutes a meeting package, and (5) procedures for the conduct and documentation of meetings with OOPD. This guidance provides consistent procedures to promote well-managed meetings between OOPD and stakeholders.

Burden estimate. Table 1 of this document provides an estimate of the annual reporting burden associated with the recommendation found in the guidance.

Request for a meeting. Based upon information collected from OOPD program areas, approximately 2,332 informal and 51 formal meetings were requested with OOPD in fiscal year (FY) 2016 regarding orphan drug designation requests, HUD designation requests, rare pediatric disease designation requests, funding opportunities through the Orphan Products Grants Program and the Pediatric Device Consortia Grants Program, and orphan product patient-related issues. FDA anticipates that the number of meeting requests and stakeholders will remain the same or will only slightly increase and therefore estimates the total number of meeting requests will be 2,383 annually (2332 informal and 51 formal meetings). The hours per response, which is the estimated number of hours that a stakeholder would spend preparing the information to be submitted with a meeting request in accordance with the guidance, is estimated to be approximately 3 hours for informal meetings and approximately 10 hours for formal meetings. Based on FDA's experience, the Agency expects that it will take stakeholders this amount of time to gather and copy brief statements about the product and a description of the purpose and details of the meeting. Therefore, the Agency estimates that stakeholders will spend 7,506 hours per year (6,996 hours for informal meetings and 510 hours for formal meetings) preparing meeting requests to OOPD regarding orphan drug designation requests, HUD designation requests, rare pediatric disease designation requests, funding opportunities through the Orphan Products Grants Program and the Pediatric Device Consortia Grants Program, and orphan product patient-related issues.

Meeting packages. Based upon information collected from OOPD program areas, OOPD held approximately 51 formal meetings in FY 2016 regarding orphan drug designation requests, HUD designation requests, rare pediatric disease designation requests, funding opportunities through the Orphan Products Grants Program and the Pediatric Device Consortia Grants Program, and orphan product patient-related issues. FDA anticipates that the number of formal meetings, and therefore meeting packages, may increase only slightly as a result of this guidance; thus, the Agency estimates that the total responses will be 51 annually. As stated previously, it is current practice for stakeholders to submit meeting packages to the Agency in advance of any such formal meeting. The hours per response, which is the

estimated number of hours that a stakeholder would spend preparing the meeting package in accordance with this guidance, is estimated to be approximately 18 hours. Based on FDA's experience, the Agency expects it will take stakeholders this amount of time to gather and copy brief statements about the product, a description of details for the anticipated meeting, and data and information that generally would already have been compiled for submission to the Agency. Therefore, the Agency estimates that stakeholders will spend 918 hours per year submitting meeting packages to the Agency prior to a formal meeting regarding orphan drug designation requests, HUD designation requests, rare pediatric disease designation requests, funding opportunities through the Orphan Products Grants Program and the Pediatric Device Consortia Grants Program, and orphan product patient-related issues.

Draft meeting minutes. Based upon information collected from OOPD program areas, OOPD received approximately 51 draft meeting minutes for formal meetings and 23 draft meeting minutes for informal meetings in FY 2016 regarding orphan drug designation requests, HUD designation requests, rare pediatric disease designation requests, funding opportunities through the Orphan Products Grants Program and the Pediatric Device Consortia Grants Program, and orphan product patient-related issues. FDA anticipates that the number of stakeholders submitting draft meeting minutes may remain the same or increase only slightly; thus, the Agency estimates that the total number of respondents will be 74 annually. As stated previously, it is current practice for stakeholders to submit draft meeting minutes to the Agency after all formal meetings and certain informal meetings. The hours per response, which is the estimated number of hours that a stakeholder would spend preparing draft meeting minutes in accordance with this guidance, is estimated to be approximately 8 hours. Based on FDA's experience, the Agency expects it will take stakeholders this amount of time to summarize the meeting discussion points, agreements, disagreements, and action items. Therefore, the Agency estimates that stakeholders will spend 592 hours per year submitting draft meeting minutes to the Agency documenting the meeting outcomes, agreements, disagreements, and action items as followup to all formal and certain informal meetings.

FDA therefore estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Meeting requests, packages and minutes	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Meeting requests (informal)	2,332	1	2,332	3	6,996
Meeting requests (formal)	51	1	51	10	510
Meeting packages	51	1	51	18	918
Meeting minutes	74	1	74	8	592
Total					9,016

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Since the last OMB approval, we have increased our estimate by 832 hours and 229 respondents in parallel to an increase in overall orphan drug designation submissions and to correspond meeting requests to the Office of Orphan Products Development.

Dated: November 9, 2017.

Anna K. Abram,

Deputy Commissioner for Policy, Planning, Legislation, and Analysis.

[FR Doc. 2017–24926 Filed 11–16–17; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–N–6175]

Agency Information Collection Activities; Proposed Collection; Comment Request; Food and Drug Administration Recall Regulations

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. 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 of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on FDA recalls for human drugs, biological products, devices, animal drugs, food, cosmetics, and tobacco.

DATES: Submit either electronic or written comments on the collection of information by January 16, 2018.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before January 16, 2018. The *https://www.regulations.gov* electronic filing system will accept comments until midnight Eastern Time at the end of January 16, 2018. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2017–N–6175 for ''Agency Information Collection Activities; Proposed Collection; Food and Drug Administration Recall Regulations.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Ila S. Mizrachi, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–7726, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

FDA Recall Regulations—21 CFR Part 7

OMB Control Number 0910–0249—Extension

Section 701 of the Federal Food, Drug, and Cosmetic Act charges the Secretary of Health and Human Services, through FDA, with the responsibility of assuring recalls (21 U.S.C. 371, Regulations and hearings, and 21 CFR part 7, Enforcement Policy, Subpart C, Recalls (Including Product Corrections)—Guidance on Policy, Procedures, and Industry Responsibilities which pertain to the recall regulations and provide guidance to manufacturers on recall responsibilities). The regulations and guidance apply to all FDA-regulated products (*i.e.,* food, including animal feed; drugs, including animal drugs; medical devices, including in vitro diagnostic products; cosmetics; biological products intended for human use; and tobacco).

These responsibilities of companies conducting recalls include providing FDA with complete details of the recall including: (1) Reason(s) for the removal or correction, risk evaluation, quantity produced, distribution information, firm's recall strategy, a copy of any recall communication(s), and a contact official (§ 7.46); (2) notifying direct accounts of the recall, providing guidance regarding further distribution, giving instructions as to what to do with the product, providing recipients with a ready means of reporting to the recalling firm (§ 7.49); and (3) submitting periodic status reports so that FDA may assess the progress of the recall. Status report information may be determined by, among other things, evaluation return reply cards, effectiveness checks and product returns (§ 7.53), and providing the opportunity for a firm to request in writing that FDA terminate the recall (§ 7.55(b)).

A search of the FDA database was performed to determine the number of recalls that took place during fiscal years 2014 to 2016. The resulting number of total recalls (8,560) from this database search were then averaged over the 3 years, and the resulting per year average of recalls (2,853) are used in estimating the current annual reporting burden for this report. The resulting number of total terminations (8,560) from this database search were then averaged over the 3 years, and the resulting per year average of terminations (2,853) are used in estimating the current annual reporting burden for this report.

FDA estimates the total annual industry burden to collect and provide the required information to be 470,745 burden hours.

The following is a summary of the estimated annual burden hours for recalling firms (manufacturers, processors, and distributors) to comply with the reporting requirements of FDA's recall regulations, recognizing that there may be a vast difference in the information collection and reporting time involved in different recalls of FDA's regulated products.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Firm initiated recall (§ 7.46) and recall communications (§ 7.49)	2,853	1	2,853	25	71,325
Recall status reports (§ 7.53)	2,853	13	37,089	10	370,890
Termination of a recall (§ 7.55(b))	2,853	1	2,853	10	28,530
Total					470,745

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

I. Total Annual Reporting

A. Firm Initiated Recall and Recall Communications

We request firms that voluntarily remove or correct foods and drugs (human or animal), cosmetics, medical devices, biologics, and tobacco to immediately notify the appropriate FDA District Office of such actions. The firm is to provide complete details of the recall reason, risk evaluation, quantity produced, distribution information, firms' recall strategy, and a contact official as well as requires firms to notify their direct accounts of the recall and to provide recipients with a ready means of reporting to the recalling firm. Under these portions of the collection of information, the Agency estimates it will receive 2,853 responses annually based on the average number of recalls over the last 3 fiscal years. The number of responses multiplied by the number of respondents equals 2,853. The average burden hours, 25, multiplied by total number of annual responses equal 71,325.

B. Recall Status Reports

We request that recalling firms provide periodic status reports so FDA can ascertain the progress of the recall. This request only applies to firms with active recalls, and periodic status reports are estimated to be reported every 2 to 4 weeks. This collection of information will generate approximately 2,853 responses annually, based on the average number of recalls over the last 3 fiscal years, 8,560. The number of respondents multiplied by the number of responses per respondents (13) equals a total number of annual responses of 37,089. The total number of responses, 37,089, multiplied by an average burden hours of 10 per response equals a total of 370,890 total hours.

C. Termination of a Recall

We provide the firms an opportunity to request in writing that FDA end the recall. The Agency estimates it will receive 2,853 responses annually based on the average number of terminations over the past 3 fiscal years. The total annual responses of 2,853 multiplied by the average burden hours of 10 per response equals a total number of hours of 28,530.

II. Total Annual Third-Party Disclosure Burden

Recall Communications. We request that firms notify their consignees of the recall and to provide recipients with a ready means of reporting to the recalling firm. Under this portion of the collection of information, the Agency estimates firms will provide 4,433,562 notifications annually based on the number of respondents/consignees (2,853) multiplied by the number of disclosures per respondent (1,554). The total number of hours is 248,279 (based on 4,433,562 multiplied by 0.056 hours).

TABLE 2—ESTIMATED ANNUAL THIRD-PARTY DISCLOSURE BURDEN [1]

21 CFR section	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure	Total hours
Recall communications (§ 7.49)	2,853	1,554	4,433,562	0.056	248,279

[1] There are no capital costs or operating and maintenance costs associated with this information collections.

FDA regulates many different types of products including, but not limited to, medical products, food and feed, cosmetics, and tobacco products. FDA notes that not all third-party disclosures provided by firms to their consignees are similar in nature and may entail different methods and mediums of communication. FDA estimates the burden for third-party disclosure per recall event to be an average of 25 hours. This burden estimate factored out to the average number of consignees per recall (1,554) results in a burden per disclosure estimate of approximate hours (25 hours per recall/1,554 disclosures/recall = 0.056 hours).

Dated: November 9, 2017.

Anna K. Abram,

Deputy Commissioner for Policy, Planning, Legislation, and Analysis.

[FR Doc. 2017–24923 Filed 11–16–17; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–N–6152]

Authorizations of Emergency Use of In Vitro Diagnostic Devices for Detection of Zika Virus; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the issuance of two Emergency Use Authorizations (EUAs) (the Authorizations) for in vitro diagnostic devices for detection of the Zika virus in response to the Zika virus outbreak in the Americas. FDA issued these Authorizations under the Federal Food, Drug, and Cosmetic Act (the FD&C Act), as requested by Siemens Healthcare Diagnostics, Inc. and Chembio Diagnostic Systems, Inc. The Authorizations contain, among other things, conditions on the emergency use of the authorized in vitro diagnostic devices. The Authorizations follow the February 26, 2016, determination by the Secretary of Health and Human Services (HHS) that there is a significant potential for a public health emergency that has a significant potential to affect national security or the health and security of U.S. citizens living abroad and that involves Zika virus. On the basis of such determination, the Secretary of HHS declared on February 26, 2016, that circumstances exist justifying the authorization of emergency use of in vitro diagnostic tests for detection of Zika virus and/or diagnosis of Zika virus infection, subject to the terms of any authorization issued under the FD&C Act. The Authorizations, which include an explanation of the reasons for issuance, are reprinted in this document.

DATES: The Authorization for Siemens Healthcare Diagnostics, Inc. is effective as of September 18, 2017; the Authorization for Chembio Diagnostic Systems, Inc. is effective as of September 27, 2017.

ADDRESSES: Submit written requests for single copies of the EUAs to the Office of Counterterrorism and Emerging Threats, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, Rm. 4338, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request or include a fax number to which the Authorizations may be sent. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the Authorizations.

FOR FURTHER INFORMATION CONTACT: Carmen Maher, Office of Counterterrorism and Emerging Threats, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, Rm. 4347, Silver Spring, MD 20993–0002, 301–796–8510 (this is not a toll free number).

SUPPLEMENTARY INFORMATION:

I. Background

Section 564 of the FD&C Act (21 U.S.C. 360bbb–3) as amended by the Project BioShield Act of 2004 (Pub L. 108–276) and the Pandemic and All-Hazards Preparedness Reauthorization Act of 2013 (Pub L. 113–5) allows FDA to strengthen the public health protections against biological, chemical, nuclear, and radiological agents. Among other things, section 564 of the FD&C Act allows FDA to authorize the use of an unapproved medical product or an unapproved use of an approved medical product in certain situations. With this EUA authority, FDA can help ensure that medical countermeasures may be used in emergencies to diagnose, treat, or prevent serious or life-threatening diseases or conditions caused by biological, chemical, nuclear, or radiological agents when there are no adequate, approved, and available alternatives.

Section 564(b)(1) of the FD&C Act provides that, before an EUA may be issued, the Secretary of HHS must declare that circumstances exist justifying the authorization based on one of the following grounds: (1) A determination by the Secretary of Homeland Security that there is a domestic emergency, or a significant potential for a domestic emergency, involving a heightened risk of attack with a biological, chemical, radiological, or nuclear agent or agents; (2) a determination by the Secretary of Defense that there is a military emergency, or a significant potential for a military emergency, involving a heightened risk to U.S. military forces of attack with a biological, chemical, radiological, or nuclear agent or agents; (3) a determination by the Secretary of HHS that there is a public health emergency, or a significant potential for a public health emergency, that affects, or has a significant potential to affect, national security or the health and security of U.S. citizens living abroad, and that involves a biological, chemical, radiological, or nuclear agent or agents, or a disease or condition that may be attributable to such agent or agents; or (4) the identification of a material threat by the Secretary of Homeland Security under section 319F–2 of the Public Health Service (PHS) Act (42 U.S.C. 247d–6b) sufficient to affect national security or the health and security of U.S. citizens living abroad.

Once the Secretary of HHS has declared that circumstances exist justifying an authorization under section 564 of the FD&C Act, FDA may authorize the emergency use of a drug, device, or biological product if the Agency concludes that the statutory criteria are satisfied. Under section 564(h)(1) of the FD&C Act, FDA is required to publish in the **Federal Register** a notice of each authorization, and each termination or revocation of an authorization, and an explanation of the reasons for the action. Section 564 of the FD&C Act permits FDA to authorize the introduction into interstate commerce of a drug, device, or biological product intended for use when the Secretary of HHS has declared that circumstances exist justifying the authorization of emergency use. Products appropriate for emergency use may include products and uses that are not approved, cleared, or licensed under sections 505, 510(k), or 515 of the FD&C Act (21 U.S.C. 355, 360(k), and 360e) or section 351 of the PHS Act (42 U.S.C. 262). FDA may issue an EUA only if, after consultation with the HHS Assistant Secretary for Preparedness and Response, the Director of the National Institutes of Health, and the Director of the Centers for Disease Control and Prevention (to the extent feasible and appropriate given the applicable circumstances), FDA [1] concludes: (1) That an agent referred to in a declaration of emergency or threat can cause a serious or life-threatening disease or condition; (2) that, based on the totality of scientific evidence available to FDA, including data from adequate and well-controlled clinical trials, if available, it is reasonable to believe that: (A) the product may be effective in diagnosing, treating, or preventing (i) such disease or condition; or (ii) a serious or life-threatening disease or condition caused by a product authorized under section 564, approved or cleared under the FD&C Act, or licensed under section 351 of the PHS Act, for diagnosing, treating, or preventing such a disease or condition caused by such an agent; and (B) the known and potential benefits of the product, when used to diagnose, prevent, or treat such disease or condition, outweigh the known and potential risks of the product, taking into consideration the material threat posed by the agent or agents identified in a declaration under section 564(b)(1)(D) of the FD&C Act, if applicable; (3) that there is no adequate, approved, and available alternative to the product for diagnosing, preventing, or treating such disease or condition; and (4) that such other criteria as may be prescribed by regulation are satisfied.

No other criteria for issuance have been prescribed by regulation under

[1] The Secretary of HHS has delegated the authority to issue an EUA under section 564 of the FD&C Act to the Commissioner of Food and Drugs.

section 564(c)(4) of the FD&C Act. Because the statute is self-executing, regulations or guidance are not required for FDA to implement the EUA authority.

II. EUA Requests for In Vitro Diagnostic Devices for Detection of the Zika Virus

On February 26, 2016, the Secretary of HHS determined that there is a significant potential for a public health emergency that has a significant potential to affect national security or the health and security of U.S. citizens living abroad and that involves Zika virus. On February 26, 2016, under section 564(b)(1) of the FD&C Act, and on the basis of such determination, the Secretary of HHS declared that circumstances exist justifying the authorization of emergency use of in vitro diagnostic tests for detection of Zika virus and/or diagnosis of Zika virus infection, subject to the terms of any authorization issued under section 564 of the FD&C Act. Notice of the determination and declaration of the Secretary was published in the **Federal Register** on March 2, 2016 (81 FR 10878). On September 8, 2017, Siemens Healthcare Diagnostics, Inc. requested, and on September 18, 2017, FDA issued, an EUA for the ADVIA Centaur Zika test, subject to the terms of the Authorization. On September 14, 2017, Chembio Diagnostic Systems, Inc. requested, and on September 27, 2017, FDA issued an EUA for the DPP Zika IgM Assay System, subject to the terms of the Authorization.

III. Electronic Access

An electronic version of this document and the full text of the Authorizations are available on the internet at *https://www.regulations.gov/*.

IV. The Authorizations

Having concluded that the criteria for issuance of the Authorizations under section 564(c) of the FD&C Act are met, FDA has authorized the emergency use of two in vitro diagnostic devices for detection of Zika virus subject to the terms of the Authorizations. The Authorizations in their entirety (not including the authorized versions of the fact sheets and other written materials) follow and provide an explanation of the reasons for issuance, as required by section 564(h)(1) of the FD&C Act:

BILLING CODE 4164–01–P

September 18, 2017

Matthew Gee, M.Sc.
Senior Manager, Regulatory Affairs
Siemens Healthcare Diagnostics Inc.
511 Benedict Avenue
Tarrytown, NY 10591-5097

Dear Mr. Gee:

This letter is in response to your request that the Food and Drug Administration (FDA) issue an Emergency Use Authorization (EUA) for emergency use of Siemens Healthcare Diagnostics Incorporated's ("Siemens Healthcare Diagnostics") ADVIA Centaur Zika test for the presumptive qualitative detection of Zika virus IgM antibodies in human serum and plasma (potassium EDTA or lithium heparin, each collected alongside a patient-matched serum specimen) specimens collected from individuals meeting the Centers for Disease Control and Prevention (CDC) Zika virus clinical criteria (e.g., clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated), by laboratories in the United States (U.S.) that are certified under the Clinical Laboratory Improvement Amendments of 1988 (CLIA), 42 U.S.C. § 263a, to perform high or moderate complexity tests, or by similarly qualified non-U.S. laboratories,[1] pursuant to section 564 of the Federal Food, Drug, and Cosmetic Act (the Act) (21 U.S.C. § 360bbb-3). Specimens from symptomatic patients or returning travelers from endemic areas should not be collected prior to 8 days after onset of symptoms or risk of exposure, respectively. Where there are presumptive Zika positive results from the ADVIA Centaur Zika test, confirmation of the presence of anti-Zika IgM antibodies requires additional testing, as described in the Scope of Authorization of this letter (Section II) and in the authorized Instructions for Use document, and/or consideration alongside test results for other patient-matched specimens using the latest CDC testing algorithms for the diagnosis of Zika virus infection.[2]

On February 26, 2016, pursuant to section 564(b)(1)(C) of the Act (21 U.S.C. § 360bbb-3(b)(1)(C), the Secretary of Health and Human Services (HHS) determined that there is a significant potential for a public health emergency that has a significant potential to affect national security or the health and security of United States citizens living abroad and that

[1] For ease of reference, this letter will refer to "laboratories in the United States (U.S.) that are certified under the Clinical Laboratory Improvement Amendments of 1988 (CLIA), 42 U.S.C. § 263a, to perform high or moderate complexity tests, or by similarly qualified non-U.S. laboratories" as "authorized laboratories."
[2] Available at http://www.cdc.gov/zika/laboratories/lab-guidance.html (last updated on July 24, 2017).

involves Zika virus.[3] Pursuant to section 564(b)(1) of the Act (21 U.S.C. § 360bbb-3(b)(1)), and on the basis of such determination, the Secretary of HHS then declared that circumstances exist justifying the authorization of the emergency use of *in vitro* diagnostic tests for detection of Zika virus and/or diagnosis of Zika virus infection, subject to the terms of any authorization issued under 21 U.S.C. § 360bbb-3(a).[4]

Having concluded that the criteria for issuance of this authorization under section 564(c) of the Act (21 U.S.C. § 360bbb-3(c)) are met, I am authorizing the emergency use of the ADVIA Centaur Zika test (as described in the Scope of Authorization section of this letter (Section II)) in individuals meeting CDC Zika virus clinical criteria (e.g., clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated) (as described in the Scope of Authorization section of this letter (Section II)) for the presumptive qualitative detection of Zika virus infection by authorized laboratories, subject to the terms of this authorization.

I. Criteria for Issuance of Authorization

I have concluded that the emergency use of the ADVIA Centaur Zika test for the presumptive qualitative detection of Zika virus IgM antibodies in the specified population meets the criteria for issuance of an authorization under section 564(c) of the Act, because I have concluded that:

1. The Zika virus can cause Zika virus infection, a serious or life-threatening disease or condition to humans infected with the virus;

2. Based on the totality of scientific evidence available to FDA, it is reasonable to believe that the ADVIA Centaur Zika test may be effective in diagnosing recent Zika virus infection, and that the known and potential benefits of the ADVIA Centaur Zika test for diagnosing Zika virus infection outweigh the known and potential risks of such product, when, for presumptive Zika positive results, additional testing (as described in the Instructions for Use document) is performed and/or test results for other patient-matched specimens (using the latest CDC testing algorithms for the diagnosis of Zika virus infection) are considered; and

3. There is no adequate, approved, and available alternative to the emergency use of the ADVIA Centaur Zika test for diagnosing Zika virus infection.[5]

---

[3] As amended by the Pandemic and All-Hazards Preparedness Reauthorization Act, Pub. L. No. 113-5, under section 564(b)(1)(C) of the Act, the Secretary may make a determination of a public health emergency, or of a significant potential for a public health emergency.

[4] HHS. *Determination and Declaration Regarding Emergency Use of In Vitro Diagnostic Tests for Detection of Zika Virus and/or Diagnosis of Zika Virus Infection.* 81 Fed. Reg. 10878 (March 2, 2016).

[5] No other criteria of issuance have been prescribed by regulation under section 564(c)(4) of the Act.

II. Scope of Authorization

I have concluded, pursuant to section 564(d)(1) of the Act, that the scope of this authorization is limited to the use of the authorized ADVIA Centaur Zika test by authorized laboratories for the presumptive qualitative detection of Zika virus IgM antibodies in individuals meeting CDC Zika virus clinical criteria (e.g., clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated) when, for presumptive Zika positive results, additional testing (as described in the Instructions for Use document) is performed[6] and/or test results for other patient-matched specimens (using the latest CDC testing algorithms for the diagnosis of Zika virus infection) are considered.

The Authorized ADVIA Centaur Zika Test

The ADVIA Centaur Zika test is an immunoassay for the *in vitro* presumptive qualitative detection of Zika virus IgM antibodies in human serum and potassium EDTA or lithium heparin plasma (each collected alongside a patient-matched serum specimen) specimens and other authorized specimen types from individuals meeting CDC Zika virus clinical criteria (e.g., clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated).

The ADVIA Centaur Zika test is comprised of the ADVIA Centaur Zika Ab and ADVIA Centaur Zika IgM assays. All ADVIA Centaur Zika Ab reactive samples must be tested with the ADVIA Centaur Zika IgM assay.

The ADVIA Centaur Zika Ab assay is an antibody capture immunoassay using a 2-pass format. In the first pass, coated microparticles (solid phase) are added to the cuvette, binding antibodies from the patient sample. The captured antibodies are washed and resuspended. In the second pass, the anti-Zika antibodies captured on the Solid Phase are detected by the addition of NS1 antigen labeled with acridinium ester (Lite Reagent) for chemiluminescent detection.

The ADVIA Centaur Zika IgM assay is an IgM capture immunoassay using a 2-pass format. In the first pass, the microparticles, coated with anti-human IgM monoclonal antibody (Solid Phase), are added to the cuvette, binding IgM from the patient sample. The captured IgM antibodies are washed and resuspended. In the second pass, the anti-Zika IgM captured on the Solid Phase is detected by the addition of NS1 antigen labeled with acridinium ester (Lite Reagent) for chemiluminescent detection.

The ADVIA Centaur Zika test includes use of the ADVIA Centaur XP and/or ADVIA Centaur XPT immunoassay analyzers, and other authorized instruments.

[6] As discussed in the Instructions for Use document, the additional testing for presumptive Zika IgM positive results is to be performed using the latest CDC testing algorithms for the diagnosis of Zika virus infection.

Page 4 – Mr. Gee, Siemens Healthcare Diagnostics Inc.

The ADVIA Centaur Zika test requires the following control materials and assay calibrators:

- ADVIA Centaur ZikaM low calibrator
- ADVIA Centaur ZikaM high calibrator
- ADVIA Centaur ZikaM Calibrator Assigned Value Card and barcode labels
- ADVIA Centaur ZikaM Master Curve Card
- ADVIA Centaur ZikaM Quality Control
    - 2 x 2 mL negative control
    - 2 x 2 mL positive control
    - Lot-specific assigned value card and barcode labels
- ADVIA Centaur ZikaAb Quality Control
    - 2 x 2 mL negative control
    - 2 x 2 mL positive control
    - Lot-specific assigned value card and barcode labels

Quality control requirements should be followed in conformance with local, state, and federal regulations or accreditation requirements and the user laboratory's standard quality control procedures.

The ADVIA Centaur Zika test also requires the use of additional materials and ancillary reagents commonly used in clinical laboratories and that are described in the authorized ADVIA Centaur Zika test Instructions for Use.

The above described ADVIA Centaur Zika test, when labeled consistently with the labeling authorized by FDA entitled "ADVIA Centaur Zika test" (available at http://www.fda.gov/MedicalDevices/%20Safety/EmergencySituations/ucm161496.htm), is authorized to be distributed to and used by authorized laboratories under this EUA, despite the fact that it does not meet certain requirements otherwise required by federal law. This labeling may be revised by Siemens Healthcare Diagnostics in consultation with, and with concurrence of, the Division of Microbiology Devices (DMD)/Office of In Vitro Diagnostics and Radiological Health (OIR)/Center for Devices and Radiological Health (CDRH).

The above described ADVIA Centaur Zika test is authorized to be accompanied by the following information pertaining to the emergency use, which is authorized to be made available to healthcare providers and patients:

- Fact Sheet for Healthcare Providers: Interpreting ADVIA Centaur Zika Test Results
- Fact Sheet for Patients: Understanding Results from the ADVIA Centaur Zika Test

Other Fact Sheets developed by Siemens Healthcare Diagnostics in consultation with, and with concurrence of, the Office of Counterterrorism and Emerging Threats (OCET)/Office of the Chief Scientist (OCS)/Office of the Commissioner (OC) and DMD/OIR/CDRH may be authorized to accompany the above described ADVIA Centaur Zika test and to be made available to healthcare providers and patients.

As described in Section IV below, Siemens Healthcare Diagnostics is also authorized to make available additional information relating to the emergency use of the authorized ADVIA Centaur Zika test that is consistent with, and does not exceed, the terms of this letter of authorization.

I have concluded, pursuant to section 564(d)(2) of the Act, that it is reasonable to believe that the known and potential benefits of the authorized ADVIA Centaur Zika test in the specified population, when used for presumptive qualitative detection of Zika virus IgM antibodies and used consistently with the Scope of Authorization of this letter (Section II), outweigh the known and potential risks of such a product.

I have concluded, pursuant to section 564(d)(3) of the Act, based on the totality of scientific evidence available to FDA, that it is reasonable to believe that the authorized ADVIA Centaur Zika test may be effective in the diagnosis of recent Zika virus infection, when used consistently with the Scope of Authorization of this letter (Section II), pursuant to section 564(c)(2)(A) of the Act.

FDA has reviewed the scientific information available to FDA, including the information supporting the conclusions described in Section I above, and concludes that the authorized ADVIA Centaur Zika test, when used to diagnose Zika virus infection in the specified population (as described in the Scope of Authorization of this letter (Section II)), meets the criteria set forth in section 564(c) of the Act concerning safety and potential effectiveness.

The emergency use of the authorized ADVIA Centaur Zika test under this EUA must be consistent with, and may not exceed, the terms of this letter, including the Scope of Authorization (Section II) and the Conditions of Authorization (Section IV). Subject to the terms of this EUA and under the circumstances set forth in the Secretary of HHS's determination described above and the Secretary of HHS's corresponding declaration under section 564(b)(1), the ADVIA Centaur Zika test described above is authorized to diagnose Zika virus infection in individuals meeting CDC Zika virus clinical criteria (e.g., clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated).

This EUA will cease to be effective when the HHS declaration that circumstances exist to justify the EUA is terminated under section 564(b)(2) of the Act or when the EUA is revoked under section 564(g) of the Act.

III. Waiver of Certain Requirements

I am waiving the following requirements for the ADVIA Centaur Zika test during the duration of this EUA:

- Current good manufacturing practice requirements, including the quality system requirements under 21 CFR Part 820 with respect to the design, manufacture, packaging, labeling, storage, and distribution of the ADVIA Centaur Zika test.

- Labeling requirements for cleared, approved, or investigational devices, including labeling requirements under 21 CFR 809.10 and 21 CFR 809.30, except for the intended use statement (21 CFR 809.10(a)(2), (b)(2)); adequate directions for use (21 U.S.C. 352(f)), (21 CFR 809.10(b)(5), (7), and (8)); any appropriate limitations on the use of the device including information required under 21 CFR 809.10(a)(4); and any available information regarding performance of the device, including requirements under 21 CFR 809.10(b)(12).

IV. Conditions of Authorization

Pursuant to section 564 of the Act, I am establishing the following conditions on this authorization:

Siemens Healthcare Diagnostics and Its Authorized Distributor(s)

A. Siemens Healthcare Diagnostics and its authorized distributor(s) will distribute the authorized ADVIA Centaur Zika test with the authorized labeling only to authorized laboratories. Siemens Healthcare Diagnostics may request changes to the authorized labeling. Such requests will be made by Siemens Healthcare Diagnostics in consultation with, and require concurrence of, DMD/OIR/CDRH.

B. Siemens Healthcare Diagnostics and its authorized distributor(s) will provide to authorized laboratories the authorized ADVIA Centaur Zika test Fact Sheet for Healthcare Providers and the authorized ADVIA Centaur Zika test Fact Sheet for Patients, and any additional ADVIA Centaur Zika test Fact Sheets for Healthcare Providers and Patients that OCET/OCS/OC and DMD/OIR/CDRH may authorize.

C. Siemens Healthcare Diagnostics and its authorized distributor(s) will make available on their websites the authorized ADVIA Centaur Zika test Fact Sheet for Healthcare Providers and the authorized ADVIA Centaur Zika test Fact Sheet for Patients, and any additional ADVIA Centaur Zika test Fact Sheets for Healthcare Providers and Patients that OCET/OCS/OC and DMD/OIR/CDRH may authorize.

D. Siemens Healthcare Diagnostics and its authorized distributor(s) will inform authorized laboratories and relevant public health authority(ies) of this EUA, including the terms and conditions herein.

Page 7 – Mr. Gee, Siemens Healthcare Diagnostics Inc.

E. Siemens Healthcare Diagnostics and its authorized distributor(s) will ensure that authorized laboratories using the authorized ADVIA Centaur Zika test have a process in place for reporting test results to healthcare providers and relevant public health authorities, as appropriate.[7]

F. Through a process of inventory control, Siemens Healthcare Diagnostics and its authorized distributor(s) will maintain records of device usage.

G. Siemens Healthcare Diagnostics and its authorized distributor(s) will collect information on the performance of the test. Siemens Healthcare Diagnostics will report to FDA any suspected occurrence of false positive and false negative results and significant deviations from the established performance characteristics of the test of which Siemens Healthcare Diagnostics becomes aware.

H. Siemens Healthcare Diagnostics and its authorized distributor(s) are authorized to make available additional information relating to the emergency use of the authorized ADVIA Centaur Zika test that is consistent with, and does not exceed, the terms of this letter of authorization.

Siemens Healthcare Diagnostics

I. Siemens Healthcare Diagnostics will notify FDA of any authorized distributor(s) of the ADVIA Centaur Zika test, including the name, address, and phone number of any authorized distributor(s).

J. Siemens Healthcare Diagnostics will provide its authorized distributor(s) with a copy of this EUA, and communicate to its authorized distributor(s) any subsequent amendments that might be made to this EUA and its authorized accompanying materials (e.g., Fact Sheets, Instructions for Use).

K. Siemens Healthcare Diagnostics may request changes to the authorized ADVIA Centaur Zika test Fact Sheet for Healthcare Providers and the authorized ADVIA Centaur Zika test Fact Sheet for Patients. Siemens Healthcare Diagnostics may also develop new ADVIA Centaur Zika test Fact Sheets for Healthcare Providers and Patients, if appropriate, and may request changes to such Fact Sheets. All such requests listed in this condition of authorization will be made by Siemens Healthcare Diagnostics in consultation with, and require concurrence of, OCET/OCS/OC and DMD/OIR/CDRH.

L. Siemens Healthcare Diagnostics may request the addition of other instruments for use with the authorized ADVIA Centaur Zika test. Such requests will be made by Siemens Healthcare Diagnostics in consultation with, and require concurrence of, DMD/OIR/CDRH.

---

[7] For questions related to reporting Zika test results to relevant public health authorities, it is recommended that Siemens Healthcare Diagnostics and authorized laboratories consult with the applicable country, state, or territory health department(s). According to CDC, Zika is a nationally notifiable condition (see http://www.cdc.gov/zika/).

M. Siemens Healthcare Diagnostics may request the addition of other ancillary reagents for use with the authorized ADVIA Centaur Zika test. Such requests will be made by Siemens Healthcare Diagnostics in consultation with, and require concurrence of, DMD/OIR/CDRH.

N. Siemens Healthcare Diagnostics may request the addition of other specimen types for use with the authorized ADVIA Centaur Zika test. Such requests will be made by Siemens Healthcare Diagnostics in consultation with, and require concurrence of, DMD/OIR/CDRH.

O. Siemens Healthcare Diagnostics may request the addition of other control materials for use with the authorized ADVIA Centaur Zika test. Such requests will be made by Siemens Healthcare Diagnostics in consultation with, and require concurrence of, DMD/OIR/CDRH.

P. Siemens Healthcare Diagnostics may request substitution for or changes to the authorized materials used in the detection process of the human anti-Zika IgM in the specimen. Such requests will be made by Siemens Healthcare Diagnostics in consultation with, and require concurrence of, DMD/OIR/CDRH.

Q. Siemens Healthcare Diagnostics will track adverse events and report to FDA under 21 CFR Part 803.

R. Siemens Healthcare Diagnostics will evaluate the performance of the ADVIA Centaur Zika test with any FDA-recommended or established panel(s) of characterized clinical specimens, and will submit that performance data to FDA. After DMD/OIR/CDRH's review of and concurrence with the data, Siemens Healthcare Diagnostics will update its labeling, in consultation with, and with concurrence of, DMD/OIR/CDRH, to reflect the additional testing.

S. Siemens Healthcare Diagnostics will assess traceability[8] of the ADVIA Centaur Zika test with any FDA-recommended reference material(s). After submission to FDA and DMD/OIR/CDRH's review of and concurrence with the data, Siemens Healthcare Diagnostics will update its labeling to reflect the additional testing.

T. Siemens Healthcare Diagnostics will track the performance of the ADVIA Centaur Zika test and report to DMD/OIR/CDRH on a semi-annual basis.

[8] Traceability refers to tracing analytical sensitivity/reactivity back to a FDA-recommended reference material.

Page 9 – Mr. Gee, Siemens Healthcare Diagnostics Inc.

Authorized Laboratories

U. Authorized laboratories will include with reports of the results of the ADVIA Centaur Zika test the authorized Fact Sheet for Healthcare Providers and the authorized Fact Sheet for Patients, and any additional ADVIA Centaur Zika test Fact Sheets for Healthcare Providers and Patients that OCET/OCS/OC and DMD/OIR/CDRH may authorize. Under exigent circumstances, other appropriate methods for disseminating these Fact Sheets may be used, which may include mass media.

V. Authorized laboratories will perform the ADVIA Centaur Zika test on only human serum or plasma (potassium EDTA or lithium heparin, each collected alongside a patient-matched serum specimen) specimens or with other authorized specimen types.

W. If non-serum specimens are used with the ADVIA Centaur Zika test, authorized laboratories responsible for collecting the patient specimen must collect a patient-matched serum specimen, or if this is not possible, an additional serum specimen must be collected soon after the original specimen. This is to facilitate any additional testing that may be required, using the latest CDC testing algorithms for the diagnosis of Zika virus infection, to confirm Zika virus infection.

X. Authorized laboratories must read the results of the ADVIA Centaur Zika test on the ADVIA Centaur XP, ADVIA Centaur XPT, or on other authorized instruments.

Y. Within the United States and its territories, authorized laboratories will report all Presumptive Zika Positive results to Siemens Healthcare Diagnostics.

Z. Authorized laboratories will report only the final interpretation of algorithm test results (Presumptive Zika Positive, Negative for IgM antibodies to Zika virus, or Negative for antibodies to Zika virus), as described in the Instructions for Use document, to healthcare providers.

AA. Authorized laboratories will have a process in place to assure that, for Presumptive Zika Positive results, additional testing (as described in the Instructions for Use document) is performed and/or test results for other patient-matched specimens, using the latest CDC testing algorithms for the diagnosis of Zika virus infection, are considered.

BB. Authorized laboratories will have a process in place for reporting test results to healthcare providers and relevant public health authorities, as appropriate.[9]

---

[9] For questions related to reporting Zika test results to relevant public health authorities, it is recommended that Siemens Healthcare Diagnostics and authorized laboratories consult with the applicable country, state, or territory health department(s). According to CDC, Zika is a nationally notifiable condition (see http://www.cdc.gov/zika/).

Page 10 – Mr. Gee, Siemens Healthcare Diagnostics Inc.

CC. Authorized laboratories will collect information on the performance of the ADVIA Centaur Zika test and report to DMD/OIR/CDRH (*via* email CDRH-EUA-Reporting@fda.hhs.gov) and Siemens Healthcare Diagnostics any suspected occurrence of false negative and false positive results and significant deviations from the established performance characteristics of which they become aware.

DD. All laboratory personnel using the assay must be appropriately trained in performing and interpreting immunoassay techniques, use appropriate laboratory and personal protective equipment when handling this kit, and use the test in accordance with the authorized labeling. All laboratory personnel using the assay must also be trained in and be familiar with the interpretation of results of the ADVIA Centaur Zika test.

Siemens Healthcare Diagnostics, Its Authorized Distributor(s), and Authorized Laboratories

EE. Siemens Healthcare Diagnostics, its authorized distributor(s), and authorized laboratories will ensure that any records associated with this EUA are maintained until notified by FDA. Such records will be made available to FDA for inspection upon request.

Conditions Related to Advertising and Promotion

FF. All advertising and promotional descriptive printed matter relating to the use of the authorized ADVIA Centaur Zika test shall be consistent with the authorized Fact Sheets and authorized labeling, as well as the terms set forth in this EUA and the applicable requirements set forth in the Act and FDA regulations.

GG. All advertising and promotional descriptive printed matter relating to the use of the authorized ADVIA Centaur Zika test shall clearly and conspicuously state that:

- This test has not been FDA cleared or approved;
- This test has been authorized by FDA under an EUA for use by authorized laboratories;
- This test has been authorized only for the diagnosis of Zika virus infection and not for any other viruses or pathogens; and
- This test is only authorized for the duration of the declaration that circumstances exist justifying the authorization of the emergency use of *in vitro* diagnostic tests for detection of Zika virus and/or diagnosis of Zika virus infection under section 564(b)(1) of the Act, 21 U.S.C. § 360bbb-3(b)(1), unless the authorization is terminated or revoked sooner.

No advertising or promotional descriptive printed matter relating to the use of the authorized ADVIA Centaur Zika test may represent or suggest that this test is safe or effective for the diagnosis of Zika virus infection.

The emergency use of the authorized ADVIA Centaur Zika test as described in this letter of authorization must comply with the conditions and all other terms of this authorization.

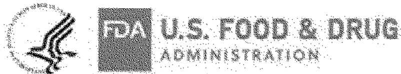
V. Duration of Authorization

This EUA will be effective until the declaration that circumstances exist justifying the authorization of the emergency use of *in vitro* diagnostic tests for detection of Zika virus and/or diagnosis of Zika virus infection is terminated under section 564(b)(2) of the Act or the EUA is revoked under section 564(g) of the Act.

Sincerely,

Rachel Sherman, M.D., M.P.H.
Principal Deputy Commissioner

Enclosures



September 27, 2017

Thomas D. Ippolito
Vice President, Clinical and Regulatory Affairs
Chembio Diagnostic Systems, Inc.
3661 Horseblock Road
Medford, NY 11763

Dear Mr. Ippolito:

This letter is in response to your request that the Food and Drug Administration (FDA) issue an Emergency Use Authorization (EUA) for emergency use of Chembio Diagnostic Systems, Inc.'s ("Chembio") DPP Zika IgM Assay System for the presumptive qualitative detection of Zika virus IgM antibodies in human serum (plain or separation gel) and fingerstick whole blood, EDTA venous whole blood, or EDTA plasma (each collected alongside a patient-matched serum specimen) specimens collected from individuals meeting the Centers for Disease Control and Prevention (CDC) Zika virus clinical criteria (e.g., a history of clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated), by laboratories in the United States that are certified under the Clinical Laboratory Improvement Amendments of 1988 (CLIA), 42 U.S.C. § 263a, to perform high or moderate complexity tests, or by similarly qualified non-U.S. laboratories,[1] pursuant to section 564 of the Federal Food, Drug, and Cosmetic Act (the Act) (21 U.S.C. § 360bbb-3). Specimens from symptomatic patients or returning travelers from endemic areas should not be collected prior to 8 days after onset of symptoms or risk of exposure, respectively. Where there are reactive results (i.e., presumptive Zika IgM positive), from the DPP Zika IgM Assay System, confirmation of the presence of anti-Zika IgM antibodies requires additional testing, as described in the Scope of Authorization of this letter (Section II) and in the authorized Instructions for Use document, and/or consideration alongside test results for other patient-matched specimens using the latest CDC testing algorithms for the diagnosis of Zika virus infection.[2]

On February 26, 2016, pursuant to section 564(b)(1)(C) of the Act (21 U.S.C. § 360bbb-3(b)(1)(C), the Secretary of Health and Human Services (HHS) determined that there is a significant potential for a public health emergency that has a significant potential to affect

[1] For ease of reference, this letter will refer to "laboratories in the United States that are certified under the Clinical Laboratory Improvement Amendments of 1988 (CLIA), 42 U.S.C. § 263a, to perform high or moderate complexity tests, or by similarly qualified non-U.S. laboratories" as "authorized laboratories."

[2] Available at http://www.cdc.gov/zika/laboratories/lab-guidance.html (last updated on July 24, 2017).

national security or the health and security of United States citizens living abroad and that involves Zika virus.[3] Pursuant to section 564(b)(1) of the Act (21 U.S.C. § 360bbb-3(b)(1)), and on the basis of such determination, the Secretary of HHS then declared that circumstances exist justifying the authorization of the emergency use of *in vitro* diagnostic tests for detection of Zika virus and/or diagnosis of Zika virus infection, subject to the terms of any authorization issued under 21 U.S.C. § 360bbb-3(a).[4]

Having concluded that the criteria for issuance of this authorization under section 564(c) of the Act (21 U.S.C. § 360bbb-3(c)) are met, I am authorizing the emergency use of the DPP Zika IgM Assay System (as described in the Scope of Authorization section of this letter (Section II)) in individuals meeting CDC Zika virus clinical criteria (e.g., a history of clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated) (as described in the Scope of Authorization section of this letter (Section II)) for the presumptive qualitative detection of Zika virus infection by authorized laboratories, subject to the terms of this authorization.

I. Criteria for Issuance of Authorization

I have concluded that the emergency use of the DPP Zika IgM Assay System for the presumptive qualitative detection of Zika virus IgM antibodies in the specified population meets the criteria for issuance of an authorization under section 564(c) of the Act, because I have concluded that:

1. The Zika virus can cause Zika virus infection, a serious or life-threatening disease or condition to humans infected with the virus;

2. Based on the totality of scientific evidence available to FDA, it is reasonable to believe that the DPP Zika IgM Assay System may be effective in diagnosing recent Zika virus infection, and that the known and potential benefits of the DPP Zika IgM Assay System for diagnosing Zika virus infection outweigh the known and potential risks of such product, when, for reactive results (i.e., presumptive Zika IgM positive), additional testing (as described in the Instructions for Use document) is performed and/or test results for other patient-matched specimens (using the latest CDC testing algorithms for the diagnosis of Zika virus infection) are considered; and

3. There is no adequate, approved, and available alternative to the emergency use of the DPP Zika IgM Assay System for diagnosing Zika virus infection.[5]

[3] As amended by the Pandemic and All-Hazards Preparedness Reauthorization Act, Pub. L. No. 113-5, under section 564(b)(1)(C) of the Act, the Secretary may make a determination of a public health emergency, or of a significant potential for a public health emergency.

[4] HHS. *Determination and Declaration Regarding Emergency Use of In Vitro Diagnostic Tests for Detection of Zika Virus and/or Diagnosis of Zika Virus Infection.* 81 Fed. Reg. 10878 (March 2, 2016).

[5] No other criteria of issuance have been prescribed by regulation under section 564(c)(4) of the Act.

II. Scope of Authorization

I have concluded, pursuant to section 564(d)(1) of the Act, that the scope of this authorization is limited to the use of the authorized DPP Zika IgM Assay System by authorized laboratories for the presumptive qualitative detection of Zika virus IgM antibodies in individuals meeting CDC Zika virus clinical criteria (e.g., a history of clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated) when, for reactive results (i.e., presumptive Zika IgM positive), additional testing (as described in the Instructions for Use document) is performed[6] and/or test results for other patient-matched specimens (using the latest CDC testing algorithms for the diagnosis of Zika virus infection) are considered.

The Authorized DPP Zika IgM Assay System

The DPP Zika IgM Assay System is a single-use immunochromatographic lateral flow assay for the *in vitro* presumptive qualitative detection of Zika virus IgM antibodies in human serum (plain or separation gel) and fingerstick whole blood, EDTA venous whole blood, or EDTA plasma (each collected alongside a patient-matched serum specimen) specimens and other authorized specimen types from individuals meeting CDC Zika virus clinical criteria (e.g., a history of clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated).

The DPP Zika IgM Assay System employs a dual path platform technology and consists of a sample path that distributes sample onto a reagent strip containing a TEST (T) area and a CONTROL (C) area in the test-control window of the test device. The reagent strip is for the detection of ZIKV IgM antibodies. The test procedure is based on capturing human IgM antibodies from the patient specimen in the TEST (T) area that is functionalized with Zika NS1 antigens followed by the addition of an antibody-binding colored conjugate. The patient specimen is collected and then diluted with sample buffer before being applied to the SAMPLE+BUFFER Well#1 of the DPP Zika Test Device. The specimen migrates along the sample path membrane and is delivered to the TEST (T) area of the reagent strip, where Zika NS1 antigens are immobilized. Zika-specific antibodies, if present in the sample, bind to the immobilized NS1 antigens in the TEST (T) area, while non-specific antibodies bind to the Protein A in the CONTROL (C) area. Running buffer is then added into the BUFFER Well #2, which hydrates the dried antibody-binding colored conjugate causing it to migrate to the TEST area. ZIKV IgM antibodies bound to the TEST (T) area will capture the antibody-binding colored conjugate and detection is performed using the Chembio DPP Micro Reader, or other authorized instruments, that uses assay-specific algorithms to verify the presence of the control line and measure color intensity in the TEST (T) area position; it interprets the results using

[6] As discussed in the Instructions for Use document, the additional testing for reactive results (i.e., presumptive Zika IgM positive) is to be performed using the latest CDC testing algorithms for the diagnosis of Zika virus infection.

assay-specific cut-off values, and reports a reactive, nonreactive, or invalid result along with a numerical intensity value for the IgM test line.

One of the limitations of this test is the possibility of false positive results in patients with a history of infection with other flaviviruses. For reactive results (i.e., presumptive Zika IgM positive), additional testing (as described in the Instructions for Use document) and/or consideration of test results for other patient-matched specimens, using the latest CDC testing algorithms for the diagnosis of Zika virus infection, is therefore required to confirm Zika virus infection.

The DPP Zika IgM Assay System includes use of the DPP Zika Test Device kit and the DPP Micro Reader kit which are comprised of the following materials and instruments, or other authorized materials and instruments:

- The DPP Zika Test Device kit: individually pouched DPP Zika Test Devices each with a desiccant pouch, Microsafe tubes, sample vials, transfer pipets, DPP Zika IgM Sample Buffer- BLUE Cap, DPP Zika IgM Running Buffer – YELLOW Cap, product insert (authorized Instructions for Use) and a quick reference guide.
- The DPP Micro Reader kit: DPP Micro Reader, holder case, USB cable and user manual.

The DPP Zika IgM Assay System requires the following control materials or other authorized control materials, which are not provided with the test:

- DPP Zika IgM Assay Control Pack: DPP Zika Reactive Control, DPP Nonreactive Control and product insert. The assay controls are used to verify and assess the assay performance and verify the user's ability to properly perform the test and to interpret the results.

Quality control requirements should be followed in conformance with local, state, and federal regulations or accreditation requirements and the user laboratory's standard quality control procedures.

The DPP Zika IgM Assay System also requires the use of additional materials and ancillary reagents commonly used in clinical laboratories and that are described in the authorized DPP Zika IgM Assay System Instructions for Use.

The above described DPP Zika IgM Assay System, when labeled consistently with the labeling authorized by FDA entitled "DPP Zika IgM Assay System," "DPP Micro Reader," "DPP Zika IgM Assay Control Pack," and "DPP Zika IgM Assay System Quick Reference Instructions," (available at
http://www.fda.gov/MedicalDevices/Safety/EmergencySituations/ucm161496.htm), is authorized to be distributed to and used by authorized laboratories under this EUA, despite the fact that it does not meet certain requirements otherwise required by federal law. This labeling may be revised by Chembio in consultation with, and with concurrence of, the Division of Microbiology Devices (DMD)/Office of In Vitro Diagnostics and Radiological Health (OIR)/Center for Devices and Radiological Health (CDRH).

The above described DPP Zika IgM Assay System is authorized to be accompanied by the following information pertaining to the emergency use, which is authorized to be made available to healthcare providers and patients:

- Fact Sheet for Healthcare Providers: Interpreting DPP Zika IgM Assay System Results
- Fact Sheet for Patients: Understanding Results from the DPP Zika IgM Assay System

Other Fact Sheets developed by Chembio in consultation with, and with concurrence of, the Office of Counterterrorism and Emerging Threats (OCET)/Office of the Chief Scientist (OCS)/Office of the Commissioner (OC) and DMD/OIR/CDRH may be authorized to accompany the above described DPP Zika IgM Assay System and to be made available to healthcare providers and patients.

As described in Section IV below, Chembio is also authorized to make available additional information relating to the emergency use of the authorized DPP Zika IgM Assay System that is consistent with, and does not exceed, the terms of this letter of authorization.

I have concluded, pursuant to section 564(d)(2) of the Act, that it is reasonable to believe that the known and potential benefits of the authorized DPP Zika IgM Assay System in the specified population, when used for presumptive qualitative detection of Zika virus IgM antibodies and used consistently with the Scope of Authorization of this letter (Section II), outweigh the known and potential risks of such a product.

I have concluded, pursuant to section 564(d)(3) of the Act, based on the totality of scientific evidence available to FDA, that it is reasonable to believe that the authorized DPP Zika IgM Assay System may be effective in the diagnosis of recent Zika virus infection, when used consistently with the Scope of Authorization of this letter (Section II), pursuant to section 564(c)(2)(A) of the Act.

FDA has reviewed the scientific information available to FDA, including the information supporting the conclusions described in Section I above, and concludes that the authorized DPP Zika IgM Assay System, when used to diagnose Zika virus infection in the specified population (as described in the Scope of Authorization of this letter (Section II)), meets the criteria set forth in section 564(c) of the Act concerning safety and potential effectiveness.

The emergency use of the authorized DPP Zika IgM Assay System under this EUA must be consistent with, and may not exceed, the terms of this letter, including the Scope of Authorization (Section II) and the Conditions of Authorization (Section IV). Subject to the terms of this EUA and under the circumstances set forth in the Secretary of HHS's determination described above and the Secretary of HHS's corresponding declaration under section 564(b)(1), the DPP Zika IgM Assay System described above is authorized to diagnose Zika virus infection in individuals meeting CDC Zika virus clinical criteria (e.g., a history of clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated).

This EUA will cease to be effective when the HHS declaration that circumstances exist to justify the EUA is terminated under section 564(b)(2) of the Act or when the EUA is revoked under section 564(g) of the Act.

III. Waiver of Certain Requirements

I am waiving the following requirements for the DPP Zika IgM Assay System during the duration of this EUA:

- Current good manufacturing practice requirements, including the quality system requirements under 21 CFR Part 820 with respect to the design, manufacture, packaging, labeling, storage, and distribution of the DPP Zika IgM Assay System.

- Labeling requirements for cleared, approved, or investigational devices, including labeling requirements under 21 CFR 809.10 and 21 CFR 809.30, except for the intended use statement (21 CFR 809.10(a)(2), (b)(2)); adequate directions for use (21 U.S.C. 352(f)), (21 CFR 809.10(b)(5), (7), and (8)); any appropriate limitations on the use of the device including information required under 21 CFR 809.10(a)(4); and any available information regarding performance of the device, including requirements under 21 CFR 809.10(b)(12).

IV. Conditions of Authorization

Pursuant to section 564 of the Act, I am establishing the following conditions on this authorization:

Chembio and Its Authorized Distributor(s)

A. Chembio and its authorized distributor(s) will distribute the authorized DPP Zika IgM Assay System with the authorized labeling only to authorized laboratories. Chembio may request changes to the authorized labeling. Such requests will be made by Chembio in consultation with, and require concurrence of, DMD/OIR/CDRH.

B. Chembio and its authorized distributor(s) will provide to authorized laboratories the authorized DPP Zika IgM Assay System Fact Sheet for Healthcare Providers and the authorized DPP Zika IgM Assay System Fact Sheet for Patients, and any additional DPP Zika IgM Assay System Fact Sheets for Healthcare Providers and Patients that OCET/OCS/OC and DMD/OIR/CDRH may authorize.

C. Chembio and its authorized distributor(s) will make available on their websites the authorized DPP Zika IgM Assay System Fact Sheet for Healthcare Providers and the authorized DPP Zika IgM Assay System Fact Sheet for Patients, and any additional DPP Zika IgM Assay System Fact Sheets for Healthcare Providers and Patients that OCET/OCS/OC and DMD/OIR/CDRH may authorize.

Page 7 – Mr. Ippolito, Chembio Diagnostic Systems, Inc.

D. Chembio and its authorized distributor(s) will inform authorized laboratories and relevant public health authority(ies) of this EUA, including the terms and conditions herein.

E. Chembio and its authorized distributor(s) will ensure that authorized laboratories using the authorized DPP Zika IgM Assay System have a process in place for reporting test results to healthcare providers and relevant public health authorities, as appropriate.[7]

F. Through a process of inventory control, Chembio and its authorized distributor(s) will maintain records of device usage.

G. Chembio and its authorized distributor(s) will collect information on the performance of the assay. Chembio will report to FDA any suspected occurrence of false positive and false negative results and significant deviations from the established performance characteristics of the assay of which Chembio becomes aware.

H. Chembio and its authorized distributor(s) are authorized to make available additional information relating to the emergency use of the authorized DPP Zika IgM Assay System that is consistent with, and does not exceed, the terms of this letter of authorization.

I. Chembio and its authorized distributor(s) will make available the DPP Zika IgM Control Pack control material or other authorized control materials for purchase at the same time as the DPP Zika IgM Assay System.

Chembio

J. Chembio will notify FDA of any authorized distributor(s) of the DPP Zika IgM Assay System, including the name, address, and phone number of any authorized distributor(s).

K. Chembio will provide its authorized distributor(s) with a copy of this EUA, and communicate to its authorized distributor(s) any subsequent amendments that might be made to this EUA and its authorized accompanying materials (e.g., Fact Sheets, Instructions for Use).

L. Chembio may request changes to the authorized DPP Zika IgM Assay System Fact Sheet for Healthcare Providers and the authorized DPP Zika IgM Assay System Fact Sheet for Patients. Chembio may also develop new DPP Zika IgM Assay System Fact Sheets for Healthcare Providers and Patients, if appropriate, and may request changes to such Fact Sheets. All such requests listed in this condition of authorization will be made by Chembio in consultation with, and require concurrence of, OCET/OCS/OC and DMD/OIR/CDRH.

---

[7] For questions related to reporting Zika test results to relevant public health authorities, it is recommended that Chembio and authorized laboratories consult with the applicable country, state, or territory health department(s). According to CDC, Zika is a nationally notifiable condition (see http://www.cdc.gov/zika/).

M. Chembio may request the addition of other instruments for use with the authorized DPP Zika IgM Assay System. Such requests will be made by Chembio in consultation with, and require concurrence of, DMD/OIR/CDRH.

N. Chembio may request the addition of other ancillary reagents for use with the authorized DPP Zika IgM Assay System. Such requests will be made by Chembio in consultation with, and require concurrence of, DMD/OIR/CDRH.

O. Chembio may request the addition of other specimen types for use with the authorized DPP Zika IgM Assay System. Such requests will be made by Chembio in consultation with, and require concurrence of, DMD/OIR/CDRH.

P. Chembio may request the addition of other control materials for use with the authorized DPP Zika IgM Assay System. Such requests will be made by Chembio in consultation with, and require concurrence of, DMD/OIR/CDRH.

Q. Chembio may request substitution for or changes to the authorized materials used in the detection process of the human anti-Zika IgM in the specimen. Such requests will be made by Chembio in consultation with, and require concurrence of, DMD/OIR/CDRH.

R. Chembio will track adverse events and report to FDA under 21 CFR Part 803.

S. Chembio will evaluate the performance of the DPP Zika IgM Assay System with any FDA-recommended or established panel(s) of characterized clinical specimens, and will submit that performance data to FDA. After DMD/OIR/CDRH's review of and concurrence with the data, Chembio will update its labeling, in consultation with, and with concurrence of, DMD/OIR/CDRH, to reflect the additional testing.

T. Chembio will assess traceability[8] of the DPP Zika IgM Assay System with any FDA-recommended reference material(s). After submission to FDA and DMD/OIR/CDRH's review of and concurrence with the data, Chembio will update its labeling to reflect the additional testing.

U. Chembio will track the performance of the DPP Zika IgM Assay System and report to DMD/OIR/CDRH on a semi-annual basis.

Authorized Laboratories

V. Authorized laboratories will include with reports of the results of the DPP Zika IgM Assay System the authorized Fact Sheet for Healthcare Providers and the authorized Fact Sheet for Patients, and any additional DPP Zika IgM Assay System Fact Sheets for Healthcare Providers and Patients that OCET/OCS/OC and DMD/OIR/CDRH may authorize. Under exigent circumstances, other appropriate methods for disseminating

[8] Traceability refers to tracing analytical sensitivity/reactivity back to a FDA-recommended reference material.

these Fact Sheets may be used, which may include mass media.

W. Authorized laboratories will perform the DPP Zika IgM Assay System on only human serum (plain or separation gel) and fingerstick whole blood, EDTA venous whole blood, or EDTA plasma (each collected alongside a patient-matched serum specimen) specimens or with other authorized specimen types.

X. If non-serum specimens are used with the DPP Zika IgM Assay System, authorized laboratories responsible for collecting the patient specimen must collect a patient-matched serum specimen, or if this is not possible, an additional serum specimen must be collected soon after the original specimen. This is to facilitate any additional testing that may be required, using the latest CDC testing algorithms for the diagnosis of Zika virus infection, to confirm Zika virus infection.

Y. Authorized laboratories must read the results of the DPP Zika IgM Assay System on the DPP Micro Reader or on other authorized instruments. Authorized laboratories must not attempt to interpret the results of the DPP Zika IgM Assay System visually.

Z. Within the United States and its territories, authorized laboratories will report all reactive results (i.e., presumptive Zika IgM positive) to Chembio.

AA. Authorized laboratories will have a process in place to ensure that, for reactive results (i.e., presumptive Zika IgM positive), additional testing (as described in the Instructions for Use document) is performed and/or test results for other patient-matched specimens, using the latest CDC testing algorithms for the diagnosis of Zika virus infection, are considered.

BB. Authorized laboratories will have a process in place for reporting test results to healthcare providers and relevant public health authorities, as appropriate.[9]

CC. Authorized laboratories will collect information on the performance of the DPP Zika IgM Assay System and report to DMD/OIR/CDRH (*via* email CDRH-EUA-Reporting@fda.hhs.gov) and Chembio any suspected occurrence of false negative and false positive results and significant deviations from the established performance characteristics of which they become aware.

DD. All laboratory personnel using the assay must be appropriately trained in performing and interpreting immunochromatographic techniques, use appropriate laboratory and personal protective equipment when handling this kit, and use the test in accordance with the authorized labeling. All laboratory personnel using the assay must also be trained in and be familiar with the interpretation of results of the DPP Zika IgM Assay System.

[9] For questions related to reporting Zika test results to relevant public health authorities, it is recommended that Chembio and authorized laboratories consult with the applicable country, state, or territory health department(s). According to CDC, Zika is a nationally notifiable condition (see http://www.cdc.gov/zika/).

Chembio, Its Authorized Distributor(s), and Authorized Laboratories

EE. Chembio, its authorized distributor(s), and authorized laboratories will ensure that any records associated with this EUA are maintained until notified by FDA. Such records will be made available to FDA for inspection upon request.

Conditions Related to Advertising and Promotion

FF. All advertising and promotional descriptive printed matter relating to the use of the authorized DPP Zika IgM Assay System shall be consistent with the authorized Fact Sheets and authorized labeling, as well as the terms set forth in this EUA and the applicable requirements set forth in the Act and FDA regulations.

GG. All advertising and promotional descriptive printed matter relating to the use of the authorized DPP Zika IgM Assay System shall clearly and conspicuously state that:

- This test has not been FDA cleared or approved;
- This test has been authorized by FDA under an EUA for use by authorized laboratories;
- This test has been authorized only for the diagnosis of Zika virus infection and not for any other viruses or pathogens; and
- This test is only authorized for the duration of the declaration that circumstances exist justifying the authorization of the emergency use of *in vitro* diagnostic tests for detection of Zika virus and/or diagnosis of Zika virus infection under section 564(b)(1) of the Act, 21 U.S.C. § 360bbb-3(b)(1), unless the authorization is terminated or revoked sooner.

No advertising or promotional descriptive printed matter relating to the use of the authorized DPP Zika IgM Assay System may represent or suggest that this test is safe or effective for the diagnosis of Zika virus infection.

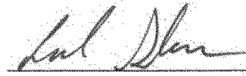
The emergency use of the authorized DPP Zika IgM Assay System as described in this letter of authorization must comply with the conditions and all other terms of this authorization.

V. Duration of Authorization

This EUA will be effective until the declaration that circumstances exist justifying the authorization of the emergency use of *in vitro* diagnostic tests for detection of Zika virus and/or diagnosis of Zika virus infection is terminated under section 564(b)(2) of the Act or the EUA is revoked under section 564(g) of the Act.

Page 11 – Mr. Ippolito, Chembio Diagnostic Systems, Inc.

Sincerely,



Rachel Sherman, M.D., M.P.H.
Principal Deputy Commissioner

Enclosures

Dated: November 9, 2017.

Anna K. Abram,

Deputy Commissioner for Policy, Planning, Legislation, and Analysis.

[FR Doc. 2017–25010 Filed 11–16–17; 8:45 am]

BILLING CODE 4164–01–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–D–6159]

Expedited Programs for Regenerative Medicine Therapies for Serious Conditions; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft document entitled ''Expedited Programs for Regenerative Medicine Therapies for Serious Conditions; Draft Guidance for Industry.'' The draft guidance, when finalized, will provide stakeholders engaged in the development of regenerative medicine therapies with FDA's current thinking on the expedited development and review of these products. The draft guidance describes the expedited programs available to sponsors of regenerative medicine therapies for serious or life-threatening diseases or conditions (referred to in the draft guidance as serious conditions), including those products designated as regenerative advanced therapies (which FDA refers to as ''regenerative medicine advanced therapy'' (RMAT) designation); describes how the Center for Biologics Evaluation and Research (CBER) will work with sponsors and encourage flexibility in clinical trial design to facilitate the development of data to demonstrate the safety and effectiveness of regenerative medicine therapies being developed to address unmet medical needs in patients with serious or life-threatening diseases or conditions; and describes the opportunities for sponsors of regenerative medicine therapies to interact with CBER review staff.

DATES: Submit either electronic or written comments on the draft guidance by February 15, 2018 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2017–D–6159 for ''Expedited Programs for Regenerative Medicine Therapies for Serious Conditions; Draft Guidance for Industry.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20

and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist the office in processing your requests. The draft guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 240–402–8010. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Tami Belouin, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft document entitled ''Expedited Programs for Regenerative Medicine Therapies for Serious Conditions; Draft Guidance for Industry.'' The draft guidance document describes the expedited programs available to sponsors of regenerative medicine therapies for serious or life-threatening diseases or conditions (referred to in the draft guidance as serious conditions), including those products designated as RMATs; provides information about the provisions in the 21st Century Cures Act (Cures Act) (Pub. L. 114–225) regarding the use of the accelerated approval pathway for regenerative medicine therapies that have been granted designation as an RMAT; describes how CBER will encourage flexibility in clinical trial design to facilitate the development of data to demonstrate the safety and effectiveness of regenerative medicine therapies that are being developed to address unmet needs in patients with serious conditions; and describes the opportunities for sponsors of regenerative medicine therapies to interact with CBER review staff.

The draft guidance document addresses regenerative medicine therapies, which are defined in section 506(g)(8) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act), as amended by the Cures Act, as including cell therapies, therapeutic tissue engineering products, human cell and tissue products, and combination products using any such therapies or products, except for those regulated solely under section 361 of the Public Health Service Act (PHS Act) (42 U.S.C. 264) and 21 CFR part 1271. Gene therapies, including genetically modified cells, that lead to a durable modification of cells or tissues can meet the definition of a regenerative medicine therapy. Under section 506(g) of the FD&C Act, RMAT designation is available for a drug (*i.e.,* a human drug, including a drug that is a biological product) that meets the definition of regenerative medicine therapy; is intended to treat, modify, reverse, or cure a serious or life-threatening disease or condition; and with respect to which preliminary clinical evidence indicates the potential to address unmet medical needs for such disease or condition. A combination product (biologic-device, biologic-drug, or biologic-device-drug) can be eligible for RMAT designation when the biological product provides the greatest contribution to the overall intended therapeutic effects of the combination product (*i.e.,* the primary mode of action in the combination product is conveyed by the biological product component).

Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of a document entitled ''Evaluation of Devices Used with Regenerative Medicine Advanced Therapies; Draft Guidance for Industry.''

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''Expedited Programs for Regenerative Medicine Therapies for Serious Conditions; Draft Guidance for Industry.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations. This guidance is not subject to Executive Order 12866.

II. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 312 have been approved under OMB control number 0910–0014; the collections of information regarding formal meetings in ''Guidance for Formal Meetings Between the FDA and Sponsors or Applicants of PDUFA Products'' have been approved under OMB control number 0910–0429; the collections of information in 21 CFR part 601 have been approved under OMB control number 0910–0338; the collections of information for expedited programs in ''Guidance for Industry: Expedited Programs for Serious Conditions—Drugs and Biologics,'' have been approved under OMB control number 0910–0765; the collections of information in 21 CFR part 314 have been approved under OMB control number 0910–0001.

III. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either *https://www.fda.gov/BiologicsBloodVaccines/GuidanceCompliance RegulatoryInformation/Guidances/default.htm* or *https://www.regulations.gov.*

Dated: November 13, 2017.

Anna K. Abram,

Deputy Commissioner for Policy, Planning, Legislation, and Analysis.

[FR Doc. 2017–24837 Filed 11–16–17; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–D–1167]

Controlled Correspondence Related to Generic Drug Development; Draft Guidance for Industry; Availability; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; correction.

SUMMARY: The Food and Drug Administration is correcting a notice entitled ''Controlled Correspondence Related to Generic Drug Development; Draft Guidance for Industry; Availability'' that appeared in the

Federal Register of November 3, 2017. The document announced the availability of a draft guidance for industry. The document was published with the incorrect docket number. This document corrects that error.

FOR FURTHER INFORMATION CONTACT: Lisa Granger, Office of Policy, Food and Drug Administration, 10903 New Hampshire Ave. Bldg. 32, Rm. 3330, Silver Spring, MD 20993–0002, 301–796–9115, *lisa.granger@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In the **Federal Register** of Friday, November 3, 2017 (82 FR 51277), in FR Doc. 2017–23947, the following correction is made:

On page 51277, in the second column, in the header of the document, ''[Docket FDA–2014–D–1147]'' is corrected to read ''[Docket No. FDA–2014–D–1167]''.

Dated: November 9, 2017.

Anna K. Abram,

Deputy Commissioner for Policy, Planning, Legislation, and Analysis.

[FR Doc. 2017–24948 Filed 11–16–17; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2015–D–2245]

Unique Device Identification: Direct Marking of Devices; Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of the guidance entitled ''Unique Device Identification: Direct Marking of Devices.'' This document is intended to clarify when direct marking of devices with a unique device identifier (UDI) is required, and to assist industry and FDA staff in understanding direct marking requirements.

DATES: The announcement of the guidance is published in the **Federal Register** on November 17, 2017.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2015–D–2245 for ''Unique Device Identification: Direct Marking of Devices.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the guidance document entitled ''Unique Device Identification: Direct Marking of Devices'' to the Office of the Center Director, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002, or the Office of Communication, Outreach, and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Christina Savisaar, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 3303, Silver Spring, MD 20993–0002, 301–496–6404, email: *GUDIDSupport@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 801.45 (21 CFR 801.45) requires a device to be directly marked with a UDI when the device is intended to be used more than once and intended to be reprocessed before each use. However, ''intended to be used more than once'' and ''intended to be reprocessed'' are not defined in the UDI regulations. This guidance provides FDA's interpretation of these terms, clarifies when direct marking of devices with a UDI is required, provides recommendations for how labelers should comply with the UDI direct marking requirements, and clarifies the criteria for exceptions to the direct marking requirement.

In the **Federal Register** of June 26, 2015, FDA published the notice of availability of ''Draft Guidance for Industry and Food and Drug Administration Staff: Unique Device Identification: Direct Marking of Devices'' (80 FR 36821) (the ''Draft Guidance''). In the notice of availability, FDA also solicited feedback on two questions related to interpretation of ''intended to be reprocessed'': (1) Should the definition of ''reprocessing'' for purposes of UDI direct marking requirements include cleaning alone without subsequent disinfection and/or sterilization of the device? and (2) what public health benefits would be served by requiring a UDI direct marking to be affixed to devices intended to be reused for which reprocessing instructions include cleaning only and not disinfection and/or sterilization? Interested persons were invited to comment by September 24, 2015. FDA considered the comments received on the draft guidance, including comments responding to the specific questions in the notice of availability, and revised the guidance as appropriate in response to these comments.

II. Significance of Guidance

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on ''Unique Device Identification: Direct Marking of Devices.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations. This guidance is not subject to Executive Order 12866.

III. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *https://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm.* Guidance documents are also available at *https://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/default.htm* or *https://www.regulations.gov.* Persons unable to download an electronic copy of ''Unique Device Identification: Direct Marking of Devices'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number 1400031 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information described in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 801 have been approved under OMB control number 0910–0485; the collections of information in 21 CFR part 807, subpart E, have been approved under OMB control number 0910–0120; the collections of information in 21 CFR part 814, subparts A through E, have been approved under OMB control number 0910–0231; the collections of information in 21 CFR part 820 have been approved under OMB control number 0910–0073; and the collections of information in 21 CFR part 830 pertaining to GUDID labeler accounts and data submissions addressed in this draft guidance document have been approved under OMB control number 0910–0720.

Dated: November 14, 2017.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2017–24992 Filed 11–16–17; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, 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 Mental Health Special Emphasis Panel; Member Conflicts: Mental Health Services Research.

Date: December 7, 2017.

Time: 11:30 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Karen Gavin-Evans, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Boulevard, Room 6153, MSC 9606, Bethesda, MD 20892, 301–451–2356, *gavinevanskm@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: November 13, 2017.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017–24899 Filed 11–16–17; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the NHLBI Institutional Training Mechanism Review Committee.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Heart, Lung, and Blood Initial Review Group; NHLBI Institutional Training Mechanism Review Committee.

Date: December 8, 2017.
Time: 9:00 a.m. to 4:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Room 7194, Bethesda, MD 20892 (Telephone Conference Call).
Contact Person: Charles Joyce, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7194, Bethesda, MD 20892–7924, 301–827–7939, *cjoyce@nhlbi.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: November 9, 2017.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017–24897 Filed 11–16–17; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of meetings of the NHLBI Special Emphasis Panel.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; NHLBI SBIR Phase IIB Small Market Awards.
Date: December 7, 2017.
Time: 8:00 a.m. to 9:30 a.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: Susan Wohler Sunnarborg, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7182, Bethesda, MD 20892, *susan.sunnarborg@nih.gov*, 301–827–7987.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; NHLBI SBIR Phase IIB Bridge Awards.
Date: December 7, 2017.
Time: 9:30 a.m. to 5:00 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: Susan Wohler Sunnarborg, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7182, Bethesda, MD 20892, *susan.sunnarborg@nih.gov*, 301–827–7987.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: November 13, 2017.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017–24896 Filed 11–16–17; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, 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 Alcohol Abuse and Alcoholism Special Emphasis Panel; AA–1 and AA–4 Conflict Applications.
Date: December 11, 2017.
Time: 1:00 p.m. to 3:30 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, 5635 Fishers Lane, Bethesda, MD 20892 (Telephone Conference Call).
Contact Person: Philippe Marmillot, Ph.D., National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, 5635 Fishers Lane, Room 2017, Bethesda, MD 20892, 301–443–2861, *marmillotp@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards, National Institutes of Health, HHS)

Dated: November 13, 2017.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017–24898 Filed 11–16–17; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, 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 purpose of this meeting is to evaluate requests for preclinical development resources for potential new therapeutics for the treatment of cancer. The outcome of the evaluation will provide information to internal NCI committees that will decide whether NCI should support requests and make available contract resources for development of the potential therapeutic to improve the treatment of various forms of cancer. The research proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the proposed research projects, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; Oct2017 Cycle 27 NExT SEP Committee Meeting.
Date: December 13, 2017.
Time: 8:30 a.m. to 4:30 p.m.
Agenda: To evaluate the NCI Experimental Therapeutics Program Portfolio.
Place: National Institutes of Health, 9000 Rockville Pike, Building 31, Wing C, 6th Floor, Conference Room 10, Bethesda, MD 20892.
Contact Persons: Barbara Mroczkowski, Ph.D., Executive Secretary, Discovery

Experimental Therapeutics Program, National Cancer Institute, NIH, 31 Center Drive, Room 3A44, Bethesda, MD 20817, (301) 496–4291, *mroczkoskib@mail.nih.gov.*

Toby Hecht, Ph.D., Executive Secretary, Development Experimental Therapeutics Program, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 3W110, Rockville, MD 20850, (240) 276–5683, *toby.hecht2@nih.gov*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: November 13, 2017.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017–24895 Filed 11–16–17; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Notice of Meeting for the Interdepartmental Serious Mental Illness Coordinating Committee (ISMICC)

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice.

SUMMARY: The Secretary of Health and Human Services (Secretary), in accordance with section 6031 of the 21st Century Cures Act, announces a meeting of the Interdepartmental Serious Mental Illness Coordinating Committee (ISMICC). The meeting will be held virtually by webcast.

DATES: The ISMICC will meet on December 14, 2017, from 10:30 a.m. to 12:00 p.m., Eastern Daylight Time.

SUPPLEMENTARY INFORMATION: The meeting will focus on the Report to Congress that includes information on federal advances related to serious mental illness (SMI) and serious emotional disturbance (SED), including data evaluation, and recommendations for action. Members of the public can attend the meeting via telephone or webcast. The meeting can be accessed via webcast at *www.hhs.gov/live.* To obtain the call-in number and access code, submit written or brief oral comments, or request special accommodations for persons with disabilities, please visit the SAMHSA Advisory Committees Web page at *https://www.samhsa.gov/about-us/advisory-councils/smi-committee* or contact Pamela Foote, Designated Federal Official (see contact information below).

Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written statements should be submitted to the DFO on or before November 30, 2017. Oral presentations from the public will be scheduled at the conclusion of the meeting. Individuals interested in making oral presentations must notify the DFO on or before November 30, 2017. Two minutes will be allotted for each presentation as time permits. Substantive meeting information and a roster of Committee members is available at the Committee's Web site *https://www.samhsa.gov/about-us/advisory-councils/smi-committee* or by contacting Pamela Foote, DFO.

Committee Name: Interdepartmental Serious Mental Illness Coordinating Committee

Dates/Time/Type: Thursday, December 14, 2017, 10:30 a.m. 12:00 p.m./OPEN

Place: Webcast and teleconference (see information above).

Contact: Pamela Foote, Designated Federal Official, Substance Abuse and Mental Health Services Administration, 5600 Fishers Lane, Room14E53C, Rockville, MD 20857, Telephone: 240–276–1279, Fax: 301–480–8491, Email: *ismicc@samhsa.hhs.gov*.

Background and Authority

The ISMICC was established on March 15, 2017, in accordance with section 6031 of the 21st Century Cures Act, and the Federal Advisory Committee Act, 5 U.S.C. App., as amended, to report to the Secretary, Congress, and any other relevant federal department or agency on advances in serious mental illness (SMI) and serious emotional disturbance (SED), research related to the prevention of, diagnosis of, intervention in, and treatment and recovery of SMIs, SEDs, and advances in access to services and support for adults with SMI or children with SED. In addition, the ISMICC will evaluate the effect federal programs related to serious mental illness have on public health, including public health outcomes such as (A) rates of suicide, suicide attempts, incidence and prevalence of SMIs, SEDs, and substance use disorders, overdose, overdose deaths, emergency hospitalizations, emergency room boarding, preventable emergency room visits, interaction with the criminal justice system, homelessness, and unemployment; (B) increased rates of employment and enrollment in educational and vocational programs; (C) quality of mental and substance use disorders treatment services; or (D) any other criteria as may be determined by the Secretary. Finally, the ISMICC will make specific recommendations for actions that agencies can take to better coordinate the administration of mental health services for adults with SMI or children with SED. Not later than 1(one) year after the date of enactment of the 21st Century Cures Act, and 5 (five) years after such date of enactment, the ISMICC shall submit a report to Congress and any other relevant federal department or agency.

This ISMICC consists of federal members listed below or their designees, and non-federal public members.

A roster of Committee members is available at the Committee's Web site: *https://www.samhsa.gov/about-us/advisory-councils/smi-committee*

The ISMICC is required to meet twice per year.

Carlos Castillo,

Committee Management Officer.

[FR Doc. 2017–24876 Filed 11–16–17; 8:45 am]

BILLING CODE 4162–20–P

ADVISORY COUNCIL ON HISTORIC PRESERVATION

Notice of Proposed Draft Program Comment To Exempt Effects of Transportation-Related Undertakings Within Rail Rights-of-Way

AGENCY: Advisory Council on Historic Preservation.

ACTION: Notice of availability and request for comments.

SUMMARY: The Advisory Council on Historic Preservation, in coordination with the U.S. Department of Transportation, proposes a program comment to exempt effects of transportation-related undertakings within railroad and rail transit rights-of-way. This program comment would exempt from Section 106 review certain activities that have the potential to affect historic properties within railroad and rail transit rights-of-way where those effects are likely to be minimal or not adverse. Further, this program comment includes an optional approach that could streamline the Section 106 review for additional types of transportation-related undertakings involving railroad and rail transit properties, including those that may cause adverse effects. Issuance of this program comment would fulfill the

requirements of Section 11504 of the Fixing America's Surface Transportation Act.

DATES: Submit comments on or before December 8, 2017.

ADDRESSES: Address all comments concerning the draft program comment to both the ACHP and the U.S. Department of Transportation's Federal Railroad Administration (FRA) by U.S. mail as follows: Charlene Dwin Vaughn, AICP, Office of Federal Agency Programs, Advisory Council on Historic Preservation, 401 F Street NW., Suite 308, Washington, DC 20001–2637, and Laura Shick, U.S. Department of Transportation, Federal Railroad Administration, Office of Railroad Policy and Development, RPD–13, 1200 New Jersey Avenue SE., Washington, DC 20590. Comments may also be submitted through electronic mail to *RailROW@achp.gov* and *FRA.106Exemption@dot.gov.* Please submit comments to both the ACHP and FRA to ensure timely consideration.

FOR FURTHER INFORMATION CONTACT: Charlene Dwin Vaughn, Assistant Director, Federal Permitting, Licensing, and Assistance Section, Office of Federal Agency Programs, ACHP (202) 517–0207, *cvaughn@achp.gov;* Laura Shick, Federal Preservation Officer, Federal Railroad Administration, (202) 366–0340, *laura.shick@dot.gov;* or Sharyn LaCombe, Federal Preservation Officer, Federal Transit Administration, (202) 366–5213, *sharyn.lacombe@dot.gov.*

SUPPLEMENTARY INFORMATION: Section 106 of the National Historic Preservation Act (''NHPA'') (54 U.S.C. 306108) requires federal agencies to take into account the effects of undertakings they carry out, license, permit, or assist on historic properties and provide the Advisory Council on Historic Preservation (''ACHP'') a reasonable opportunity to comment with regard to such undertakings. Historic properties are those that are listed on the National Register of Historic Places (''National Register'') or eligible for such listing. The definition of historic properties and other terms relevant to the proposed Section 106 program comment for railroad and rail transit rights-of-way (''rail ROW'') are provided in Section VI, Definition of Terms, and are consistent with the NHPA and the Section 106 regulations.

The Section 106 implementing regulations allow federal agencies to tailor the Section 106 process to meet their needs through a variety of program alternatives (36 CFR 800.14). Types of Section 106 program alternatives include program comments and exemptions. The process for establishing an exemption is detailed in 36 CFR 800.14(c). In accordance with 36 CFR 800.14(c)(1), the ACHP may approve an exemption for a program or category of undertakings if: (i) The actions within the program or category would otherwise qualify as ''undertakings'' as defined in 36 CFR 800.16; (ii) the potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse; and (iii) exemption of the program or category is consistent with the purposes of the NHPA. The ACHP takes into account the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties in reviewing a proposed exemption. Further, at 36 CFR 800.14(e), the Section 106 implementing regulations provide a process for the ACHP to issue a program comment. Through a program comment, the ACHP comments on a category of undertakings in lieu of conducting individual reviews under 36 CFR 800.4–800.6.

Section 11504 of the Fixing America's Surface Transportation Act (''FAST Act'') (49 U.S.C. 24202), enacted on December 4, 2015, mandated the development of a Section 106 exemption for ''railroad rights-of-way.'' The FAST Act requires that ''the Secretary [of the United States Department of Transportation (''USDOT'')] shall submit a proposed exemption of railroad rights-of-way from the review under section 306108 of title 54 to the [ACHP] for consideration, consistent with the exemption for interstate highways approved on March 10, 2005 (70 FR 11928).'' The FAST Act continues that, ''Not later than 180 days after the date on which the Secretary submits the proposed exemption. . .to the Council, the Council shall issue a final exemption of railroad rights-of-way from review under chapter 3061 of title 54 consistent with the exemption for interstate highways approved on March 10, 2005 (70 FR 11928).'' While the Section 106 regulations provide the process and criteria for development of program alternatives, the FAST Act modified the timeframe and directed agency actions.

This proposed Section 106 program comment includes an activities-based exemption that would fulfill the FAST Act mandate by exempting certain routine transportation-related undertakings that occur within rail ROW. The list of activities proposed to be exempt from Section 106 review is provided in Appendix A. Based on the past experience of USDOT Operating Administrations (''USDOT OAs''), undertakings limited to the activities specified in Appendix A have typically resulted in effects to historic properties that are either minimal or not adverse. In addition to incorporating exempt activities that meet the criteria specified in the Section 106 regulations at 36 CFR 800.14(c)(1), this program comment includes an optional, Project Sponsor-led property-based approach that ultimately could provide additional streamlining for undertakings that may cause adverse effects.

I. Background

The railroad industry in the United States has developed for nearly two centuries. Ongoing activities such as maintenance, improvements, and upgrades are necessary to allow rail infrastructure to continue to serve the transportation needs of the nation safely and efficiently. Further, these activities when carried out properly preserve the infrastructure and historic transportation purpose of moving goods and passengers. Most of the nation's railroads are privately-owned and maintained through the continuous investments of private owners. According to the Association of American Railroads (AAR), privately-owned freight railroads spent more than $630 billion on rail equipment and infrastructure, including tracks, bridges, and tunnels, during the 36-year period from 1980 to 2016.[1]

The federal government also makes substantial investments in and has oversight of the nation's railroads and rail transit systems. This includes maintaining and expanding intercity passenger rail, rail transit, and freight rail services, and regulating and improving the safety and efficiency of rail operations. USDOT serves both an investment (*e.g.,* grants, loans) role and a regulatory and safety oversight role, with activities carried out most frequently by the following USDOT OAs: The Federal Railroad Administration (''FRA''), the Federal Transit Administration (''FTA''), and the Federal Highway Administration (''FHWA'').

For example, FRA provides financial and technical assistance for planning and infrastructure projects that enable the nation's railroads to move passengers and goods across the United States. FRA's investments are principally, but not exclusively, in support of intercity passenger rail operations and often provide financial assistance for maintenance, improvements, and upgrades to railroad infrastructure, equipment, and

[1] *https://www.aar.org/Pages/Railroad-101.aspx.*

technologies, including those focused on improving the safety of railroad operations and roadway/railroad grade crossings, as well as for research and development activities and training. FTA provides financial and technical assistance to transit agencies for investment in public transportation systems that include various forms of rail transit that occupy existing or former rail ROW, such as heavy rail, commuter rail, streetcar, and light rail. FHWA supports state, local, and tribal governments and federal agencies in the design, construction, and maintenance of the nation's highway systems. Highways frequently cross over, go under, or are parallel to rail ROW, requiring extensive coordination between the entities responsible for the highway and the railroad or rail transit lines, including safety considerations. FHWA's Railway-Highway Crossings Program [2] provides funds for safety improvements to reduce the number of fatalities, injuries, and crashes at public railway-highway grade crossings.

On June 5, 2008, a congressional hearing before the Subcommittee on Railroads, Pipelines, and Hazardous Materials, within the House Committee on Transportation and Infrastructure, included testimonies by the ACHP, the Alaska Railroad Corporation, the National Conference of State Historic Preservation Officers (''NCSHPO''), the National Trust for Historic Preservation (''NTHP''), the North Carolina Department of Transportation, and the Rails-to-Trails Conservancy.[3] The purpose of the hearing was to consider whether federal requirements for the preservation of historic properties created unnecessary delays and administrative burdens for improvements to rail infrastructure. This hearing revealed that while the nation's railroad system is historically important, the existing federal review process in some cases could be carried out more efficiently to expedite project delivery. As a result, Congress mandated a study to explore these issues and to recommend solutions.

Pursuant to Section 407 of the Passenger Rail Investment and Improvement Act of 2008 (''PRIIA''), FRA, in partnership with other USDOT OAs, state departments of transportation (''state DOTs''), and historic preservation organizations and agencies, including the ACHP, NCSHPO, and NTHP, conducted a study assessing the current state of historic preservation for federally funded railroad projects and the potential for expediting compliance with Section 106 and Section 4(f) (23 U.S.C. 138, 49 U.S.C. 303). In 2013, FRA submitted to Congress the resulting study, titled ''Streamlining Compliance with Section 4(f) of the Department of Transportation Act and Section 106 of the National Historic Preservation Act for Federally Funded Railroad Infrastructure and Improvement Projects'' (''2013 FRA Study'').[4]

The 2013 FRA Study drew upon the experiences shared by the participating agencies and organizations, SHPOs, and other stakeholders, and on best practices and data extrapolated from case studies. The 2013 FRA Study concluded that there is no consistent approach on how to address the National Register eligibility of railroad corridors or how to avoid, minimize, or mitigate impacts to individual rail properties along a corridor once it is determined to be eligible for the National Register. The lack of consistency was attributed to a multitude of entities conducting National Register evaluations, including SHPOs, Tribal Historic Preservation Officers (''THPOs''), federal agencies, consultants, state DOTs and railroad and rail transit operators. These inconsistency issues raised concerns regarding the lack of specific nationwide guidance for identifying, evaluating, and classifying rail properties and differentiation based on likely importance of particular historic resources on the part of each evaluator. This variety of approaches leads to inconsistent standards for evaluation and procedures to consider and address impacts, an overly burdensome process, delays in project delivery, and some projects failing to advance. The substantial experience of USDOT OAs over the years in funding maintenance, improvements, and upgrades to railroads and rail transit systems, and highway/rail grade crossings, has provided further evidence of this conclusion. Furthermore, the experience of USDOT OAs has been that undertakings involving maintenance, improvements, and upgrades to rail infrastructure often do not result in adverse effects to historic properties under Section 106 when early planning involves diverse stakeholders.

The 2013 FRA Study offered several streamlining recommendations, including the development of a Section 106 administrative exemption and a program comment. In 2015, Congress mandated a proposed administrative exemption in the FAST Act and directed USDOT that the exemption be consistent with the Interstate Highway Exemption. Developed by FHWA and approved by the ACHP in 2005, the Section 106 exemption for the Interstate Highway System acknowledges ''the importance of the Interstate System in American history, but also recognizes that ongoing maintenance, improvements and upgrades are necessary to allow the system to continue to serve the transportation needs of the nation.'' [5] Further, the concept for the exemption for the Interstate Highway System stated that, ''While actions carried out by federal agencies to maintain or improve the Interstate System will, over time, alter various segments of the system, such changes are considered to be 'minimal or not adverse' when viewing the system as a whole. Moreover, the exemption does not apply to certain historically important elements of the system.'' Therefore, in exempting only certain effects of undertakings to the interstate highway system, the exemption met the requirements of 36 CFR 800.14(c)(1).

In accordance with Section 11504 of the FAST Act, the USDOT, led by FRA and FTA, proposed to the ACHP in July 2017 a Section 106 exemption that would have applied to certain types of undertakings within rail ROW that would result in effects to rail properties that were likely to be minimal or not adverse. FRA's and FTA's proposed exemption drew upon the collective expertise and experience of the USDOT OAs and acknowledged the unique history, construction, and technological improvements of railroads and rail transit systems. The exemption as initially drafted also included an optional Project Sponsor-led property-based approach that could have streamlined the review process for other types of undertakings having the potential to adversely affect historic properties.

To develop the proposed exemption, FRA and FTA held early coordination meetings with the ACHP, NCSHPO, and NTHP. The purpose of these meetings was to discuss the most effective approach to an exemption that would satisfy the FAST Act requirement. It was also identified during these meetings that more information on the history of

[2] http://safety.fhwa.dot.gov/xings/.

[3] *The Historic Preservation of Railroad Property and Facilities: Hearing before the Subcommittee on Railroads, Pipelines, and Hazardous Materials of the Committee on Transportation and Infrastructure House of Representatives,* 110th Congress, 2008.

[4] *Report to Congress: Streamlining Compliance with the Section 4(f) of the Department of Transportation Act and Section 106 of the National Historic Preservation Act for Federally Funded Railroad Infrastructure Repair and Improvement Projects,* Federal Railroad Administration, March 2013, *https://www.fra.dot.gov/eLib/details/L04483.*

[5] *Exemption Regarding Historic Preservation Review Process for Effects to the Interstate Highway System,* 70 FR 11928, Mar. 10, 2005.

rail transit development in the country was needed to have comparable information to what was contained in FRA's 2013 Study. Subsequently, in 2017 FTA prepared a broad historic context report entitled, ''Historic Context Report for Transit Rail System Development.'' [6] Also during the early coordination meetings, the ACHP, NCSHPO, and USDOT acknowledged that opportunities for stakeholder outreach would be provided to obtain input from railroad and rail transit industries, state agencies (*e.g.,* state DOTs), SHPOs and THPOs, Indian tribes and Native Hawaiian organizations, and historic preservation interest groups.

FRA's and FTA's original approach to the proposed exemption was to treat the ROW in which railroads and rail transit systems operate as a resource unto itself that would be exempt from Section 106 review. FRA and FTA conducted outreach to discuss and seek feedback from stakeholders regarding how such a property-based approach might be developed and implemented. The ACHP expressed concern that a property-based approach would exceed the limit of its authority to exempt activities under 54 U.S.C. 304108(c) and 36 CFR 800.14(c)(1) because it did not define the program or category of undertakings that would be subject to its terms and as proposed, it could allow adverse effects to historic properties without requiring Section 106 review. The ACHP recommended that FRA and FTA take an activities-based approach to the Section 106 exemption that focused on routine undertakings involving rail properties located within rail ROW, with effects that would be foreseeable and likely to be minimal or not adverse. This recommendation was echoed in comments submitted to FRA and FTA by numerous stakeholders, particularly from the preservation community. The ACHP also recommended FRA and FTA consider developing a separate program comment to provide for the property-based approach along a parallel track.

Subsequently, in response to the concerns and requests of Project Sponsors, particularly transportation stakeholders, that the program alternative should include the flexibility to address a broader range of undertakings and effects to historic properties, FRA, FTA, and the ACHP decided to incorporate the proposed activities-based exemption within a proposed program comment in order to restore the two-part concept within a single program alternative, including the property-based approach, as originally proposed by FRA and FTA. The proposed program comment recognizes that many properties in the national railroad network and rail transit systems have historic significance and that important historic rail properties (as defined in the draft program comment, Section VI: Definition of Terms) located within rail ROW should remain subject to Section 106 review when proposed undertakings cannot avoid adverse effects on such properties.

The proposed program comment is intended to balance the need for continued safe and efficient transportation with the goals of historic preservation, and takes into account the differences between the Interstate Highway System and railroad and rail transit operations. Each railroad and rail transit system has its own unique history of construction and operation, including private or public ownership; periods of economic success; opening of key markets or geographic areas; and improvements, acquisition, and consolidation or abandonment. Many buildings and structures within rail ROW followed the common standard plans of a specific carrier, but there were exceptions for individual buildings, bridges, and other structures that may have unique qualities or unusual design characteristics. Similarly, many rail corridors follow a simple natural grade and alignment, but there were exceptions made for difficult terrain, climate, and topography that may have involved unique or unusual engineering techniques and structures. Railroads have been adapted to accommodate modern freight, passenger train operations, higher speeds, and much heavier freight loads than those for which the original rail infrastructure was designed and built. Finally, rail ROW is typically privately-owned, making it challenging or impossible to perform the cultural resources surveys usually necessary to develop a comprehensive inventory of rail properties.

The nation's rail ROW and rail properties located therein have a long history, dating to the mid-1800s, and maintenance, improvements, and upgrades are necessary to their preservation and continued safe use. These activities have occurred and continue to occur regularly within rail ROW to maintain the efficient use and safety of the nation's railroads, rail transit systems, and roads; and support the continued function for which surface transportation is historically important.

II. Program Comment Concept

The continued operation of railroads and rail transit systems is vital to enabling the efficient and safe movement of people and goods throughout America. Various linear segments of rail lines, as well as individual buildings and structures along those rail lines, were determined eligible for and/or listed on the National Register prior to Congress's mandate to develop a Section 106 exemption for rail ROW.

A primary objective of the proposed program comment is to expedite certain types of maintenance, improvements, and upgrades to railroad and rail transit infrastructure located within rail ROW that typically have not resulted in adverse effects to historic properties based on years of experience gained through the Section 106 consultations among USDOT OAs, SHPOs, and consulting parties for individual undertakings. Under such an approach, fewer routine undertakings involving rail properties would be subject to Section 106 review thereby enabling federal agencies to focus their time and resources on undertakings that have the potential to cause adverse effects on historic properties. Federal agency staff, Project Sponsors, SHPOs, THPOs, and other stakeholders would be able to devote more time and resources to developing solutions that avoid, minimize, or resolve adverse effects to important historic rail properties and non-rail historic properties located within an undertaking's Area of Potential Effects (''APE'').

Recognizing the concerns and needs of industry stakeholders and seeking to achieve further efficiencies in project reviews, the ACHP, FRA and FTA incorporated the originally proposed exemption into a different program alternative under 36 CFR 800.14: a program comment. Unlike an exemption, which the ACHP can only approve for undertakings that have effects to historic properties that are foreseeable and likely to be minimal or not adverse, a program comment may provide an optional alternative process for compliance with Section 106 for a category of undertakings, including those that may result in adverse effects. Therefore, the proposed program comment includes both an activities-based exemption and an optional Project Sponsor-led approach to identify important historic rail properties and streamline the review process for other transportation-related activities. It is important to note that this Project Sponsor-led approach would require an investment of time and resources and

[6] *https://www.transit.dot.gov/regulations-and-guidance/environmental-programs/historic-context-report-transit-rail-system.*

would not likely result in immediate efficiencies as would the approval of the list of exempted activities under Appendix A. To ensure the requirements of the FAST Act are met, the program comment would incorporate the substance of the exemption for certain activities within rail ROW, as well as add the property-based approach as envisioned by FRA and FTA and discussed during the agencies' outreach to stakeholders in late 2016 and early 2017.

Given the unique history of the rail industry and the challenge of conducting the cultural resources surveys that would be needed to develop a comprehensive nationwide inventory of rail properties (including restrictions regarding access to privately-owned rail ROW, the extensive linear miles of rail ROW nationwide, and the number of qualified professionals and financial resources that would be needed), it is not feasible for USDOT OAs or Project Sponsors to identify all important historic rail properties nationwide concurrently with the development of this program alternative. The program comment would include a modified review process for transportation-related undertakings that would only apply after completion of the optional Project Sponsor-led approach to identify important historic rail properties within a study area.

Under the program comment, Project Sponsors, in coordination with the appropriate USDOT OA(s), the ACHP, NCSHPO, individual SHPOs/THPOs, NTHP, railroad and rail transit operators, state DOTs, and other appropriate stakeholders, would have the option to follow an established process to develop a list of important historic rail properties within a designated study area. The Project Sponsor would ensure that the public would be given an opportunity to provide input on the proposed list of such properties. The appropriate USDOT OA(s), in consultation with Project Sponsors, the ACHP, SHPOs/THPOs, and other stakeholders, would confirm the significance and integrity of these important historic rail properties consistent with National Register criteria.

The intent of this optional Project Sponsor-led identification and evaluation effort would be to (1) revisit those rail properties that have been previously determined eligible for listing or listed on the National Register to confirm that the property meets one or more of the National Register eligibility criteria, retains integrity, and is considered important (as defined in Section VI, Definitions of Terms), and (2) identify previously unevaluated rail properties located within the study area that should be recognized as important historic rail properties. Once the identification process is complete, federal agencies would be able to carry out, license, permit, or assist transportation-related undertakings that meet the terms listed in the Program Comment without further Section 106 review.

Project Sponsors could benefit from this optional property-based approach because it would expedite Section 106 reviews for non-routine undertakings through the early identification of and agreement on important historic rail properties located in rail ROW. The upfront identification of such properties would allow Project Sponsors to plan for and design projects within rail ROW in a manner that could avoid or minimize effects to such important properties. Furthermore, if a Project Sponsor completes the process to identify important historic rail properties, another review efficiency would apply. Future transportation-related activities within the same study area that require a license, permit, or assistance from any federal agency and that would affect rail properties that are not included on a USDOT OA-approved list of important historic rail properties would not be subject to further Section 106 review.

The lead federal agency for a proposed transportation-related undertaking in rail ROW will be responsible for determining if the program comment applies. Approval by the lead federal agency would be required in the form of written approval or through another established review and decision-making process normally used by the lead federal agency (*e.g.,* grant-making processes or permit issuance).

III. Public Participation

In accordance with 36 CFR 800.14(e)(2), USDOT, in coordination with the ACHP, is arranging for public participation appropriate to the subject matter and scope of the category of undertakings to be included within this program comment. This notice invites the public to comment on the proposed draft program comment.

In addition to this notice, FRA and FTA have previously solicited the views of a diverse group of stakeholders and subject matter experts. While that outreach was conducted with the intent to develop a Section 106 exemption (as defined in 36 CFR 800.14(c)), the substance of FRA's and FTA's original proposal is essentially the same as the content of the draft program comment that is being made available for public review and comment in this notice. This outreach included in-person meetings, webinars followed up with attendees' submittal of written comments and questions, teleconferences, and presentations at national transportation conferences with representatives from the following: USDOT OAs, the ACHP, NCSHPO, the National Association of Tribal Historic Preservation Officers, NTHP, tribal governments, individual SHPOs and their staff, THPOs, and state DOTs; national transportation associations (*e.g.,* AAR, American Public Transportation Association); private railroad companies; intercity passenger rail service providers (*e.g.,* Amtrak) and rail transit agencies; the Surface Transportation Board (STB);[7] and historic preservation organizations (*e.g.,* American Cultural Resources Association). These agencies and organizations shared their unique and varied perspectives and concerns and provided valuable feedback. Prior to transitioning the approach from an exemption to a program comment and when proposing to request an exemption, in response to the ACHP's recommendation to satisfy its consultation responsibilities under 36 CFR 800.14(c)(3), FRA and FTA provided a draft exemption to all SHPOs and THPOs for review and requested their feedback regarding any significant issues. Pursuant to 36 CFR 800.14(c)(4), the ACHP shared a draft of the proposed exemption with Indian tribes and Native Hawaiian organizations and hosted two conference calls to solicit their input and feedback. Comments were received from nine SHPOs and 14 tribes in October 2017. FRA and FTA considered these comments and made further revisions to the draft of the proposed exemption primarily to clarify the scope of the proposed exemption to make it clear that the focus was strictly on rail properties and would not apply to other types of historic properties that could be located within or adjacent to rail ROW. FRA and FTA also refined some of the proposed exempted activities in Appendix A in response to comments from SHPOs and Indian tribes, but did not eliminate any activities from the draft list because the agencies felt that all stakeholders should have the opportunity to review and provide

[7] The Surface Transportation Board (STB) is an independent agency that has broad economic regulatory oversight of the nation's freight rail system and jurisdiction over railroad rate and service issues; new rail line constructions; abandonments of existing rail lines; and railroad mergers and line acquisitions. Refer to STB's Web site at *https://www.stb.gov/stb/about/overview.html.*

comments. The draft exemption shared with SHPOs, THPOs, Indian tribes, and Native Hawaiian organizations in September and October 2017 focused only on exempted activities and did not include the optional Project Sponsor-led approach for identifying important historic rail properties.

The feedback received over the past year has been helpful in informing the development of the proposed program alternative and generally related to the following topics: (1) The scope, applicability, and implementation of exempt activities; (2) how important historic rail properties could be identified; (3) what types of resources, including archaeological sites, should explicitly not be covered by the program alternative; and (4) developing and clarifying the definitions of terms used in the proposed exemption. FRA and FTA used this feedback to refine the proposed list of exempt activities included in Appendix A and to revise key definitions (such as the definition of rail ROW). As FRA and FTA refined the approach to and scope of the proposed exemption based on stakeholder input, they determined that certain actions, such as those approved by STB (*e.g.,* rail line abandonments, new rail line constructions) as well as conversion of rail ROW to shared use (*e.g.,* bicycle, pedestrian) trails (sometimes referred to as ''rails-to-trails'' initiatives), have the potential to cause adverse effects or greater than minimal effects on historic properties, and therefore are not appropriate for inclusion in the proposed list of exempt activities included in Appendix A. The fundamental purpose of the proposed exempted activities list is to enable federal agencies to expedite reviews and approvals of proposed transportation-related undertakings for certain types of maintenance, improvements, and upgrades to railroad and rail transit infrastructure; accordingly, FRA and FTA expect that these activities would primarily involve extant buildings, structures, and equipment in existing rail ROW. Therefore, and in consideration of stakeholder comments received to date, FRA and FTA determined that effects to archaeological resources of any nature, including those associated with railroads and rail transit, should not be covered by the proposed exemption. Lastly, in response to feedback from NCSHPO and several individual SHPOs, the draft program comment includes an annual reporting requirement to help assess the effectiveness of Section 106 review streamlining as well as to help ensure that the program comment's terms are being appropriately applied.

In addition to providing substantive comments regarding the scope and content of the proposed exemption, some SHPOs questioned the type of Section 106 program alternative itself. The FAST Act specifically mandates development of an exemption; however, after further consideration and in order to fulfill the intent of that statutory mandate, USDOT and the ACHP have revised the exemption to this draft program comment. The program comment would have a broader scope and include more types of undertakings than would have the exemption.

IV. Proposed Text of the Program Comment

The following is the draft text of the proposed program comment:

Program Comment To Exempt Effects of Transportation-Related Undertakings Within Rail Rights-of-Way

Section 106 of the National Historic Preservation Act (''NHPA''), 54 U.S.C. 306108 (''Section 106''), requires federal agencies to ''take into account'' the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment with regard to such undertakings. The ACHP has issued regulations that set forth the process through which federal agencies comply with these duties. Those regulations are codified under 36 CFR part 800 (''Section 106 regulations'').

Under section 800.14(e) of those regulations, agencies can request the ACHP to provide a ''program comment'' on a particular category of undertakings in lieu of conducting separate reviews of each individual undertaking under such category, as set forth in 36 CFR 800.3 through 800.7. Federal agencies can meet their Section 106 responsibilities with regard to the effects of transportation-related undertakings on rail properties located in railroad and rail transit rights-of-way (''rail ROW'') by following this program comment and the steps set forth therein.

I. Introduction

This program comment exempts from Section 106 review the activities listed in Appendix A provided the conditions specified therein are met. It also establishes an optional Project Sponsor-led property-based approach. This optional approach could be followed to identify important historic rail properties in rail ROW in advance of specific transportation-related undertakings. Undertakings affecting such important historic rail properties and that involve activities not included in Appendix A would remain subject to Section 106 review, in order to ensure potential adverse effects are avoided, minimized, or mitigated. However, the optional property-based approach, described in Section IV below, if completed by an interested Project Sponsor, would also create efficiencies by (1) allowing transportation-related undertakings proposed to be carried out, licensed, permitted, or assisted by any federal agency to proceed without Section 106 review if the affected rail property(ies) is not on the USDOT OA-approved list of important historic rail properties and (2) providing Project Sponsors with an early awareness of which rail properties are important so that they could design projects in a manner to either avoid adverse effects or to factor sufficient time into project planning and design to resolve any unavoidable adverse effects.

The proposed program alternative has been developed in accordance with section 11504 of the FAST Act (49 U.S.C. 24202). Section 11504 mandated the development of a Section 106 exemption for ''railroad rights-of-way.'' More specifically, it required the Secretary of Transportation to submit a proposed exemption to the ACHP for consideration, and for the ACHP to issue a final exemption not later than 180 days after the date of receipt of U.S. Department of Transportation's (''USDOT's'') submittal.

Pursuant to 36 CFR 800.14(e), the ACHP can issue a program comment on its own initiative or at the request of another agency. This program comment would provide the ACHP's comment on those transportation-related undertakings that may affect rail properties within rail ROW. If a federal agency responsible for carrying out, licensing, permitting, or assisting such an undertaking with the potential to affect rail-related historic properties meets the terms of this program comment, its Section 106 responsibility to take into accounts those effects would be satisfied.

Under 36 CFR 800.14(c), an exemption from Section 106 for federal undertakings must be consistent with the purposes of the NHPA. Furthermore, in order to be exempted, the potential effects of those undertakings on historic properties must be ''foreseeable and likely to be minimal or not adverse.'' The substance of USDOT's originally proposed exemption, incorporated within this program comment, meets these criteria. The transportation-related undertakings that federal agencies carry out, license, permit, and assist to

maintain, improve, or upgrade rail properties located within rail ROW will alter over time various elements of rail ROW, but such changes are minimal or not adverse when viewing rail ROW as a whole and when limited to the activities specified in Appendix A.

II. Applicability

The program comment would apply to (1) those undertakings that are strictly limited to the activities listed in Appendix A and are carried out, licensed, permitted, or assisted by any federal agency and involve rail properties located within existing rail ROW; and (2) any transportation-related undertaking that would be carried out, licensed, permitted, or assisted by any federal agency and meets the terms for the completed optional Project-Sponsor led approach to identify important historic rail properties. The activities listed in Appendix A are for the intended purpose of routine maintenance, improvements, and upgrades to transportation infrastructure. Should the Program Comment be issued by the ACHP, federal agencies would be able to proceed with carrying out, licensing, permitting, or assisting undertakings that are limited to the activities listed in Appendix A and that meet the certain conditions specified therein without further Section 106 review regardless of whether the rail properties involved or affected are eligible for or listed on the National Register. Undertakings involving activities that are not included in Appendix A would not be included within the proposed exemption section of the program comment (*e.g.,* demolition; decommissioning, abandonment and/or conversion of rail infrastructure to a non-transportation use; double-tracking a historically single-tracked rail corridor; major new construction activities such as construction of a new or substantially expanded passenger station; or construction of a new railroad or rail transit line on new right-of-way (commonly referred to as ''greenfield construction'')). However, some of these activities may fall within the other section of the program comment regarding the optional Project Sponsor-led property-based approach.

Activities requiring a federal license, permit, or assistance that are not listed in Appendix A but constitute a transportation-related undertaking with the potential to affect rail properties located within rail ROW, as defined in Section VI, Definitions of Terms, would not require Section 106 review provided the optional Project Sponsor-led approach for identifying important historic rail properties has been completed for a defined study area and the affected rail property(ies) within that study area are not included on a USDOT OA-approved list of important historic rail properties.

If the optional Project Sponsor-led approach to identify important historic rail properties has been completed for a defined study area, transportation-related undertakings involving activities that are not included in Appendix A and would affect properties included on a USDOT OA-approved list of important historic rail would require Section 106 review. This would ensure that potential adverse effects to important historic rail properties are appropriately avoided, minimized, or mitigated consistent with the purposes of the NHPA.

Federal agencies remain responsible for determining whether a proposed undertaking, including those activities listed in Appendix A, has the potential to cause effects to non-rail historic properties, such as those of religious and cultural significance to Indian tribes or Native Hawaiian organizations or archaeological sites of any nature, in the undertaking's APE. If a federal agency determines such potential exists, the federal agency must follow the requirements of 36 CFR part 800 or follow an applicable program alternative executed pursuant to 36 CFR 800.14 in order to consider the potential effects to such properties located within that APE.

Under the Surface Transportation Project Delivery Program, codified at 23 U.S.C. 327, a state may assume the Secretary of Transportation's responsibilities to comply with Section 106 for certain projects or classes of projects. In such cases, the state may rely on this program comment to fulfill its Section 106 responsibilities. Where a program alternative developed pursuant to 36 CFR 800.14, such as a statewide programmatic agreement, delegates Section 106 responsibility to another entity, that entity may also utilize the terms of this program comment for relevant transportation-related undertakings.

III. Activities Exempt From Section 106 Review

Undertakings that are carried out by a federal agency or require a federal license, permit, or assistance to maintain, improve, or upgrade rail properties located in railroad and rail transit rights-of-way (''rail ROW'') and are limited to the activities specified in Appendix A: Exempted Activities, are exempt from the requirements of Section 106 of the National Historic Preservation Act, 54 U.S.C. 306108 (''Section 106'') because their effects on rail historic properties are foreseeable and likely to be minimal or not adverse.

IV. Optional Project Sponsor-Led Property-Based Approach

If a Project Sponsor wishes to carry out a transportation-related activity that requires a federal license, permit, or assistance and is not included in Appendix A and therefore has the potential to cause adverse effects to historic rail properties, it must either: (1) Notify the lead federal agency, which will then determine whether the standard Section 106 process or an available program alternative applies to the proposed undertaking; or (2) follow the Project-Sponsor led approach outlined in this section to identify important historic rail properties. Important historic rail properties, as defined further in Section VI, are individual rail properties or rail property types that meet the National Register eligibility criteria (36 CFR part 63), illustrate the history of the development of the nation's railroads or rail transit systems, and either possess national significance or are of certain state or local importance.

Given the variety and number of rail properties nationwide, the fact that many systems cross state boundaries, and the challenges of a ''one size fits all'' nationwide approach, important historic rail properties would be initially identified within defined study areas by Project Sponsors that wish to get additional benefit from this program comment beyond the list of exempted activities included in Appendix A. The process would intentionally provide a great deal of flexibility for Project Sponsors to identify important historic rail properties to meet state and local needs and interests and to take into account state and local historic contexts. Within six months of the ACHP's issuance of the final Program Comment, FRA, FTA, and FHWA, in coordination with the ACHP, and other federal agencies who may have an interest in utilizing the Program Comment (*e.g.,* permitting agencies such as US Army Corps of Engineers or US Coast Guard), will develop supplemental guidance for implementing the optional Project Sponsor-led property-based approach described below to identify important historic rail properties.

A. Process for Identifying Important Historic Rail Properties

1. Individual Project Sponsors or multiple Project Sponsors working collaboratively must clearly identify the study area to be subject to this process: The portion of rail ROW (*i.e.,* by

location (state, county); name of rail corridor, railroad, rail transit system or line; mile-post information; etc.). Project Sponsors must propose to the appropriate USDOT OA(s) (*i.e.,* FRA, FTA and/or FHWA), rail properties to be included on a list of important historic rail properties. To develop such a list, Project Sponsors will consult with the appropriate USDOT OA(s), appropriate State Historic Preservation Officers (''SHPOs''), appropriate Tribal Historic Preservation Officers (''THPOs''), and other interested parties, *i.e.* those parties that would typically be involved in the standard Section 106 process to identify historic properties as specified in 36 CFR 800.4(a)–(c), that have knowledge and expertise regarding rail properties and of the history and operations of the nation's railroads and rail transit systems. The proposed list of important historic rail properties may include particular individual properties (*i.e.,* a building, structure, object, or district) or a property type (*e.g.,* bridges of a certain type (stone arch, metal truss, covered, or moveable); roundhouses). The Project Sponsor's efforts to develop a list of important historic rail properties will be informed by available background research, historic context studies, surveys and evaluations performed by persons meeting the Secretary of the Interior's Professional Qualification Standards for Architectural Historians, and other relevant documentation and professional experience and expertise.

2. Once a Project Sponsor proposes a list of important rail properties located within a study area, the Project Sponsor will coordinate with the appropriate USDOT OA(s) to determine an appropriate method(s) for seeking public input on the proposed list and to determine which entity(ies) will be responsible for implementing the agreed-upon public outreach strategy. The Project Sponsor and/or the USDOT OA(s), as appropriate, will then implement the agreed-upon strategy. The USDOT OA(s) will consider input from interested parties and the public before approving the list of important historic rail properties.

3. The USDOT OAs make the final decision regarding the list of important historic rail properties within each study area, and will publish all finalized lists on their respective agency Web sites (*www.fra.dot.gov, www.fta.dot.gov,* or *www.fhwa.dot.gov*). The relevant USDOT OA will update the list anytime a Project Sponsor completes the process described herein to identify important historic rail properties located within another study area.

4. Once approved by the appropriate USDOT OA(s), the list of important historic rail properties will be available for use by any Project Sponsor and any federal agency.

B. No Further Section 106 Review Required

Should any of the exempted activities in Appendix A referred to in Section III be proposed and affect important historic rail properties included on a USDOT OA-approved list, no further Section 106 review would be required for those activities.

For rail properties in a given study area that are not included on a USDOT OA-approved list of important historic rail properties, the effects of transportation-related undertakings to those rail properties would be exempt from Section 106 review.

V. Continued Applicability of Section 106

Section 106 review is still required for transportation-related undertakings within rail ROW in the following situations under both the activities-based exemption and Project Sponsor-led property-based approach:

A. Undertakings that are located within, or would affect historic properties located on tribal lands;

B. Undertakings, within a study area that has completed the optional Project Sponsor-led approach that involve activities that are not included in Appendix A and would affect important historic rail properties

C. Undertakings that could affect historic buildings, structures, sites, objects, or districts that do not have a demonstrable association with the function and operation of a railroad or rail transit system;

D. Undertakings that could affect archaeological sites located within, partially within, or bisected by rail ROW, regardless of whether the sites are associated with railroads or rail transit systems; [8] and

E. Undertakings that could affect historic properties of religious and cultural significance to federally recognized Indian tribes or Native Hawaiian organizations.

In addition, federal agencies remain responsible for determining whether a proposed undertaking has the potential to cause effects to non-rail above-ground historic properties (buildings, structures, objects and districts) and archaeological sites of any nature (regardless of a rail nexus) that are located in the undertaking's area of potential effects (''APE'') but outside of or adjacent to rail ROW under both the activities-based exemption and Project Sponsor-led property-based approach.

Likewise, if an unanticipated discovery of a non-rail historic property, archaeological site, or human remains is made during implementation of an exempt activity listed in Appendix A, the Project Sponsor must cease the activity and consult with the lead federal agency, who must follow the requirements of 36 CFR 800.13(b) and/or applicable state burial law with regard to the discovery; if an undertaking involves multiple exempted activities, those that do not involve or effect the discovery may continue.

VI. Definition of Terms

A. Area of potential effects, as defined in 36 CFR 800.16(d), means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.

B. Historic properties, as defined in 36 CFR 800.16(l), means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records and remains that are related to and located within such properties. The term includes properties of religious and cultural importance to a federally recognized Indian tribe or Native Hawaiian organization that meet the National Register criteria.

C. Important historic rail properties means rail properties located in rail ROW that have been identified through the Project-Sponsor led approach established in Section IV. Such properties must meet the National Register eligibility criteria (36 CFR part 63), illustrate the history of the development of the nation's railroads or rail transit systems, and either possess national significance (see the definition

[8] Examples include: Archaeological remains of non-extant rail properties that have been determined eligible for the National Register under Criterion D or warrant evaluation for such eligibility because they may yield data and information on the development and operation of railroads and rail transit systems in U.S. history; archaeological sites that represent worker camps associated with the construction of a railroad and have been determined eligible for the National Register under Criterion A or warrant evaluation for such eligibility; prehistoric or historic archaeological sites that pre-date construction of a railroad or rail transit line and are historically significant for reasons that do not have a nexus with rail transportation.

below) or be of certain state or local importance. Examples of properties of certain state or local importance may include extant architectural properties, such as passenger depots, roundhouses, bridges, and tunnels that are not included in common standard plans; that met unique engineering challenges; that have exceptional design quality and characteristics; or that are of unusual or noteworthy importance, or are a rare property type.

D. National significance means a historic property that is either, (1) designated as a National Historic Landmark; (2) designated as a Civil Engineering Landmark; (3) listed as nationally significant in its nomination or listing in the National Register; or (4) determined to have significance at the national level.[9]

E. Project Sponsor means an entity such as a state, tribal or local government, joint venture, or private company that is eligible to receive financial assistance under a federal transportation–related financial assistance program (*e.g.,* grant, loan). A project sponsor may also be an entity that requires a federal permit, license, or approval in order to carry out a proposed activity in rail ROW (*e.g.,* a permit under Section 404 of the Clean Water Act issued by the Army Corps of Engineers or a permit under Section 9 of the Rivers and Harbors Act of 1899 issued by the United States Coast Guard).

F. Rail properties means, for the purpose of this program comment, infrastructure within the rail ROW that has a demonstrable relationship to the past or current function and operation of a railroad or rail transit system, including but not limited to: Rails and tracks, ties, ballast, rail beds, signal and communication systems, switches, overhead catenary systems, signage, traction power substations, passenger stations/depots and associated infrastructure and utilities, freight transfer facilities, boarding areas and platforms, boarding platform shelters and canopies, bridges, culverts, tunnels, retaining walls, ancillary facilities, ventilation structures, equipment maintenance and storage facilities, railyards, parking lots and structures, landscaping, passenger walkways, and security and safety fencing. The definition does not include properties with no demonstrable relationship to the function and operation of a railroad or rail transit system, such as: Adjacent residential, commercial or municipal buildings; archaeological resources underneath rail ROW that are unrelated to the railroad or rail transit line; or property unrelated to existing or former railroads and rail transit lines that is proposed to be used for new rail infrastructure.

G. Railroad and Rail Transit Rights-of-Way (rail ROW) means, for the purpose of this program comment, the land and infrastructure that have been developed for existing or former intercity passenger rail, freight rail, or rail transit operations, or that are maintained for the purpose of such operations. Rail ROW includes current or former railroad or rail transit lines regardless of current ownership and whether there is rail service operating on the railroad or rail transit line. It does not include land that was never developed and lacks visual evidence of historic railroad or rail transit use. Rail ROW includes and may be identifiable by the presence of infrastructure that has a demonstrable relationship to the past or current function and operation of a railroad or rail transit system that commonly includes but is not limited to the rail properties specified in the definition above.

H. Section 106 means Section 106 of the National Historic Preservation Act, 54 U.S.C. 306108, and its implementing regulations, 36 CFR part 800.

I. Undertaking, as defined at 36 CFR 800.16(y), means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including those carried out by or on behalf of a federal agency; those carried out with federal financial assistance; and those requiring a federal permit, license or approval.

VII. Effective Date

This program comment shall go into effect on the date it is issued by the ACHP, at which time federal agencies may immediately utilize the list of exempted activities in Appendix A, including undertakings that have not yet been initiated and undertakings for which the Section 106 review process is underway but not completed.

VIII. Reporting

Any lead federal agency that utilizes this program comment shall report annually to NCSHPO, NATHPO, and the ACHP regarding the application of the exempt activities in Appendix A. The USDOT OAs will also report annually to NCSHPO, NATHPO, and the ACHP regarding any coordination with Project Sponsors to pursue the property-based approach.

XIV. Amendment

The Chairman of the ACHP may amend this program comment after consulting with the USDOT and other relevant federal agencies, NCSHPO, NATHPO, tribal representatives, the National Trust for Historic Preservation, and industry representatives, as appropriate. The ACHP will publish a notice in the **Federal Register** informing the public of any amendments that are made to the program comment.

XV. Sunset Clause

This program comment will expire twenty (20) years from the date of its issuance, unless it is amended prior to that date to extend the period in which it is in effect.

XVI. Withdrawal

The Chairman of the ACHP may withdraw this program comment, pursuant to 36 CFR 800.14(e)(6), by publication of a notice in the **Federal Register** 30 days before the withdrawal will take effect.

Appendix A: Exempted Activities

Undertakings limited to the activities listed below and when occurring within rail ROW are exempt from Section 106 review because their effects on rail-related historic properties are foreseeable and likely to be minimal and not adverse.

The lead federal agency for a proposed transportation-related undertaking in rail ROW is responsible for determining if the program comment applies. Approval by the lead federal agency of undertakings involving exempt activities specified below will be required in the form of written approval or through another established review and decision-making process normally used by the lead federal agency (*e.g.,* grant-making processes or permit issuance). In particular, activities denoted with (*) and (**) require evaluation by professionals meeting the Secretary of the Interior's (''SOI'') Professional Qualification Standards for Archaeologists or Architectural Historians, as appropriate. If the appropriate SOI-qualified professionals are not available to assist in the design and evaluation of activities denoted with (*) and (**), such activities are not exempt and remain subject to Section 106 review. Additional information regarding activities denoted with (*), (**) and (***) is provided following the list.

Before approving an undertaking, the lead federal agency (or a Project Sponsor that has been delegated or assigned responsibility for Section 106 compliance) must determine if the undertaking has the potential to cause effects to non-rail historic properties located within or in the vicinity of the rail ROW. For example, the construction of a new equipment maintenance building in an existing rail yard could introduce a visual, atmospheric, vibratory, and/or audible

[9] Properties that have previously been determined to be nationally significant may be re-evaluated as part of the optional Project Sponsor-led approach. Properties may be newly determined to be nationally significant as part of the consultation that would occur under the optional Project Sponsor-led approach.

element that could affect nearby non-rail historic properties. If such potential exists, the lead federal agency (or a Project Sponsor that has been delegated or assigned Section 106 responsibility) must follow the requirements of 36 CFR part 800, including establishing an Area of Potential Effects (APE) as defined in 36 CFR 800.16(d), or an applicable program alternative executed pursuant to 36 CFR 800.14 in order to consider the potential effects to non-rail historic properties located within that APE. This requires the federal agency and/or Project Sponsor to complete the four-step Section 106 review process for such non-rail historic properties in the APE: Initiating the process; identifying historic properties; assessing adverse effects; and resolution of adverse effects to historic properties. Nevertheless, the effects of the activities listed below on rail properties within rail ROW remain exempt from Section 106 review.

If an unanticipated discovery of a non-rail historic property, archaeological site of any nature, or human remains is made during the implementation of an exempt activity, the Section 106 requirements at 36 CFR 800.13 and/or state burial law, as appropriate depending on the nature of the discovery, would apply because such resources are not covered by the program comment. In addition, although the activities listed below are exempted from Section 106, the Project Sponsor must still comply with the requirements of any easements, covenants, or state or local historic designations applicable to the affected rail property(ies). At minimum, the Project Sponsor must cease all work in and secure the area of the discovery while the appropriate notifications are made and the parties consult to determine the appropriate course of action.

A. Track and Trackbed [10]

1. Replacement of rails, fasteners, ties, or bridge timbers. This includes replacing jointed rail with continuous welded rail. This does not include changing the gauge of the rail.

2. Addition of switches in an existing trackbed.

3. Replacement of Y-tracks, turn-outs, frogs, or switches within existing footprint.

4. Installation of new turn-outs, sidings, and crossovers in areas of previously disturbed soils or when construction methods do not require surface removal (*).

5. Replacement of subgrade, ballast, and sub-ballast materials.

6. Addition of fill free of debris or other clean borrow materials on top of existing soils or fill.

7. Excavation of clean borrow material from sources within the rail ROW (*).

8. Scraping and undercutting of an existing subgrade or embankment to restore a horizontal profile or increase vertical clearance (*). This includes modifying the subgrade only, not modifications to bridges, tunnels, or other infrastructure.

9. Widening an existing embankment for the addition of turn-outs (*).

10. Reinstallation of track in the same location where it existed previously but had been removed (*e.g.,* reinstallation of double tracking on a currently single-tracked line that had historically been double-tracked).

11. Removal of abandoned sidings, rails, ties, or ballast.

B. Bridges and Tunnels

1. The following bridge and tunnel structure maintenance actions: Cleaning; in-kind painting of the bridge superstructure or substructure; in-kind masonry repointing; deck overlay with the same or similar materials as existing; application of preservative and corrosion protection treatments; ballast cribbing; affixing stiffeners; or patching spalled concrete.[11]

2. Repair or replacement of brackets, hardware, angles, rivets, flanges, bearings, fasteners, motors, locking devices, or similar elements.

3. In-kind repair or replacement of structural or non-structural bridge members (*e.g.,* I-beams, T-beams, girders, box beams, abutments, piers, parapets, bents, bridge protective systems (*e.g.,* fenders, pile clusters, dolphins, sheer booms, sheer fences, island protection systems, or floating protection systems)) that do not alter character-defining features of the bridge (**). This does not include full or partial demolition of a bridge.

4. Actions to strengthen or address deteriorating structural conditions of bridges that are intended to preserve their useful life and that do not alter character—defining features of the bridge (**). Examples include converting the bridge deck from an open deck to a ballast deck; the replacement of traditional roller bearing assemblies to elastomeric or similar pad bearings; or changing the material beneath the ballast such that the change in material would not be visually discernable from outside of the ROW.

5. Repair or replacement of tunnel ventilation structures and associated equipment (*e.g.,* fans, ducting) (**). Replaced structures must be substantially the same size as or smaller than existing and be visually compatible with the surrounding built environment.

6. Removal or replacement of any bridge or tunnel material or added-on element that is not part of the original construction or that was not added during a period of major alteration dating back to 45 years or earlier (**).

C. Rail Buildings (i.e., Passenger Stations and Depots, Maintenance and Equipment Buildings, Interlocking Towers, Signal Houses)

1. In-kind repair or replacement of light fixtures in public spaces, such as passenger waiting areas.

2. Repair, extensions to the width, or extension or shortening of the length of boarding platforms, as necessary to meet federally-mandated ADA-compliant boarding requirements or to accommodate longer or shorter trains, that are constructed with common concrete methods (*e.g.,* concrete slab) (*). This does not include platforms constructed with brick, stone, tile, wood, or other materials. This does not include platform modifications that would result in the need to modify paths of travel, such as through the installation of ramps, to achieve ADA compliant access to/from associated passenger stations.

3. In-kind repair of platforms constructed with brick, stone, tile, wood, or other non-concrete materials (**). This does not include increasing the height of an existing platform to meet ADA requirements.

4. Maintenance, repair, or replacement (**) of escalators and elevators.

5. Cleaning, painting, or refinishing of surfaces with a like color and where the products or methods used would not damage the original surface.

6. In-kind masonry repointing.

7. Repair or replacement of passenger walkways constructed with common concrete or asphalt methods when consistent with existing materials.

8. The following federally mandated ADA improvements at passenger stations do not damage, cover, alter, or remove character-defining architectural spaces, features, or finishes:

a. Installation or replacement (**) of the following: Restroom stalls/partitions, and hardware and fixtures such as grab bars, tilt frame mirrors, sinks, and toilets; tactile warning strips on floors, passenger walkways, and platforms; cane detectors; sidewalk curb cuts; automatic door openers; station identifier and wayfinding signage; public information display systems (PIDS); wheelchair lifts; and wheelchair lift enclosures. This does not include ADA improvements involving the installation, modification, or removal of ramps, stairs, doors, windows, roofs, platform boarding canopies and supports, or ticket counters.

b. Widening of or adjustments to the slope of passenger walkways constructed with common concrete or asphalt methods (*).

9. Interior maintenance work or alterations in stations or other railroad facilities that is limited to non-public spaces that lack architectural distinction (**).

10. Replacement of pumps, air compressors, or fueling stations (*).

11. Removal of mechanical equipment inside railroad facilities not visible to the public (***). Examples include relay panels, switchgear, and track diagram boards.

12. Addition of new mechanical equipment in basements, beneath platforms, in designated mechanical equipment areas, or in areas that are otherwise out of public view.

13. Paving, painting, or striping of parking surfaces.

[10] These activities do not include alterations to the trackbed that would result in a substation visual change (*i.e.,* elevation) in the relationship between the trackbed and the surrounding landscape.

[11] "In-kind" as used here and elsewhere in Appendix A means that new materials used in repairs or replacements must match the material being replaced in composition, design, color, texture, and other visual and material properties. Substitute materials should be used only on a limited basis and only when they will match the appearance and general properties of the historic material and will not damage the historic property. For more information, see *https://www.nps.gov/tps/standards/rehabilitation/rehab/stand.htm.*

14. In-kind repair and replacement of platform boarding canopies and supports (*,**).

15. State-of-good-repair (''SOGR'') activities (**) not otherwise on this list that are necessary to keep a station, depot, or other rail building inhabitable, safe,[12] and in use, and may affect character-defining architectural features of the property, such as the repair or in-kind replacement of the following: Elevator head houses and portals; roofs; doors; windows; stairs; or railings. SOGR activities do not include demolition, decommissioning, or mothballing of rail buildings that are not in use, or reconfiguring the interior spaces of passenger stations for a new use (*e.g.,* enclosing a passenger waiting area to create new office, baggage handling, or event space).

D. Signals, Communications, and Power Generation

1. Maintenance, repair, or replacement of component parts of signal, communications, catenary, electric power systems, or other mechanical equipment that retains the visual appearance of the existing infrastructure (**). This includes replacement of individual signal masts, but does not include wholesale removal or replacement of a catenary system or signal bridge.

2. Maintenance, repair, or replacement (*) of radio base stations.

3. Maintenance, repair, or replacement (*) of the mechanical components of traction power substations, *i.e.,* transformers, circuit breakers, electrical switches. This does not include replacement of an entire substation.

4. Maintenance or repair of signal instrument houses and signal bungalows (**).

5. Installation, repair, or replacement of communications equipment on locomotives and rolling stock that are actively used for intercity passenger rail, rail transit, or freight rail. This does not apply to historic trains used for tourism.

E. Rail/Roadway At-Grade Crossings and Grade Separations

1. Maintenance of existing at-grade railroad crossings including installation of railroad crossing signs, signals, gates, warning devices and signage, highway traffic signal preemption, road markings, and similar safety upgrades (*).

2. In-kind repair, rehabilitation, or replacement of existing at-grade railroad crossings including installation of railroad crossing signs, signals, gates, warning devices and signage, highway traffic signal preemption, road markings, and similar safety upgrades (*,**).

3. Installation of new, at-grade railroad crossings on existing railroads and roadways, including installation of railroad crossing signs, signals, gates, warning devices and signage, highway traffic signal pre-emption, road markings, and similar safety features (*). This does not apply when the crossing involves an individual National Register-listed or eligible roadway or a roadway that is a contributing resource to a National Register-listed or eligible historic district.

[12] As required by applicable federal or municipal fire, life safety, or health codes or standards.

4. Expansion of existing sidewalks, constructed with common concrete or asphalt methods, along the sides of an existing at-grade rail crossing (*).

5. Maintenance, repair, or rehabilitation of existing grade-separated crossings of other transportation modes (highways, local roads, pedestrian underpasses) (*,**). This does not include modifications to existing grade separation structures (*e.g.,* bridges, overpasses) that would result in a substantial increase in height or overall massing.

6. Addition of lanes, turning lanes, road widening, and pavement markings for at-grade crossings (*). This does not apply when the crossing involves an individual National Register-listed or eligible roadway or a roadway that is a contributing resource to a National Register-listed or eligible historic district.

7. Construction of curbs, gutters, or sidewalks adjacent to existing roadway for at-grade crossings (*). This does not apply when the crossing involves an individual National Register-listed or eligible roadway or a roadway that is a contributing resource to a National Register-listed or eligible historic district.

F. Safety

1. Repair, replacement, or installation of the following security and intrusion prevention devices (*,**): security cameras, closed captioned television (CCTV) systems, light poles and fixtures, bollards, emergency call boxes, access card readers, and warning signage.

2. Replacement of security and safety fencing where the replacement is substantially the same appearance as existing (*). This does not include replacement of an open-fence design with a closed design that would create a visual barrier.

3. Replacement or installation of safety equipment/fall protection equipment on rail bridges, signal bridges, or other non-station structures for the protection of rail workers or the public (**). Examples include railings, walkways, gates, tie-off safety cables, anchors, or warning signage.

4. Repair, replacement, or installation of wayside detection devices (*).

5. Repair, replacement (*), or installation (*,**) of bridge clearance/strike beams.

G. Erosion Control, Rock Slopes, and Drainage

1. Placement of rip rap to prevent erosion affecting bridges and waterways.

2. Erosion control through slide and slope corrections (*).

3. Rock removal and re-stabilization activities such as scaling and bolting.

4. Maintenance, repair, or replacement (*) of pre-cast concrete, cast iron, and corrugated metal culverts that lack stone headwalls. This does not include uniquely constructed culverts such as those built by the Civilian Conservation Corps or those made out of unusual materials (*e.g.,* a hollowed log).

5. Expansion, through horizontal elongation, of pre-cast concrete, cast iron, and corrugated metal culverts that lack stone headwalls for the purpose of improved drainage (*).

6. Embankment stabilization or the re-establishment of ditch profiles where no new grading is involved.

7. Corrections to drainage slopes, ditches, and pipes to alleviate improper drainage or changing alluvial patterns (*).

8. In-kind repair or replacement of retaining walls (*,**).

9. Maintenance, repair, or alterations to the interiors of culverts and related drainage pathways.

H. Environmental Abatement

1. Removal of environmental hazards on bridge structures, *e.g.,* treated wood that may leak into waterways or sensitive habitat, removal of graffiti; and abatement of lead/heavy-metal coatings and paintings. Activities that replace coatings or paint must be of the same color and appearance as the materials that have been abated.

2. Removal of asbestos-containing pipe insulation or transmitter relay panels in or on rail operations buildings, bridges, or tunnels.

3. Removal of contaminated ballast and sub-ballast materials.

4. Removal of contaminated soils (*).

I. Operations

1. Establishment of quiet zones, including the installation of required warning devices and additional safety measures installed at grade crossings, that do not entail closing of existing roadways.[13]

2. Increased frequency of train operations that do not result in noise or vibration impacts. (Note: A noise and vibration study would be prepared by a qualified subject matter expert as part of the NEPA process).

3. Temporary storage of rail cars on active rail lines.

4. Repair, maintenance, or replacement (*) of noise barriers. Replacements must be substantially the same size and visual appearance as existing.

J. Landscaping, Access Roads, and Laydown Areas

1. In-kind replacement of existing landscaping.

2. Mowing, seeding/reseeding, planting, tree trimming, brush removal, or other similar groundcover maintenance activities.

3. Herbicidal spraying.

4. Maintenance of existing access roads and lay-down areas (*).

K. Utilities

1. Installation, maintenance, repair, relocation, or replacement of underground utilities (*). Examples include electrical, sewer, compressed air lines, fuel lines, and fiberoptic cable.

2. Maintenance, repair, or replacement (*) of above-ground utilities. Replacements must be substantially the same size and scale (including height) as existing.

[13] A quiet zone is an FRA exemption to the rule requiring trains to sound their horns when approaching public highway-rail grade crossings. More information on the creation of quiet zones is available in FRA's regulations at 49 CFR part 222, Use of Locomotive Horns at Public Highway-Rail Grade Crossings, and in guidance promulgated by FRA's Office of Railroad Safety (for example, see *https://www.fra.dot.gov/Page/P0841* and *https://www.fra.dot.gov/eLib/Details/L04781*).

3. Installation, maintenance, repair, or replacement of utility lines and conduit inside tunnels that does not involve affixing new equipment to the exterior face of tunnel portals.

4. Affixing conduit, repeaters, antennae, and similar small-scale equipment on the exterior masonry face of tunnel portals where the color of the equipment matches the existing masonry in order to limit its visibility and does not damage the masonry construction (**).

L. Bicycle and Pedestrian Facilities, Shared Use Paths, and Other Trails

1. Maintenance, repair, or replacement (*) of existing bicycle lanes, pedestrian walkways, shared use paths (*e.g.,* bicycle, pedestrian), and other trails intended for non-motorized transportation that are constructed with common materials.

2. Adding lanes to existing shared use paths or other trails constructed with common materials (*).

3. Adding crossings for pedestrians and bicycle facilities, shared use paths, or other trails (*).

4. Installation of bicycle aid stations, bicycle racks and storage units, and similar amenities (*, **).

5. Maintenance, repair, or replacement (*) of bicycle aid stations, bicycle racks, and storage units, and similar amenities. Replacements must be substantially the same size and appearance as existing.

6. Installation of information kiosks, panels, and similar amenities for pedestrian, bicyclists, or other path or trail users (***).

7. Maintenance, repair, or replacement (*) of information kiosks, panels, and similar amenities. Replacements must be substantially the same size and appearance as existing.

8. Maintenance, repair, or replacement (*) of existing curbs, gutters, or sidewalks constructed with common materials (*e.g.,* non-decorative concrete or asphalt).

M. Construction/Installation of New Rail Infrastructure

1. Minor new construction and installation of rail infrastructure that is compatible with the scale, size, and type of existing rail infrastructure, such as buildings for housing telecommunications equipment, signal instruments, and similar equipment; storage buildings that house landscaping or maintenance of way equipment or specialty vehicles for track repairs or inspections; locomotive and train car service and inspection (S&I) facilities; trailers or temporary structures for housing rail personnel; and safety/security fencing that uses an open design and does not create a visual barrier. (*,**) applies to all activities in this bullet. This does not include the construction of new passenger stations, rail yards, bridges, or tunnels, or demolition of existing structures.

2. Installation of utility and communications poles, transmission lines, and related equipment within electrified rail ROW (*i.e.,* rail ROW with existing overhead transmission lines) (*). New poles and overhead lines must be substantially the same height as existing. *(Note: If another existing Section 106 Program Alternative, such as the ACHP Program Comment for Positive Train Control or the ACHP Program Comment for Wireless Communications Facilities, would apply to the proposed activities, defer to that Program Alternative.)*

3. Installation of new culverts beneath the trackbed in areas not visible or accessible to the public (*).

N. Rail Properties Less Than 45 Years Old

1. Maintenance, repair, replacement, rehabilitation, or demolition of any rail property less than 45 years old is an exempt activity (unless the rail property is of exceptional importance as defined under NHRP Criterion Consideration G [14] and as determined through consultation between the lead federal agency and the State Historic Preservation Officer (SHPO)). However, as with all other activities in this list, the Project Sponsor and lead federal agency must consider whether the activity may cause effects to adjacent or nearby non-rail historic properties (*e.g.,* demolition of a tall rail building could alter the existing viewshed or eliminate a noise buffer). Depending on the nature of the proposed undertaking, such consideration of effects to non-rail properties may require the involvement of an SOI-qualified professional and consultation with SHPO and other consulting parties, as well as establishment of an APE and identification of historic properties in that APE, assessment of effects to those properties, and resolution of any adverse effects to those properties.

(*) The proposed undertaking must be located entirely within previously disturbed soils or fill. Previously disturbed soils are those that show visible evidence that construction techniques used during previous construction activities required the grading or removal of soil or the addition of fill. A project engineer may be able to determine whether the ground has been previously disturbed or the project location consists of fill based on a review of relevant engineering plans from earlier construction activities at that location. If it cannot be readily demonstrated from a review of available documentation or a non-intrusive site investigation that the entire vertical and horizontal limits of ground disturbance for a proposed undertaking would be entirely located within previously disturbed soils or fill, the lead federal agency (or a Project Sponsor that has been delegated or assigned responsibility for Section 106 compliance) must ensure a Secretary of the Interior (SOI)-qualified archeologist confirms the presence or absence of previously disturbed soils. The Project Sponsor, if it has not been delegated or assigned responsibility for Section 106 compliance, must submit to the lead federal agency the archaeologist's recommendation, with supporting justification, that the undertaking would only affect disturbed soils, and the lead federal agency must provide written concurrence to the Project Sponsor before the undertaking can proceed. If the archaeologist determines that undisturbed soils are present in areas of proposed ground disturbance or if there is uncertainty, this program comment does not apply and the proposed activity remains subject to standard Section 106 review or another applicable program alternative.

(**) The proposed undertaking must meet one of the following circumstances:

- The affected rail property(ies) is listed on the National Register of Historic Places (NRHP), has previously been determined eligible for listing on the NRHP, or the lead federal agency and Project Sponsor agree to treat the affected rail property(ies) as eligible for listing on the NRHP based on factors such as the date of construction (generally 45 years old or older) and the establishment of the period(s) of significance, an assessment of integrity, and the identification of character-defining features of the affected rail property(ies) by an SOI-qualified professional. SOI-qualified professionals may be federal agency staff, federal agency contractors, Project Sponsor staff, and/or consultants hired by Project Sponsors. The value of treating a rail property as being historic is the time-savings achieved by not having to go through the full identification, evaluation, and consultation steps of the standard Section 106 process. When the affected rail property(ies) is considered historic, the work must be performed in accordance with SOI standards. The work must follow the National Park Service Standards for Preservation and Guidelines for Preserving Historic Buildings, as appropriate. Whenever possible, historic fabric must be repaired rather than replaced. The Project Sponsor, if it has not been delegated or assigned responsibility for Section 106 compliance, must provide written justification to the lead federal agency explaining why repair is not feasible. In cases where existing historic materials are beyond repair, replacement must be carried out in-kind. The lead federal agency must ensure the Project Sponsor is performing the work using or under the direct supervision of an SOI-qualified professional in the relevant discipline(s). Verification and approval in writing by the lead federal agency is required before the Project Sponsor can implement the proposed undertaking. Lastly, the lead federal agency must notify the relevant SHPO(s) in writing of the proposed undertaking upon the lead federal agency's approval and prior to the Project Sponsor's commencement of the undertaking. Or,
- The rail property is less than 45 years old and does not meet NHRP Criterion Consideration G. In such cases, the Project Sponsor may carry out maintenance, repair, rehabilitation, or replacement activities of any nature and does not need to follow SOI standards *with regard to the subject rail property.* However, the restrictions noted in Section N of the preceding list apply.

(***) If the equipment to be removed includes obsolete or outdated technology, the Project Sponsor must contact the relevant SHPO, railroad museums or railroad historical societies, museums, educational institutions, or similar entities to determine if there is an entity that may be interested in purchasing or receiving the equipment as a donation, as appropriate. The Project Sponsor, if it has not been delegated or

[14] For information regarding the NRHP Criteria for Evaluation, see *https://www.nps.gov/nr/publications/bulletins/nrb15/.*

assigned responsibility for Section 106 compliance, must demonstrate to the lead federal agency that it has made a good faith effort to contact such parties prior to removal and disposition of such equipment.

Authority: 36 CFR 800.14(e).

Dated: November 14, 2017.

Kelly Y. Fanizzo,

Associate General Counsel.

[FR Doc. 2017–25025 Filed 11–16–17; 8:45 am]

BILLING CODE 4310–K6–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2014–0022]

Technical Mapping Advisory Council

AGENCY: Federal Emergency Management Agency, DHS

ACTION: Committee Management; Notice of Federal Advisory Committee Meeting.

SUMMARY: The Federal Emergency Management Agency (FEMA) Technical Mapping Advisory Council (TMAC) will meet via conference call on December 6, 2017. The meeting will be open to the public.

DATES: The TMAC will meet via conference call on Wednesday, December 6, 2017 from 10:30 a.m. to 5:30 p.m. Eastern Standard Time (EST). Please note that the meeting will close early if the TMAC has completed its business.

ADDRESSES: For information on how to access the conference call, information on services for individuals with disabilities, or to request special assistance for the meeting, contact the person listed in **FOR FURTHER INFORMATION CONTACT** below as soon as possible. Members of the public who wish to dial in for the meeting must register in advance by sending an email to *FEMA–TMAC@fema.dhs.gov* (attention Mark Crowell) by 11 a.m. EST on Friday, December 1, 2017.

To facilitate public participation, members of the public are invited to provide written comments on the issues to be considered by the TMAC, as listed in the **SUPPLEMENTARY INFORMATION** section below. The Agenda and other associated material will be available for review at *www.fema.gov/TMAC* by Friday, December 1, 2017. Written comments to be considered by the committee at the time of the meeting must be received by Monday, December 4, 2017, identified by Docket ID FEMA–2014–0022, and submitted by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email:* Address the email TO: *FEMA–RULES@fema.dhs.gov* and CC: *FEMA–TMAC@fema.dhs.gov.* Include the docket number in the subject line of the message. Include name and contact detail in the body of the email.
- *Mail:* Regulatory Affairs Division, Office of Chief Counsel, FEMA, 500 C Street SW., Room 8NE, Washington, DC 20472–3100.

Instructions: All submissions received must include the words ''Federal Emergency Management Agency'' and the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided. *Docket:* For docket access to read background documents or comments received by the TMAC, go to *http://www.regulations.gov* and search for the Docket ID FEMA–2014–0022.

A public comment period will be held on December 6, 2017, from 1:30–1:50 p.m. EST. Speakers are requested to limit their comments to no more than two minutes. Please note that the public comment periods may end before the time indicated, following the last call for comments. Contact Mark Crowell, below, to register as a speaker by close of business on Friday, December 1, 2017.

FOR FURTHER INFORMATION CONTACT: Mark Crowell, Designated Federal Officer for the TMAC, FEMA, 500 C Street SW., Washington, DC 20472–3100, telephone (202) 646–3432, and email *mark.crowell@fema.dhs.gov.* The TMAC Web site is: *http://www.fema.gov/TMAC.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. Appendix.

As required by the *Biggert-Waters Flood Insurance Reform Act of 2012,* the TMAC makes recommendations to the FEMA Administrator on: (1) How to improve, in a cost-effective manner, the (a) accuracy, general quality, ease of use, and distribution and dissemination of flood insurance rate maps and risk data; and (b) performance metrics and milestones required to effectively and efficiently map flood risk areas in the United States; (2) mapping standards and guidelines for (a) flood insurance rate maps, and (b) data accuracy, data quality, data currency, and data eligibility; (3) how to maintain, on an ongoing basis, flood insurance rate maps and flood risk identification; (4) procedures for delegating mapping activities to State and local mapping partners; and (5) (a) methods for improving interagency and intergovernmental coordination on flood mapping and flood risk determination, and (b) a funding strategy to leverage and coordinate budgets and expenditures across Federal agencies. Furthermore, the TMAC is required to submit an Annual Report to the FEMA Administrator that contains: (1) A description of the activities of the Council; (2) an evaluation of the status and performance of flood insurance rate maps and mapping activities to revise and update Flood Insurance Rate Maps; and (3) a summary of recommendations made by the Council to the FEMA Administrator.

Agenda: On December 6, 2017, the TMAC will review the final narrative content for the TMAC 2017 Annual Report and conduct a vote on the final content and, if approved, submit the report including the previously approved 2017 recommendations and implementation actions to the FEMA Administrator. Members of the public will be afforded an opportunity to comment (no more than 2 minutes per individual) prior to any votes taken by the TMAC. A more detailed agenda will be posted by November 30, 2017, at *http://www.fema.gov/TMAC.*

Dated: November 3, 2017.

Roy E. Wright,

Deputy Associate Administrator for Insurance and Mitigation, Federal Emergency Management Agency.

[FR Doc. 2017–24969 Filed 11–16–17; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2017–0034; OMB No. 1660–0015]

Agency Information Collection Activities: Proposed Collection; Comment Request; Revisions to National Flood Insurance Program Maps: Application Forms and Instructions for (C)LOMAs and (C)LOMR–Fs

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public to take this opportunity

to comment on a reinstatement, without change, of a previously approved information collection for which approval has expired. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning information required by the Federal Emergency Management Agency to amend or revise National Flood Insurance Program maps to remove certain property from the 1-percent annual chance floodplain.

DATES: Comments must be submitted on or before January 16, 2018.

ADDRESSES: To avoid duplicate submissions to the docket, please use only one of the following means to submit comments:

(1) *Online.* Submit comments at *www.regulations.gov* under Docket ID FEMA–2017–0034. Follow the instructions for submitting comments.

(2) *Mail.* Submit written comments to Docket Manager, Office of Chief Counsel, DHS/FEMA, 500 C Street SW., 8NE, Washington, DC 20472–3100.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available via the link in the footer of *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Todd Steiner, Program Analyst, FEMA, Federal Insurance & Mitigation Administration, at (202) 679–4061 or *Todd.Steiner2@fema.dhs.gov.* You may contact the Records Management Division for copies of the proposed collection of information at email address: *FEMA-Information-Collections-Management@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: The National Flood Insurance Program (NFIP) is authorized by the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4001 *et seq.* The Federal Emergency Management Agency (FEMA) administers the NFIP and maintains the maps that depict flood hazard information. The land area covered by the floodwaters of the base flood is the Special Flood Hazard Area (SFHA) on NFIP maps. The SFHA is the area where the NFIP's floodplain management regulations must be enforced and the area where the mandatory purchase of flood insurance applies. If a SFHA has been determined to exist for property and the owner or lessee of the property believes his/her property has been incorrectly included in a SFHA, information can be provided to support removal of the SFHA designation. NFIP regulations, at 44 CFR parts 65 and 70, outline the data that must be submitted by an owner or lessee of property who believes his/her property has been incorrectly included in a SFHA. In order to remove an area from a SFHA, the owner or lessee of the property must submit scientific or technical data demonstrating that the area is ''reasonably safe from flooding'' and not in the SFHA.

This information collection expired on September 30, 2017. FEMA is requesting a reinstatement, without change, of a previously approved information collection for which approval has expired.

Collection of Information

Title: Revisions to National Flood Insurance Program Maps: Application Forms and Instructions for (C)LOMAs and (C)LOMR-Fs.

Type of information collection: Reinstatement, without change, of a previously approved information collection for which approval has expired.

OMB Number: 1660–0015.

Form Titles and Numbers: FEMA Form 086–0–26, Property Information; FEMA Form 086–0–26A, Elevation Form; FEMA Form 086–0–26B, Community Acknowledgement Form; FEMA Form 086–0–22 and FEMA Form 086–0–22A (Spanish), Application Form for Single Residential Lot or Structure Amendments to National Flood Insurance Program Maps.

Abstract: FEMA collects scientific and technical data submissions to determine whether a specific, single-lot property is located within or outside of a Special Flood Hazard Area (SFHA). If the property is determined not to be within a SFHA, FEMA provides a written determination and the appropriate map is modified by a Letter of Map Amendment (LOMA) or a Letter of Map Revision-Based on Fill (LOMR-F). The owner or lessee of a property uses a LOMA or LOMR-F to show that a property is not located within the SFHA, making it possible for the lending institution to waive the flood insurance requirement. If the policyholder decides to maintain insurance on the property, the new determination should result in lower rates.

Affected Public: Individuals and Households; and Business or Other for-Profit Institutes.

Estimated Number of Respondents: 121,116.

Estimated Number of Responses: 121,116.

Estimated Total Annual Burden Hours: 150,725 hours.

Estimated Total Annual Respondent Cost: $6,501,379.

Estimated Respondents' Operation and Maintenance Costs: $24,099,750.

Estimated Respondents' Capital and Start-Up Costs: $0.

Estimated Total Annual Cost to the Federal Government: $268,401.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) 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; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) 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.

Tammi Hines,

Acting Records Management Program Chief, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2017–24968 Filed 11–16–17; 8:45 am]

BILLING CODE 9111–52–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3394–EM; Docket ID FEMA–2017–0001]

Alabama; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of Alabama (FEMA–3394–EM), dated October 8, 2017, and related determinations.

DATES: This amendment was issued October 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 the incident period for this emergency is closed effective October 10, 2017.

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. 2017–24970 Filed 11–16–17; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket No. TSA–2011–0008]

Aviation Security Advisory Committee (ASAC) Meeting

AGENCY: Transportation Security Administration, DHS.

ACTION: Committee Management; Notice of Federal Advisory Committee Meeting.

SUMMARY: The Transportation Security Administration (TSA) will hold a meeting of the Aviation Security Advisory Committee (ASAC) on Thursday, December 7, 2017, to discuss issues listed in the ''Meeting Agenda'' section below. This meeting will be open to the public as stated in the **SUMMARY** section below.

DATES: The Committee will meet on Thursday, December 7, 2017, from 9:00 a.m. to 12:00 p.m. This meeting may end early if all business is completed.

ADDRESSES: The meeting will be held at TSA Headquarters, 601 12th Street South, Arlington, VA 20598–6028.

FOR FURTHER INFORMATION CONTACT: Dean Walter, Aviation Security Advisory Committee Designated Federal Official, Transportation Security Administration (TSA–28), 601 South 12th Street, Arlington, VA 20598–6028, *ASAC@tsa.dhs.gov,* 571–227–2645.

SUPPLEMENTARY INFORMATION:

Summary

Notice of this meeting is given in accordance with the Aviation Security Stakeholder Participation Act, codified at 49 U.S.C. 44946. Pursuant to 49 U.S.C. 44946(f), ASAC is exempt from the Federal Advisory Committee Act (5 U.S.C. App.). The committee provides advice and recommendations for improving aviation security measures to the Administrator of TSA.

The meeting will be open to the public and will focus on items listed in the ''Meeting Agenda'' section below. Members of the public, and all non-ASAC members and non-TSA staff must register in advance with their full name and date of birth to attend. Due to space constraints, the meeting is limited to 75 people, including ASAC members and staff, on a first to register basis. Attendees are required to present government-issued photo identification to verify identity.

In addition, members of the public must make advance arrangements, as stated below, to present oral or written statements specifically addressing issues pertaining to the items listed in the ''Meeting Agenda'' section below. The public comment period will begin at approximately 11:00 a.m., depending on the meeting progress. Speakers are requested to limit their comments to three minutes. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section no later than November 30, 2017, to register to attend the meeting and/or to present oral or written statements addressing issues pertaining to the items listed in the ''Meeting Agenda'' section below. Anyone in need of assistance or a reasonable accommodation for the meeting should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Meeting Agenda

The Committee will meet to discuss items listed in the agenda below:

- Committee recommendations update
- Subcommittee briefings on calendar year (CY) 2017 activities, key issues, and areas of focus for CY 2018:
  - Commercial airports
  - International aviation
  - Air cargo
  - General aviation
  - Security Technology
- Legislative Update
- REAL ID Act of 2005 implementation update
- Discussion of the CY 2018 Committee Agenda

Dated: November 9, 2017.

Eddie D. Mayenschein,

Assistant Administrator, Office of Security Policy and Industry Engagement.

[FR Doc. 2017–24917 Filed 11–16–17; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–6067–N–01]

Revocation of Orders of Succession for the Office of the Deputy Secretary

AGENCY: Office of the Deputy Secretary, HUD.

ACTION: Revocation of Orders of Succession.

SUMMARY: In this document, the Deputy Secretary of the Department of Housing and Urban Development rescinds all previous Orders of Succession for the Office of the Deputy Secretary.

DATES: November 13, 2017.

FOR FURTHER INFORMATION CONTACT: Office of Deputy Secretary, U.S. Department of Housing and Urban Development, 451 7th Street SW., Room 10100, Washington, DC 20410–6000, telephone (202) 402–5430. (This is not a toll-free number). Persons with hearing- or speech-impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Section A. Revocation of Orders of Succession

The Deputy Secretary of the Department of Housing and Urban Development revokes and rescinds any Orders of Succession for the Office of Deputy Secretary that was signed by a previous Deputy Secretary or Acting Deputy Secretary, including Orders of Succession published in the **Federal Register** or published by memorandum.

Section B. Authority Superseded

This publication supersedes all prior Orders of Succession for the Office of the Deputy Secretary, including Orders of Succession published by memorandum on January 8, 2017 and August 4, 2017.

Authority: Section 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Dated: November 13, 2017.

Pamela H. Patenaude,

Deputy Secretary.

[FR Doc. 2017–25024 Filed 11–16–17; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–IA–2017–N116; FXIA16710900000–XXX–FF09A30000]

Issuance of Import Permits for Zimbabwe Elephant Trophies Taken on or After January 21, 2016, and on or Before December 31, 2018

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: The U.S. Fish and Wildlife Service (Service) has made a finding that the killing of African elephant trophy animals in Zimbabwe, on or after January 21, 2016, and on or before December 31, 2018, will enhance the survival of the African elephant. Applications to import trophies hunted during this time period will be considered to have met the enhancement requirement, unless we issue a new finding based on available information. The Service may replace this finding, without any notification in the **Federal Register,** at any time that this finding no longer reflects the available information consistent with the regulatory requirements. In reviewing each application received for import of such specimens, the Service evaluates the information provided in the application, as well as other information available to the Service on the status of the elephant population and the management program for elephants in the country to ensure that the program is promoting the conservation of the species. Each application to import sport-hunted elephant trophies must also meet all other applicable permitting requirements before it may be authorized. This determination does not affect previous determinations by the Service regarding trophy animals taken before January 21, 2016.

DATES: This finding is made November 17, 2017.

ADDRESSES: Timothy J. Van Norman, Chief, Branch of Permits, Division of Management Authority, U.S. Fish and Wildlife Service, MS: IA, 5275 Leesburg Pike, Falls Church, VA 22041–3803; fax (703) 358–2280; or email *DMAFR@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Timothy J. Van Norman, (703) 358–2104 (telephone); (703) 358–2280 (fax); or *DMAFR@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

Background

The African elephant (*Loxodonta africana*) is listed as threatened under the Endangered Species Act of 1973, as amended (ESA or Act; 16 U.S.C. 1531 *et seq.),* on the List of Endangered and Threatened Wildlife in title 50 of the Code of Federal Regulations (50 CFR 17.11(h)). It is also regulated under the provisions of section 4(d) of the Act (known as a ''section 4(d) rule'') with a rule found at 50 CFR 17.40(e). The section 4(d) rule includes specific requirements for the import of sport-hunted trophies. Under § 17.40(e)(6)(i)(B), in order for the Service to authorize the import of a sport-hunted elephant trophy, the Service must find that the killing of the trophy animal will enhance the survival of the species in the wild (known as an ''enhancement finding'').

The Zimbabwe elephant population, along with elephant populations in Botswana, Namibia, and South Africa, are also included in Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) for the exclusive purpose of allowing certain trade subject to annotation, including trade in hunting trophies for noncommercial purposes. All specimens not included in the annotation are deemed Appendix I specimens, and trade in them is regulated accordingly. On August 22, 1997, the U.S. Fish and Wildlife Service (Service) published a proposed rule announcing decisions by the Conference of the Parties to CITES and seeking comment on whether the United States should enter a reservation for any of the species that had been listed on CITES Appendices I and II (62 FR 44627). We discussed how the populations of African elephants in Zimbabwe, Botswana, and Namibia had been down-listed from CITES Appendix I to Appendix II and noted that, because African elephants are listed under the ESA as threatened, the African elephant section 4(d) rule found at 50 CFR 17.40(e) would continue to apply. This rule required that we find that the killing of the animal whose trophy was intended for import would enhance the survival of the species before a sport-hunted trophy could be imported. We also stated that, in making the required enhancement finding for the import of sport-hunted trophies, the Service must review the status of the elephant population and the total management program for the elephant in each country to ensure the program is promoting the conservation of the species.

The preamble to the 1997 proposed rule noted that positive enhancement findings for the countries of Zimbabwe, Botswana, and Namibia had been made and would remain in effect until the Service found that the conditions of the section 4(d) rule are no longer met and published notice of a changed finding in the **Federal Register.** On May 18, 2001, we published a final rule again announcing decisions made at a meeting of the Conference of the Parties to CITES, including the decision to down-list the South African population of African elephants from CITES Appendix I to Appendix II (66 FR 27601). We again discussed the import requirements for African elephant sport-hunted trophies and stated that the enhancement finding for South African elephants would remain in effect until the Service found that conditions of the rule are no longer met and published notice of a changed finding in the **Federal Register.** The U.S. District Court for the District of Columbia, in *Safari Club International, et al.* v. *Jewell, et al.,* 213 F. Supp. 3d 48 (D.D.C. Sept. 30, 2016), has held that the Service created a binding duty on itself when it stated in the preamble of the 1997 proposed rule that it would publish notice in the **Federal Register** before making a change in its 1997 enhancement finding for Zimbabwe, and that the Service then violated this commitment when it published the **Federal Register** notice on May 12, 2014, several weeks after making an interim negative enhancement finding for Zimbabwe on April 4, 2014. As remedy, the Court ordered that the effective date of the 2014 enhancement finding is the date of the **Federal Register** notice, May 12, 2014, meaning that trophies taken on or before May 11, 2014 were allowed to meet the enhancement requirement. We did not intend to create a legal duty to publish changed enhancement findings through these **Federal Register** preamble statements.

On June 6, 2016, the Service amended the African elephant section 4(d) rule (81 FR 36388). With this amendment, ESA permits are required to import all African elephant sport-hunted trophies, including those from the CITES Appendix II populations of Zimbabwe, Botswana, Namibia, and South Africa. Because all imports will be accompanied by a threatened species permit evaluated through the ESA permit application process found at 50 CFR 17.32(a), we will no longer publish

notice of changed enhancement findings for African elephant sport-hunted trophies in the **Federal Register**. In the future, when there are subsequent changes to the determination, the individual applicant will be notified regarding whether his or her permit application was granted or denied, including a brief statement of the grounds for any denial. We may also post information on the import of African elephant hunting trophies on the Service's Web page (*www.fws.gov/international*), as appropriate and consistent with applicable laws and regulations.

Import Suspension

On April 4, 2014, the Service announced an interim suspension of imports of sport-hunted elephant trophies taken in Zimbabwe during the 2014 season. We revised this finding on April 17, 2014, primarily to clarify that the suspension applied only to elephants hunted on or after April 4, 2014. This determination was announced in the **Federal Register** on May 12, 2014 (79 FR 26986). Our decision to establish an interim suspension of imports of elephant trophies from Zimbabwe was due to having insufficient information on the status of elephants in Zimbabwe and on Zimbabwe's current elephant management program to make an enhancement finding. On July 17, 2014, the Service found that the import of elephant trophies taken in Zimbabwe in 2014 on or after April 4, 2014, would be suspended. We revised this finding on July 22, 2014, to make non-substantive corrections and announced this determination in the **Federal Register** on July 31, 2014 (79 FR 44459). The July 17, 2014, decision to uphold the April 4, 2014, suspension was due to the Service being unable to make an enhancement finding even after receiving additional materials from the Zimbabwe Parks and Wildlife Management Authority (ZPWMA) and others. On March 26, 2015, the Service made another determination to continue the suspension (80 FR 42524, July 17, 2015). This decision was again due to the Service being unable to make an enhancement finding even after receiving additional materials from ZPWMA and others. The suspension that resulted from the negative enhancement findings did not prohibit U.S. hunters from traveling to Zimbabwe and participating in an elephant hunt. The Act does not prohibit take (*e.g.,* hunting) within a foreign country; it prohibits import of trophies taken during such hunts without required authorization under the Act.

Following the Service's March 26, 2015, finding, the Service sent a letter on May 12, 2015, to the Honorable Saviour Kasukuwere, (formerly) Zimbabwe's Minister of Environment, Water and Climate, outlining the concerns the Service still had regarding elephant trophy imports from Zimbabwe. The letter identified six areas of concern: the lack of a current management plan; the current population status of elephants in Zimbabwe; poaching levels and prevention; regulations and enforcement concerns; the sustainable utilization of elephants in Zimbabwe; and the utilization of hunting revenues.

On July 20, 2015, ZPWMA responded to each of the questions outlined in the Service's letter and included a draft version of the *Action Plan for Elephant Conservation and Management in Zimbabwe (2015–2020).* In January 2016, the Service received the final version of the action plan, the *Zimbabwe National Elephant Management Plan (2015–2020),* that had been approved and signed by the (then) Director-General of ZPWMA Edson Chidziya, on January 20, 2016, and the Honorable Oppah Muchinguri-Kashiri, Minister of Environment, Water and Climate, on January 21, 2016.

In September 2016, during the 17th Meeting of the Conference of the Parties to CITES, the Service met with representatives from Zimbabwe to further discuss the current status of the Service's evaluation of the importation of elephant trophies. As a result of those conversations, the Service received a letter dated November 8, 2016, with supplemental information regarding Zimbabwe's elephant management plan priorities. Further, on January 27, 2017, the Service received a letter from ZPWMA containing a report, ''The Role of Trophy Hunting of Elephants in Support of the Zimbabwe's Communal Areas Management Programme for Indigenous Resources (CAMPFIRE) Program: December 2016'' that more fully discussed the source and amount of revenue generated between 2010 and 2015 through the CAMPFIRE program, the current role of CAMPFIRE, and how revenue generated by elephant hunting has been utilized within communal areas over this 6-year period and into the future.

Under 50 CFR 17.40(e)(6)(i)(B), the Service evaluates a number of factors to determine whether the killing of the trophy animal taken in a range country will enhance the survival of African elephants as well as taking into consideration the permit issuance criteria outlined in 50 CFR 17.32(a)(2). In evaluating each of these criteria, the Service has considered the information currently available to the Service as of the date of this finding on elephant hunting in Zimbabwe in 2016, 2017, and 2018, including information provided by the Government of Zimbabwe, current applicants for permits to import sport-hunted elephant trophies, interested individuals and organizations, and other information available to the Service.

Zimbabwe's Conservation Efforts for Elephants

On January 21, 2016, Zimbabwe adopted the *Zimbabwe National Elephant Management Plan (2015–2020)* (EMP) that replaced *The Policy and Plan for Elephant Management in Zimbabwe* (1997) and *Elephant Management in Zimbabwe, third edition* (July 1996), the former management plans. The EMP incorporates an adaptive management framework with higher level targets, with key components, strategic objectives, and outputs. Each key component has management actions that can be measured and verified through ''Key Performance Indicators.'' A set deadline for each action was identified. These measurable provisions allow ZPWMA to monitor the success of the new management plan and, through an adaptive management approach, address newly emerging concerns and long-term management needs. The EMP addresses the challenges identified by the 2014 workshop participants and concerns identified by the Service about the previous management plans. The EMP was developed as an outcome of several national and regional workshops that included government officials, nongovernmental organizations (NGOs), rural community leaders, and safari outfitters and landowners.

The 2014 Pan African Elephant Aerial Survey, also known as the Great Elephant Census (GEC), available in 2015, provided ZPWMA with a better elephant baseline population abundance estimate to assess future hunting quotas, management efforts, and anti-poaching activities. Confirmed results from the GEC reported an estimate for elephant abundance in Zimbabwe to be 82,304 individuals (73,715–90,893). The International Union for Conservation of Nature's African Elephant Specialist Group (IUCN AfESG) *African Elephant Status Report–2016* estimated Zimbabwe's elephant population at 82,630 ± 8,589 across a range of 81,228 km². The results of the 2014 GEC, and subsequent survey data reported in the 2016 AfESG report, are more reliable and provide a better basis for

establishing management priorities than previous surveys and guesses, and are now utilized in the EMP and quota setting.

As identified in the 2015 finding, the Service explained that, if properly implemented, the ZPWMA regulatory mechanisms for managing elephants appear to be adequate. A key issue in the 2015 finding was whether an adequate mechanism is in place to reliably document the financial benefits that U.S. hunters provide for elephant conservation through participation in a hunting program that addresses management needs of the species and whether the funds were utilized in a meaningful manner. Since the 2015 finding, the Service has received information regarding the Tourism Receipts Accounting System (TRAS) and its web-based system (TRAS2) under which the Reserve Bank of Zimbabwe, in collaboration with relevant stakeholders, can now track all revenue generated through hunting activities. Under this system, all authorized hunts are now being registered, allowing for the capture of hunting data, such as the origin of clients, value of trophies and hunts, and area hunted, so that officials can monitor hunting quota utilization and track hunted trophies. This system will provide data that was not previously easily obtained and greatly improve the ability to track hunting revenue.

One concern expressed by the Service in its previous findings was whether ZPWMA was responding to the apparent poaching crisis facing Zimbabwe. Based on communication from ZPWMA, as well as information received from other sources, ZPWMA has stepped up its anti-poaching efforts nationally by adopting a number of ''Urgent Measures.'' As shown in their July 2015 response to Service questions, most of ZPWMA's budget (77 percent) is allocated to staff costs and patrol provisions. These expenditures reportedly fund anti-poaching efforts throughout the elephant range. ZPWMA reportedly has a staff of 1,504 active field rangers and has stated that there is intent to increase this number. According to ''The Zimbabwe National Elephant Supplementary Management Plan (2015–2020)'', provided to the Service in late 2016, over 80 percent of spending under the new EMP has been on law enforcement (anti-poaching) and training, with law enforcement identified as the top priority going forward.

With the adoption of the EMP on January 21, 2016, it appears that ZPWMA has the means to successfully implement these laws and regulations. Moreover, ZPWMA has a mechanism in place to monitor the effects of the EMP and adapt to changing environmental and social factors that would adversely affect elephant populations within Zimbabwe.

According to the information provided to the Service in late 2014 and 2015, Zimbabwe had established hunting quotas for all areas of the country. However, it was not until late 2015 and early 2016 that the Service received more specific information on how these quotas are established, including how other forms of take, such as poaching and problem animal control, were taken into account. Further, it was not until the EMP was signed into effect on January 21, 2016, that the Service had confidence that ZWPMA had in place effective mechanisms to ensure long-term sustainability of its elephant population.

According to ZPWMA, quotas that were established before the EMP were set to maximize the sustainable production of high-quality trophies without detriment to the population. With the establishment of the EMP, there is a more systematic, scientific approach to establish national quotas. While ZPWMA still currently starts with an annual quota of 500 elephants, the quota is not immediately divided among all of the hunting areas. Instead, ZPWMA takes into consideration the results of the 2014 survey and subsequent surveys, results from research efforts, the size of the hunting area in relation to elephant habitat requirements, illegal harvest and other forms of take, how the hunting areas are managed in relation to land use or fencing, human–wildlife conflicts that have occurred previously, and recommended sustainable harvest levels developed based on ecological assessments of the hunting area. This information is then further evaluated in consideration of other species within the hunting area, past elephant trophy quality, and community benefits of proposed harvests.

Since our findings in 2014 and 2015, CAMPFIRE has provided more information on how their programs support the conservation of elephants and provide benefits to and promote greater tolerance of wildlife in rural communities, including new efforts to improve the effectiveness of CAMPFIRE and new revenue-sharing guidelines. An overarching analysis of CAMPFIRE, supported by a grant of 12 million Euros from the European Union, is currently being conducted and is scheduled to be completed by the end of 2017. Although this review is still under way, more information has been provided to the Service regarding how funds are utilized and the basis for hunting quotas.

Since our 2014 and 2015 findings, there are strong indications that the efforts of private landowners and consortiums to manage elephants within their areas of control have received greater support from ZPWMA and the Zimbabwean Government. ZPWMA has devolved authority to manage and benefit from wildlife on communal and private lands to the landholders. There now appears to be a greater effort on the part of ZPWMA to work with NGOs, landowners, and safari area concessionaires to improve elephant management and anti-poaching efforts. According to their July 2015 response to the Service, and supported by the report on the implementation of the EMP, ZPWMA is engaging private players in co-management in some areas and entering into long-term lease agreements (10–25 years) to manage some protected areas. In certain areas, ZPWMA is reportedly collaborating with safari operators; in others, they collaborate with NGOs, such as the Tashinga Initiative in the Zambezi Valley and World Wildlife Fund in the Hwange-Sanyati Biological Corridor. There is increased support from the Central Government and Rural District Councils to expand and support local conservation efforts, and there is evidence that local conservation efforts are meeting management deficiencies that the Service identified previously.

Current Finding

Therefore, in accordance with the regulatory requirements, the Service is able to make a determination that the killing of trophy animals in Zimbabwe, on or after January 21, 2016, and on or before December 31, 2018, will enhance the survival of the African elephant. With the information currently available, applications to import trophies hunted during this time period will be considered to have met this requirement unless we issue a new finding based on available information. In accordance with the section 4(d) rule for the African elephant at 50 CFR 17.40(e), the Service will review each application received for import of such specimens on a case-by-case basis and each application also needs to meet all other applicable permitting requirements before it may be authorized. On an ongoing basis and as it evaluates each application, the Service will continue to monitor the status of the elephant population, the management program for elephants in the country to ensure that the program is promoting the conservation of the species, and whether the participation

of U.S. hunters in the program provides a clear benefit to the species. Accordingly, the Service may modify its determination based on available information consistent with the regulatory requirements. In addition, the Service will reevaluate the status of African elephants in Zimbabwe before the end of 2018 and make a new finding in the beginning of 2019 for, at least, the 2019 hunting season.

Today's enhancement finding has been posted at *http://www.fws.gov/international/pdf/enhancement-finding-2017-elephant-Zimbabwe.PDF.* In addition, a list of frequently asked questions regarding the importation of sport-hunted elephant trophies from Zimbabwe is available on the Service's web page at *https://www.fws.gov/international/permits/by-activity/sport-hunted-trophies-elephants.html.*

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2017–24974 Filed 11–16–17; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[XXX.LLAZG02000.71220000.KD0000 .LVTFA0958340;AZA3116]

Notice of Availability of the Draft Ray Land Exchange/Plan Amendment Supplemental Environmental Impact Statement, Arizona

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969 (NEPA), as amended, and the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, the Bureau of Land Management (BLM), Gila District, Tucson Field Office has prepared a Draft Supplemental Environmental Impact Statement (EIS) for the Ray Land Exchange/Plan Amendment and by this Notice is announcing its availability and the opening of the comment period.

DATES: To ensure comments will be considered, the BLM must receive written comments on the Ray Land Exchange/Plan Amendment Draft Supplemental EIS within 90 days following the date the Environmental Protection Agency publishes its Notice of Availability in the **Federal Register**. The BLM will announce future meetings or hearings and any other public involvement activities at least 15 days in advance through public notices, media releases, or mailings.

ADDRESSES: You may submit comments related to the Ray Land Exchange/Plan Amendment Draft Supplemental EIS by any of the following methods:

- *Web site: http://go.usa.gov/xn2FG.*
- *Email: blm_az_raylandexchange@blm.gov.*
- *Fax:* 602–417–9454.
- *Mail:* BLM Arizona State Office, Attn: Ray Land Exchange, One North Central Avenue, Suite 800, Phoenix, AZ 85004–4427.

Copies of the Ray Land Exchange/Plan Amendment Draft Supplemental EIS are available in the BLM Arizona State Office at the above address; the BLM Tucson Field Office at 3201 East Universal Way, Tucson, AZ 85756; the BLM Kingman Field Office at 2755 Mission Boulevard, Kingman, AZ 86401; and the Kearny Public Library at 912–A Tilbury Road, Kearny, AZ 85137.

FOR FURTHER INFORMATION CONTACT: Michael Werner, Project Manager, telephone 602–417–9561; address: One North Central Avenue, Suite 800, Phoenix, AZ 85004–4427; email: *mwerner@blm.gov.*

SUPPLEMENTARY INFORMATION: The BLM Gila District, Tucson Field Office, is issuing the Ray Land Exchange/Plan Amendment Supplemental EIS to augment the environmental impact analysis in the Ray Land Exchange/Plan Amendment Final EIS completed by the BLM in 1999. The BLM issued the Final EIS for the Ray Land Exchange/Plan Amendment in June 1999 and the Record of Decision in May 2000. The decision approved a land exchange between ASARCO LLC (ASARCO) and the BLM for approximately 10,976 acres of public lands and federally owned mineral estate for acquisition by ASARCO (the Selected Lands) in exchange for approximately 7,304 acres of private land owned by ASARCO and identified by the BLM as desirable for improving access for hunting and other recreation (the Offered Lands). The decision was challenged administratively and in Federal court, with the plaintiffs ultimately prevailing in the Ninth Circuit Court of Appeals in November 2010. The court concluded that the BLM violated NEPA and FLPMA ''in assuming without explanation that ASARCO would perform mining operations on the selected lands in the same manner regardless of the land exchange'' *(Center for Biological Diversity* v. *U.S. Department of Interior*, 623 F.3d 633 [9th Cir. 2010]). The court recognized that ASARCO has the right to conduct mining and related activities under the General Mining Law, based on ASARCO's mining and mill site claims on the Selected Lands. But the court believed that the manner and extent of mining were likely to differ, depending on whether the Selected Lands are owned by the United States as public lands subject to the BLM's surface use regulations at 43 CFR 3809 or by ASARCO as private lands in fee simple, in which case the BLM's surface-use regulations would not apply. The Ninth Circuit Court stated that ASARCO is not required to prepare and submit a Mine Plan of Operations (MPO) for future activities on the Selected Lands to complete the exchange. Instead, ''the BLM must make a meaningful comparison of the environmental consequences of ASARCO's likely mining operations with and without the requirement that MPOs be prepared by ASARCO and approved by the BLM—that is, with and without the proposed exchange.'' Because the BLM did not perform this ''with and without'' comparison, the court held that the BLM did not adequately consider the environmental impacts of the land exchange or Resource Management Plan (RMP) amendments. For the same reason, the court also held that the BLM did not properly analyze whether the public interest will be served by making the exchange under FLPMA, section 206(a).

In accordance with the courts' rulings and remand orders, the Draft Supplemental EIS for the Ray Land Exchange provides the ''with and without'' comparative analysis found lacking by the Ninth Circuit Court. The ''with and without'' analysis compares two scenarios of potential environmental impacts on the Selected Lands from mining operations. One scenario analyzes potential impacts that could occur as a result of mining activities on the Selected Lands if they are not exchanged and remain under BLM jurisdiction (*i.e.,* mining occurs with BLM regulations). The other scenario analyzes potential impacts that could occur as a result of mining activities if the Selected Lands are exchanged and become privately owned lands (*i.e.,* mining occurs without BLM regulations). The Draft Supplemental EIS also addresses any substantial changes in the land exchange or plan amendments and any significant new information or circumstances that are relevant to analyzing the impacts of the land exchange or plan amendments (see 40 CFR 1502.9(c); BLM NEPA Handbook, Section 5.3 [January 2008]).

The purpose of the proposed Ray Land Exchange would be to exchange

ownership of Federal lands for private lands. ASARCO proposed the Ray Land Exchange with the BLM in order to acquire public lands adjacent to its Ray Complex (Ray Mine and associated processing facilities near Hayden) and in the Casa Grande vicinity. In exchange, ASARCO is offering to the BLM private lands that will consolidate checkerboard land ownership and improve access to existing Federal land for traditional uses such as hunting and other recreation. By acquiring the Selected Lands, ASARCO is seeking to consolidate its land holdings within and near areas of ongoing mineral development and to use the Selected Lands to support and expand current and future mining-related operations. Through the exchange, the BLM would have an opportunity to improve resource management efficiency by disposing of heavily encumbered, isolated and difficult to manage public lands; and acquire lands that will consolidate ownership patterns in order to improve public access.

The Proposed Action and alternatives presented and analyzed in the Ray Land Exchange/Plan Amendment Draft Supplemental EIS are generally the same as those presented and analyzed in the 1999 Final EIS. The environmental analysis is based on the foreseeable uses of the Selected Lands. The Draft Supplemental EIS includes an analysis of cumulative impacts to all resources and land uses, including an evaluation of potential impacts to Native American traditional values.

The Proposed Action (Agency Preferred Alternative) is to complete the Ray Land Exchange between the BLM and ASARCO. The Selected Lands total approximately 10,976 acres and consist of 31 parcels of public lands located in Pinal and Gila Counties in south-central Arizona. Twenty-eight of the parcels occur in the Middle Gila River Basin between Mineral Creek to the north, the White Canyon Wilderness to the northwest, and the Dripping Spring Mountains to the east, and the Gila River to the south. These 28 parcels are clustered in three areas (the Ray Complex, Copper Butte/Buckeye, and Chilito/Hayden) near ASARCO's Ray Mine and the communities of Kearny, Hayden, and Winkelman, Arizona. The remaining three mineral estate only parcels are located about 50 miles west of the Ray Complex, near the community of Casa Grande in Pinal County. The Offered Lands total approximately 7,304 acres and consist of 18 parcels owned by ASARCO located in Pinal and Mohave Counties, also in Arizona. These parcels, which are presented throughout the Draft Supplemental EIS as five units (two single parcels and three parcel groups), include parcels along the Gila and Big Sandy Rivers, the Black Mountains, and the Cerbat Mountains. The Offered Lands are private inholdings within the jurisdictional boundaries of the Tucson and Kingman Field Offices of the BLM.

The Draft Supplemental EIS also includes a No-Action Alternative under which no land exchange would occur nor would the Phoenix or Safford District RMPs need to be amended under this option. Two additional action alternatives are also analyzed in which less than the full amounts of land would be exchanged: The Buckeye Land Exchange Action Alternative and the Copper Butte Land Exchange Action Alternative. The Buckeye Land Exchange Alternative involves reducing the total acreage included in the land exchange under this alternative. The amount of the Selected Lands is reduced from approximately 10,976 acres to approximately 10,176 acres by excluding about 800 surface and subsurface acres in the Copper Butte area and removing 640 acres of the McCracken Mountains Parcels from the Offered Lands. The Copper Butte Land Exchange Alternative also involves a reduced acreage exchange from the full exchange Proposed Action. The Copper Butte Land Exchange Alternative involves reducing the total acreage of the Selected Lands from approximately 10,976 acres to approximately 9,161 acres by excluding surface and subsurface acres in the Copper Butte area and removing 1,703 acres of the McCracken Mountains Parcels from the Offered Lands.

A plan amendment to the Phoenix and Safford RMPs is required as the selected lands have not been designated for disposal through previous BLM planning processes. The amendment to the Phoenix and Safford District RMPs would change the land tenure designation from ''retention'' to ''disposal'' for a total of approximately 10,339 acres. Specifically:

1. Approximately 9,906 acres designated in the 1988 Phoenix RMP as part of the White Canyon Resource Conservation Area to be changed from retention to disposal; and

2. Approximately 433 acres designated in the 1993 Safford District RMP as part of the former Safford District Long-Term Management Area to be changed from retention to disposal.

The BLM was not required to conduct scoping for the Draft Supplemental EIS. However, the agency has conducted public outreach activities to inform the public and answer questions regarding the proposed land exchange. The efforts included updating the mailing list for the project, contacting mailing list persons via postcard and newsletter, providing a detailed project Web site, and interviewing key stakeholders to present the land exchange details and answer questions.

Please note that public comments and information submitted including names, street addresses, and email addresses of persons who submit comments will be available for public review and disclosure at the above address during regular business hours, Monday through Friday, except holidays.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 40 CFR 1506.6, 40 CFR 1506.10.

A. Scott Feldhausen,

Gila District Manager.

[FR Doc. 2017–24823 Filed 11–16–17; 8:45 am]

BILLING CODE 4310–32–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLORV0000. L51010000. ER0000. LVRWH09H0480. 17XL5017AP. ORОR065375. ID036029.HAG 17–0063]

Notice of Availability of the Record of Decision for the Boardman to Hemingway Transmission Line Project and Approved Land-use Plan Amendments, Oregon

AGENCY: Bureau of Land Management, Interior

ACTION: Notice of availability.

SUMMARY: The Bureau of Land Management (BLM) announces the availability of the Record of Decision (ROD) for the Boardman to Hemingway Transmission Line Project (B2H Project) and Approved Land-use Plan Amendments of the Baker and Southeastern Oregon Resource Management Plans (RMPs). The ROD constitutes the BLM's final decision regarding: (1) Approval to grant a Right-of-Way (ROW) to Idaho Power Company to construct, operate and maintain an extra-high-voltage, alternating-current transmission system; and (2) Amending portions of the BLM Baker and Southeastern Oregon RMPs.

DATES: This decision takes effect immediately.

ADDRESSES: The complete text of the ROD, along with the B2H Project Final Environmental Impact Statement (EIS) and supporting documents, is available on the BLM Web site at *http://www.boardmantohemingway.com/* Copies of the ROD will be placed in all involved BLM offices and, for public review, at the locations identified in the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Tamara Gertsch, National Project Manager, Bureau of Land Management, Vale District Office, P.O. Box 655, Vale, OR 97918; telephone: (307) 775–6115; email: *comment@boardmantohemingway.com.* Persons who use a telecommunications device for the deaf may call the Federal Relay Service at (800) 877–8339 to contact the above individual during normal business hours. The service is available 24 hours a day, 7 days a week, to assist you in leaving a message or question for the above individual. You will receive a reply during normal business hours.

For information related to the U.S. Forest Service's (USFS) involvement in the B2H Project, contact: Arlene Blumton, USFS Project Lead, telephone: (541) 962–8522, email: *ablumton@fs.fed.us.* The USFS will provide a mailing address in its Notice of Availability (NOA) of the B2H Project Final EIS and Proposed Land-use Plan Amendments, and a notice of the draft USFS Record of Decision will be published in the *Baker City Herald* shortly after the BLM ROD.

SUPPLEMENTARY INFORMATION: Idaho Power Company filed with the BLM an application for a ROW grant to use BLM-managed lands to construct, operate, and maintain the B2H Project, which is an approximately 294-mile-long overhead, single-circuit, 500-kilovolt (kV), alternating-current electric transmission line with additional ancillary facilities. The B2H Project will connect the northern terminus, the Longhorn Substation proposed by Bonneville Power Administration (BPA), which is approximately 4 miles northeast of the city of Boardman in Morrow County, Oregon, to the existing Hemingway Substation, which is near the city of Melba in Owyhee County, Idaho. When completed, the B2H Project will provide additional electrical load capacity between the Pacific Northwest Region and the Intermountain Region of Southwestern Idaho. The B2H Project also will alleviate existing transmission constraints and ensure that there is sufficient electrical capacity to meet present and forecasted customer needs as described in Idaho Power Company's 2015 Integrated Resource Plan (available online at *https://www.idahopower.com/AboutUs/PlanningForFuture/irp/2015*).

The ROW width is 250 feet for its entire length, except for an approximately 7-mile section that will replace an existing 69-kV transmission line and will require a 90-foot-wide ROW within and parallel to the eastern boundary of the Naval Weapons Systems Training Facility, Boardman, as well as a 0.9-mile-long section that will require a 125-foot-wide ROW to relocate an existing 230-kV transmission line.

Construction of the B2H Project will take 2 to 3 years and will consist of the following permanent facilities:

- A single-circuit 500-kV electric transmission line (including structures and conductors, as well as other associated facilities) between the proposed Longhorn Substation and the existing Hemingway Substation;
- Access roads and access-control gates;
- A communication regeneration site every 40 miles;
- Removal of approximately 7 miles of the existing Boardman to Tap 69-kV transmission line; and
- Rerouting 0.9 mile of the existing Quartz to Tap 230-kV transmission line.

The BLM will issue a separate, short-term ROW grant for temporary facilities, including temporary access roads (if any), and geotechnical investigation (also analyzed in the Final EIS) for a period of 5 years.

The BLM prepared an EIS in accordance with the National Environmental Policy Act (NEPA) to analyze the direct, indirect, and cumulative environmental impacts associated with the proposed action and the alternatives. The BLM also identified and considered mitigation measures in the EIS to address the environmental impacts of the B2H Project and proposed plan amendments.

The ROD approved the Agency Preferred Alternative identified in the Final EIS. The BLM issued the ROD based on compliance with relevant laws, regulations, policies, and plans, including those guiding agency decisions that may have an impact on resources and their values, services, and functions.

The ROD approving the ROW grant requires, among other things, that the applicant satisfy specific mitigation measures. In particular, the sequence of mitigation actions will be the mitigation hierarchy (avoid, minimize, or compensate) as identified by the White House Council on Environmental Quality's (CEQ) NEPA implementing regulations (40 CFR 1508.20). Siting and design of the B2H Project required the application of design features of the B2H Project for environmental protection. Additionally, selective mitigation measures and implementation plans have been developed to consider the full mitigation hierarchy to avoid, minimize, or compensate for residual impacts on important, scarce, or sensitive resources. The priority is to mitigate impacts at sites of B2H Project activity in conformance with the land-use plan goals and objectives through impact avoidance or minimization of the impact, including those measures described in laws, regulations, policies, and land-use plans. If these types of mitigation measures are not sufficient to ameliorate anticipated direct, indirect, and cumulative impacts, and if substantial or significant residual impacts remain on important, scarce, or sensitive resources, the BLM is requiring compensatory mitigation to reduce these residual impacts or meet applicable land-use plan goals and objectives, consistent with the requirements of NEPA, as well as the BLM's statutory obligations under the Federal Land Policy and Management Act (FLPMA). Compensatory mitigation may be required for Greater sage-grouse, riparian conservation areas, cultural resources, and national historic trails.

Based on the analysis in the Final EIS, the ROD also amends two BLM RMPs as follows:

- Baker RMP—modifies 23 acres of visual resource management (VRM) Class II to Class IV in Burnt River Canyon;
- Southeastern Oregon RMP—modifies 51 acres of VRM Class III to Class IV in the vicinity of the Oregon Trail—Birch Creek Area of Critical Environmental Concern (ACEC); and
- Southeastern Oregon RMP—modifies 20 acres of VRM Class II to Class IV outside of and north of the Owyhee River below the Dam ACEC.

The approved Land-use Plan Amendments specifically revise the RMPs to allow for the development of the B2H Project and ancillary facilities on land managed by the BLM. Consistent with NEPA, the BLM has integrated its land-use planning process with its evaluation of the B2H Project, including the scoping and public availability periods for the EIS. With approval of these Land-use Plan Amendments, the B2H Project will conform to the approved RMPs (43 CFR 1610.5–3).

The evaluation of B2H Project compliance with Land and Resource

Management Plans will be described by the USFS in its NOA for the B2H Project Final EIS and Approved Land-use Plan Amendments and its draft USFS ROD to be issued for comment following the BLM ROD.

Copies of the Final EIS and ROD are available for public review during normal business hours at the following locations in Oregon:

- Baker County Planning Department, 1995 Third St., Baker City
- Baker County Library, 2400 Resort St., Baker City
- BLM Baker Field Office, 3285 11th St., Baker City
- Boardman City Library, 200 S. Main St., Boardman
- Harney County Public Library, 80 W. D St., Burns
- Grant County Planning Department, 201 S. Humboldt St., Canyon City
- BLM Burns District Office, 28910 Hwy 20 W., Hines
- Hermiston Public Library, 235 E. Gladys Avenue, Hermiston
- Morrow County Planning Department, 205 NE. Third St., Irrigon
- Grant County Library, 507 S. Canyon Blvd., John Day
- La Grande Public Library, 2006 Fourth St., La Grande
- Union County Planning Department, 1001 4th St., Suite C, La Grande
- USFS Wallowa-Whitman National Forest Office, La Grande Ranger District, 3502 Highway 30, La Grande
- USFS Wallowa-Whitman National Forest Headquarters, 1550 Dewey Ave., Baker City
- Pendleton Public Library, 502 SW. Dorion Ave., Pendleton
- Umatilla County Planning Department, 216 SE. Fourth St., Pendleton
- BLM Prineville District Office, 3050 NE. 3rd St., Prineville
- Ontario Library, 388 SW. Second Ave., Ontario
- BLM Vale District Office, 100 Oregon St., Vale
- Malheur County Planning Department, 251 B St. W., Vale
- Oregon Department of Energy, 625 Marion St. NE., Salem
- North Powder City Library, 290 E. St., North Powder

Copies of the Final EIS and ROD are available for public review during normal business hours at the following locations in Idaho:

- BLM Boise District Office, 3948 Development Ave., Boise
- Boise Public Library, 715 S. Capitol Blvd., Boise
- BLM Owyhee Field Office, 20 First Ave. W., Marsing
- Owyhee County Planning Department, 17069 Basey St., Murphy
- Nampa Public Library, 215 12th Avenue South Nampa, ID 83651
- Lizard Butte Library, 111 S 3rd Ave. W., Marsing

On November 28, 2016, the NOA for the B2H Project Final EIS and Proposed Land-use Plan Amendments (81 FR 85632) was published in the **Federal Register**. The publication of the NOA initiated a 30-day protest period for the proposed land-use planning decision, as well as a simultaneous 60-day review by the Governor of Oregon to identify any inconsistencies with State or local plans, policies, or programs. At the close of the 30-day protest period, 53 protests were received. These protests were resolved by the BLM Director; individual protest response letters were sent to all protesting parties. Protest resolution is contained in the Director's Protest Summary Report, which is available online at *http://www.blm.gov/pgdata/content/wo/en/prog/planning/planningoverview/protest_resolution.html*. The proposed Land-use Plan Amendments were not modified as a result of the protest resolution, and the Oregon Governor's review did not identify any inconsistencies.

Approval of this decision by the Acting Assistant Secretary—Land and Minerals Management is not subject to administrative appeal (43 CFR 4.410(a)(3)). Additionally, any challenge to this decision must be brought in Federal District Court and is subject to 42 U.S.C. 4370m-6.

Authority: 40 CFR 1506.6.

Jamie E. Connell,

State Director, Oregon/Washington.

[FR Doc. 2017–25013 Filed 11–16–17; 8:45 am]

BILLING CODE 4310–33–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Microperforated Packaging Containing Fresh Produce, DN 3273;* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server at United States International Trade Commission (USITC) at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's Electronic Document Information System (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 has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Windham Packaging, LLC on November 13, 2017. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain microperforated packaging containing fresh produce. The complaint names as respondents Alpine Fresh, Inc. of Miami, FL; Apio, Inc. of Guadalupe, CA; B & G Foods North America, Inc. of Parsippany, NJ; Glory Foods, Inc. of Columbus, OH; Mann Packing Co., Inc. of Salinas, CA; and Taylor Farms California, Inc. of Salinas, CA. The complainant requests that the Commission issue a limited exclusion order, cease and desist orders and impose a bond upon respondents' alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five (5) pages in length, inclusive of attachments, on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would

affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) Identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) Identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) Indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) Explain how the requested remedial orders would impact United States consumers.

Written submissions must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to § 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number (''Docket No. 3273'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures.[1]) 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 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,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: November 13, 2017.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2017–24921 Filed 11–16–17; 8:45 am]

BILLING CODE 7020–02–P

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov.*

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–860 (Third Review)]

Tin- and Chromium-Coated Steel Sheet From Japan

AGENCY: United States International Trade Commission.

ACTION: Notice of revised schedule for full five-year review.

DATES: November 7, 2017.

FOR FURTHER INFORMATION CONTACT: Robert Casanova (202–708–2719), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this review may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION: On October 20, 2017, the Commission established a schedule for the conduct of this full five-year review (82 FR 49661, October 26, 2017). The Commission is revising its schedule.

The Commission's new schedule for the review is as follows: The prehearing conference (if needed) will be held on February 26, 2018; the hearing will be held at the U.S. International Trade Commission Building at 9:30 a.m. on February 27, 2018; and the deadline for filing posthearing briefs is March 7, 2018.

For further information concerning this review see the Commission's notice cited above and the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

Authority: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: November 14, 2017.

William R. Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2017–24980 Filed 11–16–17; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1028]

Certain Mobile Device Holders and Components Thereof; Commission's Determination To Review In-Part a Final Initial Determination Finding a Violation of Section 337; Request for Written Submissions

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in-part the final initial determination (''ID'') issued by the presiding administrative law judge (''ALJ'') on September 12, 2017, finding a violation of section 337 in the above-captioned investigation. Specifically, the Commission has determined to review the ID's analysis and findings with respect to the economic prong of the 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: Amanda Pitcher Fisherow, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2737. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server 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 November 14, 2016, based on a complaint and supplements, filed on behalf of Nite Ize, Inc. of Boulder, Colorado (''Nite Ize''). 81 FR 79519–20 (Nov. 14, 2016). The complaint, as supplemented, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain mobile device holders and components thereof by reason of infringement of certain claims of U.S. Patent No. 8,602,376 (''the '376 patent''), U.S. Patent No. 8,870,146 (''the '146 patent''), U.S. Patent No. D734,746 (''the '746 patent''), and U.S. Patent No. D719,959 (''the '959 patent''). The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337. The Commission's notice of investigation named the following respondents: REXS LLC of Lewes, Delaware; Spinido, Inc. of Brighton, Colorado; Guangzhou Kuaguoyi E-commerce Co., Ltd. d/b/a Kagu Culture (''Kagu Culture'') of Baiyum, China; Sunpauto Co., Ltd. of Kowloon, Hong Kong; Shenzhen Topworld Technology Co. d/b/a IdeaPro (''IdeaPro'') of Hong Kong, Hong Kong; Ninghuaxian Wangfulong Chaojishichang Youxian Gongsi, Ltd., d/b/a EasybuyUS of Shanghai, China; Chang Lee d/b/a Frentaly of Duluth, Georgia; Trendbox USA LLC d/b/a Trendbox (''Trendbox'') of Scottsdale, Arizona; Tenswall d/b/a Shenzhen Tenswall International Trading Co. of La Puente, California; Luo Jieqiong d/b/a Wekin of Chang Sha, China; Pecham d/b/a Baichen Technology Ltd. of Wan Chai, Hong Kong; Cyrift d/b/a Guangzhou Sunway Ecommerce LLC. of Guangzhou, China; Rymemo d/b/a Global Box, LLC of Dunbar, Pennsylvania; Yuan I d/b/a Bestrix of Hubei, China; Zhongshan Feiyu Hardware Technology Co., Ltd d/b/a YouFo (''YouFo'') of ZhongShan City, China; and Shenzhen Youtai Trade Company Limited, d/b/a NoChoice; Luo, Qiben, d/b/a Lita International Shop of Nanshan; Shenzhen New Dream Technology Co., Ltd., d/b/a Newdreams (''Newdreams''); Shenznen Gold South Technology Co., Ltd. d/b/a Baidatong; Wang Zhi Gang d/b/a IceFox (''Icefox''); Dang Yuya d/b/a Sminiker; Lin Zhen Mei d/b/a Anson (''Anson''); Wu Xuying d/b/a Novoland; Shenzhen New Dream Sailing Electronic Technology Co., Ltd. d/b/a MegaDream; Tontek d/b/a Shenzhen Hetongtai Electronics Co., Ltd.; Scotabc d/b/a ShenChuang Optoelectronics Technology Co., Ltd.; Zhiping Zhou d/b/a Runshion; Huijukon d/b/a Shenzhen Hui Ju Kang Technology Co. Ltd.; Barsone d/b/a Shenzhen Senweite Electronic Commerce Ltd.; Oumeiou d/b/a Shenzhen Oumeiou Technology Co., Ltd. (''Oumeiou''); Grando d/b/a Shenzhen Dashentai Network Technology Co., Ltd.; Shenzhen Yingxue Technology Co., Ltd. (''Shenzhen Yingxue''); Shenzhen Longwang Technology Co., Ltd., d/b/a LWANG; Hu Peng d/b/a AtomBud; Wang Guoxiang d/b/a Minse (''Minse'') all of Shenzhen, China. The Office of Unfair Import Investigations (''OUII'') was named as a party to the investigation.

Global Box, LLC and Chang Lee d/b/a Frentaly were terminated on the basis of a consent order. Commission Notice (March 21, 2017); Commission Notice (May 15, 2017). Barsone d/b/a Shenzhen Senweite Electronic Commerce Ltd., Shenzhen Youtai Trade Company Limited, d/b/a NoChoice, Ninghuaxian Wangfulong Chaojishichang Youxian Gongsi, Ltd., d/b/a EasybuyUS, Shenzhen Gold South Technology Co., Ltd. d/b/a Baidatong, Cyrift d/b/a Guangzhou Sunway E-Commerce LLC, Hu Peng d/b/a AtomBud, Grando d/b/a Shenzhen Dashentai Network Technology Co., Ltd., Huijukon d/b/a Shenzhen Hui Ju Kang Technology Co. Ltd., Luo, Qiben, d/b/a Lita International Shop, Shenzhen New Dream Sailing Electronic Technology Co., Ltd. d/b/a MegaDream, Spinido Inc., Dang Yuya d/b/a Sminiker, and Yuan I d/b/a Bestrix were terminated because service could not be effected. Commission Notice (June 13, 2017). The remaining respondents were previously found in default (collectively, ''the Defaulting Respondents''). Commission Notice (May 26, 2017). In addition, the '746 and '959 patents were previously terminated from the investigation. Commission Notice (July 28, 2017).

On May 18, 2017, Nite Ize filed a Motion for Summary Determination of Violation by the Defaulting Respondents and for a Recommended Determination on Remedy and Bonding, Including Issuance of a General Exclusion Order, Limited Exclusion Orders, and Cease and Desist Orders. On June 16, 2017, the ALJ issued Order No. 14 granting in-part Nite Ize's motion for summary determination. The Commission determined not to review that ID. Commission Notice (July 14, 2017).

On September 12, 2017, the ALJ issued his final ID finding a violation of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337. On the same day, the ALJ issued his Recommended Determination on Remedy and Bonding. No petitions for review were filed.

The Commission has determined to review the subject ID in-part. Specifically, the Commission has determined to review the ID's analysis and findings with respect to the economic prong of the domestic industry requirement. 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: Each party's written submission must be filed no later than close of business on Thursday, November 30, 2017. Reply submissions must be filed no later than the close of business on Thursday, December 7, 2017. No further submissions on 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 8 true paper copies to the Office of the Secretary by noon the next day pursuant to Commission Rule 210.4(f), 19 CFR 210.4(f). Submissions should refer to the investigation number (''Inv. No. 337–TA–1028'') 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: November 13, 2017.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2017–24927 Filed 11–16–17; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Employment and Training Administration

Agency Information Collection Activities; Comment Request; Workforce Flexibility (Workflex) Plan Submission and Reporting Requirements

ACTION: Notice.

SUMMARY: The Department of Labor (DOL), Employment and Training Administration is soliciting comments concerning a proposed extension for the authority to conduct the information collection request (ICR) titled, ''Workforce Flexibility (Workflex) Plan Submission and Reporting Requirements.'' This comment request is part of continuing Departmental efforts to reduce paperwork and respondent burden in accordance with the Paperwork Reduction Act of 1995 (PRA).

DATES: Consideration will be given to all written comments received by January 16, 2018.

[1] All contract personnel will sign appropriate nondisclosure agreements.

ADDRESSES: A copy of this ICR with applicable supporting documentation, including a description of the likely respondents, proposed frequency of response, and estimated total burden, may be obtained free at *https://doleta.gov/wioa/State_Plan_Resources.cfm* or by contacting Heather Fleck by telephone at 202–693–2956, TTY 877–889–5627 (these are not toll-free numbers), or by email at *fleck.heather@dol.gov.*

Submit written comments about, or requests for a copy of, this ICR by mail or courier to the U.S. Department of Labor, Employment and Training Administration, Division of WIOA Adult Services and Workforce Systems, U.S. Department of Labor, 200 Constitution Avenue NW., Room S4209, Washington, DC 20210; by email: *fleck.heather@dol.gov*; or by Fax 202–693–3015.

FOR FURTHER INFORMATION CONTACT: Heather Fleck by telephone at 202–693–2956 (this is not a toll-free number) or by email at *fleck.heather@dol.gov.*

SUPPLEMENTARY INFORMATION: The DOL, as part of continuing efforts to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies an opportunity to comment on proposed and/or continuing collections of information before submitting them to the OMB for final approval. This program helps to ensure requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements can be properly assessed.

Section 190 of the Workforce Innovation and Opportunity Act (WIOA) (Pub. L. 113–128, July 22, 2014) permits states to apply for Workflex waiver authority. The Act and 20 CFR 679.630 provide that the Secretary may grant Workflex waiver authority for up to five years pursuant to a Workflex plan submitted by a state. Under Workflex, governors are granted the authority to approve requests submitted by their local areas to waiver certain statutory and regulatory provisions of WIOA Title I programs. States may also request waivers from the Secretary of certain requirements of the Wagner-Peyser Act (Sections 8–10) as well as certain provisions of the Older Americans Act of 1965 (OAA) (42 U.S.C. 3056d(b)) for state agencies on aging with respect to activities carried out using funds allotted under OAA section 506(b). One of the underlying principles for granting Workflex waivers is that the waivers will result in improved performance outcomes for persons served and that waiver authority will be granted in consideration of improved performance.

This is a continuation of the previous collection instructions request under WIA, and WIOA continues to authorize this information collection.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

Interested parties are encouraged to provide comments to the contact shown in the **ADDRESSES** section. Comments must be written to receive consideration, and they will be summarized and included in the request for OMB approval of the final ICR. In order to help ensure appropriate consideration, comments should mention OMB Number: 1205–0432.

Submitted comments will also be a matter of public record for this ICR and posted on the Internet, without redaction. The DOL encourages commenters not to include personally identifiable information, confidential business data, or other sensitive statements/information in any comments.

The DOL is particularly interested in comments that:

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

Agency: DOL–ETA.

Type of Review: Revision.

Title of Collection: Workflex Plan Submission and Reporting Requirements.

Form: Workforce Flexibility (Workflex) Plan Collection Form.

OMB Control Number: 1205–0432.

Affected Public: State and local governments.

Estimated Number of Respondents: 5.

Frequency: 5 state plans annually; 204 quarterly reports.

Total Estimated Annual Responses: 5 state plans annually; 204 quarterly reports.

Estimated Average Time per Response: 18 hours.

Estimated Total Annual Burden Hours: 210 hours.

Total Estimated Annual Other Cost Burden: $0.

Authority: 44 U.S.C. 3506(c)(2)(A).

Nancy M. Rooney,

Deputy Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2017–24998 Filed 11–16–17; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Office of the Secretary

Meeting of the Labor Advisory Committee for Trade Negotiation and Trade Policy

AGENCY: Bureau of International Labor Affairs, U.S. Department of Labor and Office of the United States Trade Representative, Labor Advisory Committee for Trade Negotiations and Trade Policy.

ACTION: Meeting notice.

SUMMARY: Notice is hereby given of a meeting of the Labor Advisory Committee for Trade Negotiation and Trade Policy.

DATES: December 15, 2017 2:00 p.m. to 4:00 p.m.

ADDRESSES: U.S. Department of Labor, Secretary's Conference Room, 200 Constitution Ave. NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Anne M. Zollner, Chief, Trade Policy and Negotiations Division; Phone: (202) 693–4890.

SUPPLEMENTARY INFORMATION: The meeting will include a review and discussion of current issues which influence U.S. trade policy. Potential U.S. negotiating objectives and bargaining positions in current and anticipated trade negotiations will be discussed. Pursuant to 19 U.S.C. 2155(f)(2)(A), it has been determined

that the meeting will be concerned with matters the disclosure of which would seriously compromise the Government's negotiating objectives or bargaining positions. Therefore, the meeting is exempt from the requirements of subsections (a) and (b) of sections 10 and 11 of the Federal Advisory Committee Act (relating to open meetings, public notice, public participation, and public availability of documents). 5 U.S.C. app. Accordingly, the meeting will be closed to the public.

Signed at Washington, DC, the 14th day of November 2017.

Martha E. Newton,

Deputy Undersecretary, Bureau of International Labor Affairs.

[FR Doc. 2017–25011 Filed 11–16–17; 8:45 am]

BILLING CODE 4510–28–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Hazard Communication Standard

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Mine Safety and Health Administration (MSHA) sponsored information collection request (ICR) titled, ''Hazard Communication Standard,'' to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before December 18, 2017.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the *RegInfo.gov* Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201706-1219-001* (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–MSHA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This ICR seeks to extend PRA authority for the Hazard Communication Standard information collection requirements codified in regulations 30 CFR part 47. The Standard requires a mine operator to use labels or other forms of warning necessary to inform miners of all hazards to which the miners are exposed, relevant symptoms and emergency treatment, and proper conditions of safety use or exposure. Federal Mine Safety and Health Act of 1977 sections 101(a)(7) and 103(h) authorize this information collection. *See* 30 U.S.C. 811(a)(7), 813(h).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1219–0133.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on December 31, 2017. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on June 12, 2017 (82 FR 26955).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1219–0133. The OMB is particularly interested in comments that:

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

Agency: DOL–MSHA.

Title of Collection: Hazard Communication Standard.

OMB Control Number: 1219–0133.

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

Total Estimated Number of Respondents: 21,910.

Total Estimated Number of Responses: 1,253,295.

Total Estimated Annual Time Burden: 182,835 hours.

Total Estimated Annual Other Costs Burden: $11,108.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: November 13, 2017.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2017–24994 Filed 11–16–17; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Information Collection Activities; Comment Request

AGENCY: Bureau of Labor Statistics, Department of Labor.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information, in accordance with the Paperwork Reduction Act of 1995. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Bureau of Labor Statistics (BLS) is soliciting comments on the proposed revision of the "*BLS Occupational Safety and Health Statistics (OSHS) Cooperative Agreement application package.*" A copy of the proposed information collection request can be obtained by contacting the individual listed below in the Addresses section of this notice.

DATES: Written comments must be submitted to the office listed in the Addresses section of this notice on or before January 16, 2018.

ADDRESSES: Send comments to Nora Kincaid, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 4080, 2 Massachusetts Avenue NE., Washington, DC 20212. Written comments also may be transmitted by fax to 202–691–5111 (this is not a toll free number).

FOR FURTHER INFORMATION CONTACT: Nora Kincaid, BLS Clearance Officer, telephone number 202–691–7628 (this is not a toll free number.) (See **ADDRESSES** section.)

SUPPLEMENTARY INFORMATION:

I. Background

The Secretary of Labor has delegated to the BLS the authority to collect, compile, and analyze statistical data on work-related injuries and illnesses, as authorized by the Occupational Safety and Health Act of 1970 (Pub. L. 91–596). The Cooperative Agreement is designed to allow the BLS to ensure conformance with program objectives. The BLS has full authority over the financial operations of the statistical program. The existing collection of information allows Federal staff to negotiate the Cooperative Agreement with the State Grant Agencies and monitor their financial and programmatic performance and adherence to administrative requirements imposed by the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (2 CFR 200) and other grant related regulations. The information collected also is used for planning and budgeting at the Federal level and in meeting Federal reporting requirements. The BLS requires financial reporting that will produce the information that is needed to monitor the financial activities of the BLS Occupational Safety and Health Statistics grantees.

The Cooperative Agreement application package being submitted for approval is representative of the package sent every year to state agencies. The work statements included in the Cooperative Agreement application also are representative of what is included in the whole OSHS Cooperative Agreement package. The final Cooperative Agreement, including the work statements, will be submitted separately to the Office of Management and Budget for review of any minor year-to-year information collection burden changes they may contain.

II. Current Action

Office of Management and Budget clearance is being sought for the OSHS Cooperative Agreement application package. Two new forms, the OSHS Budget Variance form and the OSHS Federal Reconciliation Worksheet (FRW–B): Additional Activity to Maintain Currency (AAMC) form, are being included in this application package. The OSHS Budget Variance form will be used to request budget variances, or small movements of funds between the OSHS programs prior to closeout. The OSHS FRW–B: AAMC form will be used to reconcile OSHS AAMC expenditures and obligations as part of the closeout process.

III. Desired Focus of Comments

The BLS is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

Title of Collection: BLS Occupational Safety and Health Statistics Cooperative Agreement Application Package.

OMB Number: 1220–0149.

Type of Review: Revision of a currently approved collection.

Affected Public: State Governments.

Information collection	Respondents	Frequency	Responses	Time	Total hours
BLS–OSHS Work Statements	56	1	56	2 hours	112
BLS–OSHS2	56	4	224	1 hour	224
BLS–OSHS TCF	56	1	56	5–10 minutes	4.7–9.3
OSHS Budget Variance Request Form	0–40	1	0–40	5–25 minutes	0–16.7
BLS–OSHS FRW–A: Base Programs	56	1	56	20–30 minutes	18.7–28
BLS–OSHS FRW–B: AAMC	0–10	1	0–10	20–30 minutes	0–5
BLS–OSHS Property Listing	0–56	1	0–56	20–30 minutes	0–28
Total	56		392–498		359.4–423
Average Totals	56		445		391

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 also will become a matter of public record.

Signed at Washington, DC, this 9th day of November 2017.

Kimberley D. Hill,

Chief, Division of Management Systems.

[FR Doc. 2017–24996 Filed 11–16–17; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Information Collection Activities; Comment Request

AGENCY: Bureau of Labor Statistics, Department of Labor.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information, in accordance with the Paperwork Reduction Act of 1995. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Bureau of Labor Statistics (BLS) is soliciting comments on the proposed extension without change of a currently approved collection of the ''*Labor Market Information (LMI) Cooperative Agreement application package.*'' A copy of the proposed information collection request can be obtained by contacting the individual listed below in the Addresses section of this notice.

DATES: Written comments must be submitted to the office listed in the Addresses section of this notice on or before JANUARY 16, 2018.

ADDRESSES: Send comments to Nora Kincaid, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 4080, 2 Massachusetts Avenue NE., Washington, DC 20212. Written comments also may be transmitted by fax to 202–691–5111 (this is not a toll free number).

FOR FURTHER INFORMATION CONTACT: Nora Kincaid, BLS Clearance Officer, at 202–691–7628 (this is not a toll free number). (See Addresses section.)

SUPPLEMENTARY INFORMATION:

I. Background

The BLS enters into Cooperative Agreements with State Workforce Agencies (SWAs) annually to provide financial assistance to the SWAs for the production and operation of the following LMI statistical programs: Current Employment Statistics, Local Area Unemployment Statistics, Occupational Employment Statistics, and Quarterly Census of Employment and Wages. The Cooperative Agreement provides the basis for managing the administrative and financial aspects of these programs.

The existing collection of information allows Federal staff to negotiate the Cooperative Agreement with the SWAs and monitor their financial and programmatic performance and adherence to administrative requirements imposed by the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (2 CFR 200) and other grant related regulations. The information collected also is used for planning and budgeting at the Federal level and in meeting Federal reporting requirements.

The Cooperative Agreement application package being submitted for approval is representative of the package sent every year to state agencies. The work statements included in the Cooperative Agreement application also are representative of what is included in the whole LMI Cooperative Agreement package. The final Cooperative Agreement, including the work statements, will be submitted separately to the Office of Management and Budget for review of any minor year-to-year information collection burden changes they may contain.

II. Current Action

Office of Management and Budget clearance is being sought for the LMI Cooperative Agreement application package.

III. Desired Focus of Comments

The BLS is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

Title of Collection: Labor Market Information (LMI) Cooperative Agreement Application Package.

OMB Number: 1220–0079.

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

Affected Public: State, Local, or Tribal Governments.

Frequency: Monthly, quarterly, annually.

Information collection	Respondents	Frequency	Responses	Time	Total hours
Work Statements	54	1	54	1–2 hr	54–108
BIF (LMI 1A)	54	1	54	1–6 hr	54–324
BIF (LMI 1B)	0–30	1	0–30	1–6 hr	0–180
Quarterly Automated Financial Reports	48	4	192	10–50 min	32–160
Monthly Automated Financial Reports	48	8*	384	5–25 min	32–160
BLS Cooperative Statistics Financial Report (LMI 2A)	7	12	84	1–5 hr	84–420
Quarterly Status Report (LMI 2B)	0–30	4	0–120	1 hr	0–120
Budget Variance Request Form	0–54	1	0–54	5–25 min	0–23
Transmittal and Certification Form	54	1	54	5–10 min	4.5–9
FRW–A: Base Programs	54	1	54	20–30 min	18–27
FRW–B: AAMC	0–30	1	0–30	20–30 min	0–15
Property Listing	0–54	1	0–54	20–30 min	0–27

Information collection	Respondents	Frequency	Responses	Time	Total hours
Total	54		876–1,164		278.5–1573
Average Totals	54		1,020		925.75

* Reports are not received for end-of-quarter months, i.e., December, March, June, and September.

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 also will become a matter of public record.

Signed at Washington, DC, this 9th day of November 2017.

Kimberley D. Hill,

Chief, Division of Management Systems.

[FR Doc. 2017–24997 Filed 11–16–17; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

[OMB Control No. 1219–0066]

Proposed Extension of Information Collection; Permissible Equipment Testing

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Request for public comments.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed collections of information in accordance with the Paperwork Reduction Act of 1995. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Mine Safety and Health Administration (MSHA) is soliciting comments on the information collection for Permissible Equipment Testing.

DATES: All comments must be received on or before January 16, 2018.

ADDRESSES: Comments concerning the information collection requirements of this notice may be sent by any of the methods listed below.

- *Federal E-Rulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments for docket number MSHA–2017–0034.
- *Regular Mail:* Send comments to USDOL–MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, VA 22202–5452.
- *Hand Delivery:* USDOL—Mine Safety and Health Administration, 201 12th Street South, Suite 4E401, Arlington, VA 22202–5452. Sign in at the receptionist's desk on the 4th floor via the East elevator.

FOR FURTHER INFORMATION CONTACT: Sheila McConnell, Director, Office of Standards, Regulations, and Variances, MSHA, at *MSHA.information.collections@dol.gov* (email); (202) 693–9440 (voice); or (202) 693–9441 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

Section 103(h) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 813(h), authorizes MSHA to collect information necessary to carry out its duty in protecting the safety and health of miners. Further, section 101(a) of the Mine Act, 30 U.S.C. 811, authorizes the Secretary of Labor to develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines.

MSHA is responsible for the inspection, testing approval and certification, and quality control of mining equipment and components, materials, instruments, and explosives used in both underground and surface coal, metal, and nonmetal mines. Title 30 Code of Federal Regulations parts 6 through 36 contain procedures by which manufacturers may apply for and have equipment approved as "permissible" for use in mines.

II. Desired Focus of Comments

MSHA is soliciting comments concerning the proposed information collection related to Permissible Equipment Testing. MSHA is particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;
- Evaluate the accuracy of MSHA's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Suggest methods to enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

The information collection request will be available on *http://www.regulations.gov.* MSHA cautions the commenter against providing any information in the submission that should not be publicly disclosed. Full comments, including personal information provided, will be made available on *www.regulations.gov* and *www.reginfo.gov.*

The public may also examine publicly available documents at USDOL—Mine Safety and Health Administration, 201 12th South, Suite 4E401, Arlington, VA 22202–5452. Sign in at the receptionist's desk on the 4th floor via the East elevator.

Questions about the information collection requirements may be directed to the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

III. Current Actions

This request for collection of information contains provisions for Permissible Equipment Testing. MSHA has updated the data with respect to the number of respondents, responses, burden hours, and burden costs supporting this information collection request.

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

Agency: Mine Safety and Health Administration.

OMB Number: 1219–0066.

Affected Public: Business or other for-profit.

Number of Respondents: 139.

Frequency: On occasion.

Number of Responses: 296.

Annual Burden Hours: 3,198 hours.

Annual Respondent or Recordkeeper Cost: $1,732,175.

MSHA Forms: MSHA Form 2000–38, Electrically Operated Mining Equipment U.S. Department of Labor Field Approval Application (Coal Operator).

Comments submitted in response to this notice will be summarized and 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.

Sheila McConnell,

Certifying Officer.

[FR Doc. 2017–24995 Filed 11–16–17; 8:45 am]

BILLING CODE 4510–43–P

MERIT SYSTEMS PROTECTION BOARD

Public Availability of the Merit Systems Protection Board FY 2015 Service Contract Inventory

AGENCY: Merit Systems Protection Board.

ACTION: Notice.

SUMMARY: The Merit Systems Protection Board (MSPB) is publishing this notice to advise the public of the availability of its FY 2015 Service Contract Inventory as required by the Consolidated Appropriations Act of 2010. This inventory provides information on service contract actions over $25,000 awarded in FY 2015. The inventory was developed in accordance with guidance issued on November 5, 2010 by the Office of Management and Budget's Office of Federal Procurement Policy (OFPP). The OFPP's guidance is available at: *https://obamawhitehouse.archives.gov/sites/default/files/omb/procurement/memo/service-contract-inventories-guidance-11052010.pdf.* The MSPB posted its inventory on its Web site at *https://www.mspb.gov/contact/contracting.htm.*

FOR FURTHER INFORMATION CONTACT: Cynthia Richardson, Contracting Officer, Office of Finance and Administrative Management, Merit Systems Protection Board, 1615 M Street NW., Washington, DC 20419; telephone 202–254–4408; email *cynthia.richardson@mspb.gov.*

Jennifer Everling,

Acting Clerk of the Board.

[FR Doc. 2017–24904 Filed 11–16–17; 8:45 am]

BILLING CODE 7400–01–P

NATIONAL FOUNDATION OF THE ARTS AND THE HUMANITIES

Sunshine Act Meeting of the National Museum and Library Services Board

AGENCY: Institute of Museum and Library Services (IMLS), NFAH.

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the agenda of the forthcoming meeting of the National Museum and Library Services Board. This notice also describes the function of the Board. Notice of the meeting is required under the Sunshine in Government Act.

DATE AND TIME: Thursday, November 30 2017, from 9:00 a.m. to 12:15 p.m. and 1:15 p.m. to 2:30 p.m. EST

Agenda: Thirty-Sixth Meeting of the National Museum and Library Service Board Meeting: 9:00 a.m.–12:15 p.m. Thirty-Sixth Meeting of the National Museum and Library Service Board Meeting:

I. Welcome and Director's Report
II. Approval of Minutes
III. Program Speaker
IV. Financial and Operations Report
V. Office of Museum Services Report
VI. Office of Library Report
VII. Office of Digital and Information Strategy Report
VIII. Special Report—Office of Communications
IX. Adjourn
(Open to the Public)
1:15 p.m. to 2:30 p.m.—Executive Session
(Closed to the Public)

PLACE: The meeting will be held at the IMLS Offices, Panel Room, Suite 4000, 955 L'Enfant Plaza North SW., Washington, DC 20024

FOR FURTHER INFORMATION CONTACT: Katherine Maas, Program Specialist, Institute of Museum and Library Services, Suite 4000, 955 L'Enfant Plaza North SW., Washington, DC 20024. Telephone: (202) 653–4798.

SUPPLEMENTARY INFORMATION: The National Museum and Library Services Board, which advises the Director of the Institute of Museum and Library Services on general policies with respect to the duties, powers, and authority of the Institute relating to museum, library and information services, will meet on November 30, 2017. The Thirty-Sixth Meeting on Thursday, November 30, 2017, from 9:00 a.m. to 12:15 p.m., is open to the public. The Executive Session, which will be held from 1:15–2:30 p.m., will be closed pursuant to subsections (c)(4) and (c)(9) of section 552b of Title 5, United States Code because the Board will consider information that may disclose: Trade secrets and commercial or financial information obtained from a person and privileges or confidential; and information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action.

If you need special accommodations due to a disability, please contact: Institute of Museum and Library Services, 955 L'Enfant Plaza North SW., Suite 4000, Washington, DC 20024, Telephone: (202) 653–4796, at least seven (7) days prior to the meeting date.

Dated: November 15, 2017.

Danette Hensley,

Staff Assistant, Office of General Counsel.

[FR Doc. 2017–25108 Filed 11–15–17; 4:15 pm]

BILLING CODE 7036–01–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Integrative Activities: Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces the following meeting:

NAME AND COMMITTEE CODE: Advisory Committee for Integrative Activities (#1373).

DATES AND TIMES:
December 13, 2017; 9:00 a.m.–5:00.p.m.
December 14, 2017; 8:00 a.m.–5:00 p.m.

PLACE: National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314.

To help facilitate your entry into the building, please contact Dr. Bernice Anderson via email at *banderso@nsf.gov* or by phone: 703.292.8040 on or prior to December 12, 2017.

TYPE OF MEETING: Part-Open.

CONTACT PERSON: Dr. Bernice Anderson, Senior Advisor, Office of Integrative Activities (OIA), Room W17124, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314. Contact Information: 703–292–8040/*banderso@nsf.gov.*

PURPOSE OF MEETING: To provide advice and recommendations concerning the use of and the need for the Science and Technology Policy Institute.

Agenda

Wednesday, December 13, 2017

- 9:30 a.m.–Noon (Open): Welcome, Charge to the Panel, Overview and History of the Science and Technology Policy Institute (STPI), and STPI Research Presentation
- 1:30 p.m.–4:30 p.m. (Open): Presentation and Briefings by the Office of Science and Technology Representatives; Discussions about the Need for and Use of STPI

Thursday, December 14, 2017

- 9:00 a.m.–11:30 a.m.: (Open)—Presentations/Briefings by NSF and other Government Clients
- 11:30 a.m.–5:00 p.m.: (Closed) Review of the Contract and Report Writing

REASON FOR CLOSING: The contract being reviewed includes information of a proprietary or confidential nature, including technical and personal information that must be considered in the evaluation and the development of recommendation(s). These matters are exempt under 5 U.S.C. 552b(c), (4), (6) and (9)(B) of the Government in the Sunshine Act.

Dated: November 14, 2017.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2017–24993 Filed 11–16–17; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2017–0127]

Information Collection: Licenses and Radiation Safety Requirements for Irradiators

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of submission to the Office of Management and Budget; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted a request for a renewal of an existing collection of information to the Office of Management and Budget (OMB) for review. The information collection is entitled, ''Licenses and Radiation Safety Requirements for Irradiators.''

DATES: Submit comments by December 18, 2017.

ADDRESSES: Submit comments directly to the OMB reviewer at: Brandon De Bruhl, Desk Officer, Office of Information and Regulatory Affairs (OMB 3150–0158), NEOB–10202, Office of Management and Budget, Washington, DC 20503; telephone: 202–395–0710, email: *oira_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: David Cullison, NRC Clearance Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *INFOCOLLECTS.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2017–0127 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–2017–0127.
- *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 supporting statement is available in ADAMS under Accession No. ML17276B478.
- *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.
- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *INFOCOLLECTS.Resource@nrc.gov.*

B. Submitting Comments

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *http://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the OMB, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Background

Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC recently submitted a request for renewal of an existing collection of information to OMB for review entitled, ''Licenses and Radiation Safety Requirements for Irradiators.'' The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on July 27, 2017 (82 FR 34994).

1. *The title of the information collection:* 10 CFR part 36 ''Licenses and Radiation Safety Requirements for Irradiators.''
2. *OMB approval number:* 3150–0158.
3. *Type of submission:* Extension.
4. *The form number if applicable:* N/A.
5. *How often the collection is required or requested:* Applications for new licenses and amendments may be submitted at any time (on occasion). Applications for renewal are submitted every 10 years. Reports are submitted as events occur.
6. *Who will be required or asked to respond:* Applicant for and holders of specific licenses authorizing the use of licensed radioactive material for irradiators.
7. *The estimated number of annual responses:* 2,389.
8. *The estimated number of annual respondents:* 70.
9. *An estimate of the total number of hours needed annually to comply with the information collection requirement or request:* 42,612.
10. *Abstract:* Part 39 of title 10 of the *Code of Federal Regulations* (10 CFR), establishes radiation safety requirements for the use of radioactive material for irradiators. The information in the applications, reports and records is used by the NRC staff to ensure that the health and safety of the public is protected and that the licensee possession and use of source or byproduct material is in compliance with license and regulatory requirements.

Dated at Rockville, Maryland, this 13th day of November, 2017.

For the Nuclear Regulatory Commission.

David Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

Subject: Information Collection: Licenses and Radiation Safety Requirements for Irradiators

ADAMS Accession No. ML17276B480 (FRN)

To receive a copy of this document, indicate in the box: ''**C**'' = Copy without

attachment/enclosure ''**E**'' = Copy with attachment/enclosure ''**N**'' = No copy

OFFICE	NMSS	N	NMSS		OCIO
NAME	Lymari Sepulveda		Hipolito Gonzalez		
DATE	10/03/2017		10/3/2017		11/13/2017

OFFICIAL RECORD COPY

[FR Doc. 2017–24987 Filed 11–16–17; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2017–55; MC2018–22 and CP2018–44; MC2018–23 and CP2018–45; MC2018–24 and CP2018–46; CP2018–47]

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:* November 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:

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).:* CP2017–55; *Filing Title:* USPS Notice of Change in Prices Pursuant to Amendment to Priority Mail Contract 263*; Filing Acceptance Date:* November 9, 2017; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Katalin K. Clendenin; *Comments Due:* November 20, 2017.

2. *Docket No(s).:* MC2018–22 and CP2018–44; *Filing Title:* USPS Request to Add Priority Mail Contract 373 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* November 9, 2017; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Timothy J. Schwuchow*; Comments Due:* November 20, 2017.

3. *Docket No(s).:* MC2018–23 and CP2018–45; *Filing Title:* USPS Request to Add Priority Mail Contract 374 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* November 9, 2017; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Timothy J. Schwuchow; *Comments Due:* November 20, 2017.

4. *Docket No(s).:* MC2018–24 and CP2018–46; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail & First-Class Package Service Contract 26 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* November 9, 2017; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Timothy J. Schwuchow; *Comments Due:* November 20, 2017.

5. *Docket No(s).:* CP2018–47; *Filing Title:* Notice of United States Postal Service of Filing a Functionally Equivalent Global Expedited Package Services 9 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal; *Filing Acceptance Date:* November 9, 2017; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Katalin K. Clendenin; *Comments Due:* November 20, 2017.

This notice will be published in the **Federal Register**.

Stacy L. Ruble,

Secretary.

[FR Doc. 2017–24906 Filed 11–16–17; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copy Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE., Washington, DC 20549–2736

Extension:

Form N–CSR, SEC File No. 270–512, OMB Control No. 3235–0570

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information

summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

Form N–CSR (17 CFR 249.331 and 274.128) is a combined reporting form used by registered management investment companies (''funds'') to file certified shareholder reports under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (''Investment Company Act'') and the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Exchange Act''). Specifically, Form N–CSR is to be used for reports under section 30(b)(2) of the Investment Company Act (15 U.S.C. 80a–29(b)(2)) and section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) and 78o(d)), filed pursuant to rule 30b2–1(a) under the Investment Company Act (17 CFR 270.30b2–1(a)). Reports on Form N–CSR are to be filed with the Securities and Exchange Commission (''Commission'') no later than 10 days after the transmission to stockholders of any report that is required to be transmitted to stockholders under rule 30e–1 under the Investment Company Act (17 CFR 270.30e–1). The information filed with the Commission permits the verification of compliance with securities law requirements and assures the public availability and dissemination of the information.

The current total annual burden hour inventory for Form N–CSR is 172,899 hours.[1] The hour burden estimates for preparing and filing reports on Form N–CSR are based on the Commission's experience with the contents of the form. The number of burden hours may vary depending on, among other things, the complexity of the filing and whether preparation of the reports is performed by internal staff or outside counsel.

The Commission's new estimate of burden hours that will be imposed by Form N–CSR is as follows:

HOUR BURDEN FOR REPORTS ON FORM N–CSR

Number of funds	[2] 11,856
Number of filings per fund per year	2
Hour burden per fund per filing	7.31
Hour burden per fund per year (7.31 hours per filing × 2 filings per year)	14.62
Additional aggregate annual burden for closed-end funds	[3] 750
Total annual hour burden for all funds	[4] 174,085

In total, the Commission estimates it will take 174,085 burden hours per year for all funds to prepare and file reports on Form N–CSR. Based on the Commission's estimate of 174,085 burden hours and an estimated wage rate of approximately $324 per hour,[5] the total internal annual cost to registrants of the hour burden for complying with Form N–CSR requirements is approximately $56 million.[6]

Estimates of average burden hours and costs are made solely for purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even representative survey or study of the costs of Commission rules and forms. Compliance with the information collection requirements of Form N–CSR is mandatory. Responses to the collection of information will not be kept confidential. 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.

Written comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Pamela Dyson, Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549; or send an email to: *PRA_Mailbox@sec.gov.*

Please direct your written comments to Pamela Dyson, Director/Chief Information Officer, Securities and Exchange Commission, C/O Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549; or send an email to: *PRA_Mailbox@sec.gov.*

Dated: November 14, 2017.

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2017–24945 Filed 11–16–17; 8:45 am]

BILLING CODE 8011–01–P

---

[1] This estimate is based on the following calculations: 172,899 hours = (11,856 management investment companies × 14.52 hour burden per fund per year) + 750 additional hours for closed-end funds.

[2] This estimate is based on the following calculation: 11,856 management investment companies = (1,594 exchange-traded funds—eight organized as unit investment trusts + 750 closed-end funds + 481 money market funds + 9,039 other mutual funds).

[3] This estimate is based on the following calculation: 750 hours = (750 closed-end funds × 1 hour per closed-end fund).

[4] This estimate is based on the following calculation: 174,085 hours = 750 hours + (11,856 funds × 14.62 burden hours per fund per year).

[5] The Commission's estimate concerning the wage rate is based on salary information for the securities industry compiled by the Securities Industry and Financial Markets Association. The estimated wage figure is based on published rates for compliance attorneys and senior programmers, modified to account for an 1,800-hour work year and inflation; multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead; and adjusted to account for the effects of inflation, yielding effective hourly rates of $340 and $308, respectively. *See* Securities Industry and Financial Markets Association, Report on Management & Professional Earnings in the Securities Industry 2013. We estimate that compliance attorneys and senior programmers would divide their time equally, yielding an estimated hourly wage rate of $324. ($340 per hour for compliance attorneys + $308 per hour for senior programmers) ÷ 2 = $324 per hour.

[6] 174,085 hours × $324 per hour = $56,403,540 per year.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82063; File No. SR–ICEEU–2017–011]

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing of Proposed Rule Change, Security Based Swap Submission, or Advance Notice Relating to Amendments to the ICE Clear Europe Collateral and Haircut Policy

November 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 November 2, 2017, ICE Clear Europe Limited (''ICE Clear Europe'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule changes described in Items I, II, and III below, which Items have been primarily prepared by ICE Clear Europe. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The principal purpose of the changes is to modify the ICE Clear Europe

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Collateral and Haircut Policy to incorporate certain changes to the calculation of absolute collateral limits for bonds provided as Permitted Cover by Clearing Members. The changes also make certain clarifications and updates and add certain general provisions addressing overall risk appetite and risk limits.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICE Clear Europe 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. ICE Clear Europe has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

ICE Clear Europe proposes revising its Collateral and Haircut Policy (the ''Collateral and Haircut Policy'') to incorporate certain changes to the calculation of absolute collateral limits for bonds provided as Permitted Cover by Clearing Members and certain other revisions as described below. The amendments do not involve any changes to the ICE Clear Europe Clearing Rules or Procedures.

The Collateral and Haircut Policy establishes a maximum amount of bonds from an individual issuer that ICE Clear Europe will accept from a Member Group (an ''Absolute Limit''). The Absolute Limit is designed to take into account the trading liquidity of the bond, and accordingly the ability of ICE Clear Europe to liquidate the collateral when required. Currently, the underlying data used in the calculation of the Absolute Limit is based on the bi-annual International Capital Market Associate repo survey of market participants (the ''ICMA Data''), as a proxy for secondary market trading activity. Under the revised Collateral and Haircut Policy, the Absolute Limit will be determined using actual secondary market trading volume data provided by ICE Data Services (the ''IDS Data''). The IDS Data is compiled from a wide range of market data sources for transactions in government and corporate bonds. In certain circumstances where official trading volume data is published from a primary source, such as a governmental or central bank, such data will be used in lieu of the IDS Data. (For example, for bonds issued by Canada and Japan, ICE Clear Europe will utilize data provided by the Bank of Canada and the Japan Securities Dealers Association, respectively, instead of IDS Data.) In either case, the Absolute Limit for each bond issuer and collateral type will be 10% of the average daily volume over the past three months, rounded to the nearest million. ICE Clear Europe believes that the revised approach will provide a more direct and accurate estimation of liquidity than under the current approach, which will facilitate calculation of conservative and appropriate absolute concentration limits.

The revisions also provide that in order to capture price volatility information on a conservative basis, the haircut calculation methodology, which incorporates a historical VaR model, among other factors, will use a two-sided VaR estimation based on the largest absolute returns.

The Collateral and Haircut Policy has also been amended to more clearly take into account the existence of ICE Clear Europe's approximately U.S. $1 billion in committed repo facilities. As under the existing policy, in certain circumstances the Clearing House may permit a Clearing Member to maintain a collateral bond position in excess of normal absolute limits, in reliance on the Clearing House's ability to obtain cash for any excess securities using the committed repo facility. The amendments clarify that the repo facilities are available at any time there is an intra-day liquidity need, and are not limited to use in case of Clearing Member default.

The amendments also note certain particular scenarios in which the clearing risk department may, consistent with the current policy, consider other qualitative and quantitative factors in setting prudent haircuts. These include the need to clean the bond price input data to remove spurious effects caused by changes in the different underlying bonds used to build bond price time-series. In this regard, the time series of bond price data in some instances may be spliced together from bonds with the same maturities but certain differences in other terms. These differences may cause the bonds to trade at different price levels, which could introduce spurious price spikes into the time series. To avoid an effect on the calculated haircut levels, ICE Clear Europe removes such spurious price spikes from the time series. The policy also notes that the clearing house may also need to consider the impact of unexpected currency de-pegging events on the calculation of cross-currency FX haircuts (such as the Swiss franc de-pegging from the Euro in January 2015, which caused unexpected sharp movements in the underlying exchange rate), as such events may not be fully captured by the quantitative approach in the Collateral and Haircut Policy.

In addition, the Collateral and Haircut Policy has been revised to add certain general provisions, consistent with the approach taken in other ICE Clear Europe policies, addressing overall risk appetite and risk limits in the context of the purposes of the Collateral and Haircut Policy. Certain references in the policy to internal ICE Clear Europe personnel, departments and committees have been updated. The amendments also provide further detail as to the process for annual independent validation and governance oversight of relevant models used to support the Collateral and Haircut Policy. The policy owner, with the support of risk department personnel, will be responsible for the continuous review and reporting of the risk profile of the policy. The policy will be reviewed at least annually by the CDS and F&O Risk Committees and approved by the Board. Any material changes to the policy must be discussed with the Executive Risk Committee, reviewed by the CDS and F&O Risk Committees and the Board Risk Committee and approved by the Board. A ''red-amber-green'' escalation process has also been implemented to handle identified risks or situations as they arise.

(b) Statutory Basis

ICE Clear Europe believes that the changes described herein are consistent with the requirements of Section 17A of the Act [3] and the regulations thereunder applicable to it, including the standards under Rule 17Ad–22,[4] and in particular are consistent with the prompt and accurate clearance of and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts and transactions, the safeguarding of securities and funds in the custody or control of ICE Clear Europe or for which it is responsible and the protection of investors and the public interest, within the meaning of Section 17A(b)(3)(F) of the Act.[5] The amendments are intended, among other matters, to adopt a more robust and direct method for obtaining relevant bond trading volume data that is used

[3] 15 U.S.C. 78q–1.

[4] 17 CFR 240.17Ad–22.

[5] 15 U.S.C. 78q–1(b)(3)(F).

to determine concentration limits and to clarify certain other matters relating to calculation of haircuts and limits. The amendments also enhance the governance process around the Collateral and Haircut Policy. In ICE Clear Europe's view, the amendments will help ICE Clear Europe more clearly determine the liquidity of relevant bonds, which in turn will facilitate establishment of accurate concentration limits. As a result, ICE Clear Europe believes the amendments are consistent with the requirements of Section 17A(b)(3)(F) [6] of the Act. In addition, for the foregoing reasons, the amendments will facilitate setting and enforcing appropriately conservative haircuts and concentration limits, and provide for a review of the sufficiency of such haircuts and limits not less than annually, within the meaning of Rule 17Ad–22(e)(5).[7]

(B) Clearing Agency's Statement on Burden on Competition

ICE Clear Europe does not believe the proposed changes to the rules would have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purpose of the Act. ICE Clear Europe is adopting the amendments to the Collateral and Haircut Policy in order to enhance the calculations of concentration limits and haircuts and make certain other governance and related enhancements to the Collateral and Haircut Policy. The amendments will apply to all Clearing Members and products. ICE Clear Europe does not believe the amendments would materially affect the cost of clearing, adversely affect access to clearing in these products for Clearing Members or their customers, or otherwise adversely affect competition in clearing services. Although the amendments may change the haircuts or concentration limits for particular bonds, which may affect the costs and benefits of using those bonds as collateral, ICE Clear Europe believe that such changes are appropriate in light of the risk management enhancements provided by the revised policy. As a result, ICE Clear Europe believes that any impact or burden on competition from such amendments would be appropriate in furtherance of the purpose of the Act.

[6] 15 U.S.C. 78q–1(b)(3)(F).

[7] 17 CFR 240.17Ad–22(e)(5).

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed changes to the rules have not been solicited or received. ICE Clear Europe will notify the Commission of any written comments received by ICE Clear Europe.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*) or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ICEEU–2017–011 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–ICEEU–2017–011. 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 ICE Clear Europe and on ICE Clear Europe's Web site at *https://www.theice.com/notices/Notices.shtml?regulatoryFilings.*

All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ICEEU–2017–011 and should be submitted on or before December 8, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2017–24935 Filed 11–16–17; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82058; File No. SR–IEX–2017–39]

Self-Regulatory Organizations: Investors Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt Rules Pertaining to Certain Listing Regulatory Reporting and Operational Requirements

November 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 October 31, 2017, the Investors Exchange LLC (''IEX'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to

[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

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

Pursuant to the provisions of Section 19(b)(1) under the Securities Exchange Act of 1934 (''Act''),[4] and Rule 19b–4 thereunder,[5] Investors Exchange LLC (''IEX'' or ''Exchange'') is filing with the Commission a proposed rule change to adopt rules pertaining to certain listing regulatory reporting and operational requirements. The Exchange has designated this proposal as non-controversial and provided the Commission with the notice required by Rule 19b–4(f)(6)(iii) under the Act.[6] The text of the proposed rule change is available at the Exchange's Web site at *www.iextrading.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 the Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statement [sic] may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

On June 17, 2016 the Commission granted IEX's application for registration as a national securities exchange under Section 6 of the Act including approval of rules applicable to the qualification, listing and delisting of companies on the Exchange.[7] The Exchange plans to begin a listing program in 2017 and is proposing to adopt rules pertaining to certain listing regulatory reporting and operational requirements, as described below.

Short-Interest Reporting

The Financial Industry Regulatory Authority (''FINRA''), the Nasdaq Stock Market (''Nasdaq'') and the New York Stock Exchange (''NYSE'') each have rules requiring that members of such self-regulatory organization (''SRO'') record and report specified short positions in all customer and proprietary accounts.[8] This data is also referred to as short interest. In the case of Nasdaq, the recording and reporting requirements apply to positions in securities listed on Nasdaq, while the FINRA and NYSE rules apply to all equity securities. The FINRA, Nasdaq and NYSE rules each require reporting on a bi-monthly basis by their member firms. FINRA, NYSE and Nasdaq firms provide their short position reports to FINRA through the Firm Gateway.[9] Firms must report their mid-month short positions as of the close of business on the settlement date of the 15th of each month, or, where the 15th is a non-settlement date, on the preceding settlement date. Firms must report their end-of-month short positions as of the close of business on the last business day of the month on which transactions settle pursuant to FINRA and exchange rules. Both reports must be received by FINRA no later than the second business day after the reporting settlement date.

FINRA consolidates the short position reports submitted by each firm, and provides such reports to the relevant listing exchange for each listed security (*i.e.,* NYSE, Nasdaq and Bats BZX Exchange, Inc. (''Bats'')). In order to provide transparency [10] regarding aggregate short interest in equities securities, the listing exchanges publish the consolidated short interest data seven business days after the reporting settlement date. Similarly, FINRA publishes consolidated short interest data for securities that are not listed on an exchange on the same time frame. Short interest data is also used by FINRA for regulatory purposes, including to assess compliance with Regulation SHO.

IEX proposes to adopt a comparable rule requiring short interest recording and reporting in securities listed on IEX by Members. Specifically, IEX proposes to adopt new Rule 3.293, entitled Short-Interest Reporting, that requires IEX Members, to the extent such information is not otherwise reported to FINRA in conformance with FINRA Rule 4560, to comply with FINRA Rule 4560 with respect to securities listed on IEX, as if such rule were part of IEX's rules, and to report required information in the form and manner specified by IEX. Thus, as proposed, IEX Members are subject to the following requirements:

(a) Each Member shall maintain a record of total ''short'' positions in all customer and proprietary firm accounts in securities listed on IEX [11] and shall regularly report such information to FINRA in such a manner as may be prescribed by IEX. Reports shall be received by FINRA no later than the second business day after the reporting settlement date designated by IEX.

(b) Members shall record and report all gross short positions existing in each individual firm or customer account, including the account of a broker-dealer, that resulted from (1) a ''short sale'', as that term is defined in Rule 200(a) of SEC Regulation SHO, or (2) where the transaction(s) that caused the short position was marked ''long,'' consistent with SEC Regulation SHO, due to the firm's or the customer's net long position at the time of the transaction. Members shall report only those short positions resulting from short sales that have settled or reached settlement date by the close of the reporting settlement date designated by IEX.

(c) The recording and reporting requirements shall not apply to:

(1) Any sale by any person, for an account in which he has an interest, if such person owns the security sold and intends to deliver such security as soon as is possible without undue inconvenience or expense; and

(2) any sale by an underwriter, or any member of a syndicate or group participating in the distribution of a security, in connection with an over-allotment of securities, or any lay-off sale by such a person in connection with a distribution of securities through rights or a standby underwriting commitment.

While FINRA Rule 4560 requires such recording and reporting in all equity securities, not all IEX Members are also members of FINRA. Therefore, the Exchange believes that with the launch of its listing program, it is appropriate to add an IEX rule requiring recording and reporting of short interest positions

[4] 15 U.S.C. 78s(b)(1).

[5] 17 CFR 240.19b–4.

[6] 17 CFR 240.19b–4(f)(6)(iii).

[7] *See* Securities Exchange Act Release No. 34–78101 (June 17, 2016), 81 FR 41141 (June 23, 2016) (File No. 10–222).

[8] *See* FINRA Rule 4560, Nasdaq Rule 3360, and NYSE Rule 4560.

[9] FINRA members are required to report short interest positions through a web-based interface which is accessible via the Firm Gateway. *See,* Regulatory Notice 16–32 entitled ''Short Interest Reporting'' accessible at *http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-16-32.pdf.*

[10] Short interest reporting and publication began in 1986 in connection with a study and recommendation by Irving M. Pollack (a former Commissioner of the SEC) on behalf of the National Association of Securities Dealers, Inc., the predecessor to FINRA.

[11] FINRA Rule 4560(a) provides that the short interest recording and reporting requirements are not applicable to Restricted Equity Securities, as defined in FINRA Rule 6420 which further references the definition of ''restricted security'' in Rule 144(a)(3) under the Securities Act of 1933. Restricted securities are not eligible for listing on IEX since they are subject to trading restrictions, so this limitation is not necessary for inclusion in IEX Rule 3.293.

in securities listed on IEX, so that IEX Members that are not FINRA members are subject to such requirements and their short positions in IEX listed securities will be consolidated for publication and available to FINRA for regulatory purposes.

Further, as proposed, IEX Rule 3.293 specifies that information required to be reported pursuant to FINRA Rule 4560 shall be reported to IEX in the form and manner specified by IEX.[12] As proposed, IEX Rule 3.293 is substantially similar to FINRA Rule 4560 except that Members are only required to record and report short positions in securities listed on IEX. This limitation is substantially similar to Nasdaq Rule 3360, which also limits short interest reporting to securities listed on Nasdaq.[13]

Notification Requirements for Offering Participants

SEC Regulation M is designed to prevent manipulation by individuals with an interest in the outcome of an offering of securities, and prohibits activities and conduct that could artificially influence the market for an offered security.[14] Regulation M generally prohibits underwriters, broker-dealers, issuers and other persons participating in a distribution from directly or indirectly bidding for or purchasing the offered security (or inducing another person to do so) during the applicable ''restricted period,'' [15] which commences on the later of one or five business days prior to determination of the offering price [16] or such time that a person becomes a distribution participant, and ends upon such person's completion of participation in the distribution. Regulation M also governs certain market activities (*i.e.,* stabilizing bids, syndicate covering transactions and penalty bids [17]) in connection with an offering and requires that notification of such activity be provided to the SRO with direct authority over the principal market in the United States for the security for which the syndicate covering transaction is effected or the penalty bid is imposed. In the case of a stabilizing bid, such notice must be provided to the market on which the stabilizing bid will be posted. Further, Regulation M prohibits any person from selling short a security that is the subject of a public offering and purchasing the security in the offering, if the short sale was effected during the restricted period.

IEX and FINRA are parties to a regulatory services agreement pursuant to which FINRA performs certain regulatory functions on behalf of IEX.[18] IEX and FINRA also entered into an agreement to reduce regulatory duplication for IEX Members that are also members of FINRA whereby IEX has allocated certain regulatory responsibilities to FINRA pursuant to Rule 17d–2 under the Act.[19] Compliance with Regulation M is included within the regulatory functions and responsibilities that FINRA performs with respect to IEX Members. As part of FINRA's program to monitor for compliance with Regulation M, FINRA reviews trading and quoting activity for prohibited purchases, bids or attempts to induce bids or purchases during the applicable restricted period and for prohibited short sales during the restricted period prior to the pricing of an offering. Thus, FINRA must receive pertinent distribution related information in a timely fashion to facilitate its review of IEX Members' compliance with Regulation M.

Accordingly, in preparation for becoming a listing market, the Exchange proposes to amend Rule 11.160, which is currently reserved, to adopt provisions requiring notification requirements for offering participants that are substantially identical to those specified in NYSE Rule 5190.[20] As proposed, Rule 11.160 is entitled ''Notification Requirements for Offering Participants'' and includes the following provisions:

- Paragraph (a) provides general information and states that IEX Rule 11.160 sets forth the notice requirements applicable to Members participating in offerings of listed securities for purposes of monitoring compliance with the provisions of SEC Regulation M. In addition, the paragraph notes that Members also must comply with all applicable rules governing the withdrawal of quotations in accordance with SEC Regulation M.
- Paragraph (b) states that the terms shall have the meanings as set forth in Rules 100 and 101 of SEC Regulation M: ''actively traded'', ''affiliated purchaser'', ''covered security'', ''distribution'', ''distribution participant'', ''offering price'', ''penalty bid'', ''restricted period'', ''selling security holder'', ''stabilizing'' and ''syndicate covering transaction''.
- Paragraph (c) is entitled ''Notice Relating to Distributions of Listed Securities Subject to a Restricted Period Under SEC Regulation M'' and sets forth the notification requirements applicable to distributions of listed securities that are ''covered securities'' [21] subject to a restricted period under Rule 101 or 102 of Regulation M. Required notices must be provided in such form as specified by the Exchange with respect to: The Member's determination as to whether a one-day or five-day restricted period applies under Rule 101 of Regulation M and the basis for such determination, including the contemplated date and time of the commencement of the restricted period, the listed security name and symbol, and identification of the distribution participants and affiliated purchasers, no later than the business day prior to the first complete trading session of the applicable restricted period, unless later notification is necessary under specific circumstances; the pricing of the distribution, including the listed security name and symbol, the type of security, the number of shares offered, the offering price, the last sale before the distribution, the pricing basis, the SEC effective date and time, the trade date, the restricted period, and identification of the distribution participants and affiliated purchasers, no later than the

[12] IEX Members will use the FINRA Gateway to report short interest positions. IEX believes that virtually all IEX Members already have access to the FINRA Firm Gateway. To the extent there are any Members that do not already have access, FINRA will provide such Members with access to the Firm Gateway. Following effectiveness of this rule change, and prior to listing launch, IEX will disseminate a notice to Members advising of the reporting process and timelines.

[13] *See* Nasdaq Rule 3360(a).

[14] *See* Securities Exchange Act Release No. 38067 (December 20, 1996), 62 FR 520 (January 3, 1997) (File No. S7–11–96) (Anti-Manipulation Rules Concerning Securities Offerings; Final Rules). See also generally SEC Staff Legal Bulletin No. 9, Frequently Asked Questions About Regulation M (April 12, 2002 update) at *https://www.sec.gov/interps/legal/mrslb9.htm.*

[15] The term ''restricted period'' is defined in Rule 100(b) of Regulation M. *See* 17 CFR 242.100(b).

[16] The term ''offering price'' means the price at which the security is to be or is distributed. *See* 17 CFR 242.100(b).

[17] *See* 17 CFR 242.100(b) (definitions of ''stabilizing,'' ''syndicate covering transaction,'' and ''penalty bid''). Generally, a ''stabilizing bid'' is a bid that is intended to maintain the price of the offered security and is necessary to prevent or retard a decline in the security's price. A ''penalty bid'' allows a lead underwriter to reclaim a selling concession paid to a syndicate member if that member's customers sell their allocated shares in the immediate aftermarket. A ''syndicate covering transaction'' is generally defined as placing a bid or effecting a purchase to reduce a syndicate short position.

[18] *See* IEX Rule 1.160(hh).

[19] *See* Securities Exchange Act Release No. 78434 (July 28, 2016), 81 FR 51256 (August 3, 2016) (File No. 4–700).

[20] Proposed IEX Rule 11.160 is also substantially similar to FINRA Rule 5190, except that the FINRA rule has a broader scope since the IEX rule applies only to offerings in securities listed on IEX, and minor terminology differences.

[21] The term ''covered security'' is defined in Rule 100(b) of Regulation M. *See* 17 CFR 242.100(b).

close of business the next business day following the pricing of the distribution, unless later notification is necessary under specific circumstances; and the cancellation or postponement of any distribution for which prior notification of commencement of the restricted period has been submitted under paragraph (c)(1)(A) of Rule 11.160, immediately upon the cancellation or postponement of such distribution. If no Member is acting as a manager (or in a similar capacity) of such distribution, then each Member that is a distribution participant or affiliated purchaser shall provide the notice required under paragraph (c)(1) of Rule 11.160, unless another Member has assumed responsibility in writing for compliance therewith. Paragraph (c) also provides that any Member that is an issuer or selling security holder in a distribution of any listed security that is a covered security subject to a restricted period under Rule 102 of SEC Regulation M shall comply with the notice requirements of paragraph (c)(1) Rule 11.160, unless another Member has assumed responsibility in writing for compliance therewith.

- Paragraph (d) is entitled ''Notice Relating to Distributions of ''Actively Traded'' Securities Under Regulation M'' and sets forth the notification requirements applicable to distributions of any listed security that is considered an ''actively traded'' security under Rule 101 of Regulation M. Required notices must be provided in such form as specified by the Exchange with respect to: The Member's determination that no restricted period applies under Rule 101 of SEC Regulation M and the basis for such determination; and the pricing of the distribution, including the listed security name and symbol, the type of security, the number of shares offered, the offering price, the last sale before the distribution, the pricing basis, the SEC effective date and time, the trade date, and identification of the distribution participants and affiliated purchasers. Paragraph (d) also provides that such notice shall be provided no later than the close of business the next business day following the pricing of the distribution, unless later notification is necessary under specific circumstances. Further if no Member is acting as a manager (or in a similar capacity) of such distribution, then each Member that is a distribution participant or an affiliated purchaser shall provide the notice required, unless another Member has assumed responsibility in writing for compliance therewith.
- Paragraph (e) is entitled ''Notice of Stabilizing Bids, Penalty Bids and Syndicate Covering Transactions in Listed Securities'' and sets forth the notification requirements for such activities. Required notices must be provided in such form as specified by the Exchange with respect to: The Member's intention to conduct such activity, prior to placing or transmitting the stabilizing bid, imposing the penalty bid or engaging in the first syndicate covering transaction, including identification of the listed security and its symbol and the date such activity will occur; and confirmation that the Member has placed or transmitted a stabilizing bid, imposed a penalty bid or engaged in a syndicate covering transaction, within one business day of completion of such activity, including identification of the listed security and its symbol, the total number of shares and the date(s) of such activity.

All required notifications pursuant to IEX Rule 11.160 will be submitted by IEX Members to FINRA through the Firm Gateway.[22] Upon effectiveness of this rule change and prior to the first IEX listing, the Exchange will disseminate a regulatory circular to Members advising of the form and manner for submission of required notifications through the FINRA Firm Gateway.

Short Sale Circuit Breaker Restriction

Rule 201 of Regulation SHO[23] provides for the imposition of a short sale circuit breaker, in a covered security by trading centers in the event that the price of a covered security[24] decreases by 10% or more from the covered security's closing price as determined by the listing market[25] for the covered security as of the end of regular trading hours[26] on the prior day. If the circuit breaker is triggered, paragraph (b)(1) of Rule 201 requires each trading center to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid (subject to certain specified exceptions) for the remainder of the trading day on which it is triggered and the following day.

Paragraph (b)(3) of Rule 201 further provides that the listing market for a covered security shall determine whether the price of such covered security has decreased by 10% or more from the covered security's closing price as of the end of regular trading hours on the prior day, and, if such decrease has occurred shall immediately notify the single plan processor responsible for consolidation of information for the covered security pursuant to Rule 603(b) of Regulation NMS.[27] The single plan processor must then disseminate this information, thereby triggering the short sale circuit breaker restriction.[28]

Accordingly, in preparation for becoming a listing market, the Exchange proposes to amend IEX Rule 11.290 to adopt provisions regarding the required determinations and processes related to the short sale circuit breaker. As proposed, paragraph (b) of IEX Rule 11.290 is amended to add ''Trigger Price'' as a defined term with respect to the existing description of the Short Sale Price Test. Paragraph (c) of IEX Rule 11.290 (which is currently reserved) is titled ''Determination of Trigger Price'' and provides that, for covered securities for which the Exchange is the listing market, the System[29] shall determine whether a transaction in a covered security has occurred at a Trigger Price[30] and shall immediately notify the responsible single plan processor. Further, the System will not calculate the Trigger Price of a covered security outside of the Regular Market Session,[31] and, if a covered security did not trade on the Exchange on the prior trading day (due to a trading halt, trading suspension, or otherwise), the Exchange's determination of the Trigger Price shall be based on the last sale price on the Exchange for that security on the most recent day on which the security traded. In addition, the Exchange proposes to add provisions to paragraph (d)(1) of IEX Rule 11.290 to provide that the Exchange may lift the Short Sale Price

[22] Information regarding FINRA's Firm Gateway is available at: *http://www.finra.org/sites/default/files/NoticeDocument/p125975.pdf.* IEX believes that virtually all IEX Members that would be required to submit notifications pursuant to IEX Rule 11.160 already have access to the FINRA Firm Gateway. Generally, such Members must be members of FINRA in order to distribute shares to the public, unless such Member is an issuer or selling security holder in a distribution of a listed security pursuant to Rule 102 of Regulation M. To the extent there are any Members that fall into this exception, and do not already have access to the Firm Gateway, such Members will be provided with access to the Firm Gateway.

[23] 17 CFR 242.201.

[24] 17 CFR 242.201(a)(1).

[25] 17 CFR 242.201(a)(3).

[26] 17 CFR 242.201(a)(7).

[27] 17 CFR 242.603(b).

[28] *See,* FAQ 1.3 of ''Division of Trading and Markets: Responses to Frequently Asked Questions Concerning Rule 201 of Regulation SHO.''

[29] The term ''System'' is defined in IEX Rule 1.160(nn).

[30] *See* amendments to Rule 11.290(b).

[31] *See* Rule 1.160(gg).

Test[32] before the Short Sale Period[33] ends for securities for which the Exchange is the listing market if the Exchange determines pursuant to IEX Rule 11.270 that the triggering transaction was a clearly erroneous execution as soon as practicable following such determination. Further, the Exchange may also lift the Short Sale Price Test before the Short Sale Period ends, for a covered security for which the Exchange is the listing market, if the Exchange has been informed by another exchange or a self-regulatory organization (''SRO'') that a transaction in the covered security that occurred at the Trigger Price was a clearly erroneous execution, as determined by the rules of that exchange or SRO. Finally, proposed paragraph (d)(2) of IEX Rule 11.290 provides that if the Exchange determines that the prior day's closing price for a listed security is incorrect in the System and resulted in an incorrect determination of the Trigger Price, the Exchange may correct the prior day's closing price and lift the Short Sale Price Test before the Short Sale Period ends.

As proposed, the amendments to IEX Rule 11.290 are substantially identical to Bats Rule 11.19.

2. Statutory Basis

IEX believes that the proposed rule change is consistent with the provisions of Section 6 of the Act, in general and with Sections 6(b)[34] of the Act in general, and furthers the objectives of Sections 6(b)(5) of the Act,[35] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change supports these objectives because it provides for certain listing regulatory reporting and operational requirements which are consistent with the public interest and the protection of investors.

Short-Interest Reporting

The Exchange believes that it is consistent with the Act to require IEX Members to record and report short interest in securities listed on IEX, to the extent not otherwise reported to FINRA. As discussed in the Purpose section, recording and reporting of short interest provides transparency regarding aggregate short interest and is also used by FINRA for regulatory purposes, including to assess compliance with Regulation SHO. The Exchange believes that requiring short interest recording and reporting by IEX Members in securities listed on IEX is thus consistent with the public interest and the protection of investors in support of these objectives. Further, the Exchange believes that the requirement that all IEX Members record and report short interest is equitable and not unfairly discriminatory because the requirement will result in all IEX Members being subject to such requirements, regardless of whether such Member is a member of FINRA.

The Exchange also notes that proposed Rule 3.293 is substantially identical to FINRA Rule 4560 and Nasdaq Rule 3360, as described in the Purpose section, and thus the Exchange does not believe it raises any new or novel issues not already considered by the Commission.

Notification Requirements for Offering Participants

The Exchange believes that it is consistent with the Act to require IEX Members that are offering participants to provide the specified notifications to IEX in such form as specified by IEX, which, as discussed in the Purpose section, will be to FINRA through the Firm Gateway. The Exchange believes that imposing the specified notification requirements, and specifying that notification be to FINRA through the Firm Gateway, is consistent with the public interest and the protection of investors, since FINRA must receive such notifications in order to monitor IEX Members and other market participants for compliance with Regulation M. As described in the Purpose section, as part of FINRA's program to monitor for compliance with Regulation M, and pursuant to IEX regulatory services agreement with FINRA and allocation to FINRA pursuant to Rule 17d–2 under the Act, FINRA reviews trading and quoting activity for prohibited purchases, bids or attempts to induce bids or purchases during the applicable restricted period and for prohibited short sales during the restricted period prior to the pricing of an offering. Thus, FINRA must receive pertinent distribution related information in a timely fashion to facilitate its review of IEX Members' compliance with Regulation M. Accordingly, IEX believes that requiring such notifications is consistent with the protection of investors and the public interest.

Further, the Exchange believes that imposition of the notification requirements is equitable and not unfairly discriminatory because all IEX Members will be subject to such requirements in the same manner.

The Exchange also notes that the proposed amendments to Rule 11.160 are substantially identical to those specified in NYSE Rule 5190 and substantially similar to FINRA Rule 5190, as described in the Purpose section, and thus the Exchange does not believe that the proposed amendments raise any new or novel issues not already considered by the Commission.

Short Sale Circuit Breaker Restriction

The Exchange believes that it is consistent with the Act to amend IEX Rule 11.290 to adopt provisions regarding the required determinations and processes related to the short sale circuit breaker, as required by Rule 201 of Regulation SHO, as described in the Purpose section. Further, the Exchange believes that the rule amendments are equitable and not unfairly discriminatory because such amendments will apply to all IEX Members in the same manner.

The Exchange also believes that the rule amendments are consistent with the Act, since they are designed to encourage fair and orderly trading and markets. Additionally, as proposed the rule amendments are substantially identical to Bats Rule 11.19, and thus the Exchange does not believe that the proposed amendments raise any new or novel issues not already considered by the Commission.

B. Self-Regulatory Organization's Statement on Burden on Competition

IEX does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. As described in the Purpose and Statutory Basis sections, the proposed rule change effectuates listing regulatory reporting and operational requirements and is not designed to address or advance any competitive issues. To the contrary, the Exchange believes that the proposed rule change facilitates competition since

[32] The term ''Short Sale Price Test'' is defined in IEX Rule 11.290(b), and encompasses the restrictions of the short sale circuit breaker pursuant to Rule 201 of Regulation SHO. 17 CFR 242.201.

[33] The term ''Short Sale Period'' is defined in IEX Rule 11.290(d), and encompasses the duration of the short sale circuit breaker pursuant to Rule 201(b)(1)(ii) of Regulation SHO. 17 CFR 242.201(b)(1)(ii).

[34] 15 U.S.C. 78f.

[35] 15 U.S.C. 78f(b)(5).

it is designed to effectuate IEX's operation as a listing market thereby enhancing competition with the other listing markets.

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) of the Act [36] and Rule 19b–4(f)(6) thereunder.[37]

A proposed rule change filed under Rule 19(b)–4(f)(6) normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii), the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.[38] The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because the proposed rule change is substantially identical to the rules of other self-regulatory organizations and thus raises no novel issues.[39] Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[40]

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 under Section 19(b)(2)(B) [41] 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–IEX–2017–39 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–IEX–2017–39. This file number should be included in the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549–1090. Copies of the filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–IEX–2017–39 and should be submitted on or before December 8, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[42]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2017–24930 Filed 11–16–17; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82056; File No. SR–OCC–2017–806]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of Advance Notice Concerning Liquidity for Same-Day Settlement

November 13, 2017.

Pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, entitled Payment, Clearing and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') [1] and Rule 19b–4(n)(1)(i) of the Securities Exchange Act of 1934 (''Act''),[2] notice is hereby given that on October 13, 2017, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') an advance notice as described in Items I, II and III below, which Items have been prepared by OCC. The Commission is publishing this notice to solicit comments on the advance notice from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

This advance notice is filed in connection with a proposed change to modify the tools available to OCC in order to provide a mechanism for addressing the risks of liquidity shortfalls, specifically, in the extraordinary situation where OCC faces a liquidity need to meet its same-day settlement obligations as a result of a bank or securities or commodities clearing organization failing to achieve daily settlement.

The proposed changes to OCC's By-Laws were submitted as Exhibit 5 of the

---

[36] 15 U.S.C. 78s(b)(3)(A).

[37] 17 CFR 240.19b–4(f)(6).

[38] Rule 19b–4(f)(6) requires an SRO to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the –date of filing the proposed rule change, or such shorter time as designated by the Commission. *See* 17 CFR 240.19b–4(f)(6). The Exchange has satisfied this requirement.

[39] *See supra* notes 12–13 and accompanying text and *supra* note 20 and accompanying text. *See also* Bats Rule 11.19.

[40] 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).

[41] 15 U.S.C. 78s(b)(2)(B).

[42] 17 CFR 200.30–3(a)(12).

[1] 12 U.S.C. 5465(e)(1).

[2] 17 CFR 240.19b–4(n)(1)(i).

filing.[3] The proposed change is described in detail in Item 10 below. All terms with initial capitalization not defined herein have the same meaning as set forth in OCC's By-Laws and Rules.[4]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the advance notice and discussed any comments it received on the advance notice. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in sections A and B below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement on Comments on the Advance Notice Received From Members, Participants or Others

Written comments were not and are not intended to be solicited with respect to the proposed change and none have been received. OCC will notify the Commission of any written comments received by OCC.

(B) Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing, and Settlement Supervision Act

Description of the Proposed Change

The purpose of the proposed change is to modify the tools available to OCC in order to provide a mechanism for addressing the risks of liquidity shortfalls, specifically, in the extraordinary situation where OCC faces a liquidity need to meet its same-day settlement obligations as a result of a bank or securities or commodities clearing organization failing to achieve daily settlement.

Current Practice

Presently, Article VIII, Section 5(e) of OCC's By-Laws provides OCC with the authority to borrow against the Clearing Fund in two circumstances. First, Article VIII, Section 5(e) of OCC's By-Laws provides OCC the authority to borrow where OCC ''deems it necessary or advisable to borrow or otherwise obtain funds from third parties in order to meet obligations arising out of the default or suspension of a Clearing Member or any action taken by the Corporation in connection therewith pursuant to Chapter XI of the Rules or otherwise.'' Second, Article VIII, Section 5(e) of OCC's By-Laws provides OCC the authority to borrow against the Clearing Fund where OCC ''sustains a loss reimbursable out of the Clearing Fund pursuant to [Article VIII, Section 5(b) of OCC's By-Laws] but [OCC] elects to borrow or otherwise obtain funds from third parties in lieu of immediately charging such loss to the Clearing Fund.'' In order for a loss to be reimbursable out of the Clearing Fund under Article VIII, Section 5(b) of OCC's By-Laws, it must arise from a situation in which any bank or securities or commodities clearing organization has failed ''to perform any obligation to [OCC] when due because of its bankruptcy, insolvency, receivership, suspension of operations, or because of any similar event.''[5]

Under either of the two aforementioned circumstances, OCC is authorized to borrow against the Clearing Fund for a period not to exceed 30 days, and during such period, the borrowing shall not affect the amount or timing of any charges otherwise required to be made against the Clearing Fund pursuant to Article VIII, Section 5. However, if any part of the borrowing remains outstanding after 30 days, then at the close of business on the 30th day (or the first Business Day thereafter) such amount must be considered an actual loss to the Clearing Fund, and OCC must immediately allocate such loss in accordance with Article VIII, Section 5.

Proposed Change

While Article VIII, Section 5(e) of OCC's By-Laws currently provides for borrowing authority in the more extreme scenarios involving a bank's or securities or commodities clearing organization's bankruptcy, insolvency, receivership, suspension of operations or similar event, such authority does not extend to the similar, but less extreme scenarios in which a bank or securities or commodities clearing organization might be temporarily unable to timely make daily settlement with OCC for reasons other than its bankruptcy, insolvency, receivership or suspension of operations or similar events. An example of such a related scenario would be a disruption of the ordinary operations of a settlement bank that temporarily prohibits the bank from timely effecting settlement payments in accordance with OCC's daily settlement cycle.

The proposed change would expand upon the existing borrowing authority in Article VIII, Section 5(e) of OCC's By-Laws. As expanded, OCC would be authorized to borrow (or otherwise obtain funds through any means determined to be reasonable by the Executive Chairman, COO or CAO) against the Clearing Fund in the extraordinary event that OCC faces a liquidity need in order to complete same-day settlement. As specified in the proposed rule text, the funds obtained from any such transaction can be used only for their stated purpose, namely, to satisfy a need for liquidity for same-day settlement. Consistent with the existing borrowing authority in Article VIII, Section 5(e) of OCC's By-Laws, OCC would be authorized to borrow against the Clearing Fund for a period not to exceed 30 days, and during such period, the funds obtained would not be deemed to be charges against the Clearing Fund, irrespective of how such funds are applied, and the borrowing shall not affect the amount or timing of any charges otherwise required to be made against the Clearing Fund pursuant to Article VIII, Section 5. However, in the unlikely event that any part of the borrowing were to remain outstanding after 30 days, then at the close of business on the 30th day (or the first Business Day thereafter), such amount would be considered an actual loss to the Clearing Fund, and OCC must immediately allocate such loss in accordance with Article VIII, Section 5.

Like the existing borrowing authority in Article VIII, Section 5(e) of OCC's By-Laws, OCC envisions that the proposed expanded authority only would be relevant in extraordinary circumstances and, even then, only would be used where OCC, exercising its discretion, believes the employment of this particular authority would be appropriate to address OCC's immediate liquidity need.

OCC proposes to amend Sections 1(a), 5(b) and 5(e) of Article VIII of its By-Laws in order to give effect to the expanded borrowing authority discussed herein. Section 5(e) of Article VIII of OCC's By-Laws would be amended to permit OCC to borrow against the Clearing Fund if it reasonably believes such borrowing is necessary to meet its liquidity needs for same-day settlement as a result of the failure of any bank or securities or commodities clearing organization to achieve daily settlement.

[3] OCC has filed a proposed rule change with the Commission in connection with the proposed change. *See* SR–OCC–2017–017.

[4] OCC's By-Laws and Rules can be found on OCC's public Web site: *http://optionsclearing.com/about/publications/bylaws.jsp.* Other terms not defined herein or in the OCC By-Laws and Rules can be found in the Rules & Procedures of NSCC (''NSCC Rules''), *available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf,* as the context implies.

[5] To the extent that a loss resulting from any of the events referred to in Article VIII, Section 5(b) is recoverable out of the Clearing Fund pursuant to Article VIII, Section 5(a), the provisions of Article VIII, Section 5(a) control and render the provisions of Article VIII, Section 5(b) inapplicable.

Section 1(a) of Article VIII of OCC's By-Laws would be amended to include conforming changes that would reflect that the purpose of the Clearing Fund includes borrowing against the Clearing Fund as permitted under Section 5(e) of Article VIII of the By-Laws.

Section 5(b) of Article VIII of the By-Laws would be amended to include conforming changes that would declare that any borrowing remaining outstanding for less than 30 days may be considered, in OCC's discretion, an actual loss and the amount of any such loss then shall be charged proportionately against all Clearing Members' computed contributions to the Clearing Fund as fixed at the time, and any borrowing remaining outstanding on the 30th day shall be considered an actual loss to the Clearing Fund and the amount of any such loss shall be charged proportionately against all Clearing Members' computed contributions to the Clearing Fund as fixed at the time. OCC proposes to include discretionary authority to declare any borrowing outstanding for less than 30 days as an actual loss chargeable against the Clearing Fund because the proposed borrowing authority is intended only to address same-day liquidity needs, and intended to be promptly repaid upon the bank's or securities or commodities clearing organization's resolution of the temporary disruption. In the unlikely circumstance that a disruption of a bank or securities or commodities clearing organization is not timely resolved, OCC may need to exercise its discretion to declare an actual loss, depending on the size of the borrowing, to ensure that OCC replenishes its ''Cover 1'' financial resources.[6] The requirement to recognize any borrowing outstanding after 30 days as an actual loss chargeable against the Clearing Fund would be consistent with the requirements of the borrowing authority currently permitted by Section 5(e) of Article VIII of the By-Laws.

Expected Effect on and Management of Risk

OCC believes the proposed change would enable it to better manage the risks associated with the failure of a settlement bank or securities or commodities clearing organization's to achieve timely settlement. As noted above, OCC's By-Laws currently provide for borrowing authority in the more extreme scenarios involving a bank's or securities or commodities clearing organization's bankruptcy, insolvency, receivership, suspension of operations or similar event, such authority does not extend to the similar, but less extreme scenarios in which a bank or securities or commodities clearing organization might be temporarily unable to timely make daily settlement with OCC for reasons other than its bankruptcy, insolvency, receivership or suspension of operations or similar events. The proposed change would expand upon this existing borrowing authority to allow OCC to borrow (or otherwise obtain funds through any means determined to be reasonable by the Executive Chairman, COO or CAO) against the Clearing Fund in the extraordinary event that OCC faces a liquidity need in order to complete same-day settlement. As a result, the proposed change would enhance OCC's ability to manage its liquidity risks and ensure that it is able to continue making timely settlements in the event of such a disruption.

As stated above, it is conceivable, though extremely unlikely, that a bank or securities or commodities clearing organization may fail to make timely settlement with OCC as a result of a temporary disruption to its ordinary operations. The proposed change would not alter this risk, but would provide OCC with a mechanism for addressing it, should such risk ever be realized. The proposed mechanism for addressing this risk—discretionary authority to borrow from the Clearing Fund—would require OCC's senior and executive management to exercise discretion and judiciousness and could, if ever deployed, present an arguably new, though very limited, risk to Clearing Members.

Modifying OCC's existing authority to borrow against the Clearing Fund introduces a new, and potentially competing, demand on OCC's Clearing Fund resources in that any amount of Clearing Fund resources borrowed to address the failure of a bank or securities or commodities clearing organization to make timely settlement would subtract from the available resources to address other losses that could be charged against the Clearing Fund (most common among those, losses related to Clearing Member defaults). To manage the potential for competing demands on Clearing Fund resources, OCC would exercise discretion and judiciousness in selecting when this new borrowing authority could be prudently deployed, in light of then-existing facts and circumstances. In the alternative, OCC's could elect to deploy an alternative tool, such as OCC's ability to extend the settlement window under Rule 505, if such tool would be more appropriate given anticipated demands on Clearing Fund resources in light of then-existing facts and circumstances. Because of the low probability that a bank or securities or commodities clearing organization would suffer a temporary disruption to its ordinary operations that could threaten its ability to make timely settlement, and the extremely low probability that such a disruption would result in the bank or securities or commodities clearing organization actually failing to make timely settlement, OCC believes that the potential for competing demands on Clearing Fund resources can be managed sufficiently through the tools available in its default management rules, policies and procedures.[7]

The proposed change could arguably present a new, though very limited, risk to Clearing Members in that OCC's authority to borrow against the Clearing Fund would be expanded, albeit slightly, to permit borrowing in a new scenario where a bank or securities or commodities clearing organization fails to make timely settlement (but otherwise is not in bankruptcy, insolvency, receivership, suspension of operations or a similar state). In order for Clearing Members to be impacted by this risk, a borrowing under the proposed authority would need to be declared an actual loss by OCC prior to 30 days lapsing or remain outstanding for 30 days, at which point, such amount would be considered an actual loss to the Clearing Fund, and OCC would be required to immediately allocate such loss in accordance with Article VIII, Section 5. However, given that the proposed borrowing authority is intended to be deployed to address immediate liquidity needs arising from *temporary* disruptions of the ordinary operation of a bank or securities or commodities clearing organization, OCC believes that it is extremely unlikely that any amount of any such borrowing ultimately would need to be declared as an actual loss in advance of 30 days or remain outstanding for a period of 30

[6] ''Cover 1'' financial resources refers to the requirement that a CCA maintains financial resources sufficient to enable it to cover the ''default of the participant family that would potentially cause the largest aggregate credit exposure for the [CCA] in extreme but plausible market conditions.'' 17 CFR 240.17Ad–22(e)(7)(viii).

[7] In addition, the bank or securities or commodities clearing organization would need to be in deficit for the settlement cycle in question in order for OCC to face an immediate liquidity need. Further, OCC must reasonably anticipate an imminent or near imminent failure by one or more Clearing Members for there to be a potential competing demand on Clearing Fund resources. OCC believes that the alignment of all of these occurrences represents an extraordinarily low probability occurrence.

days. If, however, any amount of any such borrowing in fact did remain outstanding for longer than expected, OCC believes there would be a high probability that the bank or securities or commodities clearing organization in question has actually failed, and therefore entered bankruptcy, insolvency, receivership, suspension of operations or a similar state—which events would have independently triggered the already-existing borrowing authority in Article VIII, Section 5(e).

Consistency With the Clearing Supervision Act

The stated purpose of the Clearing Supervision Act is to mitigate systemic risk in the financial system and promote financial stability by, among other things, promoting uniform risk management standards for systemically important financial market utilities and strengthening the liquidity of systemically important financial market utilities.[8] Section 805(a)(2) of the Clearing Supervision Act [9] also authorizes the Commission to prescribe risk management standards for the payment, clearing and settlement activities of designated clearing entities, like OCC, for which the Commission is the supervisory agency. Section 805(b) of the Clearing Supervision Act [10] states that the objectives and principles for risk management standards prescribed under Section 805(a) shall be to:

- Promote robust risk management;
- promote safety and soundness;
- reduce systemic risks; and
- support the stability of the broader financial system.

The Commission has adopted risk management standards under Section 805(a)(2) of the Clearing Supervision Act and the Act in furtherance of these objectives and principles, including those standards adopted pursuant to the Commission rules cited below.[11] For the reasons set forth below, OCC believes that the proposed change is consistent with the risk management standards promulgated under Section 805(a) of the Clearing Supervision Act.[12]

Rule 17Ad–22(e)(7)(viii) requires that a covered clearing agency (''CCA'') address foreseeable liquidity shortfalls that would not be covered by the CCA's liquid resources and seek to avoid unwinding, revoking, or delaying the same-day settlement of payment obligations.[13] As stated above, OCC believes that it could be foreseeable, though extremely unlikely, that a bank or securities or commodities clearing organization may fail to make timely settlement with OCC as the result of an event that does not result in a loss to OCC from the bankruptcy, insolvency, resolution, suspension of operations or similar event of such bank or securities or commodities clearing organization. The proposed change would improve OCC's ability to address such situations by expanding OCC's borrowing authority to enable OCC to borrow against the Clearing Fund in order to avoid disrupting its ordinary settlement cycle (and thusly, to avoid imposing the same disruption on Clearing Members).

III. Date of Effectiveness of the Advance Notice and Timing for Commission Action

The proposed change may be implemented if the Commission does not object to the proposed change within 60 days of the later of (i) the date the proposed change was filed with the Commission or (ii) the date any additional information requested by the Commission is received. OCC shall not implement the proposed change if the Commission has any objection to the proposed change.

The Commission may extend the period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. A proposed change may be implemented in less than 60 days from the date the advance notice is filed, or the date further information requested by the Commission is received, if the Commission notifies the clearing agency in writing that it does not object to the proposed change and authorizes the clearing agency to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

OCC shall post notice on its Web site of proposed changes that are implemented.

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the advance notice is consistent with the Clearing Supervision Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–OCC–2017–806 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

All submissions should refer to File Number SR–OCC–2017–806. 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 advance notice that are filed with the Commission, and all written communications relating to the advance notice 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 OCC and on OCC's Web site at *http://www.theocc.com/components/docs/legal/rules_and_bylaws/sr_occ_17_806.pdf.*

All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–OCC–2017–806 and should be submitted on or before December 8, 2017.

---

[8] 12 U.S.C. 5461(b).

[9] 12 U.S.C. 5464(a)(2).

[10] 12 U.S.C. 5464(b).

[11] 17 CFR 240.17Ad–22. *See* Securities Exchange Act Release Nos. 68080 (October 22, 2012), 77 FR 66220 (November 2, 2012) (S7–08–11) (''Clearing Agency Standards''); 78961 (September 28, 2016), 81 FR 70786 (October 13, 2016) (S7–03–14) (''Standards for Covered Clearing Agencies''). The Standards for Covered Clearing Agencies became effective on December 12, 2016. OCC is a ''covered clearing agency'' as defined in Rule 17Ad–22(a)(5) and therefore is subject to section (e) of Rule 17Ad–22.

[12] 12 U.S.C. 5464(b)(1) and (4).

[13] 17 CFR 240.17Ad–22(e)(7)(viii).

By the Commission.

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2017–24920 Filed 11–16–17; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82066; File No. SR–NYSEArca–2017–85]

Self-Regulatory Organizations; NYSEArca, Inc.; Notice of Filing of Amendment No. 3, and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3, To Amend NYSE Arca Rule 8.700–E and To List and Trade Shares of the ProShares European Volatility Futures ETF

November 13, 2017.

I. Introduction

On July 28, 2017, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to: (1) Amend NYSE Arca Rule 8.700–E to expand the list of financial instruments that may be held by a trust that issues Managed Trust Securities; and (2) to list and trade shares (''Shares'') of the ProShares European Volatility Futures ETF (''Fund'') under proposed amended NYSE Arca Rule 8.700–E. The proposed rule change was published for comment in the **Federal Register** on August 16, 2017.[3] On September 21, 2017, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the original filing in its entirety. On September 26, 2017, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] On November 2, 2017, the Exchange filed Amendment No. 2 to the proposed rule change, which amended and replaced in its entirety the proposed rule change as modified by Amendment No. 1. On November 9, 2017, the Exchange filed Amendment No. 3 to the proposed rule change.[6] The Commission has received no comments on the proposed rule change. The Commission is publishing this notice to solicit comments on Amendment No. 3 from interested persons, and is approving the proposed rule change, as modified by Amendment No. 3 on an accelerated basis.

II. Summary of the Proposed Rule Change, as Modified by Amendment No. 3 [7]

The Exchange proposes to amend NYSE Arca Rule 8.700–E to add the VSTOXX as a reference asset to the futures contracts and swaps that may be held by trusts that issue Managed Trust Securities.[8] NYSE Arca Rule 8.700–E governs the listing and trading of Managed Trust Securities on the Exchange. Additionally, the Exchange proposes to list and trade the Shares under the proposed rule.

A. Proposed Amendments to NYSE Arca Rule 8.700–E

The Exchange proposes to amend NYSE Arca Rule 8.700–E (c)(1) to add the VSTOXX as a reference asset to the futures contracts and swaps that may be held by trusts that issue Managed Trust Securities.

The VSTOXX is a non-investable index that seeks to measure the volatility of the Index over a future time horizon as implied by the price of option contracts on the Index.[9] It is based on real-time prices of options on the Index listed on the Eurex Exchange (''Eurex''),[10] and is designed to reflect the market expectations of near-term up to long-term volatility by measuring the square root of the implied variances across all options of a given time to expiration. The Index includes 50 stocks that are among the largest free-float market capitalization stocks from 11 Eurozone countries.[11] STOXX Limited (''STOXX'') computes the Index on a real-time basis throughout each trading day, from 3:50 a.m. until 12:30 p.m. Eastern Time. The Index value is widely disseminated by major market data vendors on a real-time basis throughout each trading day.

Futures Contracts are cash settled and trade exclusively on Eurex between the hours of 2:30 a.m. and 5:30 p.m. Eastern

---

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 81373 (August 10, 2017), 82 FR 38973.

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 81721, 82 FR 45922 (October 2, 2017) (designating November 11, 2017 as the date by which the Commission will approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change).

[6] In Amendment No. 3, the Exchange: (1) Represented that the EURO STOXX 50 Volatility Index (''VSTOXX'') levels will be widely disseminated by major market data vendors on a real-time basis throughout each trading day; (2) expanded its representation regarding when the sponsor would erect a ''fire wall'' to include the circumstance where the sponsor becomes a broker-dealer and represented that the sponsor will maintain the ''fire wall'' it implemented regarding access to information concerning the composition and/or changes to the Fund's portfolio; (3) narrowed the list of the Fund's permitted investments to exclude forwards; (4) described the Fund's policies concerning swap counterparties; (5) analyzed the impacts on arbitrage of the 9 a.m. Eastern Time creation and redemption order deadline and 11:30 a.m. Eastern Time net asset value (''NAV'') calculation time; (6) represented that, to the extent that the sponsor permits an exchange of a futures contract for a related position or block trade with the Fund, such transactions will be effected on that day in the same manner for all authorized participants; (7) supplemented its description of the Fund's NAV calculation methodology and the availability of price information for the Fund's permitted investments; (8) modified its description of the Indicative Optimized Portfolio Value (''IOPV'') methodology; (9) provided information regarding the dissemination of the NAV and the availability of pricing for the EURO STOXX 50 Index (''Index''), VSTOXX, and the Fund's benchmark; (10) represented that its surveillance procedures are adequate to continue to properly monitor the trading of the Managed Trust Securities that hold futures on VSTOXX (''Futures Contracts'') and/or swaps on VSTOXX in all trading sessions and to deter and detect violations of Exchange rules; (11) clarified where Futures Contracts are listed; (12) clarified the Fund's primary investment objective; and (13) made certain technical changes. Amendment No. 3 is available on the Commission's Web site at: *https://www.sec.gov/comments/sr-nysearca-2017-85/nysearca201785-2678502-161479.pdf.*

[7] Additional information regarding the Shares and the Trust, including investment strategies, risks, NAV calculation, creation and redemption procedures, fees, Trust (as defined herein) holdings, and taxes, among other information, is included in Amendment No. 3, *supra* note 7, and the Registration Statement, *infra* note 12.

[8] Managed Trust Security is a security that is registered under the Securities Act of 1933 (15 U.S.C. 77a), as amended (the ''Securities Act''), and (1) is issued by a trust that (a) is a commodity pool as defined in the Commodity Exchange Act (7 U.S.C. 1), and that is managed by a commodity pool operator registered with the Commodity Futures Trading Commission, and (b) holds long and/or short positions in exchange-traded futures contracts and/or certain currency forward contracts and/or swaps selected by the trust's advisor consistent with the trust's investment objectives, which will only include, exchange-traded futures contracts involving commodities, commodity indices, currencies, currency indices, stock indices, fixed income indices, interest rates and sovereign, private and mortgage or asset backed debt instruments, and/or forward contracts on specified currencies, and/or swaps on stock indices, fixed income indices, commodity indices, commodities, currencies, currency indices, or interest rates, each as disclosed in the trust's prospectus as such may be amended from time to time, and cash and cash equivalents; and (2) is issued and redeemed continuously in specified aggregate amounts at the next applicable NAV. *See* NYSE Arca Rule 8.700–E (c)(1).

[9] The VSTOXX does not measure the actual volatility of the Index.

[10] Eurex is a member of the Intermarket Surveillance Group (''ISG'') and, as such, the Exchange may obtain information regarding trading in the futures contracts on VSTOXX listed by Eurex.

[11] The countries are: Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal and Spain.

Time.[12] The value of these futures contracts is 100 Euros per index point of the underlying, and it is traded to two decimal places with a minimum price change of 0.05 points (equivalent to a value of 5 Euros). The daily settlement price of these futures contracts is determined during the closing auctions. The last trading day and final settlement day is 30 calendar days prior to the third Friday of the expiration month of the underlying options, which is usually the Wednesday prior to the second to last Friday of the respective maturity month. Information regarding the VSTOXX and the overlying futures can be found on STOXX's Web site and the Eurex Web site, respectively.

B. The Listing and Trading of the Shares

The Exchange proposes to list and trade the Shares under proposed NYSE Arca Rule 8.700–E. The Fund will be a commodity pool that is a series of the ProShares Trust II (''Trust'').[13] The Fund's sponsor, ProShare Capital Management LLC (''Sponsor''), is registered as a commodity pool operator and is affiliated with a Financial Industry Regulatory Authority (''FINRA'')-registered broker-dealer. Brown Brothers Harriman & Co. will be the administrator, custodian and transfer agent of the Fund and the Shares. SEI Investments Distribution Co. (''SEI'') will be the distributor for the Shares. The Fund's primary investment objective will be to provide long exposure to lead-month Futures Contracts, and the Fund will use the Futures Contracts as a performance benchmark (''Benchmark''). The Fund will be actively managed and will have a secondary investment objective to outperform the Benchmark by actively managing the ''rolling'' of its Futures Contracts.[14]

Under normal market conditions,[15] the Fund generally will seek to remain fully invested at all times in lead-month Futures Contracts in a manner consistent with its investment objectives without regard to market conditions, trends, or direction.[16] The Fund will invest the remainder of its un-invested assets in high-quality, short-term debt instruments that have terms-to-maturity of less than 397 days, such as U.S. government securities and repurchase agreements (''Money Market Instruments'').

Under limited circumstances, the Fund also may invest in swap contracts (''Swap Contracts'') that reference the Benchmark. In the event position price or accountability limits are reached with respect to lead month Futures Contracts, the Sponsor may, in its commercially reasonable judgment, cause the Fund to invest in Swap Contracts.[17] The Fund may also invest in Swap Contracts if the market for a specific Futures Contract experiences an emergency (*e.g.,* natural disaster, terrorist attack or an act of God) or disruption (*e.g.,* a trading halt or a flash crash) which, in the Sponsor's commercially reasonable judgment, prevent, or otherwise make it impractical, for the Fund to obtain the appropriate amount of investment exposure to the affected Futures Contracts.

The Fund will also hold cash or cash equivalents, such as U.S. Treasury securities or other high credit quality, short-term fixed-income or similar securities (such as shares of money market funds and collateralized repurchase agreements), for direct investment, as collateral for its futures and Swap Contracts, or pending investment in Futures Contracts and Swap Contracts. The Fund may invest up to 100% of its assets in any of these types of cash or cash equivalent securities.

III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act[18] and the rules and regulations thereunder applicable to a national securities exchange.[19] In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[20] which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission also finds that the proposal is consistent with Section 11A(a)(1)(C)(iii) of the Act,[21] which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities.

A. Exchange's Proposal To Amend Rule 8.700–E[22]

With respect to the proposal to amend NYSE Arca Rule 8.700–E (c)(1) to add the VSTOXX as a reference asset to the futures contracts and swaps that may be held by trusts that issue Managed Trust Securities, the Commission notes that VSTOXX is included as a reference asset for Futures-Linked Securities,[23] and notwithstanding the addition of VSTOXX as a reference asset, the existing initial and continued listing criteria applicable to Managed Trust Securities would continue to apply. These continued listing standards require, among other things, that: (1) The Disclosed Portfolio (as defined in NYSE Arca Rule 8.700–E (c)(2)) be disseminated at least daily and to all market participants at the same time; (2) an Intraday Indicative Value be calculated and widely disseminated by one or more major market data vendors on at least a 15-second basis during the Exchange's Core Trading Session; and (3) following the initial 12-month period after the commencement of trading of an issue of Managed Trust Securities, (a) the trust must have 50,000 or more

[12] *See* Amendment No. 3, *supra* note 7, at 7, n.10, and 5.

[13] On May 12, 2017, the Trust filed with the Commission a registration statement on Form S–1 under the Securities Act relating to the Fund (File No. 333–217962) (''Registration Statement''). The description of the operation of the Trust and the Fund herein is based, in part, on the Registration Statement.

[14] The Fund will not seek to track or outperform either the VSTOXX or the Index, and the performance of the Fund will be very different from the performance of either the VSTOXX Index or the Index.

[15] ''Normal market conditions'' is defined in NYSE Arca Rule 8.600–E (c)(5).

[16] *See* Amendment No. 3, *supra* note 7, at 8.

[17] *See id.* The Fund intends to enter into Swap Contracts only with major, global financial institutions; however, there are no limitations on the percentage of its assets the Fund may invest in Swap Contracts with a particular counterparty. The Fund may use various techniques to minimize credit risk. The Fund will seek to mitigate risks in connection with the uncleared OTC swaps by generally requiring that the counterparties for the Fund agree to post collateral for the benefit of the Fund, marked to market daily, subject to certain minimum thresholds.

[18] 15 U.S.C. 78f.

[19] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[20] 17 U.S.C. 78f(b)(5).

[21] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[22] *See* Securities Exchange Act Release No. 79975 (February 6, 2017), 82 FR 10418 (February 10, 2017) (SR–NYSEArca–2017–08) (adding EURO STOXX 50 Volatility Futures to the definition of Futures Reference Asset in Rule 5.2(j)(6)); Securities Exchange Act Release No. 79069 (October 7, 2016), 81 FR 70714 (October 13, 2016) (SR–BatsBZX–2016–26) (amending Bats BZX Exchange Rule 14.11(d) to add EURO STOXX 50 Volatility Futures to the definition of Futures Reference Asset).

[23] *See* NYSE Arca Rule 5.2–E (j)(6)(v).

Managed Trust Securities issued and outstanding, (b) the market value of all Managed Trust Securities issued and outstanding must be $1,000,000 or more, and (c) there must be 50 or more record and/or beneficial holders.[24]

Additionally, the Commission notes that the Exchange has represented that its surveillance procedures are adequate to continue to properly monitor the trading of the Managed Trust Securities that hold Futures Contracts and/or swaps on VSTOXX in all trading sessions and to deter and detect violations of Exchange rules.[25]

B. Exchange's Proposal To List and Trade the ProShares European Volatility Futures ETF

The Commission notes the Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Quotation and last-sale information for the Shares will be available via the Consolidated Tape Association (''CTA'') high-speed line, and the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. In addition, information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services.

The Commission believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Trust's NAV and the NAV per Share will be calculated and disseminated daily. The Exchange will disseminate for the Trust on a daily basis by means of the CTA high-speed line information with respect to the most recent NAV per Share, and the number of Shares outstanding. The Exchange also will make available on its Web site daily trading volume, closing prices and the NAV per Share. The IOPV for the Shares will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Exchange's Core Trading Session. On a daily basis, the Trust will disclose on its Web site (*www.Proshares.com*) for all of the assets held by the Fund the following information: Name; ticker symbol (if applicable); CUSIP or other identifier (if applicable); description of the holding; with respect to derivatives, the identity of the security, commodity, index or other underlying asset; the quantity or aggregate amount of the holding as measured by par value, notional value or amount, number of contracts or number of units (if applicable); maturity date; coupon rate (if applicable); effective date or issue date (if applicable); market value; percentage weighting in the Disclosed Portfolio; and expiration date (if applicable). The Trust's Web site will also include the current prospectus of the Trust and additional data relating to NAV and other applicable quantitative information. The Web site information will be publicly available at no charge. Pricing for the Index, VSTOXX, the Benchmark, Swap Contracts, cash equivalents, and Money Market Instruments will be available from major market data vendors. Pricing for Futures Contracts will be available from Eurex.

The Exchange will obtain a representation from the Trust that the NAV and the NAV per Share will be calculated daily and that the NAV, the NAV per Share, and the composition of the Disclosed Portfolio will be made available to all market participants at the same time. Further, trading in the Shares will be subject to NYSE Arca Rules 7.12–E and 8.700–E(e)(2)(D), which set forth circumstances under which trading in the Shares may be halted. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.[26]

Further, the Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the actual components of the portfolio.[27] The Exchange represents that it has a general policy prohibiting the distribution of material, non-public information by its employees.

In support of this proposal, the Exchange has made the following representations:

(1) The Trust will be subject to the criteria in NYSE Arca Rule 8.700–E for initial and continued listing of the Shares.

(2) In the event (a) the Sponsor becomes a broker-dealer or newly affiliated with a broker-dealer, or (b) any new sponsor becomes affiliated with a broker-dealer, such broker-dealer shall erect and maintain a ''fire wall'' around the personnel of the sponsor who have access to information concerning changes and adjustments to the Disclosed Portfolio.[28]

(3) Personnel of the Sponsor who make decisions regarding the composition of the Disclosed Portfolio must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the Disclosed Portfolio.

(4) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

(5) Trading in the Shares will be subject to the existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by FINRA on behalf of the Exchange, and these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.[29]

(6) The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and Futures Contracts with other markets or other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and Futures Contracts from such markets or entities. In addition, the Exchange may obtain information regarding trading in the Shares and Futures Contracts from markets or other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain Money Market Instruments held by the Fund reported to FINRA's TRACE.

(7) Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin (''Bulletin'') of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (a) The procedures for purchases and

[24] *See* NYSE Arca Rule 8.700–E(e)(2).

[25] *See* Amendment No. 3, *supra* note 7, at 6.

[26] These may include: (1) The extent to which trading is not occurring in the underlying futures contracts or swaps; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

[27] *See* NYSE Arca Rule 8.700–E(e)(2)(B)(ii).

[28] The Exchange also states that the Sponsor's Code of Ethics and internal controls are designed to prevent and detect improper exchanges of information concerning the composition and/or changes to the Fund's portfolio.

[29] The Exchange states that FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement, and that the Exchange is responsible for FINRA's performance under this regulatory services agreement.

redemptions of Shares (and that Shares are not individually redeemable); (b) NYSE Arca Rule 9.2–E (a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (c) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; (d) how information regarding the IOPV and the Disclosed Portfolio is disseminated; (e) the risks involved in trading the Shares during the opening and late trading sessions when an updated IOPV will not be calculated or publicly disseminated; and (f) trading information.

(8) The Exchange represents that, for the initial and continued listing of the Shares, the Trust must be in compliance with NYSE Arca Rule 5.3–E and Rule 10A–3 under the Act.

(9) A minimum of 100,000 Shares will be outstanding at the start of trading on the Exchange.

(10) All statements and representations made in this filing regarding (a) the description of the portfolio of the Fund and Benchmark, (b) limitations on portfolio of the Fund and Benchmark, or (c) the applicability of Exchange listing rules specified in this rule filing shall constitute continued listing requirements for listing the Shares on the Exchange.

(11) In addition, the issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If a Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5–E (m).

This approval order is based on all of the Exchange's representations, including those set forth above and in Amendment No. 3.

IV. Solicitation of Comments on Amendment No. 3 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 3 are 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–2017–85 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–NYSEArca–2017–85. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2017–85, and should be submitted on or before December 8, 2017.

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 3

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 3, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 3 in the **Federal Register**. Amendment No. 3 supplements the proposed rule change by, among other things: (1) Representing that the VSTOXX levels will be widely disseminated by major market data vendors on a real-time basis throughout each trading day; (2) expanding its representation regarding when the Sponsor would erect a ''fire wall,'' and representing that the Sponsor will maintain the ''fire wall'' it implemented regarding access to information concerning the composition and/or changes to the Fund's portfolio; (3) narrowing the list of the Fund's permitted investments to exclude forwards; (4) supplementing its description of the availability of price information for the Fund's permitted investments; (5) providing information regarding the dissemination of the Trust's NAV; and (6) making representations regarding the Exchange's surveillance of Managed Trust Securities. These changes assisted the Commission in evaluating whether the proposal would be consistent with Section 6(b)(5) of the Act. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[30] to approve the proposed rule change, as modified by Amendment No. 3, on an accelerated basis.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[31] that the proposed rule change (SR–NYSEArca–2017–85), as modified by Amendment No. 3 be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[32]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2017–24938 Filed 11–16–17; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82065; File No. SR–NASDAQ–2017–117]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's Fees at Rule 7036 To Withdraw the Nasdaq Market Analytics Data Package From Sale

November 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 October 31, 2017, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule

[30] 15 U.S.C. 78s(b)(2).

[31] *Id.*

[32] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's fees at Rule 7036 to withdraw the Nasdaq Market Analytics Data Package from sale.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaq.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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to withdraw the Nasdaq Market Analytics Data Package from sale. The Nasdaq Market Analytics Data Package, established in 2006,[3] consists of four products: (i) Market Velocity, (ii) Market Forces, (iii) Competitive Volume Weighted Average Price (VWAP) Benchmark, and (iv) Competitive VWAP Leaders.

Market Velocity and Market Forces are real-time data products. Market Velocity measures the frequency and size of orders submitted to the trading system. Market Forces separates orders into buy and sell categorizes to indicate market direction. Market Velocity and Market Forces may include orders not visible in existing quote and order data feeds.

The Competitive VWAP Benchmark is an intra-day, query-response product that provides the best and worst average price performance by market makers trading on the Nasdaq Market Center execution system. The Benchmark is used to compare the purchaser's trade performance to those benchmarks. Competitive VWAP Leaders is a delayed product that identifies participants with the most experience trading a particular stock or type of stock, ranking participants by share volume, weighted by the difference between market participant VWAP and overall VWAP.

The Exchange proposes to withdraw the Nasdaq Market Analytics Data Package from the market. The Package was introduced in 2006, and has remained basically unchanged since then, notwithstanding substantial changes in technology and analytical techniques over that period. The product has generated little customer interest, and only a small number of customers currently purchase subscriptions.[4]

Recently, customers have inquired about possible modifications to the product. Specifically, customers expressed concern that data contained in the product may reveal too much information about the trading strategies of participants on the Exchange. While the Exchange does not believe that these concerns are well-founded, given that the information content of the product has been stable over time and the number of customer for the product is extremely small, the Exchange continually evaluates the views of its customers in developing and maintaining its product offerings and initiated a review of the product.

Upon such review, the Exchange has determined that modifying the product in keeping with customer requests would not be cost-effective in light of the small amount of revenue that the product generates. Given the age of the product, the small amount of revenue generated, and the cost of modifications, the Exchange has decided to withdraw the product from the market, effective immediately.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[5] in general, and furthers the objectives of Section 6(b)(5) of the Act,[6] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. Specifically, the proposed withdrawal of the Nasdaq Market Analytics Data Package will remove a potentially controversial product from the market. In light of the age of the product, the small number of subscribers for that product, the fact that modifying the product would not be cost-effective, and the concerns expressed by some market participants, the Exchange believes that the proposal to remove this product from the market strikes the correct balance to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

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.

The proposed withdrawal of the Nasdaq Market Analytics Data Package is an example of the impact of market forces on the Exchange. Because customers had not purchased the product in sufficient numbers to economically justify further investment, the Exchange decided to discontinue the product. This is precisely how competitive markets operate.

The withdrawal of the Nasdaq Market Analytics Data Package will not impose any burden on competition as the Package will no longer be offered.

[3] *See* Securities Exchange Act Release No. 54003 (June 16, 2006), 71 FR 36141 (June 23, 2006) (SR–NASD–2006–056).

[4] Indeed, neither the Competitive VWAP Benchmark nor the Competitive VWAP Leaders has any customers at all.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative 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 [7] and Rule 19b–4(f)(6) thereunder.[8]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act [9] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii) [10] permits the Commission to 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 Commission notes that the Exchange's customers have expressed concern that data contained in the Nasdaq Market Analytics Data Package may reveal too much information about the trading strategies of participants on the Exchange, and have inquired about possible modifications to the product. The Commission also notes that, in light of the age of the product, the small number of subscribers, the cost of modifying the product, and the concerns raised by some market participants, the Exchange has determined to remove the product. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[11]

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 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–NASDAQ–2017–117 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–NASDAQ–2017–117. 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2017–117 and should be submitted on or before December 8, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2017–24937 Filed 11–16–17; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission 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. The Commission has waived this requirement.

[9] 17 CFR 240.19b–4(f)(6).

[10] 17 CFR 240.19b–4(f)(6)(iii).

[11] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82067; File No. SR–OCC–2015–02]

In the Matter of the Petitions of: Virtu Financial Inc. and Virtu Americas, LLC and Susquehanna International Group, et al.; Order Granting Motion To Substitute Parties and Motion for Extension of Time; Securities Exchange Act of 1934

November 13, 2017.

On November 2, 2017, Virtu Financial Inc. and Virtu Americas LLC (collectively ''Virtu'') filed an Unopposed Motion to Substitute Virtu Financial Inc. and Virtu Americas LLC for Petitioner KCG Holdings, Inc. (''KCG'') pursuant to Rules 102 and 200(d) of the Commission Rules of Practice.[1] In its motion, Virtu represents that it acquired KCG earlier this year and represents the successor in interest to KCG and its subsidiary. Virtu represents that it intends to participate in the matter pertaining to SR–OCC–2015–02 moving forward. Virtu also represents that the motion is unopposed. The Commission believes that it is appropriate to grant the motion.

On November 7, 2017, Petitioners Susquehanna International Group, LLP, BOX Options Exchange, LLC, MIAX International Securities Exchange, LLC, and Virtu, (collectively ''Petitioners'') filed an Unopposed Motion for Extension of Time pursuant to Rule 161 of the Commission Rules of Practice [2] to extend the time previously provided for in the Commission's September 14, 2017 Corrected Order Scheduling Filing

[1] 17 CFR 201.102 and 200(d).

[2] 17 CFR 201.161.

of Statements on Review (''Corrected Order'').[3] The Petitioners represent that the motion is unopposed by the Options Clearing Corporation (''OCC''). The Petitioners also represent that they have entered into a confidentiality agreement with OCC on November 1, 2017 to obtain access to the confidential filings that OCC submitted to the Commission on October 13, 2017 to support OCC's proposed rule change. The Petitioners request an extension of time so that they may review these confidential materials and provide the Commission with informed and deliberate comments. The Petitioners further represent that extending the time for comment would allow them the same amount of time, thirty days, to review the materials as was contemplated by the Corrected Order. Given the unopposed nature of the request and the surrounding facts regarding this matter, the Commission believes that granting the extension will serve the interests of justice.

Accordingly, *it is ordered,* that the Unopposed Motion to Substitute Virtu Financial Inc. and Virtu Americas LLC for Petitioner KCG Holdings, Inc., is hereby *granted;* and

It is further ordered, that the Unopposed Motion for Extension of Time is hereby *granted*. The time for any party or other person to file any additional statement, which may include statements previously submitted or otherwise available, or any new information such party or other person considers relevant, is extended from November 13, 2017 to November 30, 2017.

By the Commission.

Brent J. Fields,

Secretary.

[FR Doc. 2017–24939 Filed 11–16–17; 8:45 am]

BILLING CODE 8011–01–P

[3] Exchange Act Release No. 81629 (September 14, 2017), File No. SR–OCC–2015–02.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82061; File No. SR–BatsEDGA–2017–30]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Modify Its Fees for Physical Ports

November 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 November 7, 2017, Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') (formerly known as Bats EDGA Exchange, Inc.) filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the fee schedule applicable to Members[5] and non-Members of the Exchange pursuant to EDGA Rules 15.1(a) and (c).

The text of the proposed rule change is available at the Exchange's Web site at *www.markets.cboe.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

A physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently maintains a presence in two third-party data centers: (i) The primary data center where the Exchange's business is primarily conducted on a daily basis, and (ii) a secondary data center, which is predominantly maintained for business continuity purposes. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,000 per physical port that connects to the System[6] via 1 gigabyte circuit; and $6,000 per physical port that connects to the System via 10 gigabyte circuit. The Exchange proposes to increase the fee per physical port that connects to the System via a 10 gigabyte circuit from $6,000 per month to $7,000 per month in order to cover its increased infrastructure costs associated with establishing physical ports to connect to the Exchange's Systems and enable it to continue to maintain and improve its market technology and services.[7] The Exchange does not propose to amend the fee for a 1 gigabyte circuit, which will remain $2,000 per month. The Exchange proposes to implement this amendment to its fee schedule on January 2, 2018.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] The term ''Member'' is defined as ''any registered broker or dealer that has been admitted to membership in the Exchange.'' *See* Exchange Rule 1.5(n).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[8] in general, and furthers the objectives of Section 6(b)(4),[9] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. The Exchange also notes that it operates in a highly-competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The proposed rule change reflects a competitive pricing structure designed to incent market participants to direct their order flow to the Exchange.

The Exchange believes that the proposed rate is equitable and non-discriminatory in that it applies uniformly to all Members. Members and non-Members will continue to choose whether they want more than one physical port and choose the method of

[6] The term ''System'' is defined as ''the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing away.'' *See* Exchange Rule 1.5(cc).

[7] The Exchange also proposes a minor technical amendment to change the title of the first column from ''Connection Service Type'' to ''Service''.

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(4).

connectivity based on their specific needs. All Members that voluntarily select various service options will be charged the same amount for the same services. As is true of all physical connectivity, all Members and non-Members have the option to select any connectivity option, and there is no differentiation with regard to the fees charged for the service.

The Exchange believes that the proposal represents an equitable allocation of reasonable dues, fees, and other charges as its fees for physical connectivity are reasonably constrained by competitive alternatives. If a particular exchange charges excessive fees for connectivity, affected Members and non-Members may opt to terminate their connectivity arrangements with that exchange, and adopt a possible range of alternative strategies, including routing to the applicable exchange through another participant or market center or taking that exchange's data indirectly. Accordingly, if the Exchange charges excessive fees, it would stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity.

Furthermore, the proposed rule change is also an equitable allocation of reasonable dues, fees, and other charges as the Exchange believes that the increased fees obtained will enable it to cover its increased infrastructure costs associated with establishing physical ports to connect to the Exchange's Systems. The additional revenue from the increased fee will also enable the Exchange to continue to maintain and improve its market technology and services.

Lastly, the Exchange believes the fees and credits remain competitive with those charged by other venues and therefore continue to be reasonable and equitably allocated to Members. For instance, the proposed fees for a 10 gigabyte circuit of $7,000 per month is less than analogous fees charged by the Nasdaq Stock Market LLC (''Nasdaq'') and NYSE Arca, Inc. (''Arca''), which range from $10,000–$15,000 per month for 10 gigabyte circuits.[10]

[10] *See* Nasdaq Rule 7034(b) *and* the NYSE Arca fee schedule *available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf* (dated October 11, 2017).

(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. As discussed above, the Exchange believes that fees for connectivity are constrained by the robust competition for order flow among exchanges and non-exchange markets. The Exchange does not believe that the proposed changes represent a significant departure from previous pricing offered by the Exchange or pricing offered by the Exchange's competitors. Additionally, Members may opt to disfavor the Exchange's pricing if they believe that alternatives offer them better value. Further, excessive fees for connectivity would serve to impair an exchange's ability to compete for order flow rather than burdening competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from Members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[11] and paragraph (f) of Rule 19b–4 thereunder.[12] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f).

- Send an email to *rule-comments@sec.gov.* Please include File No. SR–BatsEDGA–2017–30 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 No. SR–BatsEDGA–2017–30. 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 will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–BatsEDGA–2017–30 and should be submitted on or before December 8, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2017–24933 Filed 11–16–17; 8:45 am]

BILLING CODE 8011–01–P

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82064; File No. SR–BatsEDGX–2017–46]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Modify Its Fees for Physical Ports as They Relate to the Exchange's Equity Options Platform

November 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 November 2, 2017, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') (formerly known as Bats EDGX Exchange, Inc.) filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the fee schedule applicable to Members [5] and non-Members of the Exchange pursuant to EDGX Rules 15.1(a) and (c) to modify its fees for physical ports as they apply to the Exchange's equity options platform (''EDGX Options'').

The text of the proposed rule change is available at the Exchange's Web site at *www.markets.cboe.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] The term ''Member'' is defined as ''any registered broker or dealer that has been admitted to membership in the Exchange.'' *See* Exchange Rule 1.5(n).

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

A physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently maintains a presence in two third-party data centers: (i) The primary data center where the Exchange's business is primarily conducted on a daily basis, and (ii) a secondary data center, which is predominantly maintained for business continuity purposes. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,000 per physical port that connects to the System [6] via 1 gigabyte circuit; and $6,000 per physical port that connects to the System via 10 gigabyte circuit. The Exchange proposes to increase the fee per physical port that connects to the System via a 10 gigabyte circuit from $6,000 per month to $7,000 per month in order to cover its increased infrastructure costs associated with establishing physical ports to connect to the Exchange's Systems and enable it to continue to maintain and improve its market technology and services.[7] The Exchange does not propose to amend the fee for a 1 gigabyte circuit, which will remain $2,000 per month. The Exchange proposes to implement this amendment to its fee schedule on January 2, 2018.

[6] The term ''System'' is defined as ''the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing away.'' *See* Exchange Rule 1.5(cc).

[7] The Exchange also proposes two minor technical amendments to this section of its fee schedule. First is to change the word ''Connection'' to ''Connectivity'' in the section's title. The second is to change references to ''G'' for gigabyte to ''Gb''.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[8] in general, and furthers the objectives of Section 6(b)(4),[9] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. The Exchange also notes that it operates in a highly-competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The proposed rule change reflects a competitive pricing structure designed to incent market participants to direct their order flow to the Exchange.

The Exchange believes that the proposed rate is equitable and non-discriminatory in that it applies uniformly to all Members. Members and non-Members will continue to choose whether they want more than one physical port and choose the method of connectivity based on their specific needs. All Members that voluntarily select various service options will be charged the same amount for the same services. As is true of all physical connectivity, all Members and non-Members have the option to select any connectivity option, and there is no differentiation with regard to the fees charged for the service.

The Exchange believes that the proposal represents an equitable allocation of reasonable dues, fees, and other charges as its fees for physical connectivity are reasonably constrained by competitive alternatives. If a particular exchange charges excessive fees for connectivity, affected Members and non-Members may opt to terminate their connectivity arrangements with that exchange, and adopt a possible range of alternative strategies, including routing to the applicable exchange through another participant or market center or taking that exchange's data indirectly. Accordingly, if the Exchange charges excessive fees, it would stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity.

Furthermore, the proposed rule change is also an equitable allocation of

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(4).

reasonable dues, fees, and other charges as the Exchange believes that the increased fees obtained will enable it to cover its increased infrastructure costs associated with establishing physical ports to connect to the Exchange's Systems. The additional revenue from the increased fee will also enable the Exchange to continue to maintain and improve its market technology and services.

Lastly, the Exchange believes the fees and credits remain competitive with those charged by other venues and therefore continue to be reasonable and equitably allocated to Members. For instance, the proposed fees for a 10 gigabyte circuit of $7,000 per month is less than analogous fees charged by the Nasdaq Stock Market LLC (''Nasdaq'') and NYSE Arca, Inc. (''Arca''), which range from $10,000–$15,000 per month for 10 gigabyte circuits.[10]

(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. As discussed above, the Exchange believes that fees for connectivity are constrained by the robust competition for order flow among exchanges and non-exchange markets. The Exchange does not believe that the proposed changes represent a significant departure from previous pricing offered by the Exchange or pricing offered by the Exchange's competitors. Additionally, Members may opt to disfavor the Exchange's pricing if they believe that alternatives offer them better value. Further, excessive fees for connectivity would serve to impair an exchange's ability to compete for order flow rather than burdening competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from Members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [11] and paragraph (f) of Rule 19b–4 thereunder.[12] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. SR–BatsEDGX–2017–46 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 No. SR–BatsEDGX–2017–46. 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 will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–BatsEDGX–2017–46 and should be submitted on or before December 8, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2017–24936 Filed 11–16–17; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82057; File No. SR–BatsEDGX–2017–48]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt Fees for Its Recently Adopted Functionality for the Handling of Complex Orders on Its Equity Options Platform

November 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 October 31, 2017, Cboe EDGX Exchange, Inc. (formerly known as Bats EDGX Exchange, Inc.) (''EDGX'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the fee schedule applicable to

---

[10] *See* Nasdaq Rule 7034(b) *and* the NYSE Arca fee schedule *available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf* (dated October 11, 2017).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f).

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

Members[5] and non-Members of the Exchange pursuant to EDGX Rules 15.1(a) and (c).

The text of the proposed rule change is available at the Exchange's Web site at *www.markets.cboe.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify the Fee Schedule applicable to the Exchange's equity options platform (''EDGX Options'') to adopt fees for its recently adopted functionality for the handling of complex orders on EDGX Options.[6]

The Exchange proposes to adopt twelve new fee codes in connection with this new complex order functionality, which would be added to the Fee Codes and Associated Fees table of the Fee Schedule. These fee codes represent the fees applicable to complex orders, as described below. In addition, the Exchange proposes to adopt new footnote 8, which would again summarize complex order fees and rebates in a table form and would provide additional details regarding the applicability of such fees and rebates. In particular, the proposed tables for footnote 8 highlight that the proposed fees and rebates for complex orders vary depending on the contra-party for each transaction. Finally, the Exchange proposes a change to the Marketing Fees section of the Fee Schedule in connection with this proposal.

Customer Pricing for Transactions on Complex Order Book

The Exchange proposes to adopt three fee codes for Customer[7] complex orders that trade on the EDGX Options complex order book (''COB''), fee codes ZA, ZB, and ZC. As proposed, the Exchange would apply fee code ZA to Customer complex orders that are executed on the COB with a non-Customer[8] as the contra-party in Penny Pilot Securities[9] and would provide such orders a rebate of $0.47 per contract. The Exchange would apply fee code ZB to Customer complex orders that are executed on the COB with a non-Customer as the contra-party in Non-Penny Pilot Securities[10] and would provide such orders a rebate of $0.97 per contract. The Exchange would apply fee code ZC to Customer complex orders that are executed on the COB with another Customer as the contra-party and would not assess a fee or provide any rebate for such orders. There is no proposed distinction between pricing for such orders in Penny Pilot Securities and Non-Penny Pilot Securities.

Market Maker Pricing—Customer as Contra-Party

The Exchange proposes to adopt two fee codes for Market Maker[11] complex orders that trade on the COB against Customer orders, fee codes ZM and ZN. As proposed, the Exchange would apply fee code ZM to Market Maker complex orders that are executed on the COB with a Customer as the contra-party in Penny Pilot Securities and would charge such orders a fee of $0.50 per contract. The Exchange would apply fee code ZN to Market Maker complex orders that are executed on the COB with a Customer as the contra-party in Non-Penny Pilot Securities and would charge such orders a fee of $1.10 per contract.

Other Non-Customer Pricing—Customer as Contra-Party

Next, the Exchange proposes to adopt two fee codes for non-Customer/non-Market Maker complex orders that trade on the COB against Customer orders, fee codes ZT and ZR. The origin codes included in the category of non-Customer/non-Market Maker include: Professional,[12] Firm,[13] Broker Dealer,[14] Joint Back Office,[15] and Away Market Maker.[16]

As proposed, the Exchange would apply fee code ZT to non-Customer/non-Market Maker complex orders that are executed on the COB with a Customer as the contra-party in Penny Pilot Securities and would charge such orders a fee of $0.50 per contract. The Exchange would apply fee code ZR to non-Customer/non-Market Maker complex orders that are executed on the COB with a Customer as the contra-party in Non-Penny Pilot Securities and would charge such orders a fee of $1.10 per contract. The Exchange notes that while the pricing for non-Customer/non-Market Maker orders executed on the COB with Customer orders as contra-party is the same as that proposed for Market Maker orders executed on the COB with Customer orders as contra-party, the Exchange believes it is necessary to create different fee codes in order to maintain the ability to later differentiate such pricing, for instance to encourage Market Maker participate on the COB.

Non-Customer Pricing—Non-Customer as Contra-Party

Finally, the Exchange proposes to adopt four fee codes to cover all transactions between non-Customers (including Market Makers) on the COB, fee codes ZF, ZG, ZH, and ZJ. In contrast to the fee codes described above, all of which involve a Customer

[5] The term ''Member'' is defined as ''any registered broker or dealer that has been admitted to membership in the Exchange.'' *See* Exchange Rule 1.5(n).

[6] *See* Securities Exchange Act Release No. 81891 (October 17, 2017) (SR–BatsEDGX–2017–29) (order approving rules for EDGX complex order book).

[7] ''Customer'' applies to any transaction identified by a Member for clearing in the Customer range at the OCC, excluding any transaction for a Broker Dealer or a ''Professional'' as defined in Exchange Rule 16.1. *See* the Exchange's Fee Schedule *available at: https://markets.cboe.com/us/options/membership/fee_schedule/edgx/.*

[8] ''Non-Customer'' applies to any transaction that is not a Customer order. *Id.*

[9] ''Penny Pilot Securities'' are those issues quoted pursuant to Exchange Rule 21.5, Interpretation and Policy .01. *Id.*

[10] The term ''Non-Penny Pilot Security'' applies to those issues that are not Penny Pilot Securities quoted pursuant to Exchange Rule 21.5, Interpretation and Policy .01.

[11] ''Market Maker'' applies to any transaction identified by a Member for clearing in the Market Maker range at the OCC, where such Member is registered with the Exchange as a Market Maker as defined in Rule 16.1(a)(37). *See* the Exchange's Fee Schedule *available at: https://markets.cboe.com/us/options/membership/fee_schedule/edgx/.*

[12] ''Professional'' applies to any transaction identified by a Member as such pursuant to Exchange Rule 16.1. *Id.*

[13] ''Firm'' applies to any transaction identified by a Member for clearing in the Firm range at the OCC, excluding any Joint Back Office transaction. *Id.*

[14] ''Broker Dealer'' applies to any order for the account of a broker dealer, including a foreign broker dealer, that clears in the Customer range at the Options Clearing Corporation (''OCC''). *Id.*

[15] ''Joint Back Office'' applies to any transaction identified by a Member for clearing in the Firm range at the OCC that is identified with an origin code as Joint Back Office. A Joint Back Office participant is a Member that maintains a Joint Back Office arrangement with a clearing broker-dealer. *Id.*

[16] ''Away Market Maker'' applies to any transaction identified by a Member for clearing in the Market Maker range at the OCC, where such Member is not registered with the Exchange as a Market Maker, but is registered as a market maker on another options exchange. *Id.*

on one side of the transaction occurring on the COB, for non-Customer to non-Customer transactions (including transactions involving Market Makers), the Exchange proposes to vary fees depending on which party to the transaction added liquidity and which party to the transaction removed liquidity. As proposed, the Exchange would apply fee code ZF to non-Customer complex orders executed on the COB that add liquidity in Penny Pilot Securities and do not have a Customer contra-party, and would charge such orders a fee of $0.10 per contract. The Exchange would apply fee code ZG to non-Customer complex orders executed on the COB that remove liquidity in Penny Pilot Securities and do not have a Customer contra-party, and would charge such orders a fee of $0.47 per contract. The Exchange would apply fee code ZH to non-Customer complex orders executed on the COB that add liquidity in Non-Penny Pilot Securities and do not have a Customer contra-party, and would charge such orders a fee of $0.10 per contract. Last, the Exchange would apply fee code ZJ to non-Customer complex orders executed on the COB that remove liquidity in Non-Penny Pilot Securities and do not have a Customer contra-party, and would charge such orders a fee of $0.75 per contract.

Pricing for ''Leg'' Transactions

As described in Rule 21.20, in addition to complex orders executing against other complex orders on the COB, complex orders will, in certain circumstances instead ''leg'' into the EDGX Options Simple Book [17] and execute against interest resting on the Simple Book. In addition to the pricing proposed above, the Exchange proposes to adopt fee code ZD, which would be applicable to Customer complex orders that are not executed on the COB but instead leg into the Simple Book. The Exchange does not propose to assess a fee or provide any rebate for such orders. The Exchange notes that a Customer order on the Simple Book is currently provided a standard rebate of $0.05 per contract, subject to pricing incentives that may result in higher rebates.

Other than the proposed fee code specific to Customer complex orders that leg into the Simple Book, fee code ZD, as described above, the Exchange does not propose to adopt any specific pricing for complex orders that leg into the Simple Book. Instead, the Exchange proposes to apply standard pricing applicable to transactions on the Simple Book for complex orders that leg into the Simple Book. For instance, the Exchange currently applies fee code PT to Market Maker orders that remove liquidity from EDGX Options in Penny Pilot Securities and charges a standard fee of $0.19 per contract for such orders, subject to tiered pricing incentives offered by the Exchange as described in footnote 3 of the Fee Schedule. The Exchange proposes to apply fee code PT to Market Maker complex orders that leg into the Simple Book and remove liquidity and does not propose to change the pricing with respect to fee code PT. Accordingly, the Exchange proposes to state in proposed footnote 8 that with the exception of fee code ZD, standard fee codes shall apply for orders that leg into the Simple Book.

Other Changes

As discussed above, in addition to setting forth the proposed fees and rebates in the Fee Codes and Associated Fees table, the Exchange proposes to adopt footnote 8 to again summarize fees and rebates for complex orders in a table form that is organized differently in order to provide clarity to market participants. Footnote 8 would be organized similar to existing footnotes on the Fee Schedule and would first make clear that the footnote is applicable to the following twelve fee codes: ZA, ZB, ZC, ZD, ZM, ZN, ZT, ZR, ZF, ZG, ZH, and ZJ, and that the rates provided in the tables apply to executions on the Exchange's complex order book. The footnote would then re-state the fees applicable to complex orders, including the statement described above that other than fee code ZD, standard fee codes shall apply for orders that leg into the Simple Book as well as the proposed inclusion of the definition of the term ''Simple Book'' from Rule 21.20.

The first proposed table would represent fees for an order that interacts with a Customer order with three rows for each origin code or set of origin codes that yields a different fee code when interacting with a Customer Order: (i) Customer; (ii) Market Maker; and (iii) Professional Customer (or ''Pro''), Firm, Broker Dealer (or ''BD''), Joint Back Office (or ''JBO''), and Away Market Maker. The table would then have four columns, first a pair of columns to provide the fee code and rate for Penny Pilot Securities and second a pair of columns to provide the fee code and rate for Non-Penny Pilot Securities.

The second proposed table would represent fees for an order that interacts with a Non-Customer order with three rows for each origin code or set of origin codes that yields a different fee code when interacting with a Non-Customer Order, with the additional detail that for the two Non-Customer groupings the distinction is between an order that adds liquidity and an order that removes liquidity. Thus, the table would have the following rows: (i) Customer; (ii) Non-Customer Add; and (iii) Non-Customer Remove. The table would then again have four columns, first a pair of columns to provide the fee code and rate for Penny Pilot Securities and second a pair of columns to provide the fee code and rate for Non-Penny Pilot Securities.

The fee codes and rates included in each table of proposed footnote 8 are the same as proposed and described above but the Exchange believes that presenting them in a table format will assist market participants in understanding the rates applicable to executions on the COB.

Marketing Fees

The Fee Schedule currently contains a section entitled ''Marketing Fees'' that specifies that marketing fees are charged to all Market Makers who are counterparties to a trade with a Customer. In connection with the adoption of fees applicable to complex orders, the Exchange proposes to specify that marketing fees shall not apply to executions of complex orders on the COB.

Implementation Date

The Exchange proposes to implement the proposed changes immediately.[18]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act.[19] Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[20] in that it provides for the equitable allocation of reasonable dues, fees and other charges among Members and other persons using any facility or system

[17] As defined in Rule 21.20, the Simple Book is the Exchange's regular electronic book of orders. The Exchange notes that it proposes to include this definition in proposed footnote 8 for clarity.

[18] The Exchange initially filed the proposed rule changes on October 23, 2017 (SR–BatsEDGX–2017–42). On October 31, 2017 the Exchange withdrew SR–BatsEDGX–2017–42 and then subsequently submitted this filing (SR–BatsEDGX–2017–48).

[19] 15 U.S.C. 78f.

[20] 15 U.S.C. 78f(b)(4).

which the Exchange operates or controls.

The Exchange's proposal establishes fees and rebates regarding complex orders, which is new functionality adopted by the Exchange.[21] The Exchange's launch of a complex order book is a competitive offering, and believes that its proposed pricing will allow the Exchange to recoup the costs associated with developing the COB while also incentivizing its use.

In sum, the Exchange believes that the proposed fee and rebate structure is designed to promote the entry of complex orders to the Exchange and, in particular, to attract Customer liquidity, which benefits all market participants by providing additional trading opportunities. This attracts liquidity providers and an increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow originating from other market participants.

Moreover, the Exchange believes that charging market participants, other than Customers, a higher effective rate for complex order transactions is reasonable, equitable, and not unfairly discriminatory because these types of market participants are more sophisticated and have higher levels of order flow activity and system usage. Facilitating this level of trading activity requires a greater amount of system resources than that of Customers, and thus, generates greater ongoing operational costs for the Exchange. The proposed fees and rebates, which are further discussed below, will allow the Exchange to promote and maintain the COB, which is beneficial to market participants.

With respect to the proposal to adopt a rebate for Customer orders that interact with non-Customer orders on the COB, the Exchange believes this is reasonable because it encourages participation on the COB by entry of Customer orders to the Exchange. The rebate for Customer complex orders is designed to encourage Customer orders entered into the Exchange, which is reasonable for the reasons further discussed below. The proposed fees for Market Maker orders and other non-Customer complex orders that trade with Customer orders are also reasonable because the associated revenue will allow the Exchange to promote and maintain the COB, and continue to enhance its services.

Providing Customers a rebate for complex orders, while assessing Non-Customers a fee for complex orders, is reasonable because of the desirability of Customer activity. The proposed new fees and rebates for complex orders are generally intended to encourage greater Customer trade volume to the Exchange. Customer activity enhances liquidity on the Exchange for the benefit of all market participants and benefits all market participants by providing more trading opportunities, which attracts market makers and other liquidity providers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants. The practice of incentivizing increased Customer order flow through a fee and rebate schedule in order to attract professional liquidity providers is, and has been, commonly practiced in the options markets, and the Exchange.[22] The proposed fee and rebate schedule similarly attracts Customer order flow. Other competing exchanges offer different fees and rebates for orders executed on behalf of different market participants (*i.e.,* orders with different origin codes).[23] Other competing exchanges also charge different rates for transactions on their complex order books for customers versus their non-customers in a manner similar to the proposal, including the provision of rebates to customers.[24]

The fee and rebate schedule as proposed continues to reflect differentiation among different market participants typically found in options fee and rebate schedules.[25] The Exchange believes that the differentiation is reasonable and notes that unlike others (*e.g.,* Customers) some market participants like EDGX Options Market Makers commit to various obligations. For example, transactions of an EDGX Options Market Maker must constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and Market Makers should not make bids or offers or enter into transactions that are inconsistent with such course of dealings.[26] Further, all Market Makers are designated as specialists on EDGX Options for all purposes under the Act or rules thereunder.[27]

Establishing a rebate for Customer orders and a fee for Non-Customer Orders is also equitable and not unfairly discriminatory. This is because the Exchange's proposal to provide rebates and assess fees will apply the same to all similarly situated participants. Moreover, all similarly situated complex orders are subject to the same proposed Fee Schedule, and access to the Exchange is offered on terms that are not unfairly discriminatory. In addition, the proposed fee for complex orders is equitable and not unfairly discriminatory because, while other market participants (Non-Customers) will be assessed a fee, Customers will receive a rebate because an increase in Customer order flow will bring greater volume and liquidity, which benefits all market participants by providing more trading opportunities and tighter spreads.

Similarly, the Exchange believes that fees include different rates for Penny Pilot Securities and Non-Penny Pilot Securities is well-established in the options industry, including on the Exchange's current fee schedule.[28] The Exchange believes it is reasonable, equitably allocated and non-discriminatory to impose higher fees and provide higher rebates in Non-Penny Pilot Securities than Penny Pilot Securities because Penny Pilot Securities and Non-Penny Pilot Securities have different liquidity, spread and trading characteristics. In particular, spreads in Penny Pilot Securities are tighter than those in Non-Penny Pilot Securities (which trade in increments of $0.05 or greater). The wider spreads in Non-Penny Pilot Securities allow for greater profit potential.

With respect to the fees applicable to non-Customer complex orders, the Exchange believes the proposed fees are reasonable and equitably allocated as they are similar to fees charged on the Exchange for certain other orders executed, such as orders executed through the Bats Auction Mechanism (''BAM''), and on other options exchanges, and because the associated revenue will allow the Exchange to maintain and enhance its services. The proposed fees are not unreasonably discriminatory as compared to Customer orders for the reasons described above, and vis-à-vis other non-Customers

[21] *See supra,* note 6.

[22] *See* the Exchange's Fee Schedule, *available at: https://markets.cboe.com/us/options/membership/fee_schedule/edgx/; see also, e.g.,* MIAX Fee Schedule, NYSE Amex Options Fee Schedule.

[23] *Id.*

[24] *Id.*

[25] *Id; see also, e.g.,* MIAX Fee Schedule, NYSE Amex Options Fee Schedule, BX Options Fee Schedule and Nasdaq Options Market Fee Schedule.

[26] *See* Exchange Rule 22.5, entitled ''Obligations of Market Makers''.

[27] *See* Exchange Rule 22.2, entitled ''Options Market Maker Registration and Appointment''.

[28] *See* the Exchange's Fee Schedule, *available at: https://markets.cboe.com/us/options/membership/fee_schedule/edgx/; see also, e.g.,* MIAX Fee Schedule, NYSE Amex Options Fee Schedule.

because all types of non-Customers will be charged identical fees as proposed.

The Exchange also believes the proposed fees are reasonable, equitably allocated and not unreasonably discriminatory despite a proposed distinction between fees for non-Customer complex orders that add liquidity and those that remove liquidity. The Exchange currently applies this distinction to Market Maker orders on the Simple Book, and this pricing structure, the ''make-take'' pricing structure, is common on other options exchanges as well.[29] The make-take pricing structure is designed to incentivize market participants to provide liquidity on an exchange, and such liquidity in turn, benefits all market participants. Thus, the proposal to charge a higher rate to Non-Customer orders that remove liquidity than those that add liquidity is reasonable, equitably allocated and not unreasonably discriminatory despite a proposed distinction between orders that add liquidity and those that remove liquidity.

With respect to the Customer against Customer transactions, establishing no Customer fee or rebate for either side of the transaction is also reasonable, equitably allocated and not unreasonably discriminatory because it still encourages the entry of Customer orders to the Exchange while treating, from the Exchange's perspective, each side of the order neutrally rather than providing one Customer a rebate but charging another Customer a fee. Similarly, providing that Customer orders that leg into the Simple Book will be executed without application of any fee and rebate is reasonable, equitably allocated, and not unreasonably discriminatory because it provides fee certainty to Customer orders, as such orders are guaranteed to either pay no fee or to receive a rebate, again encouraging the entry of Customer orders to the Exchange.

In connection with the adoption of fees applicable to complex orders, the Exchange proposes to modify the description of Marketing Fees applicable on the Exchange to make clear that such fees do not apply to complex orders. The Exchange believes this proposal is a reasonable and equitable allocation of fees and dues and is not unreasonably discriminatory because the proposed initial rates for Market Makers on the complex order book are designed to be consistent with pricing with other non-Customers and adding an additional marketing fee to Market Maker transactions would instead increase such rates to a level higher than that paid by other non-Customers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes the proposed rebate would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed pricing for complex orders represents a significant departure from previous pricing offered by the Exchange or pricing offered by the Exchange's competitors. Rather, the Exchange believes the proposal will enhance competition as it is a competitive proposal that seeks to further the growth of the Exchange by encouraging Members to enter complex orders.

The Exchange's proposal to adopt complex order functionality was a competitive response to complex order books operated by other options exchanges. The Exchange believes this proposed rule change is necessary to permit fair competition among the options exchanges. The Exchange anticipates that the COB will create new opportunities for EDGX to attract new business to the Exchange. While the proposed fees and rebates are intended to attract participation on the Exchange, particularly complex orders, the Exchange does not believe that its proposed pricing significantly departs from pricing in place on other options exchanges that accept complex orders. Accordingly, the Exchange does not believe that the proposal creates an undue burden on inter-market 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. Specifically, the Exchange does not believe that its proposal to establish fees and rebates for complex orders will impose any burden on competition, as discussed below.

The Exchange operates in a highly competitive market in which many sophisticated and knowledgeable market participants can readily and do send order flow to competing exchanges if they deem fee levels or rebate incentives at a particular exchange to be excessive or inadequate. Additionally, new competitors have entered the market consistently in recent years. These market forces ensure that the Exchange's fees and rebates remain competitive with the fee structures at other trading platforms. In that sense, the Exchange's proposal is actually pro-competitive because the Exchange is simply establishing rebates and fees in order to remain competitive in the current environment.

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. 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 charges assessed and credits available to member firms in respect of complex orders do not impose a burden on competition because the Exchange's execution services are completely voluntary and subject to extensive competition. If the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result and/or will be unable to attract participants to the COB. 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. Additionally, the changes proposed herein are pro-competitive to the extent that they allow the Exchange to promote and maintain the COB, which has the potential to result in efficient executions to the benefit of market participants.

The Exchange believes that the proposed change would increase both inter-market and intra-market competition by incentivizing members to direct their orders, and particularly Customer orders, to the Exchange, which benefits all market participants by providing more trading opportunities, which attracts Market Makers. To the extent that there is a differentiation between proposed fees assessed and rebates offered to Customers as opposed to other market participants, the Exchange believes that

[29] *See* the Exchange's Fee Schedule, *available at: https://markets.cboe.com/us/options/membership/fee_schedule/edgx/; see also, e.g.,* MIAX Fee Schedule, BX Options Fee Schedule and Nasdaq Options Market Fee Schedule.

this is appropriate because the fees and rebates should incentivize Members to direct additional order flow to the Exchange and thus provide additional liquidity that enhances the quality of its markets and increases the volume of contracts traded on the Exchange. To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market liquidity. Enhanced market quality and increased transaction volume that results from the anticipated increase in order flow directed to the Exchange will benefit all market participants and improve competition on the Exchange. 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.

As noted above, while the Exchange has proposed to establish different fee codes for Market Maker complex orders that interact with Customer orders on the COB and other non-Customer complex orders that interact with Customer orders on the COB, the Exchange has not proposed to differentiate the pricing applicable to these fee codes at this time.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [30] and paragraph (f) of Rule 19b–4 thereunder.[31] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BatsEDGX–2017–48 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BatsEDGX–2017–48. 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BatsEDGX–2017–48, and should be submitted on or before December 8, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[32]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2017–24929 Filed 11–16–17; 8:45 am]

BILLING CODE 8011–01–P

[30] 15 U.S.C. 78s(b)(3)(A).

[31] 17 CFR 240.19b–4(f).

[32] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82055; File No. SR–OCC–2017–805]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of Advance Notice Concerning the Use of the Society of Worldwide Interbank Financial Telecommunication Messaging Network in OCC's Cash Settlement Process

November 13, 2017.

Pursuant to Section 806(e)(1) of Title VIII of the Dodd–Frank Wall Street Reform and Consumer Protection Act, entitled Payment, Clearing and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') [1] and Rule 19b–4(n)(1)(i) of the Securities Exchange Act of 1934 (''Act''),[2] notice is hereby given that on October 10, 2017, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') an advance notice as well as a proposed cash settlement agreement procedures agreement (''CSPA'') template as described in Items I and II below, which Items have been prepared by OCC. The Commission is publishing this notice to solicit comments on the advance notice from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

In accordance with Section 806(e)(1) of the Clearing Supervision Act [3] and Rule 19b–4(n)(1)(i) [4] of the Act,[5] this advance notice is filed by OCC in connection with proposed changes to improve OCC's cash settlement process by implementing Society of Worldwide Interbank Financial Telecommunication (''SWIFT'') messaging as the primary means of transmitting daily cash settlement instructions between OCC and its Clearing Banks.[6] The proposed change is designed to: (1) Increase the efficiency, accuracy, and resiliency of OCC's cash settlement process, (2) eliminate certain risks associated with the current use of OCC's proprietary online cash settlement system within the ENCORE clearing system (''OCS''), and (3) adopt communication procedures and standards that are internationally accepted and therefore

[1] 12 U.S.C. 5465(e)(1).

[2] 17 CFR 240.19b–4(n)(1)(i).

[3] 12 U.S.C. 5465(e)(1).

[4] 17 CFR 240.19b–4(n)(1)(i).

[5] 15 U.S.C. 78a *et seq.*

[6] *See OCC Rule 101.C.(1) (defining the term ''Clearing Bank'').*

are consistent with the requirements in Rule 17Ad–22(e)(22).[7]

All terms with initial capitalization that are not otherwise defined herein have the same meaning as set forth in the OCC By-Laws and Rules.[8]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the advance notice and discussed any comments it received on the advance notice. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in sections A and B below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement on Comments on the Advance Notice Received From Members, Participants or Others

Communications With Clearing Banks

There are currently eight banks or trust companies that act as OCC Clearing Banks.[9] The Clearing Banks were first informed in early 2016 via phone communications regarding OCC's initiative to utilize SWIFT messaging and the SWIFT network for cash settlement processing. This initiative was positively received by existing Clearing Banks since they utilize SWIFT-based messaging in other areas of their businesses. Moreover, several Clearing Banks have informally expressed their desire to OCC in the past for OCC to integrate use of the SWIFT messaging network in the cash settlement process.

Beginning in October 2016, OCC distributed a draft template cash settlement procedures agreement to all Clearing Banks that would implement SWIFT messaging as the primary means of transmitting daily cash settlement instructions between OCC and the Clearing Banks along with a request for feedback. In response, all of the existing Clearing Banks have expressed support for the transition to SWIFT. This is in part because the existing use of OCC's online cash settlement system is not integrated with the internal systems used by Clearing Banks for processing settlement instructions. Processing the settlement instructions therefore requires manual intervention by the Clearing Banks to enter the instructions into their own systems. According to comments from all Clearing Banks, this lack of integration elongates the timeframe to process and approve settlement instructions, which causes delays and increases the risk of errors in preparing, posting, transmitting, receiving, and executing timely settlement instructions.

Following the receipt of questions and comments, OCC began negotiating the cash settlement procedures agreement with each Clearing Bank based on the standardized template. The definitive documentation between OCC and each Clearing Bank is expected to be consistent with the template agreement, however, areas of negotiation to date have generally included such matters as acceptable backup communication methods for transmitting settlement instructions (*e.g.,* facsimile, email, or other means), standards of care associated with duties and potential liabilities under the agreement (*e.g.,* negligence, gross negligence, or willful misconduct), certain defined terms (*e.g.,* the meaning of a ''business day''), and allocations of responsibility regarding the detection of errors associated with settlement instructions.

(B) Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing, and Settlement Supervision Act

Description of the Proposed Change

Background

The Existing Online Cash Settlement System

In connection with OCC's performance of clearance and settlement services for cleared contracts[10] and Stock Loans, OCC and Clearing Members are obligated under OCC's By-Laws and Rules to perform cash settlement of related obligations.[11] This cash settlement process is facilitated by Clearing Banks, which are banks or trust companies that have entered agreements with OCC to settle on behalf of Clearing Members and at which OCC and Clearing Members each maintain accounts.[12] Currently, there are eight Clearing Banks with which OCC effects cash settlements through OCS, which is a proprietary web-based system OCC developed in conjunction with the gradual phase-in of its ENCORE clearing system in the early- to-mid 2000's.[13] OCS replaced OCC's previous cash settlement system, the Options Automated Settlement Instructions System, which required the use of dedicated terminals at each Clearing Bank. Because OCS is a web-based system, it provides greater flexibility to OCC and Clearing Banks because users are not limited to only using dedicated terminals to access the system.

On a daily basis, OCC generates settlement instructions associated with Cleared Contracts and Stock Loans of Clearing Members by running specific predefined settlement profiles[14] throughout the day. The resulting settlement instructions are generally transmitted by OCC to Clearing Banks by way of OCS, at which point the Clearing Banks are able to view batches of settlement instructions within OCS.[15] Clearing Bank staff review the settlement instructions by logging into OCS and opening the settlement batch. Thereafter, the Clearing Bank either approves or rejects the settlement instructions in OCS. One of the Clearing Banks, however, currently does not utilize OCS as its primary means of effecting cash settlement. Instead, the Clearing Bank primarily receives settlement instructions from OCC via facsimile, reviews the settlement instructions, approves or rejects them, and then returns a facsimile confirmation to OCC. After receipt of the confirmation, OCC staff manually enters the approvals or rejections into OCS.

Cash settlement instructions that OCC transmits to Clearing Banks are generally categorized in two groups: Start-of-day and intra-day. Start-of-day settlement instructions are generated through OCC's nightly processing cycle and relate to cash settlement obligations that arise from Cleared Contracts and Stock Loans of Clearing Members, including, but not limited to, premium payments, margin requirements, mark-to-market activity, and cash settlement amounts for exercised options that are cash settled. Intra-day settlement

[7] 17 CFR 240.17Ad–22(e)(22).

[8] OCC's By-Laws and Rules can be found on OCC's public Web site: *http://optionsclearing.com/about/publications/bylaws.jsp.*

[9] OCC Rule 101.C.(1) defines the term ''Clearing Bank'' to mean ''a bank or trust company which has entered into an agreement with [OCC] in respect of settlement of confirmed trades on behalf of Clearing Members.''

[10] *See* Article I., Section 1.C.(11).

[11] *See, e.g.,* Article I, Section 1.S.(16) of OCC's By-Laws (defining the term ''settlement time''); Article VI, Sections 4 and 6 of OCC's By-Laws (addressing obligations of Purchasing Clearing Members and obligations of OCC as a central counterparty); and Chapter V of OCC's Rules (regarding daily cash settlement).

[12] *See* OCC Rule 101.C.(1) (defining the term ''Clearing Bank'').

[13] *See generally* OCC Completes Second Major Installation of Encore™ Clearing System(November 25, 2002), *available at https://www.theocc.com/about/newsroom/releases/2002/11_25.jsp.*

[14] Predefined settlement profiles are programmed to track various types of obligations to pay or collect cash in connection with Cleared Contracts and Stock Loans that are in turn used to generate settlement instructions.

[15] A settlement batch is a set of individual debit or credit settlement instructions that may either instruct a Clearing Bank to move funds to or from an OCC settlement account or to or from a Clearing Member's account at the same Clearing Bank.

instructions represent any settlement instruction other than a start-of-day instruction and may be transmitted by OCC to a Clearing Bank throughout the day. For example, intra-day settlement instructions may be generated to credit excess cash to a Clearing Member in connection with its margin requirement,[16] to complete a cash substitution regarding a Clearing Member's margin deposit or to effect an intra-day margin call that OCC may issue to a Clearing Member pursuant to its authority under Rule 609.[17] The settlement timeline for processing intra-day settlement instructions depends on the time at which the Clearing Bank receives the instructions, as discussed below.

Existing Cash Settlement Procedures Agreements

Each Clearing Bank entered into a CSPA with OCC that details the substantive rights and responsibilities of the parties and specifies operational procedures for which they are responsible regarding start-of-day and intra-day settlement instructions. This includes prescribed communication methods and settlement procedures and generally contemplates the use of OCS as the primary means to facilitate the cash settlement process, with the exception of the one instance described above in which the primary means of communication between OCC and the Clearing Bank is facsimile.

For start-of-day settlement instructions, the CSPA requires the Clearing Bank on the morning of each business day and by a standard time to access OCS and act upon the settlement instructions transmitted by OCC. Once the Clearing Bank reviews the settlement instructions, it either accepts or rejects each instruction through OCS.[18] If an instruction is to be rejected, the Clearing Bank must immediately notify OCC in advance by telephone that it intends to reject the instruction and provide the reason. OCC then has an opportunity to submit a revised settlement instruction by telephone or other mutually agreed upon means. All settlement instructions must be acted upon by the Clearing Bank before a defined settlement time, which differs for credit instructions (*i.e.,* transfers of funds from an OCC account to a Clearing Member account) and debit instructions (*i.e.,* transfers of funds from a Clearing Member account to an OCC account). If a Clearing Bank does not expressly accept or reject a settlement instruction by the specified settlement time, the bank is deemed to have accepted the instruction.

For intra-day settlement instructions, OCC transmits the instructions through OCS for the Clearing Bank to review and then notifies the Clearing Bank by telephone or other agreed upon means. With respect to Clearing Banks with access to OCS, the Clearing Bank must then use commercially reasonable efforts to access OCS immediately and act upon the settlement instruction by the earlier of either: (a) Thirty (30) minutes following the time the bank first views the settlement instruction in OCS or (b) sixty (60) minutes after OCC notifies the Clearing Bank that is has submitted settlement instructions via OCS. The same provisions related to backup procedures, acceptance, rejection, and implied acceptance for morning settlement also apply to such intra-day settlement instructions.

Proposed Changes

Under the Proposed CSPA, OCC and all Clearing Banks would use the SWIFT network as the primary means of transmitting settlement instructions to each other, and Clearing Bank staff would no longer log in to OCS and accept or reject settlement instructions. OCC would, however, continue using OCS for more limited purposes to manage its settlement instruction processing, including with respect to the initiation, processing, and tracking of settlement instructions. Under the new process in which SWIFT would be the primary means of transmitting settlement instructions, OCC would integrate OCS with the SWIFT network, and SWIFT would be used to communicate settlement instructions to Clearing Banks and allow Clearing Banks to approve settlement instructions. OCC would also implement a new monitoring screen to complement OCS that would allow OCC to track the lifecycle of all SWIFT messages sent or received by OCC in connection with its cash settlement activities.

SWIFT would not be a new communication channel for OCC even though the proposed change would increase the extent to which OCC utilizes the SWIFT messaging network in connection with its clearance and settlement activities. This is because Clearing Members may currently deposit letters of credit denominated in U.S. dollars issued by banks or trust companies approved by OCC as margin assets[19] and the issuer of any such letter of credit submits amendments to OCC using the SWIFT network. OCC manages this process through a SWIFT system that interfaces with OCC's ENCORE clearing system so that OCC is able to track and process the amendment messages. Under the proposed change, OCC would also use the same SWIFT system to support cash settlement processing. Based upon settlement profiles created by OCC, settlement instructions in the form of SWIFT messages would be automatically transmitted to Clearing Banks over the SWIFT network. In response, OCC would then receive acceptances from Clearing Banks via the SWIFT network. If an acceptance is not provided, OCC would have discretion to treat a settlement instruction as rejected, and in any case would promptly contact the Clearing Bank to determine the reason and coordinate with the Clearing Bank to ensure that appropriate action is taken with respect to the instruction.

OCC believes the proposed change would significantly increase the resiliency of OCC's cash settlement process by reducing manual processing steps that are more prone to error. For example, upon a Clearing Bank's acceptance of a settlement instruction sent by OCC using SWIFT, debits or credits, as appropriate, would be automatically made as between OCC's account at the Clearing Bank and the Clearing Member's account at the Clearing Bank. This means that Clearing Banks would no longer need to view settlement instructions in OCS and manually enter them into their systems to effect them as they do today. Moreover, use of the SWIFT network would eliminate facsimile, telephone, and email communications as primary communication methods for settlement processing. If SWIFT is unavailable, OCC and Clearing Banks would communicate by using contingency methods as specified in the applicable CSPA.

The Proposed CSPA would also introduce significant efficiencies to OCC's cash settlement process by reducing manual processing steps that elongate the time frame for processing and approving settlement instructions. Notably, OCC expects significantly faster response times from Clearing Banks because the banks would be able to communicate with OCC using the same SWIFT transmission method that they already typically use to process funds transfer instructions. OCC believes that efficiencies and time savings would also be experienced by

[16] *See* OCC Rule 608 (Withdrawals of Margin).

[17] *See* OCC Rule 609 (Intra-Day Margin).

[18] In the event OCS is unavailable, the CSPA specifies backup procedures, which may include transmission by telephone or facsimile.

[19] *See* OCC Rule 604(c).

significantly reducing manual steps associated with the processing of settlement instructions, such as manual data entry by Clearing Banks to enter settlement instruction information into their own systems based on computer printouts of instructions contained in OCS or instructions that are received by facsimile. In addition, the proposed change would allow Clearing Banks to forward SWIFT messages from OCC to internal staff at the Clearing Bank who have responsibility for the cash settlement process.

The Proposed CSPA would also harmonize the primary process by which OCC performs cash settlement with Clearing Banks by having all Clearing Banks use the SWIFT messaging system. In addition to the efficiency and risk mitigation benefits described above, the Proposed CSPA would directly respond to the Clearing Bank requests for OCC to implement an enhanced process to mitigate the manual processing challenges that are associated with the existing cash settlement process.

Finally, OCC believes that the Proposed CSPA would also promote compliance with Rule 17Ad–22(e)(22),[20] which requires OCC as a covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to ''use, or at a minimum accommodate, relevant internationally accepted communication procedures and standards in order to facilitate efficient payment, clearing, and settlement.'' In adopting this requirement, the Commission stated that ''[r]elevant internationally accepted communication procedures and standards could include messaging standards such as *SWIFT,* FIX and FpML.'' [emphasis added].[21] Accordingly, use of the SWIFT messaging network as the primary process to support daily cash settlement is consistent with Rule 17Ad–22(e)(22).

New Cash Settlement Procedures Agreement

As part of the transition to SWIFT, Clearing Banks would enter into the Proposed CSPA with OCC. The Proposed CSPA is based on a standardized template developed by OCC in collaboration with its Clearing Banks. The Proposed CSPA template agreement is not a public document, and OCC has separately submitted a request for confidential treatment regarding the Proposed CSPA template agreement, which is included in this filing as Exhibit 3. The definitive Proposed CSPA between OCC and each Clearing Bank is expected to be consistent with the template agreement, however, OCC and each Clearing Bank may negotiate certain modifications.

As is the case today, the Proposed CSPA would continue to be the principal form of agreement that governs the rights and responsibilities of OCC and each Clearing Bank, details operational procedures (including backup procedures) and security protocols, and identifies individuals at OCC and at the Clearing Bank who are authorized to act on behalf of each party with respect to cash settlement instructions.

Under the Proposed CSPA, the timelines for OCC and Clearing Banks to perform the actions needed to effect settlement would be bifurcated as they are under the current agreement into start-of-day settlement instructions and intra-day settlement instructions. Also as with the current CSPA, there would be defined deadlines by which OCC must submit settlement instructions and by which the Clearing Bank must accept and execute the settlement instructions. In the event the SWIFT network is unavailable during a time at which settlement instructions are to be communicated, each Proposed CSPA would detail backup procedures with corresponding security protocols by which OCC and the Clearing Bank could effect settlement. For example, such alternative communication methods may include secure email messages, telephone instructions with the use of personal identification codes, facsimile instructions, the Clearing Bank's proprietary online account system, or other methods agreed upon by OCC and the Clearing Bank.

Under the Proposed CSPA, however, Clearing Banks would not be deemed to have accepted settlement instructions in the event the Clearing bank does not explicitly communicate acceptance or rejection to OCC. Instead, any acceptance would be required to be made by affirmative SWIFT confirmation message, and if a Clearing Bank did not respond OCC would have discretion to treat the failure to respond as a rejection and OCC would communicate with the Clearing Bank to understand the reason(s) why no response to the settlement instruction was provided and appropriate action is taken. These measures are intended to ensure that potentially erroneous instructions are identified and acted upon in a timely manner and to evidence settlement finality.

The CSPAs currently in effect between OCC and its Clearing Banks were implemented incrementally over a number of years as OCC's operations expanded and it became appropriate to maintain service agreements with a range of Clearing Banks, and in many cases they have not been renegotiated in a significant amount of time. For these reasons, there is variation between the terms and conditions of the relevant CSPA and the corresponding practices with the Clearing Banks. In some cases the differences are relatively substantial, such as in the one case described above where the primary means of communication between the Clearing Bank and OCC to support the cash settlement process is facsimile. The Proposed CSPA would address these issues by increasing consistency in the respective rights and responsibilities of OCC and the Clearing Banks and in turn promoting harmonization across OCC's daily cash settlement process. Negotiation of the Proposed CSPA to adopt the SWIFT messaging network as the primary process to support daily cash settlement would also update the agreements to rely on current industry communication procedures and standards that the Commission has recognized as consistent with the requirements of Rule 17Ad–22(e)(22).[22]

Testing and Implementation

Prior to implementation of the Proposed CSPA, the existing CSPA and current processes regarding daily cash settlement would continue in effect while OCC completes the development of the new SWIFT interface. OCC would also complete roundtrip certification testing of the proposed SWIFT network messaging operations. Upon execution of the Proposed CSPA by a Clearing Bank, an implementation date would be coordinated between OCC and the Clearing Bank and OCC would provide advance notice of the implementation to Clearing Members through an Information Memo. OCC generally expects a total timeframe of approximately 90 days would be necessary to migrate a Clearing Bank to SWIFT messaging-based cash settlement. Though OCC would be able to begin migration to SWIFT messaged–based cash settlement with each Clearing Bank on an individual basis, it would expect to complete the migration with all of its Clearing Banks by the end of Q1 2018.

[20] 17 CFR 240.17Ad–22(e)(22).

[21] Securities Exchange Act Release No. 78961 (September 28, 2016), 81 FR 70786, 70842 (October 13, 2016).

[22] 17 CFR 240.17Ad–22(e)(22).

Anticipated Effect on and Management of Risk

OCC anticipates that the Proposed CSPA would reduce the nature and level of risk presented by OCC because, as described above, it would enhance the resiliency, efficiency and consistency of the cash settlement process and thereby reduce risks that are associated with the existing cash settlement process. Specifically, the Proposed CSPA would increase the resiliency of the cash settlement process by reducing manual processing steps that are more prone to risk of delay or error. Due to implementation of the SWIFT messaging network as the primary means of transmitting settlement instructions, a Clearing Bank's acceptance of settlement instructions would automatically result in debits or credits, as appropriate, and Clearing Banks would no longer manually enter settlement instructions in their own systems.

OCC also anticipates the Proposed CSPA would enhance the efficiency of the cash settlement process by reducing manual processing steps that elongate the timeframe for processing and approving settlement instructions. In this regard, using SWIFT as the primary means of transmitting settlement instructions would reduce the risk of uncertainty in the cash settlement process by allowing OCC and the Clearing Banks to communicate using the same transmission method that is already typically used by the Clearing Banks to process funds transfer instructions with other institutions. OCC expects that this would lead to significantly faster response times from Clearing Banks to accept or reject instructions, which, in turn, would better manage the risk of untimely settlement by providing greater certainty concerning prompt settlement.

In addition, the Proposed CSPA would enhance consistency in the agreements between OCC and the Clearing Banks and harmonize the use of SWIFT as the primary process used to conduct cash settlement. OCC anticipates that this greater consistency would reduce the risk of delay or error in the settlement process that might result from OCC's management of the greater inconsistency across practices with the Clearing Banks that exists today.

Finally, OCC anticipates the Proposed CSPA would reduce regulatory risk to OCC by helping to ensure that the primary means of communicating settlement instructions uses relevant internationally accepted communications procedures and standards to facilitate efficient payment, clearing and settlement in a manner that is consistent with the requirements of Rule 17Ad–22(e)(22).[23]

For all of these reasons, OCC anticipates that the Proposed CSPA would reduce the nature and level of risk presented by OCC.

Consistency With the Payment, Clearing and Settlement Supervision Act

The stated purpose of the Clearing Supervision Act is to mitigate systemic risk in the financial system and promote financial stability by, among other things, promoting uniform risk management standards for systemically important financial market utilities and strengthening the liquidity of systemically important financial market utilities.[24] Section 805(a)(2) of the Clearing Supervision Act[25] also authorizes the Commission to prescribe risk management standards for the payment, clearing and settlement activities of designated clearing entities, like OCC, for which the Commission is the supervisory agency. Section 805(b) of the Clearing Supervision Act[26] states that the objectives and principles for risk management standards prescribed under Section 805(a) shall be to:

- Promote robust risk management;
- promote safety and soundness;
- reduce systemic risks; and
- support the stability of the broader financial system.

The Commission has adopted risk management standards under Section 805(a)(2) of the Clearing Supervision Act and the Act in furtherance of these objectives and principles.[27] In particular, Rule 17Ad–22(e)(22)[28] requires that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to ''use, or at a minimum accommodate, relevant internationally accepted communication procedures and standards in order to facilitate efficient payment, clearing, and settlement.''

OCC believes that the proposed change concerning cash settlement described above is consistent with Section 805(b)(2) of the Clearing Supervision Act[29] because it would promote safety and soundness in OCC's daily cash settlement process by mitigating risks that arise in the existing process due to manual processing steps and inconsistent practices across OCC's Clearing Banks and thereby enhancing the resiliency, efficiency and consistency of the process. As described in detail above, the proposed change would promote safety and soundness by implementing the SWIFT messaging network as the primary means of transmitting daily cash settlement instructions between OCC and each Clearing Bank that performs cash settlement on behalf of Clearing Members. This represents the use of a primary communication procedure that would be integrated with the systems that are already typically used by the Clearing Banks to process funds transfer instructions with other institutions and that would cause the acceptance of settlement instructions by Clearing Banks to automatically result in debits or credits, as appropriate, in the accounts of OCC and Clearing Members at the Clearing Banks. OCC believes that these changes promote the safety and soundness of the cash settlement process by, among other things, reducing manual processing steps that are more prone to risk of delay or error and by facilitating faster response times regarding the acceptance or rejection of settlement instructions by Clearing Banks, which, in turn, would provide greater certainty regarding prompt settlement.

OCC also believes that the proposed change to enhance the consistency of the CSPA between OCC and each Clearing Bank would promote safety and soundness by reducing the risk of settlement delay or error that may arise due to the existing degree of variability in the practices between Clearing Banks, including but not limited to the current use by one Clearing Bank of facsimile as a primary method for transmitting settlement instructions.

OCC further believes that the proposed change would promote compliance with Rule 17Ad–22(e)(22),[30] which requires OCC as a covered clearing agency to establish, implement, maintain and enforce written policies and procedures reasonably designed to ''use, or at a minimum accommodate, relevant internationally accepted communication procedures and standards in order to facilitate efficient payment, clearing, and settlement.'' In

[23] 17 CFR 240.17Ad–22(e)(22).

[24] 12 U.S.C. 5461(b).

[25] 12 U.S.C. 5464(a)(2).

[26] 12 U.S.C. 5464(b).

[27] 17 CFR 240. 17Ad–22. *See* Securities Exchange Act Release Nos. 68080 (October 22, 2012), 77 FR 66220 (November 2, 2012) (S7–08–11) (''Clearing Agency Standards''); 78961 (September 28, 2016), 81 FR 70786 (October 13, 2016) (S7–03–14) (''Standards for Covered Clearing Agencies''). The Standards for Covered Clearing Agencies became effective on December 12, 2016. As a ''covered clearing agency'' under Rule 17Ad–22(a)(5), OCC became obligated to comply with new section (e) of Rule 17Ad–22 as of the Commission's compliance date of April 11, 2017.

[28] 17 CFR 240.17Ad–22(e)(22).

[29] 12 U.S.C. 5464(b)(2).

[30] 17 CFR 240.17Ad–22(e)(22).

adopting this requirement, the Commission stated that ''[r]elevant internationally accepted communication procedures and standards could include messaging standards such as *SWIFT,* FIX and FpML.'' [emphasis added].[31] Accordingly, use of the SWIFT messaging network as the primary process to support daily cash settlement is consistent with Rule 17Ad–22(e)(22).

In these ways, OCC believes the proposed changes are consistent with Section 805(b)(2) of the Clearing Supervision Act[32] and Rule 17Ad–22(e)(22).[33]

III. Date of Effectiveness of the Advance Notice and Timing for Commission Action

The proposed change may be implemented if the Commission does not object to the proposed change within 60 days of the later of: (i) The date the proposed change was filed with the Commission or (ii) the date any additional information requested by the Commission is received. OCC shall not implement the proposed change if the Commission has any objection to the proposed change.

The Commission may extend the period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. A proposed change may be implemented in less than 60 days from the date the advance notice is filed, or the date further information requested by the Commission is received, if the Commission notifies the clearing agency in writing that it does not object to the proposed change and authorizes the clearing agency to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

OCC shall post notice on its Web site of proposed changes that are implemented.

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the advance notice is consistent with the Clearing Supervision Act and the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR-OCC–2017–805 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

All submissions should refer to File Number SR–OCC–2017–805. 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 advance notice that are filed with the Commission, and all written communications relating to the advance notice 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 OCC and on OCC's Web site at *http://www.theocc.com/components/docs/legal/rules_and_bylaws/sr_occ_17_805.pdf.*

All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–OCC–2017–805 and should be submitted on or before December 8, 2017.

By the Commission.

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2017–24919 Filed 11–16–17; 8:45 am]

BILLING CODE 8011–01–P

[31] Securities Exchange Act Release No. 78961 (September 28, 2016), 81 FR 70786, 70842 (October 13, 2016).

[32] 12 U.S.C. 5464(b)(2).

[33] 17 CFR 240.17Ad–22(e)(22).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82060; File No. SR–BatsEDGX–2017–47]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Modify Its Fees for Physical Ports

November 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 November 2, 2017, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') (formerly known as Bats EDGX Exchange, Inc.) filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the fee schedule applicable to Members[5] and non-Members of the Exchange pursuant to EDGX Rules 15.1(a) and (c).

The text of the proposed rule change is available at the Exchange's Web site at *www.markets.cboe.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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] The term ''Member'' is defined as ''any registered broker or dealer that has been admitted to membership in the Exchange.'' *See* Exchange Rule 1.5(n).

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

A physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently maintains a presence in two third-party data centers: (i) The primary data center where the Exchange's business is primarily conducted on a daily basis, and (ii) a secondary data center, which is predominantly maintained for business continuity purposes. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,000 per physical port that connects to the System [6] via 1 gigabyte circuit; and $6,000 per physical port that connects to the System via 10 gigabyte circuit. The Exchange proposes to increase the fee per physical port that connects to the System via a 10 gigabyte circuit from $6,000 per month to $7,000 per month in order to cover its increased infrastructure costs associated with establishing physical ports to connect to the Exchange's Systems and enable it to continue to maintain and improve its market technology and services.[7] The Exchange does not propose to amend the fee for a 1 gigabyte circuit, which will remain $2,000 per month. The Exchange proposes to implement this amendment to its fee schedule on January 2, 2018.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[8] in general, and furthers the objectives of Section 6(b)(4),[9] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. The Exchange also notes that it operates in a highly-competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The proposed rule change reflects a competitive pricing structure designed to incent market participants to direct their order flow to the Exchange.

The Exchange believes that the proposed rate is equitable and non-discriminatory in that it applies uniformly to all Members. Members and non-Members will continue to choose whether they want more than one physical port and choose the method of connectivity based on their specific needs. All Members that voluntarily select various service options will be charged the same amount for the same services. As is true of all physical connectivity, all Members and non-Members have the option to select any connectivity option, and there is no differentiation with regard to the fees charged for the service.

The Exchange believes that the proposal represents an equitable allocation of reasonable dues, fees, and other charges as its fees for physical connectivity are reasonably constrained by competitive alternatives. If a particular exchange charges excessive fees for connectivity, affected Members and non-Members may opt to terminate their connectivity arrangements with that exchange, and adopt a possible range of alternative strategies, including routing to the applicable exchange through another participant or market center or taking that exchange's data indirectly. Accordingly, if the Exchange charges excessive fees, it would stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity.

Furthermore, the proposed rule change is also an equitable allocation of reasonable dues, fees, and other charges as the Exchange believes that the increased fees obtained will enable it to cover its increased infrastructure costs associated with establishing physical ports to connect to the Exchange's Systems. The additional revenue from the increased fee will also enable the Exchange to continue to maintain and improve its market technology and services.

Lastly, the Exchange believes the fees and credits remain competitive with those charged by other venues and therefore continue to be reasonable and equitably allocated to Members. For instance, the proposed fees for a 10 gigabyte circuit of $7,000 per month is less than analogous fees charged by the Nasdaq Stock Market LLC (''Nasdaq'') and NYSE Arca, Inc. (''Arca''), which range from $10,000–$15,000 per month for 10 gigabyte circuits.[10]

(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. As discussed above, the Exchange believes that fees for connectivity are constrained by the robust competition for order flow among exchanges and non-exchange markets. The Exchange does not believe that the proposed changes represent a significant departure from previous pricing offered by the Exchange or pricing offered by the Exchange's competitors. Additionally, Members may opt to disfavor the Exchange's pricing if they believe that alternatives offer them better value. Further, excessive fees for connectivity would serve to impair an exchange's ability to compete for order flow rather than burdening competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from Members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [11] and paragraph (f) of Rule 19b–4 thereunder.[12] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

[6] The term ''System'' is defined as ''the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing away.'' *See* Exchange Rule 1.5(cc).

[7] The Exchange also proposes a minor technical amendment to change the title of the first column from ''Connection Service Type'' to Service''.

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Nasdaq Rule 7034(b) *and* the NYSE Arca fee schedule *available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf* (dated October 11, 2017).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. SR–BatsEDGX–2017–47 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 No. SR–BatsEDGX–2017–47. 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 will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–BatsEDGX–2017–47 and should be submitted on or before December 8, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2017–24932 Filed 11–16–17; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82053; File No. SR–MSRB–2017–06]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Amendment No. 1 to Proposed Rule Change To Amend MSRB Rule G–34, on CUSIP Numbers, New Issue, and Market Information Requirements

November 13, 2017.

I. Introduction

On August 30, 2017, the Municipal Securities Rulemaking Board (''MSRB'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'' or ''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change consisting of amendments to Rule G–34 on CUSIP numbers, new issue, and market information requirements. The proposed rule change was published for comment in the **Federal Register** on September 18, 2017.[3] The Commission received eleven comment letters on the proposal.[4] On October 18, 2017, the MSRB granted an extension of time for the Commission to act on the filing until December 15, 2017. On November 7, 2017, the MSRB responded to the comments [5] and filed Amendment No. 1 to the proposed rule change (''Amendment No. 1''). The text of Amendment No. 1 is available on the MSRB's Web site.[6] The Commission is publishing this notice to solicit comments on Amendment No. 1 to the proposed rule change from interested persons.

II. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Amendment

In response to concerns raised in the comments, the MSRB is proposing to amend proposed paragraph Rule G–34(a)(i)(F) of the proposed rule change to require dealers (and municipal advisors in a competitive sale) seeking to rely on the principles-based exception to reasonably believe the purchaser's present intent is to hold the municipal securities to maturity ''or earlier redemption or mandatory tender.'' [7] The MSRB believes the proposed rule change should be amended to more accurately reflect the terms of direct purchase transactions including the potential for earlier redemption or mandatory tender.[8] The MSRB is proposing this same amendment to the proposed principles-based exception for dealers from the depository eligibility requirements of the rule set forth in proposed subparagraph Rule G–34(a)(ii)(A)(3) for consistency.[9] The MSRB stated that this provision would clarify that the depository eligibility requirements of Rule G–34(a)(ii)(A) do not apply to municipal securities included in the principles-based exception.[10]

In response to concerns raised in the comments, the MSRB also is proposing amending the proposed rule change to

---

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Exchange Act Release No. 81595 (September 13, 2017), 82 FR 43587 (''Notice''). The comment period closed on October 10, 2017.

[4] *See* Letter to Secretary, Commission, from Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (''SIFMA''), dated October 10, 2017; Letter to Secretary, Commission, from Susan Gaffney, Executive Director, National Association of Municipal Advisors (''NAMA''), dated October 10, 2017; Letter to Secretary, Commission, from Steve Apfelbacher, President, EHLERS Inc., dated October 10, 2017; Letter to Secretary, Commission, from Noreen P. White, Co-President, and Kim W. Whelan, Co-President, Acacia Financial Group, Inc., dated October 10, 2017; Letter to Secretary, Commission, from Cristeena G. Naser, Vice President and Senior Counsel, American Bankers Association (''ABA''), dated October 10, 2017; Letter to Secretary, Commission, from Michael G. Sudsina, President, Sudsina & Associates, LLC, dated October 10, 2017; Letter to Secretary, Commission, from Marianne F. Edmonds, Senior Managing Director, Public Resources Advisory Group (''PRAG''), dated October 10, 2017; Letter to Secretary, Commission, from Emily Swenson Brock, Director, Federal Liaison Center, Government Finance Officers Association (''GFOA''), dated October 10, 2017; Letter to Secretary, Commission, from Peter Warms, Senior Manager of Fixed Income, Entity, Regulatory Content and Symbology, Bloomberg L.P., dated October 10, 2017; Letter to Secretary, Commission, from Dennis Dix, Principal, DIXWORKS LLC, dated October 10, 2017; Letter to Secretary, Commission, from Stephan Wolf, CEO, Global Legal Entity Identifier Foundation (''GLEIF''), dated October 9, 2017. Staff from the Office of Municipal Securities discussed the proposed rule change with representatives from PFM Financial Advisors LLC and PFM Asset Management LLC on October 26, 2017.

[5] *See* Letter from Margaret R. Blake, Associate General Counsel, MSRB, to Secretary, SEC, dated November 7, 2017 (''MSRB Response Letter''), available at *https://www.sec.gov/comments/sr-msrb-2017-06/msrb201706-2674227-161458.pdf.*

[6] Amendment No. 1 is available at *http://www.msrb.org/~/media/Files/SEC-Filings/2017/MSRB-2017-06-A-1.ashx.*

[7] *See* Amendment No. 1.

[8] *Id.*

[9] *Id.*

[10] *Id.*

expand the principles-based exception in proposed paragraph Rule G–34(a)(i)(F) to include cases where a municipal entity purchases the municipal securities with funds that are at least in part proceeds of the purchasing entity's issue of municipal obligations, or the municipal securities being purchased are used to fully or partially secure or pay the purchasing entity's issue of municipal obligations.[11] The MSRB believes that certain sales of municipal securities to municipal entities should be excepted from the CUSIP number requirements for the same policy reasons underlying the principles-based exception for purchases by banks and their non-dealer control affiliates.[12] In particular, the MSRB believes that where a municipal entity is purchasing municipal securities using funds that are at least in part proceeds of that purchasing entity's issuance of other municipal obligations, or where the municipal securities being purchased are used to fully or partially secure or pay the purchasing entity's issue of municipal obligations, there is a strong expectation that the purchase of the underlying municipal securities is intended to be held and not traded in the secondary market.[13] As with the exception for dealers (or municipal advisors in a competitive sale) engaging in direct purchase transactions of new issue municipal securities to banks, the MSRB believes that requiring a CUSIP number in these scenarios would not serve the purposes of Rule G–34 to, among other things, improve efficiencies in the processing, receiving, delivering and safekeeping of municipal securities.[14] The MSRB also believes that, just as in the case of purchases by banks and their non-dealer control affiliates, for a dealer (or municipal advisor in a competitive sale) to rely on the principles-based exception in this instance, it would be required to have a reasonable belief (*e.g.,* by obtaining a written representation) that the purchasing municipal entity has the present intent to hold the municipal securities to maturity or earlier redemption or mandatory tender.[15] The MSRB is also proposing this same amendment to the principles-based exception for dealers from the depository eligibility requirements of the rule set forth in subparagraph Rule G–34(a)(ii)(A).[16]

In response to comments that the principles-based exception should apply to all sales of municipal securities from one municipal entity to another where a dealer (or municipal advisor in a competitive sale) is engaged, the MSRB stated that it disagrees.[17] The MSRB stated that the principles-based exception is meant to facilitate financings by permitting the underwriting of new issue municipal securities by dealers (or advising by municipal advisors in a competitive sale) without requiring application be made for a CUSIP number where such new issues are not intended to trade in the secondary market.[18] However, the MSRB stated that it understands that a municipal entity purchasing municipal securities for investment purposes may find itself in need of liquidity and thus may look to resell those municipal securities into the secondary market.[19] In this instance, the MSRB stated, the holder of the municipal securities may find itself unable to readily resell the municipal securities because there is no CUSIP number and, based on discussions with industry participants, the MSRB stated that it understands there is also no established process for obtaining a CUSIP number at that late stage for secondary market trading.[20] The MSRB believes that by applying for the CUSIP number on the new issue up front, the dealer (or municipal advisor in a competitive sale) avoids these potential problems and ensures that this important aspect needed for secondary market trading is in place.[21] As a result, the MSRB stated that it does not believe the principles-based exception should be expanded to create a generalized private placement exception for all sales of municipal securities to another municipal entity where a dealer (or a municipal advisor in a competitive sale) is engaged, but rather, should be limited as set forth above.[22]

The MSRB is proposing to make the proposed rule change effective six months after Commission approval and is requesting accelerated approval of Amendment No. 1.[23] The MSRB believes the Commission has good cause, pursuant to Section 19(b)(2) of the Act, for granting accelerated approval of Amendment No. 1.[24] The MSRB believes that the only substantive change to the proposed rule change is responsive to commenters and expands the application of the previously proposed principles-based exception to include sales of new issue municipal securities to municipal entities that are purchasing the underlying municipal securities with funds that are at least in part proceeds of the purchasing entity's issue of municipal obligations, or the municipal securities being purchased are used to fully or partially secure or pay the purchasing entity's issue of municipal obligations.[25] The MSRB believes that the other amendment to the proposed rule change merely clarifies that in a direct purchase transaction there may be a redemption or mandatory tender that occurs prior to the municipal security's maturity.[26] The MSRB also stated that, in light of one of the purposes of the principles-based exception in the proposed rule change—to allow dealers and municipal advisors to provide services without inhibiting their issuer clients' access to certain financings—the revisions are consistent with the proposed rule change and are unlikely to be controversial.[27]

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the filing as amended by Amendment No. 1 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–MSRB–2017–06 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

All submissions should refer to File Number SR–MSRB–2017–06. 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

[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*

Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the MSRB. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MSRB–2017–06 and should be submitted on or before December 1, 2017.

For the Commission, pursuant to delegated authority.[28]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2017–24928 Filed 11–16–17; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82062; File No. SR–NASDAQ–2017–119]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 7014

November 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 November 1, 2017, The Nasdaq Stock Market LLC (''Nasdaq'' 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 (1) change the volume requirement for purposes of determining eligibility for a transaction fee under the Qualified Market Maker Program; and (2) eliminate one of the tiers of the Nasdaq Growth Program.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaq.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 7014 to (1) change the volume requirement for purposes of determining eligibility for a transaction fee under the Qualified Market Maker (''QMM'') Program; and (2) eliminate one of the tiers of the Nasdaq Growth Program.

QMM Program

A QMM is a member that makes a significant contribution to market quality by providing liquidity at the national best bid and offer (''NBBO'') in a large number of stocks for a significant portion of the day.[3] In addition, the member must avoid imposing the burdens on Nasdaq and its market participants that may be associated with excessive rates of entry of orders away from the inside and/or order cancellation. The designation reflects the QMM's commitment to provide meaningful and consistent support to market quality and price discovery by extensive quoting at the NBBO in a large number of securities. In return for its contributions, certain financial benefits are provided to a QMM with respect to its order activity, as described under Rule 7014(e). For example, Nasdaq will provide QMMs a rebate per share executed with respect to all other displayed orders (other than Designated Retail Orders, as defined in Rule 7018) in securities priced at $1 or more per share that provide liquidity and were for securities listed on the New York Stock Exchange LLC (''NYSE''), securities listed on exchanges other than Nasdaq and NYSE, or securities listed on Nasdaq.

Nasdaq also charges QMMs a lower rate for executions of orders in securities priced at $1 or more per share that access liquidity on the Nasdaq Market Center.[4] Under Rule 7014(e), the Exchange charges a QMM $0.0030 per share executed for removing liquidity on Nasdaq in Nasdaq-listed securities priced at $1 or more. The Exchange also charges a QMM $0.00295 per share executed for removing liquidity on Nasdaq in securities priced at $1 or more per share that are listed on exchanges other than Nasdaq, if the QMM's volume of liquidity added through one or more of its Nasdaq Market Center MPIDs during the month (as a percentage of Consolidated Volume) is not less than 0.80%.[5] For a QMM that meets the criteria of Tier 2,[6] the Exchange assesses a charge of $0.0029 per share executed for removing liquidity in securities priced at $1 or more per share listed on exchanges other than Nasdaq if the QMM has a combined Consolidated Volume (adding and removing liquidity) of at least 3.7%.

Nasdaq is now proposing to change the volume threshold needed to qualify for the transaction fee of $0.00295 per share executed for non-Nasdaq-listed securities for removing liquidity on Nasdaq in securities priced at $1 or more. Currently, the QMM's volume of liquidity added through one or more of its Nasdaq Market Center MPIDs during

---

[28] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Rule 7014(d).

[4] *See* Rule 7014(e).

[5] As set forth in Rule 7014(h), the term ''Consolidated Volume'' has the same meaning as the term has under Rule 7018(a). That term is defined in Rule 7018(a) to mean ''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 orders with a size of less than one round lot. 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] As set forth in Rule 7014(e), the QMM Tier 2 qualification criteria requires a QMM to execute shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represent above 0.90% of Consolidated Volume during the month.

the month (as a percentage of Consolidated Volume) must be not less than 0.80%. Nasdaq proposes to increase this threshold to 0.85%. Nasdaq believes that this increased volume threshold is more closely aligned to the corresponding transaction fee than the current volume threshold. This increase is also reflective of the Exchange's desire to provide incentives to attract order flow to the Exchange in return for significant market-improving behavior. By modestly increasing the volume of liquidity that a QMM must add during the month in order to qualify for the corresponding transaction fee, this change will help ensure that QMMs are providing significant market-improving behavior in return for a reduced fee.

Nasdaq Growth Program

Nasdaq also proposes to eliminate one of the tiers of the Nasdaq Growth Program (''Growth Program'').[7] Nasdaq introduced the Growth Program in 2016.[8] The purpose of the Growth Program is to provide a credit per share executed for members that meet certain growth criteria. The credit is designed to provide an incentive to members that do not qualify for other credits under Rule 7018 in excess of the Growth Program credit to increase their participation on the Exchange. The Growth Program provides a member either a $0.0025 per share executed credit in securities priced $1 or more per share, or a $0.0027 per share executed credit in securities priced at $1 or more if the member meets certain criteria. The credit is provided in lieu of other credits provided to the member for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity under Rule 7018, if the credit under the Growth Program is greater than the credit attained under Rule 7018.

Rule 7014(j) currently provides three ways in which a member may qualify for the $0.0025 rebate in a given month. First, the member may qualify for this rebate by: (i) Adding greater than 750,000 shares a day on average during the month through one or more of its Nasdaq Market Center MPIDs; and (ii) increasing its shares of liquidity provided through one or more of its Nasdaq Market Center MPIDs as a percent of Consolidated Volume by 20% versus the member's Growth Baseline.[9] Second, the member may qualify for the $0.0025 rebate by: (i) Adding greater than 750,000 shares a day on average during the month through one or more of its Nasdaq Market Center MPIDs; and (ii) meeting the criteria set forth above (increasing its shares of liquidity provided through one or more of its Nasdaq Market Center MPIDs as a percent of Consolidated Volume by 20% versus the member's Growth Baseline) in the preceding month, and maintaining or increasing its shares of liquidity provided through one or more of its Nasdaq Market Center MPIDs as a percent of Consolidated Volume as compared to the preceding month. Third, a member may qualify for the Growth Program by: (i) Adding greater than 750,000 shares a day on average during the month through one or more of its Nasdaq Market Center MPIDs in three separate months; (ii) increasing its shares of liquidity provided through one or more of its Nasdaq Market Center MPIDs as a percent of Consolidated Volume by 20% versus the member's Growth Baseline in three separate months; and (iii) maintaining or increasing its shares of liquidity provided through one or more of its Nasdaq Market Center MPIDs as a percent of Consolidated Volume compared to the Growth Baseline established when the member met the criteria for the third month.

To be eligible for a $0.0027 per share executed rebate, in lieu of the $0.0025 per share executed rebate above, a member must (i) add at least 0.04% or more of Consolidated Volume during the month through non-displayed orders through one or more of its Nasdaq Market Center MPIDs; and (ii) increase its shares of liquidity provided through one or more of its Nasdaq Market Center MPIDs in all securities during the month as a percent of Consolidated Volume by at least 50% versus its August 2016 share of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs as a percent of Consolidated Volume.[10]

Nasdaq now proposes to eliminate the $0.0025 rebate and the criteria for determining that rebate. Members will continue [sic] qualify for the $0.0027 rebate if they meet the criteria for qualifying for that rebate, which remains unchanged.

Nasdaq is making this change to simplify the operation of the Growth Program. To the extent that it is eliminating one of the rebates in the Growth Program, Nasdaq has determined that it is preferable to retain the $0.0027 rebate and its corresponding requirements. First, by eliminating the $0.0025 rebate, members that wish to qualify for the remaining $0.0027 rebate must meet the performance obligations that accompany that rebate, including the requirement that the member add at least 0.04% or more of Consolidated Volume during the month through non-displayed orders through one or more of its Nasdaq Market Center MPIDs. The purpose of the $0.0027 rebate is to incentivize firms to provide both displayed and non-displayed liquidity. Nasdaq notes that non-displayed orders generally provide improvement to the size of orders executed on the Exchange. As such, eliminating the $0.0025 rebate will incentivize members to qualify for the remaining $0.0027 rebate and to meet its corresponding requirement to add non-displayed size, which, among other things, will improve overall market quality on Nasdaq by increasing the size of executed orders.

Second, Nasdaq notes that, unlike the $0.0025 rebate, which requires a member to show an increase in Consolidated Volume compared to the member's Growth Baseline, with each successive month maintaining or improving upon that baseline to continue to qualify for the rebate, the $0.0027 rebate requires an initial significant increase in Consolidated Volume compared to that member's share of liquidity provided in all securities in August 2016, with the member maintaining that level to continue receiving the $0.0027 rebate. Thus, the measure against which Consolidated Volume is compared remains static month to month under the criteria of the $0.0027 rebate, whereas it can vary month to month under the qualification criteria for the $0.0025 rebate. Nasdaq believes that members may therefore be more able to

[7] As part of this change, Nasdaq proposes to re-number Rule 7014(j) to reflect this elimination of one of the rebate tiers.

[8] *See* Securities Exchange Act Release No. 78977 (September 29, 2016), 81 FR 69140 (October 5, 2016) (SR–NASDAQ–2016–132).

[9] The Growth Baseline is defined as the member's shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs as a percent of Consolidated Volume during the last month a member qualified for the Nasdaq Growth Program under current Rule 7014(j)(1)(B)(i) (increasing its Consolidated Volume by 20% versus its Growth Baseline). If a member has not yet qualified for a credit under this program, its August 2016 share of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs as a percent of Consolidated Volume will be used to establish a baseline.

As noted above, the term ''Consolidated Volume'' has the same meaning for Rule 7014 as the term has under Rule 7018(a).

[10] As is currently the case, members that were not members of the Exchange in August 2016 may still qualify for the $0.0027 rebate. For such ''new'' members, the Exchange will consider their share of liquidity provided in all securities in August 2016 as zero.

satisfy the criteria to qualify for the $0.0027 rebate over successive months than the criteria to qualify for the $0.0025 rebate.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[11] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[12] 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.

QMM Program

The Exchange believes that the change to the volume threshold needed to qualify for the $0.00295 QMM transaction fee is reasonable. The Exchange notes that it is not changing the amount of fees charged to QMMs, which have been addressed in previous filings,[13] and believes that those fees continue to be reasonable because they remain unchanged. Nasdaq believes that the change to the volume threshold is reasonable because the increased volume threshold is more closely aligned to the corresponding $0.00295 transaction fee than the current volume threshold. Nasdaq also believes that this proposed change is reasonable because it will help ensure that QMMs are providing significant market-improving behavior in return for the corresponding fee, by modestly increasing the volume of liquidity that a QMM must add during the month in order to qualify for the reduced transaction fee.

Nasdaq believes that the proposed change to the volume threshold is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same volume threshold to all members that otherwise qualify for the corresponding fee (*e.g.,* the member quotes at the NBBO at least 25% of the time during regular market hours in an average of at least 1,000 securities per day during the month). The Exchange believes that the new volume threshold will not significantly impact the number of QMMs that will likely qualify for the corresponding transaction fee, since the new volume threshold is a modest increase over the current volume threshold, and members may always elect to qualify for the corresponding fee by adding sufficient liquidity to the Exchange to meet the new volume requirement. Finally, the QMM Program is intended to encourage members to promote price discovery and market quality by quoting at the NBBO for a significant portion of each day in a large number of securities, thereby benefitting Nasdaq and other investors by committing capital to support the execution of orders.

Growth Program

The Exchange believes that eliminating the $0.0025 rebate tier of the Growth Program is reasonable. Nasdaq believes that eliminating this rebate tier and its corresponding requirements to qualify for that tier will simplify the operation of the Growth Program. To the extent that Nasdaq has determined to eliminate one of the current rebate tiers, Nasdaq believes it is reasonable to eliminate the $0.0025 rebate, rather than the $0.0027 rebate. By eliminating the $0.0025 rebate, members that wish to qualify for the remaining $0.0027 rebate must meet the performance obligations that accompany that rebate, including the requirement that the member add at least 0.04% or more of Consolidated Volume during the month through non-displayed orders through one or more of its Nasdaq Market Center MPIDs. Nasdaq notes that the $0.0027 rebate is designed to incentivize members to add both displayed and non-displayed liquidity and that, among other things, non-displayed orders generally provide improvement to the size of orders executed on the Exchange. As such, eliminating the $0.0025 rebate will incentivize members to qualify for the remaining $0.0027 rebate and to meet its corresponding requirement to add non-displayed size, which will improve overall market quality on Nasdaq by increasing the size of executed orders.

The Exchange believes that the elimination of the $0.0025 rebate tier is an equitable allocation and is not unfairly discriminatory. The $0.0025 rebate tier will be eliminated for all members. Additionally, all members may continue to qualify for the remaining $0.0027 rebate tier if they meet the qualifying criteria, *e.g.,* the member adds at least 0.04% or more of Consolidated Volume during the month through non-displayed orders through one or more of its Nasdaq Market Center MPIDs. The Exchange believes that eliminating the $0.0025 rebate tier, while maintaining the $0.0027 rebate tier, will not significantly impact the number of members that will qualify for the Growth Program. Unlike the $0.0025 rebate, which requires a member to show an increase in Consolidated Volume compared to the member's Growth Baseline, with each successive month maintaining or improving upon that baseline to continue to qualify for the rebate, the $0.0027 rebate requires an initial significant increase in Consolidated Volume compared to that member's share of liquidity provided in all securities in August 2016, with the member maintaining that level to continue receiving the $0.0027 rebate. Thus, the measure against which Consolidated Volume is compared remains static month to month under the criteria of the $0.0027 rebate, whereas it can vary month to month under the qualification criteria for the $0.0025 rebate. Nasdaq believes that members may therefore be more able to satisfy the criteria to qualify for the $0.0027 rebate over successive months than the criteria to qualify for the $0.0025 rebate.

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 change to the volume threshold for the QMM Program 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 Exchange will apply the same new volume threshold to all members, and does not believe that the new volume threshold will significantly impact the number of QMMs that will likely qualify for the corresponding transaction fee, since the new volume threshold is a modest increase over the current

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(4) and (5).

[13] *See, e.g.,* Securities Exchange Act Release No. 72810 (August 11, 2014), 79 FR 48281 (August 15, 2014) (SR–NASDAQ–2014–078).

volume threshold, and members may always elect to qualify for the corresponding fee by adding sufficient liquidity to the Exchange to meet the new volume requirement. As such, the Exchange believes that the proposed volume threshold will not negatively impact who will qualify for the corresponding transaction fee, but will rather have a positive impact on overall market quality as QMMs increase their participation in the market to qualify for those fees. If, however, the Exchange is incorrect and the changes proposed herein are unattractive to QMMs, it is likely that Nasdaq will lose market share as a result. Accordingly, Nasdaq 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.

Similarly, Nasdaq believes that the elimination of the $0.0025 rebate tier for the Growth Program 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. Nasdaq notes that the $0.0025 rebate tier will be eliminated for all members. Additionally, all members may continue to qualify for the remaining $0.0027 rebate tier if they meet the qualifying criteria, *e.g.,* the member adds at least 0.04% or more of Consolidated Volume during the month through non-displayed orders through one or more of its Nasdaq Market Center MPIDs. The Exchange believes that eliminating the $0.0025 rebate tier, while maintaining the $0.0027 rebate tier, will not significantly impact the number of members that will qualify for the Growth Program. Unlike the $0.0025 rebate, which requires a member to show an increase in Consolidated Volume compared to the member's Growth Baseline, with each successive month maintaining or improving upon that baseline to continue to qualify for the rebate, the $0.0027 rebate requires an initial significant increase in Consolidated Volume compared to that member's share of liquidity provided in all securities in August 2016, with the member maintaining that level to continue receiving the $0.0027 rebate. Thus, the measure against which Consolidated Volume is compared remains static month to month under the criteria of the $0.0027 rebate, whereas it can vary month to month under the qualification criteria for the $0.0025 rebate. Nasdaq believes that members may therefore be more able to satisfy the criteria to qualify for the $0.0027 rebate over successive months than the criteria to qualify for the $0.0025 rebate. Ultimately, if members conclude that the qualification requirements for the remaining tier in the Growth Program are set too high, or the rebate too low, it is likely that the Exchange will realize very little benefit from the Growth Program. Accordingly, the Exchange does not believe that this proposed change will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

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–NASDAQ–2017–119 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–NASDAQ–2017–119. 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2017–119, and should be submitted on or before December 8, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2017–24934 Filed 11–16–17; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82059; File No. SR–BX–2017–051]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's Options Pricing at Chapter XV, Section 2

November 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 November

[14] 15 U.S.C. 78s(b)(3)(A)(ii).

[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

1, 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 Options Pricing at Chapter XV, Section 2, entitled ''BX Options Market—Fees and Rebates,'' which governs pricing for BX members using the BX Options Market (''BX Options''). The Exchange proposes to modify certain fees for transactions in options overlying Select Symbols,[3] as further discussed 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 Exchange proposes to amend Chapter XV, Section 2(1), which includes pricing for transactions in Select Symbol options, to increase the Firm[4] fee to add liquidity and fee to remove liquidity in Select Symbols. Select Symbols represent some of the highest volume Penny Pilot options traded on the Exchange and in the industry. The fees and rebates applicable to Select Symbol options in Chapter XV, Section 2(1) are designed to attract more order flow to BX Options, particularly in these high volume symbols, and apply to Customers,[5] BX Options Market Makers,[6] Non-Customers[7] and Firms as follows:

(1) Fees for Execution of Contracts on the BX Options Market:

* * * * *

SELECT SYMBOLS OPTIONS TIER SCHEDULE

		Rebate to add liquidity	Fee to add liquidity	Rebate to remove liquidity	Fee to remove liquidity	Fee to add liquidity
	When:	Customer	BX options market maker	Customer	BX options market maker	BX options market maker
	Trading with:	Non-customer or BX options market maker, or firm	Customer	Non-customer or BX options market maker, or firm	Customer	Non-customer or BX options market maker, or firm
Tier 1	Participant executes less than 0.05% of total industry customer equity and ETF option ADV contracts per month.	$0.00	$0.44	$0.00	$0.42	$0.14
Tier 2	Participant executes 0.05% to less than 0.15% of total industry customer equity and ETF option ADV contracts per month.	0.10	0.44	0.25	0.42	0.10
Tier 3	Participant executes 0.15% or more of total industry customer equity and ETF option ADV contracts per month.	0.20	0.40	0.37	0.39	0.04
Tier 4	Participant executes greater than 10,000 PRISM Agency Contracts per month; or Participant executes BX Options Market Maker volume of 0.30% or more of total industry customer equity and ETF options ADV per month.	0.25	0.29	0.37	0.25	0.00

[3] The following are Select Symbols: ASHR, DIA, DXJ, EEM, EFA, EWJ, EWT, EWW, EWY, EWZ, FAS, FAZ, FXE, FXI, FXP, GDX, GLD, HYG, IWM, IYR, KRE, OIH, QID, QLD, QQQ, RSX, SDS, SKF, SLV, SRS, SSO, TBT, TLT, TNA, TZA, UNG, URE, USO, UUP, UVXY, UYG, VXX, XHB, XLB, XLE, XLF, XLI, XLK, XLP, XLU, XLV, XLY, XME, XOP, XRT. *See* Chapter XV, Section 2(1).

[4] The term ''Firm'' or (''F'') applies to any transaction that is identified by a Participant for clearing in the Firm range at OCC. *See* Chapter XV.

[5] The term ''Customer'' or (''C'') applies to any transaction that is identified by a Participant for clearing in the Customer range at OCC which is not for the account of broker or dealer or for the account of a ''Professional'' (as that term is defined in Chapter I, Section 1(a)(48)). *See* Chapter XV.

[6] The term ''BX Options Market Maker'' or (''M'') is a Participant that has registered as a Market Maker on BX Options pursuant to Chapter VII, Section 2, and must also remain in good standing pursuant to Chapter VII, Section 4. In order to receive Market Maker pricing in all securities, the Participant must be registered as a BX Options Market Maker in at least one security. *See* Chapter XV.

[7] As set forth in note 1 to Chapter XV, Section 2(1), a Non-Customer includes a Professional, Broker-Dealer and Non-BX Options Market Maker.

BX Options Select Symbol List

The following are Select Symbols: ASHR, DIA, DXJ, EEM, EFA, EWJ, EWT, EWW, EWY, EWZ, FAS, FAZ, FXE, FXI, FXP, GDX, GLD, HYG, IWM, IYR, KRE, OIH, QID, QLD, QQQ, RSX, SDS, SKF, SLV, SRS, SSO, TBT, TLT, TNA, TZA, UNG, URE, USO, UUP, UVXY, UYG, VXX, XHB, XLB, XLE, XLF, XLI, XLK, XLP, XLU, XLV, XLY, XME, XOP, XRT.

- Firm fee to add liquidity and fee to remove liquidity in Select Symbols Options will be $0.33 per contract, regardless of counterparty.
- Non-Customer fee to add liquidity and fee to remove liquidity in Select Symbols Options will be $0.46 per contract, regardless of counterparty.
- BX Options Market Maker fee to remove liquidity in Select Symbols Options will be $0.46 per contract when trading with Firm, Non-Customer, or BX Options Market Maker.
- Customer fee to add liquidity in Select Symbols Options when contra to another Customer is $0.33 per contract.
- Volume from all products listed on BX Options will apply to the Select Symbols Options Tiers.

* * * * *

The Exchange proposes to increase the $0.33 per contract Firm fee to add liquidity and fee to remove liquidity in Select Symbols to raise revenue for the Exchange and help defray costs. As proposed, the Firm fee to add liquidity and fee to remove liquidity in Select Symbols will be $0.37 per contract, regardless of counterparty. The pricing for all other transactions in Select Symbol options as set forth above will remain unchanged.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[9] 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 its proposal to increase the Firm fee to add liquidity and fee to remove liquidity in Select Symbols, as discussed above, is reasonable because the proposed change is a modest increase to help defray costs and remains lower than the Firm fee to add liquidity and fee to remove liquidity in all other Penny Pilot options that are not options in Select Symbols.[10] As discussed above, the pricing for all other transactions in Select Symbol options will remain unchanged. Furthermore, the Exchange notes that the proposed Firm fees for Select Symbols remain competitive with the fees of other options markets.[11] Accordingly, the Exchange believes that despite the proposed increase in Firm fees as described above, the pricing model in Chapter XV, Section 2(1) for Select Symbols will continue to attract order flow to BX Options, particularly in these high volume symbols, to the benefit of all market participants.

The Exchange also believes that the proposed increase of the Firm fee to add liquidity and fee to remove liquidity in Select Symbols is equitable and not unfairly discriminatory because the Exchange will apply the same fee to all similarly situated members. For the reasons discussed above, the proposed fee continues to provide an incentive for Firms to transact order flow on the Exchange, which order flow brings increased liquidity to the Exchange for the benefit of all Exchange participants. To the extent the purpose of the proposed Firm fee is achieved, all market participants should benefit from the improved market liquidity.

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. As discussed above, the Exchange believes that the proposed Firm fees for Select Symbol options remain competitive with those on other options markets and will continue to attract order flow to the Exchange. 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 review, and consider adjusting, its fees and rebates to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed fee changes reflect 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 either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (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–2017–051 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–2017–051. 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

---

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4) and (5).

[10] The Exchange currently charges a $0.45 per contract Firm fee to add liquidity and a $0.46 per contract Firm fee to remove liquidity in all other Penny Pilot options that are not in Select Symbol options. *See* Chapter XV, Section 2(1).

[11] *See, e.g.,* MIAX Options Fee Schedule at: *https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Options_Fee_Schedule_10112017.pdf. See also, e.g.,* Nasdaq PHLX LLC Pricing Schedule at: *http://nasdaqphlx.cchwallstreet.com/NASDAQPHLXTools/PlatformViewer.asp?selectednode=chp_1_4_1&manual=%2Fnasdaqomxphlx%2Fphlx%2Fphlx-rulesbrd%2F.*

[12] 15 U.S.C. 78s(b)(3)(A)(ii).

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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2017–051, and should be submitted on or before December 8, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2017–24931 Filed 11–16–17; 8:45 am]

BILLING CODE 8011–01–P

[13] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #15298 and #15299; PUERTO RICO Disaster Number PR–00029]

Presidential Declaration Amendment of a Major Disaster for the Commonwealth of Puerto Rico

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 4.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the Commonwealth of Puerto Rico (FEMA–4336–DR), dated 09/10/2017.

Incident: Hurricane Irma.

Incident Period: 09/05/2017 through 09/07/2017.

DATES: Issued on 11/10/2017.

Physical Loan Application Deadline Date: 03/20/2018.

Economic Injury (EIDL) Loan Application Deadline Date: 06/11/2018.

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: The notice of the President's major disaster declaration for the Commonwealth of PUERTO RICO, dated 09/10/2017, is hereby amended to extend the deadline for filing applications for physical damages as a result of this disaster to 03/20/2018.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2017–24916 Filed 11–16–17; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 10204]

Determination Under Section 7070(c)(1) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2017 Regarding the Central Government of Nicaragua

Pursuant to section 7070(c)(1) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2017 (Div. J, Pub. L. 115–31), I hereby determine that the Government of Nicaragua has recognized the independence of, or has established diplomatic relations with, the Georgian territories of Abkhazia and Tskhinvali Region/South Ossetia.

This determination shall be published in the **Federal Register** and, along with the accompanying Memorandum of Justification, shall be reported to Congress.

Rex W. Tillerson,

Secretary of State.

[FR Doc. 2017–24963 Filed 11–16–17; 8:45 am]

BILLING CODE 4710–29–P

SURFACE TRANSPORTATION BOARD

[Docket No. AB 55 (Sub-No. 757X)]

CSX Transportation, Inc.—Discontinuance of Service Exemption—in Dickenson County, VA

CSX Transportation, Inc. (CSXT), has filed a verified notice of exemption under 49 CFR part 1152 subpart F—*Exempt Abandonments and Discontinuances of Service* to discontinue service over approximately 13.65 miles of rail line from milepost ZF 0.0 to milepost ZF 13.65 on CSXT's Southern Region, Florence Division, Kingsport Subdivision in Dickenson County, Va. (the Line). The Line traverses United States Postal Service Zip Codes 24226, 24228, and 24230. CSXT states that there are 12 internal CSXT stations on the line that can be closed.[1]

CSXT has certified that: (1) No local traffic has moved over the Line for at least two years; (2) overhead traffic on the Line can be rerouted over other lines; (3) no formal complaint filed by a user of a rail service on the Line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the Line is either pending with the Surface Transportation Board or with any U.S. District Court or has been decided in favor of a complainant within the two-year period; and (4) the requirements at 49 CFR 1105.12 (newspaper publication) and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the discontinuance of service shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) to subsidize continued rail service has been received, this exemption will be effective on December 17, 2017, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues and formal expressions of intent to file an OFA to subsidize continued rail service under 49 CFR 1152.27(c)(2)[2] must be filed by November 27, 2017.[3]

[1] These stations are at Caney, Cranes Nest DTC, Dickenson, Cranes Nest, Holly Creek, Crabtree, Clintwood Mills, Mullin, Delp, Victor, Lick Fork, and Phipps.

[2] Each OFA must be accompanied by the filing fee, which currently is set at $1,800. *See Regulations Governing Fees for Servs. Performed in Connection with Licensing & Related Servs.—2017 Update,* EP 542 (Sub-No. 25), slip op. App. C at 20 (STB served July 28, 2017).

[3] Because this is a discontinuance proceeding and not an abandonment, trail use/rail banking and public use conditions are not appropriate. Because there will be an environmental review during abandonment, this discontinuance does not require environmental review.

Petitions for reconsideration must be filed by December 7, 2017, with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to CSXT's representative, Louis E. Gitomer, Law Offices of Louis E. Gitomer, LLC, 600 Baltimore Avenue, Suite 301, Towson, MD 21204.

If the verified notice contains false or misleading information, the exemption is void ab initio.

Board decisions and notices are available on our Web site at ''*WWW.STB.GOV.*''

Decided: November 13, 2017.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Tammy Lowery,

Clearance Clerk.

[FR Doc. 2017–24900 Filed 11–16–17; 8:45 am]

BILLING CODE 4915–01–P

SUSQUEHANNA RIVER BASIN COMMISSION

Projects Approved for Consumptive Uses of Water

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: This notice lists the projects approved by rule by the Susquehanna River Basin Commission during the period set forth in **DATES**.

DATES: October 1–31, 2017.

ADDRESSES: Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, PA 17110–1788.

FOR FURTHER INFORMATION CONTACT: Jason E. Oyler, General Counsel, 717–238–0423, ext. 1312, *joyler@srbc.net.* Regular mail inquiries may be sent to the above address.

SUPPLEMENTARY INFORMATION: This notice lists the projects, described below, receiving approval for the consumptive use of water pursuant to the Commission's approval by rule process set forth in 18 CFR 806.22(e) and 806.22 (f) for the time period specified above:

Approvals by Rule Issued Under 18 CFR 806.22(e)

1. Panda Patriot, LLC, ABR–201301006.1, Clinton Township, Lycoming County, Pa.; Modification of Consumptive Use of Up to 0.2000 mgd; Approval Date: October 5, 2017.
2. Panda Liberty, LLC, ABR–201301007.1, Asylum Township, Bradford County, Pa.; Modification of Consumptive Use of Up to 0.2000 mgd; Approval Date: October 5, 2017.

Approvals by Rule Issued Under 18 CFR 806.22(f)

1. Chesapeake Appalachia, LLC, Pad ID: Jes, ABR–201303008.R1, Wilmot Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: October 2, 2017.
2. SWN Production Company, LLC, Pad ID: Bolles South Well Pad, ABR–201210017.R1, Franklin Township, Susquehanna County, Pa.; Consumptive Use of Up to 4.9990 mgd; Approval Date: October 4, 2017.
3. SWN Production Company, LLC, Pad ID: SHELDON EAST PAD, ABR–201211013.R1, Thompson Township, Susquehanna County, Pa.; Consumptive Use of Up to 4.9990 mgd; Approval Date: October 4, 2017.
4. SWN Production Company, LLC, Pad ID: LOKE PAD, ABR–201211014.R1, New Milford Township, Susquehanna County, Pa.; Consumptive Use of Up to 4.9990 mgd; Approval Date: October 4, 2017.
5. SWN Production Company, LLC, Pad ID: Mordovancey Well Pad, ABR–201209023.R1, Choconut Township, Susquehanna County, Pa.; Consumptive Use of Up to 4.9990 mgd; Approval Date: October 16, 2017.
6. Chesapeake Appalachia, LLC, Pad ID: Lasher, ABR–201303010.R1, Auburn Township, Susquehanna County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: October 16, 2017.
7. SWN Production Company, LLC, Pad ID: Wootton East Well Pad, ABR–201209020.R1, Liberty Township, Susquehanna County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: October 16, 2017.
8. SWN Production Company, LLC, Pad ID: Reber-Dozier Well Pad, ABR–201210005.R1, Liberty Township, Susquehanna County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: October 16, 2017.
9. Seneca Resources Corporation, Pad ID: DCNR 100 Pad T, ABR–201301013.R1, Lewis Township, Lycoming County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: October 17, 2017.
10. Chief Oil & Gas, LLC, Pad ID: Lightcap, ABR–201303009.R1, Overton Township, Bradford County and Elkland Township, Sullivan County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: October 19, 2017.
11. Cabot Oil & Gas Corporation, Pad ID: AldrichL P1, ABR–201210002.R1, Gibson Township, Susquehanna County, Pa.; Consumptive Use of Up to 5.0000 mgd; Approval Date: October 23, 2017.
12. Cabot Oil & Gas Corporation, Pad ID: RutkowskiB P1, ABR–201210003.R1, Lenox Township, Susquehanna County, Pa.; Consumptive Use of Up to 5.0000 mgd; Approval Date: October 23, 2017.
13. Cabot Oil & Gas Corporation, Pad ID: BrayB P1, ABR–201210004.R1, Auburn Township, Susquehanna County, Pa.; Consumptive Use of Up to 5.0000 mgd; Approval Date: October 23, 2017.
14. SWEPI LP, Pad ID: Delaney 651, ABR–201209013.R1, Sullivan Township, Tioga County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: October 23, 2017.

Authority: Pub. L. 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806, 807, and 808.

Dated: November 14, 2017.

Stephanie L. Richardson,

Secretary to the Commission.

[FR Doc. 2017–24985 Filed 11–16–17; 8:45 am]

BILLING CODE 7040–01–P

SUSQUEHANNA RIVER BASIN COMMISSION

Projects Approved for Minor Modifications

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: This notice lists the minor modifications approved for a previously approved project by the Susquehanna River Basin Commission during the period set forth in **DATES**.

DATES: October 1–31, 2017.

ADDRESSES: Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, PA 17110–1788.

FOR FURTHER INFORMATION CONTACT: Jason E. Oyler, General Counsel, telephone: (717) 238–0423, ext. 1312; fax: (717) 238–2436; email: *joyler@srbc.net.* Regular mail inquiries may be sent to the above address.

SUPPLEMENTARY INFORMATION: This notice lists previously approved projects, receiving approval of minor modifications, described below, pursuant to 18 CFR 806.18 for the time period specified above:

Minor Modifications Issued Under 18 CFR 806.18

1. Panda Hummel Station LLC, Docket No. 20081222–3, Shamokin Dam Borough and Monroe Township, Snyder County, Pa.; approval to add stormwater as an additional source of water for consumptive use, and changes in the design of the intake structure; Approval Date: October 31, 2017.

Authority: Pub. L. 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806, 807, and 808.

Dated: November 14, 2017.

Stephanie L. Richardson,

Secretary to the Commission.

[FR Doc. 2017–24984 Filed 11–16–17; 8:45 am]

BILLING CODE 7040–01–P

SUSQUEHANNA RIVER BASIN COMMISSION

Projects Rescinded for Consumptive Uses of Water

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: This notice lists the approved by rule projects rescinded by the Susquehanna River Basin Commission during the period set forth in **DATES**.

DATES: October 1–31, 2017.

ADDRESSES: Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, PA 17110–1788.

FOR FURTHER INFORMATION CONTACT: Jason E. Oyler, General Counsel, telephone: (717) 238–0423, ext. 1312; fax: (717) 238–2436; email: *joyler@srbc.net.* Regular mail inquiries may be sent to the above address.

SUPPLEMENTARY INFORMATION: This notice lists the projects, described below, being rescinded for the consumptive use of water pursuant to the Commission's approval by rule process set forth in 18 CFR 806.22(e) and 806.22(f) for the time period specified above:

Rescinded ABR Issued

1. Chief Oil & Gas, LLC, Pad ID: Marcy Drilling Pad, ABR–201404005, Lenox Township, Susquehanna County, Pa.; Rescind Date: October 30, 2017.

2. Chief Oil & Gas, LLC, Pad ID: Ransom Drilling Pad #1, ABR–20100338.R1, Lenox Township, Susquehanna County, Pa.; Rescind Date: October 30, 2017.

Authority: Pub. L. 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806, 807, and 808.

Dated: November 14, 2017.

Stephanie L. Richardson,

Secretary to the Commission.

[FR Doc. 2017–24986 Filed 11–16–17; 8:45 am]

BILLING CODE 7040–01–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2017–0084; Notice No. 2017–03]

Hazardous Materials: Proposed Termination of M-Number and R-Number Approvals Issued Without an Expiration Date

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: To standardize manufacturer and reconditioner approvals, PHMSA is proposing to terminate any M-number and R-number approvals that were previously issued without an expiration date. The termination of these approvals will take effect one year from the publication date of this notice. Approval holders must either show cause why their approvals should not be terminated or apply for a modification of their approval prior to the effective date to avoid termination. Once terminated, requests for reconsideration of the termination must be submitted within 20 days of the date of termination.

FOR FURTHER INFORMATION CONTACT: Mr. Ryan Paquet, Director, Approvals and Permits Division, Office of Hazardous Materials Safety, (202) 366–4512, PHMSA, 1200 New Jersey Avenue SE., Washington, DC 20590 or at *approvals@dot.gov.*

Correspondence regarding the proposed M-number and R-number terminations should be sent to *approvals@dot.gov* with the subject line ''Termination of M-numbers/ Termination of R-numbers.''

SUPPLEMENTARY INFORMATION:

I. Introduction

PHMSA is proposing to terminate the approvals discussed below to standardize all approvals issued by the Approvals and Permits Division. Previously approved R-numbers and M-numbers that were issued without an expiration date will be terminated unless approval holders either show cause why their approvals should not be terminated as provided in 49 CFR 107.713(c)(1) or apply for a modification of their approval in accordance with 49 CFR 107.705 prior to the effective date. Modified approvals will conform to the Approvals and Permits Division's standardized format in which all approvals have a 5-year expiration date.

II. Background

The Approvals and Permits Division issues registration numbers, referred to as ''M-numbers,'' to companies that manufacture or recondition packaging related to hazardous materials. This registration number is used for identification purposes in place of the manufacturer or reconditioner's name and address, as authorized in 49 CFR 178.503. In previous years, PHMSA issued reconditioner approvals, known as an ''R-number,'' to companies that reconditioned packages related to hazardous materials. PHMSA no longer issues R-numbers and now issues M-numbers in their place. However, many R-number approvals are still active.

Standardization of the M-number and R-number approval processes will allow PHMSA to regularly review approval documents and track changes. It will ensure that all applicants are subject to the same renewal timelines and requirements to contact PHMSA when pertinent information pertaining to the approval holder has changed. PHMSA is concerned that holders of approvals issued without expiration dates may have stopped operations, or changed their names or principal places of business without notifying PHMSA. Requiring these holders to modify their approvals will require them to re-establish contact and communication with PHMSA. Although this process will assist PHMSA in monitoring and communicating with the regulated industry, PHMSA has also communicated with the regulated community on its proposed actions, at various public meetings with several companies and industry associations, to gauge the effect and benefits of this action to the regulated public. The comments received by PHMSA from the regulated public reflect that this action will greatly assist the regulated community by allowing approval holders, and other entities, to monitor the validity of their approval, renew in a timely manner, and search and determine compliance by using the updated listing on PHMSA's Web page. Lastly, this action will allow companies that are still identifiable and known within the public realm, by a previously registered ''R-Number,'' to maintain their public notoriety, while updating their approval to current standards and requirements without disruption.

III. Action

The proposed termination of these approvals will take effect one year from the publication date of this notice. Holders of R-numbers and any M-numbers that were issued without an

expiration date must either show cause why their approvals should not be terminated as provided in 49 CFR 107.713(c)(1) or apply for a modification of their approval in accordance with 49 CFR 107.705 prior to the effective date to avoid termination. R-number modification applicants will be issued an M-number but may continue to use their R-number. All modified approvals will be standardized and will have a 5-year expiration date.

A holder of an M-number or R-number that is terminated according to this notice may request that the Associate Administrator reconsider the termination. Pursuant to 49 CFR 107.715, such a request must: (1) Be in writing and filed within 20 days of the date of termination; (2) state in detail any alleged errors of fact and law; (3) enclose any additional information needed to support the request to reconsider; and (4) state in detail the modification of the final decision sought. This notice serves as service of process pursuant to 49 CFR 105.35(a)(3).

Issued in Washington, DC, on November 13, 2017, under authority of 49 U.S.C. 5101–5128, as delegated in 49 CFR part 107.

William S. Schoonover,

Associate Administrator, Pipeline and Hazardous Materials Safety Administration.

[FR Doc. 2017–24981 Filed 11–16–17; 8:45 am]

BILLING CODE 4909–60–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Department of the Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: OFAC: Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; or the Department of the Treasury's Office of the General Counsel: Office of the Chief Counsel (Foreign Assets Control), tel.: 202–622–2410.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The list of Specially Designated Nationals and Blocked Persons (SDN List) and additional information concerning OFAC sanctions programs are available on OFAC's Web site (*http://www.treasury.gov/ofac*).

Notice of OFAC Actions

On November 9, 2017, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

1. FERNANDEZ MELENDEZ, Manuel Angel (Latin: FERNÁNDEZ MELÉNDEZ, Manuel Ángel), Miranda, Venezuela; DOB 11 Jun 1966; citizen Venezuela; Gender Male; Cedula No. 6873122 (Venezuela) (individual) [VENEZUELA]. Designated pursuant to section 1(a)(ii)(C) of E.O. 13692 for being a current or former official of the Government of Venezuela.

2. HERNANDEZ DE HERNANDEZ, Socorro Elizabeth (Latin: HERNÁNDEZ DE HERNÁNDEZ, Socorro Elizabeth), Caracas, Capital District, Venezuela; DOB 11 Mar 1952; citizen Venezuela; Gender Female; Cedula No. 3977396 (Venezuela); Rector of Venezuela's National Electoral Council; Member of Venezuela's National Electoral Board (individual) [VENEZUELA]. Designated pursuant to section 1(a)(ii)(C) of E.O. 13692 for being a current or former official of the Government of Venezuela.

3. HIDROBO AMOROSO, Elvis Eduardo, Aragua, Venezuela; DOB 04 Aug 1963; POB Caracas, Venezuela; citizen Venezuela; Gender Male; Cedula No. 7659695 (Venezuela); Second Vice President of Venezuela's Constituent Assembly (individual) [VENEZUELA]. Designated pursuant to section 1(a)(ii)(C) of E.O. 13692 for being a current or former official of the Government of Venezuela.

4. MARQUEZ MONSALVE, Jorge Elieser, Caracas, District Capital, Venezuela; DOB 20 Feb 1971; citizen Venezuela; Gender Male; Cedula No. 8714253 (Venezuela); Venezuela's Minister of the Office of the Presidency (individual) [VENEZUELA]. Designated pursuant to section 1(a)(ii)(C) of E.O. 13692 for being a current or former official of the Government of Venezuela.

5. OBLITAS RUZZA, Sandra, Caracas, Capital District, Venezuela; DOB 07 Jun 1969; POB Ecuador; citizen Venezuela; Gender Female; Cedula No. 10517860 (Venezuela); Vice President of Venezuela's National Electoral Council; Rector of Venezuela's National Electoral Council; President of Venezuela's Civil and Electoral Registry Commission (individual) [VENEZUELA]. Designated pursuant to section 1(a)(ii)(C) of E.O. 13692 for being a current or former official of the Government of Venezuela.

6. OSORIO ZAMBRANO, Carlos Alberto, Miranda, Venezuela; DOB 10 Oct 1966; citizen Venezuela; Gender Male; Cedula No. 6397281 (Venezuela); President of the Superior Organ of Venezuela's Transport Mission (individual) [VENEZUELA]. Designated pursuant to section 1(a)(ii)(C) of E.O. 13692 for being a current or former official of the Government of Venezuela.

7. QUINTERO CUEVAS, Carlos Enrique, Caracas, Capital District, Venezuela; DOB 16 Feb 1972; citizen Venezuela; Gender Male; Cedula No. 10719241 (Venezuela); Alternate Rector of Venezuela's National Electoral Council; Member of Venezuela's National Electoral Board (individual) [VENEZUELA]. Designated pursuant to section 1(a)(ii)(C) of E.O. 13692 for being a current or former official of the Government of Venezuela.

8. RODRIGUEZ DIAZ, Julian Isaias (Latin: RODRÍGUEZ DÍAZ, Julián Isaías), Miranda, Venezuela; DOB 16 Dec 1942; POB Guarico, Venezuela; citizen Venezuela; Gender Male; Cedula No. 2218534 (Venezuela); Venezuelan Ambassador to Italy (individual) [VENEZUELA]. Designated pursuant to section 1(a)(ii)(C) of E.O. 13692 for being a current or former official of the Government of Venezuela.

9. VILLEGAS POLJAK, Ernesto Emilio, Caracas, Capital District, Venezuela; DOB 29 Apr 1970; citizen Venezuela; Gender Male; Cedula No. 9487963 (Venezuela); Venezuela's Minister of Culture (individual) [VENEZUELA]. Designated pursuant to section 1(a)(ii)(C) of E.O. 13692 for being a current or former official of the Government of Venezuela.

Additionally, on November 9, 2017, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following person are blocked pursuant to section 1(a)(ii)(C) of E.O. 13692 for being a current or former official of the Government of Venezuela. Accordingly, OFAC updated the SDN List for the following person, whose property and interests in property continue to be blocked under the Foreign Narcotics Kingpin Designation Act.

BERNAL ROSALES, Freddy Alirio; DOB 16 Jun 1962; POB San Cristobal, Tachira State, Venezuela; Cedula No. 5665018 (Venezuela); Passport B0500324 (Venezuela); Congressman, United Socialist Party of Venezuela (individual) [SDNTK].

The listing for this person now appears as follows:

BERNAL ROSALES, Freddy Alirio; Caracas, Capital District, Venezuela; DOB 16 Jun 1962; POB San Cristobal, Tachira State, Venezuela; Gender Male; Cedula No. 5665018 (Venezuela); Passport B0500324 (Venezuela); Venezuela's Minister of Urban Agriculture (individual) [SDNTK] [VENEZUELA].

Dated: November 14, 2017.

John E. Smith,

Director, Office of Foreign Assets Control.

[FR Doc. 2017–24954 Filed 11–16–17; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of 41 persons whose property and interests in property are blocked pursuant to the Global Terrorism Sanctions Regulations, and whose entries on OFAC's Specially Designated National and Blocked Persons List (SDN List) have been amended accordingly. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: OFAC: Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; Assistant Director for Licensing, tel.: 202–622–2480; or the Department of the Treasury's Office of the General Counsel: Office of the Chief Counsel (Foreign Assets Control), tel.: 202–622–2410.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's Web site (*www.treas.gov/ofac*).

Notice of OFAC Actions

On June 6, 2003, OFAC issued the GTSR (68 FR 34196, June 6, 2003) to implement E.O. 13224. OFAC has amended the GTSR on several occasions.

On August 2, 2017, the President signed into law the Countering America's Adversaries Through Sanctions Act, Public Law 115–44, Aug. 2, 2017, 131 Stat. 886 (22 U.S.C. 9401 *et seq.*) (CAATSA). Section 105(b) of CAATSA requires the President to impose the sanctions applicable with respect to a foreign person pursuant to the global terrorism Executive Order 13224 of September 23, 2001 (66 FR 49079, September 25, 2001) (E.O. 13224) on Iran's Islamic Revolutionary Guard Corps (IRGC) and foreign persons that are officials, agents, or affiliates of the IRGC. Such sanctions must be imposed beginning on the date that is 90 days after enactment of CAATSA, which was October 31, 2017.

Consistent with Section 105(b) of CAATSA, OFAC designated the IRGC on October 13, 2017, pursuant to E.O. 13224 for providing support to the IRGC-Qods Force, which previously had been designated for its support to various terrorist groups. OFAC also issued an amendment to the GTSR, effective October 31, 2017, adding § 594.201(a)(5) to Subpart B of the GTSR to include the following as persons whose property and interests in property are blocked pursuant to the GTSR: Foreign persons that are identified on the SDN List maintained by OFAC as officials, agents, or affiliates of the IRGC (82 FR 50313, October 31, 2017).

The names of persons whose property and interests in property are blocked pursuant to section 594.201(a) of the GTSR are published in the **Federal Register** and incorporated into the SDN List with the identifier ''[SDGT].'' Upon publication of the above-referenced GTSR amendment in the **Federal Register** on October 31, 2017, the following 41 persons became persons whose property and interests in property are blocked pursuant to section 594.201(a)(5) of the GTSR. Accordingly, OFAC has added the reference ''[SDGT]'' to their SDN List entries.

Individuals

1. AHMADIAN, Ali Akbar (a.k.a. AHMADIYAN, Ali Akbar); DOB circa 1961; POB Kerman, Iran; nationality Iran; citizen Iran; Additional Sanctions Information—Subject to Secondary Sanctions (individual) [SDGT] [NPWMD] [IRGC] [IFSR].

2. ARAGHI, Abdollah (a.k.a. ARAQI, Abdollah; a.k.a. ARAQI, Abdullah; a.k.a. ERAGHI, Abdollah; a.k.a. ERAQI, Abdollah); DOB 1945; POB Iran; Additional Sanctions Information—Subject to Secondary Sanctions; Lieutenant Commander, IRGC Ground Force; Deputy Commander, IRGC Ground Forces; Brigadier General; Former Commander, Greater Tehran's Mohammad Rasulollah IRGC; Former Chief, Greater Tehran Revolutionary Guards (individual) [SDGT] [IRGC] [IRAN–HR].

3. FATTAH, Parviz (a.k.a. FATTAH-QAREHBAGHI, Parviz); DOB 1961; alt. DOB 1962; POB Urmia, Iran; Additional Sanctions Information—Subject to Secondary Sanctions (individual) [SDGT] [NPWMD] [IRGC] [IFSR].

4. FORUZANDEH, Ahmed (a.k.a. FAYRUZI, Ahmad; a.k.a. FOROOZANDEH, Ahmad; a.k.a. FORUZANDEH, Ahmad; a.k.a. FRUZANDAH, Ahmad; a.k.a. ''ABU AHMAD ISHAB''; a.k.a. ''ABU SHAHAB''; a.k.a. ''JAFARI''), Qods Force Central Headquarters, Former U.S. Embassy Compound, Tehran, Iran; DOB circa 1960; alt. DOB 1957; alt. DOB circa 1955; alt. DOB circa 1958; alt. DOB circa 1959; alt. DOB circa 1961; alt. DOB circa 1962; alt. DOB circa 1963; POB Kermanshah, Iran; Additional Sanctions Information—Subject to Secondary Sanctions; Brigadier General, Commanding Officer of the Iranian Islamic Revolutionary Guard Corps-Qods Force Ramazan Corps; Deputy Commander of the Ramazan Headquarters; Chief of Staff of the Iraq Crisis Staff (individual) [SDGT] [IRAQ3] [IRGC].

5. HEJAZI, Mohammad; DOB circa 1959; nationality Iran; citizen Iran; Additional Sanctions Information—Subject to Secondary Sanctions (individual) [SDGT] [NPWMD] [IRGC] [IFSR].

6. JAFARI, Mohammad Ali (a.k.a. JAFARI, Ali; a.k.a. JA'FARI, Mohammad Ali; a.k.a. JAFARI-NAJAFABADI, Mohammad Ali; a.k.a. ''JA'FARI, Aziz''), c/o IRGC, Tehran, Iran; DOB 01 Sep 1957; POB Yazd, Iran; Additional Sanctions Information—Subject to Secondary Sanctions; Commander-in-Chief, Islamic Revolutionary Guard Corps; Commander, Islamic Revolutionary Guard Corps; Major General; Brigadier Commander (individual) [SDGT] [NPWMD] [IRGC] [IFSR] [IRAN–HR].

7. NAQDI, Mohammad Reza (a.k.a. NAGHDI, Mohammad Reza; a.k.a. NAQDI, Muhammad; a.k.a. SHAMS, Mohammad Reza); DOB circa 1952; alt. DOB circa Mar 1961; alt. DOB circa Apr 1961; alt. DOB 1953; POB Najaf, Iraq; alt. POB Tehran, Iran; Additional Sanctions Information—Subject to Secondary Sanctions; Brigadier General and Commander of the IRGC Basij Resistance Force; President of the Organization of the Basij of the Oppressed; Chief of the Mobilization of the Oppressed Organization; Head of the Basij (individual) [SDGT] [NPWMD] [IRGC] [IFSR] [IRAN–HR].

8. QASEMI, Rostam (a.k.a. GHASEMI MOHAMMADALI, ROSTAM), Iran; nationality Iran; citizen Iran; Additional Sanctions Information—Subject to Secondary Sanctions; Passport A2463775 (Iran) (individual) [SDGT] [NPWMD] [IRGC] [IFSR].

9. REZAIE, Morteza (a.k.a. REZAI, Morteza); DOB circa 1956; nationality Iran; citizen Iran; Additional Sanctions Information—Subject to Secondary Sanctions (individual) [SDGT] [NPWMD] [IRGC] [IFSR].

10. SAFAVI, Yahya Rahim (a.k.a. AL-SIFAWI, Yahya Rahim; a.k.a. RAHIM SAFAWI, Yahia; a.k.a. RAHIM-SAFAVI, Yahya; a.k.a. SAFAVI, Rahim; a.k.a. YAHYA RAHIM-SAFAVI, Seyyed; a.k.a. YAHYA SAFAVI, Sayed); DOB circa 1952; POB Esfahan, Iran; Additional Sanctions Information—Subject to Secondary Sanctions (individual) [SDGT] [NPWMD] [IRGC] [IFSR].

11. SALIMI, Hosein (a.k.a. SALAMI, Hoseyn; a.k.a. SALAMI, Hossein; a.k.a. SALAMI, Hussayn); nationality Iran; citizen Iran; Additional Sanctions Information—Subject to Secondary Sanctions; Passport D08531177 (Iran) (individual) [SDGT] [NPWMD] [IRGC] [IFSR].

12. TAEB, Hossein (a.k.a. TAEB, Hassan; a.k.a. TAEB, Hosein; a.k.a. TAEB, Hussayn); DOB 1963; POB Tehran, Iran; Additional Sanctions Information—Subject to Secondary Sanctions; Deputy Commander for Intelligence, Islamic Revolutionary Guard Corps; Hojjatoleslam; Former Commander of the Basij Forces (individual) [SDGT] [IRGC] [IRAN–HR].

Entities

1. BAQIYATTALLAH UNIVERSITY OF MEDICAL SCIENCES (a.k.a. BAGHIATOLLAH MEDICAL SCIENCES UNIVERSITY; a.k.a. BAGHYATOLLAH MEDICAL SCIENCES UNIVERSITY; a.k.a. BAGIATOLLAH MEDICAL SCIENCES UNIVERSITY; a.k.a. BAQIATOLLAH MEDICAL SCIENCES UNIVERSITY; a.k.a. BAQIYATALLAH MEDICAL SCIENCES UNIVERSITY; a.k.a. BAQIYATALLAH UNIVERSITY OF MEDICAL SCIENCES; a.k.a. BAQYATOLLAH MEDICAL SCIENCES UNIVERSITY), Vanak Square, Molla-Sadra Avenue, Box number: 19945, Tehran, Iran; Web site *http://www.bmsu.ac.ir/;* Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

2. BASIJ RESISTANCE FORCE (a.k.a. BASEEJ; a.k.a. BASIJ; a.k.a. BASIJ-E MELLI; a.k.a. MOBILIZATION OF THE OPPRESSED ORGANIZATION; f.k.a. SAZMAN BASIJ MELLI; a.k.a. SAZMAN-E MOGHAVEMAT-E BASIJ; f.k.a. VAHED-E BASIJ-E MOSTAZAFEEN; f.k.a. ''NATIONAL MOBILIZATION ORGANIZATION''; a.k.a. ''NATIONAL RESISTANCE MOBILIZATION''; a.k.a. ''RESISTANCE MOBILIZATION FORCE''), Iran; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [IRGC] [IRAN–HR].

3. BONYAD TAAVON SEPAH (a.k.a. BONYAD-E TA'AVON-E; a.k.a. IRGC COOPERATIVE FOUNDATION; a.k.a. SEPAH COOPERATIVE FOUNDATION), Niayes Highway, Seoul Street, Tehran, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

4. DEEP OFFSHORE TECHNOLOGY COMPANY, P.J.S., 1st Floor, Sadra Building, No. 3, Shafagh Street, Shahid Dadman Boulevard, Paknejad Boulevard, 7th Phase, Shahrake-E-Quds, Tehran, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

5. FATER ENGINEERING INSTITUTE (a.k.a. FAATER INSTITUTE; a.k.a. FATER ENGINEERING COMPANY; a.k.a. GHARARGAH GHAEM FAATER INSTITUTE), No. 25, Valiasr Jonoobi, Azizi Street, Azadi Sq. NE., Tehran, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

6. GHARARGAHE SAZANDEGI GHAEM (a.k.a. GHARARGAH GHAEM), No. 25, Valiasr St., Azadi Sq., Tehran, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

7. GHORB KARBALA (a.k.a. GHARARGAH KARBALA; a.k.a. GHARARGAH SAZANDEGI KARBALA-MOASSESEH TAHA), No. 2 Firouzeh Alley, Shahid Hadjipour St., Resalat Highway, Tehran, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

8. GHORB NOOH, P.O. Box 16765–3476, Tehran, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

9. HARA COMPANY (a.k.a. HARA INSTITUTE), Tehran, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

10. IMAM HOSSEIN UNIVERSITY (a.k.a. EMAM HOSEYN COMPREHENSIVE UNIVERSITY; a.k.a. IHU; a.k.a. IMAAM HOSSEIN UNIVERSITY; a.k.a. IMAM HOSEYN UNIVERSITY; a.k.a. IMAM HOSSEIN UNIVERSITY COMPLEX; a.k.a. IMAM HUSSEIN UNIVERSITY; a.k.a. UNIVERSITY OF IMAM HOSEYN), Near Fourth Square, Tehran Pars, Shahid Babaie Highway, near Hakimiyeh and Mini-city, Tehran, Iran; Kilometer 11, Shahid Babaei Highway, Tehran, Iran; Web site *www.ihu.ac.ir;* Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

11. IMENSAZEN CONSULTANT ENGINEERS INSTITUTE, No. 5/1, Niroo Alley, Padegan-e-Valiasr Street, Sepah Square, Tehran, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

12. IRAN MARINE INDUSTRIAL COMPANY, SADRA (a.k.a. IRAN MARINE INDUSTRIAL COMPANY SSA; a.k.a. IRAN SADRA; a.k.a. IRAN SHIP BUILDING CO.; a.k.a. SADRA; a.k.a. SHERKATE SANATI DARYAI IRAN), 3rd Floor Aftab Building, No. 3 Shafagh Street, Dadman Blvd., Phase 7, Shahrak Ghods, P.O. Box 14665–495, Tehran, Iran; Office E–43 Torre E-Piso 4, Centrao Commercial Lido Av., Francisco de Miranda, Caracas, Venezuela; Web site *www.sadra.ir;* Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

13. ISLAMIC REVOLUTIONARY GUARD CORPS AEROSPACE FORCE SELF SUFFICIENCY JIHAD ORGANIZATION (a.k.a. ISLAMIC REVOLUTIONARY GUARD CORPS AEROSPACE FORCE RESEARCH AND SELF SUFFICIENCY JEHAD ORGANIZATION; a.k.a. ISLAMIC REVOLUTIONARY GUARD CORPS AEROSPACE FORCE SELF-SUFFICIENCY JEHAD ORGANIZATION), Iran; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

14. ISLAMIC REVOLUTIONARY GUARD CORPS AIR FORCE (a.k.a. IRGC AIR FORCE; a.k.a. SEPAH PASDARAN AIR FORCE), Tehran, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

15. ISLAMIC REVOLUTIONARY GUARD CORPS AL-GHADIR MISSILE COMMAND (a.k.a. IRGC AIR FORCE AL-GHADIR MISSILE COMMAND; a.k.a. IRGC MISSILE COMMAND), Tehran, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

16. ISLAMIC REVOLUTIONARY GUARD CORPS RESEARCH AND SELF-SUFFICIENCY JEHAD ORGANIZATION (a.k.a. ISLAMIC REVOLUTIONARY GUARD CORPS RESEARCH AND SELF-SUFFICIENCY JIHAD ORGANIZATION; a.k.a. ISLAMIC REVOLUTIONARY GUARD CORPS SELF-SUFFICIENCY JEHAD ORGANIZATION), Iran; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

17. KHATAM OL ANBIA GHARARGAH SAZANDEGI NOOH (a.k.a. GHORB KHATAM; a.k.a. KHATAM AL-ANBYA; a.k.a. KHATAM OL AMBIA), No. 221, Phase 4, North Falamak-Zarafshan Intersection, Shahrak-E-Ghods, Tehran 14678, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

18. MAKIN INSTITUTE (a.k.a. MAKIN COMPANY), No. 2 Iravan St.—Tishfoon St.—Khaje Abdol ah Ansari St.—Shariati St., Tehran, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

19. MEHR BANK (a.k.a. MEHR FINANCE AND CREDIT INSTITUTE; a.k.a. MEHR INTEREST-FREE BANK), 204 Taleghani Ave., Tehran, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

20. MEHR-E EQTESAD-E IRANIAN INVESTMENT COMPANY (a.k.a. MEHR EGHTESAD IRANIAN INVESTMENT COMPANY; a.k.a. MEHR IRANIAN ECONOMY COMPANY; a.k.a. MEHR IRANIAN ECONOMY INVESTMENTS; f.k.a. TEJARAT TOSE'E EQTESADI IRANIAN), No. 18, Iranian Building, 14th Alley, Ahmad Qassir Street, Argentina Square, Tehran, Iran; No. 48, 14th Alley, Ahmad Qassir Street, Argentina Square, Tehran, Iran; Web site *www.mebank.ir;* Additional Sanctions Information—Subject to Secondary Sanctions; Business Registration Document # 103222 (Iran); Telephone: 982188526300; Alt. Telephone: 982188526301; Alt. Telephone: 982188526302; Alt. Telephone: 982188526303; Alt. Telephone: 9821227700019l; Fax: 982188526337; Alt. Fax: 9221227700019 [SDGT] [NPWMD] [IRGC] [IFSR].

21. OMRAN SAHEL, Tehran, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

22. ORIENTAL OIL KISH, Second Floor, 96/98 East Atefi St., Africa Blvd., Tehran, Iran; Dubai, United Arab Emirates; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

23. RAH SAHEL INSTITUTE, Tehran, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

24. RAHAB INSTITUTE (f.k.a. RAHSAZ INSTITUTE), Ghorb-e Ghaem Building, Valiasr St., Azizi Blvd., Azadi Sq., Tehran, Iran; Eastern 14th St., Beihaghi Blvd., Arjantin Sq., Tehran, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

25. SAHEL CONSULTANT ENGINEERS, No. 57, Eftekhar St., Larestan St., Motahhari Ave., Tehran, Iran; P.O. Box 16765–34, Tehran, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

26. SEPANIR OIL AND GAS ENGINEERING COMPANY (a.k.a. SEPANIR; a.k.a. SEPANIR ESTABLISHMENT), No. 319 Shahid Bahonar Street, Tehran, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

27. SEPASAD ENGINEERING COMPANY, No. 4 Corner of Shad St., Mollasadra Ave., Vanak Square, Tehran, Iran; Additional

Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

28. TEHRAN GOSTARESH COMPANY, P.J.S., No. 24, 5th Alley, Khaled Eslamboli Street, Tehran 1513643811, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR].

29. TIDEWATER MIDDLE EAST CO. (a.k.a. FARAZ ROYAL QESHM LLC; a.k.a. TIDE WATER COMPANY; a.k.a. TIDE WATER MIDDLE EAST MARINE SERVICE; a.k.a. TIDEWATER CO. (MIDDLE EAST MARINE SERVICES)), No. 80, Tidewater Building, Vozara Street, Next to Saie Park, Tehran, Iran; Web site *www.tidewaterco.com;* Email Address *info@tidewaterco.com;* alt. Email Address *info@tidewaterco.ir;* IFCA Determination—Port Operator; Additional Sanctions Information—Subject to Secondary Sanctions; Business Registration Document # 18745 (Iran); Telephone: 982188553321; Alt. Telephone: 982188554432; Fax: 982188717367; Alt. Fax: 982188708761; Alt. Fax: 982188708911 [SDGT] [NPWMD] [IRGC] [IFSR].

Dated: November 9, 2017.

John E. Smith,

Director, Office of Foreign Assets Control.

[FR Doc. 2017–24947 Filed 11–16–17; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee: National Academic Affiliations Council, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act that a meeting of the National Academic Affiliations Council (NAAC) will be held December 6, 2017—December 7, 2017 in Washington, DC The December 6, 2017 session will be held in the Sonny Montgomery Conference Center, Room 230, 810 Vermont Avenue NW., Washington, DC 20420. This session will begin at 8:30 a.m. and end at 4:30 p.m. The December 7, 2017 session will held in the Sonny Montgomery Conference Center, Room 230, 810 Vermont Avenue NW., Washington, DC 20420. This session will begin at 8:30 a.m. and adjourn by 2:15 p.m. The meetings are open to the public.

The purpose of the Council is to advise the Secretary on matters affecting partnerships between VA and its academic affiliates.

On December 6, 2017, the Council will review the status of its previous recommendations and receive a series of informational briefings on the budget, staffing, and functional alignment of the VA Office of Academic Affiliations. During the afternoon, the Council will explore several proposed physician recruitment initiatives to strengthen VA's clinical workforce pipeline, review efforts to minimize the adverse impact of several VA IT security policies on affiliate trainees; and receive a progress report on VA's newly launched Trainee Satisfaction Survey.

On December 7, 2017, the Council will receive presentations on VA's efforts to strengthen its academic affiliations between historically black colleges and universities and VA medical centers as well as the NAAC's Subcommittee on Diversity and Inclusion. The Members will also discuss the themes and outcomes of Secretary Shulkin's November 2017 address to the Association of American Medical Colleges and an update on plans to constitute an internal VA advisory committee on affiliation issues. During lunch, the Council will receive a series of short updates on areas of continuing interest: The revised waiver process for those VA employees with relationships with for-profit educational institutions and the Office of Personnel Management's proposed rule to limit the availability of administrative leave for Federal employees. The Council will receive public comments from 4:15 p.m. to 4:30 p.m. on December 6, 2017 and again at or before 2:00 p.m. to 2:15 p.m. on December 7, 2017.

Interested persons may attend and present oral statements to the Council. A sign-in sheet for those who want to give comments will be available at the meeting. Individuals who speak are invited to submit a 1–2 page summary of their comments at the time of the meeting for inclusion in the official meeting record. Oral presentations will be limited to five minutes or less, depending on the number of participants. Interested parties may also provide written comments for review by the Council prior to the meeting or at any time, via email to, *Steve.Trynosky@va.gov,* or by mail to Stephen K. Trynosky JD, MPH, MMAS, Designated Federal Officer, Office of Academic Affiliations (10A2D), 810 Vermont Avenue NW., Washington, DC 20420. Any member of the public wishing to attend or seeking additional information should contact Mr. Trynosky via email or by phone at (202) 461–6723. Because the meeting will be held in a Government building, anyone attending must be prepared to submit to security screening and present a valid photo I.D. Please allow at least 15 minutes prior to the meeting for this process.

Dated: November 14, 2017.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2017–25009 Filed 11–16–17; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 82 Friday,

No. 221 November 17, 2017

Book 2 of 2 Books

Pages 54471–55026

Part II

Bureau of Consumer Financial Protection

12 CFR Part 1041

Payday, Vehicle Title, and Certain High-Cost Installment Loans; Final Rule

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1041

[Docket No. CFPB–2016–0025]

RIN 3170–AA40

Payday, Vehicle Title, and Certain High-Cost Installment Loans

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; official interpretations.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau or CFPB) is issuing this final rule establishing regulations creating consumer protections for certain consumer credit products and the official interpretations to the rule. First, the rule identifies it as an unfair and abusive practice for a lender to make covered short-term or longer-term balloon-payment loans, including payday and vehicle title loans, without reasonably determining that consumers have the ability to repay the loans according to their terms. The rule exempts certain loans from the underwriting criteria prescribed in the rule if they have specific consumer protections. Second, for the same set of loans along with certain other high-cost longer-term loans, the rule identifies it as an unfair and abusive practice to make attempts to withdraw payment from consumers' accounts after two consecutive payment attempts have failed, unless the consumer provides a new and specific authorization to do so. Finally, the rule prescribes notices to consumers before attempting to withdraw payments from their account, as well as processes and criteria for registration of information systems, for requirements to furnish and obtain information from them, and for compliance programs and record retention. The rule prohibits evasions and operates as a floor leaving State and local jurisdictions to adopt further regulatory measures (whether a usury limit or other protections) as appropriate to protect consumers.

DATES:

Effective Date: This regulation is effective January 16, 2018. *Compliance Date:* Sections 1041.2 through 1041.10, 1041.12, and 1041.13 have a compliance date of August 19, 2019.

Application Deadline: The deadline to submit an application for preliminary approval for registration pursuant to § 1041.11(c)(1) is April 16, 2018.

FOR FURTHER INFORMATION CONTACT: Sarita Frattaroli, Counsel; Mark Morelli, Michael G. Silver, Steve Wrone, 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 June 2, 2016, the Bureau issued proposed consumer protections for payday loans, vehicle title loans, and certain high-cost installment loans. The proposal was published in the **Federal Register** on July 22, 2016.[1] Following a public comment period and review of comments received, the Bureau is now issuing this final rule with consumer protections governing the underwriting of covered short-term and longer-term balloon-payment loans, including payday and vehicle title loans. The rule also contains disclosure and payment withdrawal attempt requirements for covered short-term loans, covered longer-term balloon-payment loans, and certain high-cost covered longer-term loans.

Covered short-term loans are typically used by consumers who are living paycheck to paycheck, have little to no access to other credit products, and seek funds to meet recurring or one-time expenses. The Bureau has conducted extensive research on these products, in addition to several years of outreach and review of the available literature. The Bureau issues these regulations primarily pursuant to its authority under section 1031 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) to identify and prevent unfair, deceptive, or abusive acts or practices.[2] The Bureau is also using authorities under section 1022 of the Dodd-Frank Act to prescribe rules and make exemptions from such rules as is necessary or appropriate to carry out the purposes and objectives of the Federal consumer financial laws,[3] section 1024 of the Dodd-Frank Act to facilitate supervision of certain non-bank financial service providers,[4] and section 1032 of the Dodd-Frank Act to require disclosures to convey the costs, benefits, and risks of particular consumer financial products or services.[5]

The Bureau is not, at this time, finalizing the ability-to-repay determination requirements proposed for certain high-cost installment loans, but it is finalizing those requirements as to covered short-term and longer-term balloon-payment loans. The Bureau is also finalizing certain disclosure, notice, and payment withdrawal attempt requirements as applied to covered short-term loans, longer-term balloon-payment loans, and high-cost longer-term loans at this time.

The Bureau is concerned that lenders that make covered short-term loans have developed business models that deviate substantially from the practices in other credit markets by failing to assess consumers' ability to repay their loans according to their terms and by engaging in harmful practices in the course of seeking to withdraw payments from consumers' accounts. The Bureau has concluded that there is consumer harm in connection with these practices because many consumers struggle to repay unaffordable loans and in doing so suffer a variety of adverse consequences. In particular, many consumers who take out these loans appear to lack the ability to repay them and face one of three options when an unaffordable loan payment is due: Take out additional covered loans (''re-borrow''), default on the covered loan, or make the payment on the covered loan and fail to meet basic living expenses or other major financial obligations. As a result of these dynamics, a substantial population of consumers ends up in extended loan sequences of unaffordable loans. Longer-term balloon-payment loans, which are less common in the marketplace today, raise similar risks.

In addition, many lenders may seek to obtain repayment of covered loans directly from consumers' accounts. The Bureau is concerned that consumers may be subject to multiple fees and other harms when lenders make repeated unsuccessful attempts to withdraw funds from their accounts. In these circumstances, further attempts to withdraw funds from consumers' accounts are very unlikely to succeed, yet they clearly result in further harms to consumers.

A. Scope of the Rule

The rule applies to two types of covered loans. First, it applies to short-term loans that have terms of 45 days or less, including typical 14-day and 30-day payday loans, as well as short-term vehicle title loans that are usually made for 30-day terms, and longer-term balloon-payment loans. The underwriting portion of the rule applies to these loans. Second, certain parts of the rule apply to longer-term loans with terms of more than 45 days that have (1) a cost of credit that exceeds 36 percent per annum; and (2) a form of ''leveraged

[1] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 FR 47864 (July 22, 2016).

[2] Public Law 111–203, section 1031(b), 124 Stat. 1376 (2010) (hereinafter Dodd-Frank Act).

[3] Dodd-Frank Act section 1022(b).

[4] Dodd-Frank Act section 1024(b)(7).

[5] Dodd-Frank Act section 1032(a).

payment mechanism'' that gives the lender a right to withdraw payments from the consumer's account. The payments part of the rule applies to both categories of loans. The Bureau had proposed parallel underwriting requirements for high-cost covered longer-term loans. However, at this time, the Bureau is not finalizing the ability-to-repay portions of the rule as to covered longer-term loans other than those with balloon payments.

The rule excludes or exempts several types of consumer credit, including: (1) Loans extended solely to finance the purchase of a car or other consumer good in which the good secures the loan; (2) home mortgages and other loans secured by real property or a dwelling if recorded or perfected; (3) credit cards; (4) student loans; (5) non-recourse pawn loans; (6) overdraft services and lines of credit; (7) wage advance programs; (8) no-cost advances; (9) alternative loans (similar to loans made under the Payday Alternative Loan program administered by the National Credit Union Administration); and (10) accommodation loans.

B. Ability-to-Repay Requirements and Alternative Requirements for Covered Short-Term Loans

The rule identifies it as an unfair and abusive practice for a lender to make covered short-term or longer-term balloon-payment loans without reasonably determining that the consumers will have the ability to repay the loans according to their terms. The rule prescribes requirements to prevent this practice and thus the specific harms to consumers that the Bureau has identified as flowing from the practice, including extended loan sequences for a substantial population of consumers.

The first set of requirements addresses the underwriting of these loans. A lender, before making a covered short-term or longer-term balloon-payment loan, must make a reasonable determination that the consumer would be able to make the payments on the loan and be able to meet the consumer's basic living expenses and other major financial obligations without needing to re-borrow over the ensuing 30 days. Specifically, a lender is required to:

- Verify the consumer's net monthly income using a reliable record of income payment, unless a reliable record is not reasonably available;
- Verify the consumer's monthly debt obligations using a national consumer report and a consumer report from a ''registered information system'' as described below;
- Verify the consumer's monthly housing costs using a national consumer report if possible, or otherwise rely on the consumer's written statement of monthly housing expenses;
- Forecast a reasonable amount for basic living expenses, other than debt obligations and housing costs; and
- Determine the consumer's ability to repay the loan based on the lender's projections of the consumer's residual income or debt-to-income ratio.

Furthermore, a lender is prohibited from making a covered short-term loan to a consumer who has already taken out three covered short-term or longer-term balloon-payment loans within 30 days of each other, for 30 days after the third loan is no longer outstanding.

Second, and in the alternative, a lender is allowed to make a covered short-term loan without meeting all the specific underwriting criteria set out above, as long as the loan satisfies certain prescribed terms, the lender confirms that the consumer meets specified borrowing history conditions, and the lender provides required disclosures to the consumer. Among other conditions, under this alternative approach, a lender is allowed to make up to three covered short-term loans in short succession, provided that the first loan has a principal amount no larger than $500, the second loan has a principal amount at least one-third smaller than the principal amount on the first loan, and the third loan has a principal amount at least two-thirds smaller than the principal amount on the first loan. In addition, a lender is not allowed to make a covered short-term loan under the alternative requirements if it would result in the consumer having more than six covered short-term loans during a consecutive 12-month period or being in debt for more than 90 days on covered short-term loans during a consecutive 12-month period. A lender is not permitted to take vehicle security in connection with loans that are made according to this alternative approach.

C. Payment Practices Rules

The rule identifies it as an unfair and abusive practice for a lender to make attempts to withdraw payment from consumers' accounts in connection with a short-term, longer-term balloon-payment, or high-cost longer-term loan after the lender's second consecutive attempts to withdraw payments from the accounts from which the prior attempts were made have failed due to a lack of sufficient funds, unless the lender obtains the consumers' new and specific authorization to make further withdrawals from the accounts. The Bureau found that in these circumstances, further attempted withdrawals are highly unlikely to succeed, but clearly impose harms on consumers who are affected. This prohibition on further withdrawal attempts applies whether the two failed attempts are initiated through a single payment channel or different channels, such as the automated clearinghouse system and the check network. The rule requires that lenders must provide notice to consumers when the prohibition has been triggered and follow certain procedures in obtaining new authorizations.

In addition to the requirements related to the prohibition on further payment withdrawal attempts, a lender is required to provide a written notice, depending on means of delivery, a certain number of days before its first attempt to withdraw payment for a covered loan from a consumer's checking, savings, or prepaid account or before an attempt to withdraw such payment in a different amount than the regularly scheduled payment amount, on a date other than the regularly scheduled payment date, by a different payment channel than the prior payment, or to re-initiate a returned prior transfer. The notice must contain key information about the upcoming payment attempt and, if applicable, alert the consumer to unusual payment attempts. A lender is permitted to provide electronic notices as long as the consumer consents to electronic communications.

D. Additional Requirements

The rule requires lenders to furnish to provisionally registered and registered information systems certain information concerning covered short-term and longer-term balloon-payment loans at loan consummation, during the period that the loan is an outstanding loan, and when the loan ceases to be an outstanding loan. To be eligible to become a provisionally registered or registered information system, an entity must satisfy the eligibility criteria prescribed in the rule. The rule provides for a registration process that will allow information systems to be registered, and lenders to be ready to furnish required information, at the time the furnishing obligation in the rule takes effect. Consumer reports provided by registered information systems will include a reasonably comprehensive record of a consumer's recent and current use of covered short-term and longer-term balloon-payment loans. Before making covered short-term and longer-term balloon-payment loans, a lender is required to obtain and consider a consumer report from a registered information system.

A lender is required to establish and follow a compliance program and retain certain records. A lender is also required to develop and follow written policies and procedures that are reasonably designed to ensure compliance with the requirements in this rule. Furthermore, a lender is required to retain the loan agreement and documentation obtained for any covered loan or an image thereof, as well as electronic records in tabular format regarding origination calculations and determinations for a short-term or longer-term balloon-payment loan, and regarding loan type and terms. The rule also includes an anti-evasion clause to address the kinds of concerns the Bureau noted in connection with the evasive actions that lenders in this market took in response to the regulations originally adopted on loans made to servicemembers under the Military Lending Act.

E. Effective and Compliance Dates/ Application Deadline [6]

The final rule will become effective January 16, 2018, 60 days after publication of the final rule in the **Federal Register**. Compliance with §§ 1041.2 through 1041.10, 1041.12, and 1041.13 will be required beginning August 19, 2019, 21 months after publication of the final rule in the **Federal Register**. The deadline to submit an application for preliminary approval for registration pursuant to § 1041.11(c)(1) will be April 16, 2018, 150 days after publication of the final rule in the **Federal Register**. The effective and compliance dates and application deadline are structured to facilitate an orderly implementation process.

II. Background

A. Introduction

For most consumers, credit provides a means of purchasing goods or services and spreading the cost of repayment over time. This is true of the three largest consumer credit markets: The market for mortgages ($10.3 trillion in outstanding balances), for student loans ($1.4 trillion), and for auto loans ($1.1 trillion). This is also one way in which certain types of open-end credit—including home equity loans ($0.13 trillion) and lines of credit ($0.472 trillion)—and at least some credit cards and revolving credit ($1.0 trillion)—can be used.[7]

In addition to the credit markets described above, consumers living paycheck to paycheck and with little to no savings have also used credit as a means of coping with financial shortfalls. These shortfalls may be due to mismatched timing between income and expenses, misaligned cash flows, income volatility, unexpected expenses or income shocks, or expenses that simply exceed income.[8] According to a recent survey conducted by the Board of Governors of the Federal Reserve System (Federal Reserve Board), 44 percent of adults reported they would either be unable to cover an emergency expense costing $400 or would have to sell something or borrow money to cover it, and 30 percent reported that they found it ''difficult to get by'' or were ''just getting by'' financially.[9] Whatever the cause of these financial shortfalls, consumers in these situations sometimes seek what may broadly be termed a ''liquidity loan.'' [10] There are a variety of loans and products that consumers use for these purposes including credit cards, deposit account overdraft, pawn loans, payday loans, vehicle title loans, and installment loans.

Credit cards and deposit account overdraft services are each already subject to specific Federal consumer protection regulations and requirements. The Bureau generally considers these markets to be outside the scope of this rulemaking as discussed further below. The Bureau is also separately engaged in research and evaluation of potential rulemaking actions on deposit account overdraft.[11]

---

[6] The description of effective dates in this document differs from the description of effective dates in the final rule as issued on the Bureau's Web site on October 5, 2017, which provided that the regulation would be effective 21 months after date of publication in the **Federal Register**, except for § 1041.11, which would be effective 60 days after date of publication in the **Federal Register**. The rule published in the **Federal Register** provides that, for purposes of codification in the Code of Federal Regulations, this regulation is effective 60 days after date of publication in the **Federal Register**. Sections 1041.2 through 1041.10, 1041.12, and 1041.13 have a compliance date of 21 months after date of publication in the **Federal Register**. This change is a technical correction to allow for clear cross-references within sections in the Code of Federal Regulations. It is not substantive and does not affect the dates by which regulated entities must comply with sections of the regulation.

Other minor technical corrections and clarifications have been made to the final rule as issued on the Bureau's Web site on October 5, 2017. To the extent that section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553, applies, there is good cause to publish all of these changes without notice and comment. Under the APA, notice and opportunity for public comment are not required if the Bureau finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b)(B). The Bureau has determined that notice and comment are unnecessary because the technical corrections in this final rule allow for proper formatting in the Code of Federal Regulations, correct inadvertent technical errors, and align and harmonize provisions of the regulation. These changes are routine and insignificant in nature and impact, and do not change the scope of the rule or regulatory burden. Therefore, the technical corrections are adopted in final form.

[7] *See* Bd. of Governors of the Fed. Reserve Sys., ''Mortgage Debt Outstanding (Table 1.54),'' (June 2017) (mortgages (one- to four-family)), *available at http://www.federalreserve.gov/econresdata/releases/mortoutstand/current.htm;* Bd. of Governors of the Fed. Reserve Sys., ''Consumer Credit—G.19: July 2017,'' (Sept. 8, 2017) (student loans, auto loans, and revolving credit), *available at* h*ttps://www.federalreserve.gov/releases/g19/current/default.htm;* Experian-Oliver Wyman, ''2017 Q2 Market Intelligence Report: Home Equity Loans Report,'' at 16 fig. 21 (2017) and Experian-Oliver Wyman, ''2017 Q2 Market Intelligence Report: Home Equity Lines Report,'' at 21 fig. 30 (2017) (home equity loans and lines of credit outstanding estimates), *available at http://www.marketintelligencereports.com.*

[8] *See generally* Rob Levy & Joshua Sledge, ''A Complex Portrait: An Examination of Small-Dollar Credit Consumers'' (Ctr. for Fin. Servs. Innovation, 2012), *available at https://www.fdic.gov/news/conferences/consumersymposium/2012/A%20Complex%20Portrait.pdf.*

[9] Bd. of Governors of the Fed. Reserve Sys., ''Report on the Economic Well-Being of U.S. Households in 2016,'' at 2, 8 (May 2017), *available at https://www.federalreserve.gov/publications/files/2016-report-economic-well-being-us-households-201705.pdf.*

[10] If a consumer's expenses consistently exceed income, a liquidity loan is not likely to be an appropriate solution to the consumer's needs.

[11] Credit cards and deposit overdraft services would have been excluded from the proposed rule under proposed § 1041.3(e)(3) and (6) as discussed further below. On October 5, 2016, the Bureau released a final rule on prepaid accounts. Among other things, the rule regulates overdraft credit features offered in connection with prepaid accounts, and generally covers under Regulation Z's credit card rules any such credit feature that is offered by the prepaid account issuer, its affiliate, or its business partner where credit can be accessed in the course of a transaction conducted with a prepaid card. 81 FR 83934 (Nov. 22, 2016). The Bureau later published a final rule delaying the October 1, 2017, effective date of that rule by six months, to April 1, 2018. 82 FR 18975 (Apr. 25, 2017). In preparation for a potential rulemaking regarding possible consumer protection concerns with overdraft programs on checking accounts, the Bureau issued the Notice and Request for Information on the Impacts of Overdraft Programs on Consumers, 77 FR 12031 (Feb. 28, 2012); *see* Kelly Cochran, ''Spring 2017 Rulemaking Agenda,'' CFPB Blog (July 20, 2017), *available at https://www.consumerfinance.gov/about-us/blog/spring-2017-rulemaking-agenda/.* In 2015, banks with over $1 billion in assets reported overdraft and NSF (nonsufficient funds) fee revenue of $11.16 billion. *See* Gary Stein, ''New Insights on Bank Overdraft Fees and 4 Ways to Avoid Them,'' CFPB Blog (Feb. 25, 2016), *available at https://www.consumerfinance.gov/about-us/blog/new-insights-on-bank-overdraft-fees-and-4-ways-to-avoid-them/.* The $11.16 billion total does not include credit union overdraft fee revenue and does not separate out overdraft from NSF amounts but overall, overdraft fee revenue accounts for about 72 percent of that amount. Bureau of Consumer Fin. Prot., ''Data Point: Checking Account Overdraft,'' at 10 (2014), *available at http://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf.* The Federal Reserve Board has adopted a set of regulations of overdraft services. *See* Electronic Fund Transfers, 75 FR 31665 (June 4, 2010). In addition, the Bureau has published three research reports on overdraft. *See* Bureau of Consumer Fin. Prot., ''Data Point: Frequent Overdrafters'' (2017), *available at http://*

Another liquidity option—pawn—generally involves non-recourse loans made against the value of whatever item a consumer chooses to give the lender in return for the funds.[12] The consumer has the option to either repay the loan or permit the pawnbroker to retain and sell the pawned property at the end of the loan term, relieving the borrower from any additional financial obligation. This feature distinguishes pawn loans from most other types of liquidity loans. The Bureau is excluding non-recourse possessory pawn loans, as described in proposed § 1041.3(e)(5), from the scope of this rulemaking.

This rulemaking is focused on two general categories of liquidity loan products: (1) Short-term loans and longer-term balloon-payment loans; and (2) with regard to payment practices, a broader set of liquidity loan products that also includes certain higher-cost longer-term installment loans. The largest category of short-term loans are ''payday loans,'' which are generally required to be repaid in a lump-sum single-payment on receipt of the borrower's next income payment, and short-term vehicle title loans, which are also almost always due in a lump-sum single-payment, typically within 30 days after the loan is made. The final rule's underwriting requirements also apply to depository advance products and other loans of 45 days or less in duration, as well as certain longer-term balloon-payment loans that generally involve a series of small, often interest-only, payments followed by a single final large lump sum payment. The final rule's payment presentment requirements apply to short-term and longer-term balloon-payment products, as well as to certain higher-cost longer-term installment loans. That latter category includes what are often referred to as ''payday installment loans''—that is, loans that are repaid in multiple installments with each installment typically due on the borrower's payday or regularly scheduled income payment and with the lender having the ability to automatically collect payments from an account into which the income payment is deposited. In addition, the latter category includes certain high-cost installment loans made by more traditional finance companies.

This rulemaking includes both closed-end loans and open-end lines of credit.[13] As described in the section-by-section analysis, the Bureau has been studying these markets for liquidity loans for over five years, gaining insights from a variety of sources. During this time the Bureau has conducted supervisory examinations of a number of payday lenders and enforcement investigations of a number of different types of liquidity lenders, which have given the Bureau insights into the business models and practices of such lenders. Through these processes, and through market monitoring activities, the Bureau also has obtained extensive loan-level data that the Bureau has studied to better understand risks to consumers.[14] The Bureau has published five reports based upon these data.[15] The Bureau has also carefully reviewed the published literature with respect to small-dollar liquidity loans and a number of outside researchers have presented their research at seminars for Bureau staff. In addition, over the course of the past five years the Bureau has engaged in extensive outreach with a variety of stakeholders in both formal and informal settings, including several Bureau field hearings across the country specifically focused on the subject of small-dollar lending, meetings with the Bureau's standing advisory groups, meetings with State and Federal regulators, meetings with consumer advocates, religious groups, and industry trade associations, Tribal consultations, and through a Small Business Review Panel process as described further below. As described in Summary of the Rulemaking Process, the Bureau received and reviewed over one million comments on its proposal, mostly from lenders and borrowers within the respective markets.

This Background section provides a brief description of the major components of the markets for short-term loans and longer-term balloon-payment loans, describing the product parameters, industry size and structure, lending practices, and business models of major market segments. The Background section also provides a brief overview of the additional markets for higher-cost longer-term installment loans that are subject to the payment practices components of the final rule. This section also describes recent State and Federal regulatory activity in connection with these various product markets. Market Concerns—Underwriting below, provides a more detailed description of consumer experiences with short-term loans describing research about which consumers use the products, why they use the products, and the outcomes they experience as a result of the product structures and industry practices. The Background section also includes an

files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf; Bureau of Consumer Fin. Prot., ''Data Point: Checking Account Overdraft'' (2014), *available at http://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf;* Bureau of Consumer Fin. Prot., ''CFPB Study of Overdraft Programs: A White Paper of Initial Data Findings'' (2013), *available at http://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf* (hereinafter ''*CFPB Study of Overdraft Programs White Paper*'').

[12] Pawn lending, also known as pledge lending, has existed for centuries, with references to it in the Old Testament; pawn lending in the U.S. began in the 17th century. *See* Susan Payne Carter, ''Payday Loan and Pawnshop Usage: The Impact of Allowing Payday Loan Rollovers,'' at 5 (Jan. 15, 2012), *available at https://my.vanderbilt.edu/susancarter/files/2011/07/Carter_Susan_JMP_Web site2.pdf.* The two largest pawn firms, EZCORP and FirstCash, account for about 13 percent of approximately 13,000 pawn storefronts. The remaining storefronts are operated by small, independent firms. EZCORP, ''Investor Update: Business Transformation Delivering Results,'' at 7 (Mar. 7, 2017), *available at http://investors.ezcorp.com/download/Investor+Presentation_030717.pdf.* FirstCash, Inc., is the company resulting from the September 2016 merger of FirstCash Financial Services and Cash America. FirstCash operates in 26 States. FirstCash, Inc., 2016 Annual Report (Form 10–K), at 1 (Mar. 1, 2017). *See generally,* John P. Caskey, ''Fringe Banking: Cash-Checking Outlets, Pawnshops, and the Poor,'' at Chapter 2 (New York: Russell Sage Foundation 1994).

[13] The Dodd-Frank Act does not define ''payday loan,'' though it refers to the term in section 1024(a)(1)(E), and the Bureau is not proposing to define it in this rulemaking. The Bureau may do so in a subsequent rulemaking or in another context. In addition, the Bureau notes that various State, local, and Tribal jurisdictions may define ''payday loans'' in ways that may be more or less coextensive with the coverage of the Bureau's rule.

[14] Information underlying this proposed rule is derived from a variety of sources, including from market monitoring and outreach, third-party studies and data, consumer complaints, the Bureau's enforcement and supervisory work, and the Bureau's expertise generally. In publicly discussing information, the Bureau has taken steps not to disclose confidential information inappropriately and to otherwise comply with applicable law and its own rules regarding disclosure of records and information. *See* 12 CFR 1070.41(c).

[15] *See* Bureau of Consumer Fin. Prot., ''Payday Loans and Deposit Advance Products: A White Paper of Initial Data Findings'' (2013), *available at http://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf* [hereinafter ''*CFPB Payday Loans and Deposit Advance Products White Paper*'']; Bureau of Consumer Fin. Prot., ''CFPB Data Point: Payday Lending'' (2014), *available at http://files.consumerfinance.gov/f/201403_cfpb_report_payday-lending.pdf* [hereinafter ''*CFPB Data Point: Payday Lending*'']; Bureau of Consumer Fin. Prot., ''Online Payday Loan Payments'' (2016), *available at http://files.consumerfinance.gov/f/201604_cfpb_online-payday-loan-payments.pdf* [hereinafter *CFPB Online Payday Loan Payments*]; Bureau of Consumer Fin. Prot., ''Single-Payment Vehicle Title Lending'' (2016), *available at http://files.consumerfinance.gov/f/documents/201605_cfpb_single-payment-vehicle-title-lending.pdf* [hereinafter ''*CFPB Single-Payment Vehicle Title Lending*'']; Bureau of Consumer Fin. Prot., ''Supplemental Findings on Payday, Payday Installment, and Vehicle Title Loans, and Deposit Advance Products'' (2016), *available at https://www.consumerfinance.gov/data-research/research-reports/supplemental-findings-payday-payday-installment-and-vehicle-title-loans-and-deposit-advance-products/* (hereinafter ''*CFPB Report on Supplemental Findings*'').

extensive description of the methods by which lenders initiate payments from consumers' accounts. Market Concerns—Payments, below, describes consumer experiences and concerns with these payment practices. Most of the comments received on the proposal's Background section agreed in general terms with the descriptions of the markets and products described below, although there may be slight differences in individual lenders' loan products and business practices. Comments that provided significantly different information are noted below.

B. Short-Term, Hybrid, and Balloon-Payment Loans

Providing short-term loans for liquidity needs has been a long-term challenge in the consumer financial services market due to the fixed costs associated with loan origination regardless of loan size. At the beginning of the twentieth century, concern arose with respect to companies that were responding to liquidity needs by offering to ''purchase'' a consumer's paycheck in advance of it being paid. These companies charged fees that, if calculated as an annualized interest rate, were as high as 400 percent.[16] To address these concerns, between 1914 and 1943, 34 States enacted a form of the Uniform Small Loan Law, which was a model law developed by the Russell Sage Foundation. That law provided for lender licensing and permitted interest rates of between 2 and 4 percent per month, or 24 to 48 percent per year. Those rates were substantially higher than pre-existing usury limits (which generally capped interest rates at between 6 and 8 percent per year) but were viewed by proponents as ''equitable to both borrower and lender.''[17]

New forms of short-term small-dollar lending appeared in several States in the 1990s,[18] starting with check cashing outlets that would hold a customer's personal check for a period of time for a fee before cashing it (''check holding'' or ''deferred presentment''). One of the larger payday lenders began making payday loans in Kansas in 1992, and that same year at least one State regulator issued an administrative interpretation holding that deferred presentment activities were consumer loans subject to that State's licensing and consumer lending laws.[19] One commenter described his role in developing and expanding the deferred presentment lending industry in Tennessee in the early 1990s prior to any regulation in that State, while noting that those same activities required lending licenses in two nearby States.

Several market factors converged around the same time that spurred the development of these new forms of short-term small-dollar lending. Consumers were using credit cards more frequently for short-term liquidity lending needs, a trend that continues today.[20] Storefront finance companies, described below in part II.C, that had provided small loans changed their focus to larger, collateralized products, including vehicle financing and real estate secured loans. At the same time there was substantial consolidation in the storefront installment lending industry. Depository institutions similarly moved away from short-term small-dollar loans.

Around the same time, a number of State legislatures amended their usury laws to allow lending by a broader group of both depository and non-depository lenders by increasing maximum allowable State interest rates or eliminating State usury laws, while other States created usury carve-outs or special rules for short-term loans.[21] The confluence of these trends has led to the development of markets offering what are commonly referred to as payday loans (also known as cash advance loans, deferred deposit, and deferred presentment loans depending on lender and State law terminology), and short-term vehicle title loans that are much shorter in duration than vehicle-secured loans that have traditionally been offered by storefront installment lenders and depository institutions. Although payday loans initially were distributed through storefront retail outlets, they are now also widely available on the Internet. Vehicle title loans are typically offered exclusively at storefront retail outlets.

These markets as they have evolved over the last two decades are not strictly segmented. There is substantial overlap between market products and the borrowers who use them. For example, in a 2015 survey, almost 14.8 percent of U.S. households that had used a payday loan in the prior year had also used a vehicle title loan.[22] There is also an established trend away from ''monoline'' or single-product lending companies. Thus, for example, a number of large payday lenders also offer vehicle title and installment loans.[23] The following discussion nonetheless provides a description of major product types.

Storefront Payday Loans

The market that has received the greatest attention among policy makers, advocates, and researchers is the market for single-payment payday loans. These payday loans are short-term small-dollar loans generally repayable in a single payment due when the consumer is scheduled to receive a paycheck or other inflow of income (*e.g.,* government

[16] Salary advances were structured as wage assignments rather than loans to evade much lower State usury caps of about 8 percent per annum or less. John P. Caskey, ''Fringe Banking and the Rise of Payday Lending,'' at 17, 23 (Patrick Bolton & Howard Rosenthal eds., New York: Russell Sage Foundation, 2005).

[17] Elisabeth Anderson, ''Experts, Ideas, and Policy Change: The Russell Sage Foundation and Small Loan Reform, 1909–1941,'' 37 Theory & Soc'y 271, 276, 283, 285 (2008), *available at http://www.jstor.org/stable/40211037* (quoting Arthur Ham, Russell Sage Foundation, Feb. 1911, Quarterly Report, Library of Congress Russell Sage Foundation Archive, Box 55).

[18] *See* Pew Charitable Trusts, ''A Short History of Payday Lending Law,'' (July 18, 2012), *available at http://www.pewtrusts.org/en/research-and-analysis/analysis/2012/07/a-short-history-of-payday-lending-law.*

[19] QC Holdings, Inc., Registration Statement (Form S–1), at 1 (May 7, 2004);), *see, e.g.,* Laura Udis, Adm'r Colo. Dep't of Law, Unif. Consumer Credit Code, ''Check Cashing Entities Which Provide Funds In Return For A Post-Dated Check Or Similar Deferred Payment Arrangement And Which Impose A Check Cashing Charge Or Fee May Be Consumer Lenders Subject To The Colorado Uniform Consumer Credit Code,'' Administrative Interpretation No. 3.104–9201 (June 23, 1992) (on file).

[20] Robert D. Manning, ''Credit Card Nation: The Consequences of America's Addiction to Credit'' (Basic Books 2000); Amy Traub, ''Debt Disparity: What Drives Credit Card Debt in America,'' Demos (2014), *available at http://www.demos.org/sites/default/files/publications/DebtDisparity_1.pdf.*

[21] *See* Pew Charitable Trusts, ''A Short History of Payday Lending Law'' (July 18, 2012). This article notes that State legislative changes were in part a response to the ability of Federally- and State-chartered banks to lend without being subject to the usury laws of the borrower's State.

[22] Estimates by the Bureau's Office of Research are based on data derived from FDIC. Fed. Deposit Ins. Corp., ''*2015 FDIC National Survey of Unbanked and Underbanked Households*'' (Oct. 20, 2016), *available at https://www.fdic.gov/householdsurvey/2015/2015report.pdf.*

[23] *See, e.g.,* Advance America, ''Title Loan Services,'' *available at https://www.advanceamerica.net/services/title-loans* (last visited Mar. 3, 2016); FirstCash, ''Own Your Car? Need Cash Now? Drive Away with Cash in Minutes,'' *available at http://ww2.firstcash.com/title-loans* (last visited May 15, 2017); Check Into Cash, ''Auto Title Loans,'' *available at https://checkintocash.com/commercial/auto-title-loans/* (last visited Sept. 14, 2017); Community Choice Financial/CheckSmart ''Get Cash Fast,'' *available at https://www.ccfi.com/checksmart/* (last visited Mar. 3, 2016); Speedy Cash, ''Title Loans,'' *available at https://www.speedycash.com/title-loans/* (last visited Sept. 14, 2017); PLS Financial Services, ''Title Loans,'' *available at http://pls247.com/il/loans.html* (last visited Mar. 3, 2016). Moneytree offers vehicle title and installment loans in Idaho and Nevada. *See, e.g.,* Money Tree Inc., ''Title Loans (Idaho),'' *available at https://www.moneytreeinc.com/loans/idaho/title-loans* (last isited Mar. 3, 2016); Money Tree Inc., ''Title Loans (Nevada),'' *available at https://www.moneytreeinc.com/loans/nevada/title-loans* (last visited Mar. 3, 2016).

benefits).[24] For most borrowers, the loan is due in a single payment on their payday, although State laws with minimum loan terms—seven days for example—or lender practices may affect the loan duration in individual cases. The Bureau refers to these short-term payday loans available at retail locations as ''storefront payday loans,'' but the requirements for borrowers taking online payday loans are generally similar, as described below. There are now 35 States that either have created a carve-out from their general usury cap for payday loans or have no usury caps on consumer loans.[25] The remaining 15 States and the District of Columbia either ban payday loans or have fee or interest rate caps that payday lenders apparently find too low to sustain their business models. As discussed further below, several of these States previously had authorized payday lending but subsequently changed their laws.

Product definition and regulatory environment. As noted above, payday loans are typically repayable in a single payment on the borrower's next payday. In order to help ensure repayment, in the storefront environment the lender generally holds the borrower's personal check made out to the lender—usually post-dated to the loan due date in the amount of the loan's principal and fees—or the borrower's authorization to electronically debit the funds from her checking account, commonly known as an automated clearing house (ACH) transaction.[26] Payment methods are described in more detail below in part II.D.

Payday loan sizes vary depending on State law limits, individual lender credit models, and borrower demand. Many States set a limit on payday loan size; $500 is a common loan limit although the limits range from $300 to $1,000.[27] In 2013, the Bureau reported that the median loan amount for storefront payday loans was $350, based on supervisory data.[28] This finding is broadly consistent with other studies using data from one or more lenders as well as with self-reported information in surveys of payday borrowers[29] and State regulatory reports.[30]

The fee for a payday loan is generally structured as a percentage or dollar amount per $100 borrowed, rather than a periodic interest rate based on the amount of time the loan is outstanding. Many State laws set a maximum amount for these fees, with 15 percent ($15 per $100 borrowed) being the most common limit.[31] The median storefront payday loan fee is $15 per $100; thus for a $350 loan, the borrower must repay $52.50 in finance charges together with the $350 borrowed for a total repayment amount of $402.50.[32] The annual percentage rate (APR) on a 14-day loan with these terms is 391 percent.[33] For payday borrowers

[24] For convenience, this discussion refers to the next scheduled inflow of income as the consumer's next ''payday'' and the inflow itself as the consumer's ''paycheck'' even though these are misnomers for consumers whose income comes from government benefits.

[25] *See* Pew Charitable Trusts, ''State Payday Loan Regulation and Usage Rates'' (Jan. 14, 2014), *available at http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/state-payday-loan-regulation-and-usage-rates* (for a list of States). Other reports reach slightly different totals of payday authorizing States depending on their categorization methodology. *See, e.g.,* Susanna Montezemolo, ''The State of Lending in America & Its Impact on U.S. Households: Payday Lending Abuses and Predatory Practices,'' at 32–33 (Ctr. for Responsible Lending 2013), *available at http://www.responsiblelending.org/sites/default/files/uploads/10-payday-loans.pdf;* Consumer Fed'n of Am., ''Legal Status of Payday Loans by State,'' *available at http://www.paydayloaninfo.org/state-information* (last visited Apr. 6, 2016) (lists 32 States as having authorized or allowed payday lending). Since publication of these reports, South Dakota enacted a 36 percent usury cap for consumer loans. Press Release, S.D. Dep't of Labor and Reg., ''Initiated Measure 21 Approved'' (Nov. 10, 2016), *available at http://dlr.sd.gov/news/releases16/nr111016_initiated_measure_21.pdf.* Legislation in New Mexico prohibiting short-term payday and vehicle title loans will go into effect on January 1, 2018. Regulatory Alert, N.M. Reg. and Licensing Dep't, ''Small Loan Reforms,'' *available at http://www.rld.state.nm.us/uploads/files/HB%20347%20Alert%20Final.pdf.*

[26] The Bureau is aware from market outreach that at a storefront payday lender's Tennessee branch, almost 100 percent of customers opted to provide ACH authorization rather than leave a post-dated check for their loans. *See also* Speedy Cash, ''Can Anyone Get a Payday Loan?,'' *available at https://www.speedycash.com/faqs/payday-loans/* (last visited Feb. 4, 2016) (''If you choose to apply in one of our payday loan locations, you will need to provide a repayment source which can be a personal check or your bank routing information.''); QC Holdings, Inc., 2014 Annual Report (Form 10–K), at 3, 6 (Mar. 12, 2015); FirstCash, Inc., 2016 Annual Report (Form 10–K), at 21.

[27] At least 19 States cap payday loan amounts between $500 and $600 (Alabama, Alaska, Florida, Hawaii, Iowa, Kansas, Kentucky, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, and Virginia), California limits payday loans to $300 (including the fee), and Delaware caps loans at $1,000. Ala. Code sec. 5–18A–12(a); Alaska Stat. sec. 06.50.410; Cal. Fin. Code sec. 23035(a); Del. Code Ann. tit. 5, sec. 2227(7); Fla. Stat. sec. 560.404(5); Haw. Rev. Stat. sec. 480F–4(c); Iowa Code sec. 533D.10(1)(b); Kan. Stat. Ann. sec. 16a–2–404(1)(c); Ky. Rev. Stat. Ann. sec. 286.9–100(9); Mich. Comp. Laws sec. 487.2153(1); Miss. Code Ann. sec. 75–67–519(2); Mo. Rev. Stat. sec. 408.500(1); Neb. Rev. Stat. sec. 45–919(1)(b); N.D. Cent. Code sec. 13–08–12(3); Ohio Rev. Code Ann. sec. 1321.39(A); Okla. Stat. tit. 59, sec. 3106(7), R.I. Gen. Laws sec. 19–14.4–5.1(a); S.C. Code Ann. sec. 34–39–180(B); Tenn. Code Ann. sec. 45–17–112(o); Va. Code Ann. sec. 6.2–1816(5). States that limit the loan amount to the lesser of a percent of the borrower's income or a fixed-dollar amount include Idaho—25 percent or $1,000, Illinois—25 percent or $1,000, Indiana—20 percent or $550, Washington—30 percent or $700, and Wisconsin—35 percent or $1,500. At least two States cap the maximum payday loan at 25 percent of the borrower's gross monthly income (Nevada and New Mexico). A few States' laws are silent as to the maximum loan amount (Utah and Wyoming). Idaho Code Ann. secs. 28–46–413(1), (2); 815 Ill. Comp. Stat. 122/2–5(e); Ind. Code secs. 24–4.5–7–402, 404; Nev. Rev. Stat. sec. 604A.425(1)(b); N.M. Stat. Ann. sec. 58–15–32(A); Utah Code Ann. sec. 7–23–401; Wash. Rev. Code sec. 31.45.073(2); Wis. Stat. sec. 138.14(12)(b); Wyo. Stat. Ann. sec. 40–14–363. As noted above, the New Mexico statute will be repealed on Jan. 1, 2018. *See* N.M. H.B. 347, 53d Leg., 1st Sess. (N.M. 2017), *available at https://www.nmlegis.gov/Sessions/17%20Regular/final/HB0347.pdf* (hereinafter N.M. H.B. 347).

[28] *CFPB Payday Loans and Deposit Advance Products White Paper,* at 15.

[29] Leslie Parrish & Uriah King, ''Phantom Demand: Short-term Due Date Generates Need for Repeat Payday Loans, Accounting for 76% of Total Volume,'' at 21 (Ctr. for Responsible Lending 2009), *available at http://www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-final.pdf* (reporting $350 as the average loan size); Pew Charitable Trusts, ''Payday Lending in America: Who Borrows, Where They Borrow, and Why,'' at 9 (Report 3, 2013), *available at http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf* (reporting $375 as the average). Leslie Parrish & Uriah King, Ctr.

[30] *See, e.g.,* Ill. Dep't. of Fin. & Prof. Reg., ''Illinois Trends Report All Consumer Loan Products Through December 2015,'' at 15 (Apr. 14, 2016), *available at http://www.idfpr.com/DFI/CCD/pdfs/IL_Trends_Report%202015-%20FINAL.pdf?ActID=1204&ChapterID=20)* ($355.85 is the average for Illinois); Idaho Dep't. of Fin., ''Idaho Credit Code 'Fast Facts','' at 5 (Fiscal and Annual Report Data as of January 1, 2016), *available at https://www.finance.idaho.gov/ConsumerFinance/Documents/Idaho-Credit-Code-Fast-Facts-With-Fiscal-Annual-Report-Data-01012016.pdf* ($350 is the average for Idaho); Wash. State Dep't. of Fin. Insts., ''2015 Payday Lending Report,'' at 6 (2015), *available at http://www.dfi.wa.gov/sites/default/files/reports/2015-payday-lending-report.pdf* ($387.35 is the average for Washington). For example: $355.85 (Illinois average, *see* Ill.

[31] Of the States that expressly authorize payday lending, Rhode Island has the lowest cap at 10 percent of the loan amount. Florida has the same fee amount but also allows a flat $5 verification fee. Oregon's fees are $10 per $100 capped at $30 plus 36 percent interest. Some States have tiered caps depending on the size of the loan. Generally, in these States the cap declines with loan size. However, in Mississippi, the cap is $20 per $100 for loans under $250 and $21.95 for larger loans (up to the State maximum of $500). Six States do not cap fees on payday loans or are silent on fees (Delaware, Idaho, Nevada, and Texas (no cap on credit access business fees) and Utah and Wisconsin (silent on fees)). Depending on State law, the fee may be referred to as a ''charge,'' ''rate,'' ''interest,'' or other similar term. R.I. Gen. Laws sec. 19–14.4–4(4); Fla. Stat. sec. 560.404(6); Or. Rev. Stat. sec. 725A.064(1)–()–(2); Miss. Code Ann. sec. 75–67–519(4); Del. Code Ann. tit. 5, sec. 2229; Idaho Code Ann. sec. 28–46–412(3); Tex. Fin. Code Ann. sec. 393.602(b); Utah Code Ann. sec. 7–23–401; Wis. Stat. sec. 138.14(10)(a).

[32] ''CFPB Payday Loans and Deposit Advance Products White Paper,'' at 15–17.

[33] Throughout part II, APR refers to the annual percentage rate calculated as required by the Truth in Lending Act, 15 U.S.C. 1601 *et seq.* and

Continued

who receive monthly income and thus receive a 30-day or monthly payday loan—many of whom are Social Security recipients [34]—a $15 per $100 charge on a $350 loan for a term of 30 days equates to an APR of about 180 percent. The Bureau has found the median loan term for a storefront payday loan to be 14 days, with an average term of 18.3 days. The longer average loan duration is due to State laws that require minimum loan terms that may extend beyond the borrower's next pay date.[35] Fees and loan amounts are higher for online loans, described in more detail below.

On the loan's due date, the terms of the loan obligate the borrower to repay the loan in full. Although the States that created exceptions to their usury limits for payday lending generally did so on the theory these were short-term loans to which the usual usury rules did not easily apply, in 18 of the States that authorize payday lending the lender is permitted to roll over the loan when it comes due. A rollover occurs when, instead of repaying the loan in full at maturity, the consumer pays only the fees due and the lender agrees to extend the due date.[36] By rolling over, the loan repayment of the principal is extended for another period of time, usually equivalent to the original loan term, in return for the consumer's agreement to pay a new set of fees calculated in the same manner as the initial fees (*e.g.,* 15 percent of the loan principal). The rollover fee is not applied to reduce the loan principal or amortize the loan. As an example, if the consumer borrows $300 with a fee of $45 (calculated as $15 per $100 borrowed), the consumer will owe $345 on the due date, typically 14 days later. On the due date, if the consumer cannot afford to repay the entire $345 due or is otherwise offered the option to roll over the loan, she will pay the lender $45 for another 14 days. On the 28th day, the consumer will owe the original $345 and if she pays the loan in full then, will have paid a total of $90 for the loan.

In some States in which rollovers are permitted they are subject to certain limitations such as a cap on the number of rollovers or requirements that the borrower amortize—repay part of the original loan amount—on the rollover. Other States have no restrictions on rollovers. Specially, 17 of the States that authorize single-payment payday lending prohibit lenders from rolling over loans and 11 more States impose some rollover limitations.[37] However, in most States where rollovers are prohibited or limited, there is no restriction on the lender immediately making a new loan to the consumer (with new fees) after the consumer has repaid the prior loan. New loans made the same day, or ''back-to-back'' loans, effectively replicate a rollover because the borrower remains in debt to the lender on the borrower's next payday.[38]

Ten States have implemented a cooling-off period before a lender may make a new loan. The most common cooling-off period is one day, although some States have longer periods following a specified number of rollovers or back-to-back loans.[39]

At least 17 States have adopted laws that require payday lenders to offer borrowers the option of taking an extended repayment plan when they encounter difficulty in repaying payday loans.[40] Details about the extended repayment plans vary including: Borrower eligibility (in some States only prior to the lender instituting collections or litigation); how borrowers may elect to participate in repayment plans; the number and timing of payments; the length of plans; permitted fees for plans; requirements for credit counseling; requirements to report plan payments to a statewide database; cooling-off or ''lock-out'' periods for new loans after completion of plans; and the consequences of plan defaults.

Regulation Z, 12 CFR part 1026, except where otherwise specified.

[34] ''CFPB Payday Loans and Deposit Advance Products White Paper,'' at 16, 19 (33 percent of payday loans borrowers receive income monthly; 18 percent of payday loan borrowers are public benefits recipients, largely from Social Security including Supplemental Security Income and Social Security Disability, typically paid on a monthly basis).

[35] For example, Washington requires the due date to be on or after the borrower's next pay date but if the pay date is within seven days of taking out the loan, the due date must be on the second pay date after the loan is made. Wash. Rev. Code sec. 31.45.073(2). A number of States set minimum loan terms, some of which are tied directly to the consumer's next payday.

[36] This rulemaking uses the term ''rollover'' but this practice is sometimes described under State law or by lenders as a ''renewal'' or an ''extension.''

[37] States that prohibit rollovers include California, Florida, Hawaii, Illinois, Indiana, Kentucky, Michigan, Minnesota, Mississippi, Nebraska, New Mexico, Oklahoma, South Carolina, Tennessee, Virginia, Washington, and Wyoming. Cal. Fin. Code sec. 23037(a); Fla. Stat. sec. 560.404(18); Haw. Rev. Stat. sec. 480F–4(d); 815 Ill. Comp. Stat. 122/2–30; Ind. Code sec. 24–4.5–7–402(7); Ky. Rev. Stat. Ann. sec. 286.9–100(14); Mich. Comp. Laws sec. 487.2155(1); Minn. Stat. sec. 47.60(2)(f); Miss. Code Ann. sec. 75–67–519(5); Neb. Rev. Stat. sec. 45–919(1)(f); N.M. Stat. Ann. sec. 58–15–34(A) (to be repealed January 1, 2018 as noted above); Okla. Stat. tit. 59, sec. 3109(A); S.C. Code Ann. sec. 34–39–180(F); Tenn. Code Ann. sec. 45–17–112(q); Va. Code Ann. sec. 6.2–1816(6); Wash. Rev. Code sec. 31.45.073(2); Wyo. Stat. Ann. sec. 40–14–364. Other States such as Iowa and Kansas restrict a loan from being repaid with the proceeds of another loan. Iowa Code sec. 533D.10(1)(e); Kan. Stat. Ann. sec. 16a–2–404(6). Other States that permit some degree of rollovers include: Alabama (one); Alaska (two); Delaware (four); Idaho (three); Missouri (six if there is at least 5 percent principal reduction on each rollover); Nevada (may extend loan up to 60 days after the end of the initial loan term); North Dakota (one); Oregon (two); Rhode Island (one); Utah (allowed up to 10 weeks after the execution of the first loan); and Wisconsin (one). Ala. Code sec. 5–18A–12(b); Alaska Stat. sec. 06.50.470(b); Del. Code Ann. tit. 5, sec. 2235A(a)(2); Idaho Code Ann. sec. 28–46–413(9); Mo. Rev. Stat. sec. 408.500(6); Nev. Rev. Stat. sec. 604A.480(1); N.D. Cent. Code sec. 13–08–12(12); Or. Rev. Stat. sec. 725A.064(6); R.I. Gen. Laws sec. 19–14.4–5.1(g); Utah Code Ann. sec. 7–23–401(4)(b); Wis. Stat. sec. 138.14 (12)(a).

[38] *See* CFPB Payday Loans and Deposit Advance Products White Paper, at 94; Julie A. Meade, Adm'r of the Colo. Unif. Consumer Credit Code Unit, Colo. Dep't of Law, ''Payday Lending Demographic and Statistical Information: July 2000 through December 2012,'' at 24 (Apr. 10, 2014), *available at http://www.coloradoattorneygeneral.gov/sites/default/files/contentuploads/cp/ConsumerCreditUnit/UCCC/AnnualReportComposites/DemoStatsInfo/ddlasummary2000-2012.pdf*; Pew Charitable Trusts, ''Payday Lending in America: Who Borrows, Where They Borrow, and Why,'' at 15 (Report 1, 2012), *available at http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf*; Leslie Parrish & Uriah King, ''Phantom Demand: Short-term Due Date Generates Need for Repeat Payday Loans, Accounting for 76% of Total Volume,'' at 7 (Ctr. for Responsible Lending 2009), *available at http://www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-final.pdf.*

[39] States with cooling-off periods include: Alabama (next business day after a rollover is paid in full); Florida (24 hours); Illinois (seven days after a consumer has had payday loans for more than 45 days); Indiana (seven days after five consecutive loans); New Mexico (10 days after completing an extended payment plan) (to be repealed Jan. 1, 2018 as noted above); North Dakota (three business days); Ohio (one day with a two loan limit in 90 days, four per year); Oklahoma (two business days after fifth consecutive loan); Oregon (seven days); South Carolina (one business day between all loans and two business days after seventh loan in a calendar year); Virginia (one day between all loans, 45 days after fifth loan in a 180-day period, and 90 days after completion of an extended payment plan or extended term loan); and Wisconsin (24 hour after renewals). Ala. Code sec. 5–18A–12(b); Fla. Stat. sec. 560.404(19); 815 Ill. Comp. Stat. 122/2–5(b); Ind. Code sec. 24–4.5–7–401(2); N.M. Stat. Ann. sec. 58–15–36; N.D. Cent. Code sec. 13–08–12(4); Ohio Rev. Code Ann. sec. 1321.41(E), (N), (R); Okla. Stat. tit. 59, sec. 3110; Or. Rev. Stat. sec. 725A.064(7); S.C. Code Ann. sec. 34–39–270(A), (B); Va. Code Ann. sec. 6.2–1816(6); Wis. Stat. sec. 138.14(12)(a).

[40] States with statutory extended repayment plans include: Alabama, Alaska, Florida, Idaho, Illinois, Indiana, Louisiana, Michigan (fee permitted), Nevada, New Mexico (to be repealed Jan. 1, 2018 as noted above), Oklahoma (fee permitted), South Carolina, Utah, Virginia, Washington, Wisconsin, and Wyoming. Florida also requires that as a condition of providing a repayment plan (called a grace period), borrowers make an appointment with a consumer credit counseling agency and complete counseling by the end of the plan. Ala. Code sec. 5–18A–12(c); Alaska Stat. sec. 06.50.550(a); Fla. Stat. sec. 560.404(22)(a); Idaho Code Ann. sec. 28–46–414; 815 Ill. Comp. Stat. 122/2–40; Ind. Code sec. 24–4.5–7–401(3); La. Rev. Stat. Ann. sec. 9:3578.4.1; Mich. Comp. Laws sec. 487.2155(2); Nev. Rev. Stat. sec. 604A.475(1); N.M. Stat. Ann. sec. 58–15–35; Okla. Stat. tit. 59, sec. 3109(D); S.C. Code Ann. sec. 34–39–280; Utah Code Ann. sec. 7–23–403; Va. Code Ann. sec. 6.2–1816(26); Wash. Rev. Code sec. 31.45.084(1); Wis. Stat. sec. 138.14(11)(g); Wyo. Stat. Ann. sec. 40–14–366(a).

Two States more generally allow lenders the discretion to offer borrowers an extension of time to repay or enter into workout agreements with borrowers having repayment difficulties.[41] The effects of these various restrictions are discussed further below in Market Concerns—Underwriting.

Industry size and structure. There are various estimates as to the number of consumers who use payday loans on an annual basis. One survey found that 2.5 million households (2 percent of U.S. households) used payday loans in 2015.[42] In another survey, 3.4 percent of households reported taking out a payday loan in the past year.[43] These surveys referred to payday loans generally, and did not specify whether they were referring to loans made online or at storefront locations. One report estimated the number of individual borrowers, rather than households, was higher at approximately 12 million annually and included both storefront and online loans.[44] See Market Concerns—Underwriting for additional information on borrower characteristics.

There are several ways to gauge the size of the storefront payday loan industry. Typically, the industry has been measured by counting the total dollar value of each loan made during the course of a year, counting each rollover, back-to-back loan or other re-borrowing as a new loan that is added to the total. By this metric, one industry analyst estimated that from 2009 to 2014, storefront payday lending generated approximately $30 billion in new loans per year and that by 2015 the volume had declined to $23.6 billion,[45] although these numbers may include products other than single-payment loans. The analyst's estimate for combined storefront and online payday loan volume was $45.3 billion in 2014 and $39.5 billion in 2015, down from a peak of about $50 billion in 2007.[46]

Alternatively, the industry can be measured by calculating the dollar amount of loan balances outstanding. Given the amount of payday loan re-borrowing, which results in the same funds of the lender being used to finance multiple loan originations to the same borrower, the dollar amount of loan balances outstanding may provide a more nuanced sense of the industry's scale. Using this metric, the Bureau estimates that in 2012, storefront payday lenders held approximately $2 billion in outstanding single-payment loans.[47] In 2015, industry revenue (fees paid on storefront payday loans) was an estimated $3.6 billion, representing 15 percent of loan originations. Combined storefront and online payday revenue was estimated at $8.7 billion in 2014 and $6.7 billion in 2015, down from a peak of over $9 billion in 2012.[48]

In the last several years, it has become increasingly difficult to identify the largest payday lenders due to firm mergers, diversification by many lenders into a range of products including installment loans and retraction by others into pawn loans, and the lack of available data because most firms are privately held. However, there are at least 10 lenders with approximately 200 or more storefront locations.[49] Only a few of these firms are publicly traded companies.[50] Most large payday lenders are privately held,[51] and the remaining payday loan stores are owned by smaller regional or local entities. The Bureau estimates there are about 2,400 storefront payday lenders that are small entities as defined by the Small Business Administration (SBA).[52] Several industry commenters, an industry trade association commenter, and a number of payday

[41] California (no fees permitted) and Delaware are States that permit payday lenders to extend the time for repayment of payday loans. Cal. Fin. Code sec. 23036(b); Del. Code Ann. tit. 5, sec. 2235A(a)(2).

[42] Fed. Deposit Ins. Corp., ''2015 FDIC National Survey of Unbanked and Underbanked Households,'' at 2, 34 (Oct. 20, 2016), *available at https://www.fdic.gov/householdsurvey/2015/2015report.pdf.*

[43] Jesse Bricker, et al., ''Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances,'' at 27 (Bd. of Governors of the Fed. Reserve Sys., 103 Fed. Reserve Bulletin No. 3, 2017), *available at https://www.federalreserve.gov/publications/files/scf17.pdf.*

[44] Pew Charitable Trusts, ''Payday Lending in America: Who Borrows, Where They Borrow, and Why,'' at 4 (Report 3, 2013), *available at http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf.*

[45] John Hecht, ''The State of Short-Term Credit Amid Ambiguity, Evolution and Innovation'' (2016) (Jefferies LLC, slide presentation) (on file); John Hecht, ''The State of Short-Term Credit in a Constantly Changing Environment'' at 4 (2015) (Jeffries LLC, slide presentation) (on file).

[46] Hecht, ''Short-Term Credit Amid Ambiguity.''

[47] The Bureau's staff estimate is based on public company financial information, confidential information gathered in the course of statutory functions, and industry analysts' reports. The estimate is derived from lenders' single-payment payday loans gross receivables and gross revenue and industry analysts' reports on loan volume and revenue. No calculations were done for 2013 to 2016, but that estimate would be less than $2 billion due to changes in the market as the industry has shifted away from single-payment payday loans to products discussed below.

[48] Hecht, ''Short-Term Credit Amid Ambiguity.''

[49] These firms include: ACE Cash Express, Advance America, Amscot Financial, Axcess Financial (CNG Financial, Check 'n Go, Allied Cash), Check Into Cash, Community Choice Financial (Checksmart), CURO Financial Technologies (Speedy Cash/Rapid Cash), DFC Global Corp (Money Mart), FirstCash, and QC Holdings. *See* Ace Cash Express, ''Store Locator,'' *available at https://www.acecashexpress.com/locations*; Advance America, ''Find an Advance America Store Location,'' *available at https://www.advanceamerica.net/locations/find*; Amscot Financial, Inc., ''Amscot Locations,'' *available at https://www.amscot.com/locations.aspx*; Check 'n Go, ''State Center,'' *available at https://www.checkngo.com/resources/state-center*; Allied Cash Advance, ''Allied Cash Advance Store Directory,'' *available at https://locations.alliedcash.com/index.html*; Check Into Cash, ''Payday Loan Information By State,'' *available at https://checkintocash.com/payday-loan-information-by-state*; Community Choice Financial (CheckSmart), ''Locations,'' *available at https://www.ccfi.com/locations/*; SpeedyCash, ''Speedy Cash Stores Near Me,'' *available at https://www.speedycash.com/find-a-store*; DFC Global Corp., ''Home,'' *available at http://www.dfcglobalcorp.com/index.html*; FirstCash Inc., ''Find a Location Near You,'' *available at http://www.firstcash.com/*; QC Holdings, Inc., ''Branch Locator,'' *available at https://www.qcholdings.com/branchlocator.aspx* (all sites last visited Jul. 26, 2017).

[50] The publicly traded firms are Community Choice Financial Inc./Cash Central/Checksmart (CCFI), EZCORP, Inc. (EZPW), FirstCash Inc. (FCFS), and QC Holdings (QCCO). As noted above, in September 2016, FirstCash Financial Services merged with Cash America, resulting in the company FirstCash Inc. Prior to the merger, in November 2014, Cash America migrated its online loans to a spin-off company, Enova. Cash America International, Inc., 2015 Annual Report (Form 10–K), at 3 (Dec. 14, 2016). Both FCFS and Cash America had been deemphasizing payday lending in the U.S., and shifting towards pawn. In 2016, the new company, FirstCash, had only 45 stand-alone consumer loan locations, in Texas, Ohio, and California, and 326 pawn locations that also offered consumer loans, compared to 1,085 pawn locations. Only 4 percent of its revenue was from non-pawn consumer loans and credit services operations. (Credit services organizations are described below.) FirstCash Inc., 2016 Annual Report (Form 10–K), at 5, 7. In 2015, EZCORP exited payday, installment, and auto title lending, focusing domestically on pawn lending. EZCORP, Inc., 2016 Annual Report (Form 10–K), at 3 (Dec. 14, 2016). QC Holdings delisted from Nasdaq in February 2016 and is traded over-the-counter. QC Holdings, Inc., Suspension of Duty to File Reports Under Sections 13 and 15(d) (Form 15).

[51] The larger privately held payday lending firms include Advance America, ACE Cash Express, Axcess Financial (CNG Financial, Check 'n Go, Allied Cash), Check Into Cash, DFC Global (Money Mart), PLS Financial Services, and Speedy Cash Holdings Corporation. *See* Susanna Montezemolo, ''Payday Lending Abuses and Predatory Practices: The State of Lending in America & Its Impact on U.S. Households'' at 9–10 (Ctr. for Responsible Lending, 2013); John Hecht, ''Alternative Financial Services: Innovating to Meet Customer Needs in an Evolving Regulatory Framework'' (2014) (Stephens, Inc., slide presentation) (on file).

[52] Bureau staff estimated the number of storefront payday lenders using licensee information from State financial regulators, firm revenue information from public filings and non-public sources, and, for a small number of States, industry market research relying on telephone directory listings from Steven Graves and Christopher Peterson, *available at http://www.csun.edu/~sg4002/research/data/US_pdl_addr.xls.* Based on these sources, there are approximately 2,503 storefront payday lenders, including those operating primarily as loan arrangers or brokers, in the United States. Based on the publicly-available revenue information, at least 56 of the firms have revenue above the small entity threshold. Most of the remaining firms operate a very small number of storefronts. Therefore, while some of the firms without publicly available information may have revenue above the small entity threshold, in the interest of being inclusive they are all assumed to be small entities.

lenders noted that they offer non-credit products and services at their locations including check cashing, money transmission and bill payments, sale of prepaid cards, and other services, some of which require them to comply with other laws as ''money service businesses.''

According to one industry analyst, there were an estimated 16,480 payday loan stores in 2015 in the United States, a decline from 19,000 stores in 2011 and down from the industry's 2007 peak of 24,043 storefronts.[53]

The average number of payday loan stores in a county with a payday loan store is 6.32.[54] The Bureau has analyzed payday loan store locations in States which maintain lists of licensed lenders and found that half of all stores are less than one-third of a mile from another store, and three-quarters are less than a mile from the nearest store.[55] Even the 95th percentile of distances between neighboring stores is only 4.3 miles. Stores tend to be closer together in counties within metropolitan statistical areas (MSA).[56] In non-MSA counties the 75th percentile of distance to the nearest store is still less than one mile, but the 95th percentile is 22.9 miles.

Research and the Bureau's own market outreach indicate that payday loan stores tend to be relatively small with, on average, three full-time equivalent employees.[57] An analysis of loan data from 29 States found that the average store made 3,541 advances in a year.[58] Given rollover and re-borrowing rates, a report estimated that the average store served fewer than 500 customers per year.[59]

Marketing, underwriting, and collections practices. Payday loans tend to be marketed as a short-term bridge to cover emergency expenses. For example, one lender suggests that, for consumers who have insufficient funds on hand to meet such an expense or to avoid a penalty fee, late fee, or utility shut-off, a payday loan can ''come in handy'' and ''help tide you over until your next payday.''[60] Some lenders offer new borrowers their initial loans at no fee (''first loan free'') to encourage consumers to try a payday loan.[61] Stores are typically located in high-traffic commuting corridors and near shopping areas where consumers obtain groceries and other staples.[62]

The evidence of price competition among payday lenders is mixed. In their financial reports, publicly traded payday lenders have reported their key competitive factors to be non-price related. For instance, they cite location, customer service, and convenience as some of the primary factors on which payday lenders compete with one another, as well as with other financial service providers.[63] Academic studies have found that, in States with rate caps, loans are almost always made at the maximum rate permitted.[64] Another study likewise found that in States with rate caps, firms lent at the maximum permitted rate, and that lenders operating in multiple States with varying rate caps raise their fees to those caps rather than charging consistent fees company-wide. The study found, however, that in States with no rate caps, different lenders operating in those States charged different rates. The study reviewed four lenders that operate in Texas[65] and observed differences in the cost to borrow $300 per two-week pay period: two lenders charged $61 in fees, one charged $67, and another charged $91, indicating some level of price variation between lenders (ranging from about $20 to $32 per $100 borrowed).[66] One industry commenter cited the difference in average loan pricing between storefront (generally lower) and online loans (generally higher), as evidence of price competition but that is more likely due to the fact that state-licensed lenders are generally constrained in the amount they can charge rather than competitive strategies adopted by those lenders. That commenter also notes as evidence of price competition that it sometimes discounts its own loans from its advertised prices; the comment did not address whether such discounts were offered to meet competition.

The application process for a payday loan is relatively simple. For a storefront payday loan, a borrower must generally provide some verification of income (typically a pay stub) and evidence of a personal deposit account.[67] Although a few States impose limited requirements that lenders consider a borrower's ability to repay,[68] storefront payday

[53] Hecht, ''*Short-Term Credit Amid Ambiguity,*'' at 7. Although there is no estimate for 2016, the number of storefronts offering payday loans is likely smaller due to the regulatory changes in South Dakota, the exit of EZCORP from payday lending, and the merger of First Cash Financial and Cash America, and its shift away from payday lending. However, it is difficult to precisely measure the number of stores that have shifted from payday to pawn lending, rather than closing. By way of comparison, in 2015 there were 14,259 McDonald's fast food outlets in the United States. McDonald's Corp., 2015 Annual Report (Form 10–K), at 23 (Feb. 25, 2016).

[54] James R. Barth, et al., ''Do State Regulations Affect Payday Lender Concentration?,'' at 12 (2015), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2581622.*

[55] CFPB Report on Supplemental Findings, at 90.

[56] An MSA is a geographic entity delineated by the Office of Management and Budget. An MSA contains a core urban area of 50,000 or more in population. *See* U.S. Census Bureau, ''Metropolitan and Micropolitan,'' *available at http://www.census.gov/population/metro/* (last visited Apr. 7, 2016).

[57] Mark Flannery & Katherine Samolyk, ''Payday Lending: Do the Costs Justify the Price?,'' (FDIC Ctr. for Fin. Res., Working Paper No. 2005–09, 2005), *available at https://www.fdic.gov/bank/analytical/cfr/2005/wp2005/cfrwp_2005-09_flannery_samolyk.pdf.*

[58] Susanna Montezemolo, ''Payday Lending Abuses and Predatory Practices: The State of Lending in America & Its Impact on U.S. Households'' at 26 n.2 (Ctr. for Responsible Lending, 2013), *available at http://www.responsiblelending.org/state-of-lending/reports/10-Payday-Loans.pdf.*

[59] Pew Charitable Trusts, ''Payday Lending in America: Policy Solutions,'' at 18 (Report 3, 2013), available at *http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2013/pewpaydaypolicysolutionsoct2013pdf.pdf.*

[60] Cash America Int'l Inc., ''Cash Advance/Short-term Loans,'' *available at http://www.cashamerica.com/LoanOptions/CashAdvances.aspx* (last visited Apr. 7, 2016).

[61] *See, e.g.,* Instant Cash Advance Corp., ''Instant PayDay,'' *available at http://www.instantcashadvancecorp.com/free-loan-offer-VAL312.php* (introductory offer of a free (no fee) cash advance of $200) (storefront payday loans); Check N Title Loans, ''First Loan Free,'' *available at http://www.checkntitle.com/* (storefront payday and title loans); AmeriTrust Financial LLC, ''1st Advance Free,'' available at *http://www.americantrustcash.com/payday-loans* (storefront payday, title, and installment loans, first loan free on payday loans) (all firm Web sites last visited on Dec. 21, 2015).

[62] *See* FirstCash, Inc., 2016 Annual Report (Form 10–K), at 9; QC Holdings, Inc., 2014 Annual Report (Form 10–K), at 11; Community Choice Fin. Inc., 2016 Annual Report (Form 10–K), at 6.

[63] *See* QC Holdings, Inc., 2014 Annual Report (Form 10–K), at 12–13.

[64] Robert DeYoung & Ronnie Phillips, ''Payday Loan Pricing,'' at 27–28, (Fed. Reserve Bank of Kan. City, Working Paper No. RWP 09–07, 2009), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1066761* (studying rates on loans in Colorado between 2000 and 2006); Mark Flannery & Katherine Samolyk, ''Payday Lending: Do the Costs Justify the Price?,'' at 9–10 (FDIC Ctr. for Fin. Res., Working Paper No. 2005–09, 2005), *available at https://www.fdic.gov/bank/analytical/cfr/2005/wp2005/cfrwp_2005-09_flannery_samolyk.pdf.*

[65] In Texas, these lenders operate as credit services organizations or loan arrangers with no fee caps, described in more detail below. Pew Charitable Trusts, ''How State Rate Limits Affect Payday Loan Prices,'' (Apr. 2014), *available at http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs/content-level_pages/fact_sheets/stateratelimitsfactsheetpdf.pdf.*

[66] Pew Charitable Trusts, ''How State Rate Limits Affect Payday Loan Prices,'' (Apr. 2014), *available at http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs/content-level_pages/fact_sheets/stateratelimitsfactsheetpdf.pdf.*

[67] *See, e.g.,* Check Into Cash, ''Frequently Asked Questions and Policies of Check into Cash,'' *available at https://checkintocash.com/faqs/in-store-cash-advance/* (last visited Sept. 14, 2017) (process as described by one lender).

[68] For example, Utah requires lenders to make an inquiry to determine that the borrower has the ability to repay the loan, which may include rollovers or extended payment plans. This determination may be made through borrower affirmation of ability to repay, proof of income, repayment history at the same lender, or information from a consumer reporting agency.

lenders generally do not consider a borrower's other financial obligations or require collateral (other than the check or electronic debit authorization) for the loan. Most storefront payday lenders do not consider traditional credit reports or credit scores when determining loan eligibility, nor do they report any information about payday loan borrowing history to the nationwide consumer reporting agencies, TransUnion, Equifax, and Experian.[69] From market outreach activities and confidential information gathered in the course of statutory functions, the Bureau is aware that a number of storefront payday lenders obtain data from one or more specialty consumer reporting agencies during the loan application process to check for previous payday loan defaults, identify recent inquiries that suggest an intention to not repay the loan, and perform other due diligence such as identity and deposit account verification. Some storefront payday lenders use analytical models and scoring that attempt to predict likelihood of default.[70] Through market outreach and confidential information gathered in the course of statutory functions, the Bureau is aware that many storefront payday lenders only conduct their limited underwriting for first-time borrowers or those returning after an absence.

From market outreach, the Bureau is aware that the specialty consumer reporting agencies contractually require any lender that obtains data to also report data to them, although compliance may vary. Reporting usually occurs on a real-time or same-day basis. Separately, 14 States require lenders to check statewide databases before making each loan in order to ensure that their loans comply with various State restrictions.[71] These States likewise require lenders to report certain lending activity to the database, generally on a real-time or same-day basis. As discussed in more detail above, these State restrictions may include prohibitions on consumers having more than one payday loan at a time, cooling-off periods, or restrictions on the number of loans consumers may take out per year.

Although a consumer is generally required when obtaining a loan to provide a post-dated check or authorization for an electronic debit of the consumer's account which could be presented to the consumer's bank,[72] consumers in practice generally return to the store when the loan is due to ''redeem'' the check either by repaying the loan or by paying the finance charges and rolling over the loan.[73] For example, a major payday lender with a predominantly storefront loan portfolio reported that in 2014, over 90 percent of its payday loan volume was repaid in cash at its branches by consumers either paying in full or by paying the ''original loan fee'' (finance charges) and rolling over the loan (signing a new promissory note and leaving a new check or payment authorization).[74]

An industry commenter stated that repayment in cash reflects customers' preferences. However, borrowers are strongly encouraged and in some cases required by lenders to return to the store when payment is due. Some lenders give borrowers appointment cards with a date and time to encourage them to return with cash. For example, one major storefront payday lender explained that after loan origination ''the customer then makes an appointment to return on a specified due date, typically his or her next payday, to repay the cash advance . . . . Payment is usually made in person, in cash at the center where the cash advance was initiated . . . .'' [75]

The Bureau is aware, from confidential information gathered in the course of statutory functions and from market outreach, that lenders routinely make reminder calls to borrowers a few days before loan due dates to encourage borrowers to return to the store. One large lender reported this practice in a public filing.[76] Another storefront payday lender requires its borrowers to return to the store to repay. Its Web site states: ''All payday loans must be repaid with either cash or money order. Upon payment, we will return your original check to you.'' [77]

The Bureau is also aware, from confidential information gathered in the course of statutory functions, that one or more storefront payday lenders have operating policies that specifically state that cash is preferred because only half of their customers' checks would clear if deposited on the loan due dates. Encouraging or requiring borrowers to return to the store on the due date provides lenders an opportunity to offer borrowers the option to roll over the loan or, where rollovers are prohibited by State law, to re-borrow following repayment or after the expiration of any cooling-off period. Most storefront lenders examined by the Bureau employ monetary incentives that reward employees and store managers for loan volumes, although one industry commenter described the industry's incentives to employees as rewards for increases in net revenue. Since as discussed below, a majority of loans result from rollovers of existing loans or re-borrowing contemporaneously with or shortly after loans have been repaid, rollovers and re-borrowing contribute substantially to employees'

Utah Code sec. 7–23–401. Missouri requires lenders to consider borrower financial ability to reasonably repay under the terms of the loan contract, but does not specify how lenders may satisfy this requirement. Mo. Rev. Stat sec. 408.500(7). Effective July 1, 2017, Nevada lenders must assess borrowers' reasonable ability to repay by considering, to the extent available, their current or expected income; current employment status based on a pay stub, bank deposit, or other evidence; credit history; original loan amount due, or for installment loans or potential repayment plans, the monthly payment amount; and other evidence relevant to ability to repay including bank statements and borrowers' written representations. Other States prohibit loans that exceed a certain percentage of the borrower's gross monthly income (generally between 20 and 35 percent) as a proxy for ability to repay as described above.

[69] *See, e.g.,* Neil Bhutta, *et al.,* ''Payday Loan Choices and Consequences,'' 47 J. of Money, Credit and Banking 223 (2015).

[70] *See, e.g.,* Advance America, ''FAQs on Payday Loans/Cash Advances: Is my credit score checked before receiving an in-store Payday Loan?,'' *available at https://www.advanceamerica.net/questions/payday-loans-cash-advances* (last visited May 10, 2017) (the custom scoring model described by one lender).

[71] The States with databases are Alabama, Delaware, Florida, Illinois Indiana, Kentucky, Michigan, New Mexico (to be repealed Jan. 1, 2018 as noted above), North Dakota, Oklahoma, South Carolina, Virginia, Washington, and Wisconsin. Illinois also requires use of its database for payday installment loans, vehicle title loans, and some installment loans. Some State laws allow lenders to charge borrowers a fee to access the database that may be set by statute. Ala. Code sec. 5–18A–13(o); Del. Code Ann. tit. 5, sec. 2235B; Fla. Stat. sec. 560.404(23); 815 Ill. Comp. Stat. 122/2–15; Ind. Code sec. 24–4.5–7–404(4); Ky. Rev. Stat. Ann. sec. 286.9–100(19)(b); Mich. Comp. Laws sec. 487.2142; N.M. Stat. Ann. sec. 58–15–37(B); N.D. Cent. Code sec. 13–08–12(4); Okla. Stat. tit. 59, sec. 3109(B)(2)(b); S.C. Code Ann. sec. 34–39–175; Va. Code Ann. sec. 6.2–1810; Wash. Rev. Code sec. 31.45.093; Wis. Stat. sec. 138.14(14).

[72] Payments may also be taken from the consumer's debit card. *See, e.g.,* All American Check Cashing, Inc., Miss. Dep't of Banking and Consumer Fin., Administrative Order, Cause No. 2016–001, May 11, 2017, *available at http://www.dbcf.ms.gov/documents/actions/consumerfin/aa0517.pdf.*

[73] According to the Bureau's market outreach, if borrowers provided ACH authorization and return to pay the loan in cash, the authorization may be returned to them or voided.

[74] QC Holdings, 2014 Annual Report (Form 10–K), at 7.

[75] Advance America, 2011 Annual Report (Form 10–K) at 45 (Mar. 15, 2012). *See also* Check Into Cash, ''Cash Advance Loan FAQs, What is a cash advance?,'' *available at https://checkintocash.com/faqs/in-store-cash-advance/* (last visited Feb. 4, 2016) (''We hold your check until your next payday, at which time you can come in and pay back the advance.'').

[76] When Advance America was a publicly traded corporation, it reported: ''The day before the due date, we generally call the customer to confirm their payment due date.'' Advance America, 2011 Annual Report (Form 10–K), at 11.

[77] Instant Cash Advance, ''How Cash Advances Work,'' *available at http://www.instantcashadvancecorp.com/services/payday-loans/* (last visited July 17, 2017).

compensation. From confidential information gathered in the course of statutory functions, the Bureau is aware that rollover and re-borrowing offers are made when consumers log into their accounts online, during ''courtesy calls'' made to remind borrowers of upcoming due dates, and when borrowers repay in person at storefront locations. In addition, some lenders train their employees to offer rollovers during courtesy calls when borrowers notified lenders that they had lost their jobs or suffered pay reductions.

Store personnel often encourage borrowers to roll over their loans or to re-borrow, even when consumers have demonstrated an inability to repay their existing loans. In an enforcement action, the Bureau found that one lender maintained training materials that actively directed employees to encourage re-borrowing by struggling borrowers. It further found that if a borrower did not repay or pay to roll over the loan on time, store personnel would initiate collections. Store personnel or collectors would then offer the option to take out a new loan to pay off an existing loan, or refinance or extend the loan as a source of relief from the potentially negative outcomes (*e.g.,* lawsuits, continued collections). This ''cycle of debt'' was depicted graphically as part of ''The Loan Process'' in the company's new hire training manual.[78] In Mississippi, another lender employed a companywide practice in which store personnel encouraged borrowers with monthly income or benefits payments to use the proceeds of one loan to pay off another loan, although State law prohibited these renewals or rollovers.[79]

In addition, though some States require lenders to offer borrowers the option of extended repayment plans and some trade associations have designated provision of such plans as a best practice, individual lenders may often be reluctant to offer them. In Colorado, for instance, some payday lenders reported, prior to a regulatory change in 2010, that they had implemented practices to restrict borrowers from obtaining the number of loans needed to be eligible for the State-mandated extended payment plan option and that some lenders had banned borrowers who had exercised their rights to elect payment plans from taking new loans.[80] The Bureau is also aware, from confidential information gathered in the course of statutory functions, that one or more lenders used training manuals that instructed employees not to mention these plans until after employees first offered rollovers, and then only if borrowers specifically asked about the plans. Indeed, details on implementation of the repayment plans that have been designated by two national trade associations for storefront payday lenders as best practices are unclear, and in some cases place a number of limitations on exactly how and when a borrower must request assistance to qualify for these ''off-ramps.'' For instance, one trade association representing more than half of all payday loan stores states that as a condition of membership, members must offer an ''extended payment plan'' but that borrowers must request the plan at least one day prior to the date on which the loan is due, generally in person at the store where the loan was made or otherwise by the same method used to originate the loan.[81] Another trade association with over 1,300 members, including both payday lenders and firms that offer non-credit products such as check cashing and money transmission, states that members will provide the option of extended payment plans in the absence of State-mandated plans to customers unable to repay, but details of the plans are not publicly available on its Web site.[82]

From confidential information gathered in the course of statutory functions and market outreach, the Bureau is aware that if a borrower fails to return to the store when a loan is due, the lender may attempt to contact the consumer and urge the consumer to make a cash payment before eventually depositing the post-dated check that the consumer had provided at origination or electronically debiting the account. The Bureau is also aware of some situations in which lenders have obtained electronic payments from borrowers' bank accounts and also accepted cash payments from borrowers at storefronts.[83] The Bureau is aware, from confidential information gathered in the course of its statutory functions and from market outreach, that lenders may use various methods to try to ensure that a payment will clear before presenting a check or ACH. These efforts may range from storefront lenders calling the borrower's bank to ask if a check of a particular size would clear the account to the use of software offered by a number of vendors that attempts to model likelihood of repayment (''predictive ACH'').[84] If

[78] Press Release, Bureau of Consumer Fin. Prot., ''CFPB Takes Action Against ACE Cash Express for Pushing Payday Borrowers Into Cycle of Debt,'' (July 10, 2014), *available at http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-ace-cash-express-for-pushing-payday-borrowers-into-cycle-of-debt/.*

[79] All American Check Cashing, Inc., Miss. Dep't of Banking and Consumer Fin., Administrative Order, Cause No. 2016–001, May 11, 2017, *available at http://www.dbcf.ms.gov/documents/actions/consumerfin/aa0517.pdf.* The lender also failed to refund consumer overpayments. The State regulator ordered revocation of all of the lender's 75 licenses, consumer refunds, civil penalties of over $1 million, and other relief. All American appealed the order and the matter was settled with terms reducing the penalty to $889,350. Agreed Order of Dismissal with Prejudice, All American Check Cashing Inc. v. Miss. Dep't of Banking and Consumer Fin., No. G–2017–699 S/2 (Miss. 2017), *available at http://www.dbcf.ms.gov/documents/aacc_agreed_060917.pdf.*

[80] See State of Colo. Dep't of Law, Off. of Att'y Gen., ''2009 Deferred Deposit/Payday Lenders Annual Report,'' at 2, *available at http://www.coloradoattorneygeneral.gov/sites/default/files/contentuploads/cp/ConsumerCreditUnit/UCCC/AnnualReportComposites/2009_ddl_composite.pdf.* See also Market Concerns—Covered Loans below for additional discussion of lenders' extended payment plan practices.

[81] Community Fin. Servs. Ass'n of America, ''About CFSA,'' *available at http://cfsaa.com/about-cfsa.aspx* (last visited Jan. 15, 2016); Community Fin. Servs. Ass'n of America, ''CFSA Member Best Practices,'' *available at http://cfsaa.com/cfsa-member-best-practices.aspx* (last visited Sept. 15, 2017); Community Fin. Servs. Ass'n of America, ''What Is an Extended Payment Plan?,'' *available at http://cfsaa.com/cfsa-member-best-practices/what-is-an-extended-payment-plan.aspx* (last visited Jan. 15, 2016). Association documents direct lenders to display a ''counter card'' describing the association's best practices. Plans are to be offered in the absence of State-mandated plans at no charge and payable in four equal payments coinciding with paydays.

[82] Fin. Serv. Ctrs. of America, ''Membership,'' *http://www.fisca.org/AM/Template.cfm?Section=Membership* (last visited Sept. 15, 2017); Joseph M. Doyle, ''Chairman's Message,'' Fin. Serv. Ctrs. of America, *http://www.fisca.org/AM/Template.cfm?Section=Chairman_s_Message&Template=/CM/HTMLDisplay.cfm&ContentID=19222* (last visited Jan. 15, 2016); Fin. Serv. Ctrs. of America, ''FiSCA Best Practices,'' *http://www.fisca.org/Content/NavigationMenu/AboutFISCA/CodesofConduct/default.htm* (last visited Jan. 15, 2016).

[83] *See* Bureau of Consumer Fin. Prot., ''Supervisory Highlights,'' at 31–32 (Summer 2017), *available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201709_cfpb_Supervisory-Highlights_Issue-16.pdf.* See also, Press Release, Bureau of Consumer Fin. Prot., ''CFPB Takes Action Against Check Cashing and Payday Lending Company for Tricking and Trapping Consumers,'' (May 11, 2016), available at *https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-check-cashing-and-payday-lending-company-tricking-and-trapping-consumers/*; All American Check Cashing, Inc., Miss. Dept. of Banking and Consumer Fin., Administrative Order, No. 2016–001 (May 11, 2017), *available at http://www.dbcf.ms.gov/documents/actions/consumerfin/aa0517.pdf* (for a description of one lender's alleged failure to refund overpayments resulting from these procedures and an associated State agency's order against that lender.).

[84] *See, e.g.,* Press Release, Clarity Servs., ''ACH Presentment Will Help Lenders Reduce Failed ACH Pulls,'' (Aug. 1, 2013), *available at https://www.clarityservices.com/clear-warning-ach-presentment-will-help-lenders-reduce-failed-ach-pulls/*; Factor Trust, ''Markets,'' *http://ws.factortrust.com/products/* (last visited Apr. 8, 2016); Microbilt, ''Bank Account Verify. More Predictive. Better Performance. Lower Costs.,'' *http://*

these attempts are unsuccessful, store personnel at either the storefront level or at a centralized location will then generally engage in collection activity.

Collection activity may involve further in-house attempts to collect from the borrower's bank account.[85] If the first attempt fails, the lender may make subsequent attempts at presentment by splitting payments into smaller amounts in hopes of increasing the likelihood of obtaining at least some funds, a practice for which the Bureau recently took enforcement action against a small-dollar lender.[86] Or, the lender may attempt to present the payment multiple times, a practice that the Bureau has noted in supervisory examinations.[87] A more detailed discussion of payments practices is provided in part D and Markets Concerns—Payments.

Eventually, the lender may attempt other means of collection. The Bureau is aware of in-house debt collections activities, by both storefront employees and employees at centralized collections divisions, including calls, letters, and visits to consumers and their workplaces,[88] as well as the sale of debt to third-party collectors.[89] The Bureau recently conducted a survey of consumer debt collection experiences; 11 percent of consumers contacted about a debt in collection reported the collection activity was related to payday loan debt.[90] Further, the Bureau observed in its consumer complaint data that from November 2013 through December 2016, more than 31,000 debt collection complaints had ''payday loan'' as the underlying debt. In more than 11 percent of the complaints the Bureau handled about debt collection, consumers selected ''payday loans'' as the underlying debt.[91]

In addition, in 2016, the Bureau handled approximately 4,400 complaints in which consumers reported ''payday loan'' as the complaint product and about 26,600 complaints about credit cards.[92] As noted above, there are about 12 million payday loan borrowers annually, and approximately 156 million consumers have one or more credit cards.[93] Therefore, by way of comparison, for every 10,000 payday loan borrowers, the Bureau handled about 3.7 complaints, while for every 10,000 credit card holders, the Bureau handled about 1.7 complaints.

Some payday lenders sue borrowers who fail to repay their loans. A study of small claims court cases filed in Utah from 2005 to 2010 found that 38 percent of cases were attributable to payday loans.[94] A recent news report found that the majority of non-traffic civil cases filed in 14 Utah justice courts are payday loan collection lawsuits, and in one justice court, the percentage was as high as 98.8 percent.[95] In 2013, the Bureau entered into a Consent Order with a large national payday and installment lender based, in part, on the filing of flawed court documents in about 14,000 debt collection lawsuits.[96] However, an industry trade association commenter states that many payday lenders do not file lawsuits on defaulted debt.

Business model. As previously noted, the storefront payday industry has built a distribution model that involves a large number of small retail outlets, each serving a relatively small number of consumers. That implies that the overhead cost on a per consumer basis is relatively high.

Additionally, the loss rates on storefront payday loans—the percentage or amounts of loans that are charged off by the lender as uncollectible—are relatively high. Loss rates on payday loans often are reported on a per-loan basis but, given the frequency of rollovers and renewals, that metric understates the amount of principal lost to borrower defaults. For example, if a lender makes a $100 loan that is rolled over nine times, at which point the consumer defaults, the per-loan default rate would be 10 percent whereas the lender would have in fact lost 100

www.microbilt.com/bank-account-verification.aspx (last visited Apr. 8, 2016); DataX. Ltd., ''Know Your Customer,'' *http://www.dataxltd.com/ancillary-services/successful-collections/* (last visited Apr.8, 2016).

[85] For example, one payday lender stated in its public documents that it ''subsequently collects a large percentage of these bad debts by redepositing the customers' checks, ACH collections or receiving subsequent cash repayments by the customers.'' FirstCash Fin. Servs., 2014 Annual Report (Form 10–K), at 5 (Feb. 12, 2015). As noted above, FirstCash has now largely exited payday lending.

[86] Press Release, Bureau of Consumer Fin. Prot., ''CFPB Orders EZCORP to Pay $10 Million for Illegal Debt Collection Tactics,'' (Dec. 16, 2015), *available at http://www.consumerfinance.gov/newsroom/cfpb-orders-ezcorp-to-pay-10-million-for-illegal-debt-collection-tactics/*.

[87] See Bureau of Consumer Fin. Prot., ''Supervisory Highlights,'' at 20 (Spring 2014), *available at http://files.consumerfinance.gov/f/201405_cfpb_supervisory-highlights-spring-2014.pdf*.

[88] Bureau of Consumer Fin. Prot., ''CFPB Compliance Bulletin 2015–07, In-Person Collection of Consumer Debt,'' (Dec. 16, 2015), *available at http://files.consumerfinance.gov/f/201512_cfpb_compliance-bulletin-in-person-collection-of-consumer-debt.pdf*.

[89] For example, prior to discontinuing its payday lending operations, EZCorp indicated that it used a tiered structure of collections on defaulted loans (storefront employees, centralized collections, and then third-parties debt sales). EZCORP, Inc., 2014 Annual Report (Form 10–K), at 9 (Nov. 26, 2014). Advance America utilized calls and letters to past-due consumers, as well as attempts to convert the consumer's check into a cashier's check, as methods of collection. Advance America, 2011 Annual Report (Form 10–K), at 11. *See* ACE Cash Express, Inc., Consent Order, CFPB No. 2014–CFPB–0008 (July 10, 2014), *available at http://files.consumerfinance.gov/f/201407_cfpb_consent-order_ace-cash-express.pdf*; EZCorp Inc., Consent Order, CFPB No. 2015–CFPB–0031 (Dec. 16, 2015), *available at http://files.consumerfinance.gov/f/201512_cfpb_ezcorp-inc-consent-order.pdf*. See also, Bureau of Consumer Fin. Prot., Market Snapshot: Online Debt Sales,'' at 5, 7 (Jan. 2017), *available at https://www.consumerfinance.gov/data-research/research-reports/market-snapshot-online-debt-sales/* (describing a significant share of payday loan portfolios on Web sites with online debts for sale).

[90] Bureau of Consumer Fin. Prot., ''Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt,'' at 19 (Jan. 2017), *available at https://www.consumerfinance.gov/documents/2251/201701_cfpb_Debt-Collection-Survey-Report.pdf*.

[91] Bureau of Consumer Fin. Prot., ''Monthly Complaint Report, Vol. 18,'' at 12 (Dec. 2016), available at *https://www.consumerfinance.gov/data-research/research-reports/monthly-complaint-report-vol-18/*.

[92] Bureau of Consumer Fin. Prot., ''Consumer Response Annual Report, January 1–December 31, 2016,'' at 27, 33–35 (Mar. 2017), *available at https://www.consumerfinance.gov/documents/3368/201703_cfpb_Consumer-Response-Annual-Report-2016.PDF*.

[93] The Bureau's staff estimate is based on finding that 63 percent of American adults hold an open credit card and Census population estimates. Bureau of Consumer Fin. Prot., ''The Consumer Credit Card Market Report,'' at 36 (Dec. 2015), *available at http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf*; U.S. Census Bureau, ''Annual Estimates of Resident Population for Selected Age Groups by Sex for the United States, States, Counties, and Puerto Rico Commonwealth and Municipios: April 1, 2010 to July 1, 2016,'' (June 2017), *available at https://factfinder.census.gov/bkmk/table/1.0/en/PEP/2016/PEPAGESEX*. Other estimates of the number of credit card holders have been higher, meaning that 1.7 complaints per 10,000 credit card holders would be a high estimate. The U.S. Census Bureau estimated there were 160 million credit card holders in 2012, and researchers at the Federal Reserve Bank of Boston estimated that 72.1 percent of U.S. consumers held at least one credit card in 2014. U.S. Census Bureau, ''Statistical Abstract of the United States: 2012,'' at 740 tbl.1188 (Aug. 2011), *available at https://www.census.gov/library/publications/2011/compendia/statab/131ed.html*; Claire Greene et al., ''The 2014 Survey of Consumer Payment Choice: Summary Results,'' at 18 (Fed. Reserve Bank of Boston, No. 16–3, 2016), *available at https://www.bostonfed.org/-/media/Documents/researchdatareport/pdf/rdr1603.pdf.* As noted above in the text, additional complaints related to both credit cards and payday loans are submitted as debt collection complaints with credit card or payday loan listed as the type of debt.

[94] Coalition of Religious Communities, ''Payday Lenders and Small Claims Court Cases in Utah,'' at 2 (2005–2010), *available at http://www.consumerfed.org/pdfs/PDL-UTAH-court-doc.pdf*.

[95] Lee Davidson, ''Payday Lenders Sued 7,927 Utahns Last Year,'' The Salt Lake City Tribune, Aug. 2, 2016, *http://www.sltrib.com/home/3325528-155/payday-lenders-sued-7927-utahns-last*.

[96] Press Release, Bureau of Consumer Fin. Prot., ''Consumer Financial Protection Bureau Takes Action Against Payday Lender for Robo-Signing,'' (Nov. 20, 2013), *available at http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-takes-action-against-payday-lender-for-robo-signing/*.

percent of the amount loaned. In this example, the lender would still have received substantial revenue, as the lender would have collected fees for each rollover prior to default. The Bureau estimates that during the 2011–2012 time frame, charge-offs (*i.e.,* uncollectible loans defaulted on and never repaid) equaled nearly one-half of the average amount of outstanding loans during the year. In other words, for every $1.00 loaned, only $.50 in principal was eventually repaid.[97] One academic study found loss rates to be even higher.[98]

To sustain these significant costs, the payday lending business model is dependent upon a large volume of re-borrowing—that is, rollovers, back-to-back loans, and re-borrowing within a short period of paying off a previous loan—by those borrowers who do not default on their first loan. The Bureau's research found that over the course of a year, 90 percent of all loan fees comes from consumers who borrowed seven or more times and 75 percent comes from consumers who borrowed 10 or more times.[99] Similarly, when the Bureau identified a cohort of borrowers and tracked them over 10 months, the Bureau found that more than two-thirds of all loans were in sequences of at least seven loans, and that over half of all loans were in sequences of 10 or more loans.[100] The Bureau defines a sequence as an initial loan plus one or more subsequent loans renewed within 30 days after repayment of the prior loan; a sequence thus captures not only rollovers and back-to-back loans but also re-borrowing that occurs within a short period of time after repayment of a prior loan either at the point at which a State-mandated cooling-off period ends or at the point at which the consumer, having repaid the prior loan, runs out of money.[101] A more detailed discussion of sequence length is provided in the section-by-section discussion of §§ 1041.2(a)(14) and 1041.5 and in Market Concerns—Underwriting.

Other studies are broadly consistent. For example, a 2013 report based on lender data from Florida, Kentucky, Oklahoma, and South Carolina found that 85 percent of loans were made to borrowers with seven or more loans per year, and 62 percent of loans were made to borrowers with 12 or more loans per year. These four States have restrictions on payday loans such as cooling-off periods and limits on rollovers that are enforced by State-regulated databases, as well as voluntary extended repayment plans.[102] An updated report on Florida payday loan usage derived from the State database noted this trend has continued, with 83 percent of payday loans in 2015 made to borrowers with seven or more loans and 57 percent of payday loans that same year made to borrowers with 12 or more loans.[103] In Alabama's first year of tracking payday loans with a single database, it reported that almost 50 percent of borrowers had seven or more payday loans and almost 37 percent of borrowers had 10 or more payday loans.[104] Other reports have found that over 80 percent of total payday loans and loan volume is due to repeat borrowing within 30 days of a prior loan.[105] One trade association has acknowledged that ''[i]n any large, mature payday loan portfolio, loans to repeat borrowers generally constitute between 70 and 90 percent of the portfolio, and for some lenders, even more.'' [106] A recent report by a specialty consumer reporting agency confirms that the industry's business model relies on repeat customers, noting that over half of all loans are made to returning customers and stating ''[t]his finding suggests that even though new customers are critical, existing customers are the most productive.'' [107] Market Concerns—Underwriting below discusses the impact of these outcomes for consumers who are unable to repay and either default or re-borrow.

Recent regulatory and related industry developments. A number of Federal and State regulatory developments have occurred over the last 15 years as concerns about the effects of payday lending have spread. Regulators have found that the industry has tended to shift to new models and products in response.

Since 2000, it has been clear from commentary added to Regulation Z, that payday loans constitute ''credit'' under the Truth in Lending Act (TILA) and that cost of credit disclosures are required to be provided in payday loan transactions, regardless of how State law characterizes payday loan fees.[108]

In 2006, Congress enacted the Military Lending Act (MLA) to address concerns that servicemembers and their families were becoming over-indebted in high-cost forms of credit.[109] The MLA, as

[97] The Bureau's staff estimate is based on public company financial statements and confidential information gathered in the course of the Bureau's statutory functions. Ratio of gross charged off loans to average balances, where gross charge-offs represent single-payment loan losses and average balance is the average of beginning and end of year single-payment loan receivables.

[98] Mark Flannery & Katherine Samolyk, ''Payday Lending: Do the Costs Justify the Price?,'' at 16 (FDIC Ctr. for Fin. Res., Working Paper No. 2005–09, 2005), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=771624* (estimating annual charge-offs on storefront payday loans at 66.6 percent of outstanding loans).

[99] CFPB Payday Loans and Deposit Advance Products White Paper, at 22.

[100] CFPB Report on Supplemental Findings, at 129.

[101] The Bureau's Report on Supplemental Findings analyzed payday loan usage patterns with varying definitions of loan sequence length, including 30-days. CFPB Report on Supplemental Findings, at 109–114. Other reports have proposed other definitions of sequence length including 30 days. *See* Marc Anthony Fusaro & Patricia J. Cirillo, *Do Payday Loans Trap Consumers in a Cycle of Debt?,* at 12 (2011), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1960776&download=yes*; (sequences based on the borrower's pay period); nonPrime 101, ''Report 7B: Searching for Harm in Storefront Payday Lending, A Critical Analysis of the CFPB's 'Debt Trap' Data,'' at 4 n.9 (2016), *available at https://www.nonprime101.com/wp-content/uploads/2016/02/Report-7-B-Searching-for-Harm-in-Storefront-Payday-Lending-nonPrime101.pdf.* See Market Concerns—Underwriting below for an additional discussion of these alternative definitions.

[102] Susanna Montezemolo, ''The State of Lending in America & Its Impact on U.S. Households: Payday Lending Abuses and Predatory Practices,'' at 12 (Ctr. for Responsible Lending 2013), *available at http://www.responsiblelending.org/sites/default/files/uploads/10-payday-loans.pdf.* For additional information on Florida loan use, *see* Veritec Solutions, ''State of Florida Case Study: Deferred Presentment Program,'' (Implemented 2002), *available at http://www.veritecs.com/case-studies/floridas-deferred-presentation-database-and-program-solution/.*

[103] Brandon Coleman & Delvin Davis, ''Perfect Storm: Payday Lenders Harm Florida Consumer Despite State Law,'' at 4 (Ctr. for Responsible Lending, 2016), *available at http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_perfect_storm_florida_mar2016_0.pdf.*

[104] Veritec Solutions, ''State of Alabama Deferred Presentment Services Program, Report on Alabama Deferred Presentment Loan Activity, October 1, 2015 through September 30, 2016,'' *available at http://www.banking.alabama.gov/pdf/press%20release/InterimRptStatewideDatabase10_1_15to9_30_16.pdf.*

[105] Leslie Parrish & Uriah King, ''Phantom Demand: Short-term Due Date Generates Need for Repeat Payday Loans, Accounting for 76% of Total Volume,'' at 11–12 (Ctr. for Responsible Lending, 2009), *available at http://www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-final.pdf.*

[106] Letter from Hilary B. Miller, on behalf of Community Fin. Servs. Ass'n. of America to Bureau of Consumer Fin. Prot. (June 20, 2013), *available at http://files.consumerfinance.gov/f/201308_cfpb_cfsa-information-quality-act-petition-to-CFPB.pdf* (Petition of Community Financial Services Association of America For Retraction of Payday Loans and Deposit Advance Products: A White Paper of Initial Data Findings, at 5.).

[107] Clarity Services, Inc., ''2017 Subprime Lending Trends: Insights into Consumers & the Industry,'' at 8 (2017), *available at https://www.clarityservices.com/wp-content/uploads/2017/03/Subprime-Lending-Report-2017-Clarity-Services-3.28.17.pdf.* This finding does not distinguish between storefront and online lenders, nor is it expressly limited to single payment loans.

[108] 12 CFR part 1026, supplement I, comment 2(a)(14)–2.

[109] The Military Lending Act, part of the John Warner National Defense Authorization Act for Fiscal Year 2007, was signed into law in October 2006. The interest rate cap took effect October 1, 2007. *See* 10 U.S.C. 987.

implemented by the Department of Defense's regulation, imposes two broad classes of requirements applicable to a creditor. First, the creditor may not impose a military annual percentage rate (MAPR) [110] greater than 36 percent in connection with an extension of consumer credit to a covered borrower. Second, when extending consumer credit, the creditor must satisfy certain other terms and conditions, such as providing certain information, both orally and in a form the borrower can keep, before or at the time the borrower becomes obligated on the transaction or establishes the account; refraining from requiring the borrower to submit to arbitration in the case of a dispute involving the consumer credit; and refraining from charging a penalty fee if the borrower prepays all or part of the consumer credit. In 2007, the Department of Defense issued its initial regulation under the MLA, limiting the Act's application to closed-end loans with a term of 91 days or less in which the amount financed did not exceed $2,000; closed-end vehicle title loans with a term of 181 days or less; and closed-end tax refund anticipation loans.[111] However, the Department found that evasions developed in the market as ''the extremely narrow definition of 'consumer credit' in the [then-existing rule] permits a creditor to structure its credit products in order to reduce or avoid altogether the obligations of the MLA.'' [112]

As a result, effective October 2015 the Department of Defense expanded its definition of covered credit to include open-end credit and longer-term loans so that the MLA protections generally apply to all credit subject to the requirements of Regulation Z of the Truth in Lending Act, other than certain products excluded by statute.[113] In general, creditors must comply with the new regulations for extensions of credit after October 3, 2016; for credit card accounts, creditors are required to comply with the new rule starting October 3, 2017.[114]

At the State level, the last States to enact legislation authorizing payday lending—Alaska and Michigan—did so in 2005.[115] At least 11 States and jurisdictions that previously had authorized payday loans have taken steps to restrict or eliminate payday lending. In 2001, North Carolina became the first State that had previously permitted payday loans to adopt an effective ban by allowing the authorizing statute to expire. In 2004, Georgia also enacted a law banning payday lending.

In 2008, the Ohio legislature adopted the Short Term Lender Act with a 28 percent APR cap, including all fees and charges, for short-term loans and repealed the existing Check-Cashing Lender Law that authorized higher rates and fees.[116] In a referendum later that year, Ohioans voted against reinstating the Check-Cashing Lender Law, leaving the 28 percent APR cap and the Short Term Lending Act in effect.[117] After the vote, some payday lenders began offering vehicle title loans. Other lenders continued to offer payday loans utilizing Ohio's Credit Service Organization Act [118] and the Mortgage Loan Act; [119] the latter practice was upheld by the State Supreme Court in 2014.[120] Also in 2008, the District of Columbia banned payday lending which had been a permissible activity under the District's check cashing law, making the loans subject to the District's 24 percent per annum maximum interest rate cap.[121]

In 2010, Colorado's legislature banned short-term single-payment balloon loans in favor of longer-term, six-month loans. Colorado's regulatory framework is described in more detail in the discussion of payday installment lending below.

As of July 1, 2010, Arizona effectively prohibited payday lending after the authorizing statute expired and a statewide referendum that would have continued to permit payday lending failed to pass.[122] However, small-dollar lending activity continues in the State. The State financial regulator issued an alert in 2013, in response to complaints about online unlicensed lending, advising consumers and lenders that payday and consumer loans of $1,000 or less are generally subject to a rate of 36 percent per annum and loans in violation of those rates are void.[123] In addition, vehicle title loans continue to be made in Arizona as secondary motor vehicle finance transactions.[124] The number of licensed vehicle title lenders has increased by about 300 percent since the payday lending law expired and now exceeds the number of payday lenders that were licensed prior to the ban.[125]

In 2009, Virginia amended its payday lending law. It extended the minimum loan term to the length of two income periods, added a 45-day cooling-off period after substantial time in debt (the fifth loan in a 180-day period) and a 90-day cooling-off period after completing an extended payment plan, and implemented a database to enforce limits on loan amounts and frequency. The payday law applies to closed-end loans. Virginia has no interest rate regulations or licensure requirements for open-end credit.[126] After the amendments, a number of lenders that were previously licensed as payday lenders in Virginia, and that offer closed-end payday loans in other States, switched to offering open-end credit in Virginia without State licenses.[127]

Washington and Delaware have restricted repeat borrowing by imposing limits on the number of payday loans consumers may obtain. In 2009,

[110] The military annual percentage rate is an ''all-in'' APR that includes a broader range of fees and charges than the APR that must be disclosed under the Truth in Lending Act. *See* 32 CFR 232.4.

[111] 72 FR 50580 (Aug. 31, 2007).

[112] 80 FR 43560, 43567 n.78 (July 22, 2015).

[113] 80 FR 43560 (July 22, 2015).

[114] 80 FR 43560 (July 22, 2015).

[115] Alaska Stat. secs. 06.50.010–900; Mich. Comp. Laws secs. 487.2121–.2173.

[116] Ohio Rev. Code secs. 1321.35 and 1321.40.

[117] *See generally Ohio Neighborhood Fin., Inc.* v. *Scott,* 139 Ohio St.3d 536, 13 N.E. 3d 1115 (2014).

[118] Ohio Rev. Code sec. 4712.01.

[119] Ohio Rev. Code sec. 1321.52(C).

[120] *Scott,* 139 Ohio St.3d 536, 13 N.E. 3d 1115 (2014).

[121] Payday Loan Consumer Protection Amendment Act of 2007, DC Act 17–42 (2007); D.C. Official Code sec. 28–3301(a) (2011).

[122] Ariz. Rev. Stat. sec. 6–1263; Ariz. Sec'y of State, ''State of Arizona Official Canvass,'' at 15 (2008), *available at http://apps.azsos.gov/election/2008/General/Canvass2008GE.pdf*; Ariz. Att'y Gen. Off., ''Operation Sunset FAQ,'' *available at https://www.azag.gov/sites/default/files/sites/all/docs/consumer/op-sunset-FAQ.pdf.*

[123] Ariz. Dep't of Fin. Insts., to Consumers, Financial Institutions and Enterprises Conducting Business in Arizona, available at *http://www.azdfi.gov/LawsRulesPolicy/Forms/FE-AD-PO-Regulatory_and_Consumer_Alert_CL_CO_13_01%2002-06-2013.pdf.*

[124] Ariz. Rev. Stat. sec. 44–281 and 44–291; Arizona Dept. of Fin. Insts., ''Frequently Asked Questions from Licensees, Question #6 'What is a Title Loan','' *http://www.azdfi.gov/Licensing/Licensing_FAQ.html#MVDSFC* (last visited Apr. 20, 2016).

[125] These include loans ''secured'' by borrowers' registrations of encumbered vehicles. Jean Ann Fox et al., ''Wrong Way: Wrecked by Debt, Auto Title Lending in America'' at 9 (Consumer Fed'n of America, Ctr. for Econ. Integrity, 2016), *available at http://consumerfed.org/wp-content/uploads/2016/01/160126_wrongway_report_cfa-cei.pdf.*

[126] Va. Code Ann. sec. 6.2–312.

[127] *See, e.g.,* CashNetUSA, ''What We Offer'' *https://www.cashnetusa.com/what-we-offer.html* (last visited Sept. 16, 2017) (CashNetUSA is part of Enova); Check Into Cash, ''Virginia Line of Credit,'' *https://checkintocash.com/virginia-line-of-credit/* (last visited Sept. 16, 2017); Allied Cash Advance, ''Get the Cash You Need Now'' *https://www.alliedcash.com/* (last visited Sept. 16, 2017) (''VA: Loans made through open-end credit account.''); First Virginia Loans, ''Get Cash Fast'' *https://www.ccfi.com/firstvirginialoans/* (last visited Sept. 16, 2017) (First Virginia is part of Community Choice, *see* Community Choice Fin. Inc., 2016 Annual Report (Form 10–K), Exhibit 21.1). *See also,* Commonwealth of Virginia State Corp. Comm'n, ''Payday Lender License Surrenders as of January 1, 2012,'' *available at https://www.scc.virginia.gov/SCC-INTERNET/bfi/reg_inst/sur/pay_sur_0112.pdf* (for a list of payday lender license surrenders and dates of surrender).

Washington made several changes to its payday lending law. These changes, effective January 1, 2010, include a cap of eight loans per borrower from all lenders in a rolling 12-month period where there had been no previous limit on the number of total loans, an extended repayment plan for any loan, and a database to which lenders are required to report all payday loans.[128] In 2013, Delaware, a State with no fee restrictions for payday loans, implemented a cap of five payday loans, including rollovers, in any 12-month period.[129] Delaware defines payday loans as loans due within 60 days for amounts up to $1,000. Some Delaware lenders have shifted from payday loans to longer-term installment loans with interest-only payments followed by a final balloon payment of the principal and an interest fee payment—sometimes called a ''flexpay'' loan.[130]

In 2016, South Dakota voters approved a ballot measure instituting a 36 percent APR limit for all consumer loans made by licensed lenders.[131] The measure passed with approximately 75 percent of voters supporting it.[132] Subsequently, a number of lenders previously licensed to do business in the State either declined to renew their licenses or indicated that they would not originate new loans that would be subject to the cap.[133]

New Mexico enacted legislation in 2017 that will effectively prohibit single payment payday loans. It requires small-dollar loans to have minimum loan terms of 120 days and be repaid in four or more installments.[134] The legislation will take effect on January 1, 2018.[135] The legislation also sets a usury limit of 175 percent APR and will apply to short-term vehicle title loans.

In 2017, several other States also passed legislation related to payday lending. Arkansas passed a law clarifying that fees charged by credit service organizations are interest under the State's constitutional usury limit of 17 percent per annum.[136] Utah amended its existing law that prohibits rollovers of payday loans for more than 10 weeks by prohibiting lenders from originating new loans for borrowers to repay prior ones.[137]

At least 41 Texas municipalities have adopted local ordinances setting business regulations on payday lending (and vehicle title lending).[138] Some of the ordinances, such as those in Dallas, El Paso, Houston, and San Antonio, include requirements such as limits on loan amounts (no more than 20 percent of the borrower's gross annual income for payday loans), limits on the number of rollovers, required amortization of the principal loan amount on repeat loans—usually in 25 percent increments, record retention for at least three years, and a registration requirement.[139] On a statewide basis, there are no Texas laws specifically governing payday lenders or payday loan terms; credit access businesses that act as loan arrangers or broker payday loans (and vehicle title loans) are regulated and subject to licensing, reporting, and requirements to provide consumers with disclosures about repayment and re-borrowing rates.[140]

Online Payday Lending

With the growth of the Internet, a significant online payday lending industry has developed. Some storefront lenders use the Internet as an additional method of originating payday loans in the States in which they are licensed to do business. In addition, there are now a number of lenders offering what are referred to as ''hybrid'' payday loans, through the Internet. Hybrid payday loans are structured so that rollovers occur automatically unless the consumer takes affirmative action to pay off the loan, thus effectively creating a series of interest-only payments followed by a final balloon payment of the principal amount and an additional fee.[141] Hybrid loans structured as single payment loans with automatic rollovers[142] and longer-term loans with a final balloon payment[143] are covered by the final rule's Ability-to-Repay

---

[128] Wash. Dep't of Fin. Insts., ''2010 Payday Lending Report,'' at 1–3, *available at http://www.dfi.wa.gov/sites/default/files/reports/2010-payday-lending-report.pdf.*

[129] Del. Code Ann. 5 secs. 2227(7), 2235A(a)(1).

[130] *See, e.g., James* v. *National Financial, LLC,* 132 A.3d 799, 837 (2016) (holding loan agreement unconscionable and invalid).

[131] Press Release, S.D., Dep't of Labor and Regulation, ''Initiated Measure 21 Approved,'' (Nov. 10, 2016), *available at http://dlr.sd.gov/news/releases16/nr111016_initiated_measure_21.pdf.*

[132] S.D., Sec'y of State, ''South Dakota Official Election Returns and Registration Figures,'' at 39 (2016), *available at https://sdsos.gov/elections-voting/assets/ElectionReturns2016_Web.pdf.*

[133] Dana Ferguson, ''Payday Lenders Flee South Dakota After Rate Cap,'' Argus Leader (Jan. 6, 2017), *http://www.argusleader.com/story/news/politics/2017/01/06/payday-lenders-flee-sd-after-rate-cap/96103624/.*

[134] N.M. H.B. 347.

[135] N.M. H.B. 347.

[136] 2017 Ark. S.B. 658, Arkansas 91st General Assembly, Title: To Create the Credit Repair Services Organizations Act of 2017, and to Repeal the Credit Services Repair Act of 1987.

[137] 2017 Utah H.B. 40, Utah 62nd Legislature, 2017 General Session, Title: Check Cashing and Deferred Deposit Lending Amendments Sess.

[138] A description of the municipalities is available at Texas Municipal League. An additional 16 Texas municipalities have adopted land use ordinances on payday or vehicle title lending. Texas Municipal League, ''City Regulation of Payday and Auto Title Lenders,'' *http://www.tml.org/payday-updates* (last visited April 26, 2017).

[139] Other municipalities have adopted similar ordinances. For example, at least seven Oregon municipalities, including Portland and Eugene, have enacted ordinances that include a 25 percent amortization requirement on rollovers and a requirement that lenders offer a no-cost payment plan after two rollovers. *See* Portland, Or., Code sec. 7.26.050; Eugene Or., Code sec. 3.556.

[140] CABs must include a pictorial disclosure with the percentage of borrowers who will repay the loan on the due date and the percentage who will roll over (called renewals) various times. *See* Texas Off. of Consumer Credit Commissioner, ''Credit Access Businesses'' *http://occc.texas.gov/industry/cab* (last visited Sept. 16, 2017). The CABs, rather than the lenders, maintain storefront locations, and qualify borrowers, service and collect the loans for the lenders. CABs may also guaranty the loans. There is no cap on CAB fees and when these fees are included in the loan finance charges, the disclosed APRs for Texas payday and vehicle title loans are similar to those in other States with deregulated rates. *See* Ann Baddour, ''Why Texas' Small Dollar Lending Market Matter,'' (Fed. Reserve Bank of Dallas, e-Perspectives Issue 2, 2012), *available at https://www.fedinprint.org/items/feddep/y2012n2x1.html.* In 2004, a Federal appellate court dismissed a putative class action related to these practices. *Lovick* v. *RiteMoney, Ltd.,* 378 F.3d 433 (5th Cir. 2004).

[141] nonPrime101, ''Report 1: Profiling Internet Small Dollar Lending—Basic Demographics and Loan Characteristics,'' at 2–3, (2014), *available at https://www.nonprime101.com/wp-content/uploads/2015/02/Profiling-Internet-Small-Dollar-Lending-Final.pdf.* The report refers to these automatic rollovers as ''renewals.''

[142] Examples of hybrid payday loans requiring borrower affirmative action to opt out of automatic rollovers are described in recent litigation by the Bureau and the Federal Trade Commission. Loans by Integrity Advance contained default terms that caused loans to automatically roll over four times with charges added at each rollover before any payments were applied to the principal. *See* Press Release, Bureau of Consumer Fin. Prot., ''CFPB Takes Action Against Online Lender for Deceiving Borrowers,'' (Nov.18, 2015), *available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-online-lender-for-deceiving-borrowers/.* Similarly, OneClickCash was an online lender that offered loans with a TILA disclosure as a single repayment loan, but unless borrowers satisfied certain pre-conditions they were automatically enrolled in a 10 pay-period renewal plan with new finance charges accruing each pay period and no payments applied to the principal balance until the fifth payment. *See* Order, Fed. Trade Comm'n v. AMG Services, Inc., No. 12–00536 (D. Nev. Mar. 07, 2014), ECF No. 559, *available at https://www.ftc.gov/system/files/documents/cases/140319amgorder.pdf. See also,* Sierra Lending, ''FAQ, How do I repay?,'' *https://www.sierralending.com/Home/FAQ* (last visited July 20, 2017) (consumer must call online payday lender at least three business days prior to due date or lender will automatically withdraw only the finance charge and loan will roll over).

[143] The Bureau is aware of a number of examples of storefront and online longer-term loans with final balloon payments. For instance, a loan agreement for a $200 loan from National Financial LLC d/b/a Loan Till Payday LLC required the borrower to pay 26 bi-weekly payments of $60 with a final balloon payment of $260. *See, James* v. *National Financial, LLC,* 132 A.3d 799, 837 (2016) (holding loan agreement unconscionable and invalid). Additionally the Bureau is aware of a Texas loan for $365.60, arranged through a credit access business, to be repaid in five payments of $108 with a sixth, final payment of $673.70.

requirements as discussed more fully below.

Industry size, structure, and products. The size of the online payday market is difficult to measure for a number of reasons. First, many online lenders offer a variety of products beyond single-payment loans (what the Bureau refers to as payday loans) and hybrid loans (which the Bureau views as a form of payday lending and falls within the final rule's definition of short-term loans), including longer-term installment loans; this poses challenges in sizing the portion of these firms' business that is attributable to payday and hybrid loans. Second, most online payday lenders are not publicly traded, which means that minimal financial information is available about this market segment. Third, many online payday lenders claim exemption from State lending laws and licensing requirements on the basis that they are located and operated from other jurisdictions. Consequently, these lenders report less information publicly, whether individually or in aggregate compilations, than lenders holding traditional State licenses. Finally, storefront payday lenders who are also using the online channel generally do not separately report their online originations. Bureau staff's reviews of the largest storefront lenders' Web sites indicate an increased focus in recent years on online loan origination.

With these caveats, a frequently cited industry analyst has estimated that by 2012, online payday loans had grown to generate nearly an equivalent amount of fee revenue as storefront payday loans on roughly 62 percent of the origination volume, about $19 billion, but originations had then declined somewhat to roughly $15.9 billion by 2015.[144] This trend appears consistent with storefront payday loans, as discussed above, and is likely related at least in part to increasing lender migration from short-term into longer-term products. Online payday loan fee revenue has been estimated at $3.1 billion for 2015, or 19 percent of origination volume.[145] However, these estimates may be both over- and under-inclusive; they may not differentiate precisely between online lenders' short-term and longer-term loans, and they may not account for the online lending activities by storefront payday lenders.

Whatever the precise size, the online industry can broadly be divided into two segments: online lenders licensed in the State in which the borrower resides and lenders that are not licensed in the borrower's State of residence.

The first segment consists largely of storefront lenders with an online channel to complement their storefronts as a means of originating loans, as well as a few online-only payday lenders who lend to borrowers in States where they have obtained State lending licenses. Because this segment of online lenders is State-licensed, State administrative payday lending reports include these data but generally do not differentiate loans originated online from those originated in storefronts. Accordingly, this portion of the market is included in the market estimates summarized above, and the lenders consider themselves to be subject to, or generally follow, the relevant State laws discussed above.

The second segment consists of lenders that claim exemption from State lending laws. Some of these lenders claim exemption because their loans are made from physical locations outside of the borrower's State of residence, including from off-shore locations outside of the United States.[146] Other lenders claim exemption because they are lending from Tribal lands, with such lenders claiming that they are regulated by the sovereign laws of ''federally recognized Indian tribes.'' [147] These lenders claim immunity from suit to enforce State or Federal consumer protection laws on the basis of their sovereign status.[148] A Federal appellate court recently rejected claims of immunity from the Bureau's civil investigative demands by several Tribal-related lenders, finding that ''Congress did not expressly exclude tribes from the Bureau's enforcement authority.'' [149]

A frequently cited source of data on this segment of the market is a series of reports using data from a specialty consumer reporting agency serving certain online lenders, most of whom are unlicensed.[150] These data are not representative of the entire online industry, but nonetheless cover a large enough sample (2.5 million borrowers over a period of four years) to be significant. These reports indicate the following concerning this market segment:

- Although the mean and median loan size among the payday borrowers in this dataset are only slightly higher than the information reported above for storefront payday loans,[151] the online payday lenders charge higher rates than storefront lenders. As noted above, most of the online lenders reporting this data claim exemption from State laws and do not comply with State rate caps. The median loan fee in this dataset is $23.53 per $100 borrowed, compared to $15 per $100 borrowed for storefront payday loans. The mean fee amount is even higher at $26.60 per $100 borrowed.[152] Another study based on a similar dataset from three online payday lenders is generally consistent, putting the

[144] John Hecht, ''The State of Short-Term Credit Amid Ambiguity, Evolution and Innovation'' (2016) (Jefferies LLC, slide presentation) (on file); John Hecht, ''The State of Short-Term Credit in a Constantly Changing Environment'' (2015) (Jeffries LLC, slide presentation) (on file); Jessica Silver-Greenberg, ''Major Banks Aid in Payday Loans Banned by States,'' N.Y. Times, Feb. 23, 2013, *http://www.nytimes.com/2013/02/24/business/major-banks-aid-in-payday-loans-banned-by-states.html.*

[145] John Hecht, ''The State of Short-Term Credit Amid Ambiguity, Evolution and Innovation'' (2016) (Jefferies LLC, slide presentation) (on file).

[146] For example, in 2015 the Bureau filed a lawsuit in Federal district court against NDG Enterprise, NDG Financial Corp., Northway Broker, Ltd., and others alleging that defendants illegally collected online payday loans that were void or that consumers had no obligations to repay, and falsely threatened consumers with lawsuits and imprisonment. Several defendants are Canadian corporations and others are incorporated in Malta. The case is pending. *See* Press Release, Bureau of Consumer Fin. Prot., ''CFPB Sues Offshore Payday Lender'' (Aug. 4, 2015), *available at http://www.consumerfinance.gov/newsroom/cfpb-sues-offshore-payday-lender/.*

[147] 12 U.S.C. 5481(27). According to a tribal trade association representative, about 30 tribes are involved in the payday lending industry. Julia Harte & Joanna Zuckerman Bernstein, ''Payday Nation, When Tribes Team Up with Payday Lenders, Who Profits?,'' AlJazeera America, June 17, 2014, *http://projects.aljazeera.com/2014/payday-nation/.* The Bureau is unaware of other public sources for an estimate of the number of tribal lenders.

[148] *See* First Amended Complaint, *Consumer Fin. Prot. Bureau* v. *CashCall, Inc.,* No. 13–13167 (D. Mass. Mar. 21, 2014), ECF No. 27, *available at http://files.consumerfinance.gov/f/201403_cfpb_amended-complaint_cashcall.pdf;* Complaint for Permanent Injunction and Other Relief, *Consumer Fin. Prot. Bureau* v. *Golden Valley Lending Inc.,* No. 17–3155 (N.D. Ill. Apr. 27, 2017), ECF No. 1, *available at http://files.consumerfinance.gov/f/documents/201704_cfpb_Golden-Valley_Silver-Cloud_Majestic-Lake_complaint.pdf; Order, Fed. Trade Comm'n* v. *AMG Services, Inc.,* No. 12–00536 (D. Nev. Mar. 07, 2014), ECF No. 559, *available at https://www.ftc.gov/system/files/documents/cases/140319amgorder.pdf;* State *ex rel. Suthers* v. *Cash Advance & Preferred Cash Loans,* 205 P.3d 389 (Colo. App. 2008), aff'd sub nom; *Cash Advance & Preferred Cash Loans* v. *State,* 242 P.3d 1099 (Colo. 2010); *California* v. *Miami Nation Enterprises,* 166 Cal.Rptr.3d 800 (2014).

[149] *CFPB* v. *Great Plains Lending, LLC,* 846 F.3d 1049, 1058 (9th Cir. 2017), *reh'g denied* (Apr. 5, 2017).

[150] nonPrime101, ''Report 1: Profiling Internet Small Dollar Lending—Basic Demographics and Loan Characteristics,'' at 9, (2014), *available at https://www.nonprime101.com/wp-content/uploads/2015/02/Profiling-Internet-Small-Dollar-Lending-Final.pdf.*

[151] The median online payday loan size is $400, compared to a median loan size of $350 for storefront payday loans. nonPrime101, ''Report 1: Profiling Internet Small Dollar Lending—Basic Demographics and Loan Characteristics,'' at 10, (2014), *available at https://www.nonprime101.com/wp-content/uploads/2015/02/Profiling-Internet-Small-Dollar-Lending-Final.pdf.*

[152] nonPrime101, ''Report 1: Profiling Internet Small Dollar Lending—Basic Demographics and Loan Characteristics,'' at 10, (2014), *available at https://www.nonprime101.com/wp-content/uploads/2015/02/Profiling-Internet-Small-Dollar-Lending-Final.pdf.*

range of online payday loan fees at between $18 and $25 per $100 borrowed.[153]

- More than half of the payday loans made by these online lenders are hybrid payday loans. As described above, a hybrid loan involves automatic rollovers with payment of the loan fee until a final balloon payment of the principal and fee.[154] For the hybrid payday loans, the most frequently reported payment amount is 30 percent of principal, implying a finance charge during each pay period of $30 for each $100 borrowed.[155]
- Unlike storefront payday loan borrowers who generally return to the same store to re-borrow, the credit reporting data may suggest that online borrowers tend to move from lender to lender. As discussed further below, however, it is difficult to evaluate whether some of this apparent effect is due to online lenders simply not consistently reporting lending activity.[156]

Marketing, underwriting, and collection practices. As with most online lenders in other markets, online payday lenders have utilized direct marketing, lead generators, and other forms of advertising for customer acquisition. Lead generators, via Web sites advertising payday loans usually in the form of banner advertisements or paid search results (the advertisements that appear at the top of an Internet search on Google, Bing, or other search engines) operated by ''publishers,'' collect consumers' personal and financial information and electronically offer it to lenders that have expressed interest in consumers meeting certain criteria.[157] In July 2016, Google banned ads for loans with APRs over 36 percent or with repayment due in 60 days or less.[158] From the Bureau's market outreach activities it is aware that the payday lending industry's use of lead generators has decreased but that payday lenders may be using other forms of advertising for customer acquisition and retention.

Online lenders view fraud (*i.e.,* consumers who mispresent their identity) as a significant risk and also express concerns about ''bad faith'' borrowing (*i.e.,* consumers with verified identities who borrow without the intent to repay).[159] Consequently, online payday and hybrid payday lenders attempt to verify the borrower's identity and the existence of a bank account in good standing. Several specialty consumer reporting agencies have evolved primarily to serve the online payday lending market. The Bureau is aware from market outreach that online lenders also generally report loan closure information on a real-time or daily basis to the specialty consumer reporting agencies. In addition, some online lenders report to the Bureau that they use nationwide credit report information to evaluate both credit and potential fraud risk associated with first-time borrowers, including recent bankruptcy filings. However, there is evidence that online lenders do not consistently utilize credit report data for every loan, and instead typically check and report data only for new borrowers or those returning after an extended absence from the lender's records.[160]

Typically, proceeds from online payday loans are disbursed electronically into the consumer's bank account and the consumer authorizes the lender to electronically debit her account to repay the loan as payments are due. The Bureau is aware from market monitoring that lenders employ various practices to encourage consumers to agree to authorize electronic debits for repayment. Some lenders generally will not disburse electronically if consumers do not agree to ACH repayment, but instead will require the consumer to wait for a paper loan proceeds check to arrive in the mail.[161] Some online payday lenders charge higher interest rates or fees to consumers who do not commit to electronic debits.[162] In addition, some online payday lenders have adopted policies that may delay the crediting of non-ACH payments.[163]

As noted above, online lenders typically collect payday loans via electronic debits. For a hybrid payday loan the lender seeks to collect the finance charges a pre-set number of times and then eventually collect the principal; for a true payday loan the lender will seek to collect the principal and finance charges when the loan is due. Online payday lenders, like their

[153] G. Michael Flores, ''The State of Online Short-Term Lending, Second Annual Statistical Analysis Report'' Bretton-Woods, Inc., at 15 (Feb. 28, 2014), *available at http://onlinelendersalliance.org/wp-content/uploads/2015/07/2015-Bretton-Woods-Online-Lending-Study-FINAL.pdf.*

[154] nonPrime101, ''Report 5—Loan Product Structures and Pricing in Internet Installment Lending, Similarities to and Differences from Payday Lending and Implications for CFPB Rulemaking,'' at 4 (May 15, 2015), *available at https://www.nonprime101.com/wp-content/uploads/2015/05/Report-5-Loan-Product-Structures-1.3-5.21.15-Final3.pdf.* As noted above, these loans may also be called flexpay loans. Such loans would likely be covered longer-term loans under this rule.

[155] nonPrime101, ''Report 5—Loan Product Structures and Pricing in Internet Installment Lending, Similarities to and Differences from Payday Lending and Implications for CFPB Rulemaking,'' at 6 (May 15, 2015), *available at https://www.nonprime101.com/wp-content/uploads/2015/05/Report-5-Loan-Product-Structures-1.3-5.21.15-Final3.pdf.*

[156] *See generally* nonPrime101, ''Report 7–A—How Persistent is the Borrower-Lender Relationship in Payday Lending,'' (Sept. 10, 2015), *available at https://www.nonprime101.com/wp-content/uploads/2015/10/Report-7A-How-Persistent-Is-the-Borrow-Lender-Relationship_1023151.pdf.*

[157] For more information about the use of lead generators in the payday market, *see* Fed. Trade Comm'n, ''Follow the Lead Workshop: Staff Perspective'' (Sept. 2016), *available at https://www.ftc.gov/system/files/documents/reports/staff-perspective-follow-lead/staff_perspective_follow_the_lead_workshop.pdf.*

[158] Google announced that it was ''banning payday loans and some related products from our ads systems,'' in an attempt to ''protect our users from deceptive or harmful financial products.'' The changes to Google's advertising service, AdWords, went into effect on July 13, 2016, and on its face apply to lenders, lead generators, and others. In the six months following the new policy's introduction, Google reported removing five million payday loan ads from its services. However, some observers have questioned the effectiveness of Google's policy. *See* David Graff, ''An Update to Our AdWords Policy on Lending Products,'' Google The Keyword Blog (May 11, 2016), *https://blog.google/topics/public-policy/an-update-to-our-adwords-policy-on/;* Scott Spencer, ''How We Fought Bad Ads, Sites and Scammers in 2016,'' Google The Keyword Blog (Jan. 25, 2017), *https://blog.google/topics/ads/how-we-fought-bad-ads-sites-and-scammers-2016/;* David Dayen, ''Google Said It Would Ban All Payday Loan Ads. It Didn't'' The Intercept, Oct. 7, 2016, *https://theintercept.com/2016/10/07/google-said-it-would-ban-all-payday-loan-ads-it-didnt/.*

[159] For example, Enova states that it uses its own analysis of previous fraud incidences and third party data to determine if applicant information submitted matches other indicators and whether the applicant can authorize transactions from the submitted bank account. In addition, it uses proprietary models to predict fraud. Enova Int'l Inc., 2016 Annual Report (Form 10–K), at 8–9.

[160] Based on the Bureau's market outreach with lenders and specialty consumer reporting agencies.

[161] *See, e.g.,* Mobiloans, ''Line of Credit Terms and Conditions,'' *www.mobiloans.com/terms-and-conditions* (last visited Feb. 5, 2016) (''If you do not authorize electronic payments from your Demand Deposit Account and instead elect to make payments by mail, you will receive your Mobiloans Cash by check in the mail.'').

[162] One online payday lender's Web site FAQs states: ''Q: Am I only able to pay through ACH? A: Paying your cash advance via an electronic funds transfer (EFT) or ACH is certainly the easiest, most efficient, and least expensive method. However, should the need for an alternative payment method arises [sic], we will be happy to discuss that with you.'' National Payday, ''Frequently Asked Questions,'' *https://www.nationalpayday.com/faq/* (last visited July 20, 2017). LendUp's Web site states there may be a fee to make a MoneyGram payment. LendUp, ''Frequently Asked Questions, Paying back your LendUp Loan,'' *https://www.lendup.com/faq#paying-loan* (last visited July 20, 2017).

Under the Electronic Fund Transfer Act (EFTA) and its implementing regulation (Regulation E), lenders cannot condition the granting of credit on a consumer's repayment by preauthorized (recurring) electronic fund transfers, except for credit extended under an overdraft credit plan or extended to maintain a specified minimum balance in the consumer's account. 12 CFR 1005.10(e). The summary in the text of current lender practices is intended to be purely descriptive. The Bureau is not addressing in this rulemaking the question of whether any of the practices described in text are consistent with EFTA.

[163] LendUp's Web site states payment by Moneygram or check may involve ''processing times'' of ''1–2 business days'' to apply the payment. LendUp, ''Frequently Asked Questions, Paying back your LendUp Loan,'' *https://www.lendup.com/faq#paying-loan* (last visited July 20, 2017). LendUp offers both single payment and installment loans, depending on the borrower's State.

storefront counterparts, use various models and software, described above, to predict when an electronic debit is most likely to succeed in withdrawing funds from a borrower's bank account. As discussed further below, the Bureau has observed lenders seeking to collect multiple payments on the same day. This pattern may be driven by a practice of dividing the payment amount in half and presenting two debits at once, presumably to reduce the risk of a larger payment being returned for nonsufficient funds. Indeed, the Bureau found that about one-third of presentments by online payday lenders occur on the same day as another request by the same lender from the same account. The Bureau also found that split presentments almost always result in either payment of all presentments or return of all presentments (in which event the consumer will likely incur multiple nonsufficient funds (NSF) fees from the bank). The Bureau's study indicates that when an online payday lender's first attempt to obtain a payment from the consumer's account is unsuccessful, it will make a second attempt 75 percent of the time and if that attempt fails the lender will make a third attempt 66 percent of the time.[164] As discussed further at part II.D, the success rate on these subsequent attempts is relatively low, and the cost to consumers may be correspondingly high.[165]

There is limited information on the extent to which online payday lenders that are unable to collect payments through electronic debits resort to other collection tactics.[166] The available evidence indicates, however, that online lenders sustain higher credit losses and risk of fraud than storefront lenders. One lender with publicly available financial information that originated both storefront and online single-payment loans reported in 2014, a 49 percent and 71 percent charge-off rate, respectively, for these loans.[167] Online lenders generally classify as ''fraud'' both consumers who misrepresented their identity in order to obtain a loan and consumers whose identity is verified but default on the first payment due, which is viewed as reflecting the intent not to repay.

Business model. While online lenders tend to have fewer costs relating to operation of physical facilities than do storefront lenders, as discussed above, they face higher costs relating to lead acquisition and marketing, loan origination screening to verify applicant identity, and potentially larger losses due to what they classify as ''fraud'' than their storefront competitors.

Accordingly, it is not surprising that online lenders—like their storefront counterparts—are dependent upon repeated re-borrowing. Indeed, even at a cost of $25 or $30 per $100 borrowed, a typical single online payday loan would generate fee revenue of under $100, which is not sufficient to cover the typical origination costs. Consequently, as discussed above, hybrid loans that roll over automatically in the absence of affirmative action by the consumer account for a substantial percentage of online payday business. These products, while nominally structured as single-payment products, effectively build a number of rollovers into the loan. For example, the Bureau has observed online payday lenders whose loan documents suggest that they are offering a single-payment loan but whose business model is to collect only the finance charges due, roll over the principal, and require consumers to take affirmative steps to notify the lender if consumers want to repay their loans in full rather than allowing them to roll over. The Bureau recently initiated an action against an online lender alleging that it engaged in deceptive practices in connection with such products.[168] In a recent survey conducted of online payday borrowers, 31 percent reported that they had experienced loans with automatic renewals.[169]

As discussed above, a number of online payday lenders claim exemption from State laws and the regulations and limitations established under those laws. As reported by a specialty consumer reporting agency with data from that market, more than half of the payday loans for which information is furnished to it are hybrid payday loans with the most common fee being $30 per $100 borrowed, twice the median amount for storefront payday loans.[170]

Similar to associations representing storefront lenders as discussed above, a national trade association representing online lenders includes loan repayment plans as one of its best practices, but does not provide many details in its public material.[171] A trade association that represents Tribal online lenders has adopted a set of best practices, but the list does not address repayment plans.[172]

Vehicle Title Loans, Including Short-Term Loans and Balloon-Payment Products

Vehicle title loans—also known as ''automobile equity loans''—are another form of liquidity lending permitted in certain States. In a title loan transaction, the borrower must provide identification and usually the title to the vehicle as evidence that the borrower owns the vehicle ''free and clear.'' [173]

[164] *See generally CFPB Online Payday Loan Payments,* at 14.

[165] Because these online lenders may offer single-payment payday, hybrid, and installment loans, reviewing the debits does not necessarily distinguish the type of loan involved. Storefront payday lenders were not included. *See* CFPB Online Payday Loan Payments, at 7, 13.

[166] One publicly traded online-only lender that makes single-payment payday loans as well as online installment loans and lines of credit reports that its call center contacts borrowers by phone, email, and in writing after a missed payment and periodically thereafter and that it also may sell uncollectible charged off debt. Enova Int'l Inc., 2016 Annual Report (Form, 10–K), at 9 (Feb. 24, 2017).

[167] Net charge-offs over average balance based on data from Cash America and Enova Forms 10–K. *See* Cash America Int'l, Inc., 2014 Annual Report (Form 10–K), at 102 (Mar. 13, 2015); Enova Int'l Inc., 2014 Annual Report (Form 10–K), at 95 (Mar. 20, 2015). Net charge-offs represent single-payment loan losses less recoveries for the year. Averages balance is the average of beginning and end of year single-payment loan receivables. Prior to November 14, 2014, Enova comprised the e-commerce division of Cash America. Using the 2014 Forms 10–K allows for a better comparison of payday loan activity, than the 2015 Forms 10–K, as Cash America's payday loan operations declined substantially after 2014.

[168] Press Release, Bureau of Consumer Fin. Prot., ''CFPB Takes Action Against Online Lender for Deceiving Borrowers'' (Nov. 18, 2015), *available at http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-online-lender-for-deceiving-borrowers/.* The FTC raised and resolved similar claims against online payday lenders. *See* Press Release, FTC, FTC Secures $4.4 Million From Online Payday Lenders to Settle Deception Charges (Jan. 5, 2016), *available at https://www.ftc.gov/news-events/press-releases/2016/01/ftc-secures-44-million-online-payday-lenders-settle-deception.*

[169] Pew Charitable Trusts, ''Payday Lending in America Fraud and Abuse Online: Harmful Practices in Internet Payday Lending, at 8 (Report 4, 2014), *available at www.pewtrusts.org/~/media/Assets/2014/10/Payday-Lending-Report/Fraud_and_Abuse_Online_Harmful_Practices_in_Internet_Payday_Lending.pdf.*

[170] nonPrime101, ''Report 5—Loan Product Structures and Pricing in Internet Installment Lending, Similarities to and Differences from Payday Lending and Implications for CFPB Rulemaking,'' at 4, 6 (May 15, 2015), *available at https://www.nonprime101.com/wp-content/uploads/2015/05/Report-5-Loan-Product-Structures-1.3-5.21.15-Final3.pdf*; CFPB Payday Loans and Deposit Advance Products White Paper, at 16.

[171] Online Lenders Alliance, ''Best Practices,'' at 29 (May 2017), *available at http://onlinelendersalliance.org/wp-content/uploads/2015/01/Best-Practices-2017.pdf.* The materials state that its members ''shall comply'' with any required State repayment plans; otherwise, if a borrower is unable to repay a loan according to the loan agreement, the trade association's members ''should create'' repayment plans that ''provide flexibility based on the customer's circumstances.''

[172] Native American Fin. Servs. Ass'n, ''Best Practices,'' *http://www.mynafsa.org/best-practices/* (last visited Apr. 20, 2016).

[173] Arizona also allows vehicle title loans to be made against as secondary motor vehicle finance transactions. Ariz. Rev. Stat. sec. 44–281, 44–291G; Arizona Dep.t of Fin. Inst., ''Frequently Asked Questions from Licensees, Question #6 'What is a Title Loan.'''

Unlike payday loans, there is generally no requirement that the borrowers have a bank account, and some lenders do not require a copy of a pay stub or other evidence of income.[174] Rather than holding a check or ACH authorization for repayment as with a payday loan, the lender generally retains the vehicle title or some other form of security interest that provides it with the right to repossess the vehicle, which may then be sold with the proceeds used for repayment.[175]

The lender retains the vehicle title or some other form of security interest during the duration of the loan, while the borrower retains physical possession of the vehicle. In some States either the lender files a lien with State officials to record and perfect its interest in the vehicle or charges a fee for non-filing insurance. In a few States, a clear vehicle title is not required, and vehicle title loans may be made as secondary liens against the title or against the borrower's automobile registration.[176] In some States, such as Georgia, vehicle title loans are made under pawnbroker statutes that specifically permit borrowers to pawn vehicle certificates of title.[177] Almost all vehicle title lending is conducted at storefront locations, although some title lending does occur online.[178]

Product definition and regulatory environment. There are three types of vehicle title loans: Single-payment loans, installment loans, and in at least one State, balloon payment loans.[179] Of the 24 States that permit some form of vehicle title lending, six States permit only single-payment title loans, 13 States allow the loans to be structured as single-payment or installment loans, and five permit only title installment loans.[180] (The payment practices of installment title loans are discussed briefly below.) All but three of the States that permit some form of title lending (Arizona, Georgia, and New Hampshire) also permit payday lending.

Single-payment vehicle title loans are typically due in 30 days and operate much like payday loans: The consumer is charged a fixed price per $100 borrowed, and when the loan is due the consumer is obligated to repay the full amount of the loan plus the fee but is typically given the opportunity to roll over or re-borrow.[181] The Bureau recently studied anonymized data from vehicle title lenders consisting of nearly 3.5 million loans made to over 400,000 borrowers in 20 States. For single-payment vehicle title loans with a typical duration of 30 days, the median loan amount was $694 with a median APR of 317 percent; the average loan amount was $959 and the average APR was 291 percent.[182] Two other studies contain similar findings.[183] Vehicle title loans are therefore for substantially larger amounts than typical payday loans, but carry similar APRs for similar terms. Some States that authorize vehicle title loans limit the rates lenders may charge to a percentage or dollar amount per $100 borrowed, similar to some State payday lending pricing structures. A common fee limit is 25 percent of the loan amount per month, but roughly half of the authorizing States have no restrictions on rates or fees.[184] Some, but not all, States limit the maximum amount that may be borrowed to a fixed dollar amount, a percentage of the borrower's monthly income (50 percent of the borrower's gross monthly income in Illinois), or a

---

[174] *See* Fast Cash Title Loans, ''FAQ,'' *http://fastcashvirginia.com/faq/* (last visited Mar. 3, 2016) (''There is no need to have a checking account to get a title loan.''); Title Max, ''How Title Loans Work,'' *https://www.titlemax.com/how-it-works/* (last visited Jan. 15, 2016) (borrowers need a vehicle title and government issued identification plus any additional requirements of State law).

[175] *See* Speedy Cash, ''Title Loans FAQs,'' *https://www.speedycash.com/faqs/title-loans/* (last visited Mar. 29, 2016) (title loans are helpful ''when you do not have a checking account to secure your loan. . . . your car serves as collateral for your loan.'').

[176] See, for example, the discussion above about Arizona law applicable to vehicle title lending.

[177] *Ga. Code sec. 44–12–131 (2015).*

[178] *See, e.g.,* the Bureau's action involving Wilshire Consumer Credit for illegal collection practices. Consumers primarily applied for Wilshire's vehicle title loans online. Press Release, Bureau of Consumer Fin. Prot., ''CFPB Orders Indirect Auto Finance Company to Provide Consumers $44.1 Million in Relief for Illegal Debt Collection Tactics'' (Oct. 1, 2015), *available at http://www.consumerfinance.gov/newsroom/cfpb-orders-indirect-auto-finance-company-to-provide-consumers-44-1-million-in-relief-for-illegal-debt-collection-tactics/. See also* State actions against Liquidation, LLC d/b/a Sovereign Lending Solutions, LLC and other names, purportedly organized in the Cook Islands, New Zealand. Press Release, Oregon Dep't of Justice, ''AG Rosenblum and DCBS Sue Predatory Title Loan Operator'' (Aug. 18, 2015), *available at http://www.doj.state.or.us/releases/Pages/2015/rel081815.aspx*; Press Release, Michigan Attorney General, ''Schuette Stops Collections by High Interest Auto Title Loan Company'' (Jan. 26, 2016), *available at http://www.michigan.gov/ag/0,4534,7-164-46849-374883-,00.html*; Press Release, Pennsylvania Dep't of Banking and Securities, ''Consumers Advised about Illegal Auto Title Loans Following Court Decision'' (Feb. 3, 2016), *available at http://www.media.pa.gov/pages/banking_details.aspx?newsid=89*; Press Release, North Carolina Dep't of Justice, ''Online Car Title Lender Banned from NC for Unlawful Loans, AG Says'' (May 2, 2016), *available at http://www.ncdoj.gov/Home/Search-Results.aspx?searchtext=Ace%20payday&searchmode=AnyWord&searchscope=SearchCurrentSection&page=82; Final Order: Director's Consideration, Washington Dep't of Financial Institutions, Division of Consumer Services* v. *Auto Loans, LLC a/k/a Car Loan, LLC a/k/a Liquidation, LLC a/k/a Vehicle Liquidation, LLC a/k/a Sovereign Lending Solutions a/k/a Title Loan America, and William McKibbin, Principal, (Apr. 22, 2016), available at http://dfi.wa.gov/sites/default/files/consumer-services/enforcement-actions/C-15-1804-16-FO02.pdf;* Press Release, Colo. Dept't of Law, ''AG Coffman Announces Significant Relief for Victims of Illegal Auto Title Loan Scheme'' (Nov. 30, 2016), *available at https://coag.gov/sites/default/files/contentuploads/cp/ConsumerCreditUnit/PressReleases/UCCC/rsfinancialsovereignlending11.30.16.pdf;* Press Release, Att'y Gen. of Mass., ''AG Obtains Judgment Voiding Hundreds of Illegal Loans to Massachusetts Consumers in Case Against Online Auto Title Lender'' (May 25, 2017), *available at http://www.mass.gov/ago/news-and-updates/press-releases/2017/2017-05-25-voiding-hundreds-of-illegal-loans.html.* Consumers applied for the title loans online and sent their vehicle titles to the lender. The lender used local agents for repossession services.

[179] The Bureau is aware of Texas vehicle title installment loans structured as longer-term balloon payment loans. One vehicle title loan for $433, arranged through a credit access business, was to be repaid in five payments of $64.91 and a final balloon payment of $519.15. Similarly, another vehicle title loan arranged through a credit access business for $2,471.03 was scheduled to be repaid in five payments for $514.80 with a final balloon payment of $2,985.83.

[180] Pew Charitable Trusts, ''Auto Title Loans: Market Practices and Borrowers' Experiences,'' at 4 (2015), *available at http://www.pewtrusts.org/~/media/Assets/2015/03/AutoTitleLoansReport.pdf?la=en.* The report lists 25 States but post-publication, as noted above, South Dakota effectively prohibited vehicle title lending in November 2016 by adopting a 36 percent APR rate cap. And, as of January 1, 2018, New Mexico vehicle title loans will be required to have a 120-day minimum loan term.

[181] *See* Pew Charitable Trusts, ''Auto Title Loans: Market Practices and Borrowers' Experiences,'' (2015), *available at http://www.pewtrusts.org/~/media/Assets/2015/03/AutoTitleLoansReport.pdf?la=en; see also* Idaho Dep't of Fin., ''Idaho Credit Code 'Fast Facts' '', *available at http://www.finance.idaho.gov/ConsumerFinance/Documents/Idaho-Credit-Code-Fast-Facts-With-Fiscal-Annual-Report-Data-01012016.pdf;* Letter from Greg Gonzales, Comm'r, Tenn. Dep't of Fin. Insts., to Hon. Bill Haslam, Governor and Hon. Members of the 109th General Assembly, at 4 (Apr. 12, 2016) (Report on the Title Pledge Industry), *available at http://www.tennessee.gov/assets/entities/tdfi/attachments/Title_Pledge_Report_2016_Final_Draft_Apr_6_2016.pdf.*

[182] CFPB Single-Payment Vehicle Title Lending, at 7.

[183] Pew Charitable Trusts, ''Auto Title Loans: Market Practices and Borrowers' Experiences,'' (2015), *available at http://www.pewtrusts.org/~/media/Assets/2015/03/AutoTitleLoansReport.pdf?la=en;* Susanna Montezemolo, ''The State of Lending in America & Its Impact on U.S. Households: Payday Lending Abuses and Predatory Practices,'' at 3 (Ctr. for Responsible Lending 2013), *available at http://www.responsiblelending.org/sites/default/files/uploads/10-payday-loans.pdf.*

[184] States with a 15 percent to 25 percent per month cap include Alabama, Georgia (rate decreases after 90 days), Mississippi, and New Hampshire; Tennessee limits interest rates to 2 percent per month, but also allows for a fee up to 20 percent of the original principal amount. Virginia's fees are tiered at 22 percent per month for amounts up to $700 and then decrease on larger loans. Ala. Code sec. 5–19A–7(a); Ga. Code Ann. sec. 44–12–131(a)(4); Miss. Code Ann. sec. 75–67–413(1); N.H. Rev. Stat. Ann. sec. 399–A:18(I)(f); Tenn. Code Ann. sec. 45–15–111(a); Va. Code Ann. sec. 6.2–2216(A).

percentage of the vehicle's value.[185] Some States limit the initial loan term to one month but several States authorize rollovers (including, in Idaho and Tennessee, automatic rollovers arranged at the time of the original loan, resembling the hybrid payday structure described above), with a few States requiring mandatory amortization in amounts ranging from five to 20 percent on rollovers.[186] Unlike payday loan regulation, few States require cooling-off periods between loans or optional extended repayment plans for borrowers who cannot repay vehicle title loans.[187]

State vehicle title regulations also sometimes address default, repossession and related fees; any cure periods prior to and after repossession; whether the lender must refund any surplus after the repossession and sale or disposition of the vehicle; and whether the borrower is liable for any deficiency remaining after sale or disposition.[188] Of the States that expressly authorize vehicle title lending, nine are ''non-recourse'' meaning that a lender's remedy upon the borrower's default is limited to repossession of the vehicle unless the borrower has impaired the vehicle by concealment, damage, or fraud.[189] Other vehicle title lending statutes are silent and do not directly specify whether a lender has recourse against a borrower for any deficiency balance remaining after repossessing the vehicle. An industry trade association commenter stated that title lenders do not sue borrowers or garnish their wages for deficiency balances.

Some States have enacted general requirements that vehicle title lenders consider a borrower's ability to repay before making a title loan. For example, both South Carolina and Utah require lenders to consider borrower ability to repay, but this may be accomplished through a borrower affirmation that she has provided accurate financial information and has the ability to repay.[190] Until July 1, 2017, Nevada required title lenders to generally consider a borrower's ability to repay and obtain an affirmation of this fact. Effective July 1st, an amendment to Nevada law requires vehicle title lenders (and payday lenders, as noted above) to assess borrowers' reasonable ability to repay by considering, to the extent available, their current or expected income; current employment status based on a pay stub, bank deposit, or other evidence; credit history; original loan amount due, or for installment loans or potential repayment plans, the monthly payment amount; and other evidence relevant to ability to repay including bank statements and borrowers' written representations.[191] Missouri requires that lenders consider a borrower's financial ability to reasonably repay the loan under the loan's contract, but does not specify how lenders may satisfy this requirement.[192]

Industry size and structure. Information about the vehicle title market is more limited than the storefront payday industry because there are currently no publicly traded monoline vehicle title loan companies, most payday lending companies that offer vehicle title loans are not publicly traded, and less information is generally available from State regulators and other sources.[193] One national survey conducted in June 2015 found that 1.7 million households reported obtaining a vehicle title loan over the preceding 12 months.[194] Another study extrapolating from State regulatory reports estimated that about two million Americans used vehicle title loans annually.[195] In 2014, new vehicle title loan originations were estimated at roughly $2 billion with revenue estimates of $3 to $5.6 billion.[196] These estimates may not include the full extent of rollovers, as well as vehicle title loan expansion by payday lenders.

There are approximately 8,000 title loan storefront locations in the United States, about half of which also offer payday loans.[197] Of those locations that

[185] For example, some maximum vehicle title loan amounts are $2,500 in Mississippi, New Mexico, and Tennessee, and $5,000 in Missouri. Illinois limits the loan amount to $4,000 or 50 percent of monthly income, Virginia and Wisconsin limit the loan amount to 50 percent of the vehicle's value and Wisconsin also has a $25,000 maximum loan amount. Examples of States with no limits on loan amounts, limits of the amount of the value of the vehicle, or statutes that are silent about loan amounts include Arizona, Idaho, South Dakota, and Utah. Miss. Code Ann. sec. 75–67–415(f); N.M. Stat. Ann. sec. 58–15–3(A); Tenn. Code Ann. sec. 45–15–115(3); Mo. Rev. Stat. sec. 367.527(2); Ill. Admin. Code tit. 38; sec. 110.370(a); Va. Code Ann. sec. 6.2–2215(1)(d); Wis. Stat. sec. 138.16(1)(c); (2)(a); Ariz. Rev. Stat. Ann. sec. 44–291(A); Idaho Code Ann. sec. 28–46–508(3); S.D. Codified Laws sec. 54–4–44; Utah Code Ann. sec. 7–24–202(3)(c). As noted above, as of January 1, 2018, New Mexico vehicle title loans will be limited to $5,000, with minimum loan terms of 120 days. N.M. H.B. 347.

[186] States that permit rollovers include Delaware, Georgia, Idaho, Illinois, Mississippi, Missouri, Nevada, New Hampshire, Tennessee, and Utah. Idaho and Tennessee limit title loans to 30 days but allow automatic rollovers and require a principal reduction of 10 percent and 5 percent respectively, starting with the third rollover. Virginia prohibits rollovers and requires a minimum loan term of at least 120 days. *See* Del. Code Ann. tit. 5 sec. 2254 (rollovers may not exceed 180 days from date of fund disbursement); Ga. Code Ann. sec. 44–12–138(b)(4); Idaho Code Ann. sec. 28–46–506(1) & (3); Ill. Admin. Code tit. 38; sec. 110.370(b)(1) (allowing refinancing if principal is reduced by 20 percent); Miss. Code Ann. sec. 75–67–413(3); Mo. Rev. Stat. sec. 367.512(4); Nev. Rev. Stat. sec. 604A.445(2); N.H. Rev. Stat. Ann. sec. 399–A:19(II) (maximum of 10 rollovers); Tenn. Code Ann. sec. 45–15–113(a); Utah Code Ann. sec. 7–24–202(3)(a); Va. Code Ann. sec. 6.2–2216(F).

[187] Illinois requires 15 days between title loans. Delaware requires title lenders to offer a workout agreement after default but prior to repossession that repays at least 10 percent of the outstanding balance each month. Delaware does not cap fees on title loans and interest continues to accrue on workout agreements. Ill. Admin. Code tit. 38; sec. 110.370(c); Del. Code Ann. 5 secs. 2255 & 2258 (2015).

[188] For example, Georgia allows repossession fees and storage fees. Arizona, Delaware, Idaho, Missouri, South Dakota, Tennessee, Utah, Virginia, and Wisconsin specify that any surplus must be returned to the borrower. Mississippi requires that 85 percent of any surplus be returned. Ga. Code Ann. sec. 44–12–131(a)(4)(C); Ariz. Rev. Stat. Ann. sec. 47–9608(A)(4); Del. Code Ann. tit. 5, sec. 2260; Idaho Code Ann. sec. 28–9–615(d); Mo. Rev. Stat. sec. 408.553; S.D. Codified Laws sec. 54–4–72; Tenn. Code Ann. sec. 45–15–114(b)(2); Utah Code Ann. sec. 7–24–204(3); Va. Code Ann. sec. 6.2–2217(C); Wis. Stat. sec. 138.16(4)(e); Miss. Code Ann. sec. 75–67–411(5).

[189] The non-recourse States include Delaware, Florida (short-term loans), Idaho (short-term loans), Nevada, South Carolina, Tennessee (short-term loans), Utah, Virginia, and Wisconsin. Del. Code 5–22–V sec. 2260; Fla. Stat. sec. 33.537.012 (5) (2016); Idaho Code 28–46–508 (2); NRS 604A.455–2; S.C. Code of Laws sec. 37–2–413(5); Tenn. Code Ann. sec. 45–15–115 (2); Utah Code Ann. sec.7–24–204(1); Va. Code sec. 6.2–2217.A & E; and Wis. Stats. 138.16(4)(f). Kentucky and South Dakota's title lending laws are also non-recourse but those States also have low rate caps that effectively prohibit title loans. Ky. Rev Stat 286.10–275 (2015); S.D. Codified Laws 54–4–72. In addition, vehicle title loans are sometimes made under State pawn lending laws that may provide that borrowers have no personal liability to repay pawn loans or obligation to redeem pledged items. *See, e.g.,* O.C.G.A. 44–12–137(a)(7) (2010); La. Rev Stat sec. 37:1803 (2016); Minn. Statutes 325J.08(6) (2016).

[190] Utah Code Ann. sec. 7–24–202; S.C. Code Ann. sec. 37–3–413(3).

[191] Nev. Rev. Stat. sec. 640A.450(3); A.B. 163, 79th Sess. (Nev. 2017).

[192] Mo. Rev. Stat sec. 367.525(4).

[193] A trade association representing several larger title lenders, the American Association of Responsible Auto Lenders, does not have a public-facing Web site but has provided the Bureau with some information about the industry.

[194] FDIC, ''2016 Unbanked and Underbanked Survey,'' at 2, 34.

[195] Pew Charitable Trusts, ''Auto Title Loans: Market Practices and Borrowers' Experiences,'' at 1 (2015), *available at http://www.pewtrusts.org/~/media/Assets/2015/03/AutoTitleLoansReport.pdf?la=en.* Pew's estimate includes borrowers of single-payment and installment vehicle title loans. The FDIC's survey question did not specify any particular type of title loan.

[196] Pew Charitable Trusts, ''Auto Title Loans: Market Practices and Borrowers' Experiences,'' at 1 (2015), *available at http://www.pewtrusts.org/~/media/Assets/2015/03/AutoTitleLoansReport.pdf?la=en;* Jean Ann Fox et al., ''Driven to Disaster: Car-Title Lending and Its Impact on Consumers,'' at 8 (Ctr. for Responsible Lending, 2013), *available at, http://www.responsiblelending.org/other-consumer-loans/car-title-loans/research-analysis/CRL-Car-Title-Report-FINAL.pdf.*

[197] Pew Charitable Trusts, ''Auto Title Loans: Market Practices and Borrowers' Experiences,'' at 1, 33 n.7 (2015), *available at http://www.pewtrusts.org/~/media/Assets/2015/03/AutoTitleLoansReport.pdf.*

predominately offer vehicle title loans, three privately held firms dominate the market and together account for about 3,000 stores in about 20 States.[198] These lenders are concentrated in the southeastern and southwestern regions of the country.[199] In addition to the large title lenders, smaller vehicle title lenders are estimated to have about 800 storefront locations,[200] and as noted above several companies offer both title loans and payday loans.[201] The Bureau understands that for some firms whose core business had been payday loans, the volume of vehicle title loan originations now exceeds payday loan originations.

State loan data also show an overall trend of vehicle title loan growth. The number of borrowers in Illinois taking vehicle title loans increased 77 percent from 2009 to 2013, and then declined 14 percent from 2013 to 2015.[202] The number of title loans taken out in California increased 183 percent between 2011 and 2016.[203] In Virginia, from 2011 to 2013, the number of motor vehicle title loans made increased by 38 percent from 128,446 to a peak of 177,775, and the number of individual consumers taking title loans increased by 44 percent, from 105,542 to a peak of 152,002. By 2016, the number of title loans in Virginia decreased to 155,996 and the number of individual consumers taking title loans decreased to 114,042. The average number of loans per borrower remained constant at 1.2 from 2011 to 2015; in 2016 the number of loans per borrower increased to 1.4.[204] In addition to loans made under Virginia's vehicle title law, a series of reports noted that some Virginia title lenders offered ''consumer finance'' installment loans without the corresponding consumer protections of the vehicle title lending law and, accounted for about ''a quarter of the money loaned in Virginia using automobile titles as collateral.''[205] In Tennessee, the number of licensed vehicle title (title pledge) locations at year-end has been measured yearly since 2006. The number of Tennessee locations peaked in 2014 at 1,071, 52 percent higher than the 2006 levels. In 2015, the number of locations declined to 965. However, in each year from 2013 to 2016, the State regulator has reported more licensed locations than existed prior to the State's title lending regulation, the Tennessee Title Pledge Act.[206]

Vehicle title loan storefront locations serve a relatively small number of customers. One study estimated that the average vehicle title loan store made 218 loans per year, not including rollovers.[207] Another study using data from four States and public filings from the largest vehicle title lender estimated that the average vehicle title loan store serves about 300 unique borrowers per year—or slightly more than one unique borrower per business day.[208] The same report estimated that the largest vehicle title lender had 4.2 employees per store.[209] But, as mentioned, a number of large payday firms offer both products from the same storefront and may use the same employees to do so. In addition, small vehicle title lenders are likely to have fewer employees per location than do larger title lenders.

Marketing, underwriting, and collections practices. Vehicle title loans are marketed to appeal to borrowers with impaired credit who seek immediate funds. The largest vehicle title lender described title loans as a ''way for consumers to meet their liquidity needs'' and described their customers as those who ''often . . . have a sudden and unexpected need for cash due to common financial challenges.''[210] Advertisements for vehicle title loans suggest that title loans can be used ''to cover unforeseen costs this month . . . [if] utilities are a little higher than you expected,'' if consumers are ''in a bind,'' for a ''short term cash

[198] The largest vehicle title lender is TMX Finance, LLC formerly known as Title Max Holdings, LLC with about 1,200 stores in 17 States. It was publicly traded until 2013 when it was taken private. Its last 10–K reported annual revenue of $656.8 million. TMX Fin. LLC, 2012 Annual Report (Form 10–K), at 21 (Mar. 27, 2013). *See* TMX Finance, ''Careers, We Believe in Creating Opportunity,'' *https://www.tmxfinancefamily.com/careers/* (last visited Sept. 17, 2017) (for TMX Finance store counts); Community Loans of America ''About Us,'' *https://clacorp.com/about-us* (last visited Jun. 19, 2017) (states it has about 1,000 locations across 25 States); Fred Schulte, ''Lawmakers protect title loan firms while borrowers pay sky-high interest rates'' Public Integrity, (updated Sept. 13, 2016), *http://www.publicintegrity.org/2015/12/09/18916/lawmakers-protect-title-loan-firms-while-borrowers-pay-sky-high-interest-rates* (Select Management Resources has about 700 stores.).

[199] Fred Schulte, ''Lawmakers protect title loan firms while borrowers pay sky-high interest rates'' Public Integrity, (updated Sept. 13, 2016), *http://www.publicintegrity.org/2015/12/09/18916/lawmakers-protect-title-loan-firms-while-borrowers-pay-sky-high-interest-rates.*

[200] State reports have been supplemented with estimates from Center for Responsible Lending, revenue information from public filings and from non-public sources. *See* Jean Ann Fox et al., ''Driven to Disaster: Car-Title Lending and Its Impact on Consumers,'' at 7 (Ctr. for Responsible Lending, 2013) *available at http://www.responsiblelending.org/other-consumer-loans/car-title-loans/research-analysis/CRL-Car-Title-Report-FINAL.pdf.*

[201] Pew Charitable Trusts, ''Auto Title Loans: Market Practices and Borrowers' Experiences,'' at 1 (2015), *available at http://www.pewtrusts.org/~/media/Assets/2015/03/AutoTitleLoansReport.pdf?la=en.*

[202] Ill. Dep't. of Fin. & Prof. Reg., ''Illinois Trends Report All Consumer Loan Products Through December 2015,'' at 6 (Apr. 14, 2016), *available at http://www.idfpr.com/DFI/CCD/pdfs/IL_Trends_Report%202015-%20FINAL.pdf?ActID=1204&ChapterID=20).*

[203] Compare 38,148 vehicle title loans in CY 2011 to 108,080 in CY 2016. California Dep't of Corps., ''2011 Annual Report Operation of Finance Companies Licensed under the California Finance Lenders Law,'' at 12 (2012), *available at http://www.dbo.ca.gov/Licensees/Finance_Lenders/pdf/CFL2011ARC.pdf;* California Dep't of Bus. Oversight, ''2016 Annual Report Operation of Finance Companies Licensed Under the California Finance Lenders Law,'' at 13 (2017), *available at http://www.dbo.ca.gov/Licensees/Finance_Lenders/pdf/2016%20CFLL%20Annual%20Report%20FINAL%207-6-17.pdf.*

[204] Va. State Corp. Comm'n, ''The 2016 Annual Report of the Bureau of Financial Institutions: Payday Lender Licensees, Check Cashers, Motor Vehicle Title Lender Licensees Operating in Virginia at the Close of Business December 31, 2016,'' at 67 (2017), *available at https://www.scc.virginia.gov/bfi/annual/ar04-16.pdf;* Va. State Corp. Comm'n, ''The 2013 Annual Report of the Bureau of Financial Institutions, Payday Lender Licensees, Check Cashers, Motor Vehicle Title Lender Licensees Operating in Virginia at the Close of Business December 31, 2013,'' at 80 (2014), *available at https://www.scc.virginia.gov/bfi/annual/ar04-13.pdf.* Because Virginia vehicle title lenders are authorized by State law to make vehicle title loans to residents of other States, the data reported by licensed Virginia vehicle title lenders may include loans made to out-of-State residents.

[205] Michael Pope, ''How Virginia Became the Region's Hub For High-Interest Loans,'' WAMU, Oct. 6, 2015, *http://wamu.org/news/15/10/06/how_virginia_became_the_regional_leader_for_car_title_loans.*

[206] Letter from Greg Gonzales, Comm'r,Tennessee Dep't of Fin. Insts., to Hon. Bill Haslam, Governor and Hon. Members of the 108th General Assembly, at 1 (Mar. 31, 2014) (Report on the Title Pledge Industry), *available at http://www.tennessee.gov/assets/entities/tdfi/attachments/Title_Pledge_Report_2014.pdf;* Letter from Greg Gonzales, Comm'r,Tennessee Dep't of Fin. Insts., to Hon. Bill Haslam, Governor and Hon. Members of the 109th General Assembly, at 2 (Apr. 12, 2016) (Report on the Title Pledge Industry), *available at http://www.tennessee.gov/assets/entities/tdfi/attachments/Title_Pledge_Report_2016_Final_Draft_Apr_6_2016.pdf.*

[207] Jean Ann Fox et al., ''Driven to Disaster: Car-Title Lending and Its Impact on Consumers,'' at 7 (Ctr. for Responsible Lending, 2013) *available at http://www.responsiblelending.org/other-consumer-loans/car-title-loans/research-analysis/CRL-Car-Title-Report-FINAL.pdf.*

[208] Pew Charitable Trusts, ''Auto Title Loans: Market Practices and Borrowers' Experiences,'' at 5 (2015), *available at http://www.pewtrusts.org/~/media/Assets/2015/03/AutoTitleLoansReport.pdf?la=en.* The four States were Mississippi, Tennessee, Texas, and Virginia. The public filing was from TMX Finance, the largest lender by store count. *Id.* at 35 n.37.

[209] Pew Charitable Trusts, ''Auto Title Loans: Market Practices and Borrowers' Experiences,'' at 22 (2015), *available at http://www.pewtrusts.org/~/media/Assets/2015/03/AutoTitleLoansReport.pdf?la=en.* The estimate is based on TMX Finance's total store and employee count reported in its Form 10–K as of the end of 2012 (1,035 stores and 4,335 employees). TMX Fin. LLC, 2012 Annual Report (Form 10–K), at 3, 6. The calculation does not account for employees at centralized non-storefront locations.

[210] TMX Fin. LLC, 2012 Annual Report (Form 10–K), at 4, 21.

flow'' problem, or for ''fast cash to deal with an unexpected expense.'' [211] Vehicle title lenders advertise quick loan approval ''in as little as 15 minutes.'' [212] Some lenders offer promotional discounts for the initial loan and bonuses for referrals,[213] for example, a $100 prepaid card for referring friends for vehicle title loans.[214]

The underwriting policies and practices that vehicle title lenders use vary and may depend on such factors as State law requirements and individual lender practices. As noted above, some vehicle title lenders do not require borrowers to provide information about their income and instead rely on the vehicle title and the underlying collateral that may be repossessed and sold in the event the borrower defaults—a practice known as asset-based lending.[215] The largest vehicle title lender stated in 2011 that its underwriting decisions were based entirely on the wholesale value of the vehicle.[216] Other title lenders' Web sites state that proof of income is required,[217] although it is unclear whether employment information is verified or used for underwriting, whether it is used for collections and communication purposes upon default, or for both purposes. The Bureau is aware, from confidential information gathered in the course of its statutory functions, that one or more vehicle title lenders regularly exceed their maximum loan amount guidelines and instruct employees to consider a vehicle's sentimental or use value to the borrower when assessing the amount of funds they will lend.

As in the market for payday loans, there have been some studies about the extent of price competition in the vehicle title lending market. Vehicle title lending is almost exclusively a storefront market, as discussed above. The evidence of price competition is mixed. One large title lender stated that it competes on factors such as location, customer service, and convenience, and also highlights its pricing as a competitive factor.[218] An academic study found evidence of price competition in the vehicle title market, citing the abundance of price-related advertising and evidence that in States with rate caps, such as Tennessee, approximately half of the lenders charged the maximum rate allowed by law, while the other half charged lower rates.[219] However, another report found that like payday lenders, title lenders compete primarily on location, speed, and customer service, gaining customers by increasing the number of locations rather than underpricing their competition.[220]

Loan amounts are typically for less than half the wholesale value of the consumer's vehicle. Low loan-to-value ratios reduce a lender's risk. A survey of title lenders in New Mexico found that the lenders typically lend between 25 and 40 percent of a vehicle's wholesale value.[221] At one large title lender, the weighted average loan-to-value ratio was found to be 26 percent of Black Book retail value.[222] The same lender has two principal operating divisions; one division requires that vehicles have a minimum appraised value greater than $500, but the lender will lend against vehicles with a lower appraised value through another brand.[223]

When a borrower defaults on a vehicle title loan, the lender may repossess the vehicle. The Bureau believes, based on market outreach, that the decision whether to repossess a vehicle will depend on factors such as the amount due, the age and resale value of the vehicle, the costs to locate and repossess the vehicle, and State law requirements to refund any surplus amount remaining after the sale proceeds have been applied to the remaining loan balance.[224] Available information indicates that lenders are unlikely to repossess vehicles they do not expect to sell. The largest vehicle title lender sold 83 percent of the vehicles it repossessed but did not report overall repossession rates.[225] In 2012, its firm-wide gross charge-offs equaled 30 percent of its average outstanding title loan balances.[226] The Bureau is aware of vehicle title lenders engaging in illegal debt collection activities in order to collect amounts claimed to be due under title loan agreements. These practices include altering caller ID information on outgoing calls to borrowers to make it appear that calls were from other businesses, falsely threatening to refer borrowers for criminal investigation or prosecution, and unlawfully disclosing debt information to borrowers' employers, friends, and family.[227] In

[211] See, *e.g.,* Cash 1, ''Get an Instant Title Loan,'' *https://www.cash1titleloans.com/apply-now/arizona.aspx?st-t=cash1titleloans_srch&gclid=Cj0KEQjwoM63BRDK_bf4_MeV3ZEBEiQAuQWqkU6O5gtz6kRjP8T3Al-BvylI-bIKksDT-r0NMPjEG4kaAqZe8P8HAQ;* Speedy Cash, ''Title Loans,'' *https://www.speedycash.com/title-loans/;* Metro Loans, ''FAQs,'' *http://metroloans.com/title-loans-faqs/;* Lending Bear, ''How it Works,'' *https://www.lendingbear.com/how-it-works/;* Fast Cash Title Loans, ''FAQ,'' *http://fastcashvirginia.com/* (all Web sites last visited Mar. 24, 2016).

[212] Check Smart, ''Arizona Vehicle Title Loan,'' *http://www.checksmartstores.com/arizona/title-loans/* (last visited Jan. 14, 2016); Fred Schulte, ''Lawmakers protect title loan firms while borrowers pay sky-high interest rates'' Public Integrity, (updated Sept. 13, 2016), *http://www.publicintegrity.org/2015/12/09/18916/lawmakers-protect-title-loan-firms-while-borrowers-pay-sky-high-interest-rates.*

[213] Ctr. for Responsible Lending, ''Car Title Lending: Disregard for Borrowers' Ability to Repay,'' at 1, CRL Policy Brief (May 12, 2014), *available at http://www.responsiblelending.org/other-consumer-loans/car-title-loans/research-analysis/Car-Title-Policy-Brief-Abilty-to-Repay-May-12-2014.pdf.*

[214] Check Smart, ''Special Offers,'' *http://www.checksmartstores.com/arizona/special-offers/* last visited Mar. 29, 2016).

[215] Advance America's Web site states ''[l]oan amount will be based on the value of your car* (*requirements may vary by state).'' Advance America, ''Title Loans,'' *https://www.advanceamerica.net/services/title-loans* (last visited Mar. 3, 2016); Pew Charitable Trusts, ''Auto Title Loans: Market Practices and Borrowers' Experiences,'' at 1 (2015), *available at http://www.pewtrusts.org/~/media/Assets/2015/03/AutoTitleLoansReport.pdf?la=en;* Fred Schulte, ''Lawmakers protect title loan firms while borrowers pay sky-high interest rates'' Public Integrity, (updated Sept. 13, 2016), *http://www.publicintegrity.org/2015/12/09/18916/lawmakers-protect-title-loan-firms-while-borrowers-pay-sky-high-interest-rates.*

[216] TMX Fin. LLC, 2012 Annual Report (Form 10–K), at 5.

[217] *See, e.g.,* Check Into Cash, ''Unlock The Cash In Your Car,'' *https://checkintocash.com/title-loans/* (last visited Mar. 3, 2016); Speedy Cash, ''Title Loans,'' *https://www.speedycash.com/title-loans/* (last visited Mar. 3, 2016); ACE Cash Express, ''Title Loans,'' *https://www.acecashexpress.com/title-loans* (last visited Mar. 3, 2016); Fast Cash Title Loans, ''FAQ,'' *http://fastcashvirginia.com/faq/* (last visited Mar. 3, 2016).

[218] TMX Fin. LLC, 2012 Annual Report (Form 10–K), at 6.

[219] Jim Hawkins, ''Credit on Wheels: The Law and Business of Auto-Title Lending,'' 69 Wash. & Lee L. Rev. 535, 558–559 (2012).

[220] Pew Charitable Trusts, ''Auto Title Loans: Market Practices and Borrowers' Experiences,'' at 5 (2015), *available at http://www.pewtrusts.org/~/media/Assets/2015/03/AutoTitleLoansReport.pdf?la=en.*

[221] Nathalie Martin & Ozymandias Adams, ''Grand Theft Auto Loans: Repossession and Demographic Realities in Title Lending,'' 77 Mo. L. Rev. 41 (2012).

[222] TMX Fin. LLC, 2011 Annual Report (Form 10–K), at 3 (Mar. 19, 2012).

[223] TMX Fin. LLC, 2011 Annual Report (Form 10–K), at 5 (Mar. 19, 2012).

[224] *See also* Pew Charitable Trusts, ''Auto Title Loans: Market Practices and Borrowers' Experiences,'' at 13–14 (2015), *available at http://www.pewtrusts.org/~/media/Assets/2015/03/AutoTitleLoansReport.pdf?la=en.*

[225] Missouri sales of repossessed vehicles calculated from data linked to St. Louis Post-Dispatch. Walter Moskop, ''Title Max is Thriving in Missouri—and Repossessing Thousands of Cars in the Process,'' St. Louis Post-Dispatch, Sept. 21, 2015, *available at http://www.stltoday.com/business/local/titlemax-is-thriving-in-missouri-and-repossessing-thousands-of-cars/article_d8ea72b3-f687-5be4-8172-9d537ac94123.html.*

[226] Bureau estimates based on publicly available financial statements by TMX Fin. LLC, 2012 Annual Report (Form 10–K), at 22, 43.

[227] Press Release, Bureau of Consumer Fin. Prot., ''CFPB Orders Relief for Illegal Debt Collection

Continued

addition, approximately 16 percent of consumer complaints handled by the Bureau about vehicle title loans involved consumers reporting concerns about repossession issues.[228]

Some vehicle title lenders have installed electronic devices on the vehicles, known as starter interrupt devices, automated collection technology, or more colloquially as ''kill switches,'' that can be programmed to transmit audible sounds in the vehicle before or at the payment due date. The devices may also be programmed to prevent the vehicle from starting when the borrower is in default on the loan, although they may allow a one-time re-start upon the borrower's call to obtain a code.[229] One of the starter interrupt providers states that ''[a]ssuming proper installation, the device will *not* shut off the vehicle while driving.'' [230] Due to concerns about consumer harm, a State Attorney General issued a consumer alert about the use of starter interrupt devices specific to vehicle title loans.[231] The alert also noted that some title lenders require consumers to provide an extra key to their vehicles. In an attempt to avoid illegal repossessions, Wisconsin's vehicle title law prohibits lenders from requiring borrowers to provide the lender with an extra key to the vehicle.[232] The Bureau has received several complaints about starter interrupt devices.

Business model. As noted above, short-term vehicle title lenders appear to have overhead costs relatively similar to those of storefront payday lenders. Default rates on vehicle title loans and lender reliance on re-borrowing activity appear to be even greater than that of storefront payday lenders.

Based on data analyzed by the Bureau, the default rate on single-payment vehicle title loans is six percent and the sequence-level default rate is 33 percent, compared with a 20 percent sequence-level default rate for storefront payday loans. One-in-five single-payment vehicle title loan borrowers have their vehicle repossessed by the lender.[233] One industry trade association commenter stated that 15 to 25 percent of repossessed vehicles are subsequently redeemed by borrowers after paying off the deficiency balance owed (along with repossession costs).

Similarly, the rate of vehicle title re-borrowing appears high. In the Bureau's data analysis, more than half—56 percent—of single-payment vehicle title loan sequences stretched for at least four loans; over a third—36 percent—were seven or more loans; and 23 percent of loan sequences consisted of 10 or more loans. While other sources on vehicle title lending are more limited than for payday lending, the Tennessee Department of Financial Institutions publishes a biennial report on vehicle title lending. Like the single-payment vehicle title loans the Bureau has analyzed, the vehicle title loans in Tennessee are 30-day single-payment loans. The most recent report shows similar patterns to those the Bureau found in its research, with a substantial number of consumers rolling over their loans multiple times. According to the report, of the total number of loan agreements made in 2014, about 15 percent were paid in full after 30 days without rolling over. Of those loans that are rolled over, about 65 percent were at least in their fourth rollover, about 44 percent were at least in their seventh rollover, and about 29 percent were at least in their tenth, up to a maximum of 22 rollovers.[234]

The impact of these outcomes for consumers who are unable to repay and either default or re-borrow is discussed in Market Concerns—Underwriting.

Short-Term Lending by Depository Institutions

As noted above, within the banking system, consumers with liquidity needs rely primarily on credit cards and overdraft services. Some depository institutions, particularly community banks and credit unions, provide occasional small loans on an accommodation basis to their customers.[235] The Bureau's market monitoring indicates that a number of the banks and credit unions offering these accommodation loans are located in small towns and rural areas and that it is not uncommon for borrowers to be in non-traditional employment or have seasonal or variable income. In addition, some depository institutions have experimented with short-term payday-like products or partnered with payday lenders, but such experiments have had mixed results and in several cases have prompted prudential regulators to take action discouraging certain types of activity. For a period of time, a handful of banks also offered a deposit advance product as discussed below; that product also prompted prudential regulators to issue guidance that effectively discouraged the offering of the product.

National banks, most State-chartered banks, and State credit unions are permitted under existing Federal laws to charge interest on loans at the highest rate allowed by the laws of the State in which the lender is located (lender's home State).[236] The bank or State-chartered credit union may then charge the interest rate of its home State on loans it makes to borrowers in other States without needing to comply with the usury limits of the States in which it makes the loans (borrower's home State). Federal credit unions generally must not charge more than an 18 percent interest rate. However, the National Credit Union Administration

Tactics,'' (Oct. 1, 2015), *available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-indirect-auto-finance-company-to-provide-consumers-44-1-million-in-relief-for-illegal-debt-collection-tactics/.* In September 2016, the CFPB took action against TMX Finance, alleging that employees made in-person visits to borrowers' references and places of employment, and disclosed the existence of borrowers' past due debts to these third-parties. Consent Order, TMX Finance LLC, CFPB No. 2016–CFPB–0022, (Sept. 26, 2016), available at *https://www.consumerfinance.gov/documents/1011/092016_cfpb_TitleMaxConsentOrder.pdf.*

[228] This represents complaints received between November 2013 and December 2016.

[229] *See, e.g.,* Eric L. Johnson & Corinne Kirkendall, ''Starter Interrupt and GPS Devices: Best Practices,'' PassTime InTouch, Jan. 14, 2016, *available at https://passtimegps.com/starter-interrupt-and-gps-devices-best-practices/.* These products may be used in conjunction with GPS devices and are also marketed for subprime automobile financing and insurance.

[230] Eric L. Johnson & Corinne Kirkendall, ''Starter Interrupt and GPS Devices: Best Practices,'' PassTime InTouch, Jan. 14, 2016, *available at https://passtimegps.com/starter-interrupt-and-gps-devices-best-practices/.*

[231] The alert also noted that vehicle title loans are illegal in Michigan. Bill Schuette, Mich. Att'y Gen., ''Consumer Alert: Auto Title Loans,'' *available at http://www.michigan.gov/ag/0,4534,7-164-17337_20942-371738-,00.html.*

[232] Wis. Stat. sec. 138.16(4)(b).

[233] CFPB Single-Payment Vehicle Title Lending, at 23; CFPB Report on Supplemental Findings, at 112.

[234] Letter from Greg Gonzales, Comm'r,Tennessee Dep't of Fin. Insts., to Hon. Bill Haslam, Governor and Hon. Members of the 109th General Assembly, at 8 (Apr. 12, 2016) (Report on the Title Pledge Industry), *available at http://www.tennessee.gov/assets/entities/tdfi/attachments/Title_Pledge_Report_2016_Final_Draft_Apr_6_2016.pdf. See* Tenn. Code Ann. sec. 45–17–112(q).

[235] A trade association representing community banks conducted a survey of its members and found 39 percent of respondents offered short-term personal loans of $1,000 (term of 45 day or less). However, among respondents, personal loan portfolios (including longer-term loans, open-end lines of credit, and deposit advance loans) accounted for less than 3 percent of the dollar volume of their total lending portfolios. Further, the survey noted that these loans are not actively advertised to consumers. Ryan Hadley, ''2015 ICBA Community Bank Personal Small Dollar Loan Survey,'' at 4 (Oct. 29, 2015) (on file).

[236] *See generally* 12 U.S.C. 85 (governing national banks); 12 U.S.C. 1463(g) (governing savings associations); 12 U.S.C. 1785(g) (governing credit unions); 12 U.S.C. 1831d (governing State banks). Alternatively, these lenders may charge a rate that is no more than 1 percent above the 90-day commercial paper rate in effect at the Federal Reserve Bank in the Federal Reserve district in which the lender is located (whichever is higher). *Id.*

(NCUA) has taken some steps to encourage federally chartered credit unions to offer ''payday alternative loans,'' which generally have a longer term than traditional payday products. Federal credit unions are authorized to make these small-dollar loans at rates up to 28 percent interest plus an application fee. This program is discussed in more detail below.

Agreements between depository institutions and payday lenders. In 2000, the Office of the Comptroller of the Currency (OCC) issued an advisory letter alerting national banks that the OCC had significant safety and soundness, compliance, and consumer protection concerns with banks entering into contractual arrangements with vendors seeking to avoid certain State lending and consumer protection laws. The OCC noted it had learned of nonbank vendors approaching federally chartered banks urging them to enter into agreements to fund payday and title loans. The OCC also expressed concern about unlimited renewals (what the Bureau refers to as rollovers or re-borrowing), and multiple renewals without principal reduction.[237] The agency subsequently took enforcement actions against two national banks for activities relating to payday lending partnerships.[238]

The Federal Deposit Insurance Corporation (FDIC) has also expressed concerns with similar agreements between payday lenders and the depositories under its purview. In 2003, the FDIC issued Guidelines for Payday Lending applicable to State-chartered FDIC-insured banks and savings associations; the guidelines were revised in 2005 and most recently in 2015. The guidelines focus on third-party relationships between the chartered institutions and other parties, and specifically address rollover limitations. They also indicate that banks should ensure borrowers exhibit both a willingness and ability to repay when rolling over a loan. Among other things, the guidelines indicate that institutions should: (1) Ensure that payday loans are not provided to customers who had payday loans outstanding at any lender for a total of three months during the previous 12 months; (2) establish appropriate cooling-off periods between loans; and (3) provide that no more than one payday loan is outstanding with the bank at a time to any one borrower.[239] In 2007, the FDIC issued guidelines encouraging banks to offer affordable small-dollar loan alternatives with APRs of 36 percent or less, reasonable and limited fees, amortizing payments, underwriting focused on a borrower's ability to repay but allowing flexible documentation, and to avoid excessive renewals.[240]

Deposit advance product lending. As the payday lending industry grew, a handful of banks decided to offer their deposit customers a similar product termed a deposit advance product (DAP). While one bank started offering deposit advances in the mid-1990s, the product began to spread more rapidly in the late 2000s and early 2010s. DAP could be structured a number of ways but generally involved a line of credit offered by depository institutions as a feature of an existing consumer deposit account with repayment automatically deducted from the consumer's next qualifying deposit. Deposit advance products were available to consumers who received recurring electronic deposits if they had an account in good standing and, for some banks, several months of account tenure, such as six months. When an advance was requested, funds were deposited into the consumer's account. Advances were automatically repaid when the next qualifying electronic deposit, whether recurring or one-time, was made to the consumer's account rather than on a fixed repayment date. If an outstanding advance was not fully repaid by an incoming electronic deposit within about 35 days, the consumer's account was debited for the amount due and could result in a negative balance on the account.

The Bureau estimates that at the product's peak from mid-2013 to mid-2014, banks originated roughly $6.5 billion of advances, which represents about 22 percent of the volume of storefront payday loans issued in 2013. The Bureau estimates that at least 1.5 million unique borrowers took out one or more DAP loans during that same period.[241]

DAP fees, like payday loan fees, did not vary with the amount of time that the advance was outstanding but rather were set as dollars per amount advanced. A typical fee was $2 per $20 borrowed, the equivalent of $10 per $100. Research undertaken by the Bureau using a supervisory dataset found that the median duration of an episode of DAP usage was 12 days, yielding an effective APR of 304 percent.[242]

The Bureau further found that while the median draw on a DAP was $180, users typically took more than one draw before the advance was repaid. The multiple draws resulted in a median average daily DAP balance of $343, which is similar to the size of a typical payday loan. With the typical DAP fee of $2 per $20 advanced, the fees for $343 in advances equate to about $34.30. The median DAP user was indebted for 112 days over the course of a year and took advances in seven months. Fourteen percent of borrowers took advances totaling over $9,000 over the course of the year; these borrowers had a median number of days in debt of 254.[243]

In 2010, the Office of Thrift Supervision (OTS) issued a supervisory directive ordering one bank to terminate its DAP program, which the bank offered in connection with prepaid accounts, after determining the bank engaged in unfair or deceptive acts or

[237] Advisory Letter: AL 2000–10 to Chief Executive Officers of All Nat'l Banks, Dep't and Div. Heads, and All Examing Personnel from OCC (Nov. 27, 2000) (Payday Lending), *available at http://www.occ.gov/static/news-issuances/memos-advisory-letters/2000/advisory-letter-2000-10.pdf.*

[238] *See* OCC consent orders involving Peoples National Bank and First National Bank in Brookings. Press Release, OCC Admin of Nat'l Banks, NR 2003–06, ''Peoples National Bank to Pay $175,000 Civil Money Penalty And End Payday Lending Relationship with Advance America'' (Jan. 31, 2003), *available at http://www.occ.gov/static/news-issuances/news-releases/2003/nr-occ-2003-6.pdf;* Consent Order, First National Bank in Brookings, OCC No. 2003–1 (Jan. 17, 2003), *available at http://www.occ.gov/static/enforcement-actions/ea2003-1.pdf.* In December 2016, the OCC released a plan to offer limited special purpose bank charters to fintech companies. In response to criticism that such a charter might enable payday lenders to circumvent some States' attempts to ban payday lending, the OCC stated it had virtually eliminated abusive payday lending in the federal banking system in the early 2000s, and had ''no intention of allowing these practices to return.'' Lalita Clozel, ''OCC Fintech Charter Opens 'henhouse' to Payday Lenders: Consumer Groups,'' American Banker, Jan. 13, 2016, *available at https://www.americanbanker.com/news/occ-fintech-charter-opens-hen-house-to-payday-lenders-consumer-groups. See* ''Comptroller's Licensing Manual Draft Supplement: OCC, Evaluating Charter Application From Financial Technology Companies,'' (Mar. 2017), *available at https://www.occ.gov/publications/publications-by-type/licensing-manuals/file-pub-lm-fintech-licensing-manual-supplement.pdf.*

[239] FDIC, ''Financial Institution Letters: Guidelines for Payday Lending,'' (Revised Nov. 2015), *available at https://www.fdic.gov/news/news/financial/2005/fil1405a.html.*

[240] FDIC, ''Financial Institution Letters: Affordable Small-Dollar Loan Products Final Guidelines,'' FIL 50–2007 (June 19, 2007), *available at https://www.fdic.gov/news/news/financial/2007/fil07050.html.*

[241] CFPB staff analysis based on confidential information gathered in the course of statutory functions. Estimates made by summing aggregated data across a number of DAP-issuing institutions. *See* John Hecht, ''Alternative Financial Services: Innovating to Meet Customer Needs in an Evolving Regulatory Framework,'' at 7 (2014) (Stephens, Inc., slide presentation) (on file) (for payday industry size).

[242] CFPB Payday Loans and Deposit Advance Products White Paper, at 27–28.

[243] CFPB Payday Loans and Deposit Advance Products White Paper, at 33 fig. 11, 37 fig. 14.

practices and violated the OTS' Advertising Regulation.[244] Consequently, in 2011, pursuant to a cease and desist order, the bank agreed to remunerate its DAP consumers nearly $5 million and pay a civil monetary penalty of $400,000.[245]

In November 2013, the FDIC and OCC issued final supervisory guidance on DAP.[246] This guidance stated that banks offering DAP should adjust their programs in a number of ways, including applying more scrutiny in underwriting DAP loans and discouraging repetitive borrowing. Specifically, the OCC and FDIC stated that banks should ensure that the customer relationship is of sufficient duration to provide the bank with adequate information regarding the customer's recurring deposits and expenses, and that the agencies would consider sufficient duration to be no less than six months. In addition, the guidance said that banks should conduct a more stringent financial capacity assessment of a consumer's ability to repay the DAP advance according to its terms without repeated re-borrowing, while meeting typical recurring and other necessary expenses, as well as outstanding debt obligations. In particular, the guidance stated that banks should analyze a consumer's account for recurring inflows and outflows at the end, at least, of each of the preceding six months before determining the appropriateness of a DAP advance. Additionally, the guidance noted that in order to avoid re-borrowing, a cooling-off period of at least one monthly statement cycle after the repayment of a DAP advance should be completed before another advance could be extended. Finally, the guidance stated that banks should not increase DAP limits automatically and without a fully underwritten reassessment of a consumer's ability to repay, and banks should reevaluate a consumer's eligibility and capacity for DAP at least every six months.[247]

Following the issuance of the FDIC and OCC guidance, banks supervised by the FDIC and OCC ceased offering DAP. Of two DAP-issuing banks supervised by the Federal Reserve Board and therefore not subject to either the FDIC or OCC guidance, one eliminated its DAP program while another continues to offer a modified version of DAP to its existing DAP borrowers.[248] Today, with the exception of some short-term lending within the NCUA's Payday Alternative Loan (PAL) program, described in detail below, relatively few banks or credit unions offer large-scale formal loan programs of this type.

Federal credit union payday alternative loans. As noted above, Federal credit unions may not charge more than 18 percent interest. However, in 2010, the NCUA adopted an exception to the interest rate limit under the Federal Credit Union Act that permitted Federal credit unions to make PALs at an interest rate of up to 28 percent plus an application fee, ''that reflects the actual costs associated with processing the application'' up to $20.[249] PALs may be made in amounts of $200 to $1,000 to borrowers who have been members of the credit union for at least one month. PAL terms range from one to six months, PALs may not be rolled over, and borrowers are limited to one PAL at a time and no more than three PALs from the same credit union in a rolling six-month period. PALs must fully amortize and the credit union must establish underwriting guidelines such as verifying borrowers' employment from at least two recent pay stubs.[250]

In 2016, about 650 Federal credit unions (nearly 20 percent of all Federal credit unions) offered PALs, with originations at $134.7 million, representing a 9.7 percent increase from 2015.[251] In 2015, the average PAL amount was about $700 and carried a median interest rate of 25 percent; in 2016, the average PAL loan amount increased to about $720 with a similar median interest rate of 25 percent.[252]

C. Longer-Term, High-Cost Loans

In addition to short-term loans, certain longer-term, high-cost loans will be covered by the payments protections provisions of this rule. These are longer-term, high-cost loans with a leveraged payment mechanism, as described in more detail in part II.D and Markets Concerns—Payments. The category of longer-term high-cost loans most directly impacted by the payments protections in this rule are payday installment loans.

Payday Installment Loans

Product definition and regulatory environment. The term ''payday installment loan'' refers to a high-cost loan repaid in multiple installments, with each installment typically due at the consumer's payday and with the lender generally having the ability to collect the payment from the consumer's bank account as money is deposited or directly from the consumer's paycheck.[253]

Two States, Colorado and Illinois, have authorized payday installment loans.[254] Through 2010 amendments to its payday loan law, Colorado no longer permits short-term single-payment payday loans. Instead, in order to charge fees in excess of the 36 percent APR cap for most other consumer loans, the minimum loan term must be six months and lenders are permitted to take a series of post-dated checks or payment authorizations to cover each payment under the loan, providing lenders with the same access to borrower's accounts as a single-payment payday loan.[255] In Illinois, lenders have been permitted to make payday installment loans since 2011. These loans must be fully-amortizing for terms of 112 to 180 days and the loan amounts are limited to the

[244] Meta Fin. Grp., Inc., 2010 Annual Report (Form 10–K), at 59 (Dec. 13, 2010).

[245] Meta Fin. Grp., Inc., Quarter Report (Form 10–Q) at 31 (Aug. 5, 2011). The OTS was merged with the OCC effective July 21, 2011. *See* OCC, ''OTS Integration,'' *http://www.occ.treas.gov/about/who-we-are/occ-for-you/bankers/ots-integration.html* (last visited Apr. 27, 2016).

[246] Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 78 FR 70624 (Nov. 26, 2013); Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 78 FR 70552 (Nov. 26, 2013).

[247] Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 78 FR 70624 (Nov. 26, 2013); Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 78 FR 70552 (Nov. 26, 2013).

[248] The Federal Reserve Board issued a statement to its member banks on DAP. Bd. of Governors of the Fed. Reserve Sys., ''Statement on Deposit Advance Products,'' (Apr. 25, 2013), *available at https://www.federalreserve.gov/supervisionreg/caletters/CA13-07attachment.pdf.*

[249] 12 CFR 701.21(c)(7)(iii). Application fees charged to all applicants for credit are not part of the finance charge that must be disclosed under Regulation Z. *See* 12 CFR 1026.4(c).

[250] 12 CFR 701.21(c)(7)(iii).

[251] Nat'l Credit Union Admin., ''5300 Call Report Aggregate Financial Performance Reports (FPRs),'' (Dec. 2016), *available at https://www.ncua.gov/analysis/Pages/call-report-data/aggregate-financial-performance-reports.aspx.*

[252] Bureau staff estimates are based on NCUA Call Report data. Nat'l Credit Union Admin., ''Credit Union and Corporate Call Report Data,'' *available at https://www.ncua.gov/analysis/Pages/call-report-data.aspx.*

[253] Lenders described in part II.C as payday installment lenders may not use this terminology.

[254] As noted above, as of January 1, 2018, New Mexico payday loans (and vehicle title loans) must be payable in four substantially equal payments over at least 120 days with an APR of 175 percent or less.

[255] Colo. Rev. Stat. sec. 5–3.1–103. Although loans may be structured in multiple installments of substantially equal payments or a single installment, almost all lenders contract for repayment in monthly or bi-weekly installments. 4 Colo. Code Regs. sec. 902–1, Rule 17(B); Adm'r of the Colo. Consumer Credit Unit, ''Colorado Payday Lending—July Demographic and Statistical Information: July 2000 through December 2012,'' at 15–16, *available at https://coag.gov/uccc/info/ar.*

lesser of $1,000 or 22.5 percent of gross monthly income.[256]

A number of other States have adopted usury laws that some payday lenders use to offer payday installment loans in lieu of, or in addition to, more traditional payday loans. Since July 2016, Mississippi lenders can make ''credit availability loans''—closed-end fully-amortizing installment loans with loan terms of four to 12 months, whether secured by personal property or unsecured.[257] The maximum loan amount on a credit availability loan is limited to $2,500, and lenders may charge a monthly handling fee of up to 25 percent of the outstanding principal balance plus an origination fee of the greater of 1 percent of the amount disbursed or $5.[258]

As of 2015, Tennessee lenders may offer ''flex loans''—open-end lines of credit that need not have a fixed maturity date and that may be secured by personal property or unsecured.[259] The maximum outstanding balance on a flex loan may not exceed $4,000, with an interest rate of up to 24 percent per annum and ''customary fees'' for underwriting and other purposes not to exceed a daily rate of 0.7 percent of the average daily principal balance.[260] At least one lender offering flex loans states that loan payments are ''aligned with your payday.'' [261] Similar legislation has been unsuccessful in other States. For example, in May 2017 the Governor of Oklahoma vetoed legislation that would have authorized high-cost installment loans with interest rates of up to 17 percent per month, or 204 percent APR.[262]

None of these laws authorizing payday installment loans, credit access loans, or flex loans appear to limit the use of electronic repayment or ACH options for repayment.

In addition to States that authorize a specific form of payday installment loan, credit access loan, or flex loan, several other States provide room within their usury laws for high-cost installment products. A recent report found that seven States have no rate or fee limits for closed-end loans of $500 and that 10 States have no rate or fee limits for closed-end loans of $2,000.[263] The same report noted that for open-end credit, 13 States do not limit rates for a $500 advance and 15 States do not limit them for a $2,000 advance.[264] Another recent study of the Web sites of five payday lenders that operate both online and at storefront locations found that these five lenders offered payday installment loans in at least 17 States.[265]

In addition, as discussed above, a substantial segment of the online payday industry operates outside of the constraints of State law, and this segment, too, has migrated towards payday installment loans. For example, a study commissioned by a trade association for online lenders surveyed seven lenders and concluded that, while single-payment loans are still a significant portion of these lenders' volume, they are on the decline while installment loans are growing. Several of the lenders represented in the report had either eliminated single-payment products or were migrating to installment products while still offering single-payment loans.[266] For the practical reasons associated with having no retail locations, online lenders prefer repayment by electronic methods and use various approaches to secure consumers' authorization for payments electronically through ACH debits.

As with payday loans, and as noted above, as authorized or permitted by some State laws, payday installment lenders often hold borrowers' checks or obtain their authorization for ACH repayment. Some borrowers may prefer ACH repayment methods for convenience. The Bureau is aware of certain practices used by payday installment lenders to secure repayment through consumers' accounts including longer waits for distribution of loan proceeds and higher fees for non-electronic payment methods, described above in the Online Payday Loans section, and discussed in more detail in part II.D and Markets Concerns—Payments. To the extent that longer-term payday installment loans meet the cost of credit threshold and include leveraged payment mechanisms, they are subject to this rule's payments protections.[267]

Finance Company Installment Loans

Product definition and regulatory environment. Before the advent of single-payment payday loans or online lending, and before widespread availability of credit cards, ''personal loans'' or ''personal installment loans'' were offered by storefront nonbank installment lenders, often referred to as ''finance companies.'' Personal loans are typically unsecured loans used for any variety of purposes and distinguished from loans where the lender generally requires the funds be used for a specific intended purpose, such as automobile purchase loans, student loans, and mortgage loans. As discussed below, these finance companies (and their newer online counterparts) have a different business model than payday installment lenders. Some of these finance companies limit the APRs on their loans to 36 percent or less,

[256] 815 Ill. Comp. Stat. sec. 122/2–5.

[257] Miss. Code Ann. sec. 75–67–603(e) (2017).

[258] Miss. Code Ann. sec. 75–67–619 (2017)

[259] Tenn. Code Ann. sec. 45–12–102(6) (2017).

[260] Tenn. Code Ann. sec. 45–12–111(2017).

[261] Advance Financial Flex Loan, ''Online Tennessee Flex Loans,'' *https://www.af247.com/tennessee-flex-loans* last visited May 17, 2017).

[262] Okla. H.B. 1913, 56th Leg., 1st Sess. (Okla. 2017). *http://www.oklegislature.gov/BillInfo.aspx?Bill=HB1913&Session=1700.*

[263] Nat'l. Consumer Law Ctr., ''Predatory Installment Lending in 2017, States Battle to Restrain High-Cost Loans,'' at 14 map 1, 15 map 2 (Aug. 2017), *available athttps://www.nclc.org/images/pdf/pr-reports/installment-loans/report-installment-loans.pdf.* Roughly half of the States with no set limits do prohibit unconscionable interest rates. As of January 1, 2008, New Mexico's status will change from a State with no rate caps for loans of $500 or $2,000 to a State that caps rates at 175 percent APR.

[264] Nat'l. Consumer Law Ctr., ''Predatory Installment Lending in 2017, States Battle to Restrain High-Cost Loans,'' at 18 map 3, 19 map 4 (Aug. 2017), *available at https://www.nclc.org/images/pdf/pr-reports/installment-loans/report-installment-loans.pdf.*

[265] Diane Standaert, ''Payday and Car Title Lenders' Migration to Unsafe Installment Loans,'' at 7 tbl.1 (Ctr. for Responsible Lending, 2015), *available at http://www.responsiblelending.org/other-consumer-loans/car-title-loans/research-analysis/crl_brief_cartitle_lenders_migrate_to_installmentloans.pdf.* CRL surveyed the Web sites for: Cash America, Enova International (d/b/a CashNetUSA and d/b/a NetCredit), Axcess Financial (d/b/a Check 'N Go), and ACE Cash Express. *Id.* at 10 n.52.

[266] G. Michael Flores, ''The State of Online Short-Term Lending, Second Annual Statistical Analysis Report,'' Bretton-Woods, Inc., at 3 (Feb. 28, 2014), *available at http://onlinelendersalliance.org/wp-content/uploads/2015/07/2015-Bretton-Woods-Online-Lending-Study-FINAL.pdf.* The report does not address the State licensing status of the study participants but based on its market outreach activities, the Bureau believes that some of the loans included in the study were not made subject to the licensing laws of the borrowers' States of residence. *See also* nonPrime101, ''Report 1: Profiling Internet Small Dollar Lending—Basic Demographics and Loan Characteristics,'' at 9, 11, (2014), *available at https://www.nonprime101.com/wp-content/uploads/2013/10/Clarity-Services-Profiling-Internet-Small-Dollar-Lending.pdf.*

[267] Installment vehicle title loans are title loans that are contracted to be repaid in multiple installments rather than in a single payment. Vehicle title lending almost exclusively occurs at retail storefront locations and consequently, borrowers often repay both in cash at the lender's location. However, some installment vehicle title lenders allow repayment by ACH from the borrower's account or by debit card, a practice common to payday installment loans. *See, e.g.,* Auto Loan Store, ''Auto Title Loan FAQ,'' *https://www.autotitlelending.com/faq/* (last visited June 20, 2017); TFC Title Loans, ''How Are Title Loans Paid Back?,'' TFC Title Loans Blog, *https://www.tfctitleloans.com/blog/how-are-title-loans-paid-back/* (last visited Sept. 17, 2017); Presto Title Loans, ''You Can Make Payments Online!,'' *http://prestoautoloans.com/pay-online/!/* (last visited June 20, 2017). To the extent that longer-term installment vehicle title loans meet the cost of credit threshold and the lender obtains a leveraged payment mechanism, the loans are subject to this rule's protections for payment presentments.

whether required by State law or as a matter of company policy. However, there are other finance companies and installment lenders that offer loans that fall within the rule's definition of ''covered longer-term loan,'' as they carry a cost of credit that exceeds 36 percent APR and include repayment through a leveraged payment mechanism—access to the borrower's account.

According to a report from a consulting firm using data derived from a nationwide consumer reporting agency, in 2016 finance companies originated 8.6 million personal loans (unsecured installment loans) totaling $41.7 billion in originations; approximately 6.9 million of these loans worth $25.8 billion, with an average loan size of about $3,727, were made to nonprime consumers (categorized as near prime, subprime, and deep subprime, with VantageScores of 660 and below).[268]

APRs at storefront locations in States that do not cap rates on installment loans can be 50 to 90 percent for subprime and deep subprime borrowers; APRs in States with rate caps are 24 to 36 percent APR for near prime and subprime borrowers.[269] A survey of finance companies conducted in conjunction with a national trade association reported that 80 percent of loans were for $2,000 or less and 85 percent of loans had durations of 24 months or less (60 percent of loans had durations of one year or less).[270] The survey did not report an average loan amount. Almost half of the loans had APRs between 49 and 99 percent; 9 percent of loans of $501 or less had APRs between 100 and 199 percent, but there was substantial rate variation among States.[271] Except for loans subject to the Military Loan Act described above, APR calculations under Regulation Z include origination fees, but lenders generally are not required to include within the APR costs such as application fees and add-on services such as optional credit insurance and guaranteed automobile protection.[272] A wider range and number of such up-front fees and add-on products and services appear to be charged by the storefront lenders than by their newer online counterparts.

Finance companies typically engage in underwriting that includes a monthly net income and expense budget, a review of the consumer's credit report, and an assessment of monthly cash flow.[273] One trade association representing traditional finance companies has described the underwriting process as evaluating the borrower's ''stability, ability, and willingness'' to repay the loan.[274] Many finance companies report loan payment history to one or more of the nationwide consumer reporting agencies,[275] and the Bureau believes from market outreach that these lenders generally furnish payment information on a monthly basis.

With regard to newer online counterparts, the Bureau is aware from its market monitoring activities that some online installment lenders in this market offer products that resemble the types of loans made by finance companies. Many of these online installment lenders engage in highly-automated underwriting that involves substantial use of analytics and technology. The APRs on the loans are over 36 percent and can reach the triple digits.[276]

Finance companies and online installment lenders offer various methods for consumers to repay their loans. Particularly for online loans, repayment through ACH is common.[277] Some online installment lenders also allow other repayment methods, such as check, debit or credit card, MoneyGram, or Western Union, but may require advance notice for some of these payment methods.[278] From its market monitoring functions, the Bureau is aware that finance companies with storefront locations tend to offer a wider array of repayment options. Some finance companies will accept ACH payments in person, set up either during the loan closing process or at a later date, or by phone.[279] Finance companies also traditionally take payments in-store, generally by cash or check, or by mail. Some finance companies charge consumers a fee to use certain payment methods.[280]

---

[268] Experian-Oliver Wyman, ''2016 Q4 Market Intelligence Report: Personal Loans Report,'' at 11–13 figs. 9, 10, 12 & 13 (2017), *available at http://www.marketintelligencereports.com;* Experian-Oliver Wyman, ''2016 Q3 Market Intelligence Report: Personal Loans Report,'' at 11–13 figs. 9, 10, 12 & 13 (2016), *available at http://www.marketintelligencereports.com;* Experian-Oliver Wyman, ''2016 Q2 Market Intelligence Report: Personal Loans Report,'' at 11–13 figs. 9, 10, 12 & 13 (2016), *available at http://www.marketintelligencereports.com;* Experian-Oliver Wyman, ''2016 Q1 Market Intelligence Report: Personal Loans Report,'' at 11–13, figs. 9, 10, 12 & 13 (2016), *available at http://www.marketintelligencereports.com.* These finance company personal loans are not segmented by cost and likely include some loans with a cost of credit of 36 percent APR or less that would not be covered by the Bureau's rule.

[269] *See* John Hecht, ''Alternative Financial Services: Innovating to Meet Customer Needs in an Evolving Regulatory Framework,'' at 11 (2014) (Stephens, Inc., slide presentation) (on file) (for listing of typical rates and credit scores for licensed installment lenders).

[270] Thomas A. Durkin et al., ''Findings from the AFSA Member Survey of Installment Lending,'' at 24 tbl. 3 (2014), *available at http://www.masonlec.org/site/rte_uploads;/files;/Manne;/11.21.14%20;JLEP%20Consumer%20Credit%20;and%20the;%20American%20Economy;/Findings%20;from%20the;%20AFSA%20Member;%20Survey;%20of%20Installment;/%20Lending.pdf.* It appears that lenders made loans in at least 27 States, but the majority of loans were from 10 States. Id. at 28 tbl. 9.

[271] Thomas A. Durkin et al., ''Findings from the AFSA Member Survey of Installment Lending,'' at 24 tbl. 3 (2014), *available at http://www.masonlec.org/site/rte_uploads/files/Manne/11.21.14%20JLEP%20Consumer%20Credit%20and%20the%20American%20Economy/Findings%20from%20the%20AFSA%20Member%20Survey%20of%20Installment%20Lending.pdf.* It appears that lenders made loans in at least 27 States, but the majority of loans were from 10 States. Id. at 28 tbl. 9 & n.1.

[272] 12 CFR 1026.4(a) through (d).

[273] *See* American Fin. Servs. Ass'n, ''Traditional Installment Loans, Still the Safest and Most Affordable Small Dollar Credit,'' *available at https://www.afsaonline.org/Portals/0/Federal/White%20Papers/Small%20Dollar%20Credit%20TP.pdf;* Sun Loan Company, ''Loan FAQs,'' *http://www.sunloan.com/faq/* (last visited Sept. 23, 2017) (''Yes, we do check your credit report when you complete an application for a Sun Loan Company, but we do not base our approval on your score. Your ability, stability and willingness to repay the loan are the most important things we check when making a decision.'').

[274] Nat'l Installment Lenders Ass'n, ''Best Practices,'' *http://nilaonline.org/best-practices/* (last visited Apr. 29, 2016).

[275] American Fin. Servs. Ass'n, ''Traditional Installment Loans, Still the Safest and Most Affordable Small Dollar Credit,'' *available at https://www.afsaonline.org/Portals/0/Federal/White%20Papers/Small%20Dollar%20Credit%20TP.pdf.*

[276] APRs on Elevate's Rise loans can reach 299 percent, APRs on LendUp's loans can reach about 256 percent, and APRs on Enova's loans originated through its NetCredit platform can reach 179 percent. Rise, ''What it Costs,'' *https://www.risecredit.com/how-online-loans-work#WhatItCosts* (last visited Sept. 17, 2017); LendUp, ''Rates & Notices,'' *https://www.lendup.com/rates-and-notices* (last visited Sept. 17, 2017); Enova, ''Investor Presentation,'' at 7 (May 8, 2017), *available at http://ir.enova.com/download/Enova+Investor+Presentation+v5+%28as+of+May+5+2017%29.pdf.*

[277] *See, e.g.,* Elevate, 2017 S–1, at 22; Rise, ''Frequently Asked Questions About Rise Loans,'' *https://www.risecredit.com/frequently-asked-questions* (last visited Sept. 23, 2017); Enova, 2016 Annual Report (10–K), at 25.

[278] *See, e.g.,* NetCredit, ''Frequently Asked Questions: How Can I Repay My Personal Loan,'' *https://www.netcredit.com/faq* (last visited Sept. 17, 2017); Rise, ''Frequently Asked Questions About Rise Loans,'' *https://www.risecredit.com/frequently-asked-questions* (last visited Sept. 17, 2017).

[279] *See* Republic Finance, ''Payments,'' *http://republicfinance.com/payment* (last visited Sept. 17, 2017).

[280] *See* One lender's Web site notes (''Republic Finance has arrangements with a payment processor, PaymentVision, to accept payments from our customers either by phone or online as further described below. By using this service, you contract directly with the payment processor, PaymentVision. If permitted by State law, the payment processor charges a fee for their service. Republic Finance does not receive any portion of that fee.''). Republic Finance, ''Payments by Phone (Interactive Voice Response) or Online Payments through Payment Processor,'' *http://republicfinance.com/payment* (last visited Sept. 17, 2017).

D. Initiating Payment From Consumers' Accounts

As discussed above, payday and payday installment lenders nearly universally obtain at origination one or more authorizations to initiate withdrawal of payment from the consumer's account. There are a variety of payment options or channels that they use to accomplish this goal, and lenders frequently obtain authorizations for multiple types. Different payment channels are subject to different laws and, in some cases, private network rules, leaving lenders with broad control over the parameters of how a particular payment will be pulled from a consumer's account, including the date, amount, and payment method.

Obtaining Payment Authorization

A variety of payment methods enable lenders to use a previously-obtained authorization to initiate a withdrawal from a consumer's account without further action from the consumer. These methods include paper signature checks, remotely created checks (RCCs) and remotely created payment orders (RCPOs),[281] and electronic payments like ACH[282] and debit and prepaid card transactions. Payday and payday installment lenders—both online and in storefronts—typically obtain a post-dated check or electronic payment authorization from consumers for repayments of loans.[283] For storefront payday loans, lenders typically obtain a post-dated check (or, where payday installment products are authorized, a series of postdated checks) that they can use to initiate a check or ACH transaction from a consumer's account. For an online loan, a consumer often provides bank account information to receive the loan funds, and the lender often uses that bank account information to obtain payment from the consumer.[284] This account information can be used to initiate an ACH payment from a consumer's account. Typically, online lenders require consumers to authorize payments from their account as part of their agreement to receive the loan proceeds electronically.[285] Some traditional installment lenders also obtain an electronic payment authorization from their customers.

Payday and payday installment lenders often take authorization for multiple payment methods, such as taking a post-dated check along with the consumer's debit card information.[286] Consumers usually provide the payment authorization as part of the loan origination process.[287]

For storefront payday loans, providing a post-dated check is typically a requirement to obtain a loan. Under the Electronic Fund Transfer Act (EFTA) lenders cannot condition credit on obtaining an authorization from the consumer for ''preauthorized'' (recurring) electronic fund transfers,[288] but in practice online payday and payday installment lenders are able to obtain such authorizations from consumers for almost all loans. The EFTA provision concerning compulsory use does not apply to paper checks and one-time electronic fund transfers. Moreover, even for loans subject to the EFTA compulsory use provision, lenders use various methods to obtain electronic authorizations. For example, although some payday and payday installment lenders provide consumers with alternative methods to repay loans, these options may be burdensome and may significantly change the terms of the loan. For example, one lender increases its APR by an additional 61 percent or 260 percent, depending on the length of the loan, if a consumer elects a cash-only payment option for its installment loan product, resulting in a total APR of 462 percent (210 day loan) to 780 percent (140 day loan).[289] Other lenders change the origination process if consumers do not immediately provide account access. For example, some online payday lenders require prospective customers to contact them by phone if they do not want to provide a payment authorization and wish to

---

[281] A RCC or RCPO is a type of check that is created by the payee—in this case, it would be created by the lender—and processed through the check clearing system. Given that the check is created by the lender, it does not bear the consumer's signature. *See* Regulation CC, 12 CFR 229.2(fff) (defining remotely created check); Telemarketing Sales Rule, 16 CFR 310.2(cc) (defining ''remotely created payment order'' as a payment instrument that includes remotely created checks).

[282] In order to initiate an ACH payment from a consumer's account, a lender must send a request (also known as an ''entry'') through an originating depository financial institution (ODFI). An ODFI is a bank or other financial institution with which the lender or the lender's payment processor has a relationship. ODFIs aggregate and submit batches of entries for all of their originators to an ACH operator. The ACH operators sort the ACH entries and send them to the receiving depository financial institutions (RDFI) that hold the individual consumer accounts. The RDFI then decides whether to debit the consumer's account or to send it back unpaid. ACH debit transactions generally clear and settle in one business day after the payment is initiated by the lender. The private operating rules for the ACH network are administered by the National Automated Clearinghouse Association (NACHA), an industry trade organization.

[283] *See, e.g.,* QC Holdings, Inc., 2014 Annual Report (Form 10–K), at 6 (Mar. 12, 2015) (''Upon completion of a loan application, the customer signs a promissory note with a maturity of generally two to three weeks. The loan is collateralized by a check (for the principal amount of the loan plus a specified fee), ACH authorization or a debit card.''); Advance America, 2011 Annual Report (Form 10–K) at 45 (Mar. 15, 2012) (''After the required documents presented by the customer have been reviewed for completeness and accuracy, copied for record-keeping purposes, and the cash advance has been approved, the customer enters into an agreement governing the terms of the cash advance. The customer then provides a personal check or an Automated Clearing House (''ACH'') authorization, which enables electronic payment from the customer's account, to cover the amount of the cash advance and charges for applicable fees and interest of the balance due under the agreement.''); ENOVA Int'l, Inc., 2014 Annual Report (Form 10–K), at 6 (Mar. 20, 2015)) (''When a customer takes out a new loan, loan proceeds are promptly deposited in the customer's bank account or onto a debit card in exchange for a preauthorized debit for repayment of the loan from the customer's account.'').

[284] *See, e.g.,* Great Plains Lending d/b/a Cash Advance Now ''Frequently Asked Questions (FAQs),'' *https://www.cashadvancenow.com/FAQ.aspx* (last visited May 16, 2016) (''If we extend credit to a consumer, we will consider the bank account information provided by the consumer as eligible for us to process payments against. In addition, as part of our information collection process, we may detect additional bank accounts under the ownership of the consumer. We will consider these additional accounts to be part of the application process.'').

[285] *See, e.g.,* Notice of Motion and Motion to Compel Arbitration at exhibit 1, 38, 55, *Labajo* v. *First Int'l Bank* & *Trust,* No. 14–00627 (C.D. Cal. May 23, 2014), ECF No. 26–3.

[286] *See, e.g.,* Memorandum of Law in Support of Motion to Dismiss for Failure to State a Claim at exhibit A, *Parm* v. *BMO Harris Bank,* N.A., No. 13–03326 (N.D. Ga. Dec. 23, 2013), ECF No. 60–1 (''You may revoke this authorization by contacting us in writing at *ach@castlepayday.com* or by phone at 1–888–945–2727. You must contact us at least three (3) business days prior to when you wish the authorization to terminate. If you revoke your authorization, you authorize us to make your payments by remotely-created checks as set forth below.''); Declaration re: Motion to Compel Arbitration at exhibit 5, *Booth* v. *BMO Harris Bank,* N.A., No. 13–5968 (E.D. Pa. Dec. 13, 2013), ECF No. 41–8 (stating that in the event that the consumer terminates an ACH authorization, the lender would be authorized to initiated payment by remotely created check); Notice of Motion and Motion to Compel Arbitration at exhibit A, *Labajo* v. *First Int'l Bank & Trust,* No. 14–00627 (C.D. Cal. May 23, 2014), ECF No. 25–1 (taking ACH and remotely created check authorization).

[287] *See, e.g.,* Advance America, 2011 Annual Report (Form 10–K), at 10 (''To obtain a cash advance, a customer typically . . . enters into an agreement governing the terms of the cash advance, including the customer's agreement to repay the amount advanced in full on or before a specified due date (usually the customer's next payday), and our agreement to defer the presentment or deposit of the customer's check or ACH authorization until the due date.'').

[288] EFTA and its implementing regulation, Regulation E, prohibit the conditioning of credit on an authorization for a preauthorized recurring electronic fund transfer. *See* 12 CFR 1005.10(e)(1) (''No financial institution or other person may condition an extension of credit to a consumer on the consumer's repayment by preauthorized electronic fund transfers, except for credit extended under an overdraft credit plan or extended to maintain a specified minimum balance in the consumer's account.'').

[289] Cash Store, ''Installment Loans: Fee Schedule Examples,'' *https://www.cashstore.com/-/media/cashstore/files/pdfs/nm%20ins%20552014.pdf* (last visited May 16, 2016).

pay by money order or check at a later time. Other lenders delay the disbursement of the loan proceeds if the consumer does not immediately provide a payment authorization.[290]

Banks and credit unions have additional payment channel options when they lend to consumers who have a deposit account at the same institution. As a condition of certain types of loans, many financial institutions require consumers to have a deposit account at that same institution.[291] The loan contract often authorizes the financial institution to pull payment directly from the consumer's account. Since these payments can be processed through an internal transfer within the bank or credit union, these institutions do not typically use external payment channels to complete an internal payment transfer.

Exercising Payment Authorizations

For different types of loans that will be covered under the rule, lenders use their authorizations to collect payment differently. As discussed above, most storefront lenders encourage or require consumers to return to their stores to pay in cash, roll over, or otherwise renew their loans. The lender often will deposit a post-dated check or initiate an electronic fund transfer only where the lender considers the consumer to be in ''default'' under the contract or where the consumer has not responded to the lender's communications.[292] Bureau examiners have cited one or more payday lenders for threatening to initiate payments from consumer accounts that were contrary to the agreement, and that the lenders did not intend to initiate.[293]

In contrast, online lenders typically use the authorization to collect all payments, not just those initiated after there has been some indication of distress from the consumer. Moreover, as discussed above, online lenders offering ''hybrid'' payday loan products structure them so that the lender is authorized to collect a series of interest-only payments—the functional equivalent of paying finance charges to roll over the loan—before full payment or amortizing payments are due.[294] The Bureau also is aware that some online lenders, although structuring their product as nominally a two-week loan, automatically roll over the loan every two weeks unless the consumer takes affirmative action to make full payment.[295] The payments processed in such cases are for the cost of the rollover rather than the full balance due.

As a result of these distinctions, storefront and online lenders have different success rates in exercising such payment authorizations. Some large storefront lenders report that they initiate payment attempts in less than 10 percent of cases, and that 60 to 80 percent of those attempts are returned for non-sufficient funds.[296] Bureau analysis of ACH payments by online payday and payday installment lenders, which typically collect all payments by initiating a transfer from consumers' accounts, indicates that for any given payment only about 6 percent fail on the first try. However, over an eighteen-month observation period, 50% of online borrowers were found to experience at least one payment attempt that failed or caused an overdraft and one-third of the borrowers experienced more than one such incident.

Lenders typically charge fees for these returned payments, sometimes charging both a returned payment fee and a late fee.[297] These fees are in addition to fees, such as NSF fees, that may be charged by the financial institution that holds the consumer's account.

The Bureau found that if an electronic payment attempt failed, online lenders try again three-quarters of the time. However, after an initial failure the lender's likelihood of failure jumps to 70 percent for the second attempt and 73 percent for the third. Of those that succeed, roughly one-third result in an overdraft.

Both storefront and online lenders also frequently change the ways in which they attempt to exercise authorizations after one attempt has failed. For example, many typically make additional attempts to collect initial payment due.[298] Some lenders attempt to collect the entire payment

[290] *See, e.g.,* Mobiloans, ''Line of Credit Terms and Conditions,'' *www.mobiloans.com/terms-and-conditions* (last visited Feb. 5, 2016) (''If you do not authorize electronic payments from your Demand Deposit Account and instead elect to make payments by mail, you will receive your Mobiloans Cash by check in the mail.'').

[291] *See, e.g.,* Fifth Third Bank, ''Ways to Borrow Money for Your Unique Needs,'' *https://www.53.com/content/fifth-third/en/personal-banking/borrowing-basics/personal-loans.html* (last visited May 17, 2016), at 3 (last visited May 17, 2016), *available at https://www.53.com/doc/pe/pe-eax-tc.pdf* (providing eligibility requirements including that the consumer ''must have a Fifth Third Bank checking deposit account that has been open for the past 90 (ninety) days and is in good standing'').

[292] Payday and payday installment lenders may contact consumers a few days before the payment is due to remind them of their upcoming payment. This is a common practice, with many lenders calling the consumer 1 to 3 days before the payment is due, and some providing reminders through text or email.

[293] Bureau of Consumer Fin. Prot., ''Supervisory Highlights,'' at 20 (Spring 2014), available at *http://files.consumerfinance.gov/f/201405_cfpb_supervisory-highlights-spring-2014.pdf.*

[294] *See, e.g.,* Notice of Charges Seeking Restitution, Digorgement, Other Equitable Relief, and Civil Money Penalties, In the Matter of: Integrity Advance, LLC, No. 2015–CFPB–0029, at 5 (Nov. 18, 2015), *available at http://files.consumerfinance.gov/f/201511_cfpb_notice-of-charges-integrity-advance-llc-james-r-carnes.pdf* (providing lender contract for loan beginning with four automatic interest-only rollover payments before converting to a series of amortizing payments).

[295] *See, e.g.,* Motion to Compel Arbitration, Motion to Stay Litigation at exhibit A, *Riley* v. *BMO Harris Bank*, N.A., No. 13–1677 (D.D.C. Jan. 10, 2014), ECF No. 33–2 (interpreting silence from consumer before the payment due date as a request for a loan extension; contract was for a 14-day single-payment loan, loan amount financed was $700 for a total payment due of $875).

[296] One major lender with a predominantly storefront loan portfolio, QC Holdings, notes that in 2014, 91.5 percent of its payday and installment loans were repaid or renewed in cash. QC Holdings 2014 Annual Report (Form 10–K), at 7. For the remaining 8.5 percent of loans for which QC Holdings initiated a payment attempt, 78.5 percent were returned due to non-sufficient funds. *Id.* Advance America, which offers mostly storefront payday and installment loans, initiated check or ACH payments on approximately 6.7 and 6.5 percent, respectively, of its loans in 2011; approximately 63 and 64 percent, respectively, of those attempts failed. Advance America 2011 Annual Report (Form 10–K), at 27.

[297] *See* Advance America 2011 Annual Report (Form 10–K), at 8 (''We may charge and collect fees for returned checks, late fees, and other fees as permitted by applicable law. Fees for returned checks or electronic debits that are declined for non-sufficient funds (''NSF'') vary by State and range up to $30, and late fees vary by State and range up to $50. For each of the years ended December 31, 2011 and 2010, total NSF fees collected were approximately $2.9 million and total late fees collected were approximately $1 million and $0.9 million, respectively.''); *Mypaydayloan.com*, ''Frequently Asked Questions,'' *https://www.mypaydayloan.com/faq#loancost* (last visited May 17, 2016) (''If your payment is returned due to NSF (or Account Frozen or Account Closed), our collections department will contact you to arrange a second attempt to debit the payment. A return item fee of $25 and a late fee of $50 will also be collected with the next debit.'').

[298] *See* Bureau of Consumer Fin. Prot., ''Supervisory Highlights,'' at 20 (Spring 2014), *available at http://files.consumerfinance.gov/f/201405_cfpb_supervisory-highlights-spring-2014.pdf* (''Upon a borrower's default, payday lenders frequently will initiate one or more preauthorized ACH transactions pursuant to the loan agreement for repayment from the borrower's checking account.''); FirstCash Fin. Servs., Inc. 2014 Annual Report (Form10–K) at 5 (Feb. 12, 2015) (''Banks return a significant number of ACH transactions and customer checks deposited into the Independent Lender's account due to insufficient funds in the customers' accounts. The Company subsequently collects a large percentage of these bad debts by redepositing the customers' checks, ACH collections or receiving subsequent cash repayments by the customers.''); Advance America, ''FAQs on Payday Loans/Cash Advances,'' *https://www.advanceamerica.net/questions/payday-loans-cash-advances* (last visited Sept. 17, 2017) (''Once we present your bank with your ACH authorization for payment, your bank will send the specified amount to CashNetUSA. If the payment is returned because of insufficient funds, CashNetUSA can and will re-present the ACH Authorization to your bank.'').

amount once or twice within a few weeks of the initial failure. The Bureau, however, is aware of online and storefront lenders that use more aggressive and unpredictable payment collection practices, including breaking payments into multiple smaller payments and attempting to collect payment multiple times in one day or over a short period of time.[299] The cost to lenders to repeatedly attempt payment depends on their contracts with payment processors and commercial banks, but is generally nominal; the Bureau estimates the cost is in a range of 5 to 15 cents for an ACH transaction.[300] These practices are discussed in more detail in Market Concerns—Payments.

As noted above, banks and credit unions that lend to their account holders can use their internal system to transfer funds from the consumer accounts and do not need to utilize the payment networks. Deposit advance products and their payment structures are discussed further in part II.B. The Bureau believes that many small-dollar loans with depository institutions are paid through internal transfers.

Due to the fact that lenders obtain authorizations to use multiple payment channels and benefit from flexibility in the underlying payment systems, lenders generally enjoy broad discretion over the parameters of how a particular payment will be pulled from a consumer's account, including the date, amount, and payment method. For example, although a check specifies a date, lenders may not present the check on that date. Under UCC section 4–401, merchants can present checks for payment even if the check specifies a later date.[301] Lenders sometimes attempt to collect payment on a different date from the one stated on a check or original authorization. They may shift the attempt date in order to maximize the likelihood that funds will be in the account; some use their own models to determine when to collect, while others use predictive payment products provided by third parties that estimate when funds are most likely to be in the account.[302]

Moreover, the checks provided by consumers during origination often are not processed as checks. Rather than sending these payments through the check clearing network, lenders often process these payments through the ACH network. They are able to use the consumer account number and routing number on a check to initiate an ACH transaction. When lenders use the ACH network in a first attempt to collect payment, the lender has used the check as a source document and the payment is considered an electronic fund transfer under EFTA and Regulation E,[303] which generally provide additional consumer protections—such as error resolution rights—beyond those applicable to checks. However, if a transaction is initially processed through the check system and then processed through the ACH network because the first attempt failed for insufficient funds, the subsequent ACH attempt is *not* considered an electronic fund transfer under current Regulation E.[304] Similarly, consumers may provide their account and routing number to lenders for the purposes of an ACH payment, but the lender may use that information to initiate a remotely created check that is processed through the check system and thus may not receive Regulation E protections.[305]

Payment System Regulation and Private Network Requirements

Different payment mechanisms are subject to different laws and, in some cases, private network rules that affect how lenders can exercise their rights to initiate withdrawals from consumers' accounts and how consumers may attempt to limit or stop certain withdrawal activity after granting an initial authorization. Because ACH payments and post-dated checks are the most common authorization mechanisms used by payday and payday installment lenders, this section briefly outlines applicable Federal laws and National Automated Clearinghouse Association (NACHA) rules concerning stop-payment rights, prohibitions on unauthorized payments, notices where payment amounts vary, and rules governing failed withdrawal attempts.

NACHA recently adopted several changes to the ACH network rules in response to complaints about problematic behavior by payday and payday installment lenders, including a rule that allows it to more closely scrutinize originators who have a high rate of returned payments.[306] Issues around monitoring and enforcing those rules and their application to problems in the market for covered loans are discussed in more detail in Market Concerns—Payments. But it should be noted here at the outset that the NACHA rules only apply to payment attempts through ACH and are not enforceable by the Bureau.

Stop-payment rights. For preauthorized (recurring) electronic fund transfers,[307] EFTA grants consumers a right to stop paym ent by issuing a stop-payment order through their depository institution.[308] The

[299] *See generally* CFPB Online Payday Loan Payments.

[300] The Bureau reviewed publicly available litigation documents and fee schedules posted online by originating depository institutions to compile these estimates. However, because of the limited availability of private contracts and variability of commercial bank fees, these estimates are tentative. Originators typically also pay their commercial bank or payment processor fees for returned ACH and check payments. These fees appear to range widely, from 5 cents to several dollars.

[301] UCC section 4–401(c) (''A bank may charge against the account of a customer a check that is otherwise properly payable from the account, even though payment was made before the date of the check, unless the customer has given notice to the bank of the postdating describing the check with reasonable certainty.'').

[302] *See, e.g.,* Press Release, Clarity Servs., Inc., ''ACH Presentment Will Help Lenders Reduce Failed ACH Pulls'' (Aug. 1, 2013), *available at https://www.clarityservices.com/clear-warning-ach-presentment-will-help-lenders-reduce-failed-ach-pulls/;* FactorTrust, ''Service Offerings,'' *http://ws.factortrust.com/products/* (last visited May 4, 2016); Microbilt, ''Bank Account Verify,'' *http://www.microbilt.com/bank-account-verification.aspx* (last visited May 4, 2016); DataX, ''Credit Risk Mitigation,'' *http://www.dataxltd.com/ancillary-services/successful-collections/* (last visited May 4, 2016).

[303] 12 CFR 1005.3(b)(2)(i) (''This part applies where a check, draft, or similar paper instrument is used as a source of information to initiate a one-time electronic fund transfer from a consumer's account. The consumer must authorize the transfer.'').

[304] Supplement I, Official Staff Interpretations, 12 CFR part 1005, comment 3(c)(1) (''The electronic re-presentment of a returned check is not covered by Regulation E because the transaction originated by check.'').

[305] Remotely created checks are particularly risky for consumers because they have been considered to fall outside of protections for electronic fund transfers under Regulation E. Also, unlike signature paper checks, they are created by the entity seeking payment (in this case, the lender)—making such payments particularly difficult to track and reverse in cases of error or fraud. Due to concerns about remotely created checks and remotely created payment orders, the FTC recently banned the use of these payment methods by telemarketers. *See* FTC Final Amendments to Telemarketing Sales Rule, 80 FR 77520 (Dec. 14, 2015).

[306] *See* NACHA, ''ACH Network Risk and Enforcement Topics,'' *https://www.nacha.org/rules/ach-network-risk-and-enforcement-topics* (last visited Sept. 23, 2017) (providing an overview of changes to the NACHA Rules); NACHA, ''ACH Operations Bulletin #1–2014: Questionable ACH Debit Origination: Roles and Responsibilities of ODFIs and RDFIs'' (Sept. 30, 2014), *available at https://www.nacha.org/news/ach-operations-bulletin-1-2014-questionable-ach-debit-origination-roles-and-responsibilities* (''During 2013, the ACH Network and its financial institution participants came under scrutiny as a result of the origination practices of certain businesses, such as online payday lenders, in using the ACH Network to debit consumers' accounts.'').

[307] A preauthorized transfer is ''an electronic fund transfer authorized in advance to recur at substantially regular intervals. EFTA, 15 U.S.C. 1693a(10); Regulation E, 12 CFR 1005.2(k).

[308] ''A consumer may stop payment of a preauthorized electronic fund transfer by notifying the financial institution orally or in writing at any time up to three business days preceding the

Continued

NACHA private rules adopt this EFTA provision along with additional stop-payment rights. In contrast to EFTA, NACHA provides consumers with a stop-payment right for both one-time and preauthorized transfers.[309] Specifically, for recurring transfers, NACHA Rules require financial institutions to honor a stop-payment order as long as the consumer notifies the bank at least 3 banking days before the scheduled debit.[310] For one-time transfers, NACHA Rules require financial institutions to honor the stop-payment order as long as the notification provides them with a ''reasonable opportunity to act upon the order.'' [311] Consumers may notify the bank or credit union verbally or in writing, but if the consumer does not provide written confirmation the oral stop-payment order may not be binding beyond 14 days. If a consumer wishes to stop all future payments from an originator, NACHA Rules allow a bank or credit union to require the consumer to confirm in writing that she has revoked authorization from the originator.

Checks are also subject to a stop-payment right under the Uniform Commercial Code (UCC).[312] Consumers have a right to stop payment on any check by providing the bank with oral (valid for 14 days) or written (valid for 6 months) notice. To be effective, the stop-payment notice must describe the check ''with reasonable certainty'' and give the bank enough information to find the check under the technology then existing.[313] The stop-payment notice also must be given at a time that affords the bank a reasonable opportunity to act on it before the bank becomes liable for the check under U.C.C. 4–303.

Although EFTA, the UCC, and NACHA Rules provide consumers with stop-payment rights, financial institutions typically charge a fee of approximately $32 for consumers to exercise those rights.[314] Further, both lenders and financial institutions often impose a variety of requirements that make the process for stopping payments confusing and burdensome for consumers. See the discussion of these requirements in Market Concerns—Payments.

Protection from unauthorized payments. Regulation E and NACHA Rules both provide protections with respect to payments by a consumer's financial institution if the electronic transfer is unauthorized.[315] Payments originally authorized by the consumer can become unauthorized under EFTA if the consumer notifies his or her financial institution that the originator's authorization has been revoked.[316] NACHA has a specific threshold for unauthorized returns, which involve transactions that originally collected funds from a consumer's account but that the consumer is disputing as unauthorized. Under NACHA Rules, originators are required to operate with an unauthorized return rate below 0.5 percent or they risk fines and loss of access to the ACH network.[317]

Notice of variable amounts. Regulation E and the NACHA Rules both provide that if the debit amount for a preauthorized transfer changes from the previous transfer or from the preauthorized amount, consumers must receive a notice 10 calendar days prior to the debit.[318] However, both of these rules have an exception from this requirement if consumers have agreed to a range of debit amounts and the payment does not fall outside that range.[319]

Based on outreach and market research, the Bureau does not believe that most payday and payday installment lenders making loans that will be covered under the rule are providing a notice of transfers varying in amount. However, the Bureau is aware that many of these lenders take authorizations for a range of amounts. As a result, lenders use these broad authorizations rather than fall under the Regulation E requirement to send a notice of transfers varying in amount even when collecting for an irregular amount (for example, by adding fees or a past due amount to a regularly scheduled payment). Some of these contracts provide that the consumer is authorizing the lender to initiate payment for any amount up to the full amount due on the loan.[320]

Reinitiation Cap. After a payment attempt has failed, NACHA Rules allow an originator—in this case, the lender that is trying to collect payment—to attempt to collect that same payment no more than two additional times through the ACH network.[321] NACHA Rules also require the ACH files [322] for the two additional attempts to be labeled as ''reinitiated'' transactions. Because the rule applies on a per-payment basis, for lenders with recurring payment

scheduled date of such transfer.'' EFTA, 15 U.S.C. 1693e(a); Regulation E, 12 CFR 1005.10(c).

[309] *See* NACHA Rule 3.7.1.2, RDFI Obligation to Stop Payment of Single Entries (''An RDFI must honor a stop-payment order provided by a Receiver, either verbally or in writing, to the RDFI at such time and in such manner as to allow the RDFI a reasonable opportunity to act upon the order prior to acting on an ARC, BOC, POP, or RCK Entry, or a Single Entry IAT, PPD, TEL, or WEB Entry to a Consumer Account.'').

[310] NACHA Rule 3.7.1.1.

[311] NACHA Rule 3.7.1.2.

[312] U.C.C. 4–403.

[313] U.C.C. 4–403 cmt. 5.

[314] Median stop-payment fee for an individual stop-payment order charged by the 50 largest financial institutions in 2015 based on information in the Informa Research Database. *See* Research Srvs, Inc., ''Informa Research Database,'' *www.informars.com* (last visited Mar. 2016). Although information has been obtained from the various financial institutions, the accuracy cannot be guaranteed.

[315] NACHA Rule 2.3.1, General Rule, Originator Must Obtain Authorization from Receiver.

[316] EFTA, 15 U.S.C. 1693a(12) (providing that the term ''unauthorized electronic fund transfer'' means an electronic fund transfer from a consumer's account initiated by a person other than the consumer without actual authority to initiate such transfer and from which the consumer receives no benefit, but that the term does not include, among other things, any electronic fund transfer initiated by a person other than the consumer who was furnished with the card, code, or other means of access to such consumer's account by such consumer, unless the consumer has notified the financial institution involved that transfers by such other person are no longer authorized). Regulation E implements this provision at 12 CFR 1005.2(m).

[317] NACHA Rule 2.17.2.

[318] 12 CFR 1005.10(d)(1) (providing that when a preauthorized electronic fund transfer from the consumer's account will vary in amount from the previous transfer under the same authorization or from the preauthorized amount, the designated payee or the financial institution shall send the consumer written notice of the amount and date of the transfer at least 10 days before the scheduled date of transfer); NACHA Rule 2.3.2.6(a).

[319] 12 CFR 1005.10(d)(2) (providing that the designated payee or the institution shall inform the consumer of the right to receive notice of all varying transfers, but may give the consumer the option of receiving notice only when a transfer falls outside a specified range of amounts or only when a transfer differs from the most recent transfer by more than an agreed-upon amount); NACHA Rule 2.3.2.6(b).

[320] For example, a 2013 One Click Cash Loan Contract states: The range of ACH debit entries will be from the amount applied to finance charge for the payment due on the payment date as detailed in the repayment schedule in your loan agreement to an amount equal to the entire balance due and payable if you default on your loan agreement, plus a return item fee you may owe as explained in your loan agreement. You further authorize us to vary the amount of any ACH debit entry we may initiate to your account as needed to pay the payment due on the payment date as detailed in the repayment schedule in your loan agreement as modified by any prepayment arrangements you may make, any modifications you and we agree to regarding your loan agreement, or to pay any return item fee you may owe as explained in your loan agreement.''); Notice of Motion and Motion to Compel Arbitration at exhibit 1, 38, 55, *Labajo* v. *First Int'l Bank & Trust*, No. 14–00627 (C.D. Cal. May 23, 2014), ECF No. 26–3. (SFS Inc., d/b/a One Click Cash, Authorization to Initiate ACH Debit and Credit Entries).

[321] NACHA Rule 2.12.4.

[322] ACH transactions are transferred in a standardized electronic file format between financial institutions and ACH network operators. These files contain information about the payment itself along with routing information for the applicable consumer account, originator (or in this case, the lender) account, and financial institution.

authorizations, the count resets to zero when the next scheduled payment comes due.

III. Summary of the Rulemaking Process

As described in more detail below, the Bureau has conducted broad outreach with a multitude of stakeholders on a consistent basis over more than five years to learn more about the market for small-dollar loans of various kinds. This outreach has comprised many public events, including field hearings, and hundreds of meetings with both consumer and industry stakeholders on the issues raised by small-dollar lending. In addition to meeting with lenders and other market participants, trade associations, consumer groups, community groups, and others, the Bureau has engaged with individual faith leaders and coalitions of faith leaders from around the country to gain their perspective on how these loans affect their communities and the people they serve. And the Bureau has met frequently with Federal, State, and Tribal officials to consult and share information about these kinds of loans and their consequences for consumers.

The Bureau's understanding of these loans, and how they affect consumers, has also been furthered by its ongoing supervisory activity, which involves exercising its legally mandated authority to conduct formal examinations of companies who make such loans and of debt collectors who collect on such loans. These examinations have canvassed the operations, marketing, underwriting, collections, and compliance management systems at such lenders and continue to do so on an ongoing basis. In addition, the Bureau has investigated and taken enforcement actions against a number of small-dollar lenders, which has provided further insight into various aspects of their operations and the practical effects of their business models on consumers.

The Bureau has also undertaken extensive research and analysis over several years to develop the factual foundation for issuance of this final rule. That research and analysis has included multiple white papers and data points on millions of such loans,[323] as well as careful review of studies and reports prepared by others and the relevant academic literature.[324] The Bureau has analyzed its own data on consumer complaints about the issues raised by small-dollar loans and the collections efforts made by lenders and debt collectors on such loans. And the Bureau has consistently engaged in market monitoring activities to gain insights into developing trends in the market for small-dollar loans.

All of the input and feedback the Bureau has received from its outreach over the years, its extensive experience of examining and investigating small-dollar lenders, and its research and analysis of the marketplace, have assisted the Bureau in developing and issuing this final rule. The material presented in this section summarizes the Bureau's work relating to the rule in three categories:

- The Bureau's background and processes in developing the rule;
- the key elements of the notice of proposed rulemaking; and
- the receipt and consideration of feedback prior to finalizing the rule.

A. Bureau Outreach to Stakeholders

Birmingham Field Hearing. The Bureau's formal outreach efforts on this subject began in January 2012, when it held its first public field hearing in Birmingham, Alabama, focused on small-dollar lending. At the field hearing, the Bureau heard testimony and received input from consumers, civil rights groups, consumer advocates, religious leaders, industry and trade association representatives, academics, and elected representatives and other governmental officials about consumers' experiences with small-dollar loan products. At the same time, the Bureau announced the launch of its program to conduct supervisory examinations of payday lenders pursuant to the Bureau's authority under section 1024 of the Dodd-Frank Act. As part of this initiative, the Bureau put in place a process to obtain loan-level records from a number of large payday lenders to assist in analyzing the nature and effects of such loans.

The Bureau transcribed the field hearing and posted the transcript on its Web site.[325] Concurrently, the Bureau placed a notice in the **Federal Register** inviting public comment on the issues discussed in the field hearing. The Bureau received 664 public comments in response to that request, which were reviewed and analyzed.

Nashville Field Hearing. In March 2014, the Bureau held a field hearing in Nashville, Tennessee to gather further input from a broad range of stakeholders.[326] The Bureau heard testimony from consumer groups, industry representatives, academics, and members of the public, including consumers of payday loans. The field hearing was held in conjunction with issuing the second of two research reports on findings by Bureau staff using the supervisory data that it had collected from a number of large payday lenders. In the Director's opening remarks, he noted three concerns associated with covered loans that had been identified in recent Bureau research: That a significant population of consumers were ending up in extended loan sequences; that some lenders use the electronic payments system in ways that pose risks to consumers; and that a troubling number of companies engage in collection activities that may be unfair or deceptive in one or more ways. While the Bureau was working on these reports and in the period following their release, the Bureau held numerous meetings with stakeholders on small-dollar lending in general and to hear their views on potential policy approaches.

Richmond Field Hearing. In March 2015, the Bureau held another field hearing in Richmond, Virginia to gather further input from a broad range of stakeholders.[327] The focus of this field hearing was the announcement the Bureau simultaneously made of the rulemaking proposals it had under consideration that would require lenders to take steps to make sure consumers can repay their loans and would restrict certain methods of collecting payments from consumers' bank accounts in ways that lead to substantial penalty fees. The Bureau heard testimony from consumer groups, industry representatives, faith leaders, and members of the public, including consumers of payday loans. In addition to the field hearing, the Bureau held separate roundtable discussions with consumer advocates and with industry

[323] Bureau of Consumer Fin. Prot., "Payday Loans, Auto Title Loans, and High-Cost Installment Loans: Highlights from CFPB Research," (June 2, 2016), *available at http://files.consumerfinance.gov/f/documents/Payday_Loans_Highlights_From_CFPB_Research.pdf* (summary of the CFPB's independent research).

[324] *See* part VII and the Section 1022(b)(2) Analysis for more on the relevant academic literature.

[325] Bureau of Consumer Fin. Prot., "In the Matter Of: A Field Hearing on Payday Lending, Hearing Transcript," (Jan. 19, 2012), *available at http://files.consumerfinance.gov/f/201201_cfpb_transcript_payday-lending-field-hearing-alabama.pdf.*

[326] Bureau of Consumer Fin. Prot., "Live from Nashville—Field Hearing on Payday Loans," CFPB Blog (Mar. 25, 2014), *available at https://www.consumerfinance.gov/about-us/blog/live-from-nashville/.*

[327] Bureau of Consumer Fin. Prot., "Field Hearing on Payday Loans in Richmond, VA," Archive of Past Events (Mar. 26, 2015), *available at https://www.consumerfinance.gov/about-us/events/archive-past-events/field-hearing-on-payday-lending/.*

members and trade associations to hear feedback on the rulemaking proposals under consideration.

A summary of the rulemaking proposals under consideration was released at the time of the Richmond field hearing. This marked the first stage in the process the Bureau is required to follow under the Small Business Regulatory Enforcement and Fairness Act (SBREFA),[328] which is discussed in more detail below. The summary was formally known as the Small Business Review Panel Outline. In addition to the discussions that occurred at the time of the Richmond field hearing, the Bureau has met on a number of other occasions with industry members and trade associations, including those representing storefront payday lenders, to discuss their feedback on the issues presented in the Outline.

Omaha Meeting and Other Events. At the Bureau's Consumer Advisory Board (CAB) meeting in June 2015 in Omaha, Nebraska, a number of meetings and field events were held about payday, vehicle title, and similar loans. The CAB advises and consults with the Bureau in the exercise of its functions under the Federal consumer financial laws, and provides information on emerging practices in the consumer financial products and services industry, including regional trends, concerns, and other relevant information. The CAB members over several years have included, among others, a payday lending executive and consumer advocates on payday lending. The Omaha events included a visit to a payday loan store to learn more about its operations first-hand and a day-long public session that focused on the Bureau's proposals in the Small Business Review Panel Outline and trends in payday and vehicle title lending. The CAB also held six subcommittee discussions on the Outline in the spring and summer of 2015, and three more subcommittee discussions on the proposed rule in the summer of 2016.

Kansas City Field Hearing. In June 2016, the Bureau held a field hearing in Kansas City, Missouri to gather further input on the issues surrounding potential new Federal regulations of small-dollar lending.[329] The focus of this field hearing was the announcement that the Bureau simultaneously made of the release of its notice of proposed rulemaking on payday, vehicle title, and certain high-cost installment loans. The proposed rule would require lenders to take steps to make a reasonable determination that consumers can afford to repay their loans and would restrict certain methods of collecting payments from consumers' bank accounts in ways that can lead to substantial penalty fees. The Bureau heard testimony on the proposed rule from consumer groups, industry representatives, and members of the public, including consumers of payday loans.

The release of the notice of proposed rulemaking commenced the formal notice-and-comment process under the Administrative Procedure Act. In the notice of proposed rulemaking, the Bureau stated that comments on the proposed rule would have to be received on or before October 7, 2016 to be considered by the Bureau. The notice of proposed rulemaking further specified the details of the methods by which comments would be received, which included email, electronic, mail, and hand delivery/courier. The Bureau also noted that all comments submitted would become part of the public record and would be subject to public disclosure.

Little Rock Meeting and Other Events. In June 2016, just a week after the field hearing in Kansas City announcing the public release of the proposed rule, the CAB held another public meeting on this topic in Little Rock, Arkansas. Among other things, Bureau officials gave a public briefing on the proposed rule to the CAB members, and the Bureau heard testimony from the general public on the subject.

Two of the Bureau's other advisory bodies have also provided input and feedback on the Bureau's work to develop appropriate provisions to regulate small-dollar loans. The Community Bank Advisory Council (CBAC) held two subcommittee discussions of the proposals contained in the Small Business Review Panel Outline in March 2015 and November 2015, a Council discussion on the proposed rule in July 2016, and two more subcommittee discussions of the proposed rule in the summer of 2016. In addition, the Bureau's Credit Union Advisory Council (CUAC) held two subcommittee discussions of the proposals in April 2015 and October 2015, discussed the Outline in its full meeting in March 2016, and held two subcommittee discussions of the proposed rule during the summer of 2016.

Faith Leaders. The Bureau has taken part in a large number of meetings with faith leaders, and coalitions of faith leaders, of all denominations to hear their perspective on how small-dollar loans affect their communities and the people they serve. In April 2016, the White House convened a meeting of national faith leaders for this purpose, which included the Bureau's director. The Bureau has also engaged in outreach to local and national leaders from churches, synagogues, mosques, and temples—both in Washington, DC and in many locations around the country. In these sessions, the Bureau has heard from faith leaders about the challenges some of them have faced in seeking to develop alternatives to payday loans that would mitigate what they perceive to be the harms caused to consumers.

General Outreach. Various Bureau leaders, including its director, and Bureau staff have participated in and spoken at dozens of events and conferences throughout the country, which have provided further opportunities to gather insight and recommendations from both industry and consumer groups about how to approach the issue of whether and how to regulate small-dollar loans. In addition to gathering information from meetings with lenders and trade associations and through regular supervisory and enforcement activities, Bureau staff made fact-finding visits to at least 12 non-depository payday and vehicle title lenders.

Inter-Agency Consultation. As discussed in connection with section 1022 of the Dodd-Frank Act below, the Bureau has consulted with other Federal consumer protection and prudential regulators about these issues and the approaches that the other regulators have taken to small-dollar lending over the years. The Bureau has provided other regulators with information about the proposals under consideration, sought their input, and received feedback that has assisted the Bureau in preparing this final rule. In addition, the Bureau was involved, along with its fellow Federal regulatory agencies, in meetings and other efforts to assist the U.S. Department of Defense as it developed and adopted regulations to implement updates to the Military Lending Act. That statute governs small-dollar loans in addition to various other loan products, and the Bureau developed insights from this work that have been germane to this rulemaking, especially in how to address the potential for lenders to find ways to evade or circumvent its provisions.

Consultation with State and Local Officials. The Bureau's outreach also has included a large number of meetings

[328] Public Law 104–1.21, 110 Stat. 847 (1996).

[329] Bureau of Consumer Fin. Prot., ''Field Hearing on Small Dollar Lending in Kansas City, MO,'' Archive of Past Events (June 2, 2016), *available at https://www.consumerfinance.gov/about-us/events/archive-past-events/field-hearing-small-dollar-lending-kansas-city-mo/.*

and calls with State Attorneys General, State financial regulators, and municipal governments, along with the organizations representing the officials charged with enforcing applicable Federal, State, and local laws on small-dollar loans. These discussions have occurred with officials from States that effectively disallow such loans by imposing strict usury caps, as well as with officials from States that allow such loans and regulate them through various frameworks with different substantive approaches. The issues discussed have involved both storefront and online loans. In particular, as the Bureau has worked to develop the proposed registered information system requirements, it has consulted with State agencies from those States that require lenders to provide information about certain small-dollar loans to statewide databases. A group of State Attorneys General submitted a comment claiming that the extent to which the Bureau consulted State and local officials was insufficient. Some other State officials submitted similar comments. Although it is true that the Bureau did not meet with every attorney general or interested official from every State to discuss issues involving the regulation of small-dollar loans, it did meet with many of them, some on multiple occasions. In addition, the Bureau did receive public comments from groups of State Attorneys General and other officials, including both regulators and legislators, and has carefully considered the issues they discussed, which presented many conflicting points of view.

Several State Attorneys General requested that the Bureau commit to consulting with State officials before enforcing this regulation. The Bureau will coordinate and consult with State regulators and enforcement officials in the same manner that it does in other enforcement and supervisory matters.

Tribal Consultations. The Bureau has engaged in consultation with Indian tribes about this rulemaking. The Bureau's Policy for Consultation with Tribal Governments provides that the Bureau ''is committed to regular and meaningful consultation and collaboration with tribal officials, leading to meaningful dialogue with Indian tribes on Bureau policies that would be expressly directed to tribal governments or tribal members or that would have direct implications for Indian tribes.'' [330] To date, the Bureau has held three formal consultation sessions related to this rulemaking. The first was held on October 27, 2014, at the National Congress of American Indians 71st Annual Convention and Marketplace in Atlanta, Georgia and before the release of the Bureau's small-dollar lending SBREFA materials. The timing of the consultation gave Tribal leaders an opportunity to speak directly with the small-dollar lending team about Tribal lender and/or consumer experiences prior to the drafting of proposals that would become the Small Business Review Panel Outline. A second consultation was held on June 15, 2015, at the Bureau's headquarters. At that consultation, Tribal leaders responded to the proposals under consideration set forth in the Outline that had recently been released. A third consultation was held on August 17, 2016, at the Sandra Day O'Connor College of Law in Phoenix, Arizona, after the release of the proposed rule. All Federally recognized Indian tribes were invited to attend these consultations, which generated frank and valuable input from Tribal leaders to Bureau senior leadership and staff about the effects such a rulemaking could have on Tribal nations and lenders. In addition, the Bureau has met individually with Tribal leaders, Tribal lenders, and Tribal lending associations in an effort to further inform its small-dollar lending work. A Tribal trade association dealing with financial services issues informed the Bureau that it believed these consultations were inadequate.

B. Supervisory and Enforcement Activity

In addition to these many channels of outreach, the Bureau has developed a broader understanding of small-dollar lending through its supervisory and enforcement work. This work is part of the foundation of the Bureau's expertise and experience with this market, which is informed by frequent contact with certain small-dollar lenders and the opportunity to scrutinize their operations and practices up close through supervisory examinations and enforcement investigations. Some illustrative details of this work are related below.

The Bureau's Supervisory Work. The Bureau has been performing supervisory examinations of small-dollar lenders for more than five years. During this time, the Bureau has written and published its guidelines on performing such examinations, which its exam teams have applied and refined further over time.[331] All of this work has provided the Bureau with a quite comprehensive vantage point on the operations of payday and other small-dollar lenders and the nature and effects of their loan products for consumers.

In its regular published reports known as *Supervisory Highlights,* the Bureau has summarized, while maintaining confidentiality of supervised entities, the types of issues and concerns that arise in its examinations of non-bank financial companies in general, and of small-dollar lenders in particular. In its Summer 2013 edition, for example, the Bureau emphasized its general finding that ''nonbanks are more likely to lack a robust [Compliance Management System] as their consumer compliance-related activities have not been subject to examinations at the federal level for compliance with the Federal consumer financial laws prior to the Bureau's existence.'' [332] The Bureau noted that it had identified ''one or more instances of nonbanks that lack formal policies and procedures, have not developed a consumer compliance program, or do not conduct independent consumer compliance audits. Lack of an effective CMS has, in a number of instances, resulted in violations of Federal consumer financial laws.'' [333]

In the Spring 2014 edition, the Bureau addressed its supervisory approach to short-term, small-dollar lending in more detail. At that time, the Bureau noted that its exercise of supervisory authority marked the first time any of these lenders had been subject to Federal compliance examinations. The Bureau described a number of shortcomings it had found and addressed with the compliance management systems implemented by small-dollar lenders, including lack of oversight, inadequate complaint management, lack of written policies and procedures, failure to train staff adequately, lack of effective compliance audit programs, and more generally a pervasive lack of accountability within the compliance program. It also catalogued many different violations and abuses in the collection methods these lenders used with their customers. Finally, the report noted that Bureau examinations found

[330] Bureau of Consumer Fin. Prot., ''Consumer Financial Protection Bureau Policy for Consultation with Tribal Governments,'' at 1, *available at http://files.consumerfinance.gov/f/201304_cfpb_consultations.pdf.*

[331] See Bureau of Consumer Fin. Prot., ''CFPB Examination Procedures, Short-term, Small-Dollar Lending,'' *available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201309_cfpb_payday_manual_revisions.pdf.*

[332] Bureau of Consumer Fin. Prot., ''Supervisory Highlights,'' at 6 (Summer 2013), *available at http://files.consumerfinance.gov/f/201308_cfpb_supervisory-highlights_august.pdf.*

[333] Bureau of Consumer Fin. Prot., ''Supervisory Highlights,'' at 6 (Summer 2013), *available at http://files.consumerfinance.gov/f/201308_cfpb_supervisory-highlights_august.pdf.*

deceptive practices in the use of preauthorized ACH withdrawals from borrower checking accounts.[334]

The Summer 2016 edition included a discussion of debt collection issues, which are relevant to many payday lenders, and also included a section explicitly dedicated to small-dollar lending and issues associated with compliance with the Electronic Fund Transfer Act. The Bureau's examiners found that the ''loan agreements of one or more entities failed to set out an acceptable range of amounts to be debited, in lieu of providing individual notice of transfers of varying amounts. These ranges could not be anticipated by the consumer because they contained ambiguous or undefined terms in their descriptions of the upper and lower limits of the range.'' [335] And the Spring 2017 edition expressed concerns about production incentives relevant to many providers of financial services, noting that ''many supervised entities choose to implement incentive programs to achieve business objectives. These production incentives can lead to significant consumer harm if not properly managed.'' [336]

In the most recent Summer 2017 edition, the Bureau again described problems that it had addressed with short-term, small-dollar lending, including payday and vehicle title loans. Among them were a variety of collections issues, along with misrepresentations that several lenders had made in the marketing of such loans. Examiners reported that lenders had promised consumers that they could obtain such a loan without a credit check, yet this turned out to be untrue and, in some instances, to lead to loan denials based on the information obtained from the consumers' credit reports. They also found that certain lenders advertised products and services in their outdoor signage that they did not, in fact, offer. And some lenders advertised their products by making unsubstantiated claims about how they compared with those of competing lenders. These practices were found to be deceptive and changes were ordered to be made.[337]

The Bureau further found that some lenders misrepresented their processes to apply for a loan online, and others misused references provided by loan applicants on applications for origination purposes by marketing products to the persons listed. Finally, examiners observed that one or more lenders mishandled the payment process by debiting accounts automatically for payments that had already been made, leading to unauthorized charges and overpayments. The entities also failed to implement adequate processes to accurately and promptly identify and refund borrowers who paid more than they owed, who were unable to avoid the injury.[338]

The Bureau's Enforcement Work. The Bureau also has developed expertise and experience in this market over time by pursuing public enforcement actions against more than 20 small-dollar lenders, including brick-and-mortar storefront lenders, online lenders, and vehicle title lenders (as well as pawn lenders, which are not covered under the rule). A number of these actions have been resolved, but some remain pending in the courts at this time. In every instance, however, before the enforcement action was brought, it was preceded by a thorough investigation of the underlying facts in order to determine whether legal violations had occurred. The issues raised in these actions include engaging in misleading and deceptive marketing practices, making improper disclosures, training employees to hide or obfuscate fees, pushing customers into a cycle of debt by pressuring them to take out additional loans they could not afford, making false statements about whether and how transactions can be canceled or reversed, taking unauthorized and improper electronic withdrawals from customer accounts, and engaging in collections efforts that generate wide-ranging problems.[339] The Bureau has determined many of these practices to be violations of the prohibition against unfair, deceptive, or abusive acts or practices. The information and insights that the Bureau has gleaned from these investigations and enforcement actions has further advanced its understanding of this market and of the factual foundations for the policy interventions contained in this final rule.

For example, in 2013 the Bureau resolved a public enforcement action against Cash America, Inc. that arose out of an examination of this large national payday lender. The Bureau cited Cash America for committing three distinct unfair and deceptive practices: Robo-signing court documents in debt collection lawsuits; violating the Military Lending Act by overcharging servicemembers and their families; and improperly destroying records in advance of the Bureau's examination. Cash America was ordered to pay $14 million in refunds to consumers and to pay a civil penalty of $5 million for these violations.[340]

In 2014, the Bureau filed a public enforcement action against Ace Cash Express that developed out of the Bureau's prior exam work. The Bureau found through its examination and subsequent investigation that ACE had engaged in unfair, deceptive, and abusive practices by using illegal debt collection tactics to pressure overdue borrowers into taking out additional loans they could not afford. In fact, ACE's own training manual for its employees had a graphic illustrating this cycle of debt. According to the graphic, consumers begin by applying to ACE for a loan, which ACE approved.

[334] Bureau of Consumer Fin. Prot., ''Supervisory Highlights,'' at 14–20 (Spring 2014), *available at http://files.consumerfinance.gov/f/201405_cfpb_supervisory-highlights-spring-2014.pdf.*

[335] Bureau of Consumer Fin. Prot., ''Supervisory Highlights,'' at 13 (Summer 2016), *available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_12.pdf.*

[336] Bureau of Consumer Fin. Prot., ''Supervisory Highlights,'' at 27 (Spring 2017), *available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201704_cfpb_Supervisory-Highlights_Issue-15.pdf.*

[337] Bureau of Consumer Fin. Prot., ''Supervisory Highlights,'' at 28–30 (Summer 2017), *available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201709_cfpb_Supervisory-Highlights_Issue-16.pdf.*

[338] See Bureau of Consumer Fin. Prot., ''Supervisory Highlights,'' at 31–32 (Summer 2017), *available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201709_cfpb_Supervisory-Highlights_Issue-16.pdf.*

[339] *See, e.g.,* Press Release, Bureau of Consumer Fin. Prot., ''CFPB Takes Acton Against Check Cashing and Payday Lending Company for Tricking and Trapping Consumers'' (May 11, 2016), *available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-check-cashing-and-payday-lending-company-tricking-and-trapping-consumers/*; Press Release, Bureau of Consumer Fin. Prot., ''CFPB Fines Titlemax Parent Company $9 Million for Luring Consumers Into More Costly Loans'' (Sept. 26, 2016), *available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-fines-titlemax-parent-company-9-million-luring-consumers-more-costly-loans/*; Press Release, Bureau of Consumer Fin. Prot., ''CFPB Sues Five Arizona Title Lenders for Failing to Disclose Loan Annual Percentage Rate to Consumers'' (Sept. 21, 2016), *available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-five-arizona-title-lenders-failing-disclose-loan-annual-percentage-rate-consumers/*; Press Release, Bureau of Consumer Fin. Prot., ''CFPB Sues Offshore Payday Lender'' (Aug. 5, 2015), *available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-offshore-payday-lender/*; Press Release, Bureau of Consumer Fin. Prot., ''Consumer Financial Protection Bureau Takes Action Against Payday Lender for Robo-Signing'' (Nov. 20, 2013), *available at https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-takes-action-against-payday-lender-for-robo-signing/.*

[340] *See* Press Release, Bureau of Consumer Fin. Prot., ''Consumer Financial Protection Bureau Takes Action Against Payday Lender for Robo-Signing'' (Nov. 20, 2013), *available at https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-takes-action-against-payday-lender-for-robo-signing/.*

Next, if the consumer ''exhausts the cash and does not have the ability to pay,'' ACE ''contacts the customer for payment or offers the option to refinance or extend the loan.'' Then, when the consumer ''does not make a payment and the account enters collections,'' the cycle starts all over again—with the formerly overdue borrower applying for another payday loan.[341]

The Bureau's examination of ACE was conducted in coordination with the Texas Office of Consumer Credit Commissioner and resulted in an order imposing $5 million in consumer refunds and a $5 million civil penalty. The enforcement action was partially based on ACE's creation of a false sense of urgency to get delinquent borrowers to take out more payday loans—all while charging new fees each time.[342]

In September 2015, the Bureau took action against Westlake Services, an indirect auto finance company, and Wilshire Consumer Credit, its auto title lending subsidiary, which offered auto title loans directly to consumers, largely via the Internet, and serviced those loans; Wilshire also purchased and serviced auto title loans made by others. The Bureau concluded that Westlake and Wilshire had committed unfair and deceptive acts or practices by pressuring borrowers through the use of illegal debt collection tactics. The tactics included illegally deceiving consumers by using phony caller ID information (sometimes masquerading as pizza delivery services or flower shops), falsely threatening to refer borrowers for investigation or criminal prosecution, calling under false pretenses, and improperly disclosing information about debts to borrowers' employers, friends, and family. Wilshire also gave consumers incomplete information about the true cost of the loans it offered. The consent order resolving the matter required the companies to overhaul their debt collection practices and to cease advertising or marketing their products untruthfully. The companies were also ordered to provide consumers with $44.1 million in cash relief and balance reductions, and to pay a civil penalty of $4.25 million.

In December 2015, the Bureau resolved another enforcement action with EZCORP, Inc., a short-term, small-dollar lender. The action was initially generated from a supervisory exam that had exposed significant and illegal debt collection practices. These included in-person collection visits at consumers' homes or workplaces (which risked disclosing the consumer's debt to unauthorized third parties), falsely threatening consumers with litigation for not paying their debts, misrepresenting consumers' rights, and unfairly making multiple electronic withdrawal attempts from consumer accounts that caused mounting bank fees. These practices were found to be unfair and deceptive and to violate the Electronic Fund Transfer Act; as a result, the Bureau ordered EZCORP to refund $7.5 million to 93,000 consumers and pay a $3 million civil penalty, while halting collection of remaining payday and installment loan debts associated with roughly 130,000 consumers. That action also prompted the Bureau to issue an industry-wide warning about potentially unlawful conduct during in-person collections at homes or workplaces.[343]

In September 2016, the Bureau took action against TitleMax's parent company TMX Finance, one of the country's largest auto title lenders, for luring consumers into costly loan renewals by presenting them with misleading information about the terms and costs of the deals. The Bureau's investigation found that store employees, as part of their sales pitch for the 30-day loans, offered consumers a ''monthly option'' for making loan payments using a written guide that did not explain the true cost of the loan if the consumer renewed it multiple times, though TMX personnel were well aware of these true costs. In fact, the guide and sales pitch distracted consumers from the fact that repeatedly renewing the loan, as encouraged by TMX Finance employees, would dramatically increase the loan's cost, while making it difficult, if not impossible, for a consumer to compare costs for renewing the loan over a given period. The company then followed up with those who failed to repay by making intrusive visits to homes and workplaces that put consumers' personal information at risk. TMX Finance was ordered to stop its unlawful practices and pay a $9 million penalty.[344]

Likewise, in December 2016 the Bureau filed a public enforcement action against Moneytree, which offers payday loans and check-cashing services, for misleading consumers with deceptive online advertisements and collections letters. The company was ordered to cease its illegal conduct, refund $255,000 to consumers, and pay a civil penalty of $250,000. In addition to the deceptive advertising, the company was found to have deceptively told consumers that their vehicles could be repossessed when it had no right or ability to do so, and to have improperly withdrawn money from consumers' accounts without authorization to do so.[345]

From the Bureau's experience of carrying out investigations of these kinds of illegal practices and halting them through its enforcement efforts, the Bureau has become much more aware of the nature and likelihood of unfair, deceptive, or abusive practices in this market. And though the Bureau generally has devoted less attention in its supervisory and enforcement programs to issues that it has long intended to address separately, as here, through its rulemaking authority, the Bureau nonetheless has gained valuable experience and expertise from all of this work that it now brings to this rulemaking process. Since the inception of its supervision and enforcement program, the Bureau has worked continually to maximize compliance with the Federal consumer financial laws as they apply to payday and other types of small-dollar lenders. Sustained attention to compliance through the Bureau's supervision and enforcement work is an important adjunct to this rulemaking, but is not a sufficient substitute for it.

C. Research and Analysis of Small-Dollar Loans

Bureau White Papers. In April 2013, the Bureau issued a white paper on payday loans and deposit advance products, including findings by Bureau staff. For each of these loan products,

[341] *See* Press Release, Bureau of Consumer Fin. Prot., ''CFPB Takes Action Against Ace Cash Express for Pushing Payday Borrowers Into Cycle of Debt'' (July 10, 2014), *available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-ace-cash-express-for-pushing-payday-borrowers-into-cycle-of-debt/*.

[342] *See* Press Release, Bureau of Consumer Fin. Prot., ''CFPB Takes Action Against Ace Cash Express for Pushing Payday Borrowers Into Cycle of Debt'' (July 10, 2014), *available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-ace-cash-express-for-pushing-payday-borrowers-into-cycle-of-debt/*.

[343] *See* Press Release, Bureau of Consumer Fin. Prot., ''CFPB Orders EZCORP to Pay $10 million for Illegal Debt Collection Tactics,'' (Dec. 16, 2015), *available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-ezcorp-to-pay-10-million-for-illegal-debt-collection-tactics/*.

[344] *See* Press Release, Bureau of Consumer Fin. Prot., ''CFPB Fines Titlemax Parent Company $9 Million for Luring Consumers into More Costly Loans,'' (Sept. 26, 2016), *available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-fines-titlemax-parent-company-9-million-luring-consumers-more-costly-loans/*.

[345] *See* Press Release, Bureau of Consumer Fin. Prot., ''CFPB Takes Action Against Moneytree for Deceptive Advertising and Collection Practices,'' (Dec. 16, 2016), *available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-moneytree-deceptive-advertising-and-collection-practices/*.

the Bureau examined loan characteristics, borrower characteristics, intensity of use, and sustained use of the product. These findings were based largely on the data the Bureau had collected from some of the larger payday lenders under its supervisory authority, and covered approximately 15 million loans generated in 33 States and on approximately 15,000 deposit advance product transactions. The report took a snapshot of borrowers at the beginning of the study period and traced their usage of these products over the course of the study period. The report demonstrated that though some consumers use payday loans and deposit advances at relatively low to moderate levels, a sizable share of users conduct transactions on a long-term basis, suggesting they are unable to fully repay the loan and pay other expenses without taking out a new loan shortly thereafter.[346]

In March 2014, the Bureau issued another white paper on payday lending. This report was based on the supervisory data the Bureau had received from larger payday lenders, truncated somewhat to cover 12-month windows into borrowing patterns. These limitations yielded a dataset of over 12 million loans in 30 States. Responding to criticisms of the Bureau's white paper, this report focused on ''fresh borrowers,'' *i.e.,* those who did not have a payday loan in the first month of the Bureau's data and whose usage began in the second month. After reviewing this data, the report yielded several key findings. First, of the loans taken out by these borrowers over a period of eleven months over 80 percent are rolled over or followed by another loan within 14 days. Half of all loans are made as part of a sequence that is at least ten loans long, and few borrowers amortize, meaning their principal amounts are not reduced between the first and last loan of a sequence. Monthly borrowers (the majority of whom are receiving government benefits) are disproportionately likely to stay in debt for eleven months or longer. And most borrowing involves multiple renewals following an initial loan, rather than multiple distinct borrowing episodes separated by more than fourteen days.[347]

Both before and after the release of these white papers, the Bureau held numerous meetings with stakeholders to obtain their perspectives and comments on the methodology and contents of this research. As is also noted below, the Bureau also hosted individual scholars in the field for research presentations

Additional Research Reports. In April and May of 2016, the Bureau published two additional research reports on small-dollar loans. In conducting this research, the Bureau used not only the data obtained from the supervisory examinations previously described but also data obtained through orders the Bureau had issued pursuant to section 1022(c)(4) of the Dodd-Frank Act, data obtained through civil investigative demands made by the Bureau pursuant to section 1052 of the Dodd-Frank Act, and data voluntarily supplied to the Bureau by several lenders.

The first report addressed how online payday and payday installment lenders use access to consumers' bank accounts to collect loan payments. It found that after a failed ACH payment request made by an online lender, subsequent payment requests to the same account are unlikely to succeed, though lenders often continue to present them, with many online lenders submitting multiple payment requests on the same day. The resulting harm to consumers is shown by the fact that accounts of borrowers who use loans from online lenders and experience a payment that is returned for insufficient funds are more likely to be closed by the end of the sample period than accounts experiencing a returned payment for products other than payday or payday installment loans.[348]

The other report addressed consumer usage and default patterns on short-term vehicle title loans. Similar to payday loans, the report determined that single-payment vehicle title lenders rely on borrowers who take out repeated loans, with borrowers stuck in debt for seven months or more supplying two-thirds of the title loan business. In over half the instances where the borrower takes out such a loan, they end up taking out four or more consecutive loans, which becomes an unaffordable, long-term debt load for borrowers who are already struggling with their financial situations. In addition to high rates of default, the Bureau found that these loans carried a further adverse consequence for many consumers, as one out of every five loan sequences ends up with the borrower having their vehicle seized by the lender in repossession for failure to repay.[349]

In June 2016, the Bureau issued a supplemental report on payday, payday installment, vehicle title loan, and deposit advance products that addressed a wide range of subjects pertinent to the proposed rule. The report studied consumers' usage and default patterns for title and payday installment loans; analyzed whether deposit advance consumers overdrew accounts or took out payday loans more frequently after banks stopped offering deposit advance products; examined the impact of State laws on payday lending; compared payday re-borrowing rates across States with different renewal and cooling-off period laws; provided findings on payday borrowing and default patterns, using three different loan sequence definitions; and simulated effects of certain lending and collection restrictions on payday and vehicle title loan markets.[350]

Consumer Complaint Information. The Bureau also has conducted analysis on its own consumer complaint information. Specifically, the Bureau had received, as of April 1, 2017, approximately 51,000 consumer complaints relating to payday and other small-dollar loan products. Of these complaints, about one-third were submitted by consumers as payday or other small-dollar loan complaints and two-thirds as debt collection complaints where the source of the debt was a payday loan.[351]

Industry representatives have frequently expressed the view that consumers seem to be satisfied with payday and other covered short-term loan products, as shown by low numbers of complaints and the submission of positive stories about them to the ''Tell Your Story'' function on the Bureau's Web site. Yet, the Bureau has observed from its consumer complaint data that from November 2013 through December 2016, approximately 31,000 debt collection complaints cited payday loans as the underlying debt, and over 11 percent of the complaints the Bureau has handled about debt collection stemmed directly from payday loans.[352]

In fact, when complaints about payday loans are normalized in comparison to other credit products, the numbers do not turn out to be low at all. For example, in 2016, the Bureau

[346] CFPB Payday Loans and Deposit Advance Products White Paper.

[347] *See* CFPB Data Point: Payday Lending.

[348] *See* CFPB Online Payday Loan Payments.

[349] *See* CFPB Single-Payment Vehicle Title Lending.

[350] *See* CFPB Report on Supplemental Findings.

[351] The Bureau took a phased approach to accepting complaints from consumers. The Bureau began accepting payday loan complaints in November of 2013, and vehicle title loan complaints in July of 2014, which means that the complaint data it has accumulated on these markets does not cover the same periods as the complaint data it has collected, for example, on the mortgage or credit card markets.

[352] Bureau of Consumer Fin. Prot., ''Monthly Complaint Report, Vol. 9,'' at 12 fig. 3 (Mar. 2016), *available at http://files.consumerfinance.gov/f/201603_cfpb_monthly-complaint-report-vol-9.pdf.*

received about 4,400 complaints in which consumers reported ''payday loan'' as the complaint product and about 26,600 complaints about credit cards.[353] Yet there are only about 12 million payday loan borrowers annually, and about 156 million consumers have one or more credit cards.[354] Therefore, by way of comparison, for every 10,000 payday loan borrowers, the Bureau received about 3.7 complaints, while for every 10,000 credit cardholders, the Bureau received about 1.7 complaints. In addition, the substance of some of the consumer complaints about payday loans as catalogued by the Bureau mirrored many of the concerns that constitute the justification for this rule here.[355]

Moreover, faith leaders and faith groups of many denominations from around the country collected and submitted comments indicating that many borrowers may direct their personal complaints or dissatisfactions with their experiences elsewhere than to government officials.

Market Monitoring. The Bureau has also continuously engaged in market monitoring for the small-dollar loan market, just as it does for the other markets within its jurisdiction. This work involves regular outreach to industry members and trade associations, as well as other stakeholders in this marketplace. It also involves constant attention to news, research, trends, and developments in the market for small-dollar loans, including regulatory changes that may be proposed and adopted by the States and localities around the country. The Bureau has also carefully reviewed the published academic literature on small-dollar liquidity loans, along with research conducted or sponsored by stakeholder groups. In addition, a number of outside researchers have presented their own research at seminars for Bureau staff.

D. Small Business Review Panel

Small Business Regulatory Enforcement Fairness Act (SBREFA) Process. In April 2015, in accordance with SBREFA, the Bureau convened a Small Business Review Panel with the Chief Counsel for Advocacy of the SBA and the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB).[356] As part of this process, the Bureau prepared an outline of the proposals then under consideration and the alternatives considered (the Small Business Review Panel Outline), which it posted on its Web site for review and comment by the general public as well as the small entities participating in the panel process.[357]

Before formally convening, the Panel took part in teleconferences with small groups of the small entity representatives (SERs) to introduce the Outline and get feedback on the Outline, as well as a series of questions about their business operations and other issues. The Panel gathered information from representatives of 27 small entities, including small payday lenders, vehicle title lenders, installment lenders, banks, and credit unions. The meeting participants represented storefront and online lenders, State-licensed lenders, and lenders affiliated with Indian tribes. The Panel held a full-day meeting on April 29, 2015, to discuss the Small Business Review Panel Outline. The 27 small entities also were invited to submit written feedback, and 24 of them did so. The Panel considered input from the small entities about the potential compliance costs and other impacts on those entities and about impacts on access to credit for small businesses and made recommendations about potential options for addressing those costs and impacts. These recommendations are set forth in the Small Business Review Panel Report, which is made part of the administrative record in this rulemaking.[358] The Bureau carefully considered these findings and recommendations in preparing the proposed rule and completing this final rule, as detailed below in the section-by-section analysis of various provisions and in parts VII and VIII. The Bureau also continued its outreach and engagement with stakeholders on all sides since the SBREFA process concluded.

Comments Regarding the Bureau's SBREFA Process. Following the release of the proposed rule, a number of commenters criticized the SBREFA process. Some of these commenters were third parties such as trade associations who were familiar with the SBREFA process. Others were the SERs themselves. Some commenters argued that the Bureau failed to adequately consider the concerns raised and alternatives suggested by the SERs. Some commenters also expressed concerns about the SBREFA procedures.

Some commenters objected that in developing the proposed rule the Bureau did not consider policy suggestions made by SERs or recommendations made by the SBREFA Panel. For example, some commenters argued that the Bureau failed to consider whether, as some SERs contended, disclosures could prevent

[353] Bureau of Consumer Fin. Prot., ''Consumer Response Annual Report, January 1–December 31, 2016,'' at 27, 34 (Mar. 2017), *available at https://www.consumerfinance.gov/documents/3368/201703_cfpb_Consumer-Response-Annual-Report-2016.pdf*.

[354] Bureau staff estimate based on finding that 63 percent of American adults hold an open credit card and Census population estimates. *See* Bureau of Consumer Fin. Prot., ''The Consumer Credit Card Market Report,'' at 36 (Dec. 2015), *available at http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf*; U.S. Census Bureau, ''Annual Estimates of Resident Population for Selected Age Groups by Sex for the United States, States, Counties, and Puerto Rico Commonwealth and Municipios: April 1, 2010 to July 1, 2016,'' (June 2017), *available at https://factfinder.census.gov/bkmk/table/1.0/en/PEP/2016/PEPAGESEX*. Other estimates of the number of credit card holders have been higher, meaning that 1.7 complaints per 10,000 credit card holders would be a high estimate. The U.S. Census Bureau estimated there were 160 million credit card holders in 2012, U.S. Census Bureau, ''Statistical Abstract of the United States: 2012,'' at 740 tbl.1188 (Aug. 2011), *available at https://www.census.gov/library/publications/2011/compendia/statab/131ed.html,* and researchers at the Federal Reserve Bank of Boston estimated that 72.1 percent of U.S. consumers held at least one credit card in 2014, Claire Greene et al., ''The 2014 Survey of Consumer Payment Choice: Summary Results,'' at 18 (Fed. Reserve Bank of Boston, No. 16–3, 2016), *available at https://www.bostonfed.org/-/media/Documents/researchdatareport/pdf/rdr1603.pdf*. As noted above in the text, additional complaints related to both payday loans and credit cards are submitted as debt collection complaints with ''payday loan'' or ''credit card'' listed as the type of debt.

[355] ''Consumer confusion relating to repayment terms was frequently expressed. These consumers complained of the lack of clarity about repayment of the loan using automatic withdrawal features on a bank card, on a prepaid card, or by direct deposit. Consumers with multiple advances stated their difficulty managing a short repayment period and more often rolled-over the loan, resulting in an inflated total cost of the loan.'' Bureau of Consumer Fin. Prot., ''Consumer Response 2016 Annual Report, January 1–December 31, 2016,'' (Mar. 2017), *available at https://www.consumerfinance.gov/documents/3368/201703_cfpb_Consumer-Response-Annual-Report-2016.pdf*.

[356] 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 Public Law 104–121, tit. II, 110 Stat. 847, 857 (1996) as amended by Public Law 110–28, sec. 8302 (2007), and Public Law 111–203, sec. 1100G (2010).

[357] Bureau of Consumer Fin. Prot., ''Small Business Advisory Review Panel for Potential Rulemakings for Payday, Vehicle Title, And Similar Loans: Outline of Proposals under Consideration and Alternatives Considered,'' (Mar. 26, 2015), *available at http://files.consumerfinance.gov/f/201503_cfpb_outline-of-the-proposals-from-small-business-review-panel.pdf*.

[358] 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 Rulemaking on Payday, Vehicle Title, and Similar Loans'' (June 25, 2015), *available at http://files.consumerfinance.gov/f/documents/3a_-_SBREFA_Panel_-_CFPB_Payday_Rulemaking_-_Report.pdf* (hereinafter Small Business Review Panel Report).

the consumer injury the Bureau is seeking to address in this rulemaking. Some commenters also suggested that the Bureau failed to adequately consider alternative approaches employed by various States. Some commenters criticized the Bureau for ignoring the Panel's recommendations in developing the proposal, including, for example, the recommendation that the Bureau consider whether the rule should permit loan sequences of more than three short-term loans. Other SER commenters argued that the Bureau should adopt the requirements imposed by certain States (like Illinois or Michigan or Utah) or should require lenders to offer off-ramps instead of the requirements herein. Some commenters indicated that they believed the Bureau ultimately ignored or underestimated the rule's potential impact on small businesses and inadequately considered the rule's potential impact on rural communities. Some commenters argued that the Bureau did not adequately address issues around the cost of credit to small entities. One commenter noted that some credit unions offer certain short-term loan products and that the Bureau did not consider the impact of the rule on credit union products and small credit unions.

The SBA Office of Advocacy submitted comments of its own on the proposed rule and on how it responded to the SBREFA process. Although Advocacy had no complaints about the procedures used or the input received in the process, it did present its views on whether the proposed rule sufficiently reflected the discussions and debates that had occurred during the Panel discussions and the SBREFA process as a whole. To begin with, Advocacy agreed with the Bureau that the proposed rule would have a significant economic impact on small entities, which it found to be a matter of concern and felt had been underestimated by the Bureau. It stated that the ability-to-repay requirements in the proposed rule would be burdensome, and the cooling-off periods in particular would harm small businesses. It encouraged the Bureau to exempt from the rule small businesses that operate in States that currently have payday lending laws and to mitigate its impact on credit unions, Indian tribes, and small communities. Advocacy also commented that the proposed rule would restrict access to credit for consumers and for certain small businesses, and suggested that an exception be made for situations where such a loan may be necessary to address an emergency.

The procedural objections to the SBREFA process raised by other commenters included concerns about the make-up of the SBREFA panel and whether it was representative of the small entities who would be most affected by the proposal; the timing of SBREFA meetings; the administration and management of SBREFA-related phone calls; the overall ''sufficiency'' of the process; and unheeded requests to convene additional Panel sessions or to conduct additional research on specific topics. One trade group commenter incorporated portions of a comment letter from a SER that was sent to the Bureau during the SBREFA process, which raised a number of procedural objections. Another stated the panel excluded open-end lenders. Some expressed concern that the process did not provide them adequate time to realize the full ramifications of the proposed rule and the effects it would have on their business activity. Others suggested that the process was flawed because the Bureau's analysis allegedly ignored the rule's potential costs. One commenter also suggested that the SBREFA process was tainted by the Bureau Director's public comments regarding small-dollar lending in the years preceding the rulemaking.

Some commenters noted that the SBREFA process had been effective in considering and responding to certain concerns, including input regarding PAL loans and checking customer borrowing history.

Responses to Comments. The Bureau disagrees with commenters arguing that the Bureau did not adequately consider the suggestions of SERs and the Panel. In the proposed rule, the Bureau modified certain aspects of the approach in the Small Business Review Panel Outline in response to feedback from SERs (and others). For example, the Outline included a 60-day cooling-off period after sequences of three short-term loans, but the proposed rule included a 30-day cooling-off period, and that change is retained in the final rule. In addition, the Bureau followed the Panel's recommendation to request comment on numerous specific issues. The feedback received by the Bureau also informed its decision to revise various aspects of the rule. For example, as discussed below, the Bureau revised the ability-to-repay requirements in a number of ways to provide greater flexibility and reduce the compliance burden, such as by not requiring income verification if evidence is not reasonably available. In addition, the rule no longer requires lenders to verify or develop estimates of rental housing expenses based on statistical data. And the Bureau considered all of the alternatives posited by the SERs, as noted where applicable throughout part V and in part VIII. More generally, the Bureau considered and made appropriate modifications to the rule based upon feedback received during the SBREFA process and in response to other feedback provided by the small business community. The Bureau obtained important input through the SBREFA process and all articulated viewpoints were understood—and considered—prior to the promulgation of the final rule.

The Bureau disagrees with commenters that it did not consider alternative approaches. For example, in the proposal, the Bureau explained why it believed that disclosures would not be sufficient to address the identified harms and why the approaches of various States also appeared to be insufficient to address those harms. The Bureau likewise explains in this final rule its conclusions about why those approaches would not be sufficient.

The Bureau both agrees and disagrees with various comments from Advocacy, and a fuller treatment of these issues is presented below in part VII, which addresses the potential benefits, costs, and impacts of the final rule, including reductions in access to financial products and services and impacts on rural issues, and in part VIII, which addresses among other things the economic impact of the final rule on small entities, including small businesses. But more briefly here, the Bureau would note that it has made many changes in the final rule to reduce the burdens of the specific underwriting criteria in the ability-to-repay requirements; that Advocacy has stated that it appreciates the modification of the 60-day cooling-off period presented in the SBREFA Panel Outline to the 30-day cooling-off period in the proposed rule and now in the final rule; that Advocacy thanked the Bureau for clarifying that the proposed rule (and now the final rule) will not apply to business loans; that adoption of the conditional exemption from the final rule for alternative loans mitigates its impact on credit unions; that the Bureau did engage in another formal Tribal consultation after release of the proposed rule as Advocacy had urged; that the Bureau had consulted further with a range of State officials prior to finalizing the rule; and that the Bureau has extended the implementation period of the final rule.

The Bureau also disagrees with commenters who criticized procedural aspects of the SBREFA process. With respect to the composition of the SERs that participated in the SBREFA process, the Bureau followed legal

requirements for categorizing which entities qualified as small entities. The Bureau collaborated with the SBA Office of Advocacy so that the SERs included a variety of different types of lenders that could be affected by the rulemaking, ensuring that participants included a geographically diverse group of storefront payday lenders, online lenders, vehicle title lenders, installment lenders, and banks and credit unions. As noted above, to help ensure that the formal Panel meeting would allow for efficient and effective discussion of substantive issues, the Panel convened several telephone conferences before the formal meeting to provide information about the Outline and to obtain information from the SERs.

The Bureau disagrees, further, with the comments raising more specific procedural objections about the teleconferences and the Panel meeting. The Bureau provided agendas in advance of the calls and extended the length of the calls as needed to ensure that SERs were able to participate and provide feedback. While the Bureau appreciates that some SERs may have desired additional time to consider and provide feedback on the Outline, the Bureau notes that the Panel is required by law to report on the SERs' comments and advice within 60 days after the Panel is convened. The Bureau conducted the process diligently and in accordance with its obligations under the Regulatory Flexibility Act and consistent with prior SBREFA processes.

With respect to comments suggesting that the Bureau failed to adequately consider the costs and impact on small businesses and in rural areas, the Bureau notes that the costs and impacts were addressed in the notice of proposed rulemaking, and, for the final rule, are addressed in parts VII and VIII.

E. Consumer Testing

In developing the disclosures for this rule, the Bureau engaged a third-party vendor, Fors Marsh Group (FMG), to coordinate qualitative consumer testing for the disclosures that were being considered. The Bureau developed several prototype disclosure forms and tested them with participants in one-on-one interviews. Three categories of forms were developed and tested: (1) Origination disclosures that informed consumers about limitations on their ability to receive additional short-term loans; (2) upcoming payment notices that alerted consumers about lenders' future attempts to withdraw money from consumers' accounts; and (3) expired authorization notices that alerted consumers that lenders would no longer be able to attempt to withdraw money from the consumers' accounts. Observations and feedback from the testing were incorporated into the model forms developed by the Bureau.

Through this testing, the Bureau sought to observe how consumers would interact with and understand prototype forms developed by the Bureau. In late 2015, FMG facilitated two rounds of one-on-one interviews, each lasting 60 minutes. The first round was conducted in September 2015 in New Orleans, Louisiana, and the second round was conducted in October 2015 in Kansas City, Missouri. At the same time the Bureau released the proposed rule, it also made available a report that FMG had prepared on the consumer testing.[359] The testing and focus groups were conducted in accordance with OMB Control Number 3170–0022. A total of 28 individuals participated in the interviews. Of these 28 participants, 20 self-identified as having used a small-dollar loan within the past two years.

Highlights from Interview Findings. FMG asked participants questions to assess how well they understood the information on the forms.

For the origination forms, the questions focused on whether participants understood that their ability to roll this loan over or take out additional loans may be limited. Each participant reviewed one of two different prototype forms: Either one for loans that would require an ability-to-repay determination (ATR Form) or one for loans that would be offered under the conditional exemption for covered short-term loans (Alternative Loan Form). During Round 1, many participants for both form types recognized and valued information about the loan amount and due date; accordingly, that information was moved to the beginning of all the origination forms for Round 2. For the ATR Forms, few participants in Round 1 understood that the ''30 days'' language was describing a period when future borrowing may be restricted. Instead, several read the language as describing the loan term. In contrast, nearly all participants reviewing the Alternative Loan Form understood that it was attempting to convey that each successive loan they took out after the first in this series had to be smaller than the previous loan, and that after taking out three loans they would not be able to take out another for 30 days. Some participants also reviewed a version of this Alternative Loan Form for when consumers are taking out their third loan in a sequence. The majority of participants who viewed this notice understood it, acknowledging that they would have to wait until 30 days after the third loan was paid off to be considered for another similar loan.

During Round 2, participants reviewed two new versions of the ATR Form. One adjusted the ''30 days'' phrasing and the other completely removed the ''30 days'' language, replacing it with the phrase ''shortly after this one.'' The Alternative Loan Form was updated with similar rephrasing of the ''30 days'' language. In order to simplify the table, the ''loan date'' column was removed.

The results in Round 2 were similar to Round 1. Participants reviewing the ATR forms focused on the language notifying them they should not take out this loan if they are unable to pay the full balance by the due date. Information about restrictions on future loans went largely unnoticed. The edits appeared to have a positive impact on comprehension since no participants interpreted either form as providing information on their loan term. There did not seem to be a difference in comprehension between the group with the ''30 days'' version and the group with the ''shortly'' version. As in Round 1, participants who reviewed the Alternative Loan Form noticed and understood the schedule detailing maximum borrowable amounts. These participants understood that the purpose of the Alternative Loan Form was to inform them that any subsequent loans must be smaller.

Questions for the payment notices focused on participants' ability to identify and understand information about the upcoming payment. Participants reviewed one of two payment notices: An Upcoming Withdrawal Notice or an Unusual Withdrawal Notice. Both forms provided details about the upcoming payment attempt and a payment breakdown table. The Unusual Withdrawal Notice also indicated that the withdrawal was unusual because the payment was higher than the previous withdrawal amount. To obtain feedback on participants' likelihood to open notices delivered in an electronic manner, these notices were presented as a sequence to simulate an email message.

In Round 1, all participants, based on seeing the subject line in the email

[359] *See* Fors Marsh Group, ''Qualitative Testing of Small Dollar Loan Disclosures, Prepared for the Consumer Financial Protection Bureau,'' (Apr. 2016) *available at http://files.consumerfinance.gov/f/documents/Disclosure_Testing_Report.pdf* (for a detailed discussion of the Bureau's consumer testing) (hereinafter FMG Report).

inbox, said that they would open the Upcoming Withdrawal email and read it. Nearly all participants said they would consider the email legitimate. They reported having no concerns about the email because they would have recognized the company name, and because it included details specific to their account along with the lender contact information. When shown the full Upcoming Withdrawal Notice, participants understood that the lender would be withdrawing $40 from their account on a particular date. Several participants also pointed out that the notice described an interest-only payment. Round 1 results were similar for the Unusual Withdrawal Notice; all participants who viewed this notice said they would open the email, and all but one participant—who was deterred due to concerns with the appearance of the link's URL—would click on the link leading to additional details. The majority of participants indicated that they would want to read the email right away, because the words ''alert'' and ''unusual'' would catch their attention, and would make them want to determine what was going on and why a different amount was being withdrawn.

For Round 2, the payment amount was increased because some participants found it too low and would not directly answer questions about what they would do if they could not afford payment. The payment breakdown tables were also adjusted to address feedback about distinguishing between principal, finance charges, and loan balance. The results for both the Upcoming Payment and Unusual Payment Notices were similar to Round 1 in that the majority of participants would open the email, thought it was legitimate and from the lender, and understood the purpose.

For the consumer rights notice (referred to an ''expired authorization notice'' in the report), FMG asked questions about participant reactions to the notice, participant understanding of why the notice was being sent, and what participants might do in response to the notice information. As with the payment notices, these notices were presented as a sequence to simulate an email message.

In Round 1, participants generally understood that the lender had tried twice to withdraw money from their account and would not be able to make any additional attempts to withdraw payment. Most participants expressed disappointment with themselves for being in a position where they had two failed payments and interpreted the notice to be a reprimand from the lender.

For Round 2, the notice was edited to clarify that the lender was prohibited by Federal law from making additional withdrawals. For example, the email subject line was changed from ''Willow Lending can no longer withdraw loan payments from your account'' to ''Willow Lending is no longer permitted to withdraw loan payments from your account.'' Instead of simply saying ''federal law prohibits us from trying to withdraw payment again,'' language was added to both the email message and the full notice saying, ''In order to protect your account, federal law prohibits us from trying to withdraw payment again.'' More information about consumer rights and the CFPB was also added. Some participants in Round 2 still reacted negatively to this notice and viewed it as reflective of something they did wrong. However, several reacted more positively to this prototype and viewed the notice as protection.

To obtain feedback about consumer preferences on receiving notices through text message, participants were also presented with an image of a text of the consumer rights notice and asked how they would feel about getting this notice by text. Overall, the majority of participants in Round 1 (8 of 13) disliked the idea of receiving notices via text. One of the main concerns was privacy; many mentioned that they would be embarrassed if a text about their loan situation displayed on their phone screen while they were in a social setting. In Round 2, the text image was updated to match the new subject line of the consumer rights notice. The majority (10 of the 14) of participants had a negative reaction to the notification delivered via text message. Despite this, the majority of participants said that they would still open the text message and view the link.

Most participants (25 out of 28) also listened to a mock voice message of a lender contacting the participant to obtain renewed payment authorization after two payment attempts had failed. In Round 1, most participants reported feeling somewhat intimidated by the voicemail message and were inclined to reauthorize payments or call back based on what they heard. Participants had a similar reaction to the voicemail message in Round 2.

F. The Bureau's Proposal

Overview. In June 2016, the Bureau released for public comment a notice of proposed rulemaking on payday, vehicle title, and certain high-cost installment loans, which were referred to as ''covered loans.'' The proposal was published in the **Federal Register** in July 2016.[360]

Pursuant to its authority under the Dodd-Frank Act,[361] the Bureau proposed to establish new regulatory provisions to create consumer protections for certain consumer credit products. The proposed rule was primarily grounded on the Bureau's authority to identify and prevent unfair, deceptive, or abusive acts or practices,[362] but also drew on the Bureau's authority to prescribe rules and make exemptions from such rules as is necessary or appropriate to carry out the purposes and objectives of the Federal consumer financial laws,[363] its authority to facilitate supervision of certain non-bank financial service providers (including payday lenders),[364] and its authority to require disclosures to convey the costs, benefits, and risks of particular consumer financial products or services.[365]

In the proposal, the Bureau stated its concern that lenders that make covered loans have developed business models that deviate substantially from the practices in other credit markets by failing to assess consumers' ability to repay their loans and by engaging in harmful practices in the course of seeking to withdraw payments from consumers' accounts. The Bureau preliminarily concluded that there may be a high likelihood of consumer harm in connection with these covered loans because a substantial population of consumers struggles to repay their loans and find themselves ending up in extended loan sequences. In particular, these consumers who take out covered loans appear to lack the ability to repay them and face one of three options when an unaffordable loan payment is due: Take out additional covered loans, default on the covered loan, or make the payment on the covered loan and fail to meet other major financial obligations or basic living expenses. Many lenders may seek to obtain repayment of covered loans directly from consumers' accounts. The Bureau stated its concern that consumers may be subject to multiple fees and other harms when lenders make repeated unsuccessful attempts to withdraw funds from consumers' accounts.

Scope of the Proposed Rule. The Bureau's proposal would have applied to two types of covered loans. First, it would have applied to short-term loans

[360] 81 FR 47864 (July 22, 2016).

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

[362] Dodd-Frank Act section 1031(b).

[363] Dodd-Frank Act section 1022(b).

[364] Dodd-Frank Act section 1024(b)(7).

[365] 12 U.S.C. 5532.

that have terms of 45 days or less, including typical 14-day and 30-day payday loans, as well as single-payment vehicle title loans that are usually made for 30-day terms. Second, the proposal would have applied to longer-term loans with terms of more than 45 days that have (1) a total cost of credit that exceeds 36 percent; and (2) either a lien or other security interest in the consumer's vehicle or a form of ''leveraged payment mechanism'' that gives the lender a right to initiate transfers from the consumer's account or to obtain payment through a payroll deduction or other direct access to the consumer's paycheck. Included among covered longer-term loans was a subcategory of loans with a balloon payment, which require the consumer to pay all of the principal in a single payment or make at least one payment that is more than twice as large as any other payment.

The Bureau proposed to exclude several types of consumer credit from the scope of the proposal, including: (1) Loans extended solely to finance the purchase of a car or other consumer good in which the good secures the loan; (2) home mortgages and other loans secured by real property or a dwelling if recorded or perfected; (3) credit cards; (4) student loans; (5) non-recourse pawn loans; and (6) overdraft services and lines of credit.

Underwriting Requirements for Covered Short-Term Loans. The proposed rule preliminarily identified it as an unfair and abusive practice for a lender to make a covered short-term loan without reasonably determining that the consumer will have the ability to repay the loan, and would have prescribed requirements to prevent the practice. Before making a covered short-term loan, a lender would first be required to make a reasonable determination that the consumer would be able to make the payments on the loan and be able to meet the consumer's other major financial obligations and basic living expenses without needing to re-borrow over the ensuing 30 days. Specifically, a lender would have to:

- Verify the consumer's net income;
- verify the consumer's debt obligations using a national consumer report and, if available, a consumer report from a ''registered information system'' as described below;
- verify the consumer's housing costs or use a reliable method of estimating a consumer's housing expense based on the housing expenses of similarly situated consumers;
- estimate a reasonable amount of basic living expenses for the consumer—expenditures (other than debt obligations and housing costs) necessary for a consumer to maintain the consumer's health, welfare, and ability to produce income;
- project the amount and timing of the consumer's net income, debt obligations, and housing costs for a period of time based on the term of the loan; and
- determine the consumer's ability to repay the loan and continue paying other obligations and basic living expenses for a period of thirty days thereafter based on the lender's projections of the consumer's income, debt obligations, and housing costs and estimate of basic living expenses for the consumer.

Under certain circumstances, a lender would be required to make further assumptions or presumptions when evaluating a consumer's ability to repay a covered short-term loan. The proposal specified certain assumptions for determining the consumer's ability to repay a line of credit that is a covered short-term loan. In addition, if a consumer were to seek a covered short-term loan within 30 days of a covered short-term or longer-term balloon-payment loan, a lender generally would be required to presume that the consumer is not able to afford the new loan. A lender could overcome the presumption of unaffordability for a new covered short-term loan only if it could document a sufficient improvement in the consumer's financial capacity. Furthermore, a lender would have been prohibited for a period of 30 days from making a covered short-term loan to a consumer who has already taken out three covered short-term loans within 30 days of each other.

Under the proposal, a lender would also have been allowed to make a covered short-term loan without complying with all the underwriting criteria just specified, as long as the conditionally exempt loan satisfied certain prescribed terms to prevent and mitigate the risks and harms of unaffordable loans leading to extended loan sequences, and the lender confirmed that the consumer met specified borrowing history conditions and provided required disclosures to the consumer. Among other conditions, a lender would have been allowed to make up to three covered short-term loans in short succession, provided that the first loan had a principal amount no larger than $500, the second loan had a principal amount at least one-third smaller than the principal amount on the first loan, and the third loan had a principal amount at least two-thirds smaller than the principal amount on the first loan. In addition, a lender would not have been allowed to make a covered short-term loan under the alternative requirements if it would result in the consumer having more than six covered short-term loans during a consecutive 12-month period or being in debt for more than 90 days on covered short-term loans during a consecutive 12-month period. Under the proposal, a lender would not be permitted to take vehicle security in connection with these loans.

Underwriting Requirements for Covered Longer-Term Loans. The proposed rule would have identified it as an unfair and abusive practice for a lender to make certain covered longer-term loans without reasonably determining that the consumer will have the ability to repay the loan. The coverage would have been limited to high-cost loans of this type and for which the lender took a leveraged payment mechanism, including vehicle security. The proposed rule would have prescribed requirements to prevent the practice for these loans, subject to certain exemptions and conditions. Before making a covered longer-term loan, a lender would have had to make a reasonable determination that the consumer has the ability to make all required payments as scheduled. This determination was to be made by focusing on the month in which the payments under the loan would be the highest. The proposed ability-to-repay requirements for covered longer-term loans closely tracked the proposed requirements for covered short-term loans with an added requirement that the lender, in assessing the consumer's ability to repay a longer-term loan, must reasonably account for the possibility of volatility in the consumer's income, obligations, or basic living expenses during the term of the loan.

The Bureau has determined not to finalize this aspect of the proposal at this time (other than for covered longer-term balloon-payment loans), and will take any appropriate further action on this subject after the issuance of this final rule.

Payments Practices Related to Small-Dollar Loans. The proposed rule would have identified it as an unfair and abusive practice for a lender to attempt to withdraw payment from a consumer's account in connection with a covered loan after the lender's second consecutive attempt to withdraw payment from the account has failed due to a lack of sufficient funds, unless the lender obtains from the consumer a new and specific authorization to make further withdrawals from the account. This prohibition on further withdrawal attempts would have applied whether the two failed attempts are initiated through a single payment channel or different channels, such as the

automated clearinghouse system and the check network. The proposed rule would have required that lenders provide notice to consumers when the prohibition has been triggered and follow certain procedures in obtaining new authorizations.

In addition to the requirements related to the prohibition on further payment withdrawal attempts, the proposed rule would require a lender to provide a written notice at least three business days before each attempt to withdraw payment for a covered loan from a consumer's checking, savings, or prepaid account. The notice would have contained key information about the upcoming payment attempt, and, if applicable, alerted the consumer to unusual payment attempts. A lender could provide electronic notices as long as the consumer consented to electronic communications.

Additional Requirements. The Bureau also proposed to require lenders to furnish to provisionally registered and registered information systems certain information concerning covered loans at loan consummation, any updates to that information over the life of the loan, and certain information when the loan ceases to be outstanding. To be eligible to become a provisionally registered or registered information system, an entity would have to satisfy the eligibility criteria prescribed in the proposed rule. The Bureau proposed a sequential process to allow information systems to be registered and lenders to be ready to furnish at the time the furnishing obligation in the proposed rule would take effect. For most covered loans, registered information systems would provide a reasonably comprehensive record of a consumer's recent and current borrowing. Before making most covered loans, a lender would have been required to obtain and consider a consumer report from a registered information system.

The proposal would require a lender to establish and follow a compliance program and retain certain records, which included developing and following written policies and procedures that are reasonably designed to ensure compliance with the proposed requirements. A lender would also be required to retain the loan agreement and documentation obtained for a covered loan, and electronic records in tabular format regarding origination calculations and determinations for a covered loan, for a consumer who qualifies for an exception to or overcomes a presumption of unaffordability for a covered loan, and regarding loan type, terms, payment history, and loan performance. The proposed rule also included an anti-evasion clause and a severability clause.

Effective Date. The Bureau proposed that, in general, the final rule would become effective 15 months after publication of the final rule in the **Federal Register**. It also proposed that certain provisions necessary to implement the consumer reporting components of the proposal would become effective 60 days after publication of the final rule in the **Federal Register** to facilitate an orderly implementation process.

G. Public Comments on the Proposed Rule

Overview. Reflecting the broad public interest in this subject, the Bureau received more than 1.4 million comments on the proposed rulemaking. This is the largest comment volume associated with any rulemaking in the Bureau's history. Comments were received from consumers and consumer advocacy groups, national and regional industry trade associations, industry participants, banks, credit unions, nonpartisan research and advocacy organizations, members of Congress, program managers, payment networks, payment processors, fintech companies, Tribal leaders, faith leaders and coalitions of faith leaders, and State and local government officials and agencies. The Bureau received well over 1 million comments from individuals regarding the proposed rule, often describing their own circumstances or those of others known to them in order to illustrate their views, including their perceptions of how the proposed rule might affect their personal financial situations. Some individuals submitted multiple separate comments.

The Bureau has not attempted to tabulate precise results for how to tally the comments on both sides of the rule. Nor would it be easy to do so in any practical way, and of course some of the comments did not appear to take a side in advocating for or against the rule, though only a small number would fall in this category. Nonetheless, it was possible to achieve a rough approximation that broke down the universe of comments in this manner and the Bureau made some effort to do so. As an approximation, of the total comments submitted, more than 300,000 comments generally approved of the Bureau's proposal or suggested that the Bureau should adopt a rule that is more restrictive of these kinds of loans in some way or other. Over one million comments generally opposed the proposed rule and took the view that its provisions would be too restrictive of these kinds of loans.

The Bureau received numerous submissions generated through mass mail campaigns and other organized efforts, including signatures on a petition or multiple letters, postcards, emails, or web comments. These campaigns were conducted by opponents and supporters of the proposed rule. The Bureau also received stand-alone comments submitted by a single commenter, individual, or organization.

Of the approximately 1.4 million comments submitted, a substantial majority were generated by mass-mail campaigns or other organized efforts. In many cases, these submissions contained the same or similar wording. Of those 1.4 million comments, approximately 300,000 were handwritten and often had either the same or similar content or advanced substantially similar themes and arguments. These comments were posted as attachments to the electronic docket at *www.regulations.gov.*

For many of the comments that were submitted as part of mass mail campaigns or other organized efforts, a sample comment was posted to the electronic docket at *www.regulations.gov,* with the total number of such comments received reflected in the docket entries. Accordingly, these comments, whose content is represented on the electronic docket via the sample comment, were not individually posted to the electronic docket at *www.regulations.gov.*

In addition, the 1.4 million comments included more than 100,000 signatures or comments contained on petitions, with some petitions containing tens of thousands of signatures. These petitions were posted as attachments to the electronic docket at *www.regulations.gov.* Whenever relevant to the rulemaking, these submissions and comments were considered in the development of the final rule.

Form of Submission. As detailed in the proposed rule,[366] the Bureau accepted comments through four methods: Email, electronic,[367] regular mail, and hand delivery or courier (including delivery services like FedEx). Approximately 800,000 comments, or roughly 60% of the total, were paper comments received by mail or couriers, while approximately 600,000 (or about 40%) were submitted electronically, either directly to the electronic docket at *www.regulations.gov* or by email. The electronic submissions included

[366] *See* 81 FR 47863 (July 22, 2016).

[367] Electronic submissions were made via *http://www.regulations.gov*.

approximately 100,000 scanned paper comments sent as PDF attachments to thousands of emails.

In addition, the Bureau also processed and considered comments that were received after the comment period had closed, as well as more than 50 ex parte submissions. The ex parte materials were generally presentations and summary memoranda relevant to the rulemaking that were provided to Bureau personnel in the normal course of their work, but outside the procedures for submitting written comments to the rulemaking docket referenced above. They were considered in accordance with the Bureau's established rulemaking procedures governing ex parte materials.

Materials on the record, including ex parte submissions and summaries of ex parte meetings and telephone conferences, are publicly available at *www.regulations.gov.* Other relevant information is discussed below as appropriate. In the end, the Bureau considered all of the comments it received about the proposed rule prior to finalizing the rule.

Stand-Alone Comments. Tens of thousands appear to have been ''stand-alone'' comments—comments that did not appear to have been submitted as part of a mass mail campaign or other organized effort. Nevertheless, many of these stand-alone comments contained language and phrasing that were highly similar to other comments. In addition, pre-printed postcards or other form comments with identical language submitted as part of an organized effort sometimes *also* included additional notations, such as ''we need this product'' or ''don't take this away.'' Some comment submissions also attached material, including copies of news articles, loan applications, loan advertisements, and even personal financial documents.

Many of the comments from lenders, trade associations, consumer advocacy groups, research and advocacy organizations, and government officials included specific discussion about particular provisions of the proposed rule, and the substantive issues raised in those comments are discussed in connection with those provisions. However, as noted above, a high volume of comments were received from individuals, rather than from such entities (or their official representatives). Many of these individual comments focused on personal experiences rather than legal or financial analysis of the details of the provisions of the proposed rule. The discussion below summarizes what the commenters—more than a million in total—had to say to the Bureau about the proposed rule. The comments can be broken into three general categories: (1) Individual comments made about the rule that were more factual in nature regarding the uses and benefits of covered short-term loans; (2) individual comments stating or explaining the grounds on which the commenters opposed the rule, both generally and in more specific respects; and (3) individual comments stating or explaining the grounds on which the commenters supported the rule, again both generally and in more specific respects. The individual comments as so categorized are set forth below, and they have helped inform the Bureau's consideration of the issues involved in deciding whether and how to finalize various aspects of the proposed rule.

Comments Not Specifically Supporting or Opposing the Rule. Many commenters noted, as a factual matter, the uses they make of covered short-term loans. These uses include: Rent, childcare, food, vacation, school supplies, car payments, power/utility bills, cell phone bills, credit card bills, groceries, medical bills, insurance premiums, student educational costs, daily living costs, gaps between paychecks, money to send back to a home country, necessary credit, to ''make ends meet,'' ''hard times,'' and ''bills.'' In considering these types of comments, the Bureau generally interpreted them as critical of the rule for going too far to regulate covered short-term loans.

Some individual commenters talked about how they would cover various costs and expenses if the rule caused previously available payday loans to become less available or unavailable. Among the alternatives they cited were credit cards, borrowing from family or friends, incurring NSF or overdraft charges, or seeking bank loans.

The comments included many suggestions about the consumer financial marketplace that reached beyond the scope of the proposed rule. Some of these comments suggested that the Bureau should regulate interest rates or limit the amounts that could be charged for such loans by imposing a nationwide usury cap.

Comments Opposing the Proposed Rule. The nature of criticism varied substantially. Some commenters were broadly opposed to the rule without further explanation, while others objected to the government's participation in regulating the activity affected by the rule. Some objected to the means by which the rule was being considered or enacted while others objected to various substantive aspects of the rule. Some commenters combined these various types of criticisms. Unexplained opposition included some very brief comments like ''No'' or ''Are you crazy?''

Others based their opposition on general anti-government sentiments. Some objected simply to the fact of the rulemaking. These objections included comments like ''I'm against Washington stopping me from getting a loan.'' More specific comments stated that the government should not be in the business of limiting how much people can borrow and that consumers can manage their own funds. Others contended that similar regulatory efforts in other countries had been unsuccessful. Some were opposed on the ground that the proposed rule was too complicated, with a few objecting simply to its length and complexity or its reliance on dated evidence.

A considerable number of commenters, including some State and local governmental officials, opined that existing State laws and regulations adequately addressed any regulatory need in this area. Some suggested that any regulation of covered short-term loans should be left to the States or that the Bureau should ''work with state governments.'' Some suggested that the Bureau had not adequately consulted with State officials before proposing the rule. And though the specific intent of the comments was not always made clear, some suggested that, either in promulgating or implementing the rule, the Bureau should consult State law and compare different rates and requirements in different States. Some comments were implicitly critical of the proposal, even if not expressly so, when they proposed alternative approaches like the suggestion that the Bureau ''should follow the Florida Model.''

Many comments were from individuals who indicated they were users of payday loans, were able to reliably pay them back, and objected to new restrictions. Some of those comments came with notations that they had been specifically asked by loan providers to submit such comments. Many opposed the rule in whole or in part. Some supported some parts of the rule and opposed other parts.

Hundreds of thousands of individuals submitted comments generally supporting the availability of small-dollar loans that would have been covered by the proposed rule. Many but not all were submitted by consumers of these loans, who mentioned their need for access to small loans to address financial issues they faced with paying bills or dealing with unexpected expenses. Certain consumers stated that

they could not access other forms of credit and favored the convenience and simplicity of these loans. Many expressed their opposition to caps or limits on the number of times they would be able to borrow money on such loans.

As noted above, many commenters simply indicated that they like and use payday loans. The Bureau generally understood these comments as expressions of concerns that the proposed rule might or would restrict their access to covered loans. In contending for greater availability of such loans, commenters specifically noted their use of payday loans for a substantial range of financial needs and reasons. They explained that these loans are used to cover, among other financial needs, overdraft fees, the last piece of tuition rather than losing enrollment, a portion of rent so as not to incur a rent penalty, various bills so as to avoid incurring late fees, utilities so they would not be turned off, college student necessities not covered by student loans, and funds to cover a gap in available resources before the next paycheck. Several commenters specifically noted that payday loan costs were cheaper than bank overdraft fees that would otherwise be incurred. Some indicated they had no alternative to payday products because they lacked credit for credit cards and could not borrow from family or friends or relatives.

Some commenters focused on the favorable environment they experienced in using payday loans, often in juxtaposition to their less welcoming experience with banks. A number of loan providers commented that low-income, non-English speaking immigrants are treated well by those who make these loans to them. Various borrowers related that they have been treated well at payday storefronts and that employees are helpful with their loan applications.

Others indicated that local communities support local payday lenders and the loans they provide and these lenders in turn are leading small businesspersons in their communities. Others noted that payday lenders often provide other services like check cashing, bill paying, and loading of pre-paid cards, sometimes with no fees. Still others echoed that payday lenders do more than other lenders to help their individual customers, and are all about ‘‘finding a solution’’ for the customer. Some commented that payday lenders do not pressure customers to take out loans whereas banks do.

One commenter noted that even with substantial income, payday loans still provided convenience due to a favorable ongoing relationship with the lender. Others commented more generally that the loans are convenient because they require no application and no credit check, they are easy to get and easy to renew, and they are provided at locations where it is convenient to get a check cashed. One expressly noted that despite the recognized expense of such loans, their availability and convenience made them worth it.

Various commenters noted that small loans were difficult or impossible to obtain from banks. Others objected that banks require too much personal information when lending funds, like credit checks and references. Some noted that they had a poor credit history or insufficient credit history and therefore could not get loans from banks or credit cards. Some indicated that small-dollar loans may be necessary for assuring available cash flow at some small businesses. These commenters indicated that payday loans are often critical when bank loans have been denied, the business is awaiting customer payments, and funds are needed to make payroll. Some said that alternatives were unsafe or unable to meet their needs. Others claimed that pawn shops have a bad reputation, that loan sharks might be an available option but for the possible ‘‘outcome,’’ and foreign and ‘‘underground’’ lenders were not viable options.

Some merely signed their name to the contents of printed text. Others sometimes added related messages in filling out such forms. Other forms provided space for and encouraged individualized messages and explanations rather than simply presenting uniform prepared text. Some comments opposing the proposed rule were submitted by lender employees, and those comments also ranged fairly widely in the extent of their individualized content; some referred to their fears of losing their jobs if the proposed rule were to become effective in its current form.

Some of these commenters indicated that payday loan proceeds were used to pay bills for which non-payment would result in penalties or late fees or suspension of vital services; many of them expressed, or seemed implicitly to suggest, concern that the rule would restrict their access to funds for meeting these needs.

Some commenters discussed general or specific concerns about their understanding of the effect the rule would have without expressly indicating support for or opposition to the rule, though a fair reading of their comments showed them to be expressing concern that the proposed rule would, or might restrict their access to covered loans and thus appeared to be critical of the proposed rule. For example, specific concerns about the perceived negative effects of the rule included its potential effect on the cost of covered loans, including fees and interest rates, restrictions on product availability because of re-borrowing limits, and lack of clarity about what products would replace those made unavailable by the rule. A number of comments expressed concern or confusion about the alternative lending options they would have following the enactment of the rule, and whether these alternatives would be acceptable options.

Some had very specific concerns about the potential effects of the rule, including a potential lack of liquidity in the market, and expressed a general concern that the rule might lead to increased consumer fraud. Others were concerned about the security of the personal financial information they would have to provide to get a loan. Some expressed concern that the new requirements would lead to loan denials that would hurt their credit scores. Many employees of the lenders affected by the proposed rule were concerned about their continued employment status if the rule were to be adopted.

Some commenters proposed exclusions from the effects of the rule, either directly or indirectly, indicating, for example, the auto title or credit union loans should be unaffected by the final rule. It was also suggested that there should be a safe harbor if lenders do their own underwriting or engage in income verification. Others suggested that various types of lenders should be excluded from the rule. These included credit unions, on the ground that they make ‘‘responsible’’ loans that use the ability to repay as an eligibility screen already, and ‘‘flex loans’’ because they are like lines of credit. At least one commenter suggested that the Bureau should exempt FDIC-regulated banks from any coverage under the rule.

In addition to more general criticisms of the rule, individual commenters also offered objections and concerns about the substantive provisions of the proposed rule. Some were general, like the suggestion that repayment should be more flexible. Others were more focused on specific features of the rule, including claims that the proposed rule would violate existing laws in unspecified ways.

Many commenters were concerned about the burdens and length of the ‘‘30-day waiting period’’ or cooling-off period, noting that they would be

unable to access such loans during those periods even if they had an urgent need for funds. Others similarly commented that the various requirements and restrictions would result in loan denials and impede their ability to access needed funds easily and quickly. Many specifically noted the need for funds for unexpected emergencies, like car repairs. Some simply declared these limits ''unwarranted,'' saying that they understood the risks associated with these loans and appreciated their availability nonetheless.

Some commenters focused on the procedural difficulties of obtaining covered loans under the rule. They objected to the length and detail of the loan application process when funds were needed quickly and easily to cope with emergencies, with car repairs cited frequently. They stated that the process for getting a small-dollar loan should be short and easy and that otherwise it was not worth the effort. Others felt that the proposed rule would require them to disclose too much information about their income and expenses, which would invade their privacy. Some stated that credit checks should not be required for small-dollar loans. Still others expressed concern that the government should not be able to demand such information or require that borrowers provide it.

A few commenters noted that it would be hard for lenders to comply with the rule, which would impose additional compliance costs. A few specifically suggested that the Bureau should consider having lenders use the State databases that lenders must currently use rather than the approach laid out in the proposed rule.

Finally, though the vast majority of critical comments opposed the proposed rule and the restrictions it would impose, a substantial number of individual commenters were critical because they did not believe the rule went far enough or imposed enough restrictions. These included views that allowing consumers to receive as many as six loans a year or more would sink them into further debt, that ''big banks'' would benefit from the rule, or that the rule should ''go after big banks'' rather than smaller payday lenders. Many critics of the proposed rule stated that it should more directly impose a cap on interest rates, as many States have done and as has proved effective in limiting the making of these kinds of loans. Others suggested that the proposed rule could have ''unintended consequences,'' though without clearly explaining what those consequences might be, and that more should be done to prevent them.

Comments Supporting the Proposed Rule. Many individuals submitted comments that either supported the thrust of the proposed rule or argued that it needed to be strengthened in particular ways to accomplish its purposes. Some were submitted by consumers of these loans, and others were submitted through groups such as nonprofit organizations or coalitions of faith leaders who organized the presentation of their individual stories. Many were submitted as part of campaigns organized by consumer advocacy groups and a variety of nonprofit organizations concerned about the dangers they perceived to flow from these types of loans. These comments tended to dwell on the risks and financial harms that many consumers incur from small-dollar loans. These accounts consistently centered on those borrowers who find themselves ending up in extended loan sequences and bearing the negative collateral consequences of re-borrowing, delinquency, and default, especially the inability to keep up with their other major financial obligations and the loss of control over their budgetary decisions. Many of these commenters cited the special risks posed by loans that are extended without a reasonable determination of the consumer's ability to repay the loan without re-borrowing. Some went further and urged that such loans be outlawed altogether based on their predatory nature and the extremely high costs to consumers of most of these loan products.

Some of these comments described their first-hand experiences with extended loan sequences and the financial harms that had resulted either to themselves or to friends or family members. Some colored their accounts with considerable anger and frustration about these experiences, how they were treated, and the effects that these loans had in undermining or ruining their financial situations.

Many comments were generated or collected by faith leaders and faith groups, with individuals often presenting their views in terms of moral considerations, as well as financial effects. Some of these comments cited scripture and offered religiously based objections to covered loan activity, with particular opposition to the high interest rates associated with covered loans. Others, without necessarily grounding their concerns in a specific religious orientation, noted that current covered loans harm certain financially vulnerable populations, including the elderly, low-income consumers, and single mothers. They also recounted efforts they and others had made to develop so-called ''rescue'' products to extricate members of their congregations from the cumulative harms of extended loan sequences. Some employees of lenders, especially credit unions, offered views in favor of the proposed rule based on what they had seen of the negative experiences that their customers had encountered with these types of loans.

Many commenters who favored the proposed rule dwelled on their concerns about the risks posed by the types of covered loans that are currently available to consumers. Overall, these comments tended to focus on the risks and financial harms that many consumers incur when using short-term small-dollar loans. They expressed concerns about borrowers who find themselves in extended loan sequences and bearing increasingly negative effects as a result. Commenters often stressed that these situations left consumers unable to keep up with other major financial obligations and that they lost control over their personal budgetary decisions.

Like the favorable comments regarding current payday loan activity—which the Bureau understood to be critical of the proposed rule—critics of current covered loan practices did not always specify their views about the proposed rule. Nonetheless, absent specific indications to the contrary, comments that were critical of current payday lending activity were understood to be supportive of the proposed rule as an effective potential response to those concerns.

Some comments simply indicated a general policy view that there was a need to ''stop the debt trap'' or that rollover loans were ''out of hand.'' Others objected to the perception that covered loans are ''geared to people with fixed incomes.'' Many opposed what they viewed as the common situation that these loans were unaffordable and put people in a position in which they are unable to pay off the principal and must roll over the loans to avoid default.

Some comments focused on the specific consumer protective nature of the proposed rule, indicating that the rule was needed because current lenders do not care about people's ability to repay the loans, knowing that they can profit from continuing re-borrowing. A handful of comments from current or former employees of such lenders said they supported the proposed rule because of the negative experiences they had seen their customers encounter with these types of loans. One commenter opined that even NSF fees were less damaging to consumers than

the cumulative effects of these loans, with the fees they imposed and frequency with which they landed many consumers in continued debt traps.

Many others commenting on these types of loans indicated that their ''debt trap'' nature was reinforced in the context of vehicle loans, since repossession of a vehicle could dramatically deepen the downward debt spiral. Still, one commenter argued that even the repossession of the borrower's vehicle might not be as bad as the continuing predicament of self-perpetuating loan sequences with their escalating fees and loan balances.

Some indicated that other loans were better alternatives to payday loans, sometimes citing PAL loans in this regard. And some were concerned about the character of the lenders associated with covered loans, with one comment relating that a recent payday lender had been indicted for illegal conduct associated with payday lending.

Some individual commenters indicated that they were representatives of or otherwise affiliated with national consumer organizations, and other national organizations, and were supportive of the rule. Some commenters noted that they were current payday loan borrowers working to pay off their loans and were supportive of the rule. Others supported the rule based on their own generally negative personal experiences with covered loans, with some specifying that they only supported the rule as applied to lenders that made loans without determining whether borrowers had the ability to repay them.

Many individual commenters indicated support for time limits on these loans and the proposed ''cooling-off period'' because they believed it would ultimately help consumers better manage their funds. Some thought that the rule would have the effect of lowering interest rates.

Some individual commenters who identified themselves as State officials, including individual legislators, commented that the rule would favorably supplement existing statutes that dealt with covered loans in their respective States. Individuals affiliated with some industry groups indicated their general support for the rule, but expressed concern that, in unexplained ways, the rule may go ''too far.'' In contrast, others recommended that the standards in the proposed rule should be applied in the context of all consumer lending rather than just in this market.

The Bureau's Consideration of Individual Comments. Although the specific treatment of discrete issues is addressed more fully in part V below, which presents the section-by-section analysis explaining the components of the final rule, it may be useful here to provide some of the uses that the Bureau made of the individual comments. First, it is a notable and commendable fact that over a million individual commenters would take the time and effort to respond to the Bureau with their thoughts and reactions, both pro and con, to this proposed rule. Public comments are not just an obligatory part of the rulemaking process required by the Administrative Procedure Act, they are welcome as a means of providing insight and perspective in fashioning such rules. Perhaps needless to say, that inviting solicitation was put to the test here.

As noted earlier, many of the individual comments turned out to be duplicative and redundant of one another. In part, that was because both the industry groups, on the one side, and the consumer and community groups, on the other side, employed campaigns to solicit large numbers of individual comments. The Bureau does not view any of those efforts as improper or illegitimate, and it has not discounted any comments on their merits as a result of their apparent origins. It did create challenges, however, for figuring out how to manage this large volume of comments—how to receive and process them, how to handle and organize them, and how to review and consider them. In the end, the Bureau proceeded as laid out in its earlier discussion in this section, and though the process took many months and considerable effort, it was eventually completed in a satisfactory way.

The Bureau also does not view the repetition and redundancy among many of the comments as being immaterial. The Bureau considered not only what views the public has, but how intensely they are felt and maintained. The Bureau has frequently noted, in its handling of consumer complaints, that when the same concern arises more frequently, it may reflect an emerging pattern and be worthy of more attention than if the same concern arises only once or twice and thus appears to reflect a more isolated set of circumstances. The same may be true here, with the caveat that, depending on the circumstances, comments generated primarily through campaigns may or may not truly reflect any widespread or deeply felt convictions, depending on the level of the individual's actual involvement.

Having said that, the processes that Congress has created for Federal administrative rulemaking, both in the Administrative Procedure Act generally and here in the Dodd-Frank Act in particular, were not designed or intended to be governed by some rough assessment of majority vote or even majority sentiment. While rough estimates of pro and con submissions are provided above, the Bureau has simply sought to understand the consumer experiences reported in these comments and address the substance of these comments on their merits.

As a general matter, the individual comments have helped inform the Bureau's understanding of factual matters surrounding the circumstances and use of covered loans. In the sections on Market Concerns—Underwriting and Market Concerns—Payments, they helped add depth and content to the Bureau's description of issues such as borrower characteristics, the circumstances of borrowing, their expectations of and experience with extended loan sequences, including harms they have suffered as a consequence of delinquency, default, and loss of control over budgeting. Many of these concerns were already known at the outset of the rule-writing process, as a result of extensive outreach and feedback the Bureau has received on the subject, as well as through the research that the Bureau and others have performed on millions of covered loans, all of which is discussed above.

Nonetheless, the Bureau's review of large numbers of individual comments has reinforced certain points and prompted further consideration of others. For example, many individuals stated great concern that the proposed rule would make the underwriting process for small-dollar loans too burdensome and complex. They commented positively on the speed and convenience of obtaining such loans, and were concerned that the process described in the proposed rule would lead to fewer such loans being offered or made. This has influenced the Bureau's consideration of the details of the underwriting process addressed in § 1041.5 of the final rule and contributed to the Bureau's decision to modify various aspects of that process. At the same time, many other individual commenters had much to say about the perils of extended loan sequences and how they had harmed either themselves or others, which helped underscore the need for the Bureau to finalize a framework that would be sufficiently protective of consumers. In particular, many commenters supported the general requirement that lenders must reasonably assess the borrower's ability to repay before making a loan according

to specific underwriting criteria, and that limited exceptions to those criteria would be made only where other conditions applied to ensure that lenders would not end up in extended loan sequences. There are also many other places in the Bureau's discussion and explanation of the final rule where individual comments played a role in the Bureau's analysis.

Further Inter-Agency Consultation. In addition to the inter-agency consultation that the Bureau engaged in prior to issuing the notice of proposed rulemaking, pursuant to section 1022(b)(2) of the Dodd-Frank Act, the Bureau has consulted further with the appropriate prudential regulators and the FTC during the comment process. As a result of these consultations, the Bureau has made a number of changes to the rule and has provided additional explanation for various determinations it has made about the provisions of the rule, which have been discussed with the other regulators and agencies during the consultation process.

Ex Parte Submissions. In addition, the Bureau considered the comments it received after the comment period had closed, as well as other input from more than 50 ex parte submissions, meetings, and telephone conferences.[368] All such materials in the record are available to the public at *http://www.regulations.gov.* Relevant information received is discussed below in the section-by-section analysis and subsequent parts of this notice, as applicable. The Bureau considered all the comments it received about the proposal, made certain modifications, and is adopting the final rule as described more fully in part V below.

IV. Legal Authority

The Bureau is issuing this final rule pursuant to its authority under the Dodd-Frank Act. The rule relies on rulemaking and other authorities specifically granted to the Bureau by the Dodd-Frank Act, as discussed below.

A. Section 1031 of the Dodd-Frank Act

Section 1031(b)—The Bureau's Authority To Identify and Prevent UDAAPs

Section 1031(b) of the Dodd-Frank Act provides the Bureau with authority to prescribe rules to identify and prevent unfair, deceptive, or abusive acts or practices, or UDAAPs. Specifically, section 1031(b) of the Act authorizes the Bureau to prescribe rules "applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." Section 1031(b) of the Act further provides that, "Rules under this section may include requirements for the purpose of preventing such acts or practice."

There are notable similarities between the Dodd-Frank Act and the Federal Trade Commission Act (FTC Act) provisions relating to unfair and deceptive acts or practices. Accordingly, these FTC Act provisions, and case law and Federal agency rulemakings relying on them, inform the scope and meaning of the Bureau's rulemaking authority with respect to unfair and deceptive acts or practices under section 1031(b) of the Dodd-Frank Act.[369]

Courts evaluating exercise of agency rulemaking authority under the unfairness and deception standards of the FTC Act have held that there must be a "reasonable relation" between the act or practice identified as unlawful and the remedy chosen by the agency.[370] The Bureau agrees with this approach and therefore maintains it is reasonable to interpret section 1031(b) of the Dodd-Frank Act to permit the imposition of requirements to prevent acts or practices that are identified by the Bureau as unfair or deceptive, as long as the preventive requirements being imposed by the Bureau have a reasonable relation to the identified acts or practices.

The Bureau likewise maintains that it is reasonable to interpret section 1031(b) of the Dodd-Frank Act to provide that same degree of discretion to the Bureau with respect to the imposition of requirements to prevent acts or practices that are identified by the Bureau as abusive. Throughout this rulemaking process, the Bureau has relied on and applied this interpretation in formulating and designing requirements to prevent acts or practices identified as unfair or abusive.

Section 1031(c)—Unfair Acts or Practices

Section 1031(c)(1) of the Dodd-Frank Act provides that the Bureau shall have no authority under section 1031 to declare an act or practice in connection with a transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service, to be unlawful on the grounds that such act or practice is unfair, unless the Bureau "has a reasonable basis" to conclude that: The act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and such substantial injury is not outweighed by countervailing benefits to consumers or to competition.[371] Section 1031(c)(2) of the Act provides that, "[i]n determining whether an act or practice is unfair, the Bureau may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination." [372]

In sum, the unfairness standard under section 1031(c) of the Dodd-Frank Act requires primary consideration of three elements: The presence of a substantial injury, the absence of consumers' ability to reasonably avoid the injury, and the countervailing benefits to consumers or to competition associated with the act or practice. The Dodd-Frank Act also permits secondary consideration of public policy objectives.

As noted above, the unfairness provisions of the Dodd-Frank Act are similar to the unfairness standard under the FTC Act.[373] That standard was developed, in part, when in 1994, Section 5(n) of the FTC Act was amended to incorporate the principles set forth in the FTC's December 17, 1980 "Commission Statement of Policy on the

[368] *See also* Bureau of Consumer Fin. Prot., "CFPB Bulletin 11–3, CFPB Policy on Ex Parte Presentations in Rulemaking Proceedings," (Aug. 16, 2011), *available at http://files.consumerfinance.gov/f/2011/08/Bulletin_20110819_ExPartePresentationsRulemakingProceedings.pdf, updated and revised,* Policy on Ex Parte Presentations in Rulemaking Proceedings, 82 FR 18687 (Apr. 21, 2017).

[369] Section 18 of the FTC Act similarly authorizes the FTC to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" and provides that such rules "may include requirements prescribed for the purpose of preventing such acts or practices." 15 U.S.C. 57a(a)(1)(B). As discussed below, the Dodd-Frank Act, unlike the FTC Act, also permits the Bureau to prescribe rules identifying and preventing "abusive" acts or practices.

[370] *See Am. Fin. Servs. Ass'n* v. *FTC,* 767 F.2d 957, 988 (D.C. Cir. 1985) (*AFSA*) (holding that the FTC "has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist" (*citing Jacob Siegel Co.* v. *FTC,* 327 U.S. 608, 612–13 (1946)).

[371] 12 U.S.C. 5531(c)(1).

[372] 12 U.S.C. 5531(c)(2).

[373] Section 5(n) of the FTC Act, as amended in 1994, provides that, the FTC shall have no authority to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the FTC may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination. 15 U.S.C. 45(n).

Scope of Consumer Unfairness Jurisdiction'' (the FTC Policy Statement on Unfairness).[374]

Due to the similarities between unfairness provisions in the Dodd-Frank and FTC Acts, the scope and meaning of the Bureau's authority under section 1031(b) of the Dodd-Frank Act to issue rules that identify and prevent acts or practices that the Bureau determines are unfair pursuant to section 1031(c) of the Dodd-Frank Act are naturally informed by the FTC Act unfairness standard, the FTC Policy Statement on Unfairness, FTC and other Federal agency rulemakings,[375] and related case law. The Bureau believes it is reasonable to interpret section 1031 of the Dodd-Frank Act consistent with the specific positions discussed in this section on Legal Authority. The Bureau's interpretations are based on its expertise with consumer financial products, services, and markets, and its experience with implementing this provision in supervisory and enforcement actions. The Bureau also generally finds persuasive the reasons provided by the authorities supporting these positions as discussed in this section.

Substantial Injury

The first element required for a determination of unfairness under section 1031(c)(1) of the Dodd- Frank Act is that the act or practice causes, or is likely to cause, substantial consumer injury. As noted above, Bureau rulemaking regarding the meaning of the elements of this unfairness standard is informed by the FTC Act unfairness standard, the FTC Policy Statement on Unfairness, FTC and other Federal agency rulemakings, and related case law.

The FTC noted in the FTC Policy Statement on Unfairness that substantial injury ordinarily involves monetary harm, and that trivial or speculative harms are not cognizable under the test for substantial injury.[376] The FTC also noted that an injury is ''sufficiently substantial'' if it consists of a small amount of harm to a large number of individuals or if it raises a significant risk of harm.[377]

In addition, the FTC has also found that substantial injury may involve a large amount of harm experienced by a small number of individuals.[378] And while the FTC has said that emotional impact and other more subjective types of harm ordinarily will not constitute substantial injury,[379] the D.C. Circuit held that psychological harm can form part of the substantial injury along with financial harm.[380]

Not Reasonably Avoidable

The second element required for a determination of unfairness under section 1031(c)(1) of the Dodd-Frank Act is that the substantial injury is not reasonably avoidable by consumers. Again, the FTC Act unfairness standard, the FTC Policy Statement on Unfairness, FTC and other Federal agency rulemakings, and related case law inform the meaning of this element of the unfairness standard.

The FTC has noted that knowing the steps for avoiding injury is not enough for the injury to be reasonably avoidable; rather, the consumer must also understand the necessity of taking those steps.[381] As the FTC explained in its Policy Statement on Unfairness, most unfairness matters are brought to ''halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision making.'' [382] The D.C. Circuit held that such behavior can create a ''market failure'' and the agency ''may be required to take corrective action.'' [383] Reasonable avoidability also takes into account the costs of making a choice other than the one made and the availability of alternatives in the marketplace.[384]

Countervailing Benefits to Consumers or Competition

The third element required for a determination of unfairness under section 1031(c)(1) of the Dodd- Frank Act is that the act or practice's countervailing benefits to consumers or to competition do not outweigh the substantial consumer injury. Once again, the FTC Act unfairness standard, the FTC Policy Statement on Unfairness, FTC and other Federal agency rulemakings, and related case law inform the meaning of this element of the unfairness standard.

In applying the FTC Act's unfairness standard, the FTC has stated that it is important to consider both the costs of imposing a remedy and any benefits that consumers enjoy as a result of the practice.[385] Authorities addressing the FTC Act's unfairness standard indicate that the countervailing benefits test does not require a precise quantitative analysis of benefits and costs, because such an analysis may be unnecessary or, in some cases, impossible. Rather, the agency is expected to gather and

[374] Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (December 17, 1980), *reprinted in In re Int'l Harvester Co.,* 104 F.T.C. 949, 1070 (1984) (*Int'l Harvester*). *See also* S. Rept. 103–130, at 12–13 (1993) (legislative history to FTC Act amendments indicating congressional intent to codify the principles of the FTC Policy Statement on Unfairness).

[375] In addition to the FTC's rulemakings under unfairness authority, certain Federal prudential regulators have prescribed rules prohibiting unfair practices under section 18(f)(1) of the FTC Act and, in doing so, they applied the statutory elements consistent with the standards articulated by the FTC. The Federal Reserve Board, FDIC, and the OCC also issued guidance generally adopting these standards for purposes of enforcing the FTC Act's prohibition on unfair and deceptive acts or practices. *See* 74 FR 5498, 5502 (Jan. 29, 2009) (background discussion of legal authority for interagency Subprime Credit Card Practices rule).

[376] *See* FTC Policy Statement on Unfairness, *Int'l Harvester,* 104 F.T.C. 949, 1073 (1984). For example, in the Higher-Priced Mortgage Loan (HPML) Rule, the Federal Reserve Board concluded that a borrower who cannot afford to make the loan payments as well as payments for property taxes and homeowners insurance because the lender did not adequately assess the borrower's ability to repay suffers substantial injury, due to the various costs associated with missing mortgage payments (*e.g.,* large late fees, impairment of credit records, foreclosure related costs). *See* 73 FR 44522, 44541–42 (July 30, 2008).

[377] *See* FTC Policy Statement on Unfairness, *Int'l Harvester,* 104 F.T.C. at 1073 n.12.

[378] *See Int'l Harvester,* 104 F.T.C. at 1064.

[379] *See* FTC Policy Statement on Unfairness, *Int'l Harvester,* 104 F.T.C. at 1073.

[380] *See AFSA,* 767 F.2d at 973–74, n.20 (1985) (discussing the potential psychological harm resulting from lenders' taking of non-possessory security interests in household goods and associated threats of seizure, which was part of the FTC's rationale for intervention in the Credit Practices Rule).

[381] *See Int'l Harvester,* 104 F.T.C. at 1066.

[382] FTC Policy Statement on Unfairness, *Int'l Harvester,* 104 F.T.C. at 1074.

[383] *AFSA,* 767 F.2d at 976. The D.C. Circuit noted that Congress intended for the FTC to develop and refine the criteria for unfairness on a ''progressive, incremental'' basis. *Id.* at 978. The court upheld the FTC's Credit Practices Rule by reasoning in part that ''the fact that the [FTC's] analysis applies predominantly to certain creditors dealing with a certain class of consumers (lower-income, higher-risk borrowers) does not, as the dissent suggests, undercut its validity. [There is] a market failure with respect to a particular category of credit transactions which is being exploited by the creditors involved to the detriment of the consumers involved.'' *Id.* at 982 n.29.

[384] *See* FTC Policy Statement on Unfairness, *Int'l Harvester,* 104 F.T.C. at 1074 n.19 (''In some senses any injury can be avoided—for example, by hiring independent experts to test all products in advance, or by private legal actions for damages—but these courses may be too expensive to be practicable for individual consumers to pursue.''); *AFSA,* 767 F.2d at 976–77 (reasoning that because of factors such as substantial similarity of contracts, ''consumers have little ability or incentive to shop for a better contract'').

[385] *See* FTC Policy Statement on Unfairness, *Int'l Harvester,* 104 F.T.C. at 1073–74 (noting that an unfair practice must be ''injurious in its net effects'' and that ''[t]he Commission also takes account of the various costs that a remedy would entail. These include not only the costs to the parties directly before the agency, but also the burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and similar matters.'').

consider reasonably available evidence.[386]

Public Policy

As noted above, section 1031(c)(2) of the Dodd-Frank Act provides that, ''[i]n determining whether an act or practice is unfair, the Bureau may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.'' [387]

Section 1031(d)—Abusive Acts or Practices

The Dodd-Frank Act, in section 1031(b), authorizes the Bureau to identify and prevent abusive acts and practices. The Bureau believes that Congress intended for the statutory phrase ''abusive acts or practices'' to encompass conduct by covered persons that is beyond what would be prohibited as unfair or deceptive acts or practices, although such conduct could overlap and thus satisfy the elements for more than one of the standards.[388]

Under section 1031(d) of the Dodd-Frank Act, the Bureau ''shall have no authority . . . to declare an act or practice abusive in connection with the provision of a consumer financial product or service'' unless the act or practice meets at least one of several enumerated conditions. For example, under section 1031(d)(2)(A) of the Act, an act or practice might ''take[ ] unreasonable advantage of'' a consumer's ''lack of understanding . . . of the material risks, costs, or conditions of the [consumer financial] product or service'' (*i.e.,* the lack of understanding prong).[389] Under section 1031(d)(2)(B) of the Act, an act or practice might ''take[ ] unreasonable advantage of'' the ''inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service'' (*i.e.,* the inability to protect prong).[390] The Dodd-Frank Act does not further elaborate on the meaning of these terms, leaving it to the Bureau to interpret and apply these standards.

Although the legislative history on the meaning of the Dodd-Frank Act's abusiveness standard is fairly limited, it suggests that Congress was particularly concerned about the widespread practice of lenders making unaffordable loans to consumers. A primary focus was on unaffordable home mortgages and mortgages made without adequate or responsible underwriting.[391]

However, there is some indication that Congress also intended the Bureau to use the authority under section 1031(d) of the Dodd-Frank Act to address payday lending through the Bureau's rulemaking, supervisory, and enforcement authorities. For example, the Senate Committee on Banking, Housing, and Urban Affairs report on the Senate version of the legislation listed payday loans as one of several categories of consumer financial products and services, other than mortgages, where ''consumers have long faced problems'' because they lack ''adequate Federal rules and enforcement,'' noting further that ''[a]busive lending, high and hidden fees, unfair and deceptive practices, confusing disclosures, and other anti-consumer practices have been a widespread feature in commonly available consumer financial products such as credit cards.'' [392] The same section of the Senate committee report included a description of the basic features of payday loans and the problems associated with them, specifically noting that many consumers are unable to repay the loans while meeting their other obligations and that many of these borrowers re-borrow, which results in a ''perpetual debt treadmill.'' [393] These portions of the legislative history reinforce other indications in the Dodd-Frank Act that Congress consciously intended to confer direct authority upon the Bureau to address issues concerning payday loans.[394]

B. Section 1032 of the Dodd-Frank Act

Section 1032(a) of the Dodd-Frank Act provides that the Bureau may prescribe rules to ensure that the features of any consumer financial product or service, ''both initially and over the term of the product or service,'' are ''fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.'' [395] This authority is broad, and empowers the Bureau to prescribe rules regarding the disclosure of the ''features'' of consumer financial products and services generally.

Accordingly, the Bureau may prescribe rules containing disclosure requirements even if other Federal

[386] *See* S. Rept. 103–130, at 13 (1994) (legislative history for the 1994 amendments to the FTC Act noting that, ''In determining whether a substantial consumer injury is outweighed by the countervailing benefits of a practice, the Committee does not intend that the FTC quantify the detrimental and beneficial effects of the practice in every case. In many instances, such a numerical benefit-cost analysis would be unnecessary; in other cases, it may be impossible. This section would require, however, that the FTC carefully evaluate the benefits and costs of each exercise of its unfairness authority, gathering and considering reasonably available evidence.''); *Pennsylvania Funeral Directors Ass'n* v. *FTC,* 41 F.3d 81, 91 (3d Cir. 1994) (in upholding the FTC's amendments to the Funeral Industry Practices Rule, the Third Circuit noted that ''much of a cost-benefit analysis requires predictions and speculation''); *Int'l Harvester,* 104 F.T.C. at 1065 n.59 (''In making these calculations we do not strive for an unrealistic degree of precision . . . . We assess the matter in a more general way, giving consumers the benefit of the doubt in close issues . . . . What is important . . . is that we retain an overall sense of the relationship between costs and benefits. We would not want to impose compliance costs of millions of dollars in order to prevent a bruised elbow.'').

[387] 12 U.S.C. 5531(c)(2).

[388] *See, e.g.,* S. Rept. No. 111–176, at 172 (Apr. 30, 2010) (''Current law prohibits unfair or deceptive acts or practices. The addition of 'abusive' will ensure that the Bureau is empowered to cover practices where providers unreasonably take advantage of consumers.''); Public Law 111–203 (listing, in the preamble to the Dodd- Frank Act, one of the purposes of the Act as ''protect[ing] consumers from abusive financial services practices'').

[389] 12 U.S.C. 5531(d)(2)(A).

[390] 12 U.S.C. 5531(d)(2)(B). The Dodd-Frank Act's abusiveness standard also permits the Bureau to intervene under section 1031(d)(1) if the Bureau determines that an act or practice ''materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service,'' 12 U.S.C. 5531(d)(1), and under section 1031(d)(2)(C) if an act or practice ''takes unreasonable advantage of'' the consumer's ''reasonable reliance'' on the covered person to act in the consumer's interests, 12 U.S.C. 5531(d)(2)(C).

[391] While Congress sometimes described other products as abusive, it frequently applied the term to unaffordable mortgages and mortgages made without adequate or responsible underwriting. *See, e.g.,* S. Rept. No. 111–176, at 11 (noting that the ''financial crisis was precipitated by the proliferation of poorly underwritten mortgages with abusive terms'').

[392] *See* S. Rept. 111–176, at 17. In addition to credit cards, the Senate committee report listed overdraft, debt collection, payday loans, and auto dealer lending as the consumer financial products and services warranting concern. *Id.* at 17–23.

[393] *See* S. Rept. 111–176, 20–21; *see also* 155 Cong. Rec. 31250 (Dec. 10, 2009) (during a colloquy on the House floor with the one of the authors of the Dodd-Frank Act, Representative Barney Frank, Representative Henry Waxman stated that the ''authority to pursue abusive practices helps ensure that the agency can address payday lending and other practices that can result in pyramiding debt for low income families.'').

[394] Section 1024(a)(1)(E) of the Dodd-Frank Act also expressly confers authority upon the Bureau to take specific acts concerning ''any covered person who . . . offers or provides to a consumer a payday loan.'' These include the use of supervisory authority to ''conduct examinations'' for the purpose of ''assessing compliance with the requirements of Federal consumer financial law,'' to exercise ''exclusive'' authority to ''enforce Federal consumer financial law,'' and to exercise ''exclusive'' authority to ''issue regulations'' for the purpose of ''assuring compliance with Federal consumer financial law.'' Congress conferred this authority only for a defined and limited universe of consumer financial products—payday loans, mortgage loans, and student loans—and in certain other specified instances, thus indicating its intent to empower the Bureau to consider and carry out broad regulatory and oversight activity with respect to the market for payday loans, in particular.

[395] 12 U.S.C. 5532(a).

consumer financial laws do not specifically require disclosure of such features. Section 1032(c) of the Dodd-Frank Act provides that, in prescribing rules pursuant to section 1032 of the Act, the Bureau ''shall consider available evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services.'' [396]

Section 1032(b)(1) of the Dodd-Frank Act provides that ''any final rule prescribed by the Bureau under this section requiring disclosures may include a model form that may be used at the option of the covered person for provision of the required disclosures.'' [397] Section 1032(b)(2) of the Act provides that such a model form ''shall contain a clear and conspicuous disclosure that, at a minimum—(A) uses plain language comprehensible to consumers; (B) contains a clear format and design, such as an easily readable type font; and (C) succinctly explains the information that must be communicated to the consumer.'' [398]

Section 1032(b)(3) of the Dodd-Frank Act provides that any such model form ''shall be validated through consumer testing.'' [399] And section 1032(d) of the Act provides that, ''Any covered person that uses a model form included with a rule issued under this section shall be deemed to be in compliance with the disclosure requirements of this section with respect to such model form.'' [400]

C. Other Authorities Under the Dodd-Frank Act

Section 1022(b)(1) of the Dodd-Frank Act provides that the Bureau's director ''may 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.'' [401] ''Federal consumer financial law'' includes rules prescribed under Title X of the Dodd-Frank Act,[402] including sections 1031(b) to (d) and 1032.

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) of the Act.[403] For a discussion of the Bureau's standards for rulemaking under section 1022(b)(2) of the Act, see part VII below.

Section 1022(b)(3)(A) of the Dodd-Frank Act authorizes the Bureau, by rule, to ''conditionally or unconditionally exempt any class of covered persons, service providers, or consumer financial products or services'' from any provision of Title X or from any rule issued under Title X as the Bureau determines ''necessary or appropriate to carry out the purposes and objectives'' of Title X. In doing so, the Bureau must, ''tak[e] into consideration the factors'' set forth in section 1022(b)(3)(B) of the Act,[404] which specifies three factors that the Bureau shall, as appropriate, take into consideration in issuing such an exemption.[405]

Furthermore, §§ 1041.10 and 1041.11 of the final rule are authorized by other Dodd-Frank Act authorities, such as sections 1021(c)(3),[406] 1022(c)(7),[407] 1024(b)(1),[408] and 1024(b)(7) of the Act.[409] A more complete description of the Dodd-Frank Act authorities on which the Bureau is relying for §§ 1041.10 and 1041.11 of the final rule is contained in the section-by-section analysis of those provisions.

D. Section 1041 of the Dodd-Frank Act and Preemption

Section 1041(a)(1) of the Dodd-Frank Act provides that Title X of the Act, other than sections 1044 through 1048, ''may not be construed as annulling, altering, or affecting, or exempting any person subject to the provisions of [Title X] from complying with,'' the statutes, regulations, orders, or interpretations in effect in any State (sometimes hereinafter, State laws), ''except to the extent that any such provision of law is inconsistent with the provisions of [Title X], and then only to the extent of the inconsistency.'' [410] Section 1041(a)(2) of the Act provides that, for purposes of section 1041, ''a statute, regulation, order, or interpretation in effect in any State is not inconsistent with'' the Title X provisions ''if the protection that such statute, regulation, order, or interpretation affords to consumers is greater than the protection provided'' under Title X.[411] This section further provides that a determination regarding whether a statute, regulation, order, or interpretation in effect in any State is inconsistent with the provisions of Title X may be made by the Bureau on its own motion or in response to a nonfrivolous petition initiated by any interested person.[412]

The requirements of the final rule set minimum Federal standards for the regulation of covered loans. They thus accord with the common preemption principle that Federal law provides a floor and not a ceiling on consumer financial protection,[413] as provided in section 1041(a)(2) of the Dodd-Frank Act. The requirements of this rule will thus coexist with State laws that pertain to the making of loans that the rule treats as covered loans (hereinafter, ''applicable State laws''). Consequently, any person subject to the final rule will be required to comply with both the requirements of this rule and all applicable State laws, except to the extent that the applicable State laws are inconsistent with the requirements of the rule.[414] This approach reflects the established framework of cooperative federalism between Federal and State laws in many other substantive areas. Accordingly, the arguments advanced by some commenters that the payday rule would ''occupy the field'' are incorrect. Where Federal law occupies an entire field, ''even complementary State regulation is impermissible'' because field preemption ''foreclose[s] any State regulation in the area, even if it is parallel to Federal standards.'' [415] This rule would not have that effect.

As noted above, section 1041(a)(2) of the Dodd-Frank Act specifies that State

[396] 12 U.S.C. 5532(c).

[397] 12 U.S.C. 5532(b)(1).

[398] 12 U.S.C. 5532(b)(2).

[399] 12 U.S.C. 5532(b)(3).

[400] 12 U.S.C. 5532(d).

[401] 12 U.S.C. 5512(b)(1).

[402] 12 U.S.C. 5481(14).

[403] 12 U.S.C. 5512(b)(2).

[404] 12 U.S.C. 5512(b)(3)(A).

[405] Section 1022(b)(3)(B) of the Act provides that in issuing an exemption, as permitted under section 1022(b)(3)(A) of the Act, the Bureau shall, as appropriate, take into consideration: the total assets of the class of covered persons; the volume of transactions involving consumer financial products or services in which the class of covered persons engages; and existing provisions of law which are applicable to the consumer financial product or service and the extent to which such provisions provide consumers with adequate protections. 12 U.S.C. 5512(b)(3)(B).

[406] 12 U.S.C. 5511(c)(3).

[407] 12 U.S.C. 5512(c)(7).

[408] 12 U.S.C. 5514(b)(1).

[409] 12 U.S.C. 5514(b)(7).

[410] 12 U.S.C. 5551(a)(1). Section 1002(27) of the Dodd-Frank Act defines ''State'' to include any ''Federally recognized Indian Tribe.'' *See* 12 U.S.C. 5481(27).

[411] 12 U.S.C. 5551(a)(2).

[412] 12 U.S.C. 5551(a)(2).

[413] The Bureau received a comment from a group of State Attorneys General asking the Bureau to codify the statement that this is a floor and not a ceiling. The Bureau does not believe this is necessary, and that it would conflict with the regulatory scheme of the rule, which is primarily aimed at obligations on the part of lenders. This section should suffice for purposes of communicating the Bureau's intent with regard to preemption.

[414] The requirements of the final rule will also coexist with applicable laws in cities and other localities, and the Bureau does not intend the rule to annul, alter, affect, or exempt any person from complying with the regulatory frameworks of cities and other localities to the extent those frameworks provide greater consumer protections than the requirements of this rule.

[415] *Arizona* v. *United States,* 567 U.S. 387 (2012).

laws which afford greater consumer protection than is provided under Title X are not inconsistent with the provisions of Title X. Specifically, as discussed in part II, different States have taken different approaches to regulating loans that are treated as covered loans under the final rule, with many States electing to permit the making of such loans according to varying conditions, and other States choosing not to do so by imposing usury caps that effectively render it impractical to make such loans in those States.

Particularly in the States where fixed usury caps effectively prohibit these types of loans, nothing in this rule is intended or should be construed to undermine or cast doubt on whether those provisions are sound public policy. Because Title X does not confer authority on the Bureau to establish usury limits,[416] its policy interventions, as embodied in the final rule, are entirely distinct from such measures as are beyond its statutory authority. Therefore, nothing in this rule should be construed as annulling or even as inconsistent with a regulatory or policy approach to such loans based on usury caps, which are wholly within the prerogative of the States to lawfully impose. Indeed, as described in part II, South Dakota became the most recent State to impose a usury cap on payday loans after conducting a ballot initiative in 2016 in which the public voted to approve the measure by a substantial margin.

The requirements of the final rule will coexist with different approaches and frameworks for the regulation of such covered loans as reflected in applicable State laws.[417] The Bureau is aware of certain applicable State laws that may afford greater protections to consumers than do the requirements of this rule. For example, as described in part II and just discussed above, certain States have fee or interest rate caps (*i.e.,* usury limits) that payday lenders may find are set too low to sustain their business models. The Bureau regards the fee and interest rate caps in these States as providing greater consumer protections than, and thus as not inconsistent with, the requirements of the final rule.

Aside from those provisions of State law just discussed, the Bureau declines to determine definitively in this rulemaking whether any other individual statute, regulation, order, or interpretation in effect in any State is inconsistent with the rule. Comments on the proposal and internal analysis have led the Bureau to conclude that specific questions of preemption should be decided upon application, and the Bureau will respond to nonfrivolous petitions initiated by interested persons in accordance with section 1041(a)(2) of the Dodd-Frank Act. The Bureau believes that in most cases entities can apply the principles articulated above in a straightforward manner to determine their rights and obligations under both the rule and State law. Moreover, in light of the variety of relevant State law provisions and the range of practices that may be covered by those laws, it is impossible for the Bureau to provide a definitive description of all interactions or to anticipate all areas of potential concern.

Some commenters argued that because section 1041 of the Dodd-Frank Act includes only the term ''this title,'' and not ''any rule or order prescribed by the Bureau under this title,'' Congress contemplated only statutory and not regulatory preemption of State law. The Bureau disagrees and believes section 1041 is best interpreted to apply to Title X and rules prescribed by the Bureau under that Title. Section 1041 was modeled in large part on similar provisions from certain enumerated consumer laws. Consistent with longstanding case law holding that State laws can be pre-empted by Federal regulations promulgated in the exercise of delegated authority,[418] those provisions were definitively interpreted to apply to requirements imposed by implementing regulations, even where the statutory provisions include explicit reference only to the statutes themselves.[419] Congress is presumed to have been aware of those applications in enacting Title X, and section 1041 is best interpreted similarly. Moreover, the Bureau's interpretation furthers principles of consistency, uniformity, and manageability in interpreting Title X and legislative rules with the force and effect of law implementing that statute. Finally, while section 1041 of the Act instructs preemption analyses, any actual pre-emptive force derives from the substantive provisions of Title X and its implementing rules, not from section 1041 itself. A reading that section 1041 would apply only to Title X itself could lead to the conclusion that rules prescribed by the Bureau under Title X have broader preemptive effect than does Title X itself. The better interpretation is that the preemptive effect of regulations exercised under delegated authority should be guided by the provisions of section 1041.

Lastly, the Bureau intends this rule to interact in the same manner with laws or regulations at other government levels, like city or locality laws or regulations.

E. General Comments on the Bureau's Legal Authority

In addition to setting out the Bureau's legal authority for this rulemaking and responding to comments directed to specific sources of authority, it is necessary to address several more general comments that challenged or criticized certain aspects of the Bureau's ability to proceed to finalize this rule. They will be addressed here.

Some industry commenters and State Attorneys General have contended that the Bureau lacks the legal authority to adopt this rule because the Bureau itself or its statutory authority is unconstitutional on various grounds, including separation-of-powers, the non-delegation doctrine, and the 10th Amendment. No court has ever held that the Bureau is unable to issue regulations on the basis that it is unconstitutional, and in fact the Bureau has issued dozens of regulations to date, including many major rules that have profoundly affected key consumer markets such as mortgages, prepaid accounts, remittance transfers, and others—a number of which were mandated by Congress. In addition, longstanding precedent has established that a government agency lacks the authority to decide the constitutionality of congressional enactments.[420]

One commenter argued that the timing of the proposed rule prevented the Bureau from using data gathered in Treasury Department Financial Empowerment Studies on small dollar loans conducted under Title XII of the Dodd-Frank Act, and that the

[416] Section 1027(o) of the Dodd-Frank Act provides that ''No provision of this title shall be construed as conferring authority on the Bureau to establish a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, unless explicitly authorized by law.'' 12 U.S.C. 5517(o).

[417] Some State officials expressed concern that the identification of unfair and abusive acts or practices in this rulemaking may be construed to affect or limit provisions in State statutes or State case law. The Bureau has identified unfair and abusive acts or practices under the statutory definitions in section 1031(c) and (d) of the Dodd-Frank Act. The final rule is not intended to limit the further development of State laws protecting consumers from unfair or deceptive acts or practices as defined under State laws, or from similar conduct prohibited by State laws, consistent with the principles set forth in the Dodd-Frank Act as discussed further above.

[418] *See, e.g., Hillsborough County* v. *Automated Med. Laboratories,* 471 U.S. 707, 713 (1985).

[419] *See, e.g.,* 15 U.S.C. 1610(a)(1) & 12 CFR 1026.28 (TILA & Regulation Z); 15 U.S.C. 1691d(f) & 12 CFR 1002.11 (ECOA & Regulation B).

[420] *See, e.g., Johnson* v. *Robison,* 415 U.S. 361, 368 (1974); *Public Utils. Comm'n* v. *United States,* 355 U.S. 534, 539 (1958).

combination of Title XII and section 1022 of the Dodd-Frank Act evidence Congress's intent to not grant the Bureau authority to issue a rule that reduces the availability of payday loans. There is nothing in either the plain language or structure of the Dodd-Frank Act to suggest that Congress intended the Bureau to postpone any regulation of unfair and abusive payday lending practices until after Treasury had established the multiyear grant program that Congress authorized Treasury to establish. Indeed, it is noteworthy that Title XII does not mandate that Treasury create such programs—it merely authorizes Treasury to do so. Moreover, contrary to the commenter's assertions, the final rule will not end payday lending and it will not undermine the rationale for the grants for which Congress provided in Title XII. There is no basis to conclude that the Bureau is under any obligation to wait for such grant programs to play out to prevent UDAAPs.

Some industry commenters have made the claim that the Bureau had impermissibly prejudged the evidence about whether and how to proceed with this rule and failed to comply with its own ex parte policy by engaging in improper communications with special interest groups prior to the publication of the notice of proposed rulemaking. The Bureau does not agree with these claims for several reasons. First, part III of the final rule, which summarizes in detail the Bureau's rulemaking process, shows that these claims are without basis. That discussion reflects the Bureau's considerable experience with these issues and with this market for over five years of steady work. It also includes a description of the Bureau's approach to handling the great volume of public comments received on the proposed rule, as well as a number of ex parte communications, which have been documented and incorporated into the administrative record and are available to the public at *www.regulations.gov.* Second, both the proposed rule and the final rule are based on the Bureau's careful review of the relevant evidence, including evidence generated by the Bureau's own studies, as well as evidence submitted by a broad range of stakeholders, including industry stakeholders. Finally, the numerous changes made in the final rule in response to stakeholder comments, including industry stakeholders, is further evidence that the Bureau has not prejudged any issues.

A number of industry commenters have argued that the rule conflicts with the Bureau's statutory purpose under section 1021(b)(4) of the Dodd-Frank Act, which is to enforce the law consistently for all persons, regardless of their status as depository institutions, because it addresses covered loans but does not address other types of financial products, such as overdraft services or credit card accounts. The Bureau notes in response that each of these products has its own features, characteristics, historical background, and prior regulatory treatment, as discussed further in the section-by-section analysis of § 1041.3(d). Just as it has not been judged to be impermissibly inconsistent for Federal and State authorities (including the Congress) to treat these distinct products differently as a matter of statutory law and regulation, despite certain similarities of product features and uses, even so it is not inconsistent for the Bureau to do so for the purposes of this rule. Further, while it may be true that more nonbanks will be impacted by this rule than banks by virtue of the products that banks and nonbanks are currently providing, that does not mean that this rule conflicts with section 1021(b)(4), but simply reflects the current makeup of this marketplace.

Finally, and more narrowly, some Tribal and industry commenters have averred that the Bureau lacks authority to adopt regulations pursuant to section 1031 of the Dodd-Frank Act that apply to Indian tribes or to any of the entities to which they have delegated Tribal authority. These arguments raised on behalf of Tribal lenders have also been raised in Tribal consultations that the Bureau has held with federally recognized Indian Tribes, as discussed in part III, and in various court cases to date. They rest on what the Bureau believes is a misreading of the Act and of Federal law and precedents governing the scope of Tribal immunity, positions that the Bureau has briefed extensively to the Federal courts in some key cases testing these issues.[421]

[421] *See CFPB* v. *Great Plains Lending,* 846 F.3d 1049 (9th Cir. 2017), *reh'g denied* (Apr. 5, 2017) (Court of Appeals affirmed District Court ruling upholding and enforcing the Bureau's authority to issue civil investigative demands to payday lenders claiming Tribal affiliation and rejecting their claim of ''tribal sovereign immunity''; a petition for certiorari to the Supreme Court is now pending); *see also Otoe-Missouria Tribe of Indians* v. *New York State Dep't of Fin. Servs.,* 769 F.3d 105, 107 (2d Cir. 2014) (upholding the State's claim to be able to be able to pursue an enforcement action against payday lenders claiming Tribal affiliation that ''provide short-term loans over the Internet, all of which have triple-digit interest rates that far exceed the ceiling set by New York law;'' the Bureau filed an amicus curiae brief in support of the State's position).

V. Section-by-Section Analysis

Subpart A—General

Section 1041.1 Authority and Purpose

Proposed § 1041.1 provided that the rule is being issued pursuant to Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[422] It also provided that the purpose of this part is to identify certain unfair and abusive acts or practices in connection with certain consumer credit transactions; to set forth requirements for preventing such acts or practices; and to prescribe requirements to ensure that the features of those consumer credit transactions are fully, accurately, and effectively disclosed to consumers. It also noted that this part prescribes processes and criteria for registration of information systems.

The Bureau did not receive any comments on proposed § 1041.1 and is finalizing this provision as proposed.

Section 1041.2 Definitions

Proposed § 1041.2 set forth definitions for certain terms relevant to the proposal. Additional definitions were set forth in proposed §§ 1041.3, 1041.5, 1041.9, 1041.14, and 1041.17 for further terms used in those respective sections. To the extent those definitions are used in the final rule and have not been moved into § 1041.2, as discussed below, they are addressed in the context of those particular sections (some of which have been renumbered in the final rule).

In general, the Bureau proposed to incorporate a number of defined terms under the Dodd-Frank Act and under other statutes or regulations and related commentary, particularly Regulation Z and Regulation E as they implement the Truth in Lending Act (TILA)[423] and the Electronic Fund Transfer Act (EFTA),[424] respectively. The Bureau believed that basing the proposal's definitions on previously defined terms may minimize regulatory uncertainty and facilitate compliance, especially where the other regulations are likely to apply to the same transactions in their own right. However, as discussed further below, the Bureau proposed, in certain definitions, to expand or modify the existing definitions or the concepts enshrined in such definitions for purposes of the proposal to ensure that the rule had its intended scope of effect, particularly as industry practices may evolve.

[422] Public Law 111–203, 124 Stat. 1376, 1955 (2010).

[423] Public Law 90–321, 82 Stat. 146 (1968).

[424] Public Law 95–630, 92 Stat. 3641 (1978).

The Bureau received numerous comments about these proposed terms and their definitions, as well as some suggestions to define additional concepts left undefined in the proposal. The Bureau is finalizing § 1041.2 with some revisions and deletions from the proposal, as discussed further below, including the addition of a rule of construction as § 1041.2(b) to provide general guidance concerning the incorporation of terms from other statutes and regulations in the context of part 1041.

2(a) Definitions

2(a)(1) Account

Proposed § 1041.2(a)(1) would have defined account by cross-referencing to the definition of that same term in Regulation E, 12 CFR part 1005. Regulation E generally defines account to include demand deposit (checking), savings, or other consumer asset accounts (other than an occasional or incidental credit balance in a credit plan) held directly or indirectly by a financial institution and established primarily for personal, family, or household purposes.[425] The term account was also used in proposed § 1041.3(c), which would provide that a loan is a covered loan if, among other requirements, the lender or service provider obtains repayment directly from a consumer's account. This term was also used in proposed § 1041.14, which would impose certain requirements when a lender seeks to obtain repayment for a covered loan directly from a consumer's account, and in proposed § 1041.15, which would require lenders to provide notices to consumers before attempting to withdraw payments from consumers' accounts. The Bureau stated that defining this term consistently with an existing regulation would reduce the risk of confusion among consumers, industry, and regulators. The Bureau considered the Regulation E definition to be appropriate because that definition is broad enough to capture the types of transactions that may implicate the concerns addressed by this part. Proposed comment 2(a)(1)–1 also made clear that institutions may rely on 12 CFR 1005.2(b) and its related commentary in determining the meaning of account.

One commenter stated that the definition of account should be expanded to include general-use prepaid cards, regardless of whether they are labeled and marketed as a gift card, as defined in 12 CFR 1005.20(a)(3). The Bureau recently finalized a separate rule creating comprehensive consumer protections for prepaid accounts, and in the process amended the definition of account in 12 CFR 1005.2(b) to include ''a prepaid account,'' so the thrust of the comment is already effectively addressed.[426] The definition of ''prepaid account'' in that rulemaking only excludes gift cards that are both labeled and marketed as a gift card, which are subject to separate rules under Regulation E.[427] The Bureau does not believe that such products are likely to be tendered as a form of leveraged payment mechanism, but will monitor the market for this issue and take appropriate action if it appears that lenders are using such products to evade coverage under the rule. The Bureau did not receive any other comments on this portion of the proposal and is finalizing this definition as proposed. Proposed comment 2(a)(1)–1 has now been incorporated into comment 2(b)(1)–1 to illustrate the broader rule of construction discussed in § 1041.2(b).

2(a)(2) Affiliate

Proposed § 1041.2(a)(2) would have defined affiliate by cross-referencing to the definition of that same term in the Dodd-Frank Act, 12 U.S.C. 5481(1). The Dodd-Frank Act defines affiliate as any person that controls, is controlled by, or is under common control with another person. Proposed §§ 1041.6 and 1041.10 would have imposed certain limitations on lenders making loans to consumers who have outstanding covered loans with an affiliate of the lender, and the Bureau's analyses of those proposed sections discussed in more detail the particular requirements related to affiliates. The Bureau stated that defining this term in the proposal consistently with the Dodd-Frank Act would reduce the risk of confusion among consumers, industry, and regulators. Although the limitations in proposed §§ 1041.6 and 1041.10 are not being finalized, the final rule includes a number of other provisions in which the term affiliate is used, including the conditional exemption in § 1041.3(f). The Bureau did not receive any comments on this portion of the proposal and is finalizing this definition as proposed.

2(a)(3) Closed-End Credit

Proposed § 1041.2(a)(3) would have defined closed-end credit as an extension of credit to a consumer that is not open-end credit under proposed § 1041.2(a)(14). This term is used in various parts of the rule where the Bureau proposed to tailor provisions specifically for closed-end and open-end credit in light of their different structures and durations. Most notably, proposed § 1041.2(a)(18) prescribed slightly different methods of calculating the total cost of credit for closed-end and open-end credit. Proposed § 1041.16(c) also required lenders to furnish information about whether a covered loan is closed-end or open-end credit to registered information systems. Proposed comment 2(a)(3)–1 also made clear that institutions may rely on 12 CFR 1026.2(a)(10) and its related commentary in determining the meaning of closed-end credit, but without regard to whether the credit is consumer credit or is extended to a consumer, as those terms are defined in 12 CFR 1026.2(a).

The Bureau did not receive any comments on the definition of closed-end credit contained in the proposal and is finalizing the definition and commentary as proposed. The Bureau did, however, receive a number of comments on the definition of open-end credit contained in the proposal and made some changes to that definition in light of the comments received, all as discussed below. Because the term closed-end credit is defined in contradistinction to the term open-end credit, the changes made to the latter definition will affect the parameters of this definition as well.

2(a)(4) Consumer

Proposed § 1041.2(a)(4) would have defined consumer by cross-referencing the definition of that term in the Dodd-Frank Act, which defines consumer as an individual or an agent, trustee, or representative acting on behalf of an individual.[428] The term is used in numerous provisions across proposed part 1041 to refer to applicants for and borrowers of covered loans. The Bureau stated that this definition, rather than the arguably narrower Regulation Z definition of consumer—which defines consumer as ''a cardholder or natural person to whom consumer credit is offered or extended''—is appropriate to

[425] Regulation E also specifically includes payroll card accounts and certain government benefit card accounts. As specifically noted in the proposal here, 81 FR 47864, 47904 n.416 (July 22, 2016), the Bureau was considering in a separate rulemaking whether to provide comprehensive consumer protections under Regulation E to a broader category of prepaid accounts. The Bureau later finalized that proposed rule. *See* 81 FR 83934 (Nov. 22, 2016).

[426] *See* 81 FR 83934, 83965–83978, 84325–84326 (Nov. 22, 2016).

[427] *See* 81 FR 83934, 83976–83978 (Nov. 22, 2016) (discussing § 1005.2(b)(3)(ii)(D) and comment 2(b)(3)(ii)–3 of the final prepaid rule.).

[428] 12 U.S.C. 5481(4).

capture the types of transactions that may implicate the concerns addressed by the proposed rule. In particular, the definition of this term found in the Dodd-Frank Act expressly includes agents and representatives of individuals, rather than just individuals themselves. The Bureau believed this definition might more comprehensively foreclose possible evasion of the specific consumer protections imposed by proposed part 1041 than would the definition found in Regulation Z. The Bureau did not receive any comments on this portion of the proposal and is finalizing this definition as proposed.

2(a)(5) Consummation

Proposed § 1041.2(a)(5) would have defined consummation as the time that a consumer becomes contractually obligated on a new loan, which is consistent with the definition of the term in Regulation Z § 1026.2(a)(13), or the time that a consumer becomes contractually obligated on a modification of an existing loan that increases the amount of the loan. The proposal used the term both in defining certain categories of covered loans and in defining the timing of certain proposed requirements. The time of consummation was important both in applying certain proposed definitions for purposes of coverage and in applying certain proposed substantive requirements. For example, under proposed § 1041.3(b)(1), whether a loan is a covered short-term loan would depend on whether the consumer is required to repay substantially all of the loan within 45 days of consummation. Under proposed § 1041.3(b)(2)(i), the determination of whether a loan is subject to a total cost of credit exceeding 36 percent per annum would be made at the time of consummation. Pursuant to proposed §§ 1041.6 and 1041.10, certain limitations would potentially apply to lenders making covered loans based on the consummation dates of those loans. Pursuant to proposed § 1041.15(b), lenders would have to furnish certain disclosures before a loan subject to the requirements of that section is consummated.

In the proposal, the Bureau stated that defining this term consistently with Regulation Z with respect to new loans would reduce the risk of confusion among consumers, industry, and regulators. Proposed comment 2(a)(5)–1 also made clear that the question of when a consumer would become contractually obligated with regard to a new loan is a matter to be determined under applicable law; for example, a contractual commitment agreement that binds the consumer to the loan would be a consummation. However, the comment stated that consummation does not occur merely because the consumer has made some financial investment in the transaction (for example, by paying a non-refundable fee), unless applicable law holds otherwise. The Bureau also provided guidance as to consummation with respect to particular loan modifications, so as to further the intent of proposed §§ 1041.3(b)(1) and (2), 1041.5(b), and 1041.9(b), all of which would impose requirements on lenders as of the time that the loan amount increases on an existing loan. The Bureau concluded that defining these increases in loan amounts as consummations would improve clarity for consumers, industry, and regulators. The above-referenced sections, as proposed, would impose no duties or limitations on lenders when a loan modification decreases the amount of the loan. Accordingly, in addition to incorporating Regulation Z commentary as to the general definition of consummation for new loans, proposed comment 2(a)(5)–2 explained the time at which certain modifications of existing loans would be considered to be a consummation for purposes of the rule. Proposed comment 2(a)(5)–2 explained that a modification would be considered a consummation if the modification increases the amount of the loan. Proposed comment 2(a)(5)–2 also explained that a cost-free repayment plan, or ''off-ramp'' as it is commonly known in the market, would not result in a consummation under proposed § 1041.2(a)(5).

In the proposal, the Bureau stated that it considered expressly defining a new loan in order to clarify when lenders would need to make the ability-to-repay determinations prescribed in proposed §§ 1041.5 and 1041.9. The definition that the Bureau considered would have defined a new loan as a consumer-purpose loan made to a consumer that (a) is made to a consumer who is not indebted on an outstanding loan, (b) replaces an outstanding loan, or (c) modifies an outstanding loan, except when a repayment plan, or ''off-ramp'' extends the term of the loan and imposes no additional fees.

Although some commenters requested more guidance to distinguish a loan modification from an instance of re-borrowing or a loan refinancing, the Bureau has concluded that the examples provided in the commentary sufficiently address all of the relevant scenarios where ambiguity could arise about whether consummation occurs. No other comments were received on any other aspect of this portion of the proposal. The Bureau has reworded parts of comment 2(a)(5)–2 for clarity in describing what types of loan modifications trigger substantive requirements under part 1041, but otherwise is finalizing this definition and the commentary as proposed.

2(a)(6) Cost of Credit

Proposed § 1041.2(a)(18) set forth the method for lenders to calculate the total cost of credit to determine whether a longer-term loan would be covered under proposed § 1041.3(b)(2). Proposed § 1041.2(a)(18) generally would have defined the total cost of credit as the total amount of charges associated with a loan expressed as a per annum rate, including various charges that do not meet the definition of finance charge under Regulation Z. The charges would be included even if they were paid to a party other than the lender. The Bureau proposed to adopt this approach to defining loan costs from the Military Lending Act, and also to have adopted the MLA's 36 percent threshold in defining what covered longer-term loans were subject to part 1041. The effect would have been that a loan with a term of longer than 45 days must have a total cost of credit exceeding a rate of 36 percent per annum in order to be a covered loan. The Bureau thus proposed using an all-in measure of the total cost of credit rather than the definition of annual percentage rate (APR) under Regulation Z because it was concerned that lenders might otherwise shift their fee structures to fall outside traditional Regulation Z concepts. This in turn would lead them to fall outside the proposed underwriting criteria for covered longer-term loans, which they could do, for example, by imposing charges in connection with a loan that are not included in the calculation of APR under Regulation Z.

The Bureau acknowledged that lenders were less familiar with the approach involving the MLA calculations than they are with the more traditional APR approach and calculations under Regulation Z. Therefore, the Bureau specifically sought comment on the compliance burdens of the proposed approach and whether to use the more traditional APR approach instead.

The Bureau received many comments on the definition of the total cost of credit, which reflected its functional position in the proposed rule as the trigger for the additional underwriting criteria applicable to covered longer-term loans. A number of comments addressed what kinds of fees and charges should be included or excluded from the total cost of credit and demanded more technical guidance,

which reflected the increased complexity of using this method. One lender noted a specific loan program that would only be included in the rule because of the inclusion of participation fees in the proposed definition. Various commenters noted the greater simplicity of the APR calculation in Regulation Z, and contended that greater burdens would be imposed and less clarity achieved by applying the proposed definition of total cost of credit. The latter, they suggested, would confuse consumers who are accustomed to Regulation Z's APR definition, would be difficult to administer properly, and would be likely to have unintended consequences, such as causing many lenders to choose not to offer optional ancillary products like credit life and disability insurance, to the detriment of borrowers. Consumer groups, by contrast, generally preferred the proposed definition of total cost of credit, though they offered suggestions to tighten and clarify it in several respects.

As noted earlier, the Bureau is not finalizing the portions of the proposed rule governing underwriting criteria for covered longer-term loans at this time. Given that covered longer-term loans are only subject to the payment requirements in subpart C, and in view of the comments received, the Bureau concludes that the advantages of simplicity and consistency militate in favor of adopting an APR threshold as the measure of the cost of credit, which is widely accepted and built into many State laws, and which is the cost that will be disclosed to consumers under Regulation Z. Moreover, the Bureau believes that the other changes in the rule mean that the basis for concern that lenders would shift their fee structures to fall outside traditional Regulation Z definitions has been reduced. Instead, the cost-of-credit threshold is now relevant only to determine whether the portions of the final rule governing payments apply to longer-term loans, which the Bureau has concluded are much less likely to prompt lenders to seek to modify their fee structures simply to avoid the application of those provisions.

The Bureau notes that in determining here that the Regulation Z definition of cost of credit would be simpler and easier to use for the limited purpose of defining the application of the payment provisions of subpart C of this rule, the Bureau does not intend to decide or endorse this measure of the cost of credit—as contrasted with the total cost of credit adopted under the MLA—for any subsequent rule governing the underwriting of covered longer-term loans without balloons. The stricter and more encompassing measure used for the MLA rule may well be more protective of consumers,[429] and the Bureau will consider the applicability of that measure as it considers how to address longer-term loans in a subsequent rule.

To effectuate this change, the Bureau has adopted as the final rule's defined term ''cost of credit,'' which is an APR threshold rather than a threshold based on the total cost of credit as defined in the proposed rule. The cost of credit is defined to be consistent with Regulation Z and thus includes finance charges associated with the credit as stated in Regulation Z, 12 CFR 1026.4. As discussed further below in connection with § 1041.3(b)(3), for closed-end credit, the total cost of credit must be calculated at consummation and according to the requirements of Regulation Z, 12 CFR 1026.22, but would not have to be recalculated at some future time, even if a leveraged payment mechanism is not obtained until later. For open-end credit, the total cost of credit must be calculated at consummation and, if it does not cross the 36 percent threshold at that time, at the end of each billing cycle thereafter according to the rules for calculating the effective annual percentage rate for a billing cycle as stated in Regulation Z, 12 CFR 1026.14(c) and (d). This is a change from the proposal in order to determine coverage in situations in which there may not be an immediate draw, which was not expressly addressed in the proposal.

The Bureau has concluded that defining the term cost of credit consistently with Regulation Z would reduce the risk of confusion among consumers, industry, and regulators. It also reduces burden and avoids undue complexities, especially now that the Bureau is not finalizing the underwriting criteria that were proposed for covered longer-term loans at this time. For these reasons, the Bureau is finalizing the definition of cost of credit in a manner consistent with the discussion above, as renumbered, and with some minor additional wording revisions from the proposed rule for clarity and consistency. The proposed commentary associated with the term total cost of credit is no longer relevant and has been omitted from the final rule.

[429] In particular, the Bureau notes the statement that the Department of Defense made in the MLA rule that ''unqualified exclusions from the MAPR [military annual percentage rate] for certain fees, or all non-periodic fees, could be exploited by a creditor who would be allowed to preserve a high-cost, open-end credit product by offering a relatively lower periodic rate coupled with an application fee, participation fee, or other fee,'' in declining to adopt any such exclusions, which indicates the more protective nature of a ''total cost of credit'' definition when coupled with such further measures as necessary to protect consumers. 80 FR 43563.

2(a)(7) Covered Longer-Term Balloon-Payment Loan

Proposed § 1041.2(a)(7) would have defined a covered longer-term balloon-payment loan as a covered longer-term loan described in proposed § 1041.3(b)(2)—as further specified in the next definition below—where the consumer is required to repay the loan in a single payment or through at least one payment that is more than twice as large as any other payment(s) under the loan. Proposed § 1041.9(b)(2) contained certain rules that lenders would have to follow when determining whether a consumer has the ability to repay a covered longer-term balloon-payment loan. Moreover, some of the restrictions imposed in proposed § 1041.10 would apply to covered longer-term balloon-payment loans in certain situations.

The term covered longer-term balloon-payment loan would include loans that are repayable in a single payment notwithstanding the fact that a loan with a ''balloon'' payment is often understood in other contexts to mean a loan repayable in multiple payments with one payment substantially larger than the other payments. In the proposal, the Bureau found as a preliminary matter that both structures pose similar risks to consumers, and proposed to treat both types of loans the same way for the purposes of proposed §§ 1041.9 and 1041.10. Accordingly, the Bureau proposed to use a single defined term for both loan types to improve the proposal's readability.

Apart from including single-payment loans within the definition of covered longer-term balloon-payment loans, the proposed term substantially tracked the definition of balloon payment contained in Regulation Z § 1026.32(d)(1), with one additional modification. The Regulation Z definition requires the larger loan payment to be compared to other regular periodic payments, whereas proposed § 1041.2(a)(7) required the larger loan payment to be compared to any other payment(s) under the loan, regardless of whether the payment is a regular periodic payment. Proposed comments 2(a)(7)–2 and 2(a)(7)–3 explained that payment in this context means a payment of principal or interest, and excludes certain charges such as late fees and payments that are accelerated upon the consumer's default. Proposed comment 2(a)(7)–1 would have specified that a

loan described in proposed § 1041.3(b)(2) is considered to be a covered longer-term balloon-payment loan if the consumer must repay the entire amount of the loan in a single payment.

A coalition of consumer advocacy groups commented that this proposed definition is under-inclusive because it fails to include other loans that create risk that consumers will need to re-borrow because larger payments inflict payment shock on the borrowers. The commenter suggested that a more appropriate definition would be the one found in the North Carolina Retail Installment Sales Act, which defines a balloon payment as a payment that is more than 10 percent greater than other payments, except for the final payment, which is a balloon payment if it is more than 25 percent greater than other payments. In light of this comparison, the commenter recommended that any payment that is 10 percent greater than any other payment should be considered a balloon payment.

The Bureau recognizes these concerns, but notes that the proposed definition is generally consistent with how balloon-payment loans are defined and treated under Regulation Z, and therefore believes that adopting that definition for purposes of this rule would promote consistency and reduce the risk of confusion among consumers, industry, and regulators. The Bureau will be alert to the risk that smaller irregular payments that are not as large as twice the amount of the other payments could still cause expense shock for some consumers and lead to the kinds of problems addressed here, and thus could trigger a finding of unfairness or abusiveness in particular circumstances. In addition, the Bureau has experience with the rules adopted to implement the Military Lending Act, where loan products and lending practices adopted by some lenders in this industry evolved to circumvent the provisions of those rules. In particular, as noted in the proposal, lenders began offering payday loans greater than 91 days in duration and vehicle title loans greater than 181 days in duration, along with open-end products, in a direct response intended to evade the MLA rules—a development that prompted further Congressional and regulatory intervention. If problems begin to appear in this market from practices that are intended to circumvent the provisions of this rule, the Bureau and other regulators would be able to address any unfair or abusive practices with respect to such loan products through supervision or enforcement authority, or by amending this rule to broaden the definition.

Some industry commenters contended that the Bureau's concerns about re-borrowing for covered longer-term loans were most applicable to loans with balloon-payment structures, and they therefore argued that any ability-to-repay restrictions and underwriting criteria should be limited to longer-term balloon-payment loans. The Bureau agrees that many of its concerns about covered longer-term balloon-payment loans are similar to its concerns about covered short-term loans. Yet the Bureau also has considerable concerns about certain lending practices with respect to other covered longer-term loans, and will continue to scrutinize those practices under its supervision and enforcement authority and in a future rulemaking. At this time, however, as described more fully below in the section on Market Concerns—Underwriting, the Bureau has observed longer-term loans involving balloon payments where the lender does not reasonably assess the borrower's ability to repay before making the loan, and in those circumstances it has observed many of the same types of consumer harms that it has observed when lenders fail to reasonably assess the borrower's ability to repay before making covered short-term loans.

As noted in part I, for a number of reasons the Bureau has decided not to address the underwriting of all covered longer-term loans at this time. Nonetheless, as just mentioned and as discussed more fully below in Market Concerns—Underwriting, the Bureau is concerned that if subpart B is not applied to covered longer-term balloon-payment loans, then lenders would simply extend the terms of their current short-term products beyond 45 days, without changing the payment structures of those loans or their current inadequate underwriting practices, as a way to circumvent the underwriting criteria for covered short-term loans. As stated above, the balloon-payment structure of these loans tend to pose very similar risks and harms to consumers as for covered short-term loans, including likely poses similar forecasting problems for consumers in repaying such loans. Therefore, in § 1041.5 of the final rule, the specific underwriting criteria that apply to covered short-term loans are made applicable to covered longer-term balloon-payment loans also. The Bureau has also modified the definition of covered longer-term balloon-payment loan so that it applies to all loans with the payment structures described in the proposal. This represents an expansion in scope as compared to the proposal, as longer-term balloon-payment loans are now being covered without regard to the cost of credit or whether the lender has taken a leveraged payment mechanism in connection with the loan. In the proposal, the Bureau specifically sought comment on this potential modification, and the reasons for it are set out more extensively below in Market Concerns—Underwriting. And along with other covered longer-term loans, these particular loans remain covered by the sections of the final rule on payments as well.

In light of the decision to treat covered longer-term balloon-payment loans differently from other covered longer-term loans, the Bureau decided to shift the primary description of the requirements for covered longer-term balloon-payment loans to § 1041.3(b)(2). Accordingly, the language of § 1041.2(a)(7) of the final rule has been revised to mirror the language of § 1041.2(a)(8) and (10), which simply cross-reference the descriptions of the various types of covered loans specified in proposed § 1041.3(b). As a housekeeping matter, therefore, the substantive definition for longer-term balloon-payment loans is now omitted from this definition and is addressed instead in a comprehensive manner in § 1041.3(b)(2) of this final rule, where it has been expanded to address in more detail various loan structures that constitute covered longer-term balloon-payment loans. For the same reason, proposed comments 2(a)(7)–1 to 2(a)(7)–3 are omitted from the final rule and those matters are addressed in comments 3(b)(2)–1 to 3(b)(2)–4 of the final rule, as discussed below.

The term covered longer-term balloon-payment loan is therefore defined in the final rule as a loan described in § 1041.3(b)(2).

2(a)(8) Covered Longer-Term Loan

Proposed § 1041.2(a)(8) would have defined a covered longer-term loan to be a loan described in proposed § 1041.3(b)(2). That proposed section, in turn, described a covered loan as one made to a consumer primarily for personal, family, or household purposes that is not subject to any exclusions or exemptions, and which can be either: (1) Closed-end credit that does not provide for multiple advances to consumers, where the consumer is not required to repay substantially the entire amount due under the loan within 45 days of consummation; or (2) all other loans (whether open-end credit or closed-end credit), where the consumer is not required to repay

substantially the entire amount of the advance within 45 days of the advance under the loan and, in either case, two other conditions are satisfied—the total cost of credit for the loan exceeds an annual rate of 36 percent, as measured at specified times; and the lender or service provider obtains a leveraged payment mechanism, including but not limited to vehicle security, at specified times.

Some restrictions in proposed part 1041 would have applied only to covered longer-term loans described in proposed § 1041.3(b)(2). For example, proposed § 1041.9 would have prescribed the ability-to-repay determination that lenders are required to perform when making covered longer-term loans. Proposed § 1041.10 would have imposed limitations on lenders making covered longer-term loans to consumers in certain circumstances that may indicate the consumer lacks the ability to repay. The Bureau proposed to use a defined term for the loans described in proposed § 1041.3(b)(2) for clarity.

The Bureau received many comments on this definition that focused primarily on whether the definition was appropriate for purposes of the proposed underwriting requirements or for inclusion in the rulemaking generally, rather than with regard to the payment interventions in particular. A law firm representing a traditional installment lending client commented that the definition of covered longer-term loan in the proposed rule would include traditional installment loans to a greater extent than the Bureau anticipated, with a correspondingly larger impact on credit availability as installment lenders would be forced to replace their proven underwriting techniques with burdensome and untried approaches. Others contended that the Bureau had presented no evidence indicating that the practices associated with traditional installment loans are unfair or abusive.

Several commenters noted that a number of traditional installment loan products may exceed a total cost of credit of 36 percent, and some may even exceed a 36 percent annual percentage rate under TILA as well. A trade association said that such a stringent all-in annual percentage rate could encompass many bank loan products. More broadly, some commenters criticized the use of any form of interest rate threshold to determine the legal status of any loans as potentially violating the prohibition in section 1027(o) of the Dodd-Frank Act against imposing usury limits on extensions of consumer credit.

Many commenters offered their views on the prong of the definition that focused on the taking of a leveraged payment mechanism or vehicle security, again often in the context of application of the underwriting requirements rather than the payment requirements. Those concerns have largely been addressed or mooted by the Bureau's decisions to apply only the payment requirements to covered longer-term loans and to narrow the definition of such loans to focus only on those types of leveraged payment mechanisms that involve the ability to pull money from consumers' accounts, rather than vehicle security. Comments focusing on that narrower definition of leveraged payment mechanism are addressed in more depth in connection with § 1041.3(c) below.

Therefore, in light of these comments and the considerations discussed above and in connection with § 1041.3(b)(3) below, the Bureau is finalizing the definition of covered longer-term loan in § 1041.2(a)(8) as discussed, with the cross-reference to proposed § 1041.3(b)(2) now edited and renumbered as § 1041.3(b)(3). As for the latter section now referenced in this definition, it too has been edited to clarify that covered longer-term loans no longer encompass covered longer-term balloon-payment loans, which are now treated separately, as the former are no longer subject to specific underwriting criteria whereas the latter are subject to the same specific underwriting criteria as covered short-term loans, which are set out in § 1041.5 of the final rule.

The term covered longer-term loan is therefore defined in the final rule, as described in § 1041.3(b)(3), as one made to a consumer primarily for personal, family, or household purposes that is not subject to any exclusions or exemptions, and which can be neither a covered short-term loan nor a covered longer-term balloon-payment loan—and thus constitutes a covered longer-term loan without a balloon-payment structure—and which meets both of the following conditions: The cost of credit for the loan exceeds a rate of 36 percent per annum; and the lender or service provider obtains a leveraged payment mechanism as defined in § 1041.3(c) of the final rule.

The details of that description, and how it varies from the original proposed description of a covered longer-term loan, are provided and explained more fully in the section-by-section analysis of § 1041.3(b)(3) of the final rule.

2(a)(9) Covered Person

The Bureau has decided to include in the final rule a definition of the term covered person, which the final rule defines by cross-referencing the definition of that same term in the Dodd-Frank Act, 12 U.S.C. 5481(6). In general, the Dodd-Frank Act defines covered person as any person that engages in offering or providing a consumer financial product or service and any affiliate of such person if the affiliate acts as a service provider to such person. The Bureau concludes that defining the term covered person consistently with the Dodd-Frank Act is a mere clarification that reduces the risk of confusion among consumers, industry, and regulators, since this term is used throughout the final rule. The Bureau therefore is including this definition in the final rule as § 1041.2(a)(9).

2(a)(10) Covered Short-Term Loan

Proposed § 1041.2(a)(6) would have defined a covered short-term loan to be a loan described in proposed § 1041.3(b)(1). That proposed section, in turn, described a covered loan as one made to a consumer primarily for personal, family, or household purposes that is not subject to any exclusions or exemptions, and which can be either: Closed-end credit that does not provide for multiple advances to consumers, where the consumer is required to repay substantially the entire amount due under the loan within 45 days of consummation, or all other loans (whether open-end credit or closed-end credit), where the consumer is required to repay substantially the entire amount of the advance within 45 days of the advance under the loan. Some provisions in proposed part 1041 would apply only to covered short-term loans as described in proposed § 1041.3(b)(1). For example, proposed § 1041.5 would prescribe the ability-to-repay determination that lenders are required to perform when making covered short-term loans. Proposed § 1041.6 would impose limitations on lenders making sequential covered short-term loans to consumers. And proposed § 1041.16 would impose the payment provisions on covered short-term loans as well. The Bureau proposed to use a defined term for the loans described in § 1041.3(b)(1) for clarity.

Various commenters stated that this definition is extraordinarily broad and sweeps in many different types of short-term loans, and institutions and trade associations both argued for exempting the types of loans they or their members commonly make. For example, one credit union commenter argued that the Bureau should exclude loans with total cost of credit under 36 percent. Consumer advocates argued, to the contrary, that broad coverage under the

proposed rule is necessary to capture the relevant market, which can differ legally and functionally from one State to another. The Bureau finds that covered short-term loans pose substantial risks and harms for consumers, as it has detailed more thoroughly below in Market Concerns—Underwriting and the section-by-section analysis for § 1041.4 of the final rule. At the same time, the Bureau is adopting various exclusions and exemptions from coverage under the rule in § 1041.3(d), (e), and (f) below, and has discussed commenters' requests for exclusions of various categories of loans and lenders in connection with those provisions. The Bureau has expanded the alternative loan exclusion, which now triggers off of cost of credit as defined under Regulation Z, and thus, it appears likely that the products of the credit union noted above are excluded. In light of the aggregate effect of this broad definition coupled with those exclusions and exemptions, the Bureau concludes that its definition of covered short-term loan is specific, yet necessarily broad in its coverage, in order to effectuate protections for consumers against practices that the Bureau has found to be unfair and abusive in the market for these loans. The Bureau is finalizing as proposed other than renumbering. Likewise, the provision referenced in this definition—proposed § 1041.3(b)(1)—is being finalized with only non-substantive language changes, though additional commentary on that provision has been added in the final rule and will be addressed below in the discussion of that portion of the rule.

2(a)(11) Credit

Proposed § 1041.2(a)(9) would have defined credit by cross-referencing the definition of credit in Regulation Z, 12 CFR part 1026. Regulation Z defines credit as the right to defer payment of debt or to incur debt and defer its payment. This term was used in numerous places throughout the proposal to refer generically to the types of consumer financial products that would be subject to the requirements of proposed part 1041. The Bureau stated that defining this term consistently with an existing regulation would reduce the risk of confusion among consumers, industry, and regulators. The Bureau also stated that the definition in Regulation Z is appropriately broad so as to capture the various types of transaction structures that implicate the concerns addressed by proposed part 1041. Proposed comment 2(a)(9) further made clear that institutions may rely on 12 CFR 1026.2(a)(14) and its related commentary in determining the meaning of credit.

One consumer group commented that the definition of credit did not include a definition of loan and that these commonly related terms should be clarified to avoid the potential for confusion—a point that is addressed in §§ 1041.2(a)(13) and 1041.3(a) of the final rule. The Bureau did not receive any other comments on this portion of the proposal and is finalizing this definition and the commentary as proposed.

2(a)(12) Electronic Fund Transfer

Proposed § 1041.2(a)(10) would have defined electronic fund transfer by cross-referencing the definition of that same term in Regulation E, 12 CFR part 1005. Proposed § 1041.3(c) would provide that a loan may be a covered longer-term loan if the lender or service provider obtains a leveraged payment mechanism, which can include the ability to withdraw payments from a consumer's account through an electronic fund transfer. Proposed § 1041.14 would impose limitations on how lenders use various payment methods, including electronic fund transfers. Proposed comment 2(a)(10)–1 also made clear that institutions may rely on 12 CFR 1005.3(b) and its related commentary in determining the meaning of electronic fund transfer. The Bureau stated that defining this term consistently with an existing regulation would reduce the risk of confusion among consumers, industry, and regulators. The Bureau did not receive any comments on this portion of the proposal and is finalizing this definition as renumbered and the commentary as proposed.

2(a)(13) Lender

Proposed § 1041.2(a)(11) would have defined lender as a person who regularly makes loans to consumers primarily for personal, family, or household purposes. This term was used throughout the proposal to refer to parties that are subject to the requirements of proposed part 1041. This proposed definition is broader than the general definition of creditor under Regulation Z in that, under this proposed definition, the credit that the lender extends need not be subject to a finance charge as that term is defined by Regulation Z, nor must it be payable by written agreement in more than four installments.

The Bureau proposed a broader definition than in Regulation Z for many of the same reasons that it proposed using the total cost of credit as a threshold for covering longer-term loans rather than the traditional definition of annual percentage rate as defined by Regulation Z, which was discussed in the analyses of §§ 1041.2(a)(11) and 1041.3(b)(2)(i) of the proposed rule. In both instances, the Bureau was concerned that lenders might otherwise shift their fee structures to fall outside of traditional Regulation Z concepts and thus outside the coverage of proposed part 1041. For example, the Bureau stated that some loans that otherwise would meet the requirements for coverage under proposed § 1041.3(b) could potentially be made without being subject to a finance charge as that term is defined by Regulation Z. If the Bureau adopted that particular Regulation Z requirement in the definition of lender, a person who regularly extended closed-end credit subject only to an application fee, or open-end credit subject only to a participation fee, would not be deemed to have imposed a finance charge. In addition, many of the loans that would be subject to coverage under proposed § 1041.3(b)(1) are repayable in a single payment, so those same lenders might also fall outside the Regulation Z trigger for loans payable in fewer than four installments. Thus, the Bureau proposed to use a definition that is broader than the one contained in Regulation Z to ensure that the provisions proposed in part 1041 would apply as intended.

The Bureau proposed to carry over from the Regulation Z definition of creditor the requirement that a person ''regularly'' makes loans to a consumer primarily for personal, family, or household purposes in order to be considered a lender under proposed part 1041. Proposed comment 2(a)(11)–1 explained that the test for determining whether a person regularly makes loans is the same as in Regulation Z, as explained in 12 CFR 1026.2(a)(17)(v), and depends on the overall number of loans made to a consumer for personal, family, or household purposes, not just covered loans. The Bureau stated in the proposal that it would be appropriate to exclude from the definition of lender those persons who make loans for personal, family, or household purposes on an infrequent basis so that persons who only occasionally make loans would not be subject to the requirements of proposed part 1041. Such persons could include charitable, religious, or other community institutions that make loans very infrequently or individuals who occasionally make loans to family members.

Consumer groups noted in commenting on the definition of lender that the proposed rule did not explicitly

define what a loan is and urged the Bureau to include a definition of this term as well, as it is used frequently throughout the rule. They also commented that the definition of lender should be broadened to encompass service providers as well.

For the reasons explained above in the section-by-section analysis of § 1041.2(a)(6), with respect to the definition of the term cost of credit, the Bureau has now narrowed the coverage of longer-term loans by using a threshold that is based on finance charges under Regulation Z rather than the broader range of items included in the proposed definition of total cost of credit. At the same time, it has decided to maintain the broader definition of lender, which includes parties that extend credit even if it is not subject to a finance charge as defined in Regulation Z, nor payable by written agreement in more than four installments. With regard to covered short-term and longer-term balloon-payment loans, the Bureau has concluded that it is important to maintain broad coverage over such products, even if the companies that provide them may try to structure them so as to avoid qualifying as a ''creditor'' under Regulation Z. The reasons for revising the definition of cost of credit, again as explained further below, were driven in large part by the Bureau's decision not to address the underwriting of other covered longer-term loans in this rule at this time, given the benefits of alignment with Regulation Z and greater simplicity. The broader definition of lender remains germane, however, to the types of loans that are subject to the underwriting provisions of the final rule.

In addition, the Bureau does not find it necessary to supplement these definitions further by adding a new definition of loan in addition to the modified definitions of credit and lender. Instead, the Bureau is addressing the commenters' point by modifying the definition of lender in § 1041.2(a)(13) to refer to a person who regularly ''extends credit'' rather than making loans, and has revised § 1041.3(a) to refer to a lender who ''extends credit by making covered loans.'' The loans covered by the final rule are credit as defined in the rule and are made by lenders as defined in the rule. In addition, key subsets of the broader universe of loans—including covered short-term loans, covered longer-term loans, and covered longer-term balloon-payment loans—are also defined explicitly in the final rule. And these definitions are premised in turn on the explication of what is a covered loan in proposed § 1041.3(b).

As for the relationship between the terms lender and service provider, the Bureau is satisfied that these relationships and their effects are addressed in a satisfactory manner by defining lender as set forth here and by including separate definitions of covered person and service provider in conformity to the Dodd-Frank Act, as discussed in § 1041.2(a)(9) and (18) of the final rule. The relationship between lender and service provider is discussed further below in the section-by-section analysis of § 1041.2(a)(18), which concerns the definition of service provider.

One other segment of commenters sought to be excluded or exempted from coverage under this rule, raising many of the same points that they had raised during Bureau outreach prior to release of the proposal.

As stated in the proposal, some stakeholders had suggested to the Bureau that the definition of lender should be narrowed so as to exempt financial institutions that predominantly make loans that would not be covered loans under the proposed rule. They stated that some financial institutions only make loans that would be covered loans as an accommodation to existing customers, and that providing such loans is such a small part of the overall business that it would not be practical for the institutions to develop the required procedures for making covered loans. The Bureau solicited comment on whether it should narrow the definition of lender based on the quantity of covered loans an entity offers, and, if so, how to define such a *de minimis* test. Similarly, during the comment period many commenters, including but not limited to smaller depository institutions, presented their views that this kind of accommodation lending is longstanding and widespread and so should not be subject to coverage under the rule.

At the same time, stakeholders had urged and the Bureau recognized at the time it issued the proposed rule that some newly formed companies are providing services that, in effect, allow consumers to draw on money they have earned but not yet been paid. Certain of these services do not require the consumer to pay any fees or finance charges, relying instead on voluntary ''tips'' to sustain the business, while others are compensated through electronic fund transfers from the consumer's account. Some current or future services may use other business models. The Bureau also noted the existence of some newly formed companies providing financial management services to low- and moderate-income consumers that include features to smooth income. The Bureau solicited comment on whether such entities should be considered lenders under the regulation.

During the public comment period, a coalition of consumer groups, some ''fintech'' firms, and others expressed concern about how the definition of lender would apply to new businesses that are creating services to consumers to access earned income for a fee—thereby jeopardizing certain promising innovations by making them subject to the constraining provisions of this rule—and others offered views on that set of issues as well. Commenters also offered their thoughts on other innovative income-smoothing and financial-management initiatives.

The Bureau has decided to address the issues raised by commenters that were seeking an exclusion or exemption from this rule not by altering the definition of lender but instead by fashioning specific exclusions and conditional exemptions as addressed below in § 1041.3(d), (e), and (f) of the final rule.

Therefore in light of the comments and responses, the Bureau is finalizing this definition as renumbered and the commentary as proposed, with the one modification—use of the phrase ''extends credit''—as discussed above.

2(a)(14) Loan Sequence or Sequence

Proposed § 1041.2(a)(12) generally would have defined a loan sequence or sequence as a series of consecutive or concurrent covered short-term loans in which each of the loans (other than the first loan) is made while the consumer currently has an outstanding covered short-term loan or within 30 days thereafter. It would define both loan sequence and sequence the same way because the terms are used interchangeably in various places throughout the proposal. Furthermore, it also specified how to determine a given loan's place within a sequence (for example, whether a loan constitutes the first, second, or third loan in a sequence), which would implicate other provisions of the proposed rule.

The Bureau's rationale for proposing to define loan sequence in this manner was discussed in more detail in the section-by-section analysis of proposed §§ 1041.4 and 1041.6. The Bureau also sought comment on whether alternative definitions of loan sequence may better address its concerns about how a consumer's inability to repay a covered loan may cause the need for a successive covered loan.

Some consumer advocates commented that this definition would be clarified by including language from local ordinances or State laws that have the same effective meaning so as to avoid any confusion in compliance and enforcement. Consumer groups commented that the rule should treat a loan made within 60 days of another loan, rather than 30 days, as part of the same loan sequence in order to better effectuate its purpose of addressing the flipping of both short-term and longer-term loans and to include late fees as rollover fees. Some industry commenters argued for a shorter period.

The Bureau has considered a number of ways to specify and clarify the definition of loan sequences in order to minimize or avoid evasions of the final rule. Adopting local or State definitions would not appear to clarify the issues, as they are inconsistent from one jurisdiction to another. However, as discussed in greater detail below in Market Concerns—Underwriting and in §§ 1041.4 and 1041.5(d) of the final rule, the Bureau has decided to incorporate covered longer-term balloon-payment loans into this definition, reflecting concerns about the harms that can occur to consumers who take out a series of covered longer-term balloon-payment loans in quick succession as well as the Bureau's concerns about potential evasions of the underwriting criteria.

As discussed in the proposal, the Bureau also has considered various time frames for the definition of loan sequence, including 14 days as well as 30 days and 60 days, and decided in finalizing the rule to adhere to 30 days as a reasonable and appropriate frequency for use in this definition, to align with consumer expense cycles, which often involve recurring expenses that are typically a month in length. This is designed to account for the fact that where repaying a loan causes a shortfall, the consumer may seek to return during the same expense cycle to get funds to cover downstream expenses. In addition, a number of consumers receive income on a monthly basis. The various considerations involved in resolving these issues are discussed more fully in the section-by-section analysis of § 1041.5(d) of the final rule.

In light of the discussion above, the Bureau otherwise is finalizing this renumbered definition as modified. In addition, wherever the proposed definition had referred to a covered short-term loan, the definition in the final rule refers instead to a covered short-term loan or a covered longer-term balloon-payment loan—or, where pluralized, the definition in the final rule refers instead to covered short-term loans or covered longer-term balloon-payment loans, or a combination thereof.

2(a)(15) Motor Vehicle

In connection with proposing to subject certain longer-term loans with vehicle security to part 1041, in proposed § 1041.3(d) the Bureau would have defined vehicle security to refer to the term motor vehicle as defined in section 1029(f)(1) of the Dodd-Frank Act. That definition encompasses not only vehicles primarily used for on-road transportation, but also recreational boats, motor homes, and other categories. As described below, the Bureau has now decided to narrow the definition of covered-longer term loan to focus only on loans that meet a certain rate threshold and involve the taking of a leveraged payment mechanism as defined in § 1041.3(c) of the final rule, without regard to whether vehicle security is taken on the loan. However, the definitions of vehicle security and motor vehicle are still relevant to § 1041.6(b)(3), which prohibits lenders from making covered short-term loans under § 1041.6 if they take vehicle security in connection with such a loan, for the reasons explained in the section-by-section analysis of that provision.

Upon further consideration in light of this context and its experience from other related rulemakings, the Bureau has decided to narrow the definition of motor vehicle in the final rule to focus on any self-propelled vehicle primarily used for on-road transportation, but not including motor homes, recreational vehicles, golf carts, and motor scooters. Some commenters did suggest that vehicle title loans should encompass boats, motorcycles, and manufactured homes. Nonetheless, the Bureau has concluded that it is more appropriate to use a narrower definition because the term motor vehicle is germane to the vehicle title loans addressed in the final rule, which involve the prospect of repossession of the vehicle for failing to repay the loan. The impact to consumers from default or repossession likely operates differently for basic on-road transportation used to get to work or manage everyday affairs, thus creating different pressures to repay loans based on these kinds of vehicles as compared to loans based on other forms of transportation.

Moreover, from the Bureau's prior experience of writing rules with respect to vehicles, most notably in the Bureau's larger participant rule authorizing its supervision authority over certain entities in the market for auto loans, it is aware that treatment of this category of items requires clarification in light of what can be some difficult and unexpected boundary issues. The definition included here in § 1041.2(a)(15) of the final rule is thus similar to the language used in the Bureau's larger participant rule for the auto loan market,[430] which generally encompasses the kinds of vehicles—specifically cars and trucks and motorcycles—that consumers primarily use for on-road transportation rather than for housing or recreation. The Bureau also notes that it had proposed to exclude loans secured by manufactured homes under § 1041.3(e)(2), and has finalized that provision in § 1041.3(d)(2) as discussed below.

2(a)(16) Open-End Credit

Proposed § 1041.2(a)(14) would have defined open-end credit by cross-referencing the definition of that same term in Regulation Z, 12 CFR part 1026, but without regard to whether the credit is consumer credit, as that term is defined in Regulation Z § 1026.2(a)(12), is extended by a creditor, as that term is defined in Regulation Z § 1026.2(a)(17), or is extended to a consumer, as that term is defined in Regulation Z § 1026.2(a)(11). In general, Regulation Z § 1026.2(a)(20) provides that open-end credit is consumer credit in which the creditor reasonably contemplates repeated transactions, the creditor may impose a finance charge from time to time on an outstanding unpaid balance, and the amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid. For the purposes of defining open-end credit under proposed part 1041, the term credit, as defined in proposed § 1041.2(a)(9), was substituted for the term consumer credit in the Regulation Z definition of open-end credit; the term lender, as defined in proposed § 1041.2(a)(11), was substituted for the term creditor in the same Regulation Z definition; and the term consumer, as defined in proposed § 1041.2(a)(4), was substituted for the term consumer in the Regulation Z definition of open-end credit.

The term open-end credit was used in various parts of the proposal where the Bureau tailored requirements separately for closed-end and open-end credit in light of their different structures and durations. Most notably, proposed § 1041.2(a)(18) would require lenders to employ slightly different methods when

[430] 80 FR 37496 (June 30, 2015).

calculating the total cost of credit of closed-end versus open-end loans. Proposed § 1041.16(c) also would require lenders to report whether a covered loan is a closed-end or open-end loan.

In the proposal, the Bureau stated that generally defining this term consistently across regulations would reduce the risk of confusion among consumers, industry, and regulators. With regard to the definition of consumer, however, the Bureau proposed that, for the reasons discussed in connection with proposed § 1041.2(a)(4), it would be more appropriate to incorporate the definition from the Dodd-Frank Act rather than the definition from Regulation Z, which is arguably narrower. Similarly, the Bureau indicated that it would be more appropriate to use the broader definition of lender contained in proposed § 1041.2(a)(11) than the Regulation Z definition of creditor.

One commenter recommended that the Bureau defer action on lines of credit entirely (not just overdraft lines of credit as would be excluded in proposed § 1041.3) and address these loan products in a future rulemaking. A number of commenters stated that the underwriting criteria for such products should be aligned with the provisions of the Credit CARD Act and the Bureau's rule on prepaid accounts, and raised questions about the timing calculations on line-of-credit payments.

In response, the Bureau continues to judge it to be important to address open-end lines of credit in this rule in order to achieve more comprehensive coverage, outside of those lines of credit that are excluded under final § 1041.3(d)(6) as discussed below. In response to many comments, including those urging closer alignment with other standards for assessing ability to repay under other statutory schemes, the Bureau has also modified the underwriting criteria in § 1041.5 of the final rule in a number of respects, as explained further below.

The Bureau is therefore finalizing § 1041.2(a)(16) largely as proposed, with one substantive clarification that credit products that otherwise meet the definition of open-end credit under Regulation Z should not be excluded from the definition of open-end credit under § 1041.2(a)(16) because they do not involve a finance charge. This change will assure that products are appropriately classified as open-end credit under part 1041, rather than as closed-end credit. The Bureau has also revised comment 2(a)(16)–1 to reflect this change and to streamline guidance clarifying that for the purposes of defining open-end credit under part 1041, the term credit, as defined in § 1041.2(a)(11), is substituted for the term consumer credit, as defined in 12 CFR 1026.2(a)(12); the term lender, as defined in § 1041.2(a)(13), is substituted for the term creditor, as defined in 12 CFR 1026.2(a)(17); and the term consumer, as defined in § 1041.2(a)(4), is substituted for the term consumer, as defined in 12 CFR 1026.2(a)(11).

For all the reasons discussed above, the Bureau is finalizing this definition and the commentary as renumbered and revised.

2(a)(17) Outstanding Loan

Proposed § 1041.2(a)(15) would have generally defined outstanding loan as a loan that the consumer is legally obligated to repay, except that a loan ceases to be outstanding if the consumer has not made any payments on the loan within the previous 180 days. Under this definition, a loan is an outstanding loan regardless of whether the loan is delinquent or subject to a repayment plan or other workout arrangement if the other elements of the definition are met. Under proposed § 1041.2(a)(12), a covered short-term loan would be considered to be within the same loan sequence as a previous such loan if it is made within 30 days of the consumer having the previous outstanding loan. Proposed §§ 1041.6 and 1041.7 would impose certain limitations on lenders making covered short-term loans within loan sequences, including a prohibition on making additional covered short-term loans for 30 days after the third loan in a sequence.

In the proposal, the Bureau stated that if the consumer has not made any payment on the loan for an extended period of time, it may be appropriate to stop considering the loan to be an outstanding loan for the purposes of various provisions of the proposed rule. Because outstanding loans are counted as major financial obligations for purposes of underwriting and because treating a loan as outstanding would trigger certain restrictions on further borrowing by the consumer under the proposed rule, the Bureau attempted to balance several considerations in crafting the proposed definition. One is whether it would be appropriate for very stale and effectively inactive debt to prevent the consumer from accessing credit, even if so much time has passed that it seems relatively unlikely that the new loan is a direct consequence of the unaffordability of the previous loan. Another is how to define such stale and inactive debt for purposes of any cut-off, and to account for the risk that collections might later be revived or that lenders would intentionally exploit a cut-off in an attempt to encourage new borrowing by consumers.

The Bureau proposed a 180-day threshold as striking an appropriate balance, and noted that this approach would generally align with the policy position taken by the Federal Financial Institutions Examination Council (FFIEC), which generally requires depository institutions to charge off open-end credit at 180 days of delinquency. Although that policy also requires that closed-end loans be charged off after 120 days, the Bureau found as a preliminary matter that a uniform 180-day rule for both closed-end and open-end loans may be more appropriate, given the underlying policy considerations discussed above, as well as for simplicity.

Proposed comment 2(a)(15)–1 would clarify that the status of a loan that otherwise meets the definition of outstanding loan does not change based on whether the consumer is required to pay a lender, affiliate, or service provider or whether the lender sells the loan or servicing rights to a third party. Proposed comment 2(a)(15)–2 would clarify that a loan ceases to be an outstanding loan as of the earliest of the date the consumer repays the loan in full, the date the consumer is released from the legal obligation to repay, the date the loan is otherwise legally discharged, or the date that is 180 days following the last payment that the consumer made on the loan. Additionally, proposed comment 2(a)(15)–2 would explain that any payment the consumer makes restarts the 180-day period, regardless of whether the payment is a scheduled payment or in a scheduled amount. Proposed comment 2(a)(15)–2 would further clarify that once a loan is no longer an outstanding loan, subsequent events cannot make the loan an outstanding loan. The Bureau proposed this one-way valve to ease compliance burden on lenders and to reduce the risk of consumer confusion.

One consumer group commented that, with respect to loans that could include more than one payment, it would be helpful for the definition to refer to an installment in order to ensure its alignment with terms used in State and local laws. Other consumer groups suggested various other changes to clarify details of timing addressed in this definition, as well as urging that the 180-day period should be changed to 365 days so that more loans would be considered as outstanding. Several commented that the definition should be changed so that the 180-day period should run from either the date of the

last payment by the consumer or from the date of the last debt collection activity by the collector, in order to more accurately determine what is truly stale debt and to broaden the scope of what loans are outstanding to ensure that older loans are not being used by lenders to encourage consumers to re-borrow. To support compliance under the modified definition, they also urged that lenders be required to report collection activity to the registered information systems.

The Bureau has concluded that language in final comment 2(a)(17)–2 emphasizing that any payment restarts the 180-day clock is sufficient to address the commenter's concern without having to incorporate new terminology to align the term with its use in State and local laws. With respect to the comments about the time frame, and 365 days in particular, the Bureau was not persuaded of the reasoning or need to broaden the scope of outstanding loans to this extent. The Bureau's proposed 180-day period was already aligned to the longer end of the FFIEC treatment of these issues, by adopting the 180 days that the FFIEC has applied to open-end credit rather than the 120 days that it has applied to closed-end credit. In addition, the Bureau's experience with these markets suggests that these types of lenders typically write off their debts even sooner than 180 days.

The Bureau concludes that the various suggested changes that were offered to tighten the proposed standard are not necessary to be adopted at this time, though such matters could be revisited over time as supervision and enforcement of the final rule proceed in the future. In particular, the comment that lenders should be required to report collection activity to the registered information systems would have broadened the requirements of the rule and the burdens imposed in significant and unexpected ways that did not seem warranted at this juncture.

The Bureau also carefully considered the comments made about extending the period of an outstanding loan, which suggested that it should run not just 180 days from the date of the last payment made on the loan but also 180 days from the date of the last debt collection activity on the loan. The Bureau declines to adopt this proposed change, for several reasons. It would add a great deal of complexity that would encumber the rule, not only in terms of ensuring compliance but in terms of carrying out supervision and enforcement responsibilities as well. For example, this modification would appear not to be operational unless debt collection activities were reported to the registered information systems, which as noted above would add significant and unexpected burdens to the existing framework. Moreover, timing the cooling-off period to any debt collection activity could greatly extend how long a consumer would have to wait to re-borrow after walking away from a debt, thereby disrupting the balance the Bureau was seeking to strike in the proposal between these competing objectives. The Bureau also judged that if the comment was aimed at addressing and discouraging certain types of debt collection activities, it would be better addressed in the rulemaking process that the Bureau has initiated separately to govern debt collection issues. Finally, this suggestion seems inconsistent with the Bureau's experience, which indicates that lenders in this market typically cease their own collection efforts within 180 days.

For these reasons, the Bureau is finalizing this definition as renumbered and the commentary as proposed with minor changes for clarity. The Bureau has also added a sentence to comment 2(a)(17)–2 to expressly state that a loan is outstanding for 180 days after consummation if the consumer does not make any payments on it, the consumer is not otherwise released from the legal obligation to pay, and the loan is not otherwise legally discharged.

2(a)(18) Service Provider

Proposed § 1041.2(a)(17) would have defined service provider by cross-referencing the definition of that same term in the Dodd-Frank Act, 12 U.S.C. 5481(26). In general, the Dodd-Frank Act defines service provider as any person that provides a material service to a covered person in connection with the offering or provision of a consumer financial product or service, including one that participates in designing, operating, or maintaining the consumer financial product or service or one that processes transactions relating to the consumer financial product or service. Moreover, the Act specifies that the Bureau's authority to identify and prevent unfair, deceptive, or abusive acts or practices through its rulemaking authority applies not only to covered persons, but also to service providers.[431] Proposed § 1041.3(c) and (d) would provide that a loan is covered under proposed part 1041 if a service provider obtains a leveraged payment mechanism or vehicle title and the other coverage criteria are otherwise met.

The definition of service provider and the provisions in proposed § 1041.3(c) and (d) were designed to reflect the fact that in some States, covered loans are extended to consumers through a multi-party transaction. In these transactions, one entity will fund the loan, while a separate entity, often called a credit access business or a credit services organization, will interact directly with, and obtain a fee or fees from, the consumer. This separate entity will often service the loan and guarantee the loan's performance to the party funding the loan. The credit access business or credit services organization, and not the party funding the loan, will in many cases obtain the leveraged payment mechanism or vehicle security. In these cases, the credit access business or credit services organization is performing the responsibilities normally performed by a party funding the loan in jurisdictions where this particular business arrangement is not used. Despite the formal division of functions between the nominal lender and the credit access business, the loans produced by such arrangement are functionally the same as those covered loans issued by a single entity and appear to present the same set of consumer protection concerns. Accordingly, the Bureau stated in the proposal that it is appropriate to bring loans made under these arrangements within the scope of coverage of proposed part 1041. Proposed comment 2(a)(17)–1 further made clear that persons who provide a material service to lenders in connection with the lenders' offering or provision of covered loans during the course of obtaining for consumers, or assisting consumers in obtaining, loans from lenders are service providers, subject to the specific limitations in section 1002(26) of the Dodd-Frank Act.

The Bureau stated that defining the term service provider consistently with the Dodd-Frank Act reduces the risk of confusion among consumers, industry, and regulators. Consumer groups commented that the rule should apply to service providers, including credit service organizations and their affiliates, whenever it applies to lenders and their affiliates. The Bureau concludes that the definitions of and references to lender and service provider, including incorporation of the statutory definitions of covered person and service provider into the regulatory definitions, throughout the regulation text and commentary are sufficiently well articulated to make these points clear as to the applicability and scope of coverage of part 1041. Both section 1031(a) and section 1036(a) of the Dodd-Frank Act specify that a service provider

[431] 12 U.S.C. 5531(a) and (b).

can be held liable on the same terms as a covered person—which includes a lender as defined by § 1041.2(13)—to the extent that a service provider engages in conduct that violates this rule on behalf of a lender, or entities such as credit access businesses and credit service organizations that provide a material service to a lender in making these kinds of covered loans.[432] The Bureau did not receive any other comments on this portion of the proposal and is finalizing this definition and the commentary as just discussed and as renumbered.

2(a)(19) Vehicle Security

The Bureau has decided to make ''vehicle security'' a defined term, incorporating language that described the practice of taking vehicle security from proposed § 1041.3(d). Its role is now more limited, however, due to other changes in the rule, which no longer governs the underwriting of covered longer-term loans (other than balloon-payment loans), which instead are now subject only to the payment provisions. Nonetheless, the Bureau is preserving the language explaining vehicle security and moving it here for purposes of defining the exclusion of vehicle title loans from coverage under § 1041.6 of the final rule, which provides for conditionally exempted loans.

As to the definition itself, the proposal would have stated that for purposes of defining a covered loan, a lender or service provider obtains vehicle security if it obtains an interest in a consumer's motor vehicle (as defined in section 1029(f)(1) of the Dodd-Frank Act) as a condition of the credit, regardless of how the transaction is characterized by State law, including: (1) Any security interest in the motor vehicle, motor vehicle title, or motor vehicle registration whether or not the security interest is perfected or recorded; or (2) a pawn transaction in which the consumer's motor vehicle is the pledged good and the consumer retains use of the motor vehicle during the period of the pawn agreement. Under the proposal, the lender or service provider would obtain vehicle security if the consumer is required, under the terms of an agreement with the lender or service provider, to grant an interest in the consumer's vehicle to the lender in the event that the consumer does not repay the loan.

As noted in the proposal, because of exclusions contained in proposed § 1041.3(e)(1) and (5), the term vehicle security would have excluded loans made solely and expressly for the purpose of financing a consumer's initial purchase of a motor vehicle in which the lender takes a security interest as a condition of the credit, as well as non-recourse pawn loans in which the lender has sole physical possession and use of the property for the entire term of the loan. Proposed comment 3(d)(1)–1 also would have clarified that mechanic liens and other situations in which a party obtains a security interest in a consumer's motor vehicle for a reason that is unrelated to an extension of credit do not trigger coverage.

The Bureau proposed that the security interest would not need to be perfected or recorded in order to trigger coverage under proposed § 1041.3(d)(1). The Bureau reasoned that consumers may not be aware that the security interest is not perfected or recorded, nor would it matter in many cases. Perfection or recordation protects the lender's interest in the vehicle against claims asserted by other creditors, but does not necessarily affect whether the consumer's interest in the vehicle is at risk if the consumer does not have the ability to repay the loan. Even if the lender or service provider does not perfect or record its security interest, the security interest can still change a lender's incentives to determine the consumer's ability to repay the loan and exacerbate the harms the consumer experiences if the consumer does not have the ability to repay the loan.

The Bureau received many comments on the prong of the definition that focused on the taking of a leveraged payment mechanism or vehicle security, again often in the context of application of the underwriting requirements rather than the payment requirements. Those concerns have largely been addressed or mooted by the Bureau's decisions to apply only the payment requirements to covered longer-term loans and to narrow the definition of such loans to focus only on those types of leveraged payment mechanisms that involve the ability to pull money from consumers' accounts, rather than vehicle security. Comments focusing on that narrower definition of leveraged payment mechanism are addressed in more depth in connection with § 1041.3(c) below.

Importantly, the term vehicle security as defined in proposed § 1041.3(d) was further limited in its effect by the provisions of proposed § 1041.3(b)(3)(ii), which had stated that a lender or service provider did not become subject to the proposed underwriting criteria merely by obtaining vehicle security at any time, but instead had to obtain vehicle security before, at the same time as, or within 72 hours after the consumer receives the entire amount of funds that the consumer is entitled to receive under the loan. Many commenters criticized the 72-hour requirement as undermining consumer protections and fostering evasion of the rule. Because of various changes that have occurred in revising the coverage of the underwriting criteria and reordering certain provisions in the final rule, this limitation is no longer necessary to effectuate any of those purposes of the rule. The definition of vehicle security remains relevant to the provisions of § 1041.6 of the final rule, but it is unclear how a 72-hour limitation is germane to establishing the scope of coverage under that section, and so it has been eliminated from the final rule.

One consumer group suggested that a vehicle title loan should be covered under the rule regardless of whether the title was a condition of the loan. The Bureau does not find it necessary to alter the definition in this manner in order to accomplish the purpose of covering vehicle title loans, particularly in light of the language in comment 2(a)(19)–1, which indicates that vehicle security will attach to the vehicle for reasons that are related to the extension of credit.

With respect to comments on the details of the definition of vehicle security, one commenter had suggested that the final rule should make clear that the proposed restrictions on this form of security interest do not interfere with or prohibit any statutory liens that have been authorized by Congress. Because nothing in the language of the final rule purports to create any such interference or prohibition, the Bureau does not find it necessary to modify its definition of vehicle security in this regard. Other commenters made various points about the meaning and coverage of the term motor vehicle in the Bureau's treatment of the term vehicle security. Those comments are addressed separately in the discussion of the definition of motor vehicle in § 1041.2(a)(15) of the final rule.

The Bureau has moved the discussion of vehicle security from proposed § 1041.3(d) to § 1041.2(a)(19) in the

[432] *See* 12 U.S.C. 5531(a) (providing that the Bureau may take any action authorized under subtitle E of the Act (*i.e.,* Enforcement powers) to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service); 12 U.S.C. 5536(a) (equating covered persons and service providers for purposes of prohibited acts in violation of Federal consumer financial law, including liability for violations for engaging in ''any unfair, deceptive, or abusive act or practice'').

general definitions section, and has narrowed the definition of motor vehicle contained in section 1029(f)(1) of the Dodd-Frank Act, replacing it with the somewhat narrower definition of motor vehicle contained in § 1041.2(a)(15) of the final rule as described above. The definition of vehicle security still includes the other elements of the proposal, as slightly rewritten for clarity to focus on this term itself rather than on the actions of a lender or service provider.

Accordingly, the term vehicle security is defined in the final rule as an interest in a consumer's motor vehicle obtained by the lender or service provider as a condition of the credit, regardless of how the transaction is characterized by State law, including: (1) Any security interest in the motor vehicle, motor vehicle title, or motor vehicle registration whether or not the security interest is perfected or recorded; or (2) a pawn transaction in which the consumer's motor vehicle is the pledged good and the consumer retains use of the motor vehicle during the period of the pawn agreement. This definition also carries with it proposed comment 3(d)(1)–1, now finalized as comment 2(a)(19)–1, which explains that an interest in a consumer's motor vehicle is a condition of credit only to the extent the security interest is obtained in connection with the credit, and not for a reason that is unrelated to an extension of credit, such as the attachment of a mechanic's lien. This comment is finalized with the language unchanged.[433]

2(b) Rule of Construction

After reserving this provision in the proposal, the Bureau has determined to add a rule of construction for purposes of part 1041, which states that where definitions are incorporated from other statutes or regulations, the terms have the meaning and incorporate the embedded definitions, appendices, and commentary from those other laws except to the extent that part 1041 provides a different definition for a parallel term. The Bureau had included versions of this basic principle in the regulation text and commentary for certain individual provisions of the proposed rule, but has concluded that it would be helpful to memorialize it as a general rule of construction. Accordingly, the Bureau moved certain proposed commentary for individual definitions to comment 2(b)–1 of the final rule in order to provide examples of the rule of construction, and streamlined certain other proposed commentary as described above.

Section 1041.3 Scope of Coverage; Exclusions; Exemptions

The primary purpose of proposed part 1041 was to identify and adopt rules to prevent unfair and abusive practices as defined in section 1031 of the Dodd-Frank Act in connection with certain consumer credit transactions. Based upon its research, outreach, and analysis of available data, the Bureau proposed to identify such practices with respect to two categories of loans to which it proposed to apply this rule: (1) Consumer loans with a duration of 45 days or less; and (2) consumer loans with a duration of more than 45 days that have a total cost of credit above a certain threshold and that are either repayable directly from the consumer's income stream, as set forth in proposed § 1041.3(c), or are secured by the consumer's motor vehicle, as set forth in proposed § 1041.3(d).

In the proposal, the Bureau tentatively concluded that it is an unfair and abusive practice for a lender to make a covered short-term loan without determining that the consumer has the ability to repay the loan. The Bureau likewise tentatively concluded that it is an unfair and abusive practice for a lender to make a covered longer-term loan without determining the consumer's ability to repay the loan. Accordingly, the Bureau proposed to apply the protections of proposed part 1041 to both categories of loans.

In particular, proposed §§ 1041.5 and 1041.9 would have required that, before making a covered loan, a lender must determine that the consumer has the ability to repay the loan. Proposed §§ 1041.6 and 1041.10 would have imposed certain limitations on repeat borrowing, depending on the type of covered loan. Proposed §§ 1041.7, 1041.11, and 1041.12 would have provided for alternative requirements that would allow lenders to make covered loans, in certain limited situations, without first determining that the consumer has the ability to repay the loan. Proposed § 1041.14 would have imposed consumer protections related to repeated lender-initiated attempts to withdraw payments from consumers' accounts in connection with covered loans. Proposed § 1041.15 would have required lenders to provide notices to consumers before attempting to withdraw payments on covered loans from consumers' accounts. Proposed §§ 1041.16 and 1041.17 would have required lenders to check and report borrowing history and loan information to certain information systems with respect to most covered loans. Proposed § 1041.18 would have required lenders to keep certain records on the covered loans that they make. And proposed § 1041.19 would have prohibited actions taken to evade the requirements of proposed part 1041.

The Bureau did not propose to extend coverage to several other types of loans and specifically proposed excluding, to the extent they would otherwise be covered under proposed § 1041.3, certain purchase money security interest loans, certain loans secured by real estate, credit cards, student loans, non-recourse pawn loans, and overdraft services and lines of credit. The Bureau likewise proposed not to cover loans that have a term of longer than 45 days if they are not secured by a leveraged payment mechanism or vehicle security or if they have a total cost of credit below a rate of 36 percent per annum.

By finalizing application of the underwriting requirements with respect to certain categories of loans as described above, and excluding certain other types of loans from the reach of the rule, the Bureau does not mean to signal any definitive conclusion that it could not be an unfair or abusive practice to make any other types of loans, such as loans that are not covered by part 1041, without reasonably assessing a consumer's ability to repay. Moreover, this rule does not supersede or limit any protections imposed by other laws, such as the Military Lending Act and implementing regulations. The coverage limits in the rule simply reflect the fact that these are the types of loans the Bureau has studied in depth to date and has chosen to address within the scope of the proposal. Indeed, the Bureau issued, concurrently with the proposal, a Request for Information (RFI), which solicited information and evidence to help assess whether there are other categories of loans for which lenders do not determine the consumer's ability to repay that may pose risks to consumers. The Bureau also sought comment in response to the RFI as to whether other lender practices associated with covered loans may warrant further action by the Bureau.

The Bureau thus is reinforcing the point that all covered persons within the meaning of the Dodd-Frank Act have

[433] Two definitions in the proposal are no longer operative and so have been omitted from the final rule. First, proposed § 1041.2(a)(13) would have defined the term non-covered bridge loan. Second, proposed § 1041.2(a)(16) would have defined the term prepayment penalty. Because the Bureau is not finalizing the portions of the proposed rule on underwriting of covered longer-term loans at this time, along with other changes made in §§ 1041.5 and 1041.6 of the final rule governing the underwriting and provision of covered short-term loans, these two definitions and the related commentary are being omitted from the final rule.

a legal duty not to engage in unfair, deceptive, or abusive acts or practices. The Bureau is explicitly authorized to consider, on a case-by-case basis, through its supervisory or enforcement activities, whether practices akin to those addressed here are unfair, deceptive, or abusive in connection with loans not covered by the rule. The Bureau also is emphasizing that it may decide to engage in future rulemaking with respect to other types of loans or other types of practices associated with covered loans at a later date.

3(a) General

In proposed § 1041.3(a), the Bureau provided that proposed part 1041 would apply to a lender that makes covered loans. The Bureau received no specific comments on proposed § 1041.3(a), and is finalizing this provision as proposed except that it has adopted language as discussed above in connection with the definition of lender in § 1041.2(a)(13) to refer to a person who ''extends credit by making covered loans.''

3(b) Covered Loan

In the proposal, the Bureau noted that section 1031(b) of the Dodd-Frank Act empowers it to prescribe rules to identify and prevent unfair, deceptive, or abusive acts or practices associated with consumer financial products or services. Section 1002(5) of the Dodd-Frank Act defines such products or services as those offered or provided for use by consumers primarily for personal, family, or household purposes or, in certain circumstances, those delivered, offered, or provided in connection with another such consumer financial product or service. Proposed § 1041.3(b) would have provided, generally, that a covered loan means closed-end or open-end credit that is extended to a consumer primarily for personal, family, or household purposes that is not excluded by § 1041.3(e).

By proposing to apply the rule only to loans that are extended to consumers primarily for personal, family, or household purposes, the Bureau intended it not to apply to loans that are made primarily for a business, commercial, or agricultural purpose. But the proposal explained that a lender would violate proposed part 1041 if it extended a loan ostensibly for a business purpose and failed to comply with the requirements of proposed part 1041 for a loan that is, in fact, primarily for personal, family, or household purposes. In this regard, the Bureau referenced the section-by-section analysis of proposed § 1041.19, which provided further discussion of evasion issues.

Proposed comment 3(b)–1 would have clarified that whether a loan is covered is generally based on the loan terms at the time of consummation. Proposed comment 3(b)–2 would have clarified that a loan could be a covered loan regardless of whether it is structured as open-end or closed-end credit. Proposed comment 3(b)–3 would have explained that the test for determining the primary purpose of a loan is the same as the test prescribed by Regulation Z § 1026.3(a) and clarified by the related commentary in supplement I to part 1026. The Bureau stated that lenders are already familiar with the Regulation Z test and that it would be appropriate to apply that same test here to maintain consistency in interpretation across credit markets, though the Bureau also requested comment on whether more tailored guidance would be useful here as the related commentary in supplement I to part 1026, on which lenders would be permitted to rely in interpreting proposed § 1041.3(b), did not discuss particular situations that may arise in the markets that would be covered by proposed part 1041.

One commenter noted that while business loans are outside the scope of the rule, many small business owners use their personal vehicles to secure title loans for their businesses, and asserted that it will be difficult for lenders to differentiate the purposes of a loan in such instances. Another commenter suggested that provisions should be added to ensure that loans are made for personal use only. More generally, one commenter stated that the breadth of the definition of covered loan would enhance the burden that the proposed rule would impose on credit unions.

In response, the Bureau notes that its experience with these markets has made it aware that the distinction between business and household purposes is necessarily fact-specific, yet the basic distinction is embedded as a jurisdictional matter in many consumer financial laws and has long been regarded as a sensible line to draw. Further, the concern about the breadth of this definition as affecting credit unions is addressed substantially by the measures adopted in the final rule to reduce burdens for lenders, along with the exclusions and exemptions that have been adopted, including the conditional exemption for alternative loans.

The Bureau is finalizing § 1041.3(b) as proposed. The commentary is finalized as proposed, except proposed comment 3(b)–1, which the Bureau is not finalizing. That comment had proposed that whether a loan is covered is generally determined based on the loan terms at the time of consummation. As noted below, final comment 3(b)(3)–3 makes clear that a loan may become a covered longer-term loan at any such time as both requirements of § 1041.3(b)(3)(i) and (ii) are met, even if they were not met when the loan was initially made.

3(b)(1)

Proposed § 1041.3(b)(1) would have brought within the scope of proposed part 1041 those loans in which the consumer is required to repay substantially the entire amount due under the loan within 45 days of either consummation or the advance of loan proceeds. Loans of this type, as they exist in the market today, typically take the form of single-payment loans, including payday loans, vehicle title loans, and deposit advance products. However, coverage under proposed § 1041.3(b)(1) was not limited to single-payment products, but rather included any single-advance loan with a term of 45 days or less and any multi-advance loan where repayment is required within 45 days of a credit draw.[434] Under proposed § 1041.2(a)(6), this type of covered loan was defined as a covered short-term loan.

Specifically, proposed § 1041.3(b)(1) prescribed different tests for determining whether a loan is a covered short-term loan based on whether or not the loan is closed-end credit that does not provide for multiple advances to consumers. For this type of credit, a loan would be a covered short-term loan if the consumer is required to repay substantially the entire amount of the loan within 45 days of consummation. For all other types of loans, a loan would be a covered short-term loan if the consumer is required to repay substantially the entire amount of an advance within 45 days of the advance.

As proposed comment 3(b)(1)–1 explained, a loan does not provide for multiple advances to a consumer if the loan provides for full disbursement of the loan proceeds only through disbursement on a single specific date. The Bureau stated that a different test to determine whether a loan is a covered short-term loan is appropriate for loans that provide for multiple advances to consumers, because open-end credit and closed-end credit providing for multiple advances may be consummated long

[434] While application of the 45-day duration limit for covered short-term loans varies based on whether the loan is a single- or multiple-advance loan, the Bureau often used the phrase ''within 45 days of consummation'' throughout the proposal and in the final rule as a shorthand way of referring to coverage criteria of both types of loans.

before the consumer incurs debt that must be repaid. If, for example, the consumer waited more than 45 days after consummation to draw on an open-end line, but the loan agreement required the consumer to repay the full amount of the draw within 45 days of the draw, the loan would not be practically different than a closed-end loan repayable within 45 days of consummation. The Bureau preliminarily found that it is appropriate to treat the loans the same for the purposes of proposed § 1041.3(b)(1).

As the Bureau described in part II of the proposal, the terms of short-term loans are often tied to the date the consumer receives his or her paycheck or benefits payment. While pay periods typically vary from one week to one month, and expense cycles are typically one month, the Bureau proposed 45 days as the upper bound for covered short-term loans in order to accommodate loans that are made shortly before a consumer's monthly income is received and that extend beyond the immediate income payment to the next income payment. These circumstances could result in loans that are somewhat longer than a month in duration, but the Bureau believed that they nonetheless pose similar risks of harm to consumers as loans with durations of a month or less.

The Bureau also considered proposing to define covered short-term loans as loans that are substantially repayable within either 30 days of consummation or advance, 60 days of consummation or advance, or 90 days of consummation or advance. The Bureau, nonetheless, did not propose the 30-day period because, as described above, some loans for some consumers who are paid on a monthly basis can be slightly longer than 30 days, yet still would essentially constitute a one-pay-cycle, one-expense-cycle loan. The Bureau stated that it did not propose either the 60-day or 90-day period because loans with those terms encompass multiple income and expense cycles, and thus may present somewhat different risks to consumers, though such loans would have been covered longer-term loans if they met the criteria set forth in proposed § 1041.3(b)(2).

As discussed in the proposal, the Bureau proposed to treat longer-term loans, as defined in proposed § 1041.3(b)(2), as covered loans only if the total cost of credit exceeds a rate of 36 percent per annum and if the lender or service provider obtains a leveraged payment mechanism or vehicle security as defined in proposed § 1041.3(c) and (d). The Bureau did not propose similar limitations with respect to the definition of covered short-term loans because the evidence available to the Bureau seemed to suggest that the structure and short-term nature of these loans give rise to consumer harm even in the absence of costs above the 36 percent threshold or particular means of repayment.

Proposed comment 3(b)(1)–2 noted that both open-end credit and closed-end credit may provide for multiple advances to consumers. The comment explained that open-end credit is self-replenishing even though the plan itself has a fixed expiration date, as long as during the plan's existence the consumer may use the line, repay, and reuse the credit. Likewise, closed-end credit may consist of a series of advances. For example, under a closed-end commitment, the lender might agree to lend a fixed total amount in a series of advances as needed by the consumer, and once the consumer has borrowed the maximum, no more is advanced under that particular agreement, even if there has been repayment of a portion of the debt.

Proposed comment 3(b)(1)–3 explained that a determination of whether a loan is substantially repayable within 45 days requires assessment of the specific facts and circumstances of the loan. Proposed comment 3(b)(1)–4 provided guidance on determining whether loans that have alternative, ambiguous, or unusual payment schedules would fall within the definition. The comment explained that the key principle in determining whether a loan would be a covered short-term loan or a covered longer-term loan is whether, under applicable law, the consumer would be considered to be in breach of the terms of the loan agreement if the consumer failed to repay substantially the entire amount of the loan within 45 days of consummation.

As noted above, § 1041.3(b)(1) provides the substance of the definition of covered short-term loan as referenced in § 1041.2(a)(10) of the final rule. The limited comments on this provision are presented and addressed in the section-by-section analysis of that definition. For the reasons stated there, the Bureau is finalizing § 1041.3(b)(1) as proposed, with only non-substantive language changes. One modification has been made in the commentary, however, to address comments received about deposit advance products. New comment 3(b)(1)–4 in the final rule states that a loan or advance is substantially repayable within 45 days of consummation or advance if the lender has the right to be repaid through a sweep or withdrawal of any qualifying electronic deposit made into the consumer's account within 45 days of consummation or advance. A loan or advance described in this paragraph is substantially repayable within 45 days of consummation or advance even if no qualifying electronic deposit is actually made into or withdrawn by the lender from the consumer's account. This comment was added to address more explicitly a deposit advance product in which the lender can claim all the income coming in to the account, as it comes in, for the purpose of repaying the loan, regardless of whether income in fact comes in during the first 45 days after a particular advance. Proposed comment 3(b)(1)–4 thus has been renumbered as comment 3(b)(1)–5 of the final rule.

3(b)(2)

Proposed § 1041.3(b)(2) would have brought within the scope of proposed part 1041 several types of loans for which, in contrast to loans covered under proposed § 1041.3(b)(1), the consumer is not required to repay substantially the entire amount of the loan or advance within 45 days of consummation or advance. Specifically, proposed § 1041.3(b)(2) extended coverage to longer-term loans with a total cost of credit exceeding a rate of 36 percent per annum if the lender or service provider also obtains a leveraged payment mechanism as defined in proposed § 1041.3(c) or vehicle security as defined in proposed § 1041.3(d) in connection with the loan before, at the same time, or within 72 hours after the consumer receives the entire amount of funds that the consumer is entitled to receive. Under proposed § 1041.2(a)(8), this type of covered loan would be defined as a covered longer-term loan.

As discussed above in connection with § 1041.2(a)(7), the Bureau defined a sub-category of covered longer-term loans that would be subject to certain tailored provisions in proposed §§ 1041.6, 1041.9, and 1041.10 because they involved balloon-payment structures that the Bureau believed posed particular risks to consumers. The Bureau proposed to cover such longer-term balloon-payment loans only if they exceeded the general rate threshold and involved leveraged payment mechanisms or vehicle security, but specifically sought comment on whether such products should be subject to the rule more generally in light of the particular concerns about balloon payment structures.

In light of the Bureau's decision to differentiate which parts of the rule apply to longer-term balloon-payment loans and more generally to longer-term

loans, the Bureau has decided to make the two categories mutually exclusive and to describe them separately in § 1041.3(b)(2) and (3) of the final rule, respectively. Accordingly, the Bureau is finalizing § 1041.3(b)(2) to define longer-term balloon-payment loans, incorporating the language of proposed § 1041.2(a)(7) as further revised in various respects.

First, for purposes of greater clarity in ordering § 1041.3(b) of the final rule, the Bureau is separating out its treatment of covered longer-term balloon-payment loans (in § 1041.3(b)(2)) from its treatment of all other covered longer-term loans (in § 1041.3(b)(3)). As described in greater detail below in Market Concerns—Underwriting and in the section-by-section analysis of § 1041.4, the Bureau has decided to restructure these provisions in this way because it has decided in the final rule to subject covered longer-term balloon-payment loans both to the underwriting criteria and the payment requirements of the final rule, but to apply only the payment requirements to other types of covered longer-term loans.

This organization reflects in part the comments received from industry and trade groups who contended that the Bureau's concerns about re-borrowing for covered longer-term loans were most applicable to loans with balloon-payment structures. They therefore argued that any ability-to-repay restrictions and underwriting criteria should be limited to longer-term balloon-payment loans. These comments reinforced the Bureau's preliminary view that concerns about the re-borrowing of covered longer-term balloon-payment loans were most similar to the concerns it had about the re-borrowing of covered short-term loans. As described more fully below in the section on Market Concerns—Underwriting, the Bureau has observed longer-term loans involving balloon payments where the lender does not reasonably assess the borrower's ability to repay before making the loan, and has observed in these circumstances the same types of consumer harms that it has observed when lenders fail to make a reasonable assessment of the borrower's ability to repay before making covered short-term loans. Nonetheless, the Bureau also maintains its concerns about lender practices in the market for other covered longer-term loans, and emphasizes that it retains supervision and enforcement authority to oversee such lenders for unfair, deceptive, or abusive acts or practices.

As discussed further below, for a number of reasons the Bureau has decided not to address the underwriting of all covered longer-term loans at this time. Nonetheless, as discussed above in the section-by-section analysis of § 1041.2(a)(7) of the final rule, the Bureau is concerned that covered longer-term balloon-payment loans have a loan structure that poses many of the same risks and harms to consumers as with covered short-term loans, and could be adapted in some manner as a loan product intended to circumvent the underwriting criteria for covered short-term loans. Therefore, in § 1041.5 of the final rule, the specific underwriting criteria that apply to covered short-term loans are, with certain modifications, made applicable to covered longer-term balloon-payment loans also (without regard to interest rate or the taking of a leveraged payment mechanism). And along with other covered longer-term loans, these loans remain covered by the sections of the final rule on payment practices as well.

Given this resolution of the considerations raised by the comments and based on the Bureau's further consideration and analysis of the market, the Bureau is finalizing § 1041.3(b)(2) in parallel with § 1041.3(b)(1), since both types of loans—covered short-term loans and covered longer-term balloon loans—are subject to the same underwriting criteria and payment requirements as prescribed in the final rule.

As noted above in the discussion of § 1041.2(a)(7), in conjunction with making the definition of covered longer-term balloon-payment loan into a separate category in its own right rather than a subcategory of the general definition of covered longer-term loan, the Bureau has decided to subject such loans to an expansion in scope as compared to the proposal, since longer-term balloon-payment loans are now being covered by both the underwriting and payment provisions of the final rule without regard to whether the loans exceed a particular threshold for the cost of credit or involve the taking of a leveraged payment mechanism or vehicle security. The Bureau had specifically sought comment as to whether to cover longer-term balloon-payment loans regardless of these two conditions, and has concluded that it is appropriate to do so in light of concerns about the risks and harms that balloon-payment structures pose to consumers and of potential industry evolution to circumvent the rule, as set out more extensively below in Market Concerns—Underwriting.

The Bureau has also revised the definition of covered longer-term balloon-payment loan to address different types of loan structures in more detail. As discussed above in connection with § 1041.2(a)(7), the proposal would generally have defined the term to include loans that require repayment in a single payment or that require at least one payment that is more than twice as large as any other payment(s) under the loan. The Bureau based the twice-as-large threshold on the definition of balloon payment under Regulation Z, but with some modification in details. However, the Bureau did not expressly address whether covered longer-term balloon-payment loans could be both closed-end and open-end credit.

After further consideration of the policy concerns that prompted the Bureau to apply the underwriting requirements in subpart B to covered longer-term balloon-payment loans, the Bureau has concluded that it is appropriate to define that term to include both closed-end and open-end loans that involve the kinds of large irregular payments that were described in the proposed definition. In light of the fact that such loans could be structured a number of ways, the Bureau finds it helpful for purposes of implementation and compliance to build out the definition to more expressly address different types of structures. The Bureau has done this by structuring § 1041.3(b)(2) to be similar to the covered-short-term definition in § 1041.3(b)(1), but with longer time frames and descriptions of additional potential payment structures.

Specifically, the revised definition for covered longer-term balloon-payment loans separately addresses closed-end loans that do not provide for multiple advances from other loans (both closed-end and open-end) that do involve multiple advances. With regard to the former set of loans, § 1041.3(b)(2)(i) defines a covered longer-term balloon-payment loan to include those where the consumer is required to repay the entire balance of the loan more than 45 days after consummation in a single payment or to repay such loan through at least one payment that is more than twice as large as any other payment(s). With regard to multiple-advance loans, the revised definition focuses on either of two types of payment structures. Under the first structure, the consumer is required to repay substantially the entire amount of an advance more than 45 days after the advance is made or is required to make at least one payment on the advance that is more than twice as large as any other payment(s). Under the second structure, the consumer is paying the required minimum payments but may not fully amortize the outstanding balance by a specified date

or time, and the amount of the final payment to repay the outstanding balance at such time could be more than twice the amount of other minimum payments under the plan.

The contours of this definition are thus very similar to those for covered short-term loans, which pose the same kinds of risks and harms for consumers, and its focus on payments that are more than twice as large as other payments is generally consistent with how balloon-payment loans are defined and treated under Regulation Z. The Bureau believes retaining that payment size threshold will promote consistency and reduce the risk of confusion among consumers, industry, and regulators.

Along with finalizing § 1041.3(b)(2) as just stated, the Bureau has also built out the related commentary to incorporate the original commentary to proposed § 1041.2(a)(7) and concepts that were already used in the definition of covered short-term loan, as well as to elaborate further on language that has been added to the final rule. As now adopted, comment 3(b)(2)–1 specifies that a closed-end loan is considered to be a covered longer-term balloon-payment loan if the consumer must repay the entire amount of the loan in a single payment which is due more than 45 days after the loan was consummated, or to repay substantially the entire amount of any advance in a single payment more than 45 days after the funds on the loan were advanced, or is required to pay at least one payment that is more than twice as large as any other payment(s). Comment 3(b)(2)–2 states that for purposes of § 1041.3(b)(2)(i) and (ii), all required payments of principal and any charges (or charges only, depending on the loan features) due under the loan are used to determine whether a particular payment is more than twice as large as another payment, regardless of whether the payments have changed during the loan term due to rate adjustments or other payment changes permitted or required under the loan. Comment 3(b)(2)–3 discusses charges for actual unanticipated late payments, for exceeding a credit limit, or for delinquency, default, or a similar occurrence that may be added to a payment, and notes that they are excluded from the determination of whether the loan is repayable in a single payment or a particular payment is more than twice as large as another payment. Likewise, sums that are accelerated and due upon default are excluded from the determination of whether the loan is repayable in a single payment or a particular payment is more than twice as large as another payment. These three comments are based on prior comments to proposed § 1041.2(a)(7), with certain revisions made for consistency and form.

Comment 3(b)(2)–4 is new and provides that open-end loans are considered to be covered longer-term balloon-payment loans under § 1041.3(b)(2)(ii) if: either the loan has a billing cycle with more than 45 days and the full balance is due in each billing period, or the credit plan is structured such that paying the required minimum payment may not fully amortize the outstanding balance by a specified date or time, and the amount of the final payment to repay the outstanding balance at such time could be more than twice the amount of other minimum payments under the plan. An example is provided to show how this works for an open-end loan, in light of particular credit limits, monthly billing cycles, minimum payments due, fees or interest, and payments made, to determine whether the credit plan is a covered loan and why.

3(b)(3)

As noted above, proposed § 1041.3(b)(2) encompassed both covered longer-term balloon-payment loans and certain other covered longer-term loans. Because the Bureau is finalizing a separate definition of covered longer-term balloon-payment loans in § 1041.3(b)(2), new § 1041.3(b)(3) of the final rule addresses covered loans that are neither covered short-term loans nor covered longer-term balloon-payment loans, but rather are covered longer-term loans that are only subject to provisions of the rule relating to payment practices.

Specifically, proposed § 1041.3(b)(2) would have extended coverage to longer-term loans with a total cost of credit exceeding a rate of 36 percent per annum if the lender or service provider also obtains a leveraged payment mechanism as defined in proposed § 1041.3(c) or vehicle security as defined in proposed § 1041.3(d) in connection with the loan before, at the same time, or within 72 hours after the consumer receives the entire amount of funds that the consumer is entitled to receive. Under proposed § 1041.2(a)(8), this type of covered loan would have been defined as a covered longer-term loan.

The Bureau received extensive comments on covered longer-term loans, but key changes in the final rule mitigate most of the points made in those comments. As discussed above in connection with § 1041.2(a)(8), many commenters offered views on the prongs of the definition of covered longer-term loan as triggers for whether such loans should be subject not only to the payment requirements of part 1041 but also its underwriting requirements. As just discussed above and discussed more fully in part I and in Market Concerns—Underwriting, the Bureau has decided not to apply these underwriting requirements to longer-term loans unless they involve balloon payments as defined in §§ 1041.2(a)(7) and 1041.3(b)(2). However, the Bureau believes that such longer-term loans may still pose substantial risk to consumers with regard to certain lender payment practices, and therefore is finalizing subpart C of the rule to apply to covered longer-term loans. It thus remains relevant to describe the parameters of such loans in § 1041.3(b)(3) of the final rule, which continues to provide the substantive content for the parallel definition of covered longer-term loans in § 1041.2(a)(8) of the final rule.

In light of this decision about the policy interventions, the Bureau has also decided to narrow the definition of covered longer-term loans relative to the proposal both by relaxing the rate threshold and narrowing the focus to only loans involving the taking of a leveraged payment mechanism. Thus, § 1041.3(b)(3) of the final rule defines covered longer-term loans as loans that do not meet the definition of covered short-term loans under § 1041.3(b)(1) or of covered longer-term balloon-payment loans under § 1401.3(b)(2); for all remaining covered loans, two further limitations that were contained in the proposed rule apply, so that a loan only becomes a covered longer-term loan if both of the following conditions are also satisfied: The cost of credit for the loan exceeds a rate of 36 percent per annum, as measured in specified ways; and the lender or service provider obtains a leveraged payment mechanism as defined in § 1041.3(c) of the final rule.

As described above in connection with the definition of cost of credit in § 1041.2(a)(6), the Bureau has decided to relax the rate threshold in the final rule by basing the threshold on the annual percentage rate as defined in Regulation Z rather than the total cost of credit concept used in the Military Lending Act. The final rule retains the numeric threshold of 36 percent, however, since, as the proposal explained more fully, that annual rate is grounded in many established precedents of Federal and State law.

With regard to the taking of leveraged payment mechanisms or vehicle security as part of the definition of covered longer-term loan, as discussed in more detail below in connection with

§ 1041.3(c), the Bureau has narrowed the definition to focus solely on loans that involve types of leveraged payment mechanisms that enable a lender to pull funds directly from a consumer's account. Accordingly, a loan that involves vehicle security may be a covered longer-term loan if it involves a leveraged payment mechanism under § 1041.3(c), but not because it involves vehicle security in its own right.

The final rule also modifies and clarifies certain details of timing about when status as a covered longer-term loan is determined, in light of the fact that such loans are only subject to the payment requirements under the final rule. With regard to the rate threshold, it is measured at the time of consummation for closed-end credit. For open-end credit, it is measured at consummation and, if the cost of credit at consummation is not more than 36 percent per annum, again at the end of each billing cycle for open-end credit. Once open-end credit meets the threshold, it is treated as doing so for the duration of the plan. The rule also provides a rule for calculating the cost of credit in any billing cycle in which a lender imposes a charge included in the cost of credit where the principal balance is $0. The definition of leveraged payment mechanisms is also truncated, as mechanisms based on access to employer payments or payroll deduction repayments are no longer germane to a policy intervention that is limited solely to the payment practices in § 1041.8 of the final rule. Also, vehicle security is no longer relevant to determining coverage of longer-term loans. The Bureau has also omitted language providing a 72-hour window for determining coverage as a longer-term loan from the final rule, as that was driven largely by the need for certainty on underwriting. In short, the two major modifications to this provision as it had been set forth in the proposal are further clarification of how the 36 percent rate is measured for open-end credit and the removal of any references to vehicle security and other employment-based sources of repayment.

The commentary to proposed § 1041.3(b)(2) has been extensively revised in light of the other restructuring that has occurred in § 1041.3(b) of the final rule. To summarize briefly, comments 3(b)(3)–1 to 3(b)(3)–3 and 3(b)(3)(ii)–1 to 3(b)(3)(ii)–2 largely recapitulate the provisions of § 1041.3(b)(3) of the final rule in greater detail, as well as clarifying their practical application through a series of examples. Two key points of clarification, however, concern timing. First, comment 3(b)(3)–3 makes clear that a loan may become a covered longer-term loan at any such time as both requirements of § 1041.3(b)(3)(i) and (ii) are met, even if they were not met when the loan was initially made. Second, comment 3(b)(3)(ii)–1 states that the condition in § 1041.3(b)(3)(ii) is satisfied if a lender or service provider obtains a leveraged payment mechanism before, at the same time as, or after the consumer receives the entire amount of funds that the consumer is entitled to receive under the loan, regardless of the means by which the lender or service provider obtains a leveraged payment mechanism.

For the reasons stated in view of the comments, the Bureau is finalizing § 1041.3(b)(3) and the commentary as described above.

3(c) Leveraged Payment Mechanism

Proposed § 1041.3(c) would have set forth three ways that a lender or a service provider could obtain a leveraged payment mechanism that, if other conditions were met under proposed § 1041.3(b)(2), would bring a longer-term loan within the proposed coverage of proposed part 1041. Specifically, the proposal would have treated a lender as having obtained a leveraged payment mechanism if the lender or service provider had the right to initiate a transfer of money from the consumer's account to repay the loan, the contractual right to obtain payment from the consumer's employer or other payor of expected income, or required the consumer to repay the loan through payroll deduction or deduction from another source of income. In all three cases, the consumer would be required, under the terms of an agreement with the lender or service provider, to cede autonomy over the consumer's account or income stream in a way that the Bureau believed, as stated in the proposal, would change incentives to determine the consumer's ability to repay the loan and can exacerbate the harms the consumer experiences if the consumer does not have the ability to repay the loan and still meet the consumer's basic living expenses and major financial obligations. As explained in the section-by-section analysis of proposed §§ 1041.8 and 1041.9, the Bureau preliminarily found that it is an unfair and abusive practice for a lender to make such a loan without determining that the consumer has the ability to repay.

Proposed § 1041.3(c)(1) generally would have provided that a lender or a service provider obtains a leveraged payment mechanism if it has the right to initiate a transfer of money, through any means, from a consumer's account (as defined in proposed § 1041.2(a)(1)) to satisfy an obligation on a loan. For example, this would occur with a post-dated check or preauthorization for recurring electronic fund transfers. However, the proposed regulation did not define leveraged payment mechanism to include situations in which the lender or service provider initiates a one-time electronic fund transfer immediately after the consumer authorizes such transfer.

In the proposal, the functionality of this determination was that it served as one of three preconditions to the underwriting of such covered longer-term loans, along with the provisions of proposed § 1041.3(c)(2) and (3). In light of other changes to the proposed rule, however, the final rule is no longer covering the underwriting of covered longer-term loans (other than balloon-payment loans), but simply determining whether they are subject to the intervention for payment practices in § 1041.8 of the final rule. As described above, as a result of the decision to apply only the rule's payment requirements to covered-longer term loans, the Bureau is not finalizing the provisions of proposed § 1041.3(c)(2) and (3), which covered payment directly from the employer and repayment through payroll deduction, respectively, as they are no longer germane to the purpose of this policy intervention. With the elimination of those two provisions, § 1041.3(c)(1) is being reorganized more simply as just part of § 1041.3(c) of the final rule to focus on forms of leveraged payment mechanism that involve direct access to consumers' transaction accounts.

Proposed § 1041.3(c)(1) generally would have provided that a lender or a service provider obtains a leveraged payment mechanism if it has the right to initiate a transfer of money, through any means, from a consumer's account (as defined in proposed § 1041.2(a)(1)) to satisfy an obligation on a loan. For example, this would occur with a post-dated check or preauthorization for recurring electronic fund transfers. However, the proposed regulation did not define leveraged payment mechanism to include situations in which the lender or service provider initiates a one-time electronic fund transfer immediately after the consumer authorizes such transfer.

As proposed comment 3(c)(1)–1 explained, the key principle that makes a payment mechanism leveraged is whether the lender has the ability to ''pull'' funds from a consumer's account without any intervening action or further assent by the consumer. In those cases, the lender's ability to pull

payments from the consumer's account gives the lender the ability to time and initiate is to coincide with expected income flows into the consumer's account. This means that the lender may be able to continue to obtain payment (as long as the consumer receives income and maintains the account) even if the consumer does not have the ability to repay the loan while meeting his or her major financial obligations and basic living expenses. In contrast, the Bureau stated in the section-by-section analysis of proposed § 1041.3(c)(1) that a payment mechanism in which the consumer ''pushes'' funds from his or her account to the lender does not provide the lender leverage over the account in a way that changes the lender's incentives to determine the consumer's ability to repay the loan or exacerbates the harms the consumer experiences if the consumer does not have the ability to repay the loan.

Proposed comment 3(c)(1)–2 provided examples of the types of authorizations for lender-initiated transfers that constitute leveraged payment mechanisms. These include checks written by the consumer, authorizations for electronic fund transfers (other than immediate one-time transfers as discussed further below), authorizations to create or present remotely created checks, and authorizations for certain transfers by account-holding institutions (including a right of set-off). Proposed comment 3(c)(1)–4 explained that a lender does not obtain a leveraged payment mechanism if a consumer authorizes a third party to transfer money from the consumer's account to a lender as long as the transfer is not made pursuant to an incentive or instruction from, or duty to, a lender or service provider. Proposed comment 3(c)(1)–3 contained similar language.

As noted above, proposed § 1041.3(c)(1) provided that a lender or service provider does not obtain a leveraged payment mechanism by initiating a one-time electronic fund transfer immediately after the consumer authorizes the transfer. This provision is similar to what the Bureau proposed in § 1041.15(b), which exempts lenders from providing the payment notice when initiating a single immediate payment transfer at the consumer's request, as that term is defined in proposed § 1041.14(a)(2), and is also similar to what the Bureau proposed in § 1041.14(d), which permits lenders to initiate a single immediate payment transfer at the consumer's request even after the prohibition in proposed § 1041.14(b) on initiating further payment transfers has been triggered.

Accordingly, proposed comment 3(c)(1)–3 clarified that if the loan agreement between the parties does not otherwise provide for the lender or service provider to initiate a transfer without further consumer action, the consumer may authorize a one-time transfer without causing the loan to be a covered loan. Proposed comment 3(c)(1)–3 further clarified that the term ''immediately'' means that the lender initiates the transfer after the authorization with as little delay as possible, which in most circumstances will be within a few minutes. Proposed comment 3(c)(1)–4 took the opposite perspective, noting that a lender or service provider does not initiate a transfer of money from a consumer's account if the consumer authorizes a third party, such as a bank's automatic bill pay service, to initiate a transfer of money from the consumer's account to a lender or service provider as long as the third party does not transfer the money pursuant to an incentive or instruction from, or duty to, a lender or service provider.

In the proposal, the Bureau noted that it anticipated that scenarios involving authorizations for immediate one-time transfers would only arise in certain discrete situations. For closed-end loans, a lender would be permitted to obtain a leveraged payment mechanism more than 72 hours after the consumer has received the entirety of the loan proceeds without the loan becoming a covered loan. Thus, in the closed-end context, this exception would only be relevant if the consumer was required to make a payment within 72 hours of receiving the loan proceeds—a situation which is unlikely to occur. However, the Bureau acknowledged that the situation may be more likely to occur with open-end credit. According to the proposal, longer-term open-end loans could be covered loans if the lender obtained a leveraged payment mechanism within 72 hours of the consumer receiving the full amount of the funds which the consumer is entitled to receive under the loan. Thus, if a consumer only partially drew down the credit plan, but the consumer was required to make a payment, a one-time electronic fund transfer could trigger coverage without the one-time immediate transfer exception.

The Bureau received a few comments on § 1041.3(c)(1) of the proposed rule and the related commentary. One commenter contended that the definition of leveraged payment mechanism is overly broad as between different types of push and pull transactions. Another commenter claimed that the Bureau was improperly attributing motive to the practices of different types of lenders that were using the same leveraged payment mechanisms, that its treatment of leveraged payment mechanisms would have more than a minimal effect on lenders that were already engaged in substantial underwriting, and that the proposed rule and commentary were misaligned with respect to transactions that push or pull money from the consumer's account.

In response to these comments, the Bureau concludes that, in general, its definition is reasonably calibrated to address the core practice at issue here, which is a lender or service provider establishing a right to initiate payment directly from the consumer without any intervening action or further assent from the consumer, subject to certain narrow limitations. The definition of leveraged payment mechanism thus is not overbroad for the purposes served by the rule. As for the final set of comments, the Bureau did not undertake any inquiry or determine any of these issues based on speculation about the motivations of particular lenders; rather, it presumed that lenders that secure leveraged payment mechanisms do so for a mix of reasons. The Bureau also acknowledges at least some tension between the proposed rule and the related commentary in their treatment of push and pull transactions from a consumer's account. On further consideration, however, the Bureau has concluded that with the focus now solely on payment practices, push transactions are no longer germane to the analysis and thus has revised proposed comments 3(c)(1)–1 and 3(c)(1)–4 accordingly.

In light of these comments received and the responses, the Bureau is finalizing proposed § 1041.3(c)(1) as part of § 1041.3(c), and is revising the definition of leveraged payment mechanism to align more closely with the rule's payment provisions. Specifically, the Bureau is revising the proposed language that would have excluded a one-time immediate transfer from the definition. Under the definition as finalized, the exception applies if the lender initiates a single immediate payment transfer at the consumer's request, as defined in § 1041.8(a)(2). As discussed in the section-by-section analysis of §§ 1041.8 and 1041.9, transfers meeting the definition of a single immediate payment transfer at the consumer's request are excluded from the cap on failed payment attempts and the payment notice requirements. The Bureau has concluded that using the same definition for purposes of

excluding certain transfers from the definition of leveraged payment mechanism is important for the consistency of the rule.

One practical result of this revision is that, whereas the proposed exclusion from the definition of leveraged payment mechanism would have applied only to a one-time electronic fund transfer, the exclusion as finalized permits the lender to initiate an electronic fund transfer or process a signature check without triggering coverage under § 1041.3(b)(3), provided that the lender initiates the transfer or processes the signature check in accordance with the timing and other conditions in § 1041.8(a)(2). The Bureau notes, however, that the definition of single immediate payment transfer at the consumer's request applies only to the first time that a lender initiates the electronic fund transfer or processes the signature check pursuant to the exception. It does not apply to the re-presentment or re-submission of a transfer or signature check that is returned for nonsufficient funds. If a transfer or signature check is returned, the lender could still work with the consumer to obtain payment in cash or to set up another transfer meeting the definition of single immediate payment transfer at the consumer's request.

The Bureau is finalizing the remainder of the commentary to this provision, which is reordered as comments 3(c)–1 to 3(c)–4 of the final rule, with revisions to the language consistent with the revisions made to the definition of leverage payment mechanism in § 1041.3(c).

3(d) Exclusions for Certain Credit Transactions

As discussed above, the Bureau decided to narrow how part 1041 applies to covered longer-term loans to focus only on payment practices. Accordingly, the detailed discussion of vehicle security that appeared in proposed § 1041.3(d) in connection with the definition of covered longer-term loan under proposed § 1041.3(b)(2) is no longer germane to the final rule. As noted in the section-by-section analysis of § 1041.2(a)(19) of the final rule, the Bureau has now moved certain language from proposed § 1041.3(d) describing vehicle security to § 1041.2(a)(19) of the final rule, since vehicle security is relevant to application to § 1041.6 of the final rule. Thus the remainder of § 1041.3 is being renumbered, and all references to the provisions of proposed § 1041.3(e) have now been finalized as § 1041.3(d), with further revisions and additions as described below.

Proposed § 1041.3(e) would have excluded specific types of credit from part 1041, specifically purchase money security interest loans extended solely for the purchase of a good, real estate secured loans, certain credit cards, student loans, non-recourse pawn loans in which the consumer does not possess the pledged collateral, and overdraft services and overdraft lines of credit. The Bureau found as a preliminary matter that notwithstanding the potential term, cost of credit, repayment structure, or security of these loans, they arise in distinct markets that may pose a somewhat different set of concerns for consumers. At the same time, the Bureau was concerned about the risk that these exclusions could create avenues for evasion of the proposed rule. In the Accompanying RFI, the Bureau also solicited information and additional evidence to support further assessment of whether other categories of loans may pose risks to consumers where lenders do not determine the consumer's ability to repay. The Bureau also emphasized that it may determine in a particular supervisory or enforcement matter or in a later rulemaking, in light of evidence available at the time, that the failure to assess ability to repay when making a loan excluded from coverage here may nonetheless be an unfair or abusive act or practice.

The Bureau did not receive any comments on the brief opening language in § 1041.3(e) of the proposed rule, and is finalizing the language which notes that the exclusions listed in § 1041.3(d) of the final rule apply to certain transactions, with slight modifications for clarity.

The Bureau did, however, receive some general comments about the topic of exclusions from the scope of coverage of the proposed rule. First, various consumer groups argued that there should be no exclusions or exemptions from coverage under the rule, which would weaken its effectiveness.

A ''fintech'' company urged the Bureau to develop a ''sandbox'' type of model to allow innovation and to encourage the development of alternative loan models. Another such company offered a more complicated and prescriptive regulatory scheme establishing a safe harbor, lifting income verification requirements for loans with low loss rates and loans with amortizing payment plans, and full relief from cooling-off periods if borrowers repay their loans on time with their own money. One commenter during the SBREFA process argued for a broad exemption from the rule for payday lenders in States that permit such loans pursuant to existing regulatory frameworks governing payday lending. Another sought an exemption for Tribal lenders, asserting that the Bureau lacked statutory authority to treat them as covered by the rule. Many finance companies, and others commenting on their behalf, offered reasons why the Bureau should omit traditional installment loans from coverage under the rule; they also presented different formulations of how this result could be achieved.

The Bureau does not agree that the exclusions listed in the proposal should be eliminated, for all the reasons set out in the discussion of those specific exclusions below (and notes that a further exclusion and two conditional exemptions have been added to or revised from the proposed rule). As for the notion of a ''sandbox'' approach to financial innovation, the Bureau has developed its own approach to these issues, having created and operated its Project Catalyst for several years now as a means of carrying out the Bureau's statutory objective to ensure that ''markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.'' [435] The suggestion that a distinct and highly prescriptive regulatory approach should be adopted in preference to the framework actually set out in the proposal is not supported by any data or analysis of this market.

The arguments for an exemption of payday lender in those States where they are permitted to make such loans are directly contrary to all of the data and analysis contained in the extended discussions above in part II and below in Market Concerns—Underwriting. All of the risks and harms that the Bureau has identified from covered loans occur, by definition, in those States that authorize such lending, rather than in the 15 States and the District of Columbia that have effectively banned such lending under their State laws. The arguments raised on behalf of Tribal lenders have also been raised in Tribal consultations that the Bureau has held with federally recognized Indian tribes, as discussed in part III, and rest on what the Bureau believes is a misreading of the statutes and of governing Federal law and precedents governing the scope of Tribal immunity.[436]

[435] 12 U.S.C. 5511(b)(5). More information about Project Catalyst is available on the Bureau's Web site at *https://www.consumerfinance.gov/about-us/project-catalyst/* (last visited Sept. 24, 2017).

[436] *See, e.g., CFPB* v. *Great Plains Lending,* 846 F.3d 1049 (9th Cir. 2017), *reh'g denied* (Apr. 5, 2017) (court of appeals affirmed district court ruling

Continued

As for the points raised by finance companies and others about traditional installment loans, they are largely being addressed by various modifications to the proposed rule, including by not imposing underwriting requirements for covered longer-term loans (other than covered longer-term balloon-payment loans), by adopting the exclusions and conditional exemptions, and, as some commenters suggested, by adopting the definition of cost of credit under TILA in place of the definition of total cost of credit in the proposed rule.

3(d)(1) Certain Purchase Money Security Interest Loans

Proposed § 1041.3(e)(1) would have excluded from coverage under proposed part 1041 loans extended for the sole and express purpose of financing a consumer's initial purchase of a good when the good being purchased secures the loan. Accordingly, loans made solely to finance the purchase of, for example, motor vehicles, televisions, household appliances, or furniture would not be subject to the consumer protections imposed by proposed part 1041 to the extent the loans are secured by the good being purchased. Proposed comment 3(e)(1)–1 explained the test for determining whether a loan is made solely for the purpose of financing a consumer's initial purchase of a good. If the item financed is not a good or if the amount financed is greater than the cost of acquiring the good, the loan is not solely for the purpose of financing the initial purchase of the good. Proposed comment 3(e)(1)–1 further explained that refinances of credit extended for the purchase of a good do not fall within this exclusion and may be subject to the requirements of proposed part 1041.

Purchase money loans are typically treated differently than non-purchase money loans under the law. The FTC's Credit Practices Rule generally prohibits consumer credit in which a lender takes a nonpossessory security interest in household goods but makes an exception for purchase money security interests.[437] The Federal Bankruptcy Code, the UCC, and some other State laws also apply different standards to purchase money security interests. This differential treatment facilitates the financing of the initial purchase of relatively expensive goods, which many consumers would not be able to afford without a purchase money loan. In the proposal, the Bureau stated that it had not yet determined whether purchase money loans pose similar risks to consumers as the loans covered by proposed part 1041. Accordingly, the Bureau proposed not to cover such loans at this time.

A number of commenters expressed concern about the proposal's use of a sole purpose test for determining when a loan made to finance the consumer's initial purchase of a good gives rise to a purchase money security interest. Other alternatives were suggested, including a primary purpose test or perhaps the definition used in the UCC adopted in many States. Some commenters expressed concerns about motor vehicle purchases, in particular, noting that where the amount financed includes not simply the vehicle itself, but also the costs of ancillary products such as an extended service contract or a warranty, or other related costs such as taxes, tags, and title, it may be unclear whether the loan would lose its status as a purchase money security interest loan and become a covered loan instead. Others contended that covering the refinancing of credit that was extended for the purchase of a good could seem inconsistent with the terms of the exclusion itself, and could also bring back within the proposed rule's scope of coverage many motor vehicle loans where the total cost of credit would exceed a rate of 36 percent per annum. These commenters again were particularly concerned about motor vehicle loans, which they noted often exceed a 100 percent lien-to-value ratio because additional products, such as add-on products like extended warranties, are often financed along with the price of the vehicle.

In response to these comments, the Bureau streamlined and added language to proposed comment 3(e)(1)–1 to specify that a loan qualifies for this exclusion even if the amount financed under the loan includes Federal, State, or local taxes or amounts required to be paid under applicable State and Federal licensing and registration requirements. The Bureau recognized that these mandatory and largely unavoidable items should not cause a loan to lose its excluded status. Yet the same considerations do not apply to ancillary products that are being sold along with a vehicle or other household good, but are not themselves the good in which the lender takes a security interest as a condition of the credit. As to the concern about refinances of credit extended for the purchase of a good, and especially the concern that this provision could bring back within the proposed rule's scope of coverage many motor vehicle loans where the total cost of credit would exceed a rate of 36 percent per annum, the Bureau concluded that other changes made elsewhere in the final rule largely mitigate these concerns. In particular, the Bureau notes that the definition of total cost of credit in § 1041.2(a)(18) of the proposed rule has now been replaced with the definition of cost of credit in § 1041.2(a)(6) of the final rule, which aligns this term with Regulation Z. The Bureau also notes that these concerns about refinancing are most applicable to covered longer-term loans, which are no longer subject to underwriting criteria in the final rule (with the exception of covered longer-term balloon-payment loans). And though they are subject to the payment provisions, other changes in the coverage and the scope of the exceptions for certain payment transfers mitigate the effects for credit unions, in particular, that were the source of many of the comments on this issue.

For these reasons, the Bureau is finalizing the regulation text as proposed, and the revised commentary as explained above as § 1041.3(d)(1) in the final rule.

3(d)(2) Real Estate Secured Credit

Proposed § 1041.3(e)(2) would have excluded from coverage under proposed part 1041 loans that are secured by real property, or by personal property used as a dwelling, and in which the lender records or perfects the security interest. The Bureau stated that even without this exclusion, very few real estate secured loans would meet the coverage criteria set forth in proposed § 1041.3(b). Nonetheless, the Bureau preliminarily found that a categorical exclusion would be appropriate. For the most part, these loans are already subject to Federal consumer protection laws, including, for most closed-end loans, ability-to-repay requirements under Regulation Z § 1026.43. The proposed requirement that the security interest in the real estate be recorded or perfected also strongly discourages attempts to use this exclusion for sham or evasive purposes. Recording or perfecting a security interest in real estate is not a cursory exercise for a lender—recording fees are often charged and documentation is required. As proposed comment 3(e)(2)–1 explained, if the lender does not record or otherwise perfect the security interest in the property during the term of the loan, the loan does not fall under this exclusion and may be subject to the requirements of proposed part 1041. The Bureau did not receive any comments on this portion of the proposed rule, and is

that Tribal Lending Entities must comply with civil investigative demands issued by the CFPB); *see also Otoe-Missouria Tribe of Indians* v. *New York State Dep't of Fin. Servs.,* 769 F.3d 105, 107 (2d Cir. 2014); *Donovan* v. *Coeur d'Alene Tribal Farms,* 751 F.2d 1113, 1115 (9th Cir. 1985).

[437] 16 CFR 444.2(a)(4).

finalizing this exclusion and the commentary as proposed, with formatting changes only.

3(d)(3) Credit Cards

Proposed § 1041.3(e)(3) would have excluded from coverage under proposed part 1041 credit card accounts meeting the definition of credit card account under an open-end (not home-secured) consumer credit plan in Regulation Z § 1026.2(a)(15)(ii), rather than products meeting the more general definition of credit card accounts under Regulation Z § 1026.2(a)(15). By focusing on the narrower category, the exclusion would apply only to credit card accounts that are subject to the Credit CARD Act of 2009,[438] which provides various heightened safeguards for consumers. These protections include a limitation that card issuers cannot open a credit card account or increase a credit line on a card account unless the card issuer first considers the consumer's ability to repay the required payments under the terms of the account, as well as other protections such as limitations on fees during the first year after account opening, late fee restrictions, and a requirement that card issuers give consumers a reasonable amount of time to pay their bill.[439]

The Bureau preliminarily found that potential consumer harms related to credit card accounts are more appropriately addressed by the CARD Act, its implementing regulations, and other applicable law. At the same time, if the Bureau were to craft a broad exclusion for all credit cards as generally defined under Regulation Z, the Bureau would be concerned that a lender seeking to evade the requirements of the rule might seek to structure a product in a way that is designed to take advantage of this exclusion. The Bureau therefore proposed a narrower definition, focusing only on those credit card accounts that are subject to the full range of protections under the CARD Act and its implementing regulations. Among other requirements, the regulations imposing the CARD Act prescribe a different ability-to-repay standard that lenders must follow, and the Bureau found as a preliminary matter that the combined consumer protections governing credit card accounts subject to the CARD Act are sufficient for that type of credit.

One commenter stated that all credit cards should be excluded from coverage under the rule, not just those subject to the CARD Act. Another industry commenter found it noteworthy that credit cards are not covered under the rule even though they can result in a cycle of debt. Consumer groups argued that this exclusion should be narrowed to lower-cost mainstream credit cards in harmony with the provisions of the Military Lending Act and implementing regulations. Other narrowing categories were also suggested in that comment.

For all the reasons stated in the proposal, the Bureau does not find it sensible to expand coverage in this exclusion beyond those credit cards that are subject to the various heightened safeguards and protections for consumers in the CARD Act. At the same time, the reasons for drawing the boundaries of this exclusion around that particular universe of credit cards also militate against narrowing the scope of the exclusion further. Accordingly, the Bureau is finalizing this exclusion as proposed, with formatting changes only. The Bureau notes that ''hybrid prepaid-credit card'' products, which are treated as open-end (not home-secured) consumer credit plans under the final prepaid accounts rule, will be excluded from the scope of this final rule under § 1041.3(d)(3).[440]

3(d)(4) Student Loans

Proposed § 1041.3(e)(4) would have excluded from coverage under proposed part 1041 loans made, insured, or guaranteed pursuant to a Federal student loan program, and private education loans. The Bureau stated that even without this exclusion, very few student loans would meet the coverage criteria set forth in proposed § 1041.3(b). Nonetheless, the Bureau preliminarily determined that a categorical exclusion is appropriate. Federal student loans are provided to students or parents meeting eligibility criteria established by Federal law and regulations, such that the protections afforded by this proposed rule would be unnecessary. Private student loans are sometimes made to students based on their future potential ability to repay (as distinguished from their current ability), but they are typically co-signed by a party with financial capacity. These loans raise discrete issues that may warrant further attention in the future, but the Bureau found as a preliminary matter that they were not appropriately considered along with the types of loans at issue in this rulemaking. The Bureau stated in the proposal that it would continue to monitor the student loan servicing market for trends and developments; for unfair, deceptive, or abusive practices; and to evaluate possible policy responses, including potential rulemaking.

Consumer groups contended that student loans should not be excluded from coverage under the rule. They noted that the effect of deleting this exclusion would likely be limited to private education loans, since the total cost of credit for Federal student loans in the proposed rule would likely not exceed a rate of 36 percent per annum. The Bureau continues to judge that student loans are specialized in nature, are subject to certain other regulatory constraints more specifically contoured to the loan product, and are generally not appropriately considered among the types of loans at issue here. The Bureau did not receive any other comments on this portion of the proposed rule, and is finalizing this exclusion as proposed, with formatting changes only.

3(d)(5) Non-Recourse Pawn Loans

Proposed § 1041.3(e)(5) generally would have excluded from coverage, under proposed part 1041, loans secured by pawned property in which the lender has sole physical possession and use of the pawned property for the entire term of loan, and for which the lender's sole recourse if the consumer does not redeem the pawned property is the retention and disposal of the property. Proposed comment 3(e)(5)–1 explained that if any consumer, including a co-signor or guarantor, is personally liable for the difference between the outstanding loan balance and the value of the pawned property, then the loan does not fall under this exclusion and may be subject to the requirements of proposed part 1041.

The Bureau preliminarily found that bona fide, non-recourse pawn loans generally pose somewhat different risks to consumers than loans covered under proposed part 1041. As described in part II, non-recourse pawn loans involve the consumer physically relinquishing control of the item that secures the loan during the term of the loan. The Bureau stated that consumers may be more likely to understand and appreciate the risks associated with physically turning over an item to the lender when they are required to do so at consummation. Moreover, in most situations, the loss of a non-recourse pawned item over which the lender has sole physical possession during the term of the loan is less likely to affect the rest of the consumer's finances than is either a leveraged payment mechanism or vehicle security. For instance, a pawned item of this nature may be valuable to the consumer, but the consumer most likely does not rely on the pawned item for

---

[438] Public Law 111–24, 123 Stat. 1734 (2009).

[439] 15 U.S.C. 1665e; *see also* 12 CFR 1026.51(a); supplement I to 12 CFR part 1026.

[440] 81 FR 83934 (Nov. 22, 2016).

transportation to work or to pay basic living expenses or major financial obligations. Otherwise, the consumer likely would not have pawned the item under those terms. Finally, because the loans are non-recourse, in the event that a consumer is unable to repay the loan, the lender must accept the pawned item as fully satisfying the debt, without further collection activity on any remaining debt obligations. In all of these ways, the Bureau stated in the proposal that pawn transactions appear to differ significantly from the secured loans that would be covered under proposed part 1041.

One commenter claimed that the same reasons for excluding non-recourse pawn loans applies to vehicle title loans, and that vehicle title loans may even be preferred by consumers as the consumer retains the use of the vehicle and they can be less costly. Another similarly argued that the Bureau ignored the principle of a level playing field among different financial products by excluding high-cost alternatives like pawn loans, which can be even more costly at times than payday loans. Consumer groups suggested that the exclusion should be narrowed only to pawn loans where the loan does not exceed the fair market value of the good.

Another commenter representing pawnbrokers argued that the exclusion for pawn loans is justified because pawn transactions function as marketed, they are less likely than other loan products to affect the rest of the consumer's finances, consumers do not experience very high default rates or aggressive collection efforts, certain other harms identified in the proposal do not occur in the pawn market, State and local government regulation is working well, consumers are given clear disclosures on their pawn ticket, and loan terms are longer than the typical 14-day payday loan.

The Bureau does not find that these comments justify any modifications to this provision, and therefore finalizes the exclusion and the commentary as proposed, with formatting changes only. The first two comments do not provide any tangible support for eliminating the rationale for the exclusion of non-recourse pawn loans, and issues involving vehicle title loans are addressed elsewhere, as in Market Concerns—Underwriting, which describes the special risks and harms to consumers of repossession of their vehicle, which would potentially cause them to lose their basic transportation to work and to manage their everyday affairs. The suggestion that certain pawn loans should be covered loans depending on the relationship between the amount of the loan and the fair market value of the good would introduce needless complexity into the rule without discernible benefits. The Bureau notes that non-recourse pawn loans had previously been referenced in the definition of non-covered bridge loan in proposed § 1041.2(a)(13), which has now been omitted from the final rule. To the extent that provision would have restricted the making of such loans in connection with the underwriting criteria for covered longer-term loans, those provisions are not being included in the final rule. To the extent that provision would have restricted the making of such loans in connection with the requirements in the rule for making covered short-term or longer-term balloon-payment loans, the Bureau concludes that various other changes made in §§ 1041.5 and 1041.6 address the subject of those restrictions in ways that obviate the need for defining the term non-covered bridge loan. However, note that any type of loan, including pawn loans, if used to bridge between multiple covered short-term loans or covered longer-term balloon-payment loans, are factors which could indicate that a lender's ability-to-repay determinations are unreasonable. *See* comment 5(b)–2.

3(d)(6) Overdraft Services and Lines of Credit

Proposed § 1041.3(e)(6) would have excluded from coverage under proposed part 1041 overdraft services on deposit accounts as defined in 12 CFR 1005.17(a), as well as payments of overdrafts pursuant to a line of credit subject to Regulation Z, 12 CFR part 1026. Proposed comment 3(e)(6)–1 noted that institutions could rely on the commentary to 12 CFR 1005.17(a) in determining whether credit is an overdraft service or an overdraft line of credit that is excluded from the requirements of part 1041. Overdraft services generally operate on a consumer's deposit account as a negative balance, where the consumer's bank processes and pays certain payment transactions for which the consumer lacks sufficient funds in the account and imposes a fee for the service as an alternative to either refusing to authorize the payment (in the case of most debit and ATM transactions and ACH payments initiated from the consumer's account) or rejecting the payment and charging a non-sufficient funds fee (in the case of other ACH payments as well as paper checks). Overdraft services have been treated separately from the provisions of Regulation Z in certain circumstances, and are subject to specific rules under EFTA and the Truth in Savings Act (TISA) and their respective implementing regulations.[441] In contrast, overdraft lines of credit are separate open-end lines of credit under Regulation Z that have been linked to a consumer's deposit account to provide automatic credit draws to cover the processing of payments for which the funds in the deposit account are insufficient.

As discussed above in part II, the Bureau is engaged in research and other activity in anticipation of a separate rulemaking on overdraft products and practices.[442] Given that overdraft services and overdraft lines of credit involve complex overlays with rules about payment processing, deposit accounts, set-off rights, and other forms of depository account access, the Bureau preliminarily found that any discussion of whether additional regulatory protections are warranted for those two products should be reserved for that rulemaking. Accordingly, the Bureau proposed excluding both types of overdraft products from the scope of this rule, using definitional language from Regulation E to distinguish both overdraft services and overdraft lines of credit from other types of depository credit products.

One industry commenter argued that the Bureau ignored the principle of a level playing field among different financial products by excluding high-cost alternatives like overdraft, which can be even more costly at times than payday loans. Consumer groups argued that the Bureau should eliminate this exclusion or limit it in various ways. The Bureau maintains the analysis presented in the proposed rule to conclude that overdraft services and lines of credit are unique products with a distinct regulatory history and treatment, which should be excluded from this rule and addressed on their own as a matter of supervision, enforcement, and regulation. The Bureau also did not find persuasive the suggestion that overdraft services and lines of credit should be covered in some partial manner, which would introduce needless complexity into the rule without discernible benefits. Having received no other comments on this portion of the proposed rule, the Bureau is finalizing this exclusion and the commentary as proposed, with formatting changes only.

[441] 74 FR 59033 (Nov. 17, 2009) (EFTA); 70 FR 29582 (May 24, 2005) (TISA).

[442] CFPB Study of Overdraft Programs White Paper; Checking Account Overdraft.

3(d)(7) Wage Advance Programs

Based on prior discussions with various stakeholders, the Bureau solicited and received comments in the proposal in connection with the definition of lender under proposed § 1041.2(a)(11) about some newly formed companies that are seeking to develop programs that provide innovative access to consumers' wages in ways that do not seem to pose the kinds of risks and harms presented by covered loans. Certain of these companies, but by no means all of them, are part of the ''fintech'' wave. Some are developing new products as an outgrowth of businesses focusing mainly on payroll processing, for example, whereas others are not associated with consumers' employers but rather are focused primarily on devising new means of advising consumers about how to improve their approach to cash management. The Bureau has consistently expressed interest in encouraging more experimentation in this space.

In particular, a number of these innovative financial products are seeking to assist consumers in finding ways to draw on the accrued cash value of wages they have earned but not yet been paid. Some of these products are doing so without imposing any fees or finance charges, other than a charge for participating in the program that is designed to cover processing costs. Others are developing different models that may involve fees or advances on wages not yet earned.

The Bureau notes that some efforts to give consumers access to accrued wages may not be credit at all. For instance, when an employer allows an employee to draw accrued wages ahead of a scheduled payday and then later reduces the employee's paycheck by the amount drawn, there is a quite plausible argument that the transaction does not involve ''credit'' because the employee may not be incurring a debt at all. This is especially likely where the employer does not reserve any recourse upon the payment made to the employee other than the corresponding reduction in the employee's paycheck.

Other initiatives are structured in more complicated ways that are more likely to constitute ''credit'' under the definition set forth in § 1041.2(a)(11) and Regulation Z. For example, if an employer cannot simply reduce the amount of an employee's paycheck because payroll processing has already begun, there may be a need for a mechanism for the consumer to repay the funds after they are deposited in the consumer's account.

The Bureau has decided in new § 1041.3(d)(7) to exclude such wage advance programs—to the extent they constitute credit—from coverage under the rule if they meet certain additional conditions. The Bureau notes that the payment of accrued wages on a periodic basis, such as bi-weekly or monthly, appears to be largely driven by efficiency concerns with payroll processing and employers' cash management. In addition, the Bureau believes that the kinds of risks and harms that the Bureau has identified with making covered loans, which are often unaffordable as a result of the identified unfair and abusive practice, may not be present where these types of innovative financial products are subject to appropriate safeguards. Accordingly, where advances of wages constitute credit, the Bureau is adopting § 1041.3(d)(7) to exclude them from part 1041 if the advances are made by an employer, as defined in the Fair Labor Standards Act, 29 U.S.C. 203(d), or by the employer's business partner, to the employer's employees, provided that the following conditions apply:

- The employee is not required to pay any charges or fees in connection with such an advance from the employer or the employer's business partner, other than a charge for participating in the program; and
- The entity advancing the funds warrants that it has no legal or contractual claim or remedy against the employee based on the employee's failure to repay in the event the amount advanced is not repaid in full; will not engage in any debt collection activities if the advance is not deducted directly from wages or otherwise repaid on the scheduled date; will not place the amount advanced as a debt with or sell the debt to a third party; and will not report the debt to a consumer reporting agency concerning the amount advanced.

The Bureau has considered the comments as well as its own analysis of this evolving marketplace and has concluded that new and innovative financial products that meet these conditions will tend not to produce the kinds of risks and harms that the Bureau's final rule is seeking to address with respect to covered loans. At the same time, nothing prevents the Bureau from reconsidering these assumptions in a future rulemaking if there is evidence that such products are harming consumers.

The Bureau has also adopted new commentary. Comment 3(d)(7)–1 notes that wage advance programs must be offered by the employee's employer or the employer's business partner, and examples are provided of such business partners, which could include companies that are involved in providing payroll processing, accounting services, or benefits programs to the employer. Comment 3(d)(7)(i)–1 specifies that the advance must be made only against accrued wages and must not exceed the amount of the employee's accrued wages, and provides further definition around the meaning of accrued wages. Comment 3(d)(7)(ii)(B)–1 clarifies that though the entity advancing the funds is required to warrant that it has no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in the event the amount advanced is not repaid in full, this provision does not prevent the entity from obtaining a one-time authorization to seek repayment from the consumer's transaction account.

For these reasons, the Bureau is adopting the exclusion for wage advance programs as described in § 1041.3(d)(7) of the final rule and the related commentary.

3(d)(8) No-Cost Advances

As discussed above in connection with § 1041.3(d)(7), the Bureau noted in the proposal, in connection with its discussion of the definition of lender in proposed § 1041.2(a)(11), that some newly formed companies are providing products or services that allow consumers to draw on wages they have earned but not yet been paid. Some of these companies are providing advances of funds and are doing so without charging any fees or finance charges, for instance by relying on voluntary tips. The proposal noted that others were seeking repayment and compensation through electronic transfers from the consumer's account. The Bureau sought comment on whether to exclude such entities and similar products from coverage under the rule.

The Bureau received limited comments on this issue, perhaps reflecting that it represents a fairly new business model in the marketplace, with some championing the potential benefits for consumers and others maintaining that no exclusions—or at least no additional exclusions—should be created to the rule as it was proposed. Some comments described in more detail how the evolution of these products was unfolding, how they operate, and how they may affect the marketplace and consumers. The Bureau has also had discussions with stakeholders in connection with its other functions, such as market monitoring, supervision, and general outreach, that have informed its views and understanding of these new products and methods of providing access to funds for more consumers. As discussed above in connection with

§ 1041.3(d)(7), the Bureau is aware that some of these products provide access to the consumer's own funds in the form of earned wages already accrued but not yet paid out because of administrative and payroll processes historically developed by employers, whereas other products rely on estimates of wages likely to be accrued, or accrued on average, and may make advances against expected wages that are not already earned and accrued.

The Bureau has carefully considered the comments it has received on these issues, as well as other information about the market that it has gleaned from the course of its regular activities. The Bureau has addressed certain wage advance programs offered by employers or their business partners in § 1041.3(d)(7), as discussed above. In addition, after further weighing the potential benefits to consumers of this relatively new approach, the Bureau has decided to create a specific exclusion in § 1041.3(d)(8) of the final rule to apply to no-cost advances, regardless of whether they are offered by an employer or its business partner. The exclusion contains similar conditions to § 1041.3(d)(7), except that it applies to advances of funds where the consumer is not required to pay *any* charge or fee (even a fee for participating in the program), and it is not limited to the accrued cash value of the employee's wages. Like § 1041.3(d)(7), the exclusion is further limited to situations in which the entity advancing the funds warrants to the consumer as part of the contract between the parties (i) that it has no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in the event the amount advanced is not repaid in full; and (ii) that with respect to the amount advanced to the consumer, the entity advancing the funds will not engage in any debt collection activities, place the debt with or sell the debt to a third party, or report the debt to a consumer reporting agency if the advance is not repaid on the scheduled date.

The exclusion in § 1041.3(d)(8) is thus designed to apply to programs relying solely on a ''tips'' model or otherwise providing emergency assistance at no cost to consumers. The Bureau estimates, based on its experience with the marketplace for different types of small-dollar loans, that products meeting the conditions of § 1041.3(d)(8) are likely to benefit consumers and unlikely to lead to the risks and harms described below in Market Concerns—Underwriting. Unlike the proposal, the Bureau has decided not to confine such no-fee advances solely to the employee context, as the very specific features of their product structure makes an exclusion from the rule for them likely to be beneficial for consumers across the spectrum. At the same time, nothing prevents the Bureau from reconsidering these assumptions in a future rulemaking if there is evidence that such products are harming consumers.

New comment 3(d)(8)–1 further provides that though an entity advancing the funds is required to warrant that it has no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in the event the amount advanced is not repaid in full, this provision does not prevent the entity from obtaining a one-time authorization to seek repayment from the consumer's transaction account.

For these reasons, the Bureau is adopting the exclusion for no-cost advances as described in § 1041.3(d)(8) of the final rule and the related commentary.

3(e) Conditional Exemption for Alternative Loans

In § 1041.11 of the proposed rule, the Bureau set forth a conditional exemption for loans with a term of between 46 days and 180 days, if they satisfied a set of conditions that generally followed those established by the NCUA under the Payday Alternative Loan (PAL) Program as described above in part II. The proposal did not, however, contain a comparable exemption for PAL loans with durations between 30 and 45 days, with 30 days being the minimum duration permitted for a PAL loan. Loans that met the conditions of the proposed conditional exemption would have been exempted from the proposed underwriting criteria applicable to covered longer-term loans, but still would have been subject to the requirements on payment practices and the notice requirements.

The Bureau received many general comments on the proposed exemption for PAL loans offered by credit unions and for comparable loan products if offered by other lenders. Some commenters argued that credit unions, as a class of entity, should be entirely exempted from all coverage under the rule. Others asked for more tailored exemptions for certain credit unions, such as for those with assets totaling less than $10 billion. Still others requested that credit unions be relieved of specific obligations under the rule, such as from compliance and record retention provisions (because their prudential regulators already address those matters); or from payment regulations for internal collections that do not incur fees; or from underwriting requirements for Community Development Financial Institutions (CDFIs) that provide beneficial credit and financial services to underserved markets and populations. By contrast, other commenters did not think the Bureau could or should create any special provisions for credit unions in particular. But some consumer and legal aid groups were supportive of the PAL program, which they viewed as beneficial to consumers and not easily subject to manipulation.

Some asserted that the PAL program was too constrained to support any broad provision of such loans, which were unlikely to yield a reasonable rate of return and thus not likely to generate a substantial volume of loans or to be sustainable for other lenders that are not depository institutions. Others argued that the proposed rule contained provisions that would go beyond the terms of the PAL program and increase complexity, and these additional provisions should be scaled back to mirror the PAL program more closely. Some commenters contended that the PAL program itself imposed a usury limit, which would be improper if adopted by the Bureau.

As discussed earlier, the Bureau has decided not to finalize the specific underwriting criteria with respect to covered longer-term loans (other than covered longer-term balloon-payment loans) at this time. However, the Bureau has decided, for the reasons explained below, to create a conditional exemption to the rule that applies to any alternative loan, which is a term that is defined more specifically below. In brief, an alternative loan is a covered loan that meets certain conditions and requirements that are generally consistent with the provisions of the PAL program as authorized and administered by the NCUA, including any such loan made by a Federal credit union that is in compliance with that program. The conditions and requirements of the exemption are modified in certain respects relative to the proposal to reflect that the conditional exemption now also encompasses loans of less than 45 days in duration to create a more comprehensive lending framework, unlike the coverage initially described in the proposed rule. In creating this exception, the Bureau agrees with the commenters that concluded, after observing the PAL program over time, that program is generally beneficial to consumers and not easily subject to manipulation in ways that would create risks and harms to consumers.

At the same time, the Bureau recognizes that one of the objectives set forth in the Dodd-Frank Act is for Federal consumer financial law to be enforced consistently without regard to the status of a person as a depository institution.[443] Consistent with that objective, the Bureau has set forth the elements of alternative loans in general form, so that lenders other than Federal credit unions—including both banks and other types of financial institutions—can offer comparable loans in accordance with essentially the same conditions and requirements. By doing so, the Bureau is making it possible for more lenders to offer this product, which will offer the opportunity to test the prediction made by some commenters that these loans would not scale if offered by lenders that are not depository institutions—a point on which the Bureau is not yet convinced either way.

The conditional exemption for alternative loans contained in § 1041.3(e) of the final rule is adopted pursuant to the Bureau's exemption authority in section 1022(b)(3) of the Dodd-Frank Act to ''conditionally or unconditionally exempt any class of covered persons, service providers, or consumer financial products or services, from any . . . rule issued under this title.'' [444] In this respect, Congress gave the Bureau broad latitude, simply stating that it should do so ''as [it] deems necessary or appropriate to carry out the purposes and objectives of this title.'' [445] The statutory language thus indicates that the Bureau should evaluate the case for creating such an exemption in light of its general purposes and objectives as Congress articulated them in section 1021 of the Dodd-Frank Act. In addition, when the Bureau exercises its exemption authority under section 1022(b)(3) of the Dodd-Frank Act, it is further required to take into consideration, as appropriate, three additional statutory factors: (i) The total assets of the class of covered persons; (ii) the volume of transactions involving consumer financial products or services in which the class of covered persons engages; and (iii) existing provisions of law which are applicable to the consumer financial product or service and the extent to which such provisions provide consumers with adequate protections.[446]

Here, the Bureau perceives tangible benefit for consumers and for lenders by preserving the framework of the PAL program, which as discussed in part II has had some success in generating approximately $134.7 million in originations in 2016—up 9.7 percent from the 2015 levels—with relatively low costs of credit and relatively low levels of charge-offs for this particular market. In particular, the Bureau agrees with those commenters that noted the distinct elements of the PAL program, including the specified product features, are not configured to give rise to the kinds of risks and harms that are more evident with covered short-term loans or covered longer-term balloon-payment loans. In short, the PAL product thus far seems to be beneficial for consumers, and a conditional exemption to make such loans more broadly available to the public appears consistent with the Bureau's purpose ''of ensuring that all consumers have access to markets for consumer financial products and services.'' [447] Likewise, it seems consistent also with the Bureau's objective of ensuring that ''markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation,'' and the competition that alternative loans could provide to other types of covered loans may be helpful in protecting consumers ''from unfair . . . or abusive acts and practices.'' [448]

Turning to the statutory factors set out in section 1022(b)(3), the assets of the expected class of lenders is likely to remain relatively small in light of the thousands of smaller credit unions, as also is the volume of transactions, which many commenters did not seem to expect would scale into much larger loan programs, though the Bureau is not yet convinced on this point either way. In addition, the PAL program itself is regulated and overseen by NCUA with respect to the credit unions who offer it, which means that ''existing provisions of law . . . are applicable to [it]'' and it is reasonable at this time to judge that ''such provisions provide consumers with adequate protection'' in using this loan product, as Congress indicated was germane to determining the justifications for an exemption.[449] Moreover, under the general terms of § 1041.3(e), which allows all lenders to make alternative loans regardless of whether they are credit unions, the Bureau and other regulators, including State regulators, stand well-positioned to monitor the development of this loan product over time, and to make adjustments if the current experience of these loans as generally beneficial for consumers were perceived to be changing in ways that created greater consumer risks and harms.

The Bureau decided to create this conditional exemption in order to recognize that the NCUA is currently operating and supervising this established loan program for credit unions and to avoid duplicative overlap of requirements that could foster confusion and create undue burdens for certain lenders, in light of the Bureau's conclusion that loans made on terms that are generally consistent with the PAL program do not pose the same kinds of risks and harms for consumers as the types of covered loans addressed by this rule.[450] It also judges this approach to be superior to the broader scope of exemptions urged by various commenters, such as a complete exemption from the rule for all loans of all types made by credit unions (rather than just PAL loans), or even a conditional exemption from certain portions of the rule for all loans of all types made by credit unions. As for the comment that these loans impose a usury cap, the Bureau has explained elsewhere that an actual usury cap would flatly prohibit certain loans from being made based directly on the interest rate being charged, whereas the exemption provided here would merely allow such loans to avoid triggering certain conditions of making such loans—most notably, the requirement that the lender reasonably assess the borrower's ability to repay the loan according to its terms but also the provisions concerning payment practices.

For all of these reasons, the Bureau is finalizing this provision and the related commentary with several modifications. First, in response to comments suggesting that various conditions for alternative loans as stated in the proposed rule would render this loan product too burdensome and complex, the Bureau has eliminated certain conditions for such loans in the final rule. In particular, among the conditions added in the proposal that now are dropped are: required monthly payments; rules on charging fees; required checking of affiliate records; certain additional requirements, such as prohibitions on prepayment penalties

[443] *See* 12 U.S.C. 5511(b)(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.'').

[444] 12 U.S.C. 5512 (b)(3)(A).

[445] 12 U.S.C. 5512(b)(3)(A).

[446] 12 U.S.C. 5512(b)(3)(B)(i)–(iii).

[447] 12 U.S.C. 5511(a).

[448] 12 U.S.C. 5511(b)(5) and (b)(2).

[449] 12 U.S.C. 5512(b)(3)(B)(iii).

[450] *See* 12 U.S.C. 5512(b)(3)(B) (in deciding whether to issue an exemption, ''the Bureau shall, as appropriate, take into consideration . . . existing provisions of law which are applicable to the consumer financial product or service and the extent to which such provisions provide consumers with adequate protection'').

and sweeping of accounts in certain circumstances, as well as required information furnishing. Second, certain changes have been made to take account of the fact that proposed § 1041.11 had applied only to covered longer-term loans, whereas § 1041.3(e) of the final rule applies to covered loans more generally. The language of each prong of § 1041.3(e)(1) through (4) of the final rule is set out below, and immediately thereafter any changes made from the proposed language to the text of the final rule are specified and explained. Again, as a prefatory matter, an alternative loan is a covered loan that meets all four of these sets of conditions and requirements.

3(e)(1) Loan Term Conditions

- Loan term conditions. An alternative loan must satisfy the following conditions:
  - The loan is not structured as open-end credit, as defined in § 1041.2(a)(16);
  - The loan has a term of not less than one month and not more than six months;
  - The principal of the loan is not less than $200 and not more than $1,000;
  - The loan is repayable in two or more payments, all of which payments are substantially equal in amount and fall due in substantially equal intervals, and the loan amortizes completely during the term of the loan; and
  - The loan carries a cost of credit (excluding any application fees) of not more than the interest rate permissible for Federal credit unions to charge under regulations issued by the National Credit Union Administration at 12 CFR 701.21(c)(7)(iii), and any application fees charged to the consumer reflect the actual costs associated with processing the application and do not exceed the application fees permissible for Federal credit unions to charge under regulations issued by the National Credit Union Administration at 12 CFR 701.21(c)(7)(iii).

The language of the final rule originated in § 1041.11(a) of the proposed rule. The name of the exemption has been revised from a conditional exemption for certain covered longer-term loans up to six months in duration to a conditional exemption for alternative loans. The term of the loan is modified from ''not more than six months'' to ''not less than one month *and* no more than six months,'' again to reflect the change made in this exemption to encompass the broader set of all covered loans, rather than just covered longer-term loans. The other conditions, including the $200 floor and the $1,000 cap, are maintained because they are consistent with the requirements of the PAL program. The prior condition that the loan be repayable in two or more payments ''due no less frequently than monthly'' is now changed to omit the quoted language because the term of these loans may now be shorter than was the case in the proposal. The amortization provision is broken out and simplified to provide more flexibility around the payment schedule and allocation, which again reflects the fact that many of these loans may now be covered short-term loans. Finally, the prior language around total cost of credit is now replaced with cost of credit, which is consistent with TILA and Regulation Z and is responsive to suggestions made by several commenters; the permissible interest rate on such products is that set by the NCUA for the PAL program; any application fees charged to the consumer must reflect the actual associated costs and comply with the provisions of any NCUA regulations; and the lender does not impose any charges other than the rate and application fees permitted by the NCUA for the PAL program.

3(e)(2) Borrowing History Condition

Section 1041.3(e)(2) provides that prior to making an alternative loan under § 1041.3(e), the lender must determine from its records that the loan would not result in the consumer being indebted on more than three outstanding loans made under this section from the lender within a period of 180 days. Section 1041.3(e)(2) also provides that the lender must also make no more than one alternative loan under § 1041.3(e) at a time to a consumer.

Aside from conforming language changes, the only substantive revision here is to excise references to affiliates of the lenders, consistent with the NCUA's practice in administering the PAL program.

3(e)(3) Income Documentation Condition

Section 1041.3(e)(3) provides that in making an alternative loan under § 1041.3(e), the lender must maintain and comply with policies and procedures for documenting proof of recurring income.

This prong contains minor conforming language changes only.

3(e)(4) Safe Harbor

Section 1041.3(e)(4) provides that loans made by Federal credit unions in compliance with the conditions set forth by the National Credit Union Administration at 12 CFR 701.21(c)(7)(iii) for a Payday Alternative Loan are deemed to be in compliance with the requirements and conditions of § 1041.3(e)(1), (2), and (3).

This prong contains entirely new language, replacing what had been ''additional requirements'' in § 1041.11(e) of the proposed rule. Those additional requirements tailored by the NCUA for credit unions and included in the original proposal would be cumbersome in various respects for all lenders to adopt, including provisions on additional information furnishing, restrictions on sweeps and set-offs as means of a depository institution collecting on the loan, and prepayment penalties. The safe harbor provided for Federal credit unions in compliance with NCUA's requirements for the PAL program, however, reflects the fact that to qualify for the safe harbor, a credit union would be obligated to comply with all of the additional requirements of the PAL program.

Having considered the comments received, the Bureau concludes that it is appropriate to finalize § 1041.3(e) for all the reasons discussed above. The Bureau also is finalizing proposed comment 3(d)(8)–1 as comment 3(e)–1 of the final rule, which notes that this provision does not confer on the lenders of such loans any exemption from the requirements of other applicable laws, including State laws. This comment also clarifies that all lenders, including Federal credit unions and persons that are not Federal credit unions, are permitted to make loans under the specific terms in § 1041.3(e), provided that such loans are permissible under other applicable laws, including State laws. The remainder of the commentary is being carried forward from the proposed rule with revisions, all made to align them with the modified language in § 1041.3(e) of the final rule. The proposed comments previously designated as 11(a)–1 to (11)(e)(1)(ii)–2 are now renumbered as comments 3(e)(1)–1 to 3(e)(3)–1 in the final rule.

3(f) Conditional Exemption for Accommodation Loans

In the proposal, in connection with the discussion of the proposed definition of lender in § 1041.2(a)(11), the Bureau noted that some stakeholders had suggested narrowing the definition of lender to avoid covering lenders that are primarily focused on other types of lending or other types of financial services, but on occasion make covered loans as a means of accommodating their existing customers. The stakeholders posited that such loans would be likely to operate differently from loans made as a primary line of business, for instance because the lenders who make them have information about consumers' financial situations from their primary lines of business and because their incentives in making the loans is to preserve their

customer relationships, and thus may not pose the same risks and harms as other types of covered loans. The Bureau solicited comments on this suggestion.

The Bureau had also proposed a more detailed provision, in proposed § 1041.12, in order to provide a conditional exemption for certain covered longer-term loans that would be made through accommodation lending programs and would be underwritten to achieve an annual portfolio default rate of not more than five percent. The proposal would have allowed a lender to make such loans without meeting the specific underwriting criteria contained in the proposed rule, though proposed § 1041.12 laid out its own detailed provisions applicable to the making of such loans. Notably, the Bureau found that the feedback it received on this provision overlapped considerably with the comments submitted in response to the question the Bureau had asked with respect to the definition of lender about providing an exception based on *de minimis* lending.

Many commenters expressed their views favoring a *de minimis* exemption. Several of them urged that the Bureau should set parameters for the exemption based both on loan volume and the percentage of revenue derived from such loans. More specific suggestions ranged from caps of 100 to several thousand loans per year; one commenter suggested 2,000 loans per year that yield no more than five percent of revenue; others urged a cap of 2,500 loans per year that yield no more than 10 percent of revenue.

The Bureau also received a number of comments on proposed § 1041.12 and proposed comments 12(a)–1 to (12)(f)(1)(ii)–2. Banking organizations argued that the Bureau should exempt types of institutions rather than types of loans, and that because community banks are responsible providers of small loans, they should be conditionally exempted from coverage.

Many commenters were also critical of the provisions of proposed § 1041.12, which they viewed as so cumbersome as to discourage many institutions from engaging in this type of lending. These comments focused particularly on the back-end requirements and calculations included in the proposal. Some commenters noted the guidance already in place from other banking regulators that had suppressed such lending at the banks, and predicted that the proposal would exacerbate those difficulties. State bank regulators, in particular, advocated in favor of a *de minimis* threshold to preserve such lending by smaller community banks as beneficial to consumers, especially in rural areas and as a way to provide alternatives if the effect of the rule would be to cause consolidation in the small-dollar lending market. Consumer groups generally opposed exemptions to the rule but acknowledged that a properly structured *de minimis* provision would be unlikely to create much if any harm to consumers.

As stated earlier, the Bureau has decided not to finalize the ability-to-repay requirements with respect to covered longer-term loans (other than covered longer-term balloon-payment loans) at this time. However, as a result of reviewing and analyzing the public input on the issue of accommodation lending more generally, the Bureau has determined to create a conditional exemption that is applicable to accommodation loans that have been traditionally made primarily by community banks and credit unions. At the same time, in line with the Dodd-Frank Act's goal of enforcing Federal consumer financial law without regard to a financial company's status as a depository institution,[451] the Bureau has set forth the elements of accommodation loans in general form such that any lender whose covered loan originations fall below the thresholds set in final § 1041.3(f) can qualify for the conditional exemption. In part, the Bureau is reaching this conclusion based on its review of the comments received, which indicated that lenders would find the approach taken in proposed § 1041.12 to be cumbersome or even unworkable for lenders. Whether or not this was objectively demonstrable for most lenders, it was clear that the proposed approach would have been taken as a discouraging factor for those deciding whether or not to make such loans. Moreover, the Bureau concluded that loans made as an occasional accommodation to existing customers were not likely to pose the same risks and harms as other types of covered loans, because such loans would be likely to operate differently and carry different incentives for the lender as compared to loans made as a primary line of business.

As discussed in the preceding section on alternative loans, when the Bureau exercises its exemption authority under section 1022(b)(3) of the Dodd-Frank Act to create an exemption for ''any class of covered persons, service providers, or consumer financial products or services, from any * * * rule issued under this title,'' it has broad latitude that Congress conferred upon it to do so.[452] Again, Congress simply said that the Bureau should exercise this authority ''as [it] deems necessary or appropriate to carry out the purposes and objectives of this title,'' [453] and the Bureau's general purposes and objectives are stated in section 1021 of the Dodd-Frank Act. In addition, when the Bureau exercises its exemption authority under section 1022(b)(3) of the Dodd-Frank Act, it is further required, as appropriate, to take into consideration three statutory factors: The total assets of the class of covered persons; the volume of transactions involving consumer financial products or services in which the class of covered persons engages; and existing provisions of law which are applicable to the consumer financial product or service and the extent to which such provisions provide consumers with adequate protections.[454] Here, too, it appears that Congress intended the Bureau to do so in view of its purposes and objectives as set forth in the Dodd-Frank Act.

Here, the Bureau perceives tangible benefit for consumers and for lenders to be able to maintain access to individualized loans of the kind permitted by this provision and in line with the traditions and experience of community banks over many years, which have generally underwritten these loans as an accommodation on an individualized basis in light of their existing customer relationships. In this manner, the conditional exemption would help ensure ''that all consumers have access to markets for consumer financial products and services,'' [455] which is a principal purpose of the Dodd-Frank Act, and would not be restricted in their existing access to such traditional loan products. At the same time, this conditional exemption would enable the Bureau ''to reduce unwarranted regulatory burdens'' [456] on these longstanding loan products made to existing bank customers on an individualized basis in light of their existing customer relationships, without posing any of the kinds of risks and harms to consumers that exist with the types of covered loans addressed by this rule.

And though the provisions of § 1041.3(f) are written in general terms to be applicable to lenders that are not themselves depository institutions, it does not appear likely that these

[451] *See* 12 U.S.C. 5511(b)(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.'').

[452] 12 U.S.C. 5512 (b)(3)(A).

[453] 12 U.S.C. 5512(b)(3)(A).

[454] 12 U.S.C. 5512(b)(3)(B)(i)–(iii).

[455] 12 U.S.C. 5511(a).

[456] 12 U.S.C. 5511(b)(3).

provisions would be open to wide-scale abuse, precisely because the loan and revenue restrictions are set at a *de minimis* level that would tend to limit the scope of any predatory behavior. Assessing the matter against the three additional statutory factors as well, then, the assets of these lenders availing themselves of this provision would likely be limited; the volume of transactions would be small, by definition and design; and Federal consumer financial law, as implemented through the Bureau's continuing supervisory and enforcement authorities and by other means as provided in the statute, would maintain consumer protections in the broader market despite this slight restriction on coverage under the rule.

Therefore, as stated in § 1041.3(f), this provision will conditionally exempt any accommodation loan from coverage under the final rule. That category is defined to apply to a covered loan made by any lender where the lender and its affiliates collectively have made 2,500 or fewer covered loans in the current calendar year and also made 2,500 or fewer covered loans in the preceding calendar year; and during the most recent completed tax year in which the lender was in operation, if applicable, the lender and any affiliates that were in operation and used the same tax year derived no more than 10 percent of their receipts from covered short-term and longer-term balloon-payment loans, or if the lender was not in operation in a prior tax year, the lender reasonably anticipates that the lender and any of its affiliates that use the same tax year will, during the current tax year, derive no more than 10 percent of their receipts from covered short-term loans and covered longer-term balloon-payment loans. Comment 3(f)–1 of the final rule provides an example of the application of this provision to a sample lender.

Although, in general, all covered loans and the receipts from those loans would count toward the thresholds in § 1041.3(f) for the number of loans per year and for receipts, § 1041.3(f) allows lenders not to count toward either threshold covered longer-term loans for which the conditional exclusion for transfers in § 1041.8(a)(1)(ii) applies to all transfers for payments made under the loan. As explained in the section-by-section discussion of § 1041.8(a)(1)(ii), when the lender is the account-holder, that provision excludes certain transfers from the definition of payment transfer if, pursuant to the terms of the loan agreement or account agreement, the lender (1) does not charge the consumer any fee, other than a late fee under the loan agreement, in the event that the lender initiates a transfer of funds from the consumer's account in connection with the covered loan for an amount that the account lacks sufficient funds to cover; and (2) does not close the consumer's account in response to a negative balance that results from a transfer of funds initiated in connection with the covered loan. These conditions provide substantial protection against the harms targeted by the provisions in §§ 1041.8 and 1041.9. As a result, loans for which all payment transfers are excluded under § 1041.8(a)(1)(ii) from the definition of payment transfer are not subject to either the prohibition in § 1041.8(b) on initiating more than two consecutive failed payment transfers or the requirement in § 1041.9(b) to provide payment notices prior to initiating certain payment withdrawals. Since those loans carry with them substantial protection against the harms targeted in subpart C and would not be subject to those provisions, the Bureau believes that it is simpler not to count them for purposes of § 1041.3(f) either.

The Bureau had sought comment about the appropriate parameters of this conditional exemption, which is designed to be a *de minimis* provision to allow only a certain amount of lending of this kind to accommodate customers as a distinct sidelight to the institution's main lines of business. Once again, the purpose of this provision is to accommodate existing customers through what traditionally have been loans that were underwritten on an individualized basis for existing customers. It was not proposed, and is not being adopted, to stimulate the development of a model for loans that are offered in high volumes. As for the parameters that the Bureau decided on, they closely reflect the submissions received in the comment process, with both the overall loan limit (2,500 per year) and the revenue limit (no more than 10 percent of receipts) intended to keep loans made pursuant to this exemption to a very limited part of the lender's overall business. Each of the two provisions operates together to achieve that joint objective, which would not necessarily be achieved by either component operating in isolation.

The Bureau decided to create this conditional exemption in order to respond to the persuasive points made by the commenters about the benefits that would flow from preserving this modest amount of latitude to be able to contour specialized loans as an accommodation to individual customers. That is especially so in view of the unlikelihood that this practice would pose the same kinds of risks and harms that the Bureau recognized with covered short-term loans and covered longer-term balloon-payment loans as described below in Market Concerns—Underwriting. The adoption of this conditional exemption also evinces the Bureau's recognition of the input it has heard from many stakeholders over the years, particularly from depository institutions, who have regularly supplied the Bureau with details about their perspective that smaller depository lenders such as community banks and credit unions have a long history and tradition of making loans to accommodate their existing customers for various personal reasons, such as minor expenses related to some type of family event. These loans are typically underwritten, customized, made for small amounts and at reasonable cost, and generate low levels of defaults. Although this type of accommodation lending is often quite specialized and individualized, it could be construed to overlap in certain ways with the covered loans encompassed by the rule. The conditional exemption that is now finalized in § 1041.3(f) provides an effective method of addressing legitimate concerns about the potentially detrimental consequences of that overlap for consumers.

3(g) Receipts

The Bureau has added a new definition of the term receipts, which § 1041.3(g) of the final rule defines to mean total income (or, in the case of a sole proprietorship, gross income) plus cost of goods sold as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065, or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; and Form 1040, Schedule C for sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers but excluding taxes levied on the entity or its employees; or amounts collected for another (but fees earned in connection with such collections are receipts). Items such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes are included in receipts. This definition of receipts is modeled on the definitions of the same term in the Bureau's larger participant rulemakings for the consumer

reporting [457] and debt collection markets,[458] which in turn were based in part on the Small Business Administration's definition of receipts at 13 CFR 121.104.

The Bureau is adding this definition to clarify how the term is used in § 1041.3(f) in the course of describing accommodation loans, and to reduce the risk of confusion among consumers, industry, and regulators.

3(h) Tax Year

The Bureau has added a new definition of the term tax year, which § 1041.3(h) of the final rule defines to have the same meaning attributed to this term by the IRS as set forth in IRS Publication 538, which provides that a tax year is an annual accounting period for keeping records and reporting income and expenses. The Bureau is adding this definition to clarify how the term is used in § 1041.3(f) in the course of describing accommodation loans, and to reduce the risk of confusion among consumers, industry, and regulators.

Subpart B—Underwriting

Overview of the Bureau's Approach in the Proposal and in the Final Rule

The Bureau proposed to identify an unfair and abusive practice with respect to the making of covered short-term loans pursuant to its authority to ''prescribe rules * * * identifying as unlawful unfair, deceptive, or abusive acts or practices.'' [459] The proposal explained the Bureau's preliminary view that it is both an unfair and abusive practice for a lender to make such a loan without reasonably determining that the consumer will have the ability to repay the loan. To avoid committing this unfair and abusive practice, the Bureau stated that a lender would have to make a reasonable assessment that the consumer has the ability to repay the loan. The proposal would have established a set of requirements to prevent the unlawful practice by requiring lenders to follow certain specified underwriting practices in assessing whether the consumer has the ability to repay the loan, as well as imposing certain limitations on rapid re-borrowing. The Bureau proposed the ability-to-repay requirements under its authority to prescribe rules for ''the purpose of preventing unfair and abusive acts or practices.'' [460]

[457] 77 FR 42874 (July 20, 2012).

[458] 77 FR 65775 (Oct. 31. 2012).

[459] Public Law 111–203, section 1031(b), 124 Stat. 1376 (2010).

[460] 12 U.S.C. 5531(b).

The proposal would have further relied on section 1022(b)(3) of the Dodd-Frank Act [461] to exempt certain covered short-term loans from the ability-to-repay requirements if the loans satisfied a set of conditions designed to avoid the harms that can result from unaffordable loans, including the harms that can flow from extended sequences of multiple loans in rapid succession. Accordingly, lenders seeking to make covered short-term loans would have the choice, on a case-by-case basis, either to comply with the ability-to-repay requirements according to the specified underwriting criteria or to make loans that meet the conditions set forth in the proposed exemption—conditions that are specifically designed as an alternative means to protect consumers against the harms that can result from unaffordable loans.

As detailed further below, the Bureau has carefully considered its own research, analysis performed by others, and the public comments received with respect to this rulemaking and is now finalizing its finding that failing to reasonably determine whether consumers have the ability to repay covered short-term loans according to their terms is an unfair and abusive practice. These sources establish that unaffordable covered short-term loans generate severe harms for a substantial population of consumers. The Bureau has made the judgment that the harms and risks of such loans can be addressed most effectively by requiring lenders to underwrite such loans in accordance with specific criteria and thus not to make such a loan without reasonably determining that the consumer has the ability to repay the loan according to its terms. The Bureau has also retained the conditional exemption, while noting that the conditions on such loans, which are specifically designed as an alternative means to protect consumers against the harms that can result from unaffordable loans, will likely prompt lenders to consider more carefully their criteria for making such loans as well, given that defaults and delinquencies can no longer be offset by the revenues from repeated re-borrowing. The Bureau has modified various details of the proposed rule with respect to the underwriting criteria for the ability-to-repay requirement and the conditional exemption to strike a better balance among compliance burdens and other concerns, but has maintained the basic framework that was initially set forth in the proposed rule.

The Bureau also proposed to identify the same unfair and abusive practice

[461] 12 U.S.C. 5512(b)(3).

with respect to the failure to assess consumers' ability to repay certain longer-term loans, including both installment and balloon-payment structures, as long as the loans exceeded certain price thresholds and involved the taking of either a leveraged payment mechanism or vehicle security. The Bureau proposed to subject these covered longer-term loans to underwriting requirements similar to those for covered short-term loans, as well as proposing two exemptions for loans that satisfied different sets of conditions designed to avoid the risks and harms that can result from unaffordable loans.

As detailed further below, the Bureau has carefully considered its own research, analysis performed by others, and the public comments received with respect to the proposed treatment of covered longer-term loans, and has decided to take a bifurcated approach at this time to concerns about unfair or abusive underwriting of longer-term loans. With regard to balloon payment structures, the Bureau finds that failing to reasonably assess whether consumers have the ability to repay covered longer-term balloon-payment loans according to specific underwriting criteria is an unfair and abusive practice. Because they require large lump-sum or irregular payments, these loans impose financial hardships and payment shocks on consumers that are similar to those posed by short-term loans over just one or two income cycles. Indeed, the Bureau's analysis of longer-term balloon-payment loans in the market for vehicle title loans found that borrowers experienced high default rates—notably higher than for similar loans with amortizing installment payments. The Bureau also has concluded that the outcomes between a single-payment loan with a term of 46 or more days is unlikely to be much different for consumers than an identical loan with a term of 45 days, and is concerned that failing to cover longer-term balloon-payment loans would induce lenders to slightly extend the terms of their existing short-term lump-sum loans in an effort to evade coverage under the final rule, as occurred in this market in response to regulations adopted under the Military Lending Act.

For these reasons, the Bureau is finalizing its finding that failing to reasonably assess whether consumers have the ability to repay covered longer-term balloon-payment loans is an unfair and abusive practice. The Bureau has made the judgment that these risks and harms can be addressed most effectively—as with covered short-term loans—by requiring lenders to

underwrite such loans in accordance with specified criteria and thus not to make such a loan without reasonably determining that the consumer has the ability to repay the loan according to its terms. After having sought comment on the issue of whether longer-term balloon-payment loans should be covered regardless of price or the taking of a leveraged payment mechanism or vehicle security, the Bureau has decided, in light of the risks to consumers, to apply the rule to all such loans, aside from certain exclusions and exemptions described above in § 1041.3 of the final rule.

The Bureau has decided, however, not to move forward with its primary finding that it is an unfair and abusive practice to make certain higher-cost longer-term installment loans without making a reasonable determination that the consumer will have the ability to repay the loan, and, accordingly, its prescription of underwriting requirements designed to prevent that practice. The Bureau has decided to defer this aspect of the proposal for further consideration in a later rulemaking. After consideration of the research and the public comments, the Bureau has concluded that further analysis and outreach are warranted with respect to such loans, as well as other types of credit products on which the Bureau sought comment as part of the Request for Information. While such loans differ in certain ways from the loans covered in this final rule, the Bureau remains concerned that failing to underwrite such products may nonetheless pose substantial risk for consumers. The Bureau will continue to gather evidence about the risks and harms of such products for consideration as a general matter in a later rulemaking, and will continue in the meantime to scrutinize such lending for potential unfair, deceptive, or abusive acts or practices pursuant to its supervisory and enforcement authority.

And, as detailed in subpart C below, the Bureau has concluded that it is appropriate to apply certain limitations and disclosure requirements concerning payment practices (and related recordkeeping requirements) to longer-term installment loans with a cost of credit above 36 percent that involve the taking of a leveraged payment mechanism.

The predicate for the identification of an unfair and abusive practice in the Bureau's proposal—and thus for the preventive ability-to-repay requirements—was a set of preliminary findings about the consumers who use storefront and online payday loans, single-payment vehicle title loans, and other covered short-term loans, and the impact on those consumers of the practice of making such loans without assessing the consumers' ability to repay. The preliminary findings as set forth in the proposal, the comments that the Bureau received on them, and the Bureau's responses to those comments as the foundation of its final rule are all discussed below in the following section referred to as Market Concerns—Underwriting. Further in the discussion below, the Bureau also addresses the same issues with respect to covered longer-term balloon-payment loans.

Market Concerns—Underwriting

Short-Term Loans

In the proposal, the Bureau stated its concern that lending practices in the markets for storefront and online payday lending, single-payment vehicle title loans, and other covered short-term loans are causing harm to many consumers who use these products. Those harms include default, delinquency, and re-borrowing, as well as various collateral harms from making unaffordable payments. This section reviews the available evidence with respect to the consumers who use covered short-term loans, their reasons for doing so, and the outcomes they experience. It also reviews the lender practices that contribute to these outcomes. The discussion begins with the main points presented in this section of the proposal, stated in summary form, and provides a high-level overview of the general responses offered by the commenters. More specific issues and comments are then treated in more detail in the succeeding subsections. In the proposal, the Bureau's preliminary views were stated in summary form as follows:

- *Lower-income, lower-savings consumers.* Consumers who use these products tend to come from lower- or moderate-income households. They generally do not have any savings to fall back on, and they have very limited access to other sources of credit; indeed, typically they have sought unsuccessfully to obtain other, lower cost, credit before turning to a short-term loan. The commenters generally validated these factual points, though many disputed the inferences and conclusions to be drawn from these points, whereas others agreed with them. Individual commenters generally validated the factual descriptions of these characteristics of borrowers as well.
- *Consumers in financial difficulty.* Some consumers turn to these products because they have experienced a sudden drop in income (''income shock'') or a large unexpected expense (''expense shock''). Other borrowers are in circumstances in which their expenses consistently outstrip their income. A sizable percentage of users report that they would have taken a loan on almost any terms offered. Again, the commenters generally validated these points as a factual matter, but disputed the inferences and conclusions to be drawn therefrom.
- *Loans do not function as marketed.* Lenders market single-payment products as short-term loans designed to provide a bridge to the consumer's next payday or other income receipt. In practice, however, the amounts due on these loans consume such a large portion of the consumer's paycheck or other periodic income source as to be unaffordable for most consumers seeking to recover from an income or expense shock, and even more so for consumers with a chronic income shortfall. Lenders actively encourage consumers either simply to pay the finance charges due and roll over the loan instead of repaying the loan in full (or effectively roll over the loan by engaging in back-to-back transactions or returning to re-borrow in no more than a few days after repaying the loan). Indeed, lenders are dependent upon such re-borrowing for a substantial portion of their revenue and would lose money if each borrower repaid the loan when it was due without re-borrowing. The commenters tended to recharacterize these points rather than disputing them as a factual matter, though many industry commenters disagreed that these loans should be considered ''unaffordable'' for ''most'' consumers if many consumers manage to repay them after borrowing once or twice. Others contended that these loans should not be considered ''unaffordable'' if they are repaid eventually, even after re-borrowing multiple times in extended loan sequences. The commenters on all sides generally did not dispute the nature of the underlying business model as resting on repeat re-borrowing that lenders actively encourage, though they sharply disputed whether this model benefited or harmed consumers.
- *Very high re-borrowing rates.* Most borrowers find it necessary to re-borrow when their loan comes due or shortly after repaying their loan, as other expenses come due. This re-borrowing occurs both with payday loans and with single-payment vehicle title loans. The Bureau found that 56 percent of payday loans are borrowed on the same day and 85 percent of these loans are re-borrowed within a month. Fifty percent

of all new storefront payday loans are followed by at least three more loans and 33 percent are followed by six more loans. While single-payment vehicle title loans are often for somewhat longer durations than payday loans, typically with terms of one month, re-borrowing tends to occur sooner and longer sequences of loans are more common. The Bureau found that 83 percent of single-payment vehicle title loans are re-borrowed on the same day and 85 percent of them are re-borrowed within a month. Over half (56 percent) of all new single-payment vehicle title loans are followed by at least three more loans, and more than a third (36 percent) are followed by six or more loans. Of the payday loans made to borrowers paid weekly, bi-weekly, or semi-monthly, over 20 percent are in loan sequences of 20 loans or more and over 40 percent of loans made to borrowers paid monthly are in loan sequences of comparable durations (*i.e.,* 10 or more monthly loans). The commenters did not challenge the thrust of these points as demonstrating a high incidence of re-borrowing, which is a point that was reinforced by consumer groups and was illustrated by many individual commenters as well.

• *Consumers do not expect lengthy loan sequences.* Many consumers who take out a payday loan do not expect to re-borrow to the extent that they do. This is especially true of those consumers who end up in extended cycles of indebtedness. Research shows that many consumers who take out loans are able to accurately predict how long it will take them to get out of debt, especially if they repay immediately or re-borrow only once, but a substantial population of consumers is not able to do so, and for those consumers who end up in extended loan sequences, there is little correlation between predictions and behavior. A study on this topic found that as many as 43 percent of borrowers may have underestimated the length of time to repayment by two weeks or more.[462] The study found that consumers who have borrowed heavily in the recent past are even more likely to underestimate how long it will take to repay the loan.[463] Consumers' difficulty in this regard may be exacerbated by the fact that such loans involve a basic mismatch between how they are marketed as short-term credit and appear designed to function as long sequences of re-borrowing, which regularly occurs for a number of consumers. This disparity can create difficulties for consumers in being able to estimate accurately how long they will remain in debt and how much they will ultimately pay for the initial extension of credit. Research into consumer decision-making also helps explain why consumers may re-borrow more than they expect. For example, people under stress, including consumers in financial crisis, tend to become very focused on their immediate problems and think less about the future. Consumers also tend to underestimate their future expenses, and may be overly optimistic about their ability to recover from the shock they have experienced or to bring their expenses in line with their incomes. These points were sharply disputed by the commenters, and will be discussed further below.

• *Very high default rates and collateral harms.* Some consumers do succeed in repaying short-term loans without re-borrowing, and others eventually repay the loan after re-borrowing multiple times. But research shows that approximately 20 percent of payday loan sequences and 33 percent of single-payment vehicle title loan sequences end up with the consumer defaulting. Consumers who default can become subject to often aggressive and psychologically harmful debt collection efforts. While delinquent, they may also seek to avoid default in ways that lead to a loss of control over budgeting for their other needs and expenses. In addition, 20 percent of single-payment vehicle title loan sequences end with borrowers losing their cars or trucks to repossession. Even borrowers who have not yet defaulted may incur penalty fees, late fees, or overdraft fees along the way and may find themselves struggling to pay other bills or meet their basic living expenses. Commenters generally did not dispute that consumers may feel the effects of these negative collateral consequences of such loans and of delinquency and default, though industry commenters tended to downplay them and some argued that any such harms were outweighed by the economic benefits of such loans. Individual commenters validated this account of the negative collateral consequences of such loans as reflecting their own experiences. Many others countered that they had successful experiences with these loans and that they were benefited more than they were harmed by these experiences.

• *Harms occur despite existing regulation.* The research indicates that in the States that have authorized payday and other short-term loans, these harms persist despite existing regulatory frameworks. Indeed, payday loans do not legally exist in many States, so by definition the harms identified by the Bureau's research flow from such loans in those States where they are offered pursuant to existing regulatory frameworks. Even in those States where such loans are offered pursuant to somewhat different conditions, these distinctions do not appear to eliminate the harms that flow from the structure of such loans. In particular, the Bureau is concerned that existing caps on the amount that a consumer can borrow, rollover limitations, and short cooling-off periods still appear to leave many consumers vulnerable to the specific harms discussed above relating to default, delinquency, re-borrowing, and other collateral harms from attempting to avoid the other injuries by making unaffordable payments. Industry commenters took issue with these concerns and disputed this characterization of the effects of such loans.

In the proposal, the Bureau also reviewed the available evidence underlying each of these preliminary views. The Bureau sought and received comments on its review of the evidence, and those comments are reviewed and addressed in the discussion below. Based on the reasons set forth in each of the segments in this part, which respond to the comments and present further analysis that the Bureau has engaged in to consider these matters further, the Bureau now adopts as its findings underlying the final rule its views as stated in this initial summary overview, with certain modifications as set forth below.

a. Borrower Characteristics and Circumstances of Borrowing

As the Bureau laid out in the proposal, borrowers who take out payday, single-payment vehicle title, and other covered short-term loans are typically low-to-moderate income consumers who are looking for quick access to cash, who have little to no savings, who often have poor credit histories, and who have limited access to other forms of credit. Comments received from industry participants, trade associations, and individual users of these loans noted that this description of the borrower population does not describe all of the people who use these loans. That is so, of course, but the Bureau's discussion in the proposal was not intended as an exhaustive account of the entire universe of borrowers. Instead, it merely represented many of the recurring borrower characteristics that the Bureau

[462] *See* Ronald Mann, ''Assessing the Optimism of Payday Loan Borrowers,'' 21 Sup. Ct. Econ. Rev. 105 (2013).

[463] *See id.*

found based on its experience with such loans over the past several years and based on data from a number of studies as discussed further below.

In the proposal, the Bureau had found preliminarily that the desire borrowers have for immediate cash may be the result of an emergency expense or an unanticipated drop in income. The comments received from industry participants, trade associations, and individual users of these loans strongly reinforce the basis for this finding. Many comments describe the function that these loans perform as coping with income and expense shocks—that is, with unexpected, temporary expenses or shortfalls in income. These comments cited surveys and studies to bolster this point, including one survey that noted 86 percent of borrowers strongly or somewhat agreed that their use of a payday loan was to cope with an unexpected expense. Many other comments, including comments from individual users of these loans, offered anecdotal accounts of the personal reasons many borrowers have for taking out these loans, including a wide variety of circumstances that can create such income or expense shocks. Comments received from consumer groups were also in agreement on these points and further underscored a shared understanding that this impetus drives much of the demand for such loans.

The comments received from industry participants, trade associations, and individual users of these loans made a different point as well. One trade association, for example, noted that many consumers use such loans for ''income smoothing'' or to create a better match between income and expenses in the face of income and expense volatility—that is, where the consumer's income or expenses fluctuate over the course of the year, such that credit is needed during times of lower income or higher expenses to tide the consumer over until times of higher income or lower expenses. Many reasons were given by commenters, including a high volume of individual commenters, for such income and expense volatility, and the following examples are merely illustrative of the broader and more widespread phenomenon: People who work on commission; people scheduled to receive one-time or intermittent income supplements, such as holiday bonuses; people who work irregular hours, including many contractor or part-time workers; people who have seasonal opportunities to earn extra income by working additional hours; or circumstances that may arise that create the need or the opportunity to satisfy in full some other outstanding debt that is pressing. Comments from consumer groups echoed these accounts of how these economic situations drive a certain amount of the demand for such loans. The nature and weight of these comments thus lend further support to the preliminary findings that the Bureau had made on these issues.

In the proposal, the Bureau also noted that many borrowers who take out payday or single-payment vehicle title loans are consumers whose living expenses routinely exceed their income. This category of borrowers may consistently experience negative residual income, or to use a common phrase, find that they routinely have ''too much month at the end of the money'' and take out such loans in an effort to bolster their income—an effort that often proves to be unsuccessful when they are later unable to repay the loan according to its terms. Various commenters agreed with this account of some borrowers, and some of the individual commenters likewise described their own experiences in this vein.

In addition, some commenters noted that certain borrowers may use these kinds of loans to manage accumulated debt, preferring to use the proceeds of the loan to pay down other debt for which nonpayment or default would be more costly alternatives. This was not frequently cited as a reason why many borrowers decide to take out such loans, but it may explain occasional instances.

1. Borrower Characteristics

In the proposal, the Bureau noted that a number of studies have focused on the characteristics of payday borrowers. For instance, the FDIC and the U.S. Census Bureau have undertaken several special supplements to the Current Population Survey (CPS Supplement); the proposal cited the most recent available data from 2013, which found that 46 percent of payday borrowers (including storefront and online borrowers) have a family income of under $30,000.[464] The latest edition of the Survey has more recent data from 2015, which finds that the updated figure is 49 percent.[465] A study covering a mix of storefront and online payday borrowers similarly found that 49 percent had income of $25,000 or less.[466] Other analyses of administrative data that include the income borrowers reported to lenders show similar results.[467]

A 2012 survey administered by the Center for Financial Services Innovation (CFSI) to learn more about users of small-dollar credit products including payday loans, pawn loans, direct deposit advances, installment loans, and auto title loans found that 43 percent of small-dollar credit consumers had a household income between $0 and $25,000, compared to 26 percent of non-small-dollar credit consumers.[468] The mean annual household income for those making use of such products was $32,000, compared to $40,000 for those not using such products. Other studies and survey evidence presented by commenters were broadly consistent with the data and analysis contained in the studies that the Bureau had cited on this point.

Additionally, the Bureau found in its analysis of confidential supervisory data that 18 percent of storefront borrowers relied on Social Security or some other form of government benefits or public assistance.[469] The FDIC study further found that payday borrowers are disproportionately Hispanic or African-

[464] Fed. Deposit Ins. Corp., ''2013 FDIC National Survey of Unbanked and Underbanked Households: Appendices,'' at appendix. D–12a (Oct. 2014), *available at https://www.fdic.gov/householdsurvey/2013/2013appendix.pdf*.

[465] Fed. Deposit Ins. Corp., ''2015 FDIC National Survey of Unbanked and Underbanked Households,'' (Oct. 20, 2016), *available at https://www.fdic.gov/householdsurvey/2015/2015report.pdf* (Calculations made using custom data tool.).

[466] Pew Charitable Trusts, ''Payday Lending in America: Who Borrows, Where They Borrow, and Why,'' at 35 exhibit 14 (Report 1, 2012), *available at http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf*.

[467] CFPB Payday Loans and Deposit Advance Products White Paper, at 18 (reporting that based on confidential supervisory data of a number of storefront payday lenders, borrowers had a reported median annual income of $22,476 at the time of application (not necessarily household income)). Similarly, data from several State regulatory agencies indicate that average incomes range from about $31,000 (Delaware) to slightly over $36,000 (Washington). *See* Letter from Robert A. Glen, Del. State Bank Comm'r to Hon. Bryan Townsend, Chairman, S. Banking and Bus. Comm. and Hon. Bryon H. Short, Chairman, H. Econ. Dev./Banking/Ins./Commerce Comm. (enclosing Veritec Solutions, ''State of Delaware Short-term Consumer Loan Program—Report on Delaware Short-term Consumer Loan Activity For the Year Ending December 31, 2014,'' at 6 (Mar. 12, 2015), *available at http://banking.delaware.gov/pdfs/annual/Short_Term_Consumer_Loan_Database_2014_Operations_Report.pdf*; Wash. Dep't of Fin. Insts., ''2014 Payday Lending Report,'' at 6 (2014), *available at http://www.dfi.wa.gov/sites/default/files/reports/2014-payday-lending-report.pdf*; nonPrime 101 found the median income for online payday borrowers to be $30,000. nonPrime101, ''Report 1: Profiling Internet Small-Dollar Lending,'' at 7 (2014), *available at https://www.nonprime101.com/wp-content/uploads/2013/10/Clarity-Services-Profiling-Internet-Small-Dollar-Lending.pdf*.

[468] Rob Levy & Joshua Sledge, ''A Complex Portrait: An Examination of Small-Dollar Credit Consumers,'' (Ctr. for Fin. Servs. Innovation, 2012), *available at https://www.fdic.gov/news/conferences/consumersymposium/2012/A%20Complex%20Portrait.pdf*.

[469] CFPB Payday Loans and Deposit Advance Products White Paper, at 18.

American (with borrowing rates two to three times higher respectively than for non-Hispanic whites) and that unmarried female-headed families are more than twice as likely as married couples to be payday borrowers.[470] The CFSI study discussed above upheld this general assessment with regard to race, with African-American and Hispanic borrowers over-represented among such borrowers.[471] The commenters did not take issue with these points, and various submissions across the broad spectrum of stakeholders, including both industry participants and consumer groups, consistently reinforced the point that these loans disproportionately go to minority borrowers.

The demographic profiles of single-payment vehicle title borrowers appear to be roughly comparable to the demographics of payday borrowers.[472] Calculations from the CPS Supplement indicate that 44 percent of title borrowers have annual family incomes under $30,000.[473] Another survey likewise found that 54 percent of title borrowers reported incomes below $30,000, compared with 60 percent for payday borrowers.[474] Commenters presented some data to suggest that various borrowers are more educated and that many are middle-aged, but these results did not alter the great weight of the overall survey data on this point.

And as with payday borrowers, data from the CPS Supplement show vehicle title borrowers to be disproportionately African-American or Hispanic, and more likely to live in unmarried female-headed families.[475] Similarly, a survey of borrowers in three States conducted by academic researchers found that title borrowers were disproportionately female and minority. Over 58 percent of title borrowers were female. African-Americans were over-represented among borrowers compared to their share of their States' population at large. Hispanic borrowers were over-represented in two of the three States; however, these borrowers were under-represented in Texas, the State with the highest proportion of Hispanic residents in the study.[476] Commenters generally did not take issue with these points, and various submissions from both industry participants and consumer groups support the view that they are an accurate reflection of the borrower population. One commenter contended that the data did not show vehicle title borrowers to be disproportionately minority consumers, though this view did not seem to take into account the composition of the total population in the States that were surveyed.

As noted in the proposal, studies of payday borrowers' credit histories show both poor credit histories and recent credit-seeking activity. One academic paper that matched administrative data from one storefront payday lender to credit bureau data found that the median credit score for a payday applicant was in the bottom 15 percent of credit scores overall.[477] The median applicant had one open credit card, but 80 percent of applicants had either no credit card or no credit available on a card. The average borrower had 5.2 credit inquiries on her credit report over the preceding 12 months before her initial application for a payday loan (three times the number for the general population), but obtained only 1.4 accounts on average. This suggests that borrowers made repeated but generally unsuccessful efforts to obtain additional other forms of credit prior to initiating a payday loan. While typical payday borrowers may have one or more credit cards, they are unlikely to have unused credit; in fact, they are often delinquent on one or more cards, and have often experienced multiple overdrafts and/or NSFs on their checking accounts.[478] A recent report analyzing credit scores of borrowers from five large storefront payday lenders provides corroborative support, finding that the average borrower had a VantageScore 3.0[479] score of 532 and that over 85 percent of borrowers had a score below 600, indicating high credit risk.[480] By way of comparison, the national average VantageScore is 669 and only 30 percent of consumers have a VantageScore below 600.[481]

The proposal also cited reports using data from a specialty consumer reporting agency, which indicate that online borrowers have comparable credit scores to storefront borrowers (a mean VantageScore 3.0 score of 525 versus 532 for storefront).[482] Another study based on the data from the same specialty consumer reporting agency and an accompanying survey of online small-dollar credit borrowers reported that 79 percent of those surveyed had been denied traditional credit in the past year due to having a low or no credit score, 62 percent had already sought assistance from family and friends, and 24 percent reported having negotiated with a creditor to whom they owed money.[483] Moreover, heavy use of online payday loans seems to be correlated with more strenuous credit-seeking: compared to light (bottom quartile) users of online loans, heavy (top quartile) users were more likely to

[470] Fed. Deposit Ins. Corp., ''2015 FDIC National Survey of Unbanked and Underbanked Households,'' (Oct. 20, 2016), *available at https://www.fdic.gov/householdsurvey/2015/2015report.pdf* (Calculations made using custom data tool.).

[471] Rob Levy & Joshua Sledge, ''A Complex Portrait: An Examination of Small-Dollar Credit Consumers,'' (Ctr. for Fin. Servs. Innovation, 2012), *available at https://www.fdic.gov/news/conferences/consumersymposium/2012/A%20Complex%20Portrait.pdf.*

[472] None of the sources of information on the characteristics of vehicle title borrowers that the Bureau is aware of distinguishes between borrowers taking out single-payment and installment vehicle title loans. The statistics provided here are for borrowers taking out either type of vehicle title loan.

[473] Fed. Deposit Ins. Corp., ''2015 FDIC National Survey of Unbanked and Underbanked Households,'' (Oct. 20, 2016), *available at https://www.fdic.gov/householdsurvey/2015/2015report.pdf* (Calculations made using custom data tool.).

[474] Pew Charitable Trusts, ''Auto Title Loans: Market Practices and Borrowers Experiences,'' at 28 (2015), *available at http://www.pewtrusts.org/~/media/assets/2015/03/autotitleloansreport.pdf*; Pew Charitable Trusts, ''Payday Lending in America: Who Borrows, Where They Borrow, and Why,'' at 35 (Report 1, 2012), *available at http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf.*

[475] Fed. Deposit Ins. Corp., ''2015 FDIC National Survey of Unbanked and Underbanked Households,'' (Oct. 20, 2016), *available at https://www.fdic.gov/householdsurvey/2015/2015report.pdf* (Calculations made using custom data tool.).

[476] Kathryn Fritzdixon et al., ''Dude, Where's My Car Title?: The Law Behavior and Economics of Title Lending Markets,'' 2014 U. IL L. Rev. 1013, at 1029–1030 (2014).

[477] Neil Bhutta et al., ''Consumer Borrowing after Payday Loan Bans,'' 59 J. of L. and Econ. 225, at 231–233 (2016). Note that the credit score used in this analysis was the Equifax Risk Score which ranges from 280–850. Frederic Huynh, ''FICO Score Distribution,'' FICO Blog (Apr. 15, 2013), *http://www.fico.com/en/blogs/risk-compliance/fico-score-distribution-remains-mixed/.*

[478] Neil Bhutta et al., ''Consumer Borrowing after Payday Loan Bans,'' 59 J. of L. and Econ. 225, at 231–233 (2016).

[479] A VantageScore 3.0 score is a credit score created by an eponymous joint venture of the three major credit reporting companies; scores lie on the range 300–850.

[480] nonPrime101, ''Report 8: Can Storefront Payday Borrowers Become Installment Loan Borrowers?,'' at 7 (2015), *available at https://www.nonprime101.com/blog/can-storefront-payday-borrowers-become-installment-loan-borrowers/.*

[481] Experian, ''What is Your State of Credit,'' (2015), *available at http://www.experian.com/live-credit-smart/state-of-credit-2015.html.*

[482] nonPrime101, ''Report 8: Can Storefront Payday Borrowers Become Installment Loan Borrowers?,'' at 5 (2015), *available at https://www.nonprime101.com/blog/can-storefront-payday-borrowers-become-installment-loan-borrowers/.* Twenty percent of online borrowers are unable to be scored; for storefront borrowers the percentage of unscorable consumers is negligible. However, this may partly reflect the limited quality of the data online lenders obtain and/or report about their customers and resulting inability to obtain a credit report match.

[483] Stephen Nunez et al., ''Online Payday and Installment Loans: Who Uses Them and Why?, at 44, 51, 60 (MDRC, 2016), *available at http://www.mdrc.org/sites/default/files/online_payday_2016_FR.pdf.*

have been denied credit in the past year (87 percent of heavy users compared to 68 percent of light users).[484]

In the proposal, the Bureau also noted that other surveys of payday borrowers added to the picture of consumers in financial distress. For example, in a survey of payday borrowers published in 2009, fewer than half reported having any savings or reserve funds.[485] Almost a third of borrowers (31.8 percent) reported monthly debt-to-income payments of 30 percent or higher, and more than a third (36.4 percent) of borrowers reported that they regularly spend all the income they receive. Similarly, a 2010 survey found that over 80 percent of payday borrowers reported making at least one late payment on a bill in the preceding three months, and approximately one quarter reported frequently paying bills late. Approximately half reported bouncing at least one check in the previous three months, and 30 percent reported doing so more than once.[486] Furthermore, a 2012 survey found that 58 percent of payday borrowers report that they struggled to pay their bills on time. More than a third (37 percent) said they would have taken out a loan on almost any terms offered. This figure rises to 46 percent when the respondent rated his or her financial situation as particularly poor.[487]

A large number of comments received from industry participants, trade associations, consumer groups, academics, and individual users of these loans extensively reinforced this picture of the financial situation for many storefront and online borrowers. Industry participants and trade associations presented their understanding of the characteristics of the borrower population as being marked by poor credit histories, an acute need for credit, aggressive efforts to seek credit, and general unavailability of other means of credit for many of these borrowers. In many of the comments, these characteristics were described in particular detail and emphasized as making the case to show the need for the availability of such loans. Many individual users of these loans also related their own personal stories and situations, which were typically marked by these same features of their financial histories that demonstrated their need for credit products.

Despite these points of general agreement, many industry participants, trade associations, individual users of such loans, and some academics submitted comments that vigorously disagreed with what they regarded as assumptions the Bureau had made in the proposal about payday and vehicle title borrowers. In their view, the Bureau was wrongly portraying these consumers as financially unsophisticated and incapable of acting in their own best interests. On the contrary, many of these commenters stated, such borrowers are often very knowledgeable about the costs and terms of such loans. Their decision to take out a payday or vehicle title loan was represented, in many instances, as being based on a rational judgment that access to this form of credit is far more valuable than reducing the risks and costs associated with their indebtedness.

The Bureau recognizes that the characteristics of individual users of payday and single-payment vehicle title loans are differentiated in many and various ways. Much of the debate here represents different characterizations and opinions about potential conclusions drawn from the facts, rather than direct disagreements about the facts themselves. These issues are important and they are considered further in the discussions of unfairness and abusiveness under final § 1041.4.

2. Circumstances of Borrowing

The proposal discussed several surveys that have asked borrowers why they took out their loans or for what purpose they used the loan proceeds, and noted that these are challenging questions to study. Any survey that asks about past behavior or events runs some risk of recall errors.[488] In addition, the fact that money is fungible makes this question more complicated. For example, a consumer who has an unexpected expense may not feel the effect fully until weeks later, depending on the timing of the unexpected expense relative to other expenses and to the receipt of income. In that circumstance, a borrower may say either that she took out the loan because of the unexpected expense, or that she took out the loan to cover regular expenses. Perhaps because of this difficulty, results across surveys are somewhat inconsistent, with one finding high levels of unexpected expenses, while others find that payday loans are used primarily to pay for regular expenses.

In the first survey discussed in the proposal, a 2007 survey of payday borrowers, the most common reason cited for taking out a loan was ''an unexpected expense that could not be postponed,'' with 71 percent of respondents strongly agreeing with this reason and 16 percent somewhat agreeing.[489] A 2012 survey of payday loan borrowers, by contrast, found that 69 percent of respondents took their first payday loan to cover a recurring expense, such as utilities, rent, or credit card bills, and only 16 percent took their first loan for an unexpected expense.[490]

The 2012 CFSI survey of alternative small-dollar credit products, discussed earlier in this section asked separate questions about what borrowers used the loan proceeds for and what precipitated the loan.[491] Responses were reported for ''very short term'' and ''short term'' credit; ''very short term'' referred to payday, pawn, and deposit advance products. Respondents could report up to three reasons for what precipitated the loan; the most common reason given for very-short-term borrowing (approximately 37 percent of respondents) was ''I had a bill or payment due before my paycheck arrived,'' which the authors of the report on the survey results interpreted as a mismatch in the timing of income and expenses. Unexpected expenses were cited by 30 percent of very-short-term borrowers, and approximately 27

[484] Stephen Nunez et al., ''Online Payday and Installment Loans: Who Uses Them and Why?, at 38 tbl. 6 (MDRC, 2016), *available at http://www.mdrc.org/sites/default/files/online_payday_2016_FR.pdf*.

[485] Gregory Elliehausen, ''An Analysis of Consumers' Use of Payday Loans,'' at 29 (Geo. Wash. Sch. of Bus., Monograph No. 41, 2009), *available at https://www.researchgate.net/publication/237554300_AN_ANALYSIS_OF_CONSUMERS%27_USE_OF_PAYDAY_LOANS*.

[486] Jonathan Zinman, ''Restricting Consumer Credit Access: Household Survey Evidence on Effects Around the Oregon Rate Cap,'' at 20 tbl. 1 (Dartmouth College, 2008), *available at http://www.dartmouth.edu/~jzinman/Papers/Zinman_RestrictingAccess_oct08.pdf*.

[487] *See* Pew Charitable Trusts, ''Payday Lending in America: How Borrowers Choose and Repay Payday Loans,'' at 20 (Report 2, 2013), *http://www.pewtrusts.org/en/research-and-analysis/reports/2013/02/19/how-borrowers-choose-and-repay-payday-loans*.

[488] *See generally* David Grimes and Kenneth F. Schulz, ''Bias and Causal Associations in Observational Research,'' 359 Lancet 9302, at 248–252. (2002); *see* E. Hassan, ''Recall Bias Can Be a Threat to Retrospective and Prospective Research Designs,'' 3 Internet J. of Epidemiology 2 (2005) (for a more specific discussion of recall bias).

[489] Gregory Elliehausen, ''An Analysis of Consumers' Use of Payday Loans,'' at 35 (Geo. Wash. Sch. of Bus., Monograph No. 41, 2009), *available at https://www.researchgate.net/publication/237554300_AN_ANALYSIS_OF_CONSUMERS%27_USE_OF_PAYDAY_LOANS*.

[490] Pew Charitable Trusts, ''Payday Lending in America: Who Borrows, Where They Borrow, and Why,'' at 5 (Report 1, 2012), *available at attp://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf*.

[491] Rob Levy & Joshua Sledge, ''A Complex Portrait: An Examination of Small-Dollar Credit Consumers,'' (Ctr. for Fin. Servs. Innovation, 2012), *available at https://www.fdic.gov/news/conferences/consumersymposium/2012/A%20Complex%20Portrait.pdf*.

percent reported unexpected drops in income. Approximately 34 percent reported that their general living expenses were consistently more than their income. Respondents could also report up to three uses for the funds; the most common answers related to paying for routine expenses, with about 40 percent reporting the funds were used to "pay utility bills," about 40 percent reporting the funds were used to pay "general living expenses," and about 20 percent saying the funds were used to pay rent. Of all the reasons for borrowing, consistent shortfalls in income relative to expenses was the response most highly correlated with consumers who reported repeated usage or rollovers.

A survey of 768 online payday users conducted in 2015 and drawn from a large administrative database of payday borrowers looked at similar questions, and compared the answers of heavy and light users of online loans.[492] Based on consumers' self-reported borrowing history, they were segmented into heavy users (users with borrowing frequency in the top quartile of the dataset) and light users (bottom quartile). Heavy users were much more likely to report that they "[i]n past three months, often or always ran out of money before the end of the month" (60 percent versus 34 percent). In addition, heavy users were nearly twice as likely as light users to state their primary reason for seeking their most recent payday loan as being to pay for "regular expenses such as utilities, car payment, credit card bill, or prescriptions" (49 percent versus 28 percent). Heavy users were less than half as likely as light users to state their reason as being to pay for an "unexpected expense or emergency" (21 percent versus 43 percent). Notably, 18 percent of heavy users stated that their primary reason for seeking a payday loan online was that they "had a storefront loan, needed another [loan]" as compared to just over one percent of light users.

One industry commenter asserted that a significant share of vehicle title loan borrowers were small business owners who use these loans for business, rather than personal uses. The commenter pointed to one study that cited anonymous "industry sources" who claimed that 25–30 percent of title borrowers were small businesses[493] and another study that cited an unpublished lender survey which found that about 20 percent of borrowers were self-employed.[494] Evidence was not provided by the commenter to document the share of vehicle title loan borrowers who are either self-employed or small business owners; however, the Bureau notes that it is important to distinguish between borrowers who may be small business owners but may not necessarily use a title loan for a business purpose. For example, one survey of title loan borrowers found that while 16 percent of title loan borrowers were self-employed, only 6 percent of title loan borrowers state that they took the loan for a business expense.[495] The study's authors concluded that ". . . it seems like business credit is not a significant portion of the loans."[496] Another survey found that 20 percent of title loan borrowers are self-employed, and an additional 3 percent were both self-employed and worked for an employer. In that survey, 3 percent of title loan borrowers reported the loan was for a business expense and 2 percent reported the loan was for a mix of personal and business use.[497]

Some commenters agreed with the Bureau that the results across surveys are somewhat inconsistent, perhaps because of methodological issues. Industry commenters predictably chose to place more emphasis on the results that accorded with their arguments that these loans help consumers cope with financial shocks or allow smoothing of income. By contrast, consumer groups predictably took the opposite perspective. They contended that these loans do present special risks and harms for consumers that outweigh the benefits of access to such loans without being subject to any underwriting, especially for those consumers who experience chronic shortfalls of income. Both groups of commenters chose to downplay the results that tended to undermine their arguments. On the whole, these comments do not call into question the Bureau's treatment of the factual issues here, but go more to the potential characterization of those facts or the inferences to be drawn from them. Those issues are discussed further in the section-by-section analysis for § 1041.4 below.

A number of comments from industry participants and trade associations faulted the Bureau for not undertaking to conduct its own surveys of borrowers to gauge the circumstances that lead them to use payday, title, or other covered short-term loans. Although the Bureau had reviewed and analyzed at least four different surveys of such borrowers conducted over the past decade, as discussed above, these commenters stated that the Bureau would have furthered its understanding by speaking with and hearing directly from such borrowers. Nonetheless, many of these commenters offered further non-survey information of this kind by referencing the consumer narratives in thousands of individual consumer complaints about payday, title, and other covered loans that have been filed with the Bureau (which also include a substantial number of debt collection complaints stemming from such loans). They also pointed to individual responses that have been filed about such loans on the Bureau's online "Tell Your Story" function, where some number of individual borrowers have explained how they use such loans, often describing the benefits and challenges they have experienced as a result.

In addition, a large volume of comments—totaling well over a million comments about the proposal, both pro and con—were filed with the Bureau by individual users of payday and vehicle title loans. Many of these commenters described their own personal experiences with these loans, and others offered their perspectives. The Bureau has reviewed these comments and has carefully considered the stories they told. These comments include a large number of positive accounts of how people successfully used such loans to address shortfalls or cope with emergencies and concerns about the possibility of access to such loans being removed. The comments included fewer but still a very sizable number of other accounts, much more negative in tone, of how consumers who took out such loans became trapped in long cycles of repeated re-borrowing that led to financial distress, marked by problems such as budgetary distortions, high collateral costs, the loss of depository accounts and other services, ultimate default on the loans, and the loss of other assets such as people's homes and their vehicles. Some of these comments

[492] Stephen Nunez et al., "Online Payday and Installment Loans: Who Uses Them and Why?, (MDRC, 2016), *available at http://www.mdrc.org/sites/default/files/online_payday_2016_FR.pdf* (A demand-side analysis from linked administrative, survey, and qualitative interview data.).

[493] Todd. J. Zywicki, "Consumer Use and Government Regulation of Title Pledge Lending, 22 Loyola Cons. Law. Rev. 4 (2010), *available at http://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1053&context=lclr*.

[494] Jim Hawkins, "Credit on Wheels: The Law and Business of Auto-Title Lending," 69 Wash. & Lee L. Rev. 535, 545 (2012).

[495] Kathryn Fritzdixon et al., "Dude, Where's My Car Title?: The Law Behavior and Economics of Title Lending Markets," 2014 U. IL L. Rev. 1013, 1033 (2014).

[496] Kathryn Fritzdixon et al., "Dude, Where's My Car Title?: The Law Behavior and Economics of Title Lending Markets," 2014 U. IL L. Rev. 1013, 1036 (2014).

[497] See Pew Charitable Trusts, "Auto Title Loans," at 29 (March 2015), *available at http://www.pewtrusts.org/~/media/assets/2015/03/autotitleloansreport.pdf*.

came from the individual consumers themselves, while many came from friends, family members, clergy, legal aid attorneys, neighbors, or others who were concerned about the impact the loans had on consumers whom they knew, and in some cases whom they had helped to mitigate the negative experience through financial assistance, counseling, or legal assistance. The enormous volume of such individual comments itself helps to provide considerably more information about borrowers that helps to supplement the prior survey data discussed in the proposal. It appears that various parties on both sides of these issues went to great lengths to solicit such a large number of comment submissions by and about individual users of such loans.

The substantial volume and variation of individual comments have further added to the Bureau's understanding of the wide variety of circumstances in which such borrowing occurs. They underscore the Bureau's recognition that not only the personal characteristics, but also the particularized circumstances, of individual users of payday and single-payment vehicle title loans can be quite differentiated from one another across the market. Nonetheless, the focus of this rule is on how the identified lender practice of making such loans without reasonably assessing the borrower's ability to repay the loan according to its terms affects this broad and diverse universe of consumers.

b. Lender Practices

As described in the proposal, the business model of lenders who make payday and single-payment vehicle title loans is predicated on the lenders' ability to secure extensive re-borrowing. As recounted in the Background section, the typical storefront payday loan has a principal amount of $350, and the consumer pays a typical fee of 15 percent of the principal amount. For a consumer who takes out such a loan and repays it when it is due without re-borrowing, this means the typical loan would produce roughly $50 in revenue to the lender. Lenders would thus require a large number of ''one-and-done'' consumers to cover their overhead and acquisition costs and generate profits. However, because lenders are able to induce a large percentage of borrowers to repeatedly re-borrow, lenders have built a model in which the typical storefront lender, as discussed in part II above, has two or three employees serving around 500 customers per year. Online lenders do not have the same overhead costs, but they have been willing to pay substantial acquisition costs to lead generators and to incur substantial fraud losses, all of which can only be sufficiently offset by their ability to secure more than a single fee—and often many repeated fees—from their borrowers.

In the proposal, the Bureau used the term ''re-borrow'' to refer to situations in which consumers either roll over a loan (which means they pay a fee to defer payment of the principal for an additional period of time), or take out a new loan within a short period time following a previous loan. Re-borrowing can occur concurrently with repayment in back-to-back transactions or can occur shortly thereafter. In the proposal, the Bureau stated its reasons for concluding that re-borrowing often indicates that the previous loan was beyond the consumer's ability to repay while meeting the consumer's other major financial obligations and basic living expenses. As discussed in more detail in the section-by-section analysis of § 1041.6, the Bureau proposed and now concludes that it is appropriate to consider loans to be re-borrowings when the second loan is taken out within 30 days of the consumer being indebted on a previous loan. While the Bureau's 2014 Data Point used a 14-day period and the Small Business Review Panel Outline used a 60-day period, the Bureau used a 30-day period in its proposal to align the time frame with consumer expense cycles, which are typically a month in length. This duration was designed to account for the fact that where repaying a loan causes a shortfall, the effect is most likely to be experienced within a 30-day period in which monthly expenses for matters such as housing and other debts come due. The Bureau recognizes that some re-borrowing that occurs after a 30-day period may be attributable to the spillover effects of an unaffordable loan and that some re-borrowing that occurs within the 30-day period may be attributable to a new need that arises unrelated to the impact of repaying the short-term loan. Thus, while other periods could plausibly be used to determine when a follow-on loan constitutes re-borrowing, the Bureau believes that the 30-day period provides the most appropriate period for these purposes. In fact, the evidence presented below suggests that for any of these three potential time frames, though the percentage varies somewhat, the number of loans that occur as part of extended loan sequences of 10 loans or more is around half of all payday loans. Accordingly, this section, Market Concerns—Underwriting, uses a 30-day period to determine whether a loan is part of a loan sequence.

The proposal noted that the majority of lending revenue earned by storefront payday lenders and lenders that make single-payment vehicle title loans comes from borrowers who re-borrow multiple times and become enmeshed in long loan sequences. Based on the Bureau's data analysis, approximately half of all payday loans are in sequences that contain 10 loans or more, depending on the time frame that is used to define the sequence.[498] Looking just at loans made to borrowers who are paid weekly, bi-weekly, or semi-monthly, more than 20 percent of loans are in sequences that are 20 loans or longer. Similarly, the Bureau found that about half of all single-payment vehicle title loans are in sequences of 10 loans or more, and over two-thirds of them are in sequences of at least seven loans.[499] The commenters did not take serious issue with this data analysis, and the Bureau finds these particular facts to be of great significance in assessing the justifications for regulatory measures that would address the consequent harms experienced by consumers.

Commenters on all sides of the proposal did not seriously take issue with the account presented in the proposal of the basic business model in the marketplace for payday and single-payment vehicle title loans. They did have widely divergent views about whether they would characterize these facts as beneficial or pernicious, or what consequences they perceive as resulting from this business model. One credit union trade association stated its view that such lending takes advantage of consumers and exacerbates bad financial situations and thus it favored curbs on payday lending. Consumer groups and numerous individual borrowers echoed this view. Industry participants, other trade associations, and many other individual borrowers took the position, explicitly or implicitly, that the benefits experienced by successful users of these loans outweighed the costs incurred by those who engaged in repeat re-borrowing with consequent negative outcomes and collateral consequences.

As discussed below, the Bureau has considered the comments submitted on

[498] This is true regardless of whether sequence is defined using either a 14-day, 30-day, or 60-day period to determine whether loans are within the same loan sequence. Using the 14-day period, just under half of these loans (47 percent) are in sequences that contain 10 loans or more. Using a longer period, more than half of these loans (30 days, 53 percent; 60 days, 59 percent) are in sequences that contain 10 loans or more.

[499] CFPB Single-Payment Vehicle Title Lending, at 14.

the proposal and continues to believe that both the short term and the single-payment structure of these loans contributes to the long loan sequences that borrowers take out. Various lender practices exacerbate the problem by marketing to borrowers who are particularly likely to wind up in long sequences of loans, by failing to screen out borrowers who are likely to wind up in long-term debt or to establish guardrails to avoid long-term indebtedness, and by actively encouraging borrowers to continue to re-borrow when their single-payment loans come due.

1. Loan Structure

The proposal described how the single-payment structure and short duration of these loans makes them difficult to repay. Within the space of a single income or expense cycle, a consumer with little to no savings cushion and who has borrowed to meet an unexpected expense or income shortfall, or who chronically runs short of funds, is unlikely to have the available cash needed to repay the full amount borrowed plus the finance charge on the loan when it is due and to cover other ongoing expenses. This is true for loans of a very short duration regardless of how the loan may be categorized. Loans of this type, as they exist in the market today, typically take the form of single-payment loans, including payday loans and vehicle title loans, though other types of credit products are possible.[500] Because the focus of the Bureau's research has been on payday and vehicle title loans, the discussion in Market Concerns—Underwriting centers on those types of products.

The size of single-payment loan repayment amounts (measured as loan principal plus finance charges owed) relative to the borrower's next paycheck gives some sense of how difficult repayment may be. The Bureau's storefront payday loan data shows that the average borrower being paid on a bi-weekly basis would need to devote 37 percent of her bi-weekly paycheck to repaying the loan. Single-payment vehicle title borrowers face an even greater challenge. In the data analyzed by the Bureau, the median borrower's payment on a 30-day loan is equal to 49 percent of monthly income,[501] and the Bureau finds it especially significant as indicating the severe challenges and potential for negative outcomes associated with these loans.

The commenters did not offer any data that disagreed with this analysis of how the loan structure works in practice. Industry commenters did assert, however, that the structure of these loans is not intended or designed as a means of exploiting consumers, but rather has evolved as needed to comply with the directives of State law and State regulation of this lending market. As a historical matter, this appears to be incorrect; indeed, another commenter is the founder of the company who helped to initiate the payday lending industry, W. Allan Jones. The comment notes that the ''traditional 'payday loan' product'' was first developed by his company in 1993 in Tennessee and then became the basis for legislation and regulation that has spread to a majority of States, with various modifications and refinements. As noted above in part II.A, however, another large payday lender—QC Financial—began making payday loans in Kansas in 1992 under an existing provision of that state's existing consumer lending structure and that same year at least one State regulator formally held that deferred presentment activities constituted consumer lending subject to the State's consumer credit laws.[502] Other accounts of the history of payday lending generally tend to reinforce these historical accounts that modern payday lending began emerging in the early 1990s as a variant of check-cashing stores whereby the check casher would cash and hold consumers' personal checks for a fee for several days—until payday—before cashing them.[503] The laws of States, particularly those that had adopted the Uniform Consumer Credit Code (UCCC) including Kansas and Colorado, permitted lenders to retain a minimum finance charge on loans ranging in the 1990's from about $15 to $25 per loan regardless of State rate caps, and payday lenders used those provisions to make payday loans. In other States, and later in UCCC States, more specific statutes were enacted to authorize and regulate what had become payday lending. No doubt the structure of such loan products over time is affected by and tends to conform to State laws and regulations, but the point here is that the key features of the loan structure, which tend to make these loans difficult to repay for a significant population of borrowers, are core to this financial product and are fairly consistent across time and geography.

Regardless of the historical background, however, one implication of the suggestion put forward by these commenters appears to be that the intended consequence of this loan product is to produce cycles of re-borrowing or extended loan sequences for many consumers that exceed the permissible short-term loan periods adopted under State law. The explanation seems to be that the actual borrowing needs of consumers extend beyond the permissible loan periods permitted by State law. If that is so, then the inherent nature of this mismatched product imposes large forecasting risks on the consumer, which may often lead to unexpected harms. And even if the claim instead is that the loan structure manages to co-exist with the formal constraints imposed by State law, this justification does little to minimize the risks and harms to the substantial population of consumers who find themselves trapped in extended loan sequences.

2. Marketing

The proposal also noted that the general positioning of short-term products in marketing and advertising materials as a solution to an immediate liquidity challenge attracts consumers facing these problems, encouraging them to focus on short-term relief rather than the likelihood that they are taking on a new longer-term debt. Lenders position the purpose of the loan as being for use ''until next payday'' or to ''tide over'' the consumer until she receives her next paycheck.[504] These types of

[500] In the past, a number of depository institutions have also offered deposit advance products. A small number of institutions still offer similar products. Like payday loans, deposit advances are typically structured as short-term loans. However, deposit advances do not have a pre-determined repayment date. Instead, deposit advance agreements typically stipulate that repayment will automatically be taken out of the borrower's next qualifying electronic deposit. Deposit advances are typically requested through online banking or over the phone, although at some institutions they may be requested at a branch. As described in more detail in the CFPB Payday Loans and Deposit Advance Products White Paper, the Bureau's research demonstrated similar borrowing patterns in both deposit advance products and payday loans. *See* CFPB Payday Loans and Deposit Advance Products White Paper, at 32–42.

[501] The data used for this calculation is described in CFPB Data Point: Payday Lending, at 10–15 and in CFPB Report on Supplemental Findings.

[502] QC Holdings, Inc., Registration Statement (Form S–1), at 1 (May 7, 2004); *see, e.g.,* Laura Udis, Adm'r Colo. Dep't of Law, Unif. Consumer Credit Code, ''Check Cashing Entities Which Provide Funds In Return For A Post-Dated Check Or Similar Deferred Payment Arrangement And Which Impose A Check Cashing Charge Or Fee May Be Consumer Lenders Subject To The Colorado Uniform Consumer Credit Code,'' Administrative Interpretation No. 3.104–9201 (June 23, 1992) (on file).

[503] Pew Charitable Trusts, ''A Short History of Payday Lending Law,'' (July 18, 2012), *available at http://www.pewtrusts.org/en/research-and-analysis/analysis/2012/07/a-short-history-of-payday-lending-law.*

[504] *See, e.g.,* Speedy Cash, ''Payday Loan'', *https://www.speedycash.com/payday-loans* (last visited Sept. 24, 2017) (''A Speedy Cash payday

Continued

product characterizations can encourage consumers to think of these loans as easy to repay, a fast solution to a temporary cash shortfall, and a short-term obligation, all of which lessen the risk in the consumer's mind that the loan will become a long-term debt cycle. Indeed, one study reporting consumer focus group feedback noted that some participants reported that the marketing made it seem like payday loans were ''a way to get a cash infusion without creating an additional bill.'' [505]

As discussed in the proposal, in addition to presenting loans as short-term solutions, rather than potentially long-term obligations, lender advertising often focuses on how quickly and easily consumers can obtain a loan. An academic paper reviewing the advertisements of Texas storefront and online payday and vehicle title lenders found that the speed of getting a loan is the most frequently advertised feature in both online (100 percent) and storefront (50 percent) payday and title loans.[506] Advertising that is focused on immediacy and speed capitalizes on the sense of urgency borrowers feel when facing a cash shortfall. Indeed, the names of many payday and vehicle title lenders include the words (in different spellings) ''speedy,'' ''cash,'' ''easy,'' and ''quick,'' thus emphasizing their rapid and simple loan funding.

All of the commenters generally agreed as a factual matter that the marketing and offering of such loans is typically marked by ease, speed, and convenience, which are touted as positive attributes of such loans that make them desirable credit products from the standpoint of potential borrowers. Yet industry participants and trade associations broadly disputed what they viewed as the Bureau's perspective on the potential implications of this marketing analysis, as suggesting that many borrowers lack knowledge or awareness about the nature, costs, and overall effects of these loans. Consumer advocates, on the other hand, contended that the manner in which these loans are being marketed affects the likelihood that borrowers will tend to view them as short-term obligations that will not have long-term effects on their overall financial position, which often leads consumers to experience the negative outcomes associated with unexpectedly ending up in extended loan sequences.

3. Failure To Assess Ability To Repay

As discussed in the proposal, the typical loan process for storefront payday, online payday, and single-payment vehicle title lenders generally involves gathering some basic information about borrowers before making a loan. Lenders normally do collect income information, although the information they collect may just be self-reported or ''stated'' income. Payday lenders collect information to ensure the borrower has a checking account, and title lenders need information about the vehicle that will provide the security for the loan. Some lenders access consumer reports prepared by specialty consumer reporting agencies and engage in sophisticated screening of applicants, and at least some lenders turn down the majority of applicants to whom they have not previously made loans.

One of the primary purposes of this screening, however, is to avoid fraud and other ''first payment defaults,'' not to make any kind of determination that borrowers will be able to repay the loan without re-borrowing. These lenders generally do not obtain any information about the borrower's existing obligations or living expenses, which means that they cannot and do not prevent those with expenses chronically exceeding income, or those who have suffered from an income or expense shock from which they need substantially more time to recover than the term of the loan, from taking on additional obligations in the form of payday or similar loans. Thus, lenders' failure to assess the borrower's ability to repay the loan permits those consumers who are least able to repay the loans, and consequently are most likely to re-borrow, to obtain them.

Lending to borrowers who cannot repay their loans would generally not be profitable in a traditional lending market, but as described elsewhere in this section, the factors that funnel consumers into cycles of repeat re-borrowing turn the traditional model on its head by creating incentives for lenders to actually want to make loans to borrowers who cannot afford to repay them when due if instead the consequence is that these borrowers are likely to find themselves re-borrowing repeatedly. Although industry stakeholders have argued that lenders making short-term loans already take steps to assess ''ability to repay'' and will always do so out of economic self-interest, the Bureau believes that this refers narrowly to whether the consumer will default up front on the loan, rather than whether the consumer has the capacity to repay the loan without having to re-borrow and while meeting other financial obligations and basic living expenses. The fact that lenders often do not perform additional underwriting when borrowers are rolling over a loan, or are returning to borrow again soon after repaying a prior loan, further shows that lenders do not see re-borrowing as a sign of borrowers' financial distress or as an outcome to be avoided. Rather, repeated re-borrowing may be perceived as a preferred outcome for the lender or even as an outcome that is a crucial underpinning to the business model in this loan market.

For the most part, commenters did not take issue with the tenets of this factual description of the typical underwriting process for such loans, though some lenders contended that they do not intentionally seek out potential customers who are likely to have to re-borrow multiple times. As noted, however, this approach is consistent with the basic business model for such loans as described above. Industry

loan may be a solution to help keep you afloat until your next pay day.''); Check Into Cash, ''Our Loan Process,'' *https://checkintocash.com/payday-loans/* (last visited Sept. 24, 2017) (''A payday loan is a small dollar short-term advance used as an option to help a person with small, often unexpected expenses.''); Cash America, ''Cash Advance/Short-term Loans,'' *http://www.cashamerica.com/LoanOptions/CashAdvances.aspx* (last visited May 18, 2016) (noting that ''a short-term loan, payday advance or a deferred deposit transaction—can help tide you over until your next payday'' and that ''A single payday advance is typically for two to four weeks. However, borrowers often use these loans over a period of months, which can be expensive. Payday advances are not recommended as long-term financial solutions.''); Cmty. Fin. Servcs. Ass'n of Am., ''Is A Payday Advance Appropriate For You?,'' *http://cfsaa.com/what-is-a-payday-advance/is-a-payday-advance-appropriate-for-you.aspx* (last visited May 18, 2016) (The national trade association representing storefront payday lenders analogizes a payday loan to ''a cost-efficient 'financial taxi' to get from one payday to another when a consumer is faced with a small, short-term cash need.'' The Web site elaborates that, ''Just as a taxi is a convenient and valuable service for short distance transportation, a payday advance is a convenient and reasonably-priced service that should be used to meet small-dollar, short-term needs. A taxi service, however, is not economical for long-distance travel, and a payday advance is inappropriate when used as a long-term credit solution for ongoing budget management.'').

[505] Pew Charitable Trusts, ''Payday Lending in America: How Borrowers Choose and Repay Payday Loans,'' at 22 (Report 2, 2013), *available at http://www.pewtrusts.org/en/research-and-analysis/reports/2013/02/19/how-borrowers-choose-and-repay-payday-loans* (''To some focus group respondents, a payday loan, as marketed, did not seem as if it would add to their recurring debt, because it was a short-term loan to provide quick cash rather than an additional obligation. They were already in debt and struggling with regular expenses, and a payday loan seemed like a way to get a cash infusion without creating an additional bill.'').

[506] Jim Hawkins, ''Using Advertisements to Diagnose Behavioral Market Failure in Payday Lending Markets,'' 51 Wake Forest L. Rev. 57, at 71 (2016). The next most advertised features in online content are simple application process and no credit check/bad credit OK (both at 97 percent). For storefront lenders, the ability to get a high loan amount was the second most highly advertised content.

participants and trade associations did dispute one perceived implication of this discussion by asserting that long loan sequences, at least standing alone, cannot simply be assumed to be harmful or to demonstrate a consumer's inability to repay these loans, as many factors may bear on those outcomes. This point is discussed further below.

4. Encouraging Long Loan Sequences

In the proposal, the Bureau recounted its assessment of the market by noting that lenders attract borrowers in financial crisis, encourage them to think of the loans as a short-term solution, and fail to screen out those for whom the loans are likely to become a long-term debt cycle. After that, lenders then actively encourage borrowers to re-borrow and continue to be indebted rather than pay down or pay off their loans. Although storefront payday lenders typically take a post-dated check, which could be presented in a manner timed to coincide with deposit of the borrower's paycheck or government benefits, lenders usually encourage or even require borrowers to come back to the store to redeem the check and pay in cash.[507] When the borrowers return, they are typically presented by lender employees with two salient options: Repay the loan in full, or simply pay a fee to roll over the loan (where permitted under State law). If the consumer does not return, some lenders may reach out to the customer but ultimately the lender will proceed to attempt to collect by cashing the check. On a $300 loan at a typical charge of $15 per $100 borrowed, the cost to defer the due date for another 14 days until the next payday is $45, while repaying in full would cost $345, which may leave the borrower with insufficient remaining income to cover expenses over the ensuing month and therefore tends to prompt re-borrowing. Requiring repayment in person gives staff at the stores the opportunity to frame for borrowers a choice between repaying in full or just paying the finance charge, which may be coupled with encouragement guiding them to choose the less immediately painful option of paying just the finance charge and rolling the loan over for another term. Based on its experience from supervising payday lenders over the past several years, the Bureau has observed that storefront employees are generally incentivized to maximize the store's loan volume and the data suggest that re-borrowing is a crucial means of achieving this goal.[508]

As laid out in the proposal, the Bureau's research shows that payday borrowers rarely re-borrow a smaller amount than the initial loan. Doing so would effectively amortize their loans by reducing the principal amount owed over time, thereby reducing their costs and the expected length of their loan sequences. Rather than encouraging borrowers to make amortizing payments that would reduce their financial exposure over time, lenders encourage borrowers to pay the minimum amount and re-borrow the full amount of the earlier loan, thereby contributing to this outcome. In fact, as discussed in the proposal, some online payday loans automatically roll the loan over at the end of its term unless the consumer takes affirmative action in advance of the due date, such as notifying the lender in writing at least three days before the due date. As some industry commenters noted, single-payment vehicle title borrowers who take out multiple loans in a sequence are more likely than payday borrowers who taken out multiple loans in a sequence to reduce the loan amount from the beginning to end of that sequence. After excluding for single loan sequences for which this analysis is not applicable, 37 percent of single-payment vehicle title loan sequences have declining loan amounts compared to just 15 percent of payday loan sequences. This greater likelihood of declining loan amounts for single-payment vehicle title loans compared to payday loans may also be influenced by the larger median size of title loans, which is $694, as compared to the median size of payday loans, which is $350. However, this still indicates that a large majority of single payment vehicle title loan borrowers have constant or increasing loan amounts over the course of a sequence. In addition, the Bureau's analysis shows that those single payment vehicle title loan borrowers who do reduce their loan amounts during a sequence only do so for a median of about $200, which is less than a third of the median loan amount of about $700.[509] This may reflect the effects of certain State laws regulating vehicle title loans that require some reduction in loan size across a loan sequence.

Lenders also actively encourage borrowers who they know are struggling to repay their loans to roll over and continue to borrow. In the Bureau's work over the past several years to monitor the operations and compliance of such lenders, including supervisory examinations and enforcement actions, the Bureau has found evidence that lenders maintain training materials that promote borrowing by struggling borrowers.[510] In one enforcement action, the Bureau found that if a borrower did not repay in full or pay to roll over the loan on time, personnel would initiate collections. Store personnel or collectors would then offer new loans as a source of relief from the collections activities. This approach, which was understood to create a ''cycle of debt,'' was depicted graphically as part of the standard ''loan process'' in the company's new hire training manual. The Bureau is aware of similar practices in the single-payment vehicle title lending market, where store employees offer borrowers additional cash during courtesy calls and when calling about past-due accounts, and company training materials instruct employees to ''turn collections calls into sales calls'' and encourage delinquent borrowers to refinance to avoid default and repossession of their vehicles.

It also appears that lenders do little to affirmatively promote the use of ''off ramps'' or other alternative repayment options, even when those are required by law to be made available to borrowers. Such alternative repayment plans could help at least some borrowers avoid lengthy cycles of re-borrowing. Lenders that belong to one of the two national trade associations for storefront payday lenders have agreed to offer an extended payment plan to borrowers, but only if the borrower makes a request at least one day prior to the date on which the loan is due.[511]

[507] The Bureau believes from its experience in conducting examinations of storefront payday lenders and its outreach that cash repayments on payday and vehicle title loans are prevalent, even when borrowers provide post-dated checks or ACH authorizations for repayment. The Bureau has developed evidence from reviewing a number of payday lenders subject to supervisory examination in 2014 that the majority of them call each borrower a few days before payment is due to remind them to come to the store and pay the loan in cash. As an example, one storefront lender requires borrowers to come in to the store to repay. Its Web site states: ''All payday loans must be repaid with either cash or money order. Upon payment, we will return your original check to you.'' Others give borrowers ''appointment'' or ''reminder'' cards to return to make a payment in cash. In addition, vehicle title loans do not require a bank account as a condition of the loan, and borrowers without a checking account must return to storefront title locations to make payments.

[508] Most storefront lenders examined by the Bureau employ simple incentives that reward employees and store managers for loan volumes.

[509] *See* CFPB Single-Payment Vehicle Title Lending, at 18.

[510] Press Release, Bureau of Consumer Fin. Prot., ''CFPB Takes Action Against Ace Cash Express for Pushing Payday Borrowers Into Cycle of Debt,'' (July 10, 2014), *available at http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-ace-cash-express-for-pushing-payday-borrowers-into-cycle-of-debt/*.

[511] Cmty. Fin. Srvcs. Ass'n of Am., ''CFSA Member Best Practices,'' *http://cfsaa.com/cfsa-*

Continued

(The second national trade association reports that its members provide an extended payment plan option, but details on that option are not available.) In addition, about 18 States require payday lenders to offer repayment plans to borrowers who encounter difficulty in repaying payday loans. The usage rate of these repayment plans varies widely, but in all cases it is relatively low.[512] One explanation for the low take-up rate on these repayment plans may be that certain lenders disparage the plans or fail to promote their availability.[513] By discouraging the use of repayment plans, lenders make it more likely that such consumers will instead re-borrow. The Bureau's supervisory examinations uncovered evidence that one or more payday lenders train their employees not to mention repayment plans until after the employees have offered renewals, and then only to mention repayment plans if borrowers specifically ask about them.

In general, most of the commenters did not take issue with this factual account of the mechanics or incentives that lead to a high incidence of rolling over such loans, and much of what they said tended to confirm it. In particular, industry commenters acknowledged that incentive programs for their employees based on net revenue are widespread in the industry. Such programs are not illegal, of course, but given the structure of these loans as described above, this suggests that employees are being incentivized to encourage re-borrowing and extended loan sequences by having borrowers roll their loans over repeatedly.

Industry participants, trade associations, and some individual users of such loans did argue, however, about the implications of this analysis. One of their claims is that many consumers have an actual borrowing need that extends beyond the loan period permitted under State law, and thus repeated re-borrowing may be a means of synchronizing the consumer's borrowing needs to the specific contours of the loan product. In particular, they contended that re-borrowing may be beneficial to consumers as part of longer-term strategies around income smoothing or debt management, a point that is discussed further below.

5. Payment Mechanisms and Vehicle Title

The proposal noted that where lenders can collect payments through post-dated checks or ACH authorizations, or obtain security interests in borrowers' vehicles, these mechanisms also can be used to encourage borrowers to re-borrow, as a way to avoid what otherwise could be negative consequences if the lender were to cash the check or repossess the vehicle. For example, consumers may feel significantly increased pressure to return to a storefront to roll over a payday or vehicle title loan that includes such features. They may do so rather than risk incurring new fees in connection with an attempt to deposit the consumer's post-dated check, such as an overdraft or NSF fee from the bank and a returned-item fee from the lender if the check were to bounce or risk suffering the repossession of their vehicle. The pressure can be especially acute when the lender obtains security in the borrower's vehicle.

The proposal also noted that in cases where consumers do ultimately default on their loans, and these mechanisms are at last effectuated, they often magnify the total harm that consumers suffer from losing their access to essential transportation. Consumers often will have additional account and lender fees assessed against them, and some will end up having their bank accounts closed. When this occurs, they will have to bear the many attendant costs of becoming stranded outside the banking system, which include greater inconvenience, higher costs, reduced safety of their funds, and the loss of the other advantages of a standard banking relationship.

These harms are very real for many consumers. For example, as discussed in more detail below in Market Concerns—Payments, the Bureau's research has found that 36 percent of borrowers who took out online payday or payday installment loans and had at least one failed payment during an eighteen-month period had their checking accounts closed by the bank by the end of that period, a rate that is four times greater than the closure rate for accounts that only had NSFs from non-payday transactions.[514] For accounts with failed online payday loan transactions, account closures typically occur within 90 days of the last observed online payday loan transaction; in fact, 74 percent of account closures in these situations occur within 90 days of the first NSF return triggered by an online payday or payday installment lender.[515] This suggests that the online loan played a role in the closure of the account, or that payment attempts failed because the account was already headed towards closure, or both.[516]

member-best-practices.aspx (last visited May 18, 2016); Cmty. Fin. Srvcs. Ass'n of Am., ''What Is an Extended Payment Plan?,'' *http://cfsaa.com/cfsa-member-best-practices/what-is-an-extended-payment-plan.aspx* (last visited May 18, 2016); Fin. Srvc. Ctrs. of Am., Inc., ''FiSCA Best Practices,'' *http://www.fisca.org/Content/NavigationMenu/AboutFISCA/CodesofConduct/default.htm* (last visited May 18, 2016).

[512] Washington permits borrowers to request a no-cost installment repayment schedule prior to default. In 2014, 14 percent of payday loans were converted to installment loans. Wash. Dep't of Fin. Insts., ''2014 Payday Lending Report,'' at 7 (2014), *available at http://www.dfi.wa.gov/sites/default/files/reports/2014-payday-lending-report.pdf* Illinois allows payday loan borrowers to request a repayment plan with 26 days after default. Between 2006 and 2013, the total number of repayment plans requested was less than 1 percent of the total number of loans made in the same period. Ill. Dep't. of Fin. & Prof. Reg., ''Illinois Trends Report All Consumer Loan Products Through December 2015,'' at 19 (Apr. 14, 2016), *available at http://www.idfpr.com/DFI/CCD/pdfs/IL_Trends_Report%202015-%20FINAL.pdf?ActID=1204&ChapterID=20*). In Colorado, in 2009, 21 percent of eligible loans were converted to repayment plans before statutory changes repealed the repayment plan. State of Colorado, Dep't of Law, Office of the Att'y Gen., ''2009 Deferred Deposit Lenders Annual Report,'' at 2 (2009) (hereinafter Colorado 2009 Deferred Deposit Lenders Annual Report), *available at http://www.coloradoattorneygeneral.gov/sites/default/files/contentuploads/cp/ConsumerCreditUnit/UCCC/AnnualReportComposites/2009_ddl_composite.pdf*. In Utah, six percent of borrowers entered into an extended payment plan. G. Edward Leary, Comm'r of Fin. Insts. for the State of Utah to Hon. Gary R. Herbert, Governor, and the Legislature, (Report of the Commissioner of Financial Institutions for the Period July 1, 2013 to June 30, 2014), at 135, (Oct. 2, 2014) *available at http://dfi.utah.gov/wp-content/uploads/sites/29/2015/06/Annual1.pdf*. Florida law also requires lenders to extend the loan term on the outstanding loan by sixty days at no additional cost for borrowers who indicate that they are unable to repay the loan when due and agree to attend credit counseling. Although 84 percent of loans were made to borrowers with seven or more loans in 2014, fewer than 0.5 percent of all loans were granted a cost-free term extension. *See* Brandon Coleman & Delvin Davis, ''Perfect Storm: Payday Lenders Harm Florida Consumer Despite State Law,'' at 4 (Ctr. for Responsible Lending, 2016), *available at http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_perfect_storm_florida_mar2016_0.pdf*.

[513] Colorado's 2009 annual report of payday loan activity noted lenders' self-reporting of practices to restrict borrowers from obtaining the number of loans needed to be eligible for a repayment plan or imposing cooling-off periods on borrowers who elect to take a repayment plan. Colorado 2009 Deferred Deposit Lenders Annual Report. This evidence was from Colorado under the state's 2007 statute which required lenders to offer borrowers a no-cost repayment plan after the third balloon loan. The law was changed in 2010 to prohibit balloon loans, as discussed in part II.

[514] CFPB Online Payday Loan Payments, at 12.

[515] CFPB Online Payday Loan Payments, at 23.

[516] *See also* Complaint at 14, *Baptiste* v. *J.P. Morgan Chase Bank*, No. 12–04889 (E.D.N.Y. Oct. 1, 2012) (alleging plaintiff's bank account was closed with a negative balance of $641.95, which consisted entirely of bank's fees triggered by the payday lenders' payment attempts); *id.* at 20–21 (alleging plaintiff's bank account was closed with a negative balance of $1,784.50, which consisted entirely of banks fees triggered by the payday lender's payment attempts and payments provided to the lenders through overdraft, and that plaintiff was subsequently turned down from opening a new checking account at another bank because of a

In general, the commenters did not challenge the Bureau's factual account of how these payment mechanisms can lead to these collateral consequences that harm consumers. Industry commenters did disagree, however, with the premise that these harms were caused by the use of covered short-term loans. Some disagreed about the overall magnitude of these harms, stating that there is no evidence that covered short-term loans actually cause account closures or NSF fees, as stated in the proposal, and arguing that the Bureau overstated the extent to which consumers who default are subjected to NSF fees or fees resulting from bounced checks. But they did not present any convincing data to refute what the Bureau had observed from its own research and experience, and the assertion that online loans may have performed more poorly than storefront loans in these respects was not persuasive. Although the Bureau did not purport to find that the evidence in its data was determinative as to causation, the relationship between the consumer experience on such loans and the borrower outcomes was strongly reinforced by the data and logical as to the connection between them.

c. Patterns of Lending and Extended Loan Sequences

The Bureau's proposal described how borrower characteristics, the circumstances of borrowing, the structure of the short-term loans, and the practices of the lenders together lead to dramatic negative outcomes for many payday and single-payment vehicle title borrowers. There is strong evidence that a meaningful share of borrowers who take out payday and single-payment vehicle title loans end up with very long sequences of loans, and the loans made to borrowers with these negative outcomes make up a majority of all the loans made by these lenders.[517]

Long loan sequences lead to very high total costs of borrowing. Each single-payment loan carries the same cost as the initial loan that the borrower took out. For a storefront borrower who takes out the average-sized payday loan of $350 with a typical fee of $15 per $100, each re-borrowing by rolling over the loan means paying additional fees of $52.50. After just three re-borrowings, the borrower will have paid more than $150 simply to defer payment of the original principal amount by an additional period ranging from six weeks to three months.

As noted in the proposal, the cost of re-borrowing for title borrowers is even more dramatic, given the higher price and larger size of those loans. The Bureau's data indicates that the median loan size for single-payment vehicle title loans is $694. One study found that the most common rate charged on the typical 30-day title loan is $25 per $100 borrowed, which is a common State limit and equates to an APR of 300 percent.[518] A typical instance of re-borrowing thus means that the consumer pays a fee of around $175. After just three re-borrowings, a consumer will typically have paid about $525 simply to defer payment of the original principal amount by three months.

The proposal cited evidence for the prevalence of long sequences of payday and title loans, which comes from the Bureau's own work, from analysis by independent researchers and analysts commissioned by industry, and from statements by industry stakeholders. The Bureau has published several analyses of storefront payday loan borrowing.[519] Two of these have focused on the length of loan sequences that borrowers take out. In these publications, the Bureau defined a loan sequence as a series of loans where each loan was taken out either on the day the prior loan was repaid or within some number of days from when the loan was repaid. The Bureau's 2014 Data Point used a 14-day window to define a sequence of loans. Those data have been further refined in the CFPB Report on Supplemental Findings and shows that when a borrower who is not currently in a loan sequence takes out a payday loan, borrowers wind up taking out at least four loans in a row before repaying 43 percent of the time, take out at least seven loans in a row before repaying 27 percent of the time, and take out at least 10 loans in a row before repaying 19 percent of the time.[520] In the CFPB Report on Supplemental Findings, the Bureau re-analyzed the data using 30-day and 60-day definitions of sequences. The results are similar, although using longer windows leads to longer sequences of more loans. Using the 30-day definition of a sequence, 50 percent of new loan sequences contain at least four loans, 33 percent of sequences contain at least seven loans, and 24 percent of sequences contain at least 10 loans.[521] Borrowers who take out a fourth loan in a sequence have a 66 percent likelihood of taking out at least three more loans, for a total sequence length of seven loans. And such borrowers have a 48 percent likelihood of taking out at least six more loans, for a total sequence length of 10 loans.[522]

These findings are mirrored in other analyses. During the SBREFA process, one participant submitted an analysis prepared by Charles River Associates (CRA) of loan data from several small storefront payday lenders.[523] Using a 60-day sequence as its definition, CRA found patterns of borrowing very similar to those that the Bureau had found. Compared to the Bureau's results using a 60-day sequence definition, in the

negative ChexSystems report stemming from the account closure).

[517] In addition to the array of empirical evidence demonstrating this finding, industry stakeholders themselves have expressly or implicitly acknowledged the dependency of most storefront payday lenders' business models on repeat borrowing. A June 20, 2013 letter to the Bureau from an attorney for a national trade association representing storefront payday lenders asserted that, ''[i]n any large, mature payday loan portfolio, loans to repeat borrowers generally constitute between 70 and 90 percent of the portfolio, and for some lenders, even more,'' and that ''[t]he borrowers most likely to roll over a payday loan are, first, those who have already done so, and second, those who have had un-rolled-over loans in the immediately preceding loan period.'' Letter from Hilary B. Miller to Bureau of Consumer Fin. Prot. (June 20, 2013), *available at http://files.consumerfinance.gov/f/201308_cfpb_cfsa-information-quality-act-petition-to-CFPB.pdf*. The letter asserted challenges under the Information Quality Act to the Bureau's published White Paper (2013); *see also* Letter from Ron Borzekowski & B. Corey Stone, Jr., Bureau of Consumer Fin. Prot., to Hilary B. Miller (Aug. 19, 2013), *available at https://encrypted.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0ahUKEwjEzu_EuMDWAhUGYiYKHY00ASEQFggvMAI&url=http%3A%2F%2Ffiles.consumerfinance.gov%2Ff%2F201308_cfpb_cfsa-response.pdf&usg=AFQjCNF8PpFfXq_pt-lFOJtot1tRX_Or6A* (Bureau's response to the challenge).

[518] Pew Charitable Trusts, ''Auto Title Loans: Market Practices and Borrower Experiences,'' at 11, 34 n.15 (2015), *available at http://www.pewtrusts.org/~/media/assets/2015/03/autotitleloansreport.pdf*.

[519] *See generally* CFPB Data Point: Payday Lending; CFPB Payday Loans and Deposit Advance Products White Paper.

[520] *See* CFPB Report on Supplemental Findings.

[521] CFPB Report on Supplemental Findings. In proposed § 1041.6 the Bureau proposed some limitations on loans made within a sequence, and in proposed § 1041.2(a)(12), the Bureau proposed to define a sequence to include loans made within 30 days of one another. The Bureau believes that this is a more appropriate definition of sequence than using either a shorter or longer time horizon for the reasons set forth in the section-by-section analyses of proposed §§ 1041.2(a)(12) and 1041.6. For these same reasons, the Bureau believes that the findings contained in the CFPB Report on Supplemental Findings and cited in text provide the most accurate quantification of the degree of harm resulting from cycles of indebtedness.

[522] These figures are calculated simply by taking the share of sequences that are at least seven (or ten) loans long and diving by the share of sequences that are at least four loans long.

[523] Arthur Baines et al., ''Economic Impact on Small Lenders of the Payday Lending Rules Under Consideration by the CFPB,'' Charles River Associates, (2015), *available at http://www.crai.com/publication/economic-impact-small-lenders-payday-lending-rules-under-consideration-cfpb*. The CRA analysis states that it used the same methodology as the Bureau.

CRA analysis there were more loans where the borrower defaulted on the first loan or repaid without re-borrowing (roughly 44 percent versus 25 percent), and fewer loans that had 11 or more loans in the sequence, but otherwise the patterns were nearly identical.[524]

Similarly, in an analysis funded by an industry research organization, researchers found a mean sequence length, using a 30-day sequence definition, of nearly seven loans.[525] This is slightly higher than the mean 30-day sequence length in the Bureau's analysis (5.9 loans).

Analysis of a multi-lender, multi-year dataset by a research group affiliated with a specialty consumer reporting agency found that over a period of approximately four years the average borrower had at least one sequence of nine loans; that 25 percent of borrowers had at least one loan sequence of 11 loans; and that 10 percent of borrowers had at least one loan sequence of 22 loans.[526] Looking at these same borrowers for a period of 11 months—one month longer than the duration analyzed by the Bureau—the researchers found that on average the longest sequence these borrowers experienced over the 11 months was 5.3 loans, that 25 percent of borrowers had a sequence of at least seven loans, and that 10 percent of borrowers had a sequence of at least 12 loans.[527] This research group also identified a core of users with extremely persistent borrowing, and found that 30 percent of borrowers who took out a loan in the first month of the four-year period also took out a loan in the last month.[528] The median time in debt for this group of extremely persistent borrowers was over 1,000 days, which is more than half of the four-year period. The median borrower in this group of extremely persistent borrowers had at least one loan sequence of 23 loans long or longer (which was nearly two years for borrowers who were paid monthly). Perhaps most notable, almost one out of ten members of this research group (nine percent) borrowed continuously for the *entire* four-year period.[529]

In the proposal, the Bureau also presented its analysis of single-payment vehicle title loans according to the same basic methodology.[530] Using a 30-day definition of loan sequences, the Bureau found that short-term single-payment vehicle title loans had loan sequences that were similar to payday loans. More than half (56 percent) of these sequences contained at least four loans; 36 percent contained seven or more loans; and 23 percent had 10 or more loans. The Bureau's analysis found that title borrowers were less likely than those using payday loans to repay a loan without re-borrowing or defaulting. Only 12 percent of single-payment vehicle title loan sequences consisted of a single loan that was repaid without subsequent re-borrowing, compared to 22 percent of payday loan sequences.[531] Other sources on title lending are more limited than for payday lending, but are generally consistent. For instance, the Tennessee Department of Financial Institutions publishes a biennial report on 30-day single-payment vehicle title loans. The most recent report shows very similar results to those the Bureau found in its research, with 66 percent of borrowers taking out four or more loans in row, 40 percent taking out more than seven loans in a row, and 24 percent taking out more than 10 loans in a row.[532]

Some commenters noted data showing that vehicle title borrowers use re-borrowing to self-amortize their principal balance to a greater extent than payday borrowers do, which they suggested is evidence that title re-borrowing is not injurious. As noted previously, while it is true that more title borrowers in multi-loan sequences have declining loan balances than do payday borrowers in multi-loan sequences, this is likely the result of title loans starting out at much larger amounts. More salient is the fact that 63 percent of multi-loan sequences of title loans are for principal amounts that either remain unchanged or actually increase during the sequence, and that even those title loan sequences that do have a decline in loan amount over time only have a median decline of about $200 from beginning to end of the sequence, which is less than one-third of the average total amount of these loans. And the default rate remains high even for amortizing multi-loan sequences of title loans, at 22 percent, which is slightly higher than the default rate for payday loans (20 percent), even though the latter amortize less often. All of this suggests that even if title borrowers can somewhat reduce the larger principal amount of their loans over time, it remains difficult to succeed in digging themselves out of the debts they have incurred with these loans.

In addition to direct measures of the length of loan sequences, the cumulative number of loans that borrowers take out provides ample indirect evidence that they are often getting stuck in a long-term debt cycle. The Bureau has measured total borrowing by payday borrowers in two ways. In one study, the Bureau took a snapshot of borrowers in lenders' portfolios at a point in time (measured as borrowing in a particular month) and tracked them for an additional 11 months (for a total of 12 months) to assess overall loan use. This study

[524] *See generally* CFPB Report on Supplemental Findings.

[525] Marc Anthony Fusaro & Patricia J. Cirillo, ''Do Payday Loans Trap Consumers in a Cycle of Debt?,'' at 23 (2011), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1960776*.

[526] nonPrime 101, ''Report 7B: Searching for Harm in Storefront Payday Lending, A Critical Analysis of the CFPB's 'Debt Trap' Data,'' at 60 tbl. C–1 (2016), *available at https://www.nonprime101.com/wp-content/uploads/2016/02/Report-7-B-Searching-for-Harm-in-Storefront-Payday-Lending-nonPrime101.pdf*. Sequences are defined based on the borrower pay period, with a loan taken out before a pay period has elapsed since the last loan was repaid being considered part of the same loan sequence.

[527] nonPrime 101, ''Report 7B: Searching for Harm in Storefront Payday Lending, A Critical Analysis of the CFPB's 'Debt Trap' Data,'' at 60 tbl. C–1 (2016), *available at https://www.nonprime101.com/wp-content/uploads/2016/02/Report-7-B-Searching-for-Harm-in-Storefront-Payday-Lending-nonPrime101.pdf*. The researchers were able to link borrowers across the five lenders in their dataset and include within a sequence loans taking out from different lenders. Following borrowers across multiple lenders did not materially increase the average length of the longest sequence but did increase the length of sequences for the top decile by one to two loans. *Compare id.* at tbl. C–2 *with* tbl. C–1. The author of the report focus on loan sequences where a borrower pays more in fees than the principal amount of the loan as sequences that cause consumer harm. The Bureau does not believe that this is the correct metric for determining whether a borrower has suffered harm.

[528] nonprime 101, ''Report 7C: A Balanced View of Storefront Payday Lending,'' (2016), available at *https://www.nonprime101.com/wp-content/uploads/2016/03/Report-7-C-A-Balanced-View-of-Storefront-Payday-Borrowing-Patterns-3https://www.nonprime101.com/wp-content/uploads/2016/03/Report-7-C-A-Balanced-View-of-Storefront-Payday-Borrowing-Patterns-3.28.pdf.28.pdf*.

[529] nonprime 101, ''Report 7C: A Balanced View of Storefront Payday Lending,'' at tbl. 2 (2016), available at *https://www.nonprime101.com/wp-content/uploads/2016/03/Report-7-C-A-Balanced-View-of-Storefront-Payday-Borrowing-Patterns-3https://www.nonprime101.com/wp-content/uploads/2016/03/Report-7-C-A-Balanced-View-of-Storefront-Payday-Borrowing-Patterns-3.28.pdf.28.pdf*. A study of borrowers in Florida claims that after the first year, over 20 percent of borrowers never use payday loans again and 50 percent of borrowers no longer use payday loans after two years. Floridians for Financial Choice, ''The Florida Model: Baseless and Biased Attacks are Dangerously Wrong on Florida Payday Lending,'' at 5 (2016), available at *http://financialchoicefl.com/wp-content/uploads/2016/05/FloridaModelReport.pdf*.

[530] *See generally* CFPB Single-Payment Vehicle Title Report.

[531] CFPB Single-Payment Vehicle Title Lending, at 11; CFPB Report on Supplemental Findings, at 121.

[532] Letter from Greg Gonzales, Comm'r, Tennessee Dep't of Fin. Insts., to Hon. Bill Haslam, Governor and Hon. Members of the 109th General Assembly, at 8 (Apr. 12, 2016) (Report on the Title Pledge Industry), *available at http://www.tennessee.gov/assets/entities/tdfi/attachments/Title_Pledge_Report_2016_Final_Draft_Apr_6_2016.pdf*.

found that the median borrowing level was 10 loans over the course of a year, and more than half of the borrowers had loans outstanding for more than half of the year.[533] In another study, the Bureau measured the total number of loans taken out by borrowers beginning new loan sequences. It found that these borrowers had lower total borrowing than borrowers who may have been mid-sequence at the beginning of the period, but the median number of loans for the new borrowers was six loans over a slightly shorter (11-month) period.[534] Research by others finds similar results, with average or median borrowing, using various data sources and various samples, of six to 13 loans per year.[535]

One commenter provided further data on the length of time consumers use payday loans, which gave more particulars about multi-year indebtedness in States with payday lending, such as South Carolina and Florida. The Florida data showed that over 40 percent of all consumers who took out one or more payday loans in 2012 continued to use the product three years later, and about a third of all consumers who took one or more payday loans in 2012 continued to use the product five years later. The South Carolina data provided similar information, but reported findings for consumers by borrowing intensity. It tended to show that those with the greatest intensity of borrowing were the least likely to end the borrowing relationship over a three-year period. Separately, a report on payday lending market trends by a specialty consumer reporting agency finds that over half of all loans are made to existing customers rather than consumers who have not used payday loans before.[536] This report concludes that ''even though new customers are critical, existing customers are the most productive.'' [537]

The proposal also noted that, given differences in the regulatory context and the overall nature of the market, less information is available about online lending than storefront lending. Borrowers who take out payday loans online are likely to change lenders more frequently than storefront borrowers, so that absent comprehensive data that allows borrowing patterns to be tracked across all lenders, measuring the duration of loan sequences becomes much more challenging. The limited information that is available suggests that online borrowers take out fewer loans than storefront borrowers, but that borrowing is highly likely to be under-counted. A report commissioned by an online lender trade association, using data from three online lenders making single-payment payday loans, reported an average loan length of 20 days and an average of 73 days in debt per year.[538] The report averages the medians of the three lenders' data, which makes interpretation of these values difficult; still, these findings indicate that borrowers take out three to four loans per year at these lenders.

Additional analysis is available based on the records of a specialty consumer reporting agency. The records show similar loans per borrower, 2.9, but over a multi-year period.[539] These loans, however, are not primarily single-payment payday loans. A small number are installment loans, while most are ''hybrid'' loans with a typical duration of roughly four pay cycles. In addition, this statistic likely understates usage because online lenders may not report all of the loans they make, and some may only report the first loan they make to a borrower. Borrowers may also be more likely to change lenders online and, as many lenders do not report to the specialty consumer reporting agency that provided the data for the analysis, when borrowers change lenders their subsequent loans often may not be in the data analyzed.

Although many industry commenters disputed the significance of these findings, they offered little evidence that was inconsistent with the data presented by the Bureau. One commenter disputed the accuracy of the Bureau's statement that 69 percent of payday loan sequences which end in default are multi-loan sequences and offered its own analysis based on its own customer data, which presented somewhat lower numbers but was largely consistent with the data presented by the Bureau. Still other commenters cited a petition that purported to show data errors relating to the Bureau's White Paper on payday loans and deposit advance products that was used to draw conclusions about the prevalence of re-borrowing, which they argued was based on an unrepresentative sample weighted heavily toward repeat users. The Bureau has addressed this criticism previously, and explained that the methodology used in the White Paper, which took a snapshot of borrowers at the beginning of a twelve-month observation period and followed those borrowers over the ensuing eleven months, is an appropriate method of assessing borrowing intensity even though it is true that any such snapshot will be disproportionately composed of repeat borrowers because they comprise the bulk of payday lenders' business. At the same time, the Bureau has conducted an alternative analysis which tracks the borrowing experience of fresh borrowers and it is that analysis on which the Bureau is principally relying here for covered short-term loans.

Another study was cited to suggest that cost does not drive the cycle of debt because it found that borrowers who were given no-fee loans had re-borrowing rates that were comparable to those who were given loans with normal fees.[540] The upshot of this study, however, tended to show that the single-payment loan structure was instead a sufficient driver of the debt cycle, even without regard to the size of the fees that were charged. In fact, this study actually tends to refute the claim made elsewhere by industry commenters that the Bureau is trying to evade the statutory prohibition on imposing a usury cap by addressing price, since price alone does not seem to drive the cycle of debt that is a primary source of the harms resulting from these loans—

[533] CFPB Payday Loans and Deposit Advance Products White Paper, at 23.

[534] CFPB Data Point: Payday Lending, at 10–15.

[535] Paige Marta Skiba and Jeremy Tobacman, ''Payday Loans, Uncertainty, and Discounting: Explaining Patterns of Borrowing, Repayment, and Default,'' (Vand. L. and Econ., Research Paper No. 08–33, 2008). (finding an average of 5.5 loans per year for payday borrowers). A study of Oklahoma payday borrowing found an average of eight loans per year. Uriah King and Leslie Parrish, ''Payday Loans, Inc.: Short on Credit, Long on Debt,'' at 1 (Ctr. for Responsible Lending, 2011), *available at http://www.responsiblelending.org/payday-lending/research-analysis/payday-loan-inc.pdf*; Michael A. Stegman, *Payday Lending,* 21 J. of Econ. Perspectives 169, at 176 (2007) (finding a median of 8–12 loans per year).

[536] See generally Clarity Services, Inc., ''2017 Subprime Lending Trends: Insights into Consumers & the Industry,'' (2017), available at *https://www.clarityservices.com/wp-content/uploads/2017/03/Subprime-Lending-Report-2017-Clarity-Services-3.28.17.pdf*.

[537] Clarity Services, Inc., ''2017 Subprime Lending Trends: Insights into Consumers & the Industry,'' at 8 (2017), available at *https://www.clarityservices.com/wp-content/uploads/2017/03/Subprime-Lending-Report-2017-Clarity-Services-3.28.17.pdf*.

[538] G. Michael Flores, ''The State of Online Short-Term Lending, Second Annual Statistical Analysis Report,'' Bretton-Woods, Inc., at 5 (Feb. 28, 2014), *available at http://onlinelendersalliance.org/wp-content/uploads/2015/07/2015-Bretton-Woods-Online-Lending-Study-FINAL.pdf* (commissioned by the Online Lenders Alliance).

[539] nonPrime 101, Report 7–A, ''How Persistent in the Borrower-Lender Relationship in Payday Lending?'', at 6 tbl. 1 (2015) *available at https://www.nonprime101.com/how-persistent-is-the-borrower-lender-relationship-in-payday-lending-2/*.

[540] Marc A. Fusaro and Patricia J. Cirillo, ''Do Payday Loans Trap Consumers in a Cycle of Debt?'' (Ark. Tech U. & Cypress Research Group, 2011).

rather, it is the single-payment loan structure that does so.

Many industry participants and trade associations contended that, standing alone, multiple loan sequences cannot be presumed to be harmful to consumers. In particular, one trade association stated that where an income or expense shock cannot be resolved at once, re-borrowing in extended loan sequences can be an effective longer-term strategy of income smoothing or debt management until the consumer's financial situation improves. Thus re-borrowing cannot be presumed to be necessarily irrational or harmful, depending on the circumstances. This commenter also cited studies that examined the credit scores of payday borrowers and reported finding better outcomes for longer-term borrowers than for those who are limited to shorter loan durations, and also that reported finding better outcomes for consumers in States with less restrictive payday lending laws than for those in States with more restrictive laws. These issues are important and they are discussed further in § 1041.4 below.

A coalition of consumer groups was in agreement as a factual matter that many consumers of payday and single-payment vehicle title loans end up in extended loan sequences, and many individual commenters described their own personal experiences and perspectives on this point. They observed that borrowers in these situations do in fact suffer many if not all of the harmful collateral consequences described in the proposal, which merely compound their existing financial difficulties and leave them worse off than they were before they took out such loans. Once again, however, putting aside the starkly different conclusions that commenters were drawing from the data, the basic accuracy of the data presented in the proposal on the patterns of lending and extended loan sequences was generally acknowledged. The arguments for and against the validity of their respective conclusions are considered further in the section-by-section analysis for § 1041.4 below.

d. Consumer Expectations and Understanding of Loan Sequences

As discussed in the proposal, extended sequences of loans raise tangible concerns about the market for short-term loans. These concerns are exacerbated by the empirical evidence on consumer understanding of such loans. The available evidence indicates that many of the borrowers who take out long sequences of payday loans and single-payment vehicle title loans do not anticipate at the outset that they will end up experiencing those long sequences.

Measuring consumers' expectations about re-borrowing is inherently challenging. When answering survey questions about loan repayment, there is the risk that borrowers may conflate repaying an individual loan with completing an extended sequence of borrowing. Asking borrowers retrospective questions about their expectations at the time they started borrowing is likely to suffer from recall problems, as people have difficulty remembering what they expected at some time in the past. The recall problem is likely to be compounded by respondents tending to want to avoid admitting that they have made a mistake. Asking about expectations for future borrowing may also be imperfect, as some consumers may not be thinking explicitly about how many times they will roll a loan over when taking out their first loan. Merely asking the question may cause people to think about it and focus on it more than they otherwise would have.

Two studies discussed in the proposal have asked payday and vehicle title borrowers at the time they took out their loans about their expectations about re-borrowing, either the behavior of the average borrower or their own borrowing, and compared their responses with actual repayment behavior of the overall borrower population.[541] One 2009 survey of payday borrowers found that over 40 percent of borrowers thought that the average borrower would have a loan outstanding for only two weeks, and another 25 percent said four weeks. Translating weeks into loans, the four-week response likely reflects borrowers who believe the average number of loans that a borrower will take out before repaying is either one loan or two loans, depending on how many respondents were paid bi-weekly as opposed to monthly. The report did not provide data on actual re-borrowing, but based on analysis performed by the Bureau and others, these results suggest that respondents were, on average, somewhat optimistic about re-borrowing behavior.[542] However, it is difficult to be certain that some survey respondents did not conflate the time during which the loans are outstanding with the contract term of individual loans. This may be so because the researchers asked borrowers, ''What's your best guess of how long it takes the average person to pay back in full a $300 payday loan?'' Some borrowers may have interpreted this question to refer to the specific loan being taken out, rather than subsequent rollovers. People's beliefs about their own re-borrowing behavior could also vary from their beliefs about average borrowing behavior by others. This study also did not specifically distinguish other borrowers from the subset of borrowers who end up in extended loan sequences.

Another study discussed in the proposal was a study of single-payment vehicle title borrowers, where researchers surveyed borrowers about their expectations about how long it would take to repay the loan.[543] The report did not have data on borrowing, but compared the responses with the distribution of repayment times reported by the Tennessee Department of Financial Institutions. The report found that the entire population of borrowers was slightly optimistic, on average, in their predictions.[544]

The two studies just described compared borrowers' predictions of average borrowing with overall average borrowing levels, which is only informative about how accurate borrowers' predictions are about the average. By contrast, a 2014 study by Professor Ronald Mann,[545] which was discussed in the proposal, did attempt to survey borrowers at the point at which they were borrowing. This survey asked them about their expectations for repaying their loans and compared their responses with their subsequent actual borrowing behavior, using loan records to measure how accurate their predictions were. The results described

[541] Kathryn Fritzdixon et al., ''Dude, Where's My Car Title?: The Law Behavior and Economics of Title Lending Markets,'' 2014 U. IL L. Rev. 1013 (2014); Marianne Bertrand and Adair Morse, ''Information Disclosure, Cognitive Biases and Payday Borrowing,'' 66 J. of Fin. 1865 (2011).

[542] Marianne Bertrand and Adair Morse, ''Information Disclosure, Cognitive Biases and Payday Borrowing,'' 66 J. of Fin. 1865 (2011). Based on the Bureau's analysis, approximately 50–55 percent of loan sequences, measured using a 14-day sequence definition, end after one or two loans, including sequences that end in default. *See also* CFPB Data Point: Payday Lending, at 11; CFPB Report on Supplemental Findings, at chapter 5. Using a relatively short re-borrowing period seems more likely to match how respondents interpret the survey question, but that is speculative. Translating loans to weeks is complicated by the fact that loan terms vary depending on borrowers' pay frequency; four weeks is two loans for a borrower paid bi-weekly, but only one loan for a borrower paid monthly.

[543] Kathryn Fritzdixon et al., ''Dude, Where's My Car Title?: The Law Behavior and Economics of Title Lending Markets,'' 2014 U. IL L. Rev. 1013, at 1029–1030 (2014).

[544] As noted above, the Bureau found that the re-borrowing patterns in data analyzed by the Bureau are very similar to those reported by the Tennessee Department of Financial Institutions.

[545] Ronald Mann, ''Assessing the Optimism of Payday Loan Borrowers,'' 21 Supreme Court Econ. Rev. 105 (2013).

in the report, combined with subsequent analysis that Professor Mann shared with Bureau staff, show the following:[546]

First, and most significant, many fewer borrowers expected to experience long sequences of loans than actually did experience long sequences. Focusing on the borrowers who ended up borrowing for more than 150 days, it is notable that none predicted they would be in debt for even 100 days.[547] And of those who ended up borrowing for more than 100 days, only a very small fraction predicted that outcome.[548] Indeed, the vast majority of those who borrowed for more than 100 days actually expected to borrow for less than 50 days.[549] Borrowers who experienced long sequences of loans do not appear to have expected those long sequences when they made their initial borrowing decision; in fact they had not predicted that their sequences would be longer than the average predicted by borrowers overall. And while some borrowers did expect long sequences, those borrowers were more likely to err in their predictions; as Mann noted, ''both the likelihood of unexpectedly late payment and the proportionate size of the error increase substantially with the length of the borrower's prediction.'' [550]

Second, Mann's analysis suggests that past borrowing experience is not indicative of increased understanding of product use. In fact, those who had borrowed the most in the past did not do a better job of predicting their future use; they were actually more likely to underestimate how long it would take them to repay fully. As Mann noted in his paper, ''heavy users of the product tend to be those that understand least what is likely to happen to them.'' [551]

Finally, Mann's research also indicated that about as many consumers underestimated how long they would need to re-borrow as those who overestimated it, which suggested they have difficulty predicting the extent to which they will need to re-borrow. In particular, the Bureau's analysis of the data underlying Mann's paper determined that there was not a correlation between borrowers' predicted length of re-borrowing and their actual length of re-borrowing.[552] Professor Mann, in an email to the Bureau, confirmed that his data showed no significant relationship between the predicted number of days and the days to clearance.[553] This point was reinforced in his survey results by the fact that fully 20 percent of the borrowers who responded were not even able to offer any prediction at all about their expected duration of indebtedness.[554]

Professor Mann submitted a comment about his paper, which took issue with the Bureau's analysis of its findings. He contended his research shows instead that most payday borrowers expected some repeated sequences of loans, most of them accurately predicted the length of the sequence that they would borrow, and they did not systematically err on the optimistic side. The Bureau acknowledges these findings, and does not believe they are inconsistent with the interpretation provided here. Mann also noted that the Bureau placed its main emphasis not on the entire universe of borrowers, but on the group of borrowers who continued borrowing over the period for which he had access to the loan data, where his research showed that many of those borrowers did not anticipate that they would end up in such extended loan sequences. He further acknowledged that ''the absolute size of the errors is largest for those with the longest sequences.'' [555] He went on to state that this finding suggests ''that the borrowers who have borrowed the most are those who are in the most dire financial distress, and consequently least able to predict their future liquidity.'' [556] He also noted that the errors of estimation these borrowers tend to make are unsystematic and do not consist either of regular underestimation or regular overestimation of their subsequent duration of borrowing.[557]

The discussion of these survey findings thus seems to reflect more of a difference in emphasis than a disagreement over the facts. Professor Mann's interpretation appears most applicable to those borrowers who remain in debt for a relatively short period, who constitute a majority of all borrowers, and who do not appear to systematically fail to appreciate what will happen to them when they re-borrow. The Bureau does not disagree with this point. Instead, it emphasizes the subset of borrowers who are its principal concern, which consists of those longer-term borrowers who find themselves in extended loan sequences and thereby experience the various harms that are associated with a longer cycle of indebtedness. For *those* borrowers, the picture is quite different, and their ability to estimate accurately what will happen to them when they take out a payday loan is more limited, as Mann noted in his paper and in the comment he submitted.[558] For example, of the borrowers who remained in debt at least 140 days (10 biweekly loans), it appears that all (100 percent) underestimated their times in debt, with the average borrower in this group spending 119 more days in debt than anticipated (equivalent to 8.5 unanticipated rollovers). Of those borrowers who spent 90 or more days in debt (*i.e.,* those most directly affected by the rule's limits on re-borrowing under the § 1041.6), it appears that more than

[546] The Bureau notes that Professor Mann draws different interpretations from his analysis than does the Bureau in certain instances, as explained below, and industry stakeholders, including SERs, have cited Mann's study as support for their criticism of the Small Business Review Panel Outline. Much of this criticism is based on Professor Mann's finding that ''about 60 percent of borrowers accurately predict how long it will take them finally to repay their payday loans.'' Ronald Mann, ''Assessing the Optimism of Payday Loan Borrowers,'' 21 Supreme Court Econ. Rev. 105, at 105 (2013). The Bureau notes, however, that this was largely driven by the fact that many borrowers predicted that they would not remain in debt for longer than one or two loans, and in fact this prediction was accurate for many such borrowers. But it did not address the much larger forecasting problems experienced by other borrowers, particularly those who ended up in extended loan sequences.

[547] *See* Attachment to Email from Ronald Mann, Professor, Columbia Law School, to Jialan Wang & Jesse Leary, Bureau of Consumer Fin. Prot. (Sept. 24, 2013, 1:32 EDT), at 17. Correspondence between Bureau staff and Professor Mann was included as related material in the public docket supporting the proposed rule as published in the **Federal Register** on July 22, 2016.

[548] *See* Attachment to Email from Ronald Mann, Professor, Columbia Law School, to Jialan Wang & Jesse Leary, Bureau of Consumer Fin. Prot. (Sept. 24, 2013, 1:32 EDT), at 17.

[549] *See* Attachment to Email from Ronald Mann, Professor, Columbia Law School, to Jialan Wang & Jesse Leary, Bureau of Consumer Fin. Prot. (Sept. 24, 2013, 1:32 EDT), at 17. The same point can be made from another angle as well. Only 10 percent of borrowers expected to be in debt for more than 70 days (five two-week loans), and only 5 percent expected to be in debt for more than 110 days (roughly eight two-week loans), yet the actual numbers were substantially higher. *See* Ronald Mann, ''Assessing the Optimism of Payday Loan Borrowers,'' 21 Supreme Court Econ. Rev. 105, at 122 (2013) Indeed, approximately 12 percent of borrowers still remained in debt after 200 days (14 two-week loans). *See* comment letter submitted by Prof. Ronald Mann, at 2.

[550] Ronald Mann, ''Assessing the Optimism of Payday Loan Borrowers,'' 21 Supreme Court Econ. Rev. 105, at 127 (2013).

[551] *See* Ronald Mann, ''Assessing the Optimism of Payday Loan Borrowers,'' 21 Supreme Court Econ. Rev. 105, at 127 (2013).

[552] Attachment to Email from Ronald Mann, Professor, Columbia Law School, to Jialan Wang & Jesse Leary, Bureau of Consumer Fin. Prot. (Sept. 24, 2013, 1:32 EDT), at 17.

[553] Email from Ronald Mann, Professor, Columbia Law School, to Jialan Wang & Jesse Leary, Bureau of Consumer Fin. Prot. (Sept. 24, 2013, 1:32 EDT).

[554] Ronald Mann, ''Assessing the Optimism of Payday Loan Borrowers,'' 21 Supreme Court Econ. Rev. 105, at 121 (2013).

[555] Prof. Ronald Mann comment letter, at 3.

[556] Prof. Ronald Mann comment letter, at 3.

[557] Prof. Ronald Mann comment letter, at 3.

[558] Ronald Mann, ''Assessing the Optimism of Payday Loan Borrowers,'' 21 Supreme Court Econ. Rev. 105, at 127 (2013); Prof. Ronald Mann comment letter, at 2.

95 percent underestimated their time in debt, spending an average of 92 more days in debt than anticipated (equivalent to 6.5 unanticipated rollovers). Additionally, a line of ''best fit'' provided by Professor Mann describing the relationship between a borrower's expected time in debt and the actual time in debt experienced by that borrower shows effectively zero slope (indicating no correlation between a borrower's expectations and outcomes). In other words, while many individuals appear to have anticipated short durations of use with reasonable accuracy (highlighted by Mann's interpretation), virtually none properly anticipated long durations (which is the market failure described here).[559] For further discussion on the Mann data, see the Section 1022(b)(2) Analysis in part VII below.

Professor Mann's comment also referred to two other surveys of payday borrowers that the Bureau discussed in its proposal. A trade association commissioned the two surveys, which suggest that consumers are able to predict their borrowing patterns.[560] Both studies, as the Bureau had noted and as Professor Mann acknowledged, are less reliable in their design than the original Mann study because they focus only on borrowers who had successfully repaid a recent loan, which clearly would have biased the results of those surveys, because that approach would tend to under-sample borrowers who are in extended loan sequences. In addition, by entirely omitting borrowers whose loan sequences ended in default, these studies would have skewed the sample in other respects as well. At a minimum, the majority of borrowers who are light users of payday loans are likely to experience such loans very differently from the significant subset of borrowers (who are a minority of all borrowers, though the loans made to them constitute an overall majority of these loans) who find that they end up in extended loan sequences and suffer the various negative consequences of that predicament.

These surveys, which were very similar to each other, were conducted in 2013 and 2016 of storefront payday borrowers who had recently repaid a loan and had not taken another loan within a specified period of time. Of these borrowers, 94 to 96 percent reported that when they took out the loan they understood well or very well ''how long it would take to completely repay the loan'' and a similar percentage reported that they, in fact, were able to repay their loan in the amount of time they expected. These surveys suffer from the challenge of asking people to describe their expectations about borrowing at some time in the past, which may lead to recall problems, as described earlier. In light of the sampling bias discussed above and the challenge inherent in the survey design, the Bureau concludes that these studies do not undermine the evidence above indicating that especially those consumers who engage in long-term re-borrowing through extended loan sequences are generally not able to predict accurately the number of times that they will need to re-borrow.

As discussed in the proposal, several factors may contribute to consumers' lack of understanding of the risk of re-borrowing that will result from loans that prove unaffordable. As explained above in the section on lender practices, there is a mismatch between how these products are marketed and described by industry and how they actually operate in practice. Although lenders present the loans as a temporary bridge option, only a minority of payday loans are repaid without any re-borrowing. These loans often produce lengthy cycles of rollovers or new loans taken out shortly after the prior loans are repaid. Not surprisingly, many borrowers (especially those who end up in extended loan sequences) are not able to tell when they take out the first loan how long their cycles will last and how much they will ultimately pay for the initial disbursement of cash. Even borrowers who believe they will be unable to repay the loan immediately—and therefore expect some amount of re-borrowing—are generally unable to predict accurately how many times they will re-borrow and at what cost, unless they manage to repay the loan fairly quickly. And, as noted above, borrowers who end up re-borrowing many times are especially susceptible to inaccurate predictions.

Moreover, as noted in the proposal, research suggests that financial distress can be one of the factors in borrowers' decision-making. As discussed above, payday and single-payment vehicle title loan borrowers are often in financial distress at the time they take out the loans. Their long-term financial condition is typically very poor. For example, as described above, studies find that both storefront and online payday borrowers have little to no savings and very low credit scores, which is a sign of overall distressed financial condition. They may have credit cards but likely do not have unused credit, are often delinquent on one or more cards, and have often experienced multiple overdrafts and/or NSFs on their checking accounts.[561] They typically have tried and failed to obtain other forms of credit before turning to a payday lender, or they otherwise may perceive that such other options would not be available to them and there is no time to comparison shop when facing an imminent liquidity crisis.

Research has shown that when people are under pressure they tend to focus on the immediate problem they are confronting and discount other considerations, including the longer-term implications of their actions. Researchers sometimes refer to this phenomenon as ''tunneling,'' evoking the tunnel-vision decision-making that people may tend to engage in as they confront such situations. Consumers experiencing a financial crisis, as they often are when they are deciding whether or not to take out these kinds of loans, can be prime examples of this behavior.[562] Even when consumers are not facing a crisis, research shows that they tend to underestimate their near-term expenditures [563] and, when

[559] It should be noted that Professor Mann did not provide his data to the Bureau, either prior to the proposal, or in his comment in response to the proposal. In place of these data, the Bureau is relying on the charts and graphs he provided in his correspondence with and presentation to the Bureau. Amongst other things, these graphs depict the distribution of borrowers' expectations and outcomes, but as they are scatterplots, counting the number of observations in areas of heavy mass (*e.g.,* expecting no rollovers) is difficult. As such the analysis provided here may be somewhat imprecise.

[560] Tarrance Group et al., ''Borrower and Voter Views of Payday Loans,'' Cmty. Fin. Servs. Ass'n of America (2016), *available at http://www.tarrance.com/docs/CFSA-BorrowerandVoterSurvey-AnalysisF03.03.16.pdf*; Harris Interactive, ''Payday Loans and the Borrower Experience,'' Cmty. Fin. Servs. Ass'n of America (2013), *available at http://cfsaa.com/Portals/0/Harris_Interactive/CFSA_HarrisPoll_SurveyResults.pdf.* The trade association and SERs have cited this survey in support of their critiques of the Bureau's Small Business Review Panel Outline.

[561] *See* Neil Bhutta et al., ''Payday Loan Choices and Consequences,'' at 15–16 (Apr. 2, 2014), *available at http://www.calcfa.com/docs/PaydayLoanChoicesandConsequences.pdf*; Neil Bhutta et al., ''Payday Loan Choices and Consequences,'' 47 J. of Money, Credit and Banking 223 (2015); CFPB Online Payday Loan Payments, at 3–4; Brian Baugh, ''What Happens When Payday Borrowers Are Cut Off From Payday Lending? A Natural Experiment,) Payday Lending? A Natural Experiment,) (Ph.D. dissertation, Ohio State University, 2015), *available at http://fisher.osu.edu/supplements/10/16174/Baugh.pdf.*

[562] *See generally* Sendhil Mullainathan & Eldar Shafir, ''Scarcity: The New Science of Having Less and How It Defines Our Lives,'' (Picador, 2014).

[563] Johanna Peetz & Roger Buehler, ''When Distance Pays Off: The Role of Construal Level in Spending,'' Predictions, 48 J. of Experimental Soc. Psychol. 395 (2012); Johanna Peetz & Roger Buehler, ''Is the A Budget Fallacy? The Role of Savings Goals in the Prediction of Personal Spending,'' 34 Personality and Social Psychol. Bull. 1579 (2009);

estimating how much financial ''slack'' they will have in the future, tend to discount even the expenditures they do expect to incur.[564] Finally, regardless of their financial situation, research suggests that consumers may generally have unrealistic expectations about their future earnings, their future expenses, and their ability to save money to repay future obligations. Much research has documented that consumers in many contexts demonstrate optimism bias about future events and their own future performance. Without attempting to specify how frequently these considerations may affect individual borrower behavior, it is enough here to note that they are supported in the academic literature and are consistent with the observed behavior of those who use covered short-term loans.[565]

As discussed in the proposal, each of these behavioral biases is exacerbated when facing a financial crisis, and taken together they can contribute to affecting the decision-making of consumers who are considering taking out a payday loan, a single-payment vehicle title loan, or some other covered short-term loan. The effect of these behavioral biases may cause consumers to fail to make an accurate assessment of the likely duration of indebtedness, and, consequently, the total costs they will pay as a result of taking out the loan. Tunneling also may cause consumers not to focus sufficiently on the future implications of taking out a loan. To the extent consumers do comprehend what will happen when the loan comes due—or when future loans come due in extended loan sequences—underestimation of future expenditures and optimism bias can cause them to misunderstand the likelihood of repeated re-borrowing. These effects could be attributable to their belief that they are more likely to be able to repay the loan without defaulting or re-borrowing than they actually are. And consumers who recognize at origination that they will have difficulty paying back the loan and that they may need to roll the loan over or re-borrow once or twice may still underestimate the likelihood that they will wind up rolling over or re-borrowing multiple times and the increasingly high costs of doing so.

Regardless of the underlying explanation, the empirical evidence indicates that many borrowers who find themselves ending up in extended loan sequences did not expect that outcome—with their predictive abilities diminishing as the loan sequences become more extended. In this regard, it is notable that one survey found that payday and vehicle title borrowers were more likely to underestimate the cost and amount of time in debt than borrowers of other products examined in the survey, including pawn loans, deposit advance products, and installment loans.[566]

The commenters on this discussion in the proposal expressed sharply divergent views. Some industry commenters stated their belief that consumers make rational decisions and many of them do expect to re-borrow when they take out covered short-term loans. Others noted that this argument fails to come to grips with the key problem that the Bureau has focused on in its analysis—known to economists as a ''right tail'' problem—which rests on the fact that a subset constituting a substantial population of payday borrowers are the ones who do not seem to expect but yet experience the most extreme negative outcomes with these loans.

Other industry participants and trade associations criticized the Bureau for not conducting its own surveys of payday and title borrowers, and contended that such surveys would have shown that borrowers are generally well informed about their decisions to obtain such loans. And a large number of comments from individual users of these loans were in accord with these views, presenting their own experiences with such loans as positive and as having benefited their financial situations.

Other industry commenters pointed out what they regarded as a low volume of consumer complaints about this product, which they viewed as inconsistent with the notion that many borrowers are surprised by experiencing unexpected negative outcomes with these loans. Yet it is equally plausible that those borrowers who find themselves in extended loan sequences may be embarrassed and therefore may be less likely to submit complaints about their situation. This is consistent with survey results that show many confirmed borrowers nonetheless deny having taken out a payday loan.[567] Borrowers may also blame themselves for having gotten themselves caught up in a cycle of debt authorized by State law, which may also explain why they would be unlikely to file a complaint with a government agency or a government official.

In addition, the Bureau has noted previously that a relatively high proportion of debt collection complaints it receives are about payday loans—a much higher proportion, for example, than for mortgages or auto loans or student loans.[568] From its consumer complaint data, the Bureau observed that from November 2013 through December 2016 more than 31,000 debt collection complaints cited payday loans as the underlying debt. More than 11 percent of the complaints that the Bureau has handled about debt collection stem directly from payday loans.[569] And in any event, it is not at all clear that the Bureau receives a low number of consumer complaints about payday loans once they are normalized in comparison to other credit products. For example, in 2016, the Bureau received approximately 4,400 complaints in which consumers reported ''payday loan'' as the complaint product and about 26,600 complaints about credit cards.[570] Yet there are only about 12 million payday loan borrowers annually, and approximately 156 million consumers

Gulden Ulkuman et al., ''Will I Spend More in 12 Months or a Year? The Effects of Ease of Estimation and Confidence on Budget Estimates,'' 35 J. of Consumer Research 245, at 249 (2008).

[564] Jonathan Z. Berman et al., ''Expense Neglect in Forecasting Personal Finances,'' at 5–6 (2014) (*forthcoming* publication in J. of Marketing Res.), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2542805*.

[565] The foundational works on optimism bias come from the behavioral economics literature on forecasting. *See, e.g.,* Daniel Kahneman & Amos Tversky, ''Intuitive Prediction: Biases and Corrective Procedures,'' 12 TIMS Studies in Mgmt. Science 313 (1979); Roger Buehler et al., ''Exploring the ''Planning Fallacy'': Why People Underestimate their Task Completion Times,'' 67 J. Personality & Soc. Psychol. 366 (1994); Roger Buehler et al., ''Inside the Planning Fallacy: The Causes and Consequences of Optimistic Time Prediction, in Heuristics and Biases: The Psychology of Intuitive Judgment,'' at 250–70 (Thomas Gilovich, Dale Griffin, & Daniel Kahneman eds., 2002). Nonetheless, it is worth noting that many of the same behaviors and outcomes can be derived from other economic models based on the premise that consumers in similar situations behave rationally in light of their circumstances.

[566] Rob Levy & Joshua Sledge, ''A Complex Portrait: An Examination of Small-Dollar Credit Consumers,'' (Ctr. for Fin. Servs. Innovation, 2012), *available at https://www.fdic.gov/news/conferences/consumersymposium/2012/A%20Complex%20Portrait.pdf.*

[567] Gregory Elliehausen and Edward C. Lawrence, ''Payday Advance Credit in America: An Analysis of Customer Demand,'' (Geo. U., McDonough Sch. of Bus., Monograph No. 35, 2001).

[568] Bureau of Consumer Fin. Prot., ''Monthly Complaint Report, Vol. 18,'' (Dec. 2016), *available at https://www.consumerfinance.gov/data-research/research-reports/monthly-complaint-report-vol-18/*.

[569] Bureau of Consumer Fin. Prot., ''Monthly Complaint Report, Vol. 18,'' at 12 (Dec. 2016), *available at https://www.consumerfinance.gov/data-research/research-reports/monthly-complaint-report-vol-18/*.

[570] Bureau of Consumer Fin. Prot., ''Consumer Response Annual Report, January 1–December 31, 2016,'' at 27, 33 (Mar. 2017), *available at https://www.consumerfinance.gov/documents/3368/201703_cfpb_Consumer-Response-Annual-Report-2016.PDF*.

have one or more credit cards.[571] Therefore, by way of comparison, for every 10,000 payday loan borrowers, the Bureau received about 3.7 complaints, while for every 10,000 credit cardholders, the Bureau received about 1.7 complaints.

In addition, some faith leaders and faith groups of many denominations from around the country collected and submitted comments, which underscored the point that many borrowers may direct their personal complaints or dissatisfactions with their experiences elsewhere than to government officials. Indeed, some of the faith leaders who commented on the proposal mentioned their intentions or efforts to develop their own safer loan products in response to the crises related to them by such borrowers.

Various commenters, including some academics such as Professor Mann whose views are discussed above, also cited research that they viewed as showing that such borrowers understand the nature of the product, including the fact that they may remain indebted beyond the initial term of the loan, with many able to predict accurately (within two weeks) how long it will take to repay their loan or loans. They cited various studies to make the point that consumers are in a better position to understand and act in their own interests than are policymakers who are more removed from the conditions of their daily lives. Some of these commenters were particularly critical of what they viewed as the erroneous assumptions and, even more broadly, the misguided general approach taken by behavioral economists. They argued that any such approach to policymaking is not well grounded and runs counter to their preferred view that consumer behavior instead is marked by rational expectations and clear insight into decision-making about financial choices.

By contrast, many consumer groups and some researchers took a very different view. They tended to agree with the points presented in the proposal about how behavioral characteristics can undermine decision-making for borrowers of these loans, especially for those in financial distress. In their view, these factors can and often do lead to misjudgments by many consumers of the likelihood that they may find themselves caught up in extended loan sequences and experiencing many of the harmful collateral consequences that were described in the proposal. They suggested that both the research and the personal experiences of many borrowers suggest that this picture of a substantial number of consumers is generally accurate, especially for those consumers who find that they have ended up in extended loan sequences.

As the Bureau had noted in the proposal, the patterns of behavior and outcomes in this market are broadly consistent with a number of cognitive biases that are described and documented in the academic literature on behavioral economics. Yet it is important to note that the Bureau's intervention is motivated by the observed pattern of outcomes in the market, and not by any settled viewpoint on the varying theories about the underlying rationality of the decisions that may lead to them. That is, the Bureau does not and need not take a position here on the types of behavioral motivations that may drive the observed outcomes, for it is the outcomes themselves that are problematic, regardless of how economists may attempt to explain them. In fact, both the rational agent models generally favored by industry comments and the more behavioral models favored by consumer groups and some researchers could very well lead to these same observed outcomes.

The Bureau has weighed these conflicting comments and concludes that the discussion of these issues in the proposal remains generally accurate and is supported by considerable research and data on how payday and title loans operate in actual practice and how these loans are experienced by consumers. The data do seem to indicate that a significant group of consumers do not accurately predict the duration of their borrowing. This is particularly true, notably, for the subset of consumers who do in fact end up in extended loan sequences. These findings, and not any definitive judgment about the validity of behavioral economics or other theories of consumer behavior, provide the foundation on which this rule is based. Finally, though certain commenters have expressed concern that the Bureau had not heard sufficiently from individual users of these loans, the Bureau has now received and reviewed a high volume of individual comments that were submitted as part of this rulemaking process.

e. Delinquency and Default

The proposal also addressed the specific topics of delinquency and default on payday and single-payment vehicle title loans. In addition to the various harms caused by unanticipated loan sequences, the Bureau was concerned that many borrowers suffer other harms from unaffordable loans in the form of the collateral costs that come from being delinquent or defaulting on the loans. Many borrowers, when faced with unaffordable payments, will be late in making loan payments, and may ultimately cease making payments altogether and default on their loans.[572] They may take out multiple loans before defaulting, either because they are simply delaying the inevitable or because their financial situation deteriorates over time to the point where they become delinquent and eventually default rather than continuing to pay additional re-borrowing fees. For example, the evidence from the CFPB Report on Supplemental Findings shows that approximately two-thirds of payday loan sequences ending in default are multi-loan sequences in which the borrower has rolled over or re-borrowed at least once before defaulting. And nearly half of the consumers who experienced either a default or a 30-day delinquency already had monthly fees exceeding $60 before their first default or 30-day delinquency occurred.

While the Bureau noted in the proposal that it is not aware of any data directly measuring the number of late payments across the industry, studies of what happens when payments are so late that the lenders deposit the consumers' original post-dated checks

[571] Bureau staff estimate based on finding that 63 percent of American adults hold an open credit card and Census population estimates. Bureau of Consumer Fin. Prot., ''The Consumer Credit Card Market Report,'' at 36 (Dec. 2015), *available at http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf*; U.S. Census Bureau, ''Annual Estimates of Resident Population for Selected Age Groups by Sex for the United States, States, Counties, and Puerto Rico Commonwealth and Municipios: April 1, 2010 to July 1, 2016,'' (June 2017), *available at https://factfinder.census.gov/bkmk/table/1.0/en/PEP/2016/PEPAGESEX.* Other estimates of the number of credit card holders have been higher, meaning that 1.7 complaints per 10,000 credit card holders would be a high estimate. The U.S. Census Bureau estimated there were 160 million credit card holders in 2012, and researchers at the Federal Reserve Bank of Boston estimated that 72.1 percent of U.S. consumers held at least one credit card in 2014. U.S. Census Bureau, ''Statistical Abstract of the United States: 2012,'' at 740 tbl.1188 (Aug. 2011), *available at https://www.census.gov/library/publications/2011/compendia/statab/131ed.html*; Claire Greene et al., ''The 2014 Survey of Consumer Payment Choice: Summary Results,'' at 18 (Fed. Reserve Bank of Boston, No. 16–3, 2016), *available at https://www.bostonfed.org/-/media/Documents/researchdatareport/pdf/rdr1603.pdf*. And as noted above in the text, additional complaints related to both payday loans and credit cards are submitted as debt collection complaints with ''payday loan'' or ''credit card'' listed as the type of debt.

[572] This discussion uses the term ''default'' to refer to borrowers who do not repay their loans. Precise definitions will vary across analyses, depending on specific circumstances and data availability.

suggest that late payment rates are relatively high. For example, one study of payday borrowers in Texas found that in 10 percent of all loans, the post-dated checks were deposited and bounced.[573] Looking at the borrower level, the study found that half of all borrowers had a check that was deposited and bounced over the course of the year following their first payday loan.[574] An analysis of data collected in North Dakota showed a lower, but still high, rate of lenders depositing checks that later bounced or trying to collect loan payment via an ACH payment request that failed. It showed that 39 percent of new borrowers experienced a failed loan payment of this type within a year after their first payday loan, and 44 percent did so within the first two years after their first payday loan.[575] In a public filing, one large storefront payday lender reported a lower rate (6.5 percent) of depositing checks, of which nearly two-thirds were returned for insufficient funds.[576] In the Bureau's analysis of ACH payments initiated by online payday and payday installment lenders, half of online borrowers had at least one overdraft or NSF transaction related to their loans over 18 months. These borrowers' depository accounts incurred an average total of $185 in fees.[577]

As the Bureau noted in the proposal, bounced checks and failed ACH payments can be quite costly for borrowers. The median bank fee for an NSF transaction is $34.00, which is equivalent to the cost of a rollover on a $300 storefront loan.[578] If the lender makes repeated attempts to collect using these methods, this leads to repeated fees being incurred by the borrower. The Bureau's research indicates that when one attempt fails, online payday lenders make a second attempt to collect 75 percent of the time but are unsuccessful in 70 percent of those cases. The failure rate increases with each subsequent attempt.[579]

In addition to incurring NSF fees from a bank, in many cases when a check bounces the consumer can be charged a returned check fee by the lender. This means the borrower would be incurring duplicative and additional fees for the same failed transaction. In this connection, it should be noted that lender-imposed late fees are subject to certain restrictions in some but not all States.[580]

The proposal also noted that default can also be quite costly for borrowers. These costs vary with the type of loan and the channel through which the borrower took out the loan. As discussed above, default may come after a lender has already made repeated and expensive attempts to collect from the borrower's deposit account, such that a borrower may ultimately find it necessary to close the account. In other instances, the borrower's bank or credit union may close the account if the balance is driven negative and the borrower is unable for an extended period of time to return the balance to positive. And borrowers of single-payment vehicle title loans stand to suffer even greater harms from default, as it may lead to the repossession of their vehicle. In addition to the direct costs of the loss of an asset, the deprivation of their vehicle can seriously disrupt people's lives and put at risk their ability to remain employed or to manage their ordinary affairs as a practical matter. Yet another consequence of these setbacks could be personal bankruptcy in some cases.

Default rates on individual payday loans appear at first glance to be fairly low. This figure is three percent in the data the Bureau has analyzed, and the commenters are in accord about this figure.[581] But because so many borrowers respond to the unaffordability of these loans by re-borrowing in sequences of loans rather than by defaulting immediately, a more meaningful measure of default is the share of loan sequences that end in default. The Bureau's data show that, using a 30-day definition of a loan sequence, fully 20 percent of loan sequences end in default. A recent report based on a multi-lender dataset showed similar results, with a three percent loan-level default rate and a 16 percent sequence-level default rate.[582]

Other researchers have found similarly high levels of default. One study of Texas borrowers found that 4.7 percent of loans were charged off, while 30 percent of borrowers had a loan charged off in their first year of borrowing.[583] Default rates on single-payment vehicle title loans are higher than those on storefront payday loans; in addition, initial single-payment vehicle title loans are more likely than storefront payday loans to result in a default. In the data analyzed by the Bureau, the default rate on all title loans is six percent, and the sequence-level default rate is 33 percent.[584] Over half of all defaults occur in single-payment vehicle title loan sequences that consist of three or fewer loans. Nine percent of single-payment vehicle title loan sequences consist of single loans that end in default, compared to six percent of payday loan sequences.[585] The Bureau's research suggests that title lenders repossess a vehicle slightly more than half the time when a borrower defaults on a loan. In the data the Bureau has analyzed, three percent of all single-payment vehicle title loans lead to repossession, which represents approximately 50 percent of loans on which the borrower defaulted. At the sequence level, 20 percent of sequences end up with the borrower's vehicle

[573] Paige Marta Skiba and Jeremy Tobacman, ''Payday Loans, Uncertainty, and Discounting: Explaining Patterns of Borrowing, Repayment, and Default,'' at 33 tbl. 2 (Vand. L. and Econ., Research Paper No. 08–33, 2008). The study did not separately report the percentage of loans on which the checks that were deposited were paid.

[574] These results are limited to borrowers paid on a bi-weekly schedule.

[575] Susanna Montezemolo & Sarah Wolff, ''Payday Mayday: Visible and Invisible Payday Defaults,'' at 4 (Ctr. for Responsible Lending, 2015), *available at http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/finalpaydaymayday_defaults.pdf*.

[576] ''For the years ended December 31, 2011 and 2010, we deposited customer checks or presented an Automated Clearing House (''ACH'') authorization for approximately 6.7 percent and 6.5 percent, respectively, of all the customer checks and ACHs we received and we were unable to collect approximately 63 percent and 64 percent, respectively, of these deposited customer checks or presented ACHs.'' Advance America 2011 10–K. Borrower-level rates of deposited checks were not reported.

[577] CFPB Online Payday Loan Payments, at 10–11.

[578] CFPB Study of Overdraft Programs, at 52.

[579] CFPB Online Payday Loan Payments, at 3–4; *see generally* Market Concerns—Payments.

[580] Most States limit returned item fees on payday loans to a single fee of $15–$40; $25 is the most common returned-item fee limit. Most States do not permit lenders to charge a late fee on a payday loan, although Delaware permits a late fee of five percent and several States' laws are silent on the question of late fees.

[581] Default here is defined as a loan not being repaid as of the end of the period covered by the data or 30 days after the maturity date of the loan, whichever was later. The default rate was slightly higher [four percent] for new loans that are not part of an existing loan sequence, which could reflect an intention by some borrowers to take out a loan and not repay, or the mechanical fact that borrowers with a high probability of defaulting for some other reason are less likely to have a long sequence of loans.

[582] nonprime101, ''Report 3: Measure of Reduced Form Relationship between the Payment-Income Ratio and the Default Probability,'' at 6 (2015), *available at https://www.nonprime101.com/wp-content/uploads/2015/02/Clarity-Services-Measure-of-Reduced-Form-Relationship-Final-21715rev.pdf*. This analysis defines sequences based on the pay frequency of the borrower, so some loans that would be considered part of the same sequence using a 30-day definition are not considered part of the same sequence in this analysis.

[583] Paige Marta Skiba and Jeremy Tobacman, ''Payday Loans, Uncertainty, and Discounting: Explaining Patterns of Borrowing, Repayment, and Default,'' at 33 tbl. 2 (Vand. L. and Econ., Research Paper No. 08–33, 2008). Again, these results are limited to borrowers paid bi-weekly.

[584] CFPB Single-Payment Vehicle Title Lending, at 23.

[585] CFPB Single-Payment Vehicle Title Lending, at 11; CFPB Report on Supplemental Findings, at 120.

being repossessed. In other words, one in five borrowers is unable to escape their debt on these loans without losing their car or truck.

Some industry and trade association commenters posited that the Bureau had overstated the default and repossession rates on vehicle title loans. Companies argued that the Bureau had erroneously stated a higher repossession rate than their own data showed, with one commenter estimating its own short-term title loan sequence repossession rate at 8.4 percent. Others contended that the Bureau's repossession rates were much higher than those reported through other sources, such as regulator reports in States like Idaho and Texas. In arguing that the Bureau had overstated the default and repossession rates, one trade group also cited a study which had concluded that the rates were lower. The study relied on a handful of State regulator reports in addition to ''industry sources.'' Yet the difference seems to trace to the fact that default and repossession rates are typically reported at the loan level rather than the sequence level. The Bureau's loan-level data is actually fairly similar to the figures cited by these commenters. But the Bureau believes that sequence level is a more appropriate indicator, since it captures experience at the level of the borrower. Put differently, sequence level more appropriately indicates outcomes for particular consumers, rather than for particular lenders; from this standpoint, a loan that is rolled over three times before defaulting should not be miscounted as three ''successfully'' repaid loans and one default. As noted previously, over 80 percent of single-payment vehicle title loans were re-borrowed on the same day as a previous loan was repaid. Regardless, to the extent any one company has lower repossession rates than the average, that fact does not put in question the averages that the Bureau used, because inevitably there will be companies that are both above and below the average. The Bureau also notes that the study discussed above cited by a trade group, which relies on undefined ''industry sources'' and a handful of State regulator reports to criticize the Bureau's data on default and repossession rates, relied on far less robust loan level data than the Bureau used to arrive at the figures it cited in the Bureau's supplemental research report and in the proposal.

One commenter noted that because the vehicles put up for collateral on these loans are usually old and heavily used, lenders often do not repossess the vehicle because it is not worth the trouble. This commenter also argued that the impact of repossession is not significant, based on a study indicating that less than 15 percent of consumers whose vehicles are repossessed would not find alternative means of transportation, which again is at odds with the information presented in other studies that have been cited.[586] Another commenter asserted that the stress created by the threat of vehicle repossession is no worse than other stresses felt by consumers in financial difficulties, though it is difficult to know how much to credit this claim.

The proposal further noted that borrowers of all types of covered loans are also likely to be subject to collection efforts, which can take aggressive forms. From its consumer complaint data, the Bureau observed that from November 2013 through December 2016 more than 31,000 debt collection complaints cited payday loans as the underlying debt. More than 11 percent of the complaints that the Bureau has handled about debt collection stem directly from payday loans.[587] These collections efforts can include harmful and harassing conduct, such as repeated phone calls from collectors to the borrower's home or place of work, the harassment of family and friends, and in-person visits to consumers' homes and worksites. Some of this conduct, depending on the facts and circumstances, may be illegal. Aggressive calling to the borrower's workplace can put at risk the borrower's employment and jeopardize future earnings. Many of these practices can cause psychological distress and anxiety for borrowers who are already under the strain of financial pressure.

In fact, the Bureau's enforcement and supervisory examination processes have uncovered evidence of numerous illegal collection practices by payday lenders, including practices of the kinds just described. These have included: Illegal third-party calls, illegal home visits for collection purposes, false threats to add new fees, false threats of legal action or referral to a non-existent in-house ''collections department,'' and deceptive messages regarding non-existent ''special promotions'' to induce borrowers to return calls.[588]

In addition, lenders and trade associations contended that the Bureau had overstated the extent of harm, noting that they do not typically report nonpayment of these kinds of loans to consumer reporting agencies, which can interfere with the consumer's access to credit, and that this lack of reporting would obviate any harm that the borrower would suffer on that front. Nonetheless, debt collectors can and do report unpaid debts to the consumer reporting companies even when the original creditors do not, and the aggressive collection tactics that the Bureau has identified with respect to unpaid payday loans through its investigations and numerous enforcement actions suggest that this may be a common collateral consequence of default on these loans as well.[589]

The potential consequences of the loss of a vehicle depend on the transportation needs of the borrower's household and the available transportation alternatives. According to two surveys of title loan borrowers, 15 percent of all borrowers report that they would have no way to get to work or school if they lost their vehicle to repossession.[590] Using an 8 percent repossession rate, one industry commenter asserted that only about one percent of title loan borrowers would thus lose critical transportation, by multiplying 15 percent times 8 percent. However, the survey author specifically warns against doing this, noting that ''a borrower whose car is repossessed probably has lower wealth and income than a borrower whose car is not repossessed, and is therefore probably more likely to lack another way of getting to work.'' [591] More than one-third (35 percent) of borrowers pledge the title to the only working vehicle in the household.[592] Even those with a

[586] Kathryn Fritzdixon et al., ''Dude, Where's My Car Title?: The Law Behavior and Economics of Title Lending Markets,'' 2014 U. IL L. Rev. 1013, at 1038 (2014).

[587] Bureau of Consumer Fin. Prot., ''Monthly Complaint Report, Vol. 18,'' at 12 (Dec. 2016), *available at https://www.consumerfinance.gov/data-research/research-reports/monthly-complaint-report-vol-18/*.

[588] See Bureau of Consumer Fin. Prot., ''Supervisory Highlights,'' at 17–19 (Spring 2014), available at *http://files.consumerfinance.gov/f/201405_cfpb_supervisory-highlights-spring-2014.pdf*.

[589] *See, e.g.,* In the Matter of Money Tree, Inc., No. 2016–CFPB–0028; In the Matter of EZCORP, Inc., No. 2015–CFPB–0031; *CFPB* v. *NDG Financial Corp.,* No. 15–05211 (S.D.N.Y. 2015); In the Matter of ACE Cash Express, Inc., No. 2014–CFPB–0008; In the Matter of Westlake Servs., LLC, No. 2015–CFPB–0026. The Bureau has also taken actions against debt collectors, some of which collect in part on small-dollar loans. *See, e.g., CFPB* v. *MacKinnon, et al.,* No. 16–00880 (W.D.N.Y. 2016).

[590] Kathryn Fritzdixon et al., ''Dude, Where's My Car Title?: The Law Behavior and Economics of Title Lending Markets,'' 2014 U. IL L. Rev. 1013, 1029–1030 (2014); Pew Charitable Trusts, ''Auto Title Loans: Market Practices and Borrowers' Experiences,'' at 14 (2015), *available at http://www.pewtrusts.org/~/media/Assets/2015/03/AutoTitleLoansReport.pdf?la=en.*

[591] Kathryn Fritzdixon et al., ''Dude, Where's My Car Title?,'' 2014 U. IL L. Rev. at 1038 n.137.

[592] Pew Charitable Trusts, ''Auto Title Loans: Market Practices and Borrowers' Experiences,''

second vehicle or the ability to get rides from friends or take public transportation would presumably experience significant inconvenience or even hardship from the loss of a vehicle. This hardship goes beyond simply getting to work or school, and would as a practical matter also adversely affect the borrower's ability to conduct their ordinary household affairs, such as obtaining food or medicine or other necessary services.

In the proposal, the Bureau noted that it analyzed online payday and payday installment lenders' attempts to withdraw payments from borrowers' deposit accounts, and found that six percent of payment attempts that were not preceded by a failed payment attempt themselves fail, incurring NSF fees.[593] Another six percent avoid failure, despite a lack of sufficient available funds in the borrower's account, but only because the borrower's depository institution makes the payment as an overdraft, in which case the borrower was likely to be charged a fee that is generally similar in magnitude to an NSF fee. The Bureau could not determine default rates from these data.

As noted in the proposal, when borrowers obtain a payday or title loan, they may fail to appreciate the extent of the risk that they will default and the costs associated with default. Although consumers may well understand the concept and possibility of default, in general, they are unlikely, when they are deciding whether to take out a loan, to be fully aware of the extent of the risk and severity of the harms that would occur if they were to default or what it would take to avoid default. They may be overly focused on their immediate needs relative to the longer-term picture. The lender's marketing materials may have succeeded in convincing the consumer of the value of a loan to bridge financial shortfalls until their next paycheck. Some of the remedies a lender might invoke to address situations of nonpayment, such as repeatedly attempting to collect from a borrower's checking account or using remotely created checks, may be unknown or quite unfamiliar to many borrowers. Realizing that these measures are even a possibility would depend on the borrower investigating what would happen in the case of an event they typically do not expect to occur, such as a default.

Industry commenters contended that consumers tend to be highly knowledgeable about the nature, costs, and overall effects of payday and single-payment vehicle title loans. Yet they generally did not address the points raised here about the level of awareness and familiarity that these consumers would tend to have about the risks and costs of these other, more collateral consequences of delinquency and default. Consumer groups, by contrast, supported the view that these collateral consequences are part of the true overall cost of payday and title loans and that they are largely unforeseen by most consumers.

f. Collateral Harms From Making Unaffordable Payments

The proposal further elucidated other harms associated with payday and title loans, in addition to the harms associated with delinquency and default, by describing how borrowers who take out these loans may experience other financial hardships as a result of making payments on unaffordable loans. These harms may occur whether or not the borrower also experiences delinquency or default somewhere along the way, which means they could in many cases be experienced in addition to the harms otherwise experienced from these situations.

These further harms can arise where the borrower feels compelled to prioritize payment on the loan and does not wish to re-borrow. This course of action may result in defaulting on other obligations or forgoing basic living expenses. If a lender has taken a security interest in the borrower's vehicle, for example, and the borrower does not wish to re-borrow, then the borrower is likely to feel compelled to prioritize payments on the title loan over other bills or crucial expenditures, because of the substantial leverage that the threat of repossession gives to the lender.

The repayment mechanisms for other short-term loans can also cause borrowers to lose control over their own finances. If a lender has the ability to withdraw payment directly from a borrower's checking account, the borrower may lose control over the order in which she would prefer her payments to be made and thus may be unable to choose to make essential expenditures before repaying the covered loan. This is especially likely to happen when the lender is able to time the withdrawal to align with the borrower's payday or with the specific day when the borrower is scheduled to receive periodic income. Moreover, even if a title borrower does not have her vehicle repossessed, the threat of repossession in itself may cause tangible harm to borrowers. It may cause them to forgo other essential expenditures in order to make a payment they cannot afford in order to avoid repossession.[594] And there may be psychological harm in addition to the stress associated with the possible loss of a vehicle. Lenders recognize that consumers often have a ''pride of ownership'' in their vehicle and, as discussed above, one or more lenders are willing to exceed their maximum loan amount guidelines by considering the vehicle's sentimental or use value to the consumer when they are assessing the amount of funds they will lend.

The Bureau noted in the proposal that it is not able to directly observe the harms that borrowers suffer from making unaffordable payments. But it stands to reason that when loans are made without regard to the consumer's ability to repay and the lender secures the ability to debit a consumer's account or repossess a vehicle, many borrowers are suffering harms from making unaffordable payments at certain times, and perhaps frequently.

The commenters had vigorous reactions to this discussion in the proposal. On the effects that vehicle title borrowers feel based on their concern about losing their transportation, industry commenters argued that the Bureau had overstated its points. They emphasized that these loans are typically non-recourse loans in many States, which puts some specific limits on the harm experienced by borrowers. In the proposal, the Bureau had observed that this result would still expose the borrower to consider threat of harm if they end up losing their primary (and in many instances their sole) means of transportation to work and to manage their everyday affairs. Moreover, the Bureau notes these comments omit the issue of what harms exist in States where vehicle title loans

(2015), *available at http://www.pewtrusts.org/~/media/Assets/2015/03/AutoTitleLoansReport.pdf?la=en.*

[593] The bank's analysis includes both online and storefront lenders. Storefront lenders normally collect payment in cash and only deposit checks or submit ACH requests for payment when a borrower has failed to pay in person. These check presentments and ACH payment requests, where the borrower has already failed to make the agreed-upon payment, have a higher rate of insufficient funds.

[594] As the D.C. Circuit observed of consumers loans secured by interests in household goods, ''[c]onsumers threatened with the loss of their most basic possessions become desperate and peculiarly vulnerable to any suggested 'ways out.' As a result, 'creditors are in a prime position to urge debtors to take steps which may worsen their financial circumstances.' The consumer may default on other debts or agree to enter refinancing agreements which may reduce or defer monthly payments on a short-term basis but at the cost of increasing the consumer's total long-term debt obligation.'' *AFSA,* 767 F.2d at 974 (1985) (internal citation omitted).

are recourse. The Bureau notes the receipt of a comment letter from two consumer advocacy groups that discussed in detail the laws and lender practices in Arizona, where a robust vehicle title loan market exists. They wrote that in Arizona lenders are permitted to sue for deficiency balances after repossession; lenders can collect a ''reasonable amount'' for the cost of collection and court and attorneys' fees related to repossession; and that as of 2015, nine of out of 10 largest title lenders still required borrowers to provide bank account access to get loans secured by vehicles.[595] Furthermore, these commenters countered that borrowers often can find other means of transportation, citing what they present as a supportive survey. Their interpretation of the data is not convincing, however, as even the authors of the survey cautioned against making simplistic calculations about factors and probabilities that are intertwined in the analysis, and which thus may considerably understate the incidence of hardship. One industry commenter pointed to a survey which showed that though a majority of title loan borrowers would prioritize their title loan payment over that of a credit card, very few of these borrowers would prioritize a title loan payment over rent, utilities, groceries, or other expenses. However, the author of this survey clearly states that because of an extremely small sample size, his findings are anecdotal and are not representative of borrowers either in the local area surveyed or nationally.[596]

The industry commenters further noted that as many as half of the title borrowers who default do so on their first payment, and they construed this occurrence as a strategic default which demonstrates that these borrowers did not confront any particular hardship by facing unaffordable payments that could cause them to lose their vehicle. Yet the notion that a borrower would make the conscious decision to employ this approach as a means of ''selling'' their vehicle, where they likely will receive a sharply reduced price for it and expose themselves to the other related risks discussed here, seems strained and implausible. That is especially the case insofar as doing so would needlessly incur the risks and costs of various potential penalty fees, late fees, towing fees, and the like that could occur (depending on the provisions of State law) when lenders carry out a repossession of the vehicle.

Industry and trade association commenters also suggested that the proposal is improperly paternalistic by attempting to substitute the judgment of the Bureau for the judgments made by individual consumers about how best to address the risks of collateral harms from making unaffordable payments. Difficult choices that consumers have to make about how to meet their obligations may be temporarily eased by the ability to access these loans and utilize the proceeds, at least for those consumers who do not end up experiencing the kinds of negative collateral consequences described above from delinquencies and defaults, and perhaps for some other borrowers as well. It also can substitute a new creditor with more limited recourse for an existing creditor with greater leverage, such as a landlord or a utility company. Although the addition of a payday or title loan obligation to the already-constrained mix of obligations can lead to the kind of budgeting distortions described by the proposal, it might instead lead to more immediate financial latitude to navigate those choices and avoid the impending harms of delinquency or default on other pre-existing obligations. This narrative was echoed by comments from a large number of individual users of such loans, who described the benefits they experienced by having access to the loan proceeds for immediate use while finding various ways to avert the negative collateral consequences described in the proposal.

Consumer groups, on the other hand, strongly urged the view that payday and title loans often lead to harms similar to those described in the proposal for a significant set of borrowers. This position was buttressed by submissions from and about a sizeable number of individual borrowers as well, which included narratives describing extreme financial dislocations flowing directly from harms cause by unaffordable payments. Although the proceeds of such loans do offer a temporary infusion of flexibility into the borrower's financial situation, that brief breathing spell is generally followed almost immediately thereafter by having to confront similar financial conditions as before but now with the looming or actual threat of these harmful collateral consequences being felt as well. Again, in contrast to the viewpoint that repeated re-borrowing may be consciously intended as a means of addressing financial shortfalls over a longer period of time, the consumer groups contended that extended loan sequences often reflect the inherent pressures of the initial financial need, now exacerbated by having to confront unaffordable payments on the new loan. And many individual users of such loans described their own negative experiences in ways that were consistent with the difficult situations and outcomes that can result from having to deal with unaffordable payments.

Once again, the factual observations presented in the proposal on the kinds of collateral harms that can arise for payday and title borrowers who struggle to pursue potential alternatives to making unaffordable payments, as opposed to defaulting on these loans, were not seriously contested. The disagreement among the commenters was instead over the inferences to be drawn from these facts in context of other facts and potential benefits that they presented as bearing on their views of overall consumer welfare, and thus the broader conclusions to be drawn for purposes of deciding whether or not to support the proposed rule. Those contextual matters are important and will be discussed further in § 1041.4 below.

g. Harms Remain Under Existing Regulatory Approaches

As stated in the proposal, based on the Bureau's analysis and outreach, the harms that it has observed from payday loans, single-payment vehicle title loans, and other covered short-term loans persist in these markets despite existing regulatory frameworks. This formulation, of course, is something of a tautology, since if the harms the Bureau perceives to exist do in fact exist, they clearly do so despite the impact of existing regulatory frameworks that fail to prevent or mitigate them. Nonetheless, in the proposal the Bureau stated that existing regulatory frameworks in those States that have authorized payday and/or title lending still leave many consumers vulnerable to the specific harms discussed above relating to default, delinquency, re-borrowing, and the collateral harms that result from attempting to avoid these other injuries by making unaffordable payments.

Several different factors have complicated State efforts to effectively apply their regulatory frameworks to payday and title loans. For example, lenders may adjust their product offerings or their licensing status to

[595] The Bureau notes that an industry trade group argued that lenders generally do not pursue deficiencies even when it is legal to do so. However, in substantiating this assertion the trade group essentially cites itself as evidence for the proposition (*i.e.,* the trade group cites language from a study that itself cites language from the same trade group's Web site regarding best practices around repossession).

[596] Jim Hawkins, ''Credit on Wheels: The Law and Business of Auto-Title Lending,'' 69 Wash. & Lee L. Rev. 535, 541 (2012).

avoid State law restrictions, such as by shifting from payday loans to vehicle title or installment loans or open-end credit or by obtaining licenses under State mortgage lending laws.[597] As noted earlier, the State regulatory frameworks grew up around the pre-existing models of single-payment payday loans, but have evolved in certain respects over the past two decades. States also have faced challenges in applying their laws to certain online lenders, including lenders claiming Tribal affiliation or offshore lenders.[598]

As discussed above in part II, States have adopted a variety of different approaches for regulating short-term loans. For example, 15 States and the District of Columbia have interest rate caps or other restrictions that, in effect, prohibit payday lending and thereby limit access to this form of credit. Although consumers in these States may still be exposed to potential harms from short-term lending, such as online loans made by lenders that claim immunity from these State laws or from loans obtained in neighboring States, these provisions provide strong protections for consumers by substantially reducing their exposure to the harms they can incur from these loans. Again, as discussed above, these harms flow from the term and the single-payment structure of these loans, which along with certain lender practices expose a substantial population of consumers to the risks and harms they experience, such as ending up in extended loan sequences.

As explained in greater detail in part II above and in the section-by-section analysis for § 1041.5, the 35 States that permit payday loans in some form have taken a variety of different approaches to regulating such loans. Some States have restrictions on rollovers or other re-borrowing. Among other things, these restrictions may include caps on the total number of permissible loans in a given period, or cooling-off periods between loans. Some States prohibit a lender from making a payday loan to a borrower who already has an outstanding payday loan.

Some States have adopted provisions with minimum income requirements. For example, some States provide that a payday loan cannot exceed a percentage (most commonly 25 percent) of a consumer's gross monthly income. Some State payday or title lending statutes require that the lender consider a consumer's ability to repay the loan before making a loan, though none of them specifies what steps lenders must take to determine whether the consumer has the ability to repay a loan. Some States require that consumers have the opportunity to repay a short-term loan through an extended payment plan over the course of a longer period of time. And some jurisdictions require lenders to provide specific disclosures in order to alert borrowers of potential risks.

While the proposal noted that these provisions may have been designed to target some of the same or similar potential harms identified above, these provisions do not appear to have had a significant impact on reducing the incidences of re-borrowing and other harms that confront consumers of these loans. In particular, as discussed above, the Bureau's primary concern about payday and title loans is that many consumers end up re-borrowing over and over again, turning what was ostensibly a short-term loan into a long-term cycle of debt with many negative collateral consequences. The Bureau's analysis of borrowing patterns in different States that permit payday loans indicates that most States have very similar rates of re-borrowing, with about 80 percent of loans followed by another loan within 30 days, regardless of the terms of the specific restrictions that are in place.[599]

In particular, laws that prevent direct rollovers of payday loans, as well as laws that impose very short cooling-off periods between loans, such as Florida's prohibition on same-day re-borrowing, have had very little impact on re-borrowing rates measured over periods longer than one day. The 30-day re-borrowing rate in all States that prohibit rollovers is 80 percent, and in Florida the rate is 89 percent. Some States, however, do stand out as having substantially lower re-borrowing rates than other States. These include Washington, which limits borrowers to no more than eight payday loans in a rolling 12-month period and has a 30-day re-borrowing rate of 63 percent, and Virginia, which imposes a minimum loan length of two pay periods and imposes a 45-day cooling-off period once a borrower has had five loans in a rolling six-month period, and has a 30-day re-borrowing rate of 61 percent (though title loans have claimed much greater market share in the wake of these restrictions on payday loans).

Likewise, the Bureau explained in the proposal the basis for its view that disclosures would be insufficient to adequately reduce the harm that consumers suffer when lenders do not reasonably determine consumers' ability to repay the loan according to its terms, which rested on two primary reasons. First, the Bureau noted that it is difficult for disclosures to address the underlying incentives in this market for lenders to encourage borrowers to re-borrow and take out extended loan sequences. As the Bureau discussed in the proposal, the prevailing business model in the short-term loan market involves lenders deriving a very high percentage of their revenues from extended loan sequences. The Bureau noted that while enhanced disclosures would provide more information to consumers, the Bureau believed that the single-payment structure of these loans, along with their high cost, would cause them to remain unaffordable for most consumers. The Bureau believed that, as a result, lenders would have no greater incentive to underwrite them more rigorously, and lenders would remain dependent on long-term loan sequences for revenues.

Second, the Bureau noted in the proposal that empirical evidence suggests that disclosures may have only modest impacts on consumer borrowing patterns for short-term loans generally and negligible impacts on whether consumers re-borrow. The Bureau stated that evidence from a field trial of several disclosures designed specifically to warn of the risks and costs of re-borrowing showed that these disclosures had a marginal effect on the total volume of payday borrowing.[600] The Bureau observed that its analysis of similar disclosures implemented by the State of Texas showed a reduction in loan volume of 13 percent after the disclosure requirement went into effect, relative to the loan volume changes for the study period in comparison States, but further showed that the probability of re-borrowing on a payday loan declined by only approximately two percent once the disclosure was put in

[597] As discussed in part II, payday lenders in Ohio began making loans under the State's Mortgage Loan Act and Credit Service Organization Act following the 2008 adoption of the Short-Term Lender Act, which limited interest and fees to 28 percent APR among other requirements, and a public referendum the same year voting down the reinstatement of the State's Check-Cashing Lender Law, under which payday lenders had been making loans at higher rates.

[598] A recent report summarizes these legal actions and advisory notices. See Diane Standaert & Brandon Coleman, *Ending the Cycle of Evasion: Effective State and Federal Payday Lending Enforcement (2015)*, *http://www.responsiblelending.org/payday-lending/research-analysis/crl_payday_enforcement_brief_nov2015.pdf.*

[599] CFPB Report on Supplemental Findings, at Chapter 4.

[600] Marianne Bertrand & Adair Morse, ''Information Disclosure, Cognitive Biases and Payday Borrowing and Payday Borrowing,'' 66 J. Fin. 1865 (2011), *available at http://onlinelibrary.wiley.com/doi/10.1111/j.1540-6261.2011.01698.x/full.*

place.[601] The Bureau noted that the analysis thus tended to confirm the fairly limited magnitude of the effects from the field trial.

For these reasons, the Bureau stated in the proposal that evidence indicates the core harms to consumers in this credit market remain even after a disclosure regime is put in place. The Bureau also repeated its observation that consumers have a very high probability of winding up in a very long loan sequence once they have taken out only a few loans in a row.[602] The Bureau noted that the contrast of the very high likelihood that a consumer will wind up in a long-term debt cycle after taking out only a few loans, with the nearly negligible impact of a disclosure on consumer re-borrowing patterns, provides further evidence of the insufficiency of disclosures to address what the Bureau perceives to be one of the core harms to consumers here. The issues around the sufficiency of disclosures, and whether it is likely that further disclosures would adequately address the harms that the Bureau has identified with payday and single-payment vehicle-title loans, are discussed further in the section-by-section analysis for § 1041.5.

The proposal also discussed the SBREFA process, and noted that many participants urged the Bureau to reconsider the proposals under consideration and to consider deferring to existing regulation of these credit markets by the States or to adopt Federal regulations that are modeled on the laws or regulations of certain States. In the Small Business Review Panel Report, the Panel recommended that the Bureau continue to consider whether regulations in place at the State level are sufficient to address concerns about unaffordable loan payments. The Panel also recommended that the Bureau consider whether existing State laws and regulations could provide a model for elements of the Federal regulation. The SBA Office of Advocacy raised similar issues and suggested that the Bureau should defer to State payday lending laws.

The Bureau has examined State laws closely in connection with its work on the final rule, as discussed in part II above, and the Bureau has taken guidance from what it has learned from its consideration of those differing frameworks. The Bureau has also consulted with various State regulators and State Attorneys General on these issues over the course of its original research on these topics, its formulation of the SBREFA framework, its conduct of the SBREFA process, its formulation of the proposal, and its work since to finalize the rule. The Bureau has also considered the comments that it has received from all parties, including State regulators and State Attorneys General and the SBA Office of Advocacy, which conflict with one another in a great many respects on the topics and arguments that have already been addressed in this discussion. All of this consideration of the State legal and regulatory frameworks has been applicable to the Bureau's consideration of how it should approach its formulation of underwriting processes, restrictions on rollovers, and the use of cooling-off periods.

For those States with strong usury caps, of course, it bears repeating that the Bureau is not authorized to mirror those provisions because it is expressly barred by statute from imposing any usury cap on these loans. The Bureau has recognized this explicit restriction and carefully followed it in promulgating this rule, which does not prohibit any loan from being made based on the interest rate charged on the loan. Some of the industry commenters and trade associations have disputed this point in connection with certain provisions of the proposal, but have not explained how any loans are being prohibited on that basis.

Industry participants and trade associations commented extensively on the fact that payday and single-payment vehicle title loans are subject to significant regulation already in the remaining States, even without any new regulation being proposed by the Bureau. They pointed to specific State frameworks as examples of how these products are regulated adequately and as providing access to credit without posing undue problems for borrowers. One trade association, for example, specifically cited Florida's regulatory framework as allowing consumers in that State to use such products productively and successfully, while generating few complaints. Florida Congressional representatives made the same point. Other commenters, including some of the State Attorneys General, pointed to regulatory models in other States and drew similar conclusions. The Bureau has carefully assessed these State frameworks in considering how to respond to the comments received on the proposal and whether and how to modify the proposal in formulating the provisions of the final rule.

For example, despite Colorado's 2010 payday lending reforms that set a six-month minimum loan term for payday loans and reduced the annual percentage rates, concerns remain about sustained use and ability to repay the loans. A recent report based on State regulator data noted that in 2015, the average borrower ''took out 3.3 loans from the same lender over the course of the year, with a growing percentage of consumers (14.7 percent) being in debt every day for 12 consecutive months. Also one in four payday loans show signs of distress by delinquency or default.'' [603]

In 2010, the State of Washington amended its payday lending law to limit borrowers to no more than eight loans in a rolling 12-month period, add an extended repayment plan that borrowers could take any time before default, and add a database that all lenders must use to report loans and check before new loans are made.[604] The State regulator has issued yearly reports; with the most recent report being from calendar year 2015. There is no specific ability-to-repay requirement other than the loan amount cannot exceed 30 percent of the borrower's gross monthly income or a maximum of $700 with no review of expenses.[605] The 2015 report contains three highlights in particular. First, borrowing patterns continue to reflect a small number of borrowers responsible for most of the State's payday loans. For payday loans originated in calendar year 2015, about one-quarter (25.38 percent) of borrowers took out about half (49.59 percent) of the total loans.[606] Second, about a quarter of borrowers—26.62 percent—reached the eight-loan cap during 2015.[607] Note that the cap is

[601] *See* CFPB Report on Supplemental Findings, at 73.

[602] As discussed above in Market Concerns—Underwriting, a borrower who takes out a fourth loan in a sequence has a 66 percent likelihood of taking out at least three more loans, for a total sequence length of seven loans, and a 57 percent likelihood of taking out at least six more loans, for a total sequence length of 10 loans.

[603] Delvin Davis, Center for Responsible Lending, ''Mile High Money: Payday Stores Target Colorado Communities of Color,'' at 1 (Aug. 2017), *available at http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-mile-high-money-aug2017.pdf.*

[604] All references are to the current Washington State Department of Financial Institutions report except where otherwise noted. *Wash. State Dep't. of Fin. Insts., ''2015 Payday Lending Report,'' at 4 (2015), available at http://www.dfi.wa.gov/sites/default/files/reports/2015-payday-lending-report.pdf.*

[605] *Wash. State Dep't. of Fin. Insts., ''2015 Payday Lending Report,'' at 4 (2015), available at http://www.dfi.wa.gov/sites/default/files/reports/2015-payday-lending-report.pdf.*

[606] *Wash. State Dep't. of Fin. Insts., ''2015 Payday Lending Report,'' at 8 (2015), available at http://www.dfi.wa.gov/sites/default/files/reports/2015-payday-lending-report.pdf;* (Borrower Loan Frequency table).

[607] *Wash. State Dep't. of Fin. Insts., ''2015 Payday Lending Report,'' at 7 (2015), available at http://www.dfi.wa.gov/sites/default/files/reports/2015-payday-lending-report.pdf.*

based on a rolling 12-month period rather than a calendar year and some of these loans may have been originated in 2014. Also, note that some borrowers may be seeking loans online through unlicensed lenders that are not included in the State's database. Third, 12.35 percent of loans were converted to an extended repayment plan (known as an installment loan plan) at some point in 2015. Borrowers may convert a payday loan to an installment loan plan at any time prior to default at no charge, with 90 to 180 days to repay based on the loan amount.[608]

Missouri's regulatory framework offers an illustrative example that bears on the Bureau's decision to require specific underwriting criteria under § 1041.5, a set of requirements that many commenters have criticized as unduly prescriptive and unnecessarily burdensome. By contrast, Missouri law requires small-dollar lenders to consider the borrower's financial ability to reasonably repay under the terms of the loan contract, but does not specify how lenders may go about satisfying this requirement.[609] The unsatisfactory result of this law, which fails to specify how lenders must satisfy the ability-to-repay requirement and thus allows lenders to exercise latitude in this regard, was starkly illustrated in a recent Missouri case that addressed the practical results of this framework. In a debt collection case, an appeals court judge concluded that the law, ''which was designed for unsecured loans of five hundred dollars or less, has through the allowance of practically unlimited interest rates charged on the loans allowed the companies that provide these loans to use the court system to collect amounts from debtors far beyond anything that could be deemed consistent with the statute's original purpose,'' thus providing ''a clear example of predatory lending.''[610] The judge then presented examples from the factual record in the case as follows:

''Class member, D.W., took out a $100 loan from CSI. A judgment was entered against him for $705.18; the garnishment is still pending. So far, $3174.81 has been collected, and a balance of $4105.77 remains.

Class member, S.S., took out an $80 loan from CSI. A judgment was entered against her for $2137.68; the garnishment is still pending. So far, $5346.41 has been collected, and a balance of $19,643.48 remains.

Class member, C.R., took out a $155 loan from CSI. A judgment was entered against her for $1686.93; the garnishment is still pending. So far, $9566.15 has been collected, and a balance of $2162.07 remains.''[611]

The judge went on to provide four other similar examples, all of which were apparently deemed by the lender to satisfy its own conception of an ability-to-repay standard, even though the judge found that ''the amount the lenders are collecting or are attempting to collect on these types of loans shocks the conscience'' and were ''beyond the ability of many debtors to ever pay off.''[612]

In addition, many industry participants and trade associations pointed out that payday and title lending are already regulated at the Federal level to some degree. They noted, for example, that the following laws already apply to such loans: the Truth in Lending Act, the Electronic Transfer Act, the Equal Credit Opportunity Act, the Fair Debt Collection Practices Act, and the Gramm-Leach-Bliley Act, among others. Many of these statutes have implementing regulations as well, thus adding to the pre-existing coverage of these loans under Federal law. And as recounted in part III, the Bureau has, in fact, engaged in extensive supervisory and enforcement activity with respect to payday loans and payday lenders under various provisions of the Federal consumer laws. These commenters often recognized that the Dodd-Frank Act confers separate and additional authority on the Bureau to promulgate rules to address unfair, deceptive, or abusive acts or practices, but contended that this authority should be used sparingly in light of the many statutes and regulations that already apply to such loans.

In contrast, the consumer groups and other commenters drew a very different conclusion from their review of the State regulatory frameworks. They noted that more than 90 million people live in States without payday loans—where the State usury caps are viewed as effectively prohibiting such loans from being made as a practical matter—and observed that many of these consumers manage to deal with their cash shortfalls without resort to such loans. The same commenters contended that these consumers are not harmed by the absence of payday loans and instead are able to serve their financial needs through other credit products that are less risky. In their view, the alternatives available to potential borrowers in need of short-term credit are more diverse and more extensive than industry commenters have suggested. This market, as they describe it, is much broader than payday and single-payment vehicle title loans; it also comprises products such as credit cards, subprime credit cards, certain bank and credit union products, non-recourse pawn loans, employer funds, charitable funds, and payment plans that are often made available by utilities and others. They also suggested that other non-credit strategies, such as debt counseling and credit counseling, can be productive alternatives to payday and title loans. There was a wide gap in perspectives between these consumer groups and the industry commenters, who generally contended that these borrowers have a very limited range of alternative sources of credit available to them, other than payday and title loans, and are adversely affected when they lack access to these types of covered short-term loans. This disagreement is important and is considered further in the section-by-section analysis for § 1041.4 below in the discussions of unfairness and abusiveness.

In sum, the Bureau has considered all of the comments received about the effects of the existing legal and regulatory frameworks, including the State frameworks, on the issues addressed in the proposal. Based on the Bureau's analysis of the factual data as noted above, the regulatory frameworks in most States that allow and regulate payday, title, and other covered short-term loans do not appear to have had a significant impact on reducing the amounts of default, delinquency, re-borrowing, and the other collateral harms from making unaffordable payments that confront consumers of these loans. Nor have other existing regulatory frameworks had a significant impact in mitigating those harms to consumers. For these and the other reasons discussed above, the Bureau concludes that federal intervention in these markets is warranted at this time.

Longer-Term Balloon-Payment Loans

As stated in the proposal, some longer-term payday installment loans and vehicle title loans are structured either to be repaid in a single lump-sum payment or to require a large balloon payment, often as a final payment of all principal due following a series of smaller interest-only payments. Unsurprisingly, many consumers find making such a payment as challenging as making the single payment under a

[608] *Wash. State Dep't. of Fin. Insts., ''2015 Payday Lending Report,'' at 4, 7 (2015), available at http://www.dfi.wa.gov/sites/default/files/reports/2015-payday-lending-report.pdf.*

[609] Mo. Rev. Stat. sec. 408.500(7).

[610] *Hollins* v. *Capital Solutions Investments, Inc.*, 477 SW.3d 19, 27 (Mo. Ct. App. 2015) (Dowd, J., concurring).

[611] *Id.*

[612] *Id.* at 27–28.

traditional, two-week payday loan, and such loans frequently result in default or re-borrowing.

The Bureau concludes that consumers are likely to be adversely affected by the practice of making these loans without reasonably assessing the borrower's ability to repay the loan while paying for basic living expenses and other major financial obligations. And while there does not appear to be a large market of longer-term balloon-payment loans today, the Bureau is concerned that the market for such loans might grow if it only regulated the underwriting of covered short-term loans. Based on the evolution in small-dollar loan markets after the Military Lending Act was enacted and the initial regulations implementing the MLA were adopted, the Bureau is concerned that lenders would gravitate toward making non-underwritten balloon-payment loans that slightly exceed the time limits in the definition for covered short-term loans, resulting in similar risks and harms to consumers from default, delinquency, re-borrowing, and the collateral consequences of forgoing basic living expenses or major financial obligations to avoid default.

The Bureau received comments specifically on covered longer-term loans involving balloon payments. Several industry commenters stated that the Bureau's concerns about re-borrowing for covered longer-term loans should have focused primarily on loans with balloon payments, and argued that any restrictions should thus be limited to balloon-payment loans. The Bureau agrees with these commenters that the re-borrowing concerns with these loans are similar to the Bureau's concerns regarding covered short-term loans, and highlight similar problems from making covered longer-term balloon-payment loans without reasonably assessing the borrower's ability to repay. The thrust of these industry comments thus has tended to reinforce the judgment the Bureau has now made to address the underwriting of covered longer-term balloon-payment loans in this rule.[613]

As discussed more fully in the section-by-section analysis of §§ 1041.2(a)(7) and 1041.3(b)(2) of the final rule, the Bureau had proposed to define a covered longer-term balloon-payment loan to mean a covered longer-term loan that, in essence, is repayable either in a single lump-sum payment or requires at least one payment that is more than twice as large as any other payment.[614] After consideration of comments received concerning whether to maintain the proposal's approach to limiting coverage of such balloon-payment structures to those products that exceed a rate threshold and involved the taking of a leveraged payment mechanism or vehicle security, the Bureau has decided to adopt a more expansive definition that includes all such payment structures regardless of price or other factors, unless they are specifically excluded or exempted under § 1041.3 of the final rule.

Because relatively few covered longer-term balloon-payment loans appear in the market today, the Bureau is supplementing its analysis in this section with relevant information it has on related types of covered longer-term loans—such as hybrid payday loans, payday installment loans, and vehicle title installment loans. Although these types of loans would not necessarily involve balloon payments *per se,* the Bureau finds no reason to expect that matters such as borrower characteristics and circumstances of borrowing are likely to differ substantially as between borrowers of longer-term title loans generally, for example, and borrowers of such loans with a balloon-payment structure. The Bureau concludes as follows:

- Lower-income, lower-savings consumers in financial difficulty. While there is less research available about the consumers who use these products as compared to covered short-term loan products, available information suggests that consumers who use hybrid payday, payday installment, and vehicle title installment loans also tend to come frequently from lower- or moderate-income households, have little savings or available credit, and have been turned away from other credit products. Their reasons for borrowing and use of loan proceeds are also generally consistent with those of short-term borrowers.
- Ability-to-collect business models. Lenders of most covered longer-term loans have built their business model on their ability to collect, rather than the consumers' ability to repay the loans. Specifically, these lenders generally screen for fraud risk but do not consider consumers' expenses to determine whether a loan is tailored to what the consumers can actually afford. They tend to rely heavily on pricing structures and on leverage over the consumer's bank account or vehicle title to protect their own interests, even when the loans prove unaffordable for consumers. Lenders may continue receiving payments even when the consumer is left unable to meet her basic living expenses or major financial obligations. Again, though this tends to be the case for borrowers of covered longer-term loans, it is even more likely to be true of such borrowers if their loans have a balloon-payment structure.
- Very high default rates. Defaults are a concern with covered longer-term loans generally, and especially so if those loans reflect a balloon-payment structure. In data from one lender that the Bureau analyzed, about 60 percent of balloon-payment installment loans result in default or refinancing. In general, borrowers experienced very high levels of delinquency and default—in some cases the default rate was over 50 percent at the loan sequence level. Prior to reaching the point of default, borrowers can be exposed to a variety of harms whose likelihood and magnitude are substantially increased because of leveraged payment mechanisms or vehicle security relative to similar loans without these features.
- Re-borrowing. The combination of leveraged payment mechanism or vehicle security with an unaffordable balloon payment can compel consumers to re-borrow. They will often have to engage in costly re-borrowing when they are unable to repay the entire loan all at once and extraction of the unaffordable loan payment would leave them unable to cover basic living expenses or major financial obligations.
- Consumers do not understand the risks. The Bureau concludes that borrowers do not fully understand or

[613] The Bureau acknowledges that its determination to address the underwriting of all covered longer-term balloon-payment loans in the final rule does represent an expansion of coverage over the proposal in certain respects, which are that it would cover all such loans regardless of their cost, and regardless of whether the lender obtained a leveraged payment mechanism or vehicle security. Given that the prevalence of these kinds of loans with a balloon-payment structure is limited, however, the Bureau finds from its experience and analysis of these loan markets that the incidence of low-cost longer-term balloon-payment loans (or high-cost longer-term balloon-payment loans that do not have a leveraged payment mechanism or vehicle security) is relatively insignificant.

[614] To be precise, the term ''covered longer-term balloon-payment loan'' is defined in § 1041.2(a)(7) of the final rule to mean a loan described in § 1041.2(b)(2) of the final rule, which is a covered loan that is not a covered short-term loan and: for closed-end credit, the consumer is required to repay the entire balance of the loan in a single payment more than 45 days after consummation, is required to repay substantially the entire amount of any advance in a single payment more than 45 days after the advance, or is required to pay at least one payment that is more than twice as large as any other payment(s); or for open-end credit, the consumer is required to repay substantially the entire amount of any advance at the end of a payment billing cycle that exceeds 45 days, or the credit plan is structured such that paying the required minimum payments may not fully amortize the outstanding balance by a specified date or time, and the amount of the final payment to repay the outstanding balance at such time could be more than twice the amount of other minimum payments under the plan. *Id.*

anticipate the consequences that are likely to occur when they take out covered longer-term balloon-payment loans, including both the high likelihood of default and the degree of collateral damage that can occur in connection with unaffordable loans.

a. Borrower Characteristics and Circumstances of Borrowing

Stand-alone data specifically about payday installment and vehicle title installment borrowers is less robust than for borrowers of covered short-term loans, as discussed above. Yet a number of sources provide combined data for both categories. Both the unique and combined sources suggest that borrowers in these markets generally have low-to-moderate incomes and poor credit histories. Their reasons for borrowing and use of loan proceeds are also generally consistent with those of covered short-term borrowers.

1. Borrower Characteristics

As described above, typical payday borrowers have low average incomes ($25,000 to $30,000), poor credit histories, and have often repeatedly sought credit in the months leading up to taking out a payday loan.[615] Given the overlap in the set of firms offering these loans, the similar pricing of the products, and certain similarities in the structure of the products (*e.g.,* the high cost and the synchronization of payment due dates with borrower paydays or next deposits of income), the Bureau finds that the characteristics and circumstances of payday installment borrowers are likely to be very similar to those of short-term payday borrowers. To the extent data is available limited to payday installment borrowers, the data confirms this view.

For example, from a study of over one million high-cost loans made by four payday installment lenders, both storefront and online, median borrower gross annual income was reported to be $35,057.[616] Similarly, administrative data from Colorado and Illinois indicate that 60 percent of the payday installment borrowers in those States have income of $30,000 or below. And a study of online payday installment borrowers, using data from a specialty consumer reporting agency, found a median income of $30,000 and an average VantageScore of 523; each of these was essentially identical as between the levels for storefront payday borrowers and for online payday borrowers.[617]

The information about vehicle title borrowers that the Bureau has reviewed does not distinguish between single-payment and installment vehicle title borrowers. For the same reasons that the Bureau concludes that the demographic data with respect to short-term payday borrowers can be extrapolated to payday installment borrowers, the Bureau also finds that the demographic data is likely to be similar as between short-term vehicle title borrowers and vehicle title installment borrowers. As discussed above, vehicle-title borrowers across all categories tend to be low-income or moderate-income, with 56 percent having reported incomes below $30,000, and are disproportionately racial and ethnic minorities or members of female-headed households.[618]

2. Circumstances of Borrowing

Again, less data is available that focuses specifically on the circumstances of borrowing for users of payday installment and vehicle title installment loans than is available for short-term loans, and the data must be approached with some caution, since studies that seek to examine why consumers took out liquidity loans or for what purpose face a number of challenges. For example, any survey that asks about past behavior or events runs the risk of recall errors, and the fact that money is fungible makes this question even more complicated. For example, a consumer who has an unexpected expense may not feel the full effect until weeks later, depending on the timing of the unexpected expense relative to other expenses and the receipt of income. In that circumstance, a borrower may say that she took out the loan because of an emergency or may say instead that the loan was taken out to cover regular expenses.

A 2012 survey of over 1,100 users of alternative small-dollar credit products asked borrowers separately about what precipitated the loan and what they used the loan proceeds for.[619] Responses were reported for ''very short term'' and ''short term'' credit, with ''short term'' referring to non-bank installment loans and vehicle title loans.[620] The most common reason borrowers gave for taking out ''short term'' credit (approximately 36 percent of respondents) was ''I had a bill for an unexpected expense (*e.g.,* medical emergency, car broke down).'' About 23 percent of respondents said ''I had a payment due before my paycheck arrived,'' which the authors of the report on the survey results interpret as a mismatch in the timing of income and expenses, and a similar number said their general living expenses were consistently more than their income. The use of funds most commonly identified was to pay for routine expenses, with nearly 30 percent reporting ''pay utility bills'' and about 20 percent reporting ''general living expenses,'' but about 25 percent said the use of the money was ''car-related,'' either purchase or repair. In contrast, participants who took out ''very short term'' products such as payday and deposit advance products were somewhat more likely to cite ''I had a bill or payment due before my paycheck arrived,'' or that their general living expenses were consistently more than their incomes as compared to respondents who took out ''short term'' products, though unexpected expenses were also cited by about 30 percent of the ''very short term'' respondents. More than 40 percent of ''very short term'' respondents also reported using the funds to pay for routine expenses, including both paying utility bills and general living expenses.

[615] Fed. Deposit Ins. Corp., ''2013 FDIC National Survey of Unbanked and Underbanked Households'' at 15–17 (Oct. 2014), *available at https://www.fdic.gov/https://www.fdic.gov/householdsurvey/2013/householdsurvey/2013/. See also* Gregory Elliehausen, ''An Analysis of Consumers' Use of Payday Loans,'' at 27 (Geo. Wash. Sch. of Bus., Monograph No. 41, 2009), *available at https://www.researchgate.net/publication/237554300_AN_ANALYSIS_OF_CONSUMERS%27_USE_OF_PAYDAY_LOANS* (61percent of borrowers have household income under $40,000); Jonathan Zinman, ''Restricting Consumer Credit Access: Household Survey Evidence on Effects Around the Oregon Rate Cap,'' (Dartmouth College, 2008), *available at http://www.dartmouth.edu/~jzinman/Papers/Zinman_RestrictingAccess_oct08.pdf.*

[616] Howard Beales & Anand Goel, ''Small Dollar Installment Loans: An Empirical Analysis,'' at 12 tbl. 1 (Geo. Wash. Sch. of Bus., 2015), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2581667.*

[617] nonPrime101, ''Report 8: Can Storefront Payday Borrowers Become Installment Loan Borrowers?,'' at 5, 7 (2015), *available at https://www.nonprime101.com/blog/can-storefront-payday-borrowers-become-installment-loan-borrowers/.*

[618] Fed. Deposit Ins. Corp., ''2013 FDIC National Survey of Unbanked and Underbanked Households: Appendices,'' at appendix. D–12a (Oct. 2014), *available at https://www.fdic.gov/householdsurvey/2013/2013appendix.pdf.*; Kathryn Fritzdixon et al., ''Dude, Where's My Car Title?: The Law Behavior and Economics of Title Lending Markets,'' 2014 U. IL L. Rev. 1013, at 1029–1030 (2014).

[619] Rob Levy & Joshua Sledge, ''A Complex Portrait: An Examination of Small-Dollar Credit Consumers,'' (Ctr. for Fin. Servs. Innovation, 2012), *available at https://www.fdic.gov/news/conferences/consumersymposium/2012/A%20Complex%20Portrait.pdf.*

[620] ''Very short term'' referred to payday, pawn, and deposit advance products offered by depository institutions. Rob Levy & Joshua Sledge, ''A Complex Portrait: An Examination of Small-Dollar Credit Consumers,'' at 4 (Ctr. for Fin. Servs. Innovation, 2012), *available at https://www.fdic.gov/news/conferences/consumersymposium/2012/A%20Complex%20Portrait.pdf.*

b. Lender Practices

1. Loan Structure

As stated in the proposal, some longer-term payday installment loans and vehicle title loans are structured either to be repaid in a single lump-sum payment or to require a large balloon payment, often as a final payment of all principal due following a series of smaller interest-only payments. Unsurprisingly, many consumers find making such a payment as challenging as making the single payment under a traditional, two-week payday loan, and such loans frequently result in default or re-borrowing.

2. Failure To Assess Ability To Repay

Many lenders making longer-term balloon-payment loans—like lenders making other types of longer-term loans—have constructed a business model that allow them to offer loans profitably despite very high loan-level and sequence-level default rates. Rather than assessing whether borrowers will have the ability to repay the loans, these lenders engage in limited up-front screening to detect potential fraud and other ''first payment defaults,'' and otherwise rely heavily on loan features and practices that result in consumers continuing to make payments beyond the point at which they are affordable. These lenders do not seek to prevent those with expenses chronically exceeding income from taking on additional obligations in the form of payday installment or similar loans. Lending to borrowers who cannot repay their loans would generally not be profitable in a traditional lending market, but the key features of these loans—leveraged payment mechanisms, vehicle security, and high cost—turn the traditional model on its head. These product features significantly reduce lenders' interest in ensuring that payments under a covered longer-term balloon-payment loan are within the consumer's ability to repay.

Some of these consumers may repay the entire loan at the expense of suffering adverse consequences in their inability to keep up with basic living expenses or major financial obligations. Others end up defaulting on their loans at a point later than would otherwise be the case, thus allowing lenders to extract additional revenue on the way ultimately to the same adverse result. Product features that make this possible include the ability to withdraw payments directly from a borrower's deposit account or the leverage derived from the ability to repossess the borrower's means of transportation to work and for other everyday activities. The effect is especially strong when the lender times the loan payments to coincide with deposits of the consumer's periodic income into the account. In these cases, lenders can succeed in extracting payments from the consumer's account even if they are not affordable to the consumer. The lender's risk of default is reduced, and the point at which default ultimately occurs is delayed. As a result, the lender's incentive to invest time or effort into determining whether the consumer will have the ability to make the loan payments is greatly diminished.

c. Harms Spurred by Balloon-Payment Loan Structures

When these features are combined with a balloon-payment structure, lenders can operate, presumably at a profit, even when borrowers are defaulting on 50 percent of loan sequences. The circumstances of the borrowers and the structure of the loans that require a large balloon payment to be made all at once can lead to dramatic negative outcomes for many borrowers who receive unaffordable loans because the lender does not reasonably assess their ability to repay. The Bureau is particularly concerned about the harms associated with re-borrowing and refinancing; harms associated with default, including vehicle repossession or the loss of a deposit account; and harms that flow from borrowers forgoing basic living expenses or defaulting on other major financial obligations as a result of making unaffordable payments on such loans.

In the CFPB Report on Supplemental Findings, the Bureau analyzed several aspects of the re-borrowing and refinancing behavior of borrowers who take out vehicle title installment loans. For a longer-term loan with a balloon payment due at the end, the data analyzed by the Bureau demonstrated a large increase in borrowing around the time of the balloon payment, relative to loans without a balloon-payment feature. Further, for loans with a balloon payment, the re-borrowing was much more likely to occur around the time the balloon payment came due and consumers were less likely to take cash out, suggesting that the unaffordability of the balloon payment is the primary or sole reason for the re-borrowing or refinancing.

Specifically, about 60 percent of balloon-payment installment loans resulted in refinancing, re-borrowing, or default. In contrast, nearly 60 percent of comparable fully-amortizing installment loans were repaid without refinancing or re-borrowing. Moreover, the re-borrowing often only deepened the consumer's financial distress.

Balloon payments were not only associated with a sharp uptick in re-borrowing, but also with increased incidence of default. Notably, the default rate for balloon-payment vehicle title installment loans that the Bureau analyzed was about three times higher than the default rate for comparable fully-amortizing vehicle title installment loans offered by the same lender.

In addition to the harms discussed above, the Bureau is concerned that borrowers who take out these loans may experience other financial hardships as a result of making payments on unaffordable loans. Even if there are sufficient funds in the account, extraction of the payment through leveraged payment mechanisms or vehicle security places control of the timing of the payment with the lender, leading to the risk that the borrower's remaining funds will not cover their other expenses or obligations. The resulting harms are wide-ranging and, almost by definition, can be quite extreme. Consumers may experience knock-on effects from their failure to meet these other obligations, such as additional fees to resume utility services or late fees on other obligations. This risk is further heightened when lenders time the loan payment due dates to coincide with the consumer's receipt of income, which is typically the case.

Furthermore, even if the consumer's account lacks sufficient funds available to cover the required loan payment, the lender still may be able to collect the payment from the consumer's bank by putting the account into an overdraft position. Where that occurs, the consumer will incur overdraft fees and, at many banks, extended overdraft fees. When new funds are deposited into the account, those funds will go to repay the overdraft and not be available to the consumer for other expenses or obligations. Thus, at least certain types of covered longer-term loans—in particular, long-term balloon-payment loans—carry a high degree of risk that if the payment proves unaffordable, the consumer will still be forced to repay the loan and incur further adverse effects, such as penalty fees or legal actions such as vehicle repossession or eviction.

The Bureau is not able to directly observe the harms borrowers suffer from making unaffordable payments. The presence of a leveraged payment mechanism or vehicle security, however, each make it highly likely that borrowers who are struggling to pay back the loan will suffer these harms. The very high rates of default on these

loans means that many borrowers do struggle to repay these loans, and it is therefore reasonable to infer that many borrowers are also suffering harms from making unaffordable payments.[621]

d. Consumer Expectations and Understanding

The Bureau is concerned about these negative consequences for consumers that flow from covered longer-term balloon-payment loans made without reasonably assessing the borrower's ability to repay, because there is strong reason to believe that consumers do not understand the likelihood of the risk that such loans will prove unaffordable or the likelihood and extent of the adverse collateral consequences of such unaffordable loans.

As an initial matter, the Bureau finds that many consumers fail to understand that lenders making longer-term balloon-payment loans—like lenders making other types of longer-term loans—do not evaluate their ability to repay their loans and instead have built business models that tolerate default rates well in excess of 30 percent, even after many consumers have incurred the further costs of re-borrowing. While the Bureau is unaware of any borrower surveys in these two markets, these two conditions are directly contrary to the practices of lenders in nearly all other credit markets—including other subprime lenders.

The Bureau has observed that most borrowers are unlikely to take out a loan they expect to default on, and hence the fact that at least one in three sequences ends in default strongly suggests that borrowers do not understand the degree of risk to which they are exposed with regard to such negative outcomes as default or loss of their vehicle, re-borrowing in connection with unaffordable loans, or having to forgo basic living expenses or major financial obligations. Even if consumers did understand that lenders offering longer-term balloon-payment loans were largely uninterested in their ability to repay, consumers would still be hindered in their ability to anticipate the risks associated with these loans. As discussed above, most borrowers taking out longer-term loans are already in financial distress.[622] Many have had a recent unexpected expense, like a car repair or a decline in income, or they may have chronic problems in making ends meet. Even when not facing a crisis, research shows that consumers tend to underestimate their near-term expenditures[623] and, when estimating how much financial ''slack'' they will have in the future, discount even the expenditures they do expect to incur.[624] Consumers also tend to underestimate volatility in their own earnings and expenses, especially the risk of unusually low income or high expenses. Such optimism bias tends to have a greater effect when consumers are projecting their income and expenses over longer periods.[625] Finally, in addition to gaps in consumer expectations about the likelihood that these loans will generally prove unaffordable, the Bureau observes that consumers underestimate the potential damage from default such as secondary fees, loss of vehicle or loss of account, which may tend to cause consumers to underestimate degree of harm that could occur if a loan proved unaffordable.

In sum, the Bureau's analysis of longer-term balloon-payment loans, as supplemented by its analysis of related types of longer-term loans, indicates that many consumers are unable to appreciate the likelihood of the risk and the magnitude of the harm they face from such loans if they are made on unaffordable terms. This is likely to be the case, in particular, with covered longer-term balloon-payment loans made without reasonably assessing the borrower's ability to repay the loan according to its terms.

Section 1041.4 Identification of Unfair and Abusive Practice—Underwriting Preliminary Discussion on Covered Longer-Term Balloon-Payment Loans

The bulk of the Bureau's analysis below is tailored toward covered short-term loans because those loans are the Bureau's primary source of concern, and the market for which the Bureau has the most evidence. However, the Bureau's statement of the unfair and abusive practice in § 1041.4 of the final rule also encompasses covered longer-term balloon-payment loans as defined in § 1041.2(a)(7) of the final rule. Accordingly, these loans, like covered short-term loans, are subject to both the underwriting and payment requirements of the final rule.

The Bureau does not believe that currently there is a particularly large market for these loans, which is why most of the Bureau's evidence is focused on covered short-term loans. But as described above in Market Concerns—Underwriting, where the Bureau has observed covered longer-term loans involving balloon payments for which the lender does not assess borrowers' ability to repay before making the loan, it has seen the same type of consumer harms and other circumstances that the Bureau has observed when lenders fail to assess ability to repay before making covered short-term loans. Indeed, the Bureau's analysis of longer-term balloon-payment loans in the market for vehicle title loans found that borrowers experienced high default rates—notably higher than for similar loans with amortizing installment payments.[626]

If the Bureau were to finalize this rule without including longer-term balloon-payment loans, it also has great concern that the market for longer-term balloon-

[621] Wage assignments represent a particularly extreme form of a lender taking the control of a borrower's funds away from a borrower. When wages are assigned to the lender, the lender does not even need to go through the process of submitting a request for payment to the borrower's financial institution; the money is simply forwarded to the lender without ever passing through the borrower's hands. The Bureau is concerned that where loan agreements provide for wage assignments, a lender can continue to obtain payment as long as the consumer receives income, even if the consumer does not have the ability to repay the loan while meeting her major financial obligations and basic living expenses. This concern applies equally to contract provisions that would require the consumer to repay the loan through payroll deductions or deductions from other sources of income, as such provisions would operate in essentially the same way to extract unaffordable payments. These approaches raise concerns that go beyond the scope of this rule, and the Bureau will continue to scrutinize the use of wage assignments in connection with longer-term loans not addressed by the final rule, using its supervision and enforcement authority to identify and address unfair, deceptive, or abusive acts or practices.

[622] Rob Levy & Joshua Sledge, ''A Complex Portrait: An Examination of Small-Dollar Credit Consumers,'' at 12 chart 3 (Ctr. for Fin. Servs. Innovation, 2012), *available at https://www.fdic.gov/news/conferences/consumersymposium/2012/A%20Complex%20Portrait.pdf.*

[623] Gulden Ulkumen et al., ''Will I Spend More in 12 Months or a Year? The Effects of Ease of Estimation and Confidence on Budget Estimates,'' 35 J. of Consumer Research 245, at 245–246 (2008).; Johanna Peetz & Roger Buehler, ''Is the A Budget Fallacy? The Role of Savings Goals in the Prediction of Personal Spending,'' 34 Personality and Social Psychol. Bull. 1579 (2009); Johanna Peetz & Roger Buehler, ''When Distance Pays Off: The Role of Construal Level in Spending,'' Predictions, 48 J. of Experimental Soc. Psychol. 395 (2012).

[624] Jonathan Z. Bermann et al., ''2015 Expense Neglect in Forecasting Personal Finances,'' 53 J. of Marketing Res. 535 (2016).

[625] As noted elsewhere, this discussion is not dependent on a particular endorsement of the tenets of behavioral economics and is likewise consistent with economic models based on rational expectations as applied in the circumstances of the kinds of situations faced by the borrowers of such loans.

[626] Rather than elongate the section-by-section analysis of § 1041.4 by engaging in a separate and distinct analysis of each prong of unfairness and abusiveness for covered longer-term balloon-payment loans, the Bureau would simply note that much of the general analysis is basically the same, except that the substantial risks and harms to consumers of high levels of re-borrowing with unaffordable covered short-term loans would be analogized to the substantial risks and harms to consumers of high levels of defaults with unaffordable covered longer-term balloon-payment loans.

payment loans, which is currently quite small, could expand dramatically if lenders were to begin to make efforts to circumvent its provisions by making these loans without assessing borrowers' ability to repay. The result would be that the same type of unfair and abusive practice (just with a slightly different credit product) would persist and impose similar harms on consumers.

This scenario is also more than mere speculation. The Military Lending Act was enacted in 2006 and imposed a 36 percent interest-rate cap on certain loans made to servicemembers and their dependents.[627] Rules to implement its provisions were adopted,[628] and the small-dollar loan industry, in particular, went to some lengths to circumvent the provisions of those rules by making changes in their loan products, such as modifying terms and conditions and extending the duration of such loans.[629] The resulting evasion of the rules was successful enough that Congress found it necessary to revisit the law and direct that new rules be adopted to close loopholes that the prior rules had created, which had undermined the purposes of the Act.[630] The new regulations were adopted in July 2015 and are now in effect.[631]

The fact of this recent experience in this very industry underscores the Bureau's concern that applying the underwriting criteria of this rule to covered longer-term balloon-payment loans is necessary to effectuate its purpose to protect consumers. This point reinforces the Bureau's view, based on the limited evidence of the small size of the market currently existing for these loans, that the analysis below would apply to covered longer-term balloon-payment loans as well as to covered short-term loans if that market were to expand. Thus, the Bureau has made the judgment to similarly regulate covered longer-term balloon-payment loans.

The Bureau did not receive many comments on just the specific portion of the Bureau's proposal about covered longer-term loans involving balloon payments. However, the Bureau did receive a few. Several industry commenters stated that the Bureau's concerns about re-borrowing for covered longer-term loans should have focused primarily on loans with balloon payments, and argued that any restrictions should thus be limited to balloon-payment loans. These commenters were correct that the Bureau's concerns regarding re-borrowing, which are similar to the Bureau's concerns regarding covered short-term loans, were focused primarily on covered longer-term balloon-payment loans. This is one of the reasons why the Bureau is finalizing only this portion of the proposal involving covered longer-term loans, and provides further support for the Bureau's conclusion that the analysis below relating to covered short-term loans is applicable to covered longer-term balloon-payment loans as well. Having addressed this issue here, the remainder of the discussion in this section of the unfair and abusive practice of making loans without reasonably assessing the borrower's ability to repay the loan according to its terms will focus exclusively on covered short-term loans.

The Bureau's Approach in the Proposal

As the Bureau noted in the proposal, it is standard practice in most consumer lending markets for lenders to assess whether a consumer has the ability to repay a loan before making the loan. In certain markets, Federal law requires this.[632] The Bureau did not propose to make a determination whether, as a general rule for all kinds of credit, it is an unfair or abusive practice for any lender to make a loan without making such a determination. Nor did the Bureau propose to resolve that question in this rulemaking. Rather, the focus of the subpart B of the proposed rule was on a more specific set of loans that the Bureau has carefully studied, as discussed in more detail above in part II and in Market Concerns—Underwriting. Based on the evidence presented in the proposal, and pursuant to its authority under section 1031(b) of the Dodd-Frank Act, the Bureau proposed to identify it as both an unfair practice and an abusive practice for a lender to make a covered short-term loan without reasonably determining that the consumer will have the ability to repay the loan under its explicit authority to prescribe rules for ''the purpose of preventing [unfair and abusive] acts or practices.''[633]

In this specific context, ''ability to repay'' was defined in the proposal to mean that the consumer will have the ability to repay the loan without re-borrowing and while meeting the consumer's major financial obligations and basic living expenses. The Bureau had made preliminary findings and reached preliminary conclusions about the unfairness and the abusiveness of making these loans without such a reasonable determination, based on the specific evidence cited in the proposal, which is discussed further below as well as above in part II and Market Concerns—Underwriting. The Bureau sought comment on the evidence it had presented on these issues and on the preliminary findings and conclusions it had reached in the proposal. It also sought comment on whether making the kinds of loans that meet the conditions set forth in the proposed exemption—conditions that are specifically designed as an alternative means to protect consumers against the harms that can result from unaffordable loans—should not be regarded as an unfair or abusive practice.

General Comments

The Bureau received a number of general comments about the Bureau's use of its authority to prohibit unfair, deceptive, or abusive acts or practices (''UDAAP''). The Bureau addresses those more general comments here, but specific comments on the prongs of unfairness or abusiveness are found below.

Some industry participants suggested that an act or practice can only be deemed unfair, deceptive, or abusive if there is a strong element of wrongdoing or a sense that an unconscionable advantage has been taken, which they asserted did not exist.

Many industry participants and trade associations attacked the factual foundation set forth in the proposal as inadequate. And they took particular issue with the framing of the proposal as resting on what they viewed as mere assertions and presuppositions, not clearly grounded in factual findings, as reflected in certain phrasings and characterizations (or even ''slogans''). They further viewed this preliminary foundation for the proposal as reflecting bias or prejudgment on the part of the Bureau that improperly colored its approach to these issues.

[627] Public Law 109–364, 120 Stat. 2266 (2006).

[628] 72 FR 50580 (Aug. 31, 2007).

[629] 79 FR 58602, 58602–06 (Sept. 29, 2014).

[630] Public Law 112–239, 126 Stat. 1785 (2013).

[631] 80 FR 43560 (July 22, 2015).

[632] *See, e.g.,* Dodd-Frank Act section 1411, codified at 15 U.S.C. 1639c(a)(1); CARD Act, 15 U.S.C. 1665e; HPML Rule, 73 FR 44522, 44543 (July 30, 2008). In addition, the OCC has issued numerous guidance documents about the potential for legal liability and reputational risk connected with lending that does not take account of borrowers' ability to repay. *See* OCC Advisory Letter 2003–3, Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans (Feb. 21, 2003), *available at http://www.occ.gov/static/news-issuances/memos-advisory-letters/2003/advisory-letter-2003-3.pdf;* FDIC, Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 78 FR 70552 (Nov. 26, 2013); OCC, Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 78 FR 70624 (Nov. 26, 2013).

[633] 12 U.S.C. 5531(b).

Industry participants and trade associations also highlighted the Bureau's observation made in the proposal that ''the evidence on the effects on consumers of access to storefront payday loans is mixed.'' They argued that the Bureau cannot rest any rulemaking that imposes a substantial market intervention, including UDAAP rulemakings, on mixed evidence that is not more clearly definitive of the key points at issue. Accordingly, these commenters again contended that the Bureau was resting its proposed rule on an insufficient factual threshold.

Bank and credit union commenters, among others, suggested that the Bureau either lacked—or had failed to provide—data to support the application of the abusiveness standard (or more broadly, the UDAAP standard) in context of the kinds of short-term loans they provide, which would be covered loans under the proposal. Here again, one commenter cited the Bureau's reliance on ''a set of preliminary findings'' and what it ''believes'' to be true as indicative of the Bureau's lack of supporting data. Another suggested that loans made by community banks that are covered under the proposed rule are not predatory and do not perpetuate a cycle of indebtedness. This commenter noted that community banks have developed a business model that does not rely on rolling over loans and churning fees, that they underwrite all of their own small loans, and that default and vehicle repossession rates associated with these loans are very small. These commenters thus asserted that the Bureau lacks evidence to demonstrate that their practices associated with these loans are unfair, deceptive or abusive. For these and other reasons, community bank and credit union commenters strongly advocated for the Bureau to use its exemption authority to ensure that their lending activities would not be covered under the terms of any final rule, either in whole or in part.

Similarly, commenters asserted that the Bureau was acting improperly by resting the proposed rule on its mere ''beliefs'' and preliminary findings, rather than holding off until the Bureau was in a position to render definitive conclusions on the main points at issue. In particular, they contended that UDAAP rules governing these covered loans could not validly be enacted until after the Bureau makes definitive rulings based on evidence and fact.

Some commenters, comprising both industry participants and trade associations, argued that the Dodd-Frank Act does not authorize the Bureau to ban a ''product,'' but only to ''prescribe rules'' identifying unlawful UDAAP ''acts or practices.'' One industry commenter argued that the Bureau had mischaracterized or ignored relevant legal precedent that controls how the Bureau must interpret its UDAAP authority under the Dodd-Frank Act, going so far as to say that Bureau lawyers had a professional responsibility to correct the record, and arguing that the Bureau does not have the authority to invalidate entire contracts or whole products. Other commenters argued that the proposed rule was overbroad insofar as it rested on the sweeping conclusion that all alternative underwriting approaches would be unable to pass muster under the unfair or abusive standards laid out in the statute. Further, they contended that the proposed rule would largely eliminate payday and title loans, which are sources of credit that many consumers have long relied on, all of which would exceed the Bureau's statutory mandate. One commenter also made the point that the Bureau's proposal seemed inconsistent with the statutory objective of leveling the playing field for all competitors of consumer financial products by addressing the perceived unfairness of regulating just *these* covered loans without addressing *all* of the products that may have similar or equivalent features.

Many industry participants and trade associations submitted comments that attacked the broader legal authority of the Bureau to propose any rule governing these types of short-term loans, especially a rule under its UDAAP authority. A few of them argued that the Bureau's authority is narrowly constrained because the Truth in Lending Act and its implementing regulations provide a pervasive regulatory framework to govern consumer credit transactions. Others argued that when Congress intended to impose ability-to-repay requirements on specific lending markets, it did so explicitly by statute (as it did with mortgages and credit cards), but it did not confer such explicit authority on the Bureau to regulate payday and title loans in this manner. As a consequence, these commenters maintained that the *expressio unius* canon of statutory construction applies to deny the Bureau any such regulatory authority.

Some commenters stated views that conflicted with those set out above. One trade association, in particular, stated that Congress plainly recognized the problems created by unregulated and less regulated lenders, and for that reason conferred on the Bureau new authority to supervise and write rules for the payday lending industry for the first time ever at the Federal level. More generally, consumer groups were strongly supportive of the Bureau's legal authority to develop and finalize the proposed rule. Rather than viewing other ability-to-repay provisions in Federal consumer law as implied negative restrictions on the Bureau's authority, these commenters pointed to them and others (such as the Military Lending Act) as embodying a considerable trend of expanding public policy now supporting the principle that consumer lending generally should be premised on the borrower's ability to repay. They noted that, along with recent Federal law on mortgage and credit card lending, certain States now embody this principle in statute, and many more do so by judicial precedent. They noted that general statements of this principle in Federal and State law tend to define this approach as requiring the lender to establish the borrower's ability to repay the loan while meeting basic living expenses and without re-borrowing.

Approach in the Final Rule and Changes to Language in § 1041.4

The terms ''unfair'' and ''abusive'' are defined terms in the Dodd-Frank Act with multiple prongs. Under the Act, the Bureau cannot determine an act or practice to be unlawful unless ''the Bureau has a reasonable basis to conclude'' that the act or practice ''causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers'' and ''such substantial injury is not outweighed by countervailing benefits to consumers or to competition.''[634] The Bureau is expressly authorized to ''consider established public policies as evidence'' in ''determining whether an act or practice is unfair.''[635] An ''abusive'' act or practice is defined, among other things, as one that ''takes unreasonable advantage of (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; [or of] (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service.''[636]

In the proposal, each of the specified prongs of these two terms defined in the statute was discussed separately. Hence the comments that were submitted on these specific legal grounds regarding the Bureau's approach can be presented and addressed in this format as well,

[634] 12 U.S.C. 5531(c)(1).

[635] 12 U.S.C. 5531(c)(2).

[636] 12 U.S.C. 5531(d)(2)(A) and (B).

and that discussion is contained in the following sections. But the more general comments on the Bureau's legal approach to developing ability-to-repay rules under UDAAP to govern covered short-term loans, as those comments were summarized above, can be directly addressed here.

To begin with, the commenters' suggestion that an act or practice can only be deemed unfair, deceptive, or abusive if there is a strong element of wrongdoing or a sense that an unconscionable advantage has been taken is a mischaracterization of the Bureau's UDAAP authority as prescribed by law. Although public policy is a factor that the Bureau may consider for purposes of identifying unfairness, both the unfairness and abusiveness standards rest upon well-defined elements in the Dodd-Frank Act, and a sense of wrongdoing or unconscionability is not one of them. In fact, the FTC and Congress have explicitly rejected the notion that agencies should be measuring whether an act is ''immoral, unethical, oppressive, or unscrupulous'' or consistent with public policy to make unfairness findings.[637] An abusive practice may require that the person take ''unreasonable advantage'' of various conditions,[638] but that does not require any sense of unconscionability. The commenters do not offer any compelling justification for their position that the Bureau should, or even is authorized to, supplement the specific statutory prongs that Congress adopted to define the terms ''unfair'' and ''abusive'' with these additional and loose concepts that were not incorporated in the statute. Congress was undoubtedly aware of the unconscionability standard when it passed the Consumer Financial Protection Act, and it did not use the language of unconscionability to limit the unfairness or abusiveness standards.

Some commenters attacked various preliminary findings and conclusions set forth in the proposal by reacting to language in the proposed rule conveying that, as is true of any proposed notice-and-comment rulemaking, the Bureau always planned to wait to formulate and support its final conclusions only after receiving feedback on its proposal. The Bureau appropriately noted that various factual statements, observations, or conclusions made in the proposal were to be regarded as tentative until they could be and had been evaluated in light of comments and supporting information received through the entire rulemaking process. In fact, the Bureau is required by law to consider and analyze the comments received before deciding whether and how to finalize any regulations. As described in the section-by-section analysis for § 1014.4 and this preamble, now that the Bureau has had the opportunity to consider the high volume of input that it has received from all stakeholders, including extensive individual involvement by members of the public, it is in a position to articulate and justify the types of formal and definitive conclusions necessary to support the final rule. The factual recitation presented above in the discussion of Market Concerns—Underwriting embodies the Bureau's presentation of and response to commenters' specific points that were raised about these factual issues. The fact that the Bureau had presented some of its views in the proposal as tentative thus is not improper and was entirely appropriate at that preliminary stage of the rulemaking process.

Some commenters took virtually the opposite tack, objecting to statements made in the proposal, or made by the Bureau in the course of wide-ranging discussions on other occasions, as suggesting bias and prejudgment of certain issues underlying the proposed rule. These objections seem to lack foundation or to be based on statements taken out of context, given the considerable efforts the Bureau has undertaken to process, analyze, and digest the heavy volume of comments received and be responsive to them on the merits in formulating the final rule. The Bureau bases its UDAAP findings on the evidence and conclusions as discussed and now adopted in this section and in Market Concerns—Underwriting. Those findings are more explicitly laid out below when describing the comments and analysis that are applicable to the distinct unfairness and abusiveness prongs.

As to the statement that the Bureau based its views on ''mixed'' evidence, in the proposal the Bureau stated that ''[i]n reviewing the existing literature, the Bureau believes that the evidence on the impacts of the availability of payday loans on consumer welfare is mixed. A reasonable synthesis appears to be that payday loans benefit consumers in certain circumstances, such as when they are hit by a transitory shock to income or expenses, but that in more general circumstances access to these loans makes consumer worse off. The Bureau reiterates the point made earlier that the proposed rule would not ban payday or other covered short-term loans, and believes that covered short-term loans would still be available in States that allow them to consumers facing a truly short-term need for credit.'' In other words, the Bureau did not simply rest its preliminary findings on its determination to take one side of a debate. Instead, the Bureau analyzed the evidence, which naturally differed on methodology and subjects studied, and synthesized it into a preliminary view that payday loans benefit some consumers in certain circumstances, but generally leave many other consumers worse off, while noting that many of the consumers who benefited would still be able to access payday loans under the provisions of the proposed rule.

The Bureau finds that the comments received from banks and credit unions and their trade associations were generally well taken. Many bank and credit union loans are likely not covered by the final rule, because the Bureau is not finalizing the proposals on longer-term small-dollar loans at this time. And to the extent that community banks and credit unions make loans that would otherwise be covered on an accommodation basis for their customers, the Bureau's use of its exemption authority in the final rule assures that these loans also will not be covered (of course, nonbanks making accommodation loans would similarly be exempt).

The Bureau agrees that much of the evidence it reviewed related to loans made by nonbanks, and not banks. However, the Bureau did review evidence relating to Deposit Advance Products, made by banks, and concluded that it was consistent with the evidence the Bureau had on nonbank covered loans. Further, there appears to be no logical reason to believe that covered short-term loans, made without assessing borrowers' ability to repay, would impact consumers differently depending on the lender's charter. The Bureau thus concludes that based on the evidence it reviewed, it is appropriate to apply this rule to the banks and credit unions that are engaged in making covered loans that do not fall within the exemptions provided in the final rule. Doing so is consistent with the Bureau's objective of ensuring that ''Federal consumer financial law is enforced consistently, without regard to the status of a person

[637] J. Howard Beales, Former Dir. of Bureau of Consumer Prot., ''The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection,'' The Marketing and Public Policy Conference (May 30, 2003).

[638] Though taking ''unreasonable advantage'' is not a prerequisite for an abusiveness finding if a company ''materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service.'' 12 U.S.C. 5531(d)(1).

as a depository institution, in order to promote fair competition.'' [639]

With respect to the commenter that viewed the Bureau's proposal as inconsistent with the implicit statutory objective of leveling the playing field for all competitors of consumer financial products because it regulates covered loans without addressing every product that may have similar or equivalent features, the objection is unpersuasive. The Bureau is not required to write rules that cover every product or market all at once, and has the authority to prioritize taking action as it deems appropriate, so long as it has the data and justification for doing so for each instance. For example, the final rule does not cover the underwriting of longer-term loans. This rulemaking also does not cover overdraft services on deposit accounts. Both of those products are distinct from covered short-term loans and may be the subject of separate rulemaking efforts, as well as remaining subject to the Bureau's oversight through the exercise of its supervisory and enforcement authority.

For commenters who argued that the proposed rule was a misuse of the Bureau's prevention authority, or was too harsh and too prescriptive so as to be disproportionate to the evidence of harm to consumers that the Bureau presented in the proposal, several responses are in order. The initial question is whether the Bureau can show in this final rule that in identifying the practice described in § 1041.4 as unfair and abusive, the Bureau acted within the scope of its express legal authority to adopt rules to identify and prevent unfair and abusive acts or practices—a topic that is covered in detail in the following sections. Comments about whether the proposed ability-to-repay requirements are consistent with the Bureau's prevention authority are addressed in more detail below in the section-by-section analysis of § 1041.5.

The Bureau's determination that the failure of a lender to reasonably determine the consumer's ability to repay a covered short-term or longer-term balloon-payment loan according to its terms meets the statutory prongs of the Bureau's ''unfair'' or ''abusive'' authority, as discussed further in the following sections, and thus the Bureau is not imposing a ban on any ''product'' but instead is simply prescribing rules to prevent the acts or practices so identified.

The Bureau does not agree with commenters who suggest that the proposed underwriting rules would effectively have banned lenders from making covered loans. The Bureau continues to believe that even under the underwriting rules contained in the proposal, lenders would have been able to continue to make loans to consumers who, in fact, had the ability to repay those loans. In any event, the Bureau has reconsidered certain aspects of the ability-to-repay underwriting provisions presented in the proposal, in response to substantive comments that were received on various details of the proposed underwriting approach, which provisions are being implemented in a somewhat modified form in § 1041.5 below; and the Bureau is finalizing the alternative framework that it has presented for making such loans without all the underwriting criteria specified in § 1041.5, subject to a cap on how much lending could be achieved within this framework. For more details, see the Section 1022(b)(2) Analysis in part VII below and the section-by-section analysis for § 1041.5 of the final rule.

More generally, the Bureau's rule does not invalidate whole products.[640] Section 1041.4 identifies an unfair and abusive practice in the market—the making of covered short-term and longer-term loans without reasonably determining borrowers' ability to repay the loans according to their terms. Other sections of the rule, including §§ 1041.5 and 1041.6, are intended to prevent that existing practice and the associated harms. This approach to UDAAP rulemaking (identification and then prevention) is a consistent and straightforward application of UDAAP precedent, as discussed further in part IV above.

As to whether the specified components of the ability-to-repay determinations are disproportionate to the risks posed by such lending, the law does not impose any such proportionality test, as long as the statutory prongs of unfairness and abusiveness are met and the remedy imposed bears a reasonable relationship to addressing the identified practice. Nonetheless, it is again relevant here that, as explained in detail below in the section-by-section analysis of § 1041.5, the final rule has incorporated changes in the specified underwriting criteria to harmonize them more closely with those applicable to credit cards and to render them less demanding than the ability-to-repay test used for making mortgage loans. In particular, the Bureau has reconsidered certain aspects of the ability-to-repay underwriting criteria presented in the proposal in response to substantive comments that were received on various details of its proposed approach, and as a result these criteria are being implemented in a somewhat modified form in § 1041.5 below to take account of and respond to these particular concerns raised by the commenters. In addition, the Bureau's proposal presented an alternative framework for making such loans, subject to a cap on how much lending could be achieved within this framework. That alternative framework is being adopted in the final rule, subject to certain modifications, as discussed further below in § 1041.6. For these reasons, the Bureau concludes that the approach set forth in the final rule imposes a remedy that bears a reasonable relationship to addressing the unfair and abusive practice identified by the Bureau so that it does not persist in this market.

With respect to the commenters who asserted that the TILA or any combination of Federal statutes and regulations impliedly divest the Bureau of the authority to propose any rule governing these types of short-term loans under its UDAAP authority, those provisions do not seem able to bear the weight of the argument. On the contrary, the Dodd-Frank Act plainly gave the Bureau the authority to ''prescribe rules'' identifying ''unfair, deceptive, or abusive acts or practices'' that violate Federal law,[641] even though Congress was well aware that the TILA, in particular, already was applicable to consumer financial products, such as the covered short-term loans addressed by this rule.

Nor has Congress given any indication that it intended to restrict the Bureau from adopting an underwriting approach for this loan market (ability-to-repay underwriting, which is based on the lender making a reasonable determination that the borrower will have the ability to repay the loan) that has found increasing Congressional

[639] 12 U.S.C. 5511(b)(4).

[640] Commenters seem to believe that because section 1036(a)(1)(A) of the Dodd-Frank Act states it is unlawful to ''offer or provide to a consumer any financial *product or service* not in conformity with Federal consumer financial law,'' and section 1036(a)(1)(B) separately states that it is unlawful ''to engage in any unfair, deceptive, or abusive *act or practice*,'' that Congress intended to limit the Bureau's UDAAP authority such that it could not be used to ban or invalidate products or services. This reading ignores the definition of Federal consumer financial law, which includes the Dodd-Frank Act itself and ''any rule or order prescribed by the Bureau under [the Dodd-Frank Act],'' which includes the prohibition against UDAAP as well as UDAAP rules. 12 U.S.C. 5481(14). Thus, the clear meaning of section 1036(a)(1)(A) is to make it unlawful to ''offer or provide to a consumer any financial product or service not in conformity'' with the prohibition against unfair, deceptive, or abusive acts or practices in section 1036(a)(1)(B).

[641] 12 U.S.C. 5531(b).

favor in other markets. The Bureau agrees with the commenters who took the view that Congress has plainly recognized the importance of these measures as a means of protecting consumers in two major consumer loan markets (credit cards and mortgages), which tends to support rather than undermine a finding that lending should be premised on the borrower's ability to repay in the market for these covered loans as well. Commenters arguing otherwise did not provide any case law in support of this argument, and the cases cited by a few commenters involved Congress expressly articulating its intent to limit an agency's authority in a particular manner, or an agency acting in a manner inconsistent with an express Congressional mandate. Neither applies here. Further the Bureau's action is not without precedent, as at least one other agency has issued rules to prevent unfair or deceptive practices through an ability-to-repay requirement. Before the Consumer Financial Protection Act was passed into law, the Federal Reserve Board issued a rule under the Home Ownership and Equity Protection Act imposing ability-to-repay requirements for mortgage lenders ''to prevent unfairness, deception, and abuse.'' [642]

For these reasons, and as discussed further in the Bureau's analysis of each of the prongs of the statute addressed below, the Bureau is finalizing its conclusion that it is an unfair and abusive practice for a lender to make a covered short-term or longer-term balloon-payment loans without reasonably determining that the borrowers will have the ability to repay the loans according to their terms. The Bureau made four modifications to proposed § 1041.4. The Bureau has added to the phrase ''ability to repay the loan'' the phrase ''according to its terms,'' such that the final statement of the unfair and abusive practice is, in part, the failure to assess that the consumer ''will have the ability to repay the loan according to its terms.'' The addition was meant to address a common misimpression conveyed by commenters. Many commenters claimed that borrowers who cannot pay an originated loan nonetheless do have an ability to repay because they can repay after some amount of re-borrowing. To further reflect the Bureau's intent, both now and at the stage of the proposal, that lenders should assess the borrower's ability to repay without re-borrowing, the Bureau has added the phrase ''according to its terms.''

[642] 73 FR 44522, 44522–23 (July 30, 2008).

Second, the Bureau has added covered longer-term balloon-payment loans to the statement of the unfair and abusive practice, as noted above.

Third, the Bureau added official commentary, at comment 4–1, clarifying that a lender who complies with § 1041.5 in making a covered short-term loan or a covered longer-term balloon-payment loan has not committed the unfair and abusive practice under § 1041.4. The comment further clarifies that a lender who complies with § 1041.6 in making a covered short-term loan has not committed the unfair and abusive practice under § 1041.4 and is not subject to § 1041.5. This comment is added to clarify that the combination of §§ 1041.5 and 1041.6 are the Bureau's intended method for preventing the practice in § 1041.4, that loans made under § 1041.6 are exempt from § 1041.5, and thus, that if a lender complies with § 1041.5 or § 1041.6, a lender would not be in violation of § 1041.4.

Fourth, during inter-agency consultations, the Bureau received input from a Federal prudential regulator about the singular nature of the statement of the unfair and abusive practice. The regulator believed that supervisory or enforcement actions of this particular rule should be based on a pattern or practice of activity, rather than an isolated and inadvertent instance, which the regulator believed could deter responsible lenders from making covered loans. In the interest of inter-agency cooperation, the Bureau is adopting the suggestion to pluralize the statement of the unfair and abusive practice. Relatedly, the Bureau does not intend to bring supervisory or enforcement actions against a lender for a single isolated violation of § 1041.5.

In the discussion that follows, the Bureau responds to the core arguments raised in comments that were submitted on the Bureau's proposal. The Bureau has organized the comments received such that all of the core arguments presented by the commenters are addressed in the following analysis of the statutory prongs of whether the identified practice constitutes an ''unfair'' practice and an ''abusive'' practice.

Unfairness

As discussed in the proposal, under section 1031(c)(1) of the Dodd-Frank Act, an act or practice is unfair if it causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers and such injury is not outweighed by countervailing benefits to consumers or to competition. Under section 1031(c)(2), the Bureau may consider established public policies as evidence in making this determination. The proposal preliminarily found that it is an unfair practice for a lender to make a covered short-term loan without reasonably determining that the consumer will have the ability to repay the loan. After issuing the proposal and receiving and reviewing comments, the Bureau is now finalizing that conclusion for covered short-term loans. The Bureau concludes that the practice causes substantial injury in the form of default, delinquency, re-borrowing, and collateral consequences associated with attempts to avoid the other injuries by making unaffordable payments. The data that the Bureau analyzed suggest that, particularly with respect to re-borrowing, the incidence of injury is quite high. The Bureau also concludes that this injury is not reasonably avoidable because a substantial population of borrowers who incur injury—from default, delinquency, re-borrowing, or other collateral consequences from making unaffordable payments—do not anticipate the harm. Lastly, the Bureau concludes that the injury to these borrowers outweighs the countervailing benefits to those and other borrowers benefited by the practice and to competition. The most notable benefit would be greater access to credit for borrowers who lack an ability to repay, but for all the reasons discussed below, the Bureau believes that the harms associated with getting unaffordable credit for a substantial population of consumers outweigh any such benefit. In addition, the Bureau reasonably anticipates that even these borrowers are likely to retain access to some covered short-term loans that comply with the terms of final § 1014.6, subject to the conditions that are imposed in that provision to prevent the risks and harms associated with extended loan sequences.

Commenters presented feedback on the Bureau's preliminary conclusions for each of the three prongs of unfairness. The Bureau addresses the comments on those prongs in turn below.

Practice Causes or Is Likely To Cause Substantial Injury

The Bureau's Proposal

The proposal noted that the Bureau's interpretation of the various prongs of the unfairness test is informed by the FTC Act, the FTC Policy Statement on Unfairness, and FTC and other Federal agency rulemakings and related case

law.[643] Under these authorities, as discussed in part IV, ''substantial injury'' may consist either of a small amount of harm to a large number of individuals or of a larger amount of harm to a smaller number of individuals. In this case, the proposal stated that the practice at issue causes or is likely to cause both—a substantial number of consumers suffer a high degree of harm, and a large number of consumers suffer a lower but still meaningful degree of harm.

In the proposal, the Bureau stated its judgment that the practice of making a covered short-term loan without assessing the consumer's ability to repay the loan according to its terms causes or is likely to cause substantial injury. When a loan is structured to require repayment within a short period of time, the Bureau noted that the payments may outstrip the consumer's ability to repay since the type of consumers who turn to these products cannot absorb large loan payments on top of their major financial obligations and basic living expenses. If a lender nonetheless makes such loans without determining that the loan payments are within the consumer's ability to repay, the Bureau stated that it appears the lender's conduct causes or is likely to cause the injuries described below.

The proposal stated that, in the aggregate, the consumers who suffer the greatest injury are those consumers who find it necessary to re-borrow repeatedly and end up in exceedingly long loan sequences. As discussed in the proposal, consumers who become trapped in long loan sequences pay substantial fees for re-borrowing, and they usually do not reduce the principal amount owed when they re-borrow. For example, roughly half of payday loan sequences consist of at least three loans, at which point, in a typical two-week loan, a storefront payday borrower will have paid over a period of eight weeks charges equal to 60 percent or more of the loan amount—and will still owe the full amount originally borrowed. Roughly one-third of consumers re-borrow at least six times, which means that, after three-and-a-half months with a typical two-week loan, the consumer will have paid to the lender a sum equal to 100 percent of the loan amount and made no progress whatsoever in repaying the principal. Almost one-quarter of loan sequences [644] consist of at least 10 loans in a row, and 50 percent of all loans are in sequences of 10 loans or more. And looking just at loans made to borrowers who are paid weekly, biweekly, or semi-monthly, approximately 21 percent of loans are in sequences consisting of at least 20 loans. For loans made to borrowers who are paid monthly, 42 percent of loans are in sequences consisting of at least 10 loans. Similarly, for single-payment vehicle title loans, the Bureau found that more than half (56 percent) of loan sequences consist of at least four loans in a row; over a third (36 percent) consist of seven or more loans in a row; and about one-fourth (23 percent) had 10 or more loans.

The proposal further stated that consumers whose loan sequences are shorter may still suffer meaningful injury from re-borrowing, albeit to a lesser degree than those in longer sequences. Even consumers who re-borrow only once or twice—and, as described in the proposal, 22 percent of payday and 23 percent of vehicle title loan sequences show this pattern—will still incur significant costs related to re-borrowing or rolling over the loans.

The proposal stated that the injuries resulting from default on these loans also appeared to be significant in magnitude. As described in the proposal, 20 percent of payday loan sequences end in default, while 33 percent of single-payment vehicle title sequences end in default. Because covered short-term loans (other than vehicle title loans) are usually accompanied by some specific means of payment collection—typically a postdated check for storefront payday loans and an authorization to submit electronic debits to the consumer's account for online payday loans—a default means that the lender was unable to secure payment despite using those tools. That means a default is typically preceded by failed attempts to secure payment, which generate bank fees (such as NSF fees) that can put the consumer's account at risk and lender fees (such as late fees or returned check fees) that add to the consumer's total indebtedness. Additionally, as discussed in the proposal, where lenders' attempts to extract money directly from the consumer's account fail, the lender often will resort to other collection techniques, some of which—such as repeated phone calls, in-person visits to homes and worksites, and lawsuits leading to wage garnishments—can inflict significant financial and psychological damage on consumers.[645]

The proposal stated that for consumers with a single-payment vehicle title loan, the injury from default can be even greater. In such cases, lenders do not have access to the consumers' bank account but instead have the ability to repossess the consumer's vehicle. As discussed in the proposal, almost one in five title loan sequences end with the consumer's vehicle being repossessed. Consumers whose vehicles are repossessed and who do not have another vehicle may end up either wholly dependent upon public transportation or family or friends to get to work, to shop, or to attend to personal needs. In many personal situations and in many areas of the country, such as rural areas and urban areas without public transportation that is reasonably available, this means they may end up without any effective means of transportation at all.

Finally, the proposal stated that the Bureau believes many consumers,

[643] Over the past several decades, the FTC and Federal banking regulators have promulgated a number of rules addressing acts or practices involving financial products or services that the agencies found to be unfair under the FTC Act (the 1994 amendments to which codified the FTC Policy Statement on Unfairness). For example, in the Credit Practices Rule, the FTC determined that certain features of consumer-credit transactions were unfair, including most wage assignments and security interests in household goods, pyramiding of late charges, and cosigner liability. 49 FR 7740 (March 1, 1984) (codified at 16 CFR part 444). The D.C. Circuit upheld the rule as a permissible exercise of unfairness authority. *AFSA,* 767 F.2d at 957. The Federal Reserve Board adopted a parallel rule applicable to banks in 1985. The Federal Reserve Board's parallel rule was codified in Regulation AA, 12 CFR part 227, subpart B. Regulation AA has been repealed as of March 21, 2016, following the Dodd-Frank Act's elimination of the Federal Reserve Board's rule writing authority under the FTC Act. *See* 81 FR 8133 (Feb. 18, 2016). In 2009, in the HPML Rule, the Federal Reserve Board found that disregarding a consumer's repayment ability when extending a higher-priced mortgage loan or HOEPA loan, or failing to verify the consumer's income, assets, and obligations used to determine repayment ability, is an unfair practice. *See* 73 FR 44522 (July 30, 2008). The Federal Reserve Board relied on rulemaking authority pursuant to TILA section 129(l)(2), 15 U.S.C. 1639(l)(2), which incorporated the provisions of HOEPA. The Federal Reserve Board interpreted the HOEPA unfairness standard to be informed by the FTC Act unfairness standard. *See* 73 FR 44529 (July 30, 2008). That same year, the Federal Reserve Board, the OTS, and the NCUA issued the interagency Subprime Credit Card Practices Rule, in which the agencies concluded that creditors were engaging in certain unfair practices in connection with consumer credit card accounts. *See* 74 FR 5498 (Jan. 29, 2009). One commenter suggested that the Bureau should not rely on *AFSA* but instead on *Katharine Gibbs School* v. *FTC,* 612 F.2d 658 (2d Cir. 1979), a ruling that *AFSA* effectively distinguished in a discussion of how the agency should properly go about identifying and specifying unfair acts or practices. The Bureau agrees with the D.C. Circuit's treatment in *AFSA* of the ruling in *Katharine Gibbs.*

[644] Note that the one-third of borrowers who re-borrow six times and the one quarter of borrowers who re-borrow 10 times are not separate populations. All of the borrowers who re-borrowed 10 times also re-borrowed six times.

[645] As noted in part IV (Legal Authority), the D.C. Circuit held that psychological harm can form part of the substantial injury along with financial harm. *See AFSA,* 767 F.2d at 973–74, n.20 (1985).

regardless of whether they ultimately manage to pay off the loan, suffer collateral consequences as they struggle to make payments that are beyond their ability to repay. For instance, they may be unable to meet their other major financial obligations or may be forced to forgo basic living expenses as a result of prioritizing a loan payment and other loan charges—or having it prioritized for them, in ways they cannot control, by the lender's exercise of its leveraged payment mechanism.

Comments Received

The Bureau received many comments from stakeholders on all sides of these issues about whether the identified practice causes or is likely to cause substantial injury to consumers. As an initial matter, the Bureau received a number of comments from industry participants and trade associations on how the Bureau should measure injury before making a determination that a given act or practice is unfair. Several commenters stated that injury should be measured in relation to consumer outcomes in the absence of the act or practice (here payday lending without assessing the borrower's ability to repay). Commenters argued that the Bureau's identified injuries should be compared to the alternatives without such loans, including defaulting on other financial obligations, failing to afford basic living expenses, forgoing the purchase of goods and services, and bouncing checks. One commenter argued that the psychological injury from stress caused by the threat of repossession should be offset by the injury of the stress caused by losing electricity, heat, water, or the actual vehicle (assuming the borrower must sell or pawn the vehicle to cover the expense). Another commenter argued that the Bureau failed to identify any ''metric'' for measuring harm at all, and that without doing so, the Bureau was unable to estimate the scope of harm. Yet another commenter argued that injury should be measured by comparing the cost of covered loans against the cost of alternative loans.

A number of industry commenters made the similar argument that covered loans cannot cause substantial injury because they do not hurt, and perhaps improve, overall financial health. They presented various surveys and studies that they viewed as providing support for this point. They also contended that the Bureau had erred by assuming that re-borrowing was necessarily injurious and that sustained and repeated use of these loans was necessarily injurious. Another commenter reported having used the Bureau's financial well-being survey to compare the scores of its customers with the scores of similarly situated consumers in States that restrict payday lending, and reported finding that its customers had similar or better financial well-being scores.

The Bureau also received a number of comments arguing that the Bureau had overstated the scope of harm resulting from and frequency of the re-borrowing, defaults, and repossessions caused by the practice. Similarly, commenters argued that there was no evidence that covered loans cause account closures or NSF fees, as stated in the proposed rule. Those comments are addressed above in Market Concerns—Underwriting.

Some commenters suggested that because certain small-dollar loan products usually are underwritten, they have a much lower re-borrowing and default rate.

Other industry commenters objected to the premise that repeat borrowing constitutes an injury to consumers at all. They argued that the evidence shows extended borrowing is a net benefit to consumers because borrowers get a temporary reprieve from financial difficulty, or because cash-strapped consumers are able to satisfy necessary expenses. Another commenter pointed to a study finding that borrowers who engage in protracted refinancing have higher credit scores than borrowers who use shorter sequences. Still another commenter claimed that re-borrowing for title loans should not be regarded as causing an injury because re-borrowing allows consumers to avoid defaulting on other obligations along with such harms as vehicle repossession.

Industry commenters also argued that the Bureau should only count re-borrowing as an injury where consumers did not anticipate that outcome. These commenters cited Professor Mann's study to suggest that many consumers do anticipate they will need to re-borrow to the degree that they end up actually re-borrowing. Consumer groups, by contrast, disputed that premise both conceptually and factually. In particular, they criticized the Mann study by noting that the harm to consumers that results from paying ''exorbitant fees'' is incurred most acutely by re-borrowers who pay multiple fees, whether or not they end up defaulting.

The Bureau received a number of comments on its conclusion that harm results from default. Some of the industry commenters argued that the Bureau overstated the consequences of default. They contended that many payday loans do not affect credit scores because payday lenders do not furnish information to consumer reporting agencies. Commenters also argued that because some payday lenders may not refer accounts to debt collection, the Bureau overstated the harm of default in that manner as well. Some commenters argued that the adverse effects of debt collection practices should not be considered harm for purposes of this rule because harmful collection practices are addressed separately in the Fair Debt Collections Practices Act. One commenter even argued that borrowers benefit from defaulting on these loans, because it means they were able to get free funds that they never ended up having to repay, supposedly without ever experiencing any other negative consequences. Still another commenter argued that for certain title loans the injury resulting from default can be lower than the injury resulting from default on other types of credit, because many title loans are non-recourse loans, which limits the extent of the injury solely to the impact of vehicle repossession.

The Bureau received comments contending that it did not have sufficient evidence to substantiate the collateral consequences associated with payday and title loans that have not been underwritten, in particular the frequency and magnitude of other collateral harms from making unaffordable payments, which the Bureau cited as one of the adverse consequences associated with these loans.

Commenters also argued that the Bureau's claim that consumers are injured because they are not able to absorb loan payments on top of major financial obligations and basic living expenses is circular. They argue that consumers use covered loans because they are unable to pay major financial obligations and basic living expenses, and thus the injury the Bureau identified is pre-existing. In other words, commenters argue that the identified injuries are not caused by the identified practice of making such loans without reasonably assessing the borrower's ability to repay the loan according to its terms, and are instead, caused by borrowers' preexisting hardship. Commenters similarly suggested that making ability-to-repay assessments does not correlate to the identified injuries and thus the failure to make such assessments is not the cause of those injuries.

The Final Rule

After reviewing the comments received, and on further consideration, the Bureau is now concluding that the practice of making covered short-term loans without making a reasonable

determination of the consumer's ability to repay the loan according to its terms causes or is likely to cause substantial injury to consumers. As noted in the proposal, borrowers subject to this practice experience injury when covered short-term loans are made without making a reasonable assessment of their ability to repay and they are unable to cover the loan payment on top of major financial obligations and basic living expenses. These injuries include those associated with default, delinquency, and re-borrowing, as well as the negative collateral consequences of being forced to forgo major financial obligations or basic living expenses to cover the unaffordable loan payment. The frequency and magnitude of these types of harms experienced by consumers was discussed at greater length above in Market Concerns—Underwriting. As stated in that discussion, the Bureau does not find that every borrower is necessarily harmed by this practice, because some portion of borrowers may successfully repay these loans after little or no re-borrowing and without incurring collateral harms from so doing (though it bears noting that many of these successful borrowers presumably would qualify for a loan if the lender first made a reasonable assessment that they have the ability to repay it according to its terms). But the Bureau finds that a substantial population of borrowers is harmed, many severely, when they suffer the kinds of injuries just mentioned, which are discussed at greater length above in Market Concerns—Underwriting, as a result of the identified practice of failing to make a reasonable assessment of the borrower's ability to repay before making the loan.

As noted previously, several commenters asserted that the Bureau should only consider that a practice causes substantial injury after discounting certain benefits that borrowers may get from taking out these loans, or after comparing these loans to all other possible alternatives. That approach is not required by the legal standards regarding unfair practices set forth in the statute, FTC precedent, or case law, and the Bureau has concluded that it is not appropriate here. Adopting the suggested approach would over-complicate the analysis and risk ''double-counting'' certain countervailing benefits (here first in minimizing the nature of the injury and then again in considering the countervailing benefits for consumers or competition). Following the long history of FTC and other judicial precedent, the Bureau has assessed ''substantial injury'' and ''countervailing benefits'' separately, and then weighed the two against each other. In this way, the Bureau will fully comply with the statutory requirements because it will not conclude that the identified practice is unfair until after it has concluded that the practice is ''injurious in its net effects'' because countervailing benefits for consumers or competition do not outweigh the substantial injury.[646] The Bureau conducts that analysis and reaches that conclusion below.

Generally, the Bureau measures substantial injury by assessing the aggregate injurious consequences that the specific practice causes or is likely to cause for consumers. So, for the practice at issue in this rule, the magnitude of injury is the aggregate total injurious impact of default, delinquency, re-borrowing, and the collateral consequences caused by making unaffordable payments, all of which are the result of lenders failing to assess borrowers' ability to repay before making covered short-term loans. Injury is weighed in the aggregate, rather than simply on a consumer-by-consumer basis; and the practice need not injure every consumer if it affects any substantial number of them or if it imposes severe harm on a smaller number of them. In fact, as acknowledged above, the Bureau recognizes that some consumers do not suffer harm from the practice, and for some consumers who are harmed, the benefits to that one consumer might outweigh the harm. This may be true even of some consumers who could not satisfy the ability-to-repay standard. For example, there may be consumers who encounter a windfall after taking out the loan, but before repaying, such that none of the injuries occurs even though at the time the loan was originated the borrower would not have had an ability to repay. There also could be some consumers whose particular circumstances are such that the benefits of having immediate access to funds outweigh the harms resulting from being unable to repay the loan. The Bureau nonetheless includes the injury associated with those borrowers. Of course, the countervailing benefits to consumers are also measured in the aggregate, and the Bureau includes the benefits even to those consumers who, on net, were injured.

As to the specific argument that a practice may only be considered injurious if it is worse than all alternatives, this argument is inconsistent with the statute and not grounded in any precedent. Such a requirement would be akin to the view that as long as an alternative practice can be identified that causes even more injury to consumers, then the practice cannot cause substantial injury.

As commenters noted, the Bureau has not calculated a precise total dollar figure for the aggregate injury caused by the practice of making covered loans without making a reasonable determination of the borrower's ability to repay the loan according to its terms. That calculation would be impractical, and it represents a level of exactitude that has never been required of or attained by the FTC and the prudential regulators in regulating identifiable consumer harms under the terms of their UDAP authorities. However, in assessing the aggregate weight of injury, the Bureau was informed by all of the factual background, data, and evidence canvassed above in Market Concerns—Underwriting. When the impact of default, delinquency, re-borrowing, and other negative collateral consequences of making unaffordable payments is aggregated among all borrowers for whom lenders do not assess ability to repay before making a covered short-term loan, the sum of that injury is very substantial.

It is worth noting what is not included in the Bureau's weighing of substantial injury. Several commenters believed that the Bureau was considering all covered short-term loans to be injurious. That is not so. The Bureau has determined, more narrowly, that substantial injury is caused or likely to be caused by making a covered short-term loan without reasonably assessing the consumer's ability to repay according to its terms. Thus, the Bureau is only counting injury to consumers where the lender did not make a reasonable assessment of the borrower's ability to repay, which as discussed above leads many consumers to experience the harms from default, delinquency, re-borrowing, and other collateral consequences from attempting to avoid these other injuries by making unaffordable payments.[647]

The Bureau concludes that, contrary to some commenters' assertions, re-borrowing should be considered

[646] FTC, Policy Statement on Unfairness, Appended to International Harvester Co., 104 F.T.C. 949, 1070 (1984).

[647] The Bureau notes that some commenters claimed that certain short-term loans made by community banks and credit unions are underwritten and have much lower re-borrowing and default rates. This is consistent with the logic behind the rule, and provides further evidence that a lender's failure reasonably to assess ability to repay causes the types of harms that the Bureau has identified.

consumer injury when the borrower is forced to do so owing to an inability to cover the unaffordable payment, basic living expenses, and major financial obligations. The costs of re-borrowing are not a part of the original loan agreement. When a lender makes a loan without assessing ability to repay, and the borrower ultimately does not have enough funds to cover the unaffordable payment, basic living expenses, and major financial obligations, the consumer is forced to choose between three outcomes (default, re-borrowing, or the default avoidance costs of having to forgo basic living expenses or major financial obligations). Each of these outcomes involves ''monetary harm,'' which is the most traditional form of injury for unfairness analyses.[648]

Injury can be acute for borrowers when the lender's failure to assess ability to repay sets off a chain reaction of multiple rounds of re-borrowing, which incur additional fees and perhaps penalty fees as well. After each new loan, the borrower faces an unrepayable balloon payment that leads the borrower to incur additional fees that were not a part of the original agreement. That the borrower incurs the cost of re-borrowing instead of other injuries as perhaps a least-bad option at that juncture (when compared with default, repossession, or forgoing basic living expenses or major financial obligations), does not make the re-borrowing non-injurious. When the loan comes due, the borrower may be able to incur one type of injury over another, but the borrower does not thereby avoid being injured at all. One commenter provided an illustrative example of a borrower who paid $12,960 to borrow $1,020 in principal because the borrower continued to re-borrow the original principal. Each instance of re-borrowing was the result of a new choice between re-borrowing, default, or forgoing expenses, and each of those decisions was forced upon the consumer because the original loan was made without assessing the borrower's ability to repay the loan according to its terms.

Note that the Bureau is not, as some commenters stated, addressing in this rulemaking the sustained use of credit, or long-term indebtedness, standing alone. Such matters could bear scrutiny in particular instances under the Bureau's supervision or enforcement authority. But for purposes of this rulemaking, continued or repetitious re-borrowing is considered injurious for unfairness purposes here because it imposes new costs on the borrower that were not specified in the original loan agreement, and these costs are caused by the lender's failure to make a reasonable assessment of the borrower's ability to repay the original loan according to its terms.

The Bureau is unpersuaded by commenters' claims that protracted refinancing is not harmful because credit scores may actually improve for some borrowers. The study that these commenters cite compares borrowers who roll over covered short-term loans with borrowers who do not. Again, the fact that some borrowers may have positive experiences or some particular form of positive outcomes with these loans is not immaterial, but it fails to address the core point of the data about this market, which shows that for a further substantial population of borrowers, the harms experienced from repeated re-borrowing can be quite severe.

Moreover, the possibility that one form of the identified injury may be less injurious than another in one particular respect does not prove that the injury identified is not in fact injurious in other respects. When a lender makes covered loans without assessing ability to repay the loan according to its terms, borrowers may be able to incur one form of injury rather than another from amongst the likely set of injuries—again, default, delinquency, re-borrowing, and the collateral consequences of making unaffordable loan payments—and some may be able to mitigate that injury to an appreciable extent or even to nullify its effects, but many borrowers who have taken out an unaffordable loan will not be able to avoid being gravely injured in this situation.[649]

Similarly, the argument that re-borrowing on title loans is not injurious because it allows borrowers to avoid default, and thus repossession, is unpersuasive. The potential injuries that consumers face in these situations include default, delinquency, re-borrowing, and the collateral consequences of forgoing other basic living expenses or major financial obligations. In these instances, re-borrowing may be less injurious than another greater injury, but many borrowers will still be injured by the impact of re-borrowing as described at greater length above in Market Concerns—Underwriting, including the collateral consequences of attempting to avoid these other injuries by making unaffordable payments.

The Bureau recognizes, as commenters suggest, that some borrowers will be able to anticipate, before they take out the first covered short-term loan, that they may have to re-borrow. These industry commenters argue that re-borrowing should not be considered harmful to the extent that borrowers could anticipate it happening. But the most relevant data analyzing borrowers' ability to anticipate re-borrowing supports the conclusion that a high number of borrowers are not, in fact, able to accurately predict the length of their indebtedness to lenders that offer payday loan products.

The 2014 study by Professor Mann that asked borrowers about their expectations for re-borrowing then compared those with their actual borrowing experience, yielded insights directly relevant for this rule.[650] As described in the proposal and the Section 1022(b)(2) Analysis, the study found that borrowers who wound up with very long sequences of loans had very rarely expected those long sequences. See the discussion regarding reasonable avoidability below, and the Section 1022(b)(2) Analysis, for more on the Bureau's interpretation of the Mann study.

Thus, the Bureau continues to believe that the response from these industry commenters glosses over the point that many borrowers are not able to anticipate the nature and the likelihood and the magnitude of the harms that may occur through re-borrowing. To the extent that re-borrowing imposes new costs on the borrower that were not part of the costs specified in the original loan agreement—including additional fees and the other collateral consequences of attempting to avoid default by making unaffordable payments while forgoing basic living expenses and major financial obligations—the re-borrowing that occurs can create unexpected harm once the borrower has taken out an initial unaffordable loan. Indeed, many consumers who may anticipate some re-borrowing also seem likely to be unable to anticipate the likelihood and severity of these harms, which is a point the Bureau addresses more fully in the section below on whether injury is reasonably avoidable.

Moreover, just as the two prongs of ''substantial injury'' and ''reasonably avoidable'' are set out as distinct and independent in the statute, the Bureau concludes that even if some borrowers

[648] FTC Statement on Unfairness, 104 F.T.C. 949 (1984).

[649] Of course, the Bureau notes that all studies comparing credit score outcomes are subject to the caveat that different creditors use different credit scoring models, which are always changing.

[650] Robert Mann, Assessing the Optimism of Payday Loan Borrowers, 21 Sup. Ct. Econ. Rev. 105 (2014), and correspondence between prof. Mann and Bureau staff described above in Market Concerns—Underwriting.

do accurately predict their length of re-borrowing, this would not change the broader conclusion that the practice causes substantial injury in the aggregate. The Bureau also concludes, as addressed above in Market Concerns—Underwriting, that, contrary to the assertions made by some commenters, it did not significantly overestimate the types of injury caused by default, delinquency, re-borrowing, and the negative collateral consequences of making unaffordable payments when it issued the proposed rule.

The Bureau is highly dubious of the claim made by some industry commenters that consumers suffer no harm in the event of a default on a covered loan. The Bureau has seen many examples of payday lenders that engage in strenuous efforts, either on their own behalf or by contracting with debt collectors (or selling the debt to debt buyers), to pursue borrowers for payment in the event of default.[651] And the commenters did not present any evidence to show the extent to which lenders of covered short-term loans actually do refrain from seeking to collect on overdue debts. Moreover, nothing prevents such third-party debt collectors or debt buyers from reporting the negative information to consumer reporting agencies, which is a technique some collectors use to facilitate collection.[652] In any event, the underlying premise is quite implausible. If there were no real consequences to defaulting on these loans, it is difficult to understand why so many borrowers would engage in repeat re-borrowing, rather than simply defaulting.

The Bureau also finds that its assessment of injury should include repossessions resulting from failing to assess ability to repay before making covered vehicle title loans. As noted above, some industry commenters claimed that repossession is not harmful, or not as harmful as the Bureau indicated in its proposal. They rest this argument on two claims. First, they contend that most borrowers can find other means of transportation, citing what they present as a supportive survey, and thus would not be harmed by the loss of their vehicle. Second, they contend that the extent of the direct economic loss that borrowers sustain by having their vehicle repossessed is relatively insignificant.

On the first point, the potential consequences of the loss of a vehicle depend on the transportation needs of the borrower's household and the available transportation alternatives. According to two surveys of title loan borrowers, 15 percent report that they would have no way to get to work or school if they lost their vehicle to repossession.[653] For these borrowers, the effects of repossession could thus be catastrophic from an economic standpoint, particular in rural areas or in urban areas where public transportation is not reasonably available. And more than one-third (35 percent) of borrowers pledge the title to the only working vehicle in the household.[654] Even those with a second vehicle or who are able to get rides from friends or take public transportation would presumably experience significant inconvenience or even hardship from the loss of a vehicle. This hardship goes beyond simply getting to work or school, and would as a practical matter also adversely affect the borrower's ability to conduct their ordinary household affairs, such as obtaining food or medicine or other necessary services. The commenters countered that borrowers often can find other means of transportation, citing what they present as a supportive survey. Their interpretation of the data is not convincing, however, as even the authors of the survey cautioned against making simplistic calculations about factors and probabilities that are intertwined in the analysis, and which thus may considerably understate the incidence of hardship, especially for more economically vulnerable populations.

As to the second point about the extent of the direct economic loss, the commenters rest this argument either on the low average value of collateralized vehicles or on their claim that some borrowers deliberately choose to liquidate the value of the vehicle by taking out a title loan and then promptly abandoning the vehicle to repossession. While some vehicles used for collateral may not have high value, they still can be crucial as the consumer's principal means of transportation to and from work or to conduct everyday affairs such as obtaining medical care or buying groceries, medicine, and other essentials. The Bureau describes the harms of repossession in more detail both in Market Concerns—Underwriting and the section-by-section analysis for § 1041.6.

The Bureau also finds unpersuasive the assertion made by some commenters that a significant population of consumers would take out a title loan and then intentionally abandon the vehicle instead of just selling it, especially in light of the observations made in Market Concerns—Underwriting that title lenders usually only make loans where the value of the collateral exceeds the principal. Indeed, it appears implausible that consumers would choose to dispose of a vehicle by this means rather than simply selling the vehicle, as the latter approach very likely would usually yield more funds without involving the consumer in any adverse risks or costs of collections activities or repossession fees. It may be that some borrowers take out a title loan and immediately default on it, perhaps even intentionally, and such borrowers may not necessarily experience all of the same harms as other borrowers whose vehicles are repossessed. But no evidence plausibly suggests that this alleged population is at all significant, and thus this fact does not change the Bureau's overarching conclusion. As for the commenter who argued that the stress associated with repossession is no worse than other forms of financial stress, this argument is speculative and unpersuasive, and at least implicitly acknowledges the fact that potential psychological injury does accompany the threat of repossession.

The Bureau also rejects the claim made by some commenters that its arguments about substantial injury are circular because the injuries identified were primarily caused by the original financial hardship that induced the borrower to seek a covered loan, rather than by the covered loan itself. This is a variant on the argument that the real harm to consumers does not flow from the identified practice of failing to underwrite these loans in a reasonable manner but from the fact that many

---

[651] The Bureau has engaged in many investigations that have led to taking a number of enforcement actions against small-dollar lenders for their illegal debt collection practices that were found to be violations of the statutory prohibition against unfair, deceptive, or abusive acts or practices. *See, e.g., In the Matter of Money Tree, Inc.,* File No. 2016–CFPB–0028; *In the Matter of EZCORP, Inc.,* File No. 2015–CFPB–0031; *CFPB* v. *NDG Financial Corp.,* Case No. 1:15–cv–05211–CM (S.D.N.Y.); *In the Matter of ACE Cash Express, Inc.,* File No. 2014–CFPB–0008; *In the Matter of Westlake Servs., LLC,* File No. 2015–CFPB–0026. The Bureau has also taken actions against debt collectors, some of which collect in part on small-dollar loans. *See, e.g., CFPB* v. *MacKinnon, et al.,* Case No. 1:16–cv–00880 (W.D.N.Y.).

[652] As for whether harmful debt collection practices can constitute cognizable injury here, it would seem that they can if they flow from the identified practice of making covered short-term loans without reasonably assessing the borrower's ability to repay the loan according to its terms. Although those practices can be addressed through enforcement or rulemaking under the Fair Debt Collection Practices Act, they are also a natural consequence of the harms that consumers experience from receiving unaffordable loans that they are unable to repay.

[653] Fritzdixon, *et al.*, at 1029–1030; Pew Charitable Trusts, Auto Title Loans: Market Practices and Borrowers' Experiences, at 14 (2015), *http://www.pewtrusts.org/~/media/assets/2015/03/autotitleloansreport.pdf.*

[654] Pew 2015.

consumers lack the money to meet their obligations. First, to the extent this argument seeks to rely on the benefits provided by access to credit through covered loans in order to cover the borrower's expenses, or is an exercise in weighing those benefits against the injuries associated with the harm, it is most appropriately treated in the section below on ''countervailing benefits.'' But more to the point, the Bureau finds that the specific injuries which flow from default, delinquency, re-borrowing, and the collateral consequences of making unaffordable payments, including forgoing major financial obligations or basic living expenses in order to avoid default, are not caused by the borrower's pre-existing financial hardship for one key reason: These injuries flow from the loan itself and the fact that it was made without reasonably assessing the borrower's ability to repay the loan according to its terms. These outcomes would not have occurred without the lender engaging in the identified practice of making such loans in such manner. The borrower would have faced other difficulties flowing from her distressed circumstances, but not the harms identified here.

In other words, the fact that many consumers are in financial difficulty when they seek out a covered loan—a fact the Bureau has repeatedly recognized—does not mean they are not injured by the identified practice. For certain individual borrowers in particular situations, being able to replace a default on a different obligation with the injury identified in this section might seem to be worthwhile. But the right place to address that potential trade-off is when the analysis turns to assessing whether countervailing benefits outweigh the injury, in the aggregate rather than on an individual borrower basis—matters that are discussed further below.

In any event, the pre-existing financial stress of many consumers does not relieve lenders of responsibility for engaging in practices that are unfair or abusive. As the court in *FTC* v. *Neovi* stated, the contribution of ''independent causal agents . . . do[es] not magically erase the role'' of lenders' in causing the harm.[655] When lenders do not assess ability to repay before making loans, they end up making loans to some borrowers who lack the ability to repay. The fact that these borrowers who obtain unaffordable loans will default, become delinquent, re-borrow, or experience negative collateral consequences is a natural result of the practice that lenders should expect.

In sum, based on the analysis presented here and above in the section on Market Concerns—Underwriting, and upon further consideration after reviewing the high volume of comments received from the public, the Bureau concludes that the identified practice causes or is likely to cause substantial injury.

Injury Not Reasonably Avoidable

The Bureau's Proposal

The second prong of the statutory definition of unfairness is that the ''substantial injury'' to consumers ''is not reasonably avoidable by consumers.'' The Bureau proposed to interpret this requirement to mean that unless consumers have reason generally to anticipate the likelihood and severity of the injury and the practical means to avoid it, the injury is not reasonably avoidable. Under the proposed rule, the Bureau stated that in a significant proportion of cases, consumers appear to be unable to reasonably avoid the substantial injuries caused or likely to be caused by the identified practice. Prior to entering into a payday, single-payment vehicle title, or other covered short-term loan, many consumers do not reasonably anticipate the likelihood and severity of the injuries that frequently result from such unaffordable loans, and after entering into the loan, consumers do not have the practical means to avoid the injuries that result from being unable to repay it.

As stated in the proposal, many consumers seem unable to reasonably anticipate the likelihood and severity of the consequences of being unable to repay a loan that is unaffordable according to its terms. As discussed in the proposal, the typical consumer is likely generally aware that taking out any loan can lead to adverse consequences if the loan is not repaid, but is not likely to be familiar with all of the harms that can flow from a loan that is made without a reasonable assessment that the borrower will be able to repay it according to its terms. Some additional harms beyond the costs incurred on the loan can include, for example, the risk of accumulating penalty fees on their bank account, the potential loss of their account, or (for title loans), or the risk of aggressive collections. Moreover, even if consumers recognize these harms as possibilities, many are likely not to have sufficient information to understand the frequency with which these adverse effects may occur to borrowers who are affected by the identified practice or the severity of the consequences befalling a typical borrower who obtains an unaffordable loan. An especially compelling example of how consumers may be prone to error in making reasonable evaluations about the injuries to which they are exposed by the identified practice is the substantial number of consumers who re-borrow, many of them repeatedly, prior to eventually defaulting on these loans. But unless consumers are reasonably aware of the likelihood and severity of these injuries, it would not be reasonable for them to make special efforts to avoid such injuries where they are not in position to accurately evaluate the risks. This may be especially the case where the lender qualifies them for a loan without making a reasonable assessment of their ability to repay, as many consumers would be unlikely to expect that lenders would intentionally offer them an unaffordable loan that they would likely be unable to repay.

That is not to say that every consumer must understand everything about the potential risks or must be able to anticipate these risks with mathematical precision. Instead, it is only to say that consumers must have a sense of the order of magnitude of the risk, both in terms of its likely frequency and its likely severity. Yet the Bureau also noted in the proposal that in analyzing reasonable avoidability under the FTC Act unfairness standard, the FTC and other agencies have at times focused on factors such as the vulnerability of affected consumers,[656] as well as those

[655] *FTC* v. *Neovi*, 604 F.3d 1150, 1155 (9th Cir. 2010). In fact, the argument here is even weaker than that rejected in *Neovi,* where the claim was that intervening causal factors had rendered the cause identified by the agency insufficiently proximate. Here the alleged causal factor cited by the commenters is not even an intervening factor.

[656] *See, e.g.,* FTC Policy Statement on Unfairness, 104 FTC at 1074 (noting that the FTC may consider the ''exercise [of] undue influence over highly susceptible classes of purchasers''); Mortgage Assistance Relief Services Rule, 75 FR 75092, 75117 (Dec. 1, 2010) (emphasizing the ''financially distressed'' condition of consumers ''who often are desperate for any solution to their mortgage problems and thus are vulnerable to providers' purported solutions''); Telemarketing Sales Rule, 75 FR 48458, 48487 (Aug. 10, 2010) (concluding that injury from debt relief programs was not reasonably avoidable in part because ''purchasers of debt relief services typically are in serious financial straits and thus are particularly vulnerable'' to the ''glowing claims'' of service providers); Funeral Industry Practices Rule, 47 FR 42260, 42262 (Sept. 24, 1982) (citing characteristics which place the consumer in a disadvantaged bargaining position relative to the funeral director, leaving the consumer vulnerable to unfair and deceptive practices, and causing consumers to have little knowledge of legal requirements and available alternatives). The Funeral Industry Practices Rule and amendments were upheld in the Fourth and Third Circuits. *See Harry and Bryant Co.* v. *FTC,* 726 F.2d 993 (4th Cir. 1984); *Pennsylvania Funeral Directors Ass'n, Inc.* v. *FTC,* 41 F.3d 81 (3d Cir. 1994). In the Subprime Credit Card Practices Rule—in which three Federal

consumers' perception of the availability of alternative products.[657] Likewise, the Bureau stated that the substantial injury from covered short-term loans may not be reasonably avoidable in part because of the precarious financial situation of many consumers at the time they take out such loans and their belief that searching for potential alternatives will be fruitless and costly. As discussed in the proposal, consumers who take out payday or single-payment vehicle title loans typically have tried and failed to obtain other forms of credit before turning to these covered loans as a last resort. Thus, based on their prior negative experience with attempting to obtain credit, they may reasonably perceive that alternative options would not be available. Consumers facing an imminent liquidity crisis may also reasonably believe that their situation is so dire that they do not have time to shop for alternatives and that doing so could prove costly.

The Bureau also stated in the proposal that consumer predictions about their experience with covered short-term loans may be overly optimistic, especially if they are unaware of the risks posed by lenders making these loans without reasonably assessing the borrower's ability to repay the loan according to its terms. In particular, consumers who experience long sequences of loans often do not expect those long sequences to occur when they make their initial borrowing decision. As detailed above in Market Concerns—Underwriting, empirical evidence suggests that consumers are best able to predict accurately the duration of their borrowing if they repay after little or no re-borrowing, though many underestimate the expected duration while others overestimate it. Notably, borrowers who end up in extended loan sequences are especially likely to err in their predictions of how long their loan sequences will last, usually taking the form of underestimating the expected duration. So consumers are particularly poor at predicting long sequences of loans, a fact that does not appear to differ for those borrowers who have past borrowing experience.[658]

As discussed in the proposal, the Bureau observes other factors that prevent consumers from reasonably anticipating and avoiding the substantial injury caused by unaffordable short-term loans. Such loans involve a basic mismatch between how they appear to function as short-term credit and how they are actually designed and intended by lenders, as part of their business model, to function in long sequences of re-borrowing for a substantial population of consumers. Lenders present these loans as short-term, liquidity-enhancing products that consumers can use to bridge an income shortfall until their next paycheck. But in practice, across the universe of borrowers, these loans often do not operate that way. The term of the loan, its balloon-payment structure, and the common use of leveraged payment mechanisms, including vehicle security, all tend to magnify the risks and harms to the borrower. The disparity between how these loans appear to function and how they actually function creates difficulties for consumers in estimating with any accuracy how long they will remain in debt and how much they will ultimately pay for the initial extension of credit.

Lenders who make covered short-term loans without reasonably assessing the borrower's ability to repay the loan according to its terms, to borrowers who often do not reasonably anticipate the likelihood and severity of the risks posed, often further magnify these risks through the way they market the option of repeat borrowing. Payday lenders and title lenders typically present only two options: the re-borrowing option, with its costs limited to another set of fees but no repayment of principal, and the full repayment option of requiring the entire balloon payment to be repaid all at once, with no options offered in between these two. Low-cost repayment or amortization options are typically not presented or are obscured, even where they may be required to be available under State law. Even consumers who are delinquent and have further demonstrated their inability to repay the loan according to its terms are encouraged to re-borrow, which leads many consumers to engage in extensive re-borrowing even where they eventually wind up in default. For many re-borrowers, the upshot is that they end up making repeated payments that become increasingly unaffordable in the aggregate over time, even though a substantial number of them still will sustain the harms associated with default.

The proposal stated that not only are consumers unable to reasonably anticipate the likelihood and severity of many of these potential harms before entering into a payday or title loan, but after they have entered into a loan, they do not have any practical means to avoid the injuries that will occur if the loan proves to be unaffordable. Consumers who obtain a covered short-term loan that is beyond their ability to repay confront the harms of default, delinquency, re-borrowing, or the collateral consequences of making unaffordable payments that would cause them to miss payments on their major financial obligations and basic living expenses. They can make choices among these competing harms, but once they are facing an unaffordable payment, some form of substantial injury is almost inevitable regardless of what actions they take in that situation. And as discussed in the proposal, lenders engage in a variety of practices that further increase the likelihood and degree of harm, for instance by encouraging additional re-borrowing with its attendant costs even for consumers who are already experiencing substantial difficulties as they are mired in extended loan sequences, and by engaging in payment collection practices that are likely to cause consumers to incur substantial additional fees beyond what they already owe on the terms of the existing loan.

Comments Received

The Bureau received many comments on whether the substantial injury identified was reasonably avoidable by consumers. A number of commenters opined on the legal standards the Bureau should use when assessing reasonable avoidability. One commenter argued that the proper standard for assessing whether injury is reasonably avoidable is whether the consumer has *the ability* to anticipate the impending harm and has means to avoid it. In other words, even if consumers do not actually tend to anticipate the likelihood and severity of the impending harm, it could still be viewed as reasonably avoidable as long

banking regulators identified as unfair certain practices being routinely followed by credit card issuers—the Federal Reserve Board, OTS, and NCUA noted their concern that subprime credit cards "are typically marketed to vulnerable consumers whose credit histories or other characteristics prevent them from obtaining less expensive credit products." 74 FR 5498, 5539 (Jan. 29, 2009).

[657] In the HPML Rule, the Federal Reserve Board discussed how subprime consumers "accept loans knowing they may have difficulty affording the payments because they reasonably believe a more affordable loan will not be available to them," how "taking more time to shop can be costly, especially for the borrower in a financial pinch," and how because of these factors "borrowers often make a reasoned decision to accept unfavorable terms." 73 FR 44522, 44542 (July 30, 2008).

[658] As noted in Market Concerns—Underwriting, it appears that some consumers are able to accurately predict that they will need to re-borrow one or two times, and decide to take out the loan regardless of the additional cost of this limited amount of re-borrowing. Accordingly, such costs do not count as substantial injury that is not reasonably avoidable.

as knowledge of the impending harm is conceptually attainable.

Various parties submitted comments to the Bureau arguing that borrowers can in fact accurately predict the consequences of getting a covered loan. This point is addressed more fully above in the Market Concerns—Underwriting. One commenter claimed that a study showed borrowers who have previously used title loans are more capable of anticipating how long they will be indebted, predicting six or more additional months of indebtedness as compared to consumers who had never used title loans.

Some industry commenters also claimed that borrowers must be able to anticipate the consequences of failing to repay a title loan because title loans are simple products, and the use of vehicles as collateral to secure the loan is a defining and obvious feature of these loans. Commenters made similar arguments about payday loans.

Various industry commenters claimed that consumers do have the means to avoid the injuries that are caused or likely to be caused by the identified practice. Many of these commenters argued that consumers have the means to avoid the injury simply by forgoing the first covered loan altogether. Commenters argued that such consumers could turn instead to friends and family. They also argued that consumers could instead obtain other forms of credit, such as a traditional non-recourse pawn loan. Others noted that there are further ways to avoid these injuries even after having taken out the first covered loan. Some argued that borrowers could simply budget carefully to ensure timely payment, could take advantage of legal protections that may be available in some States that allow them to lower or extend payments, or could obtain credit counseling or other assistance. Others contended that borrowers could minimize or avoid the harms they experience from these loans by engaging in strategic default, asserting that defaults on such loans do not lead to any further negative consequences for the borrower. Similarly, some commenters claimed that where consumers have consented to leveraged payment mechanisms such as post-dated checks or automatic account withdrawals, they could avoid consequent harms by simply withdrawing their consent at a later point.

One commenter asserted that the Bureau falsely assumed that any re-borrowing was a consequence of borrowers having no other credit options. This commenter regarded the data as establishing instead that borrowers do have other options and may have reasons why they would choose to re-borrow even where they can afford to repay the prior loan.

In response to the Bureau's claim that it is reasonable for many consumers in typical circumstances to fail to shop for alternative forms of credit, one commenter argued that whenever alternatives are available, a reasonable consumer would shop for them and obtain them. In other words, even if borrowers do not generally tend to shop for alternatives, any injury could still be reasonably avoidable if consumers could have exercised the ability to shop.

Other commenters argued that acts or practices can only be unfair if the lender's actions alone caused the injury not to be avoidable. In other words, if any of the reasons that consumers could not avoid the harm caused by a lender was not itself also caused by the lender, the act or practice cannot be unfair. Commenters also argued that injury is reasonably avoidable when consumers have a "'free and informed choice' not to purchase the product," citing *FTC* v. *Neovi.*[659] At least one commenter took the opposite position, arguing that consumers' financial situations can give rise to a reasonable conclusion that an injury from the identified practice is not reasonably avoidable.

Alternatively, consumer groups observed that whether consumers could have anticipated the injury is irrelevant to whether the injury is reasonably avoidable if consumers lack the means to avoid the injury even if it were to be anticipated. They argued that even if some borrowers can more accurately anticipate the length of their indebtedness, they might nonetheless fail to understand the full range of injuries that can often occur at the end of the sequence, which the Bureau noted in its proposed rule, and which are discussed at greater length above in Market Concerns—Underwriting. Where consumers do not understand that full range of potential harms, such injury is not reasonably avoidable.

The Final Rule

After reviewing the comments received and taking into account the factual analysis of how such loans work in practice as set forth above in Market Concerns—Underwriting, the Bureau concludes that the substantial injury caused by the identified practice is not reasonably avoidable by consumers.

The specific question here is whether the practice at issue causes substantial injury to consumers "which is not reasonably avoidable by consumers."[660] Starting with the established point, already discussed, that there is substantial injury to consumers from making covered short-term loans without reasonably assessing the borrower's ability to repay the loan according to its terms. In approaching the "reasonably avoidable" criterion, the Bureau is tasked by Congress to ask whether, if lenders engage in the practice of making these loans available without assessing ability to repay, the resulting injuries are reasonably avoidable by consumers acting on their own. As noted above, the Bureau interprets this criterion to mean that unless consumers have reason generally to anticipate the likelihood and severity of the injury, and the practical means to avoid it, the injury is not reasonably avoidable. As also noted earlier, the D.C. Circuit has held that the presence of a market failure or imperfection is highly relevant to the "reasonably avoidable" inquiry, as it may hinder consumers' free-market decisions and prevent the forces of supply and demand from maximizing benefits and minimizing costs.

In addressing this issue, the Bureau does not accept, and the FTC and prudential regulators have never been satisfied with, the notion that injury is avoidable just because a consumer has the right not to enter the market in the first place. No precedent supports the idea that the existence of such a right is by itself an answer to the "reasonably avoidable" issue. Indeed, a consumer generally has a right to decline to initiate the purchase of any product or service, and if the mere existence of that right were the end of the "reasonably avoidable" question, then no act or practice by a seller would ever be subject to regulation on unfairness grounds.

The Bureau specifically rejects the arguments advanced by some commenters who contended that acts or practices can only be unfair if the lender's actions alone caused the injury not to be reasonably avoidable. The practice at issue is the making of covered short-term loans without reasonably assessing the borrower's ability to repay the loan according to its terms. The making of such loans in this manner—which is an action that is entirely within the lender's control—is the act that causes injury to consumers, which, as discussed above, is not reasonably avoidable by consumers. The lender need not also be the source that has created all the reasons why that injury is not reasonably avoidable, given

[659] 604 F.3d 1150, 1158 (9th Cir. 2010).

[660] 12 U.S.C. 5531(c)(1)(A).

the ordinary circumstances of typical consumers, including their general understanding of the likelihood and severity of the risks posed. Nonetheless, as discussed in the proposal and above, as well as in the section on Market Concerns—Underwriting, the Bureau has concluded that the manner in which lenders structure these products—including the term of the loan, its balloon-payment structure, and the common use of leveraged payment mechanisms, and vehicle security—likely contributes significantly to the market failure [661] and market imperfections that the Bureau has observed.

Commenters opposing the proposed rule who addressed the ''reasonably avoidable'' criterion generally took the position that the consumers who seek these loans are nonetheless fully capable of reasonably avoiding these injuries in order to protect their own self-interest. Many of these positions were based on their intuitive descriptions or stories about what consumers understand about the risks of loans that they do not have the ability to repay, and how consumer decision-making works. Their intuition is inconsistent with the evidence on which the Bureau has based its findings that the injury is not reasonably avoidable, including survey data showing that past borrowing experience is not indicative of increased understanding of product use. Indeed, those who had borrowed the most in the past did not do a better job of predicting their future use, and as Professor Mann noted, ''heavy users of the product tend to be those that understand least what is likely to happen to them.'' [662]

Whereas various commenters cited Professor Mann's study to show that most consumers are able to make accurate predictions about their extent of re-borrowing, as noted above in Market Concerns—Underwriting, this was mostly driven by borrowers who anticipate and experience relatively short sequences and manage to repay very quickly.

The Bureau appreciates that, as commenters pointed out, Mann's study, discussed below and in the Section 1022(b)(2) Analysis, suggest that some borrowers are better able to predict their likelihood of re-borrowing. Nonetheless, the Bureau's primary concern is for those longer-term borrowers who find themselves in extended loan sequences and thereby experience the various harms that are associated with a longer cycle of re-borrowing. For *those* borrowers, the picture is quite different, and their ability to estimate accurately what will happen to them when they take out a payday loan is quite limited. As Mann noted, very few of those borrowers who experienced the longest sequences anticipated that they would end up in a period of prolonged indebtedness, and in fact ''both the likelihood of unexpectedly late payment and the proportionate size of the error increase substantially with the length of the borrower's prediction.'' [663] Nor does their accuracy appear to improve with more experience; as he noted in his paper, ''heavy users of the product tend to be those that understand least what is likely to happen to them.'' [664] The further discussion in the comments of Professor Mann's study, including his own submission, did not alter these results, for as he noted, ''the absolute size of the errors is largest for those with the longest sequences,'' and ''the borrowers who have borrowed the most are those who are in the most dire financial distress, and consequently least able to predict their future liquidity.''

And as the Bureau discusses at length in Market Concerns—Underwriting, and in the Section 1022(b)(2) Analysis, multiple different conclusions can be made based on Mann's findings. Certainly, it is possible that many borrowers accurately anticipate their debt durations, as Mann asserts in both his 2013 paper and comment to the proposed rule. However, Mann's study supports the conclusions that most of those borrowers with long duration sequences did not accurately anticipate this outcome; that a large share of borrowers who anticipated no re-borrowing remain in debt for multiple loans, with many being unable to even offer a guess as to the duration of their indebtedness, let alone a precise prediction; and that there appears to be no discernable relationship between borrowers' individual expectations, and their ultimate outcomes.

Indeed, the 2013 Mann study showed that of the borrowers who remained in debt at least 140 days (10 bi-weekly loans), a hundred percent had underestimated their times in debt, with the average borrower in this group spending 119 more days in debt than anticipated (*i.e.,* the equivalent to eight and half unanticipated rollovers.[665] Meanwhile, over 95 percent of the borrowers who spent 90 or more days in debt had underestimated their time in debt, spending an average of 92 more days in debt than anticipated (*i.e.,* the equivalent to six and a half unanticipated rollovers). And as described in the proposal, Mann (2014) found that borrowers who wound up with very long sequences of loans had rarely expected those long sequences; that only 40 percent of respondents expected to re-borrow at all even though over 70 percent would actually re-borrow; and, that borrowers did not appear to become better at predicting their own borrowing. Thus, while many individuals appear to have anticipated short durations of use with reasonable accuracy, the Bureau is persuaded that virtually none anticipated long durations with anything approaching reasonable accuracy. The harms associated with the long durations outside the scope of the consumers' anticipation capabilities are precisely the market failure that the final rule seeks to address.

The heart of the matter here is consumer perception of risk, and whether borrowers are in position to gauge the likelihood and severity of the risks they incur by taking out covered short-term loans in the absence of any reasonable assessment of their ability to repay those loans according to their terms. It appears based on the evidence that many consumers do not understand or perceive the probability that certain harms will occur, including the substantial injury that can flow from default, re-borrowing, and the negative collateral consequences of making unaffordable payments as described above in Market Concerns—Underwriting. Other features of these loans—including their term, balloon-payment structure, and the common use of leveraged payment mechanisms or vehicle security—tend to magnify the risks posed when they are obliged to repay the full amount when the loan comes due, on top of all their other existing obligations. Whether consumers can ''reasonably avoid'' the injuries that flow from the identified practice will depend, in the first instance, on whether they understand the likelihood and the severity of these risks so that they are able to make a reasoned judgment about whether to incur or to forgo such risks. As the Bureau perceives the matter, based on its experience and expertise in addressing consumer financial behavior, the observed evidence described more fully in the Section 1022(b)(2) Analysis and Market Concerns—Underwriting indicates that a large number of consumers do not understand even

[661] *See* Section 1022(b)(2) Analysis in part VII.

[662] Mann, *Assessing the Optimism,* 21 Supreme Court Econ. Rev. at 127.

[663] *Id.*

[664] *Id.*

[665] Mann, Ronald. 2013. ''Assessing the Optimism of Payday Loan Borrowers.'' Sup. Ct. Economic Rev., 21(1): 105–132.

generally the likelihood and severity of these risks.

There are a variety of explanations why consumers will take out covered short-term loans that they actually lack the ability to repay without fully appreciating the nature and magnitude of the risks involved. As the Bureau discussed in connection with the proposed rule, and as described further in Market Concerns—Underwriting and the paragraphs above, the way the product is marketed and presented to them is calculated to obscure the risks. And while many consumers may operate as fully informed rational actors, and thus be able to predict their repayment capacity, those consumers who lack the ability to repay (and thus are most likely to be harmed by the identified practice) tend to be overly optimistic, at least when they are operating under short-term financial stress. The data available from Professor Mann, for example, tends to confirm that a substantial proportion of borrowers—those in extended loan sequences, who are the most vulnerable to harm—have great difficulty in predicting their own repayment capability. And the widespread industry practice of framing covered loans as short-term obligations, even though lenders know that their business model depends on these loans becoming long-term cycles of debt for many consumers, likely exacerbates these misimpressions among borrowers.

Some of the particular behavioral obstacles to consumers' ability to fully understand the magnitude and likelihood of the risks they face, including the difficulties of assessing their likelihood of nonpayment and of appreciating the severity of injury they would face in such an event, are discussed at greater length above in Market Concerns—Underwriting and the Section 1022(b)(2) Analysis. Once again, the economic literature, including studies in the field of behavioral economics but also those modeled on rational expectations, suggests that these considerations are particularly acute for consumers who are under financial stress (such as consumers who lack the ability to repay a covered loan) and under acute time pressure. These considerations, which are well known to economists, may especially degrade the borrower's ability to reliably evaluate the risks presented in their circumstances.

Each of the multiple factors listed in the proposal and above in Market Concerns—Underwriting that may limit consumers' ability to appreciate the magnitude and severity of risks may operate differently, and to different degrees, on particular consumers. Whether borrowers do not actually have any alternatives, do not perceive any alternatives, do not have time to shop for alternatives, or cannot otherwise anticipate the probability or extent of the harm, it is demonstrably true that a substantial population of consumers to whom industry has traditionally marketed these loans, and who lack the ability to repay, will sign up for a covered loan and, in the aggregate, will suffer substantial injury as a consequence of the identified practice. Stated differently, it is a plausible inference that the substantial injury many reasonable consumers sustain, as actually observed in the marketplace for covered short-term loans, is not in fact avoided by normal consumer decision-making. In its current form, the market does not appear to be self-correcting.

Furthermore, once borrowers find themselves obligated on a loan they cannot afford to repay, the resulting injury is generally not reasonably avoidable at any point thereafter. But the Bureau acknowledges that there are limited exceptions to this rule. For example, there may be consumers who encounter a windfall after taking out the loan, but before repaying, such that none of the injuries occurs even though at the time the loan was originated the borrower would not have had an ability to repay. The most common injury is re-borrowing, which operates as a mechanism that is intended (though often unsuccessfully) to manage the potential injuries caused by the identified practice, rather than as an effective escape from injury. Most consumers, after having taken out a covered short-term loan they cannot afford to repay, are confronted with a choice of which injury to incur—default, delinquency, re-borrowing, or collateral consequences of making unaffordable payments, including forgoing essential expenses—or how to minimize the accumulated harm from more than one such injuries. Merely having a choice among an array of injuries does not give borrowers the ability to reasonably avoid any injury.

Some industry commenters argued that consumers have other options available to them, so those who re-borrow are choosing to do so. It bears note that this argument is to some extent inconsistent with those made elsewhere by the same and other industry commenters, who argue that borrowers would be left worse off if they did not have access to covered loans because they lack other plausible options. In addition, the Bureau has found that many such alternatives are not widely available to these borrowers, who may not find them to be desirable alternatives in any event. Moreover, here again the Bureau notes that once a consumer has taken out an unaffordable loan, the decision to re-borrow becomes an unsatisfactory choice among the injuries produced by such loans, as just discussed above, rather than an unfettered choice among various alternatives, as might have been the case before the first unaffordable loan was obtained.

As for the commenters who suggested consumers can avoid harm by simply defaulting on the loan, this approach would not achieve that objective because the Bureau has identified default as an injury for all the reasons discussed above in Market Concerns—Underwriting. Again, a choice between types of injury is not a mechanism for reasonably avoiding all injury. And the commenters who suggested that such consumers could avoid any further harm by withdrawing their consent to a leveraged payment mechanism they previously granted to the lender are equally wide of the mark. First, for storefront payday loans and other covered short-term loans that require the borrower to give the lender a post-dated check, it is impractical for the consumer to withdraw consent to that payment mechanism after the loan has been made. Because that mechanism is a condition precedent to making the loan, attempting to withdraw consent later would either be ineffectual or would lead directly to default. As for the leveraged payment mechanism of automated withdrawals from the borrower's account, such as are commonly granted with on-line covered loans, as discussed in Market Concerns—Payments, consumers experience many practical difficulties in successfully withdrawing their consent after-the-fact. Even for those borrowers who do manage to avoid that harm, there are other harms attributable to default, as laid out above in Market Concerns—Underwriting.

Accordingly, the Bureau concludes that the practice of making covered short-term loans without reasonably assessing the borrower's ability to repay the loan according to its terms causes substantial injury to consumers, which is not reasonably avoidable by them.

Injury Not Outweighed by Countervailing Benefits to Consumers or to Competition

The Bureau's Proposal

As noted in part IV and in the proposal, the Bureau's interpretation of the various prongs of the unfairness test is informed by the FTC Act, the FTC

Policy Statement on Unfairness, and FTC and other Federal agency rulemakings and related case law. Under those authorities, it is generally appropriate for purposes of the ''countervailing benefits'' prong of the unfairness standard to consider both the costs of imposing a remedy and any benefits that consumers enjoy as a result of the practice, but the determination does not require a precise quantitative analysis of the benefits and the costs.[666]

The Bureau stated in the proposal that it appears that the practice of making payday, single-payment vehicle title, and other covered loans without reasonably assessing that the consumer will have the ability to repay the loan according to its terms does not result in benefits to consumers or competition that outweigh the substantial injury that consumers cannot reasonably avoid. As discussed in the proposal and for the reasons stated here, the amount of injury that is caused by the unfair practice, in the aggregate, appears to be quite substantial. Although some consumers may be able to avoid the injury, as noted above, a significant number of consumers who end up in very long loan sequences can incur severe financial injuries that are not reasonably avoidable. Moreover, the proposal stated that some consumers whose short-term loans turn into short- to medium-length loan sequences incur various degrees of injury ranging from modest to severe depending on the particular consumer's circumstances (such as the specific loan terms, whether and how much the consumer expected to re-borrow, and the extent to which the consumer incurred any collateral harms from making unaffordable payments). In addition, many borrowers who default or become delinquent on the loan also may experience substantial injury that is not reasonably avoidable as a result of the identified practice.

Against this very significant amount of harm, the Bureau recognized that it must weigh several potential countervailing benefits to consumers or competition of the practice in assessing whether the practice is unfair. Accordingly, in the proposal the Bureau divided consumers into several groups of different borrowing experiences to analyze whether the practice of extending covered loans without determining that the consumer has the ability to repay the loan yielded countervailing benefits to consumers.

The first group consisted of borrowers who repay their loans without re-borrowing. The Bureau referred to these borrowers as ''repayers'' for purposes of this countervailing benefits analysis. As discussed in the proposal, 22 percent of payday loan sequences and 12 percent of single-payment vehicle title loan sequences end with the consumer repaying the initial loan without re-borrowing. The Bureau stated that many of these consumers may reasonably be determined, before getting a loan, to have the ability to repay their loan, such that the ability-to-repay requirement in the proposed rule would not have a significant impact on their eligibility for this type of credit. The Bureau stated that, at most, it would reduce somewhat the speed and convenience of applying for a loan under the current practice, though it was not clear that any such differential would be a material factor for any prospective borrowers. The Bureau stated that, under the status quo, the median borrower lives five miles from the nearest payday store. Consumers generally can obtain payday loans simply by traveling to the store and showing a pay stub and evidence of a checking account; online payday lenders may require even less of a showing in order to extend a loan. For title loans, all that is generally required is that the consumer owns their vehicle outright without any encumbrance.

The proposal stated that there could be a significant contraction in the number of payday stores if lenders were required to assess consumers' ability to repay in the manner required by the proposal, but the Bureau projected that 93 to 95 percent of borrowers would not have to travel more than five additional miles to get a loan. Lenders likely would have to require more information and documentation from the consumer. Indeed, under the proposed rule consumers would have been required in certain circumstances to provide documentation of their income for a longer period of time than their last pay stub. Under the proposal, consumers would also be required to complete a written statement with respect to their expected future income and major financial obligations.

Moreover, when a lender makes a loan without determining a consumer's ability to repay the loan according to its terms, the lender can make the loan upon obtaining a consumer's pay stub or vehicle title. The Bureau acknowledged in the proposal that lending under the proposed rule may not be so immediate, though automated underwriting systems could achieve similar levels of speed. If lenders assessed consumers' ability to repay as stated in the proposal, they would secure extrinsic data, such as a consumer report from a nationwide consumer reporting agency, which could slow the process down somewhat. Indeed, under the proposed rule lenders would be required to review the consumer's borrowing history using the lender's own records and a report from a registered information system, and lenders would also be required to review a credit report from a nationwide consumer reporting agency. Using this information, along with verified income, under the proposed rule lenders would have to project the consumer's residual income.

As discussed in the analysis contained in the proposal, the proposed rule was designed to enable lenders to obtain electronic income verification, to use a model to estimate rental expenses, and to automate the process of securing additional information and assessing the consumer's ability to repay. The Bureau anticipated that consumers who are able to demonstrate the ability to repay under the proposed rule would be able to obtain credit to a similar extent as they did in the current market. While the speed and convenience fostered by the current practice may be somewhat reduced for these consumers, the Bureau concluded in the proposal that the proposed requirements would not be overly burdensome in these respects. In particular, the Bureau estimated that the required ability-to-repay determination would take essentially no time for a fully automated electronic system and between 15 and 20 minutes for a fully manual system.

While the Bureau stated in the proposal that most repayers would be able to demonstrate their ability to repay under the proposed rule, the Bureau recognized there may be a sub-segment of repayers who could not demonstrate their ability to repay if required to do so by a lender. For them, the current lender practice of making loans without determining their ability to repay could enables them to obtain credit that, by hypothesis, they may actually be able to afford to repay. The Bureau acknowledged that this group of ''false negatives'' may benefit by being able to obtain covered loans without having to demonstrate their ability to repay in the manner prescribed by the proposed rule.

However, the Bureau judged that under the proposed rule lenders would generally be able to identify consumers who are able to repay and that the size of any residual ''false negative'' population would be small. It assessed this to be especially true to the extent that this class of consumers is

[666] FTC Policy Statement on Unfairness; *Am. Fin. Svcs. Assoc.* v. *FTC,* 767 F.2d 957, 986 (D.C. Cir. 1985) (''Petitioners would require that the Commission's predictions or conclusions be based on a rigorous, quantitative economic analysis. There is, however, no basis for imposing such a requirement.'').

disproportionately drawn from the ranks of those whose need to borrow is driven by a temporary mismatch in timing between their income and expenses rather than those who have experienced an income or expense shock or those with a chronic cash shortfall. The Bureau inferred that it is very much in the interest of these borrowers to attempt to demonstrate their ability to repay in order to receive the loan they are seeking, and that lenders will have every incentive to err on the side of finding such ability. Moreover, even if these consumers could not qualify for the loan they would have obtained absent an ability-to-repay requirement, they may still be able to get different credit within their demonstrable ability to repay, such as a smaller loan or a loan with a longer term. For these reasons, the Bureau did not conclude that any ''false negative'' population resulting from lenders making ability-to-repay assessments would represent a significant amount of countervailing benefit.

Finally, the proposal stated that some repayers may not actually be able to afford to repay the loan, but choose to repay it nonetheless, rather than re-borrow or default—which may result in their incurring ancillary costs in connection with another obligation, such as a late fee on a utility bill. Such repayers would not be able to obtain the same loan under the proposed rule that they would have obtained absent an ability-to-repay requirement, but the proposal stated that any benefit they receive under the current practice would appear to be small at most.

The second group identified in the proposal consisted of borrowers who eventually default on their loan, either on the first loan or later in a loan sequence after having re-borrowed, perhaps multiple times. The Bureau referred to these borrowers as ''defaulters'' for purposes of its analysis of countervailing benefits in the proposal. As discussed in the proposal, borrowers of 20 percent of payday and 33 percent of single-payment vehicle title loan sequences fall within this group. For these consumers, the current lender practice of making loans without regard to their ability to repay the loan according to its terms may enable them to obtain what amounts to a temporary ''reprieve'' from their current situation. They can obtain some ready cash, which may enable them to pay a current bill or current expense. However, the proposal stated that for many consumers, the reprieve can be exceedingly short-lived: 31 percent of payday loan sequences that default are single-loan sequences, and an additional 27 percent of loan sequences that default are two or three loans long (meaning that 58 percent of defaults occur in loan sequences that are one, two, or three loans long). The proposal stated that 29 percent of single-payment vehicle title loan sequences that default are single-loan sequences, and an additional 26 percent of loan sequences that default are two or three loans long (meaning that 55 percent of defaults occur in loan sequences that are one, two, or three loans long).

The proposal stated that these consumers thus are merely substituting a payday lender or vehicle title lender for a pre-existing creditor, and in doing so, they end up in a deeper hole by accruing finance charges, late fees, or other charges that are imposed at a high rate. Title loans can have an even more dire consequence for defaulters: 20 percent of them have their vehicle repossessed. The Bureau stated in the proposal that it therefore did not find that defaulters obtain significant benefits from the current lender practice of making loans to them without determining their ability to repay.[667]

The final and largest group of consumers identified in the proposal consisted of those who neither default nor repay their loans without re-borrowing. Instead, this group of consumers will re-borrow some number of times before eventually repaying the loan. In the proposal, the Bureau referred to consumers with such loan sequences as ''re-borrowers'' for purposes of its discussion of countervailing benefits. These consumers represent 58 percent of payday loan sequences and 56 percent of title loan sequences. For these consumers, as for the defaulters, the practice of making loans without regard to their ability to repay the loan according to its terms enables them to obtain a temporary reprieve from their current situation. But for this group, the proposal stated that such a reprieve can come at a greater cost and pose a higher likelihood of risk than they would have initially expected, and for many consumers it will come at a substantially greater cost and a much higher likelihood of risk.

The proposal stated that some re-borrowers are able to end their borrowing after a relatively small number of additional loans; for example, approximately 22 percent of payday loan sequences and 23 percent of title loan sequences are repaid after the consumer re-borrows once or twice. But even among this group, many consumers do not anticipate before taking out a loan that they will need to re-borrow at all. These consumers cannot reasonably avoid their injuries, and while their injuries may be less severe than the injuries suffered by consumers with extremely long loan sequences, their injuries can nonetheless be substantial, particularly in light of their already precarious finances. Conversely, some of these consumers may expect to re-borrow and may accurately predict how many times they will have to re-borrow. For consumers who accurately predict their re-borrowing, the Bureau did not count their re-borrowing costs on the ''injury'' side of the countervailing benefits scale.

The proposal stated that while some re-borrowers end their borrowing after a relatively small number of additional loans, a large majority of re-borrowers end up in significantly longer loan sequences. Of storefront payday loan sequences, for instance, one-third contain seven or more loans, meaning that consumers pay finance charges equal to or greater than 100 percent of the amount borrowed. About a quarter of loan sequences consist of 10 or more loans in succession and even larger aggregate finance charges. For single-payment vehicle title borrowers, the consequences described in the proposal were similarly dramatic: Only 23 percent of loan sequences taken out by re-borrowers on title loans are repaid after two or three successive loans, whereas 23 percent of the loan sequences are for 10 or more loans in succession. The Bureau did not find that any significant number of consumers anticipated such lengthy loan sequences, and such empirical research as is available indicates that borrowers who end up in extended loan sequences are the least accurate in predicting the duration of their borrowing.

Thus, the Bureau stated its view in the proposal that the substantial injury suffered by the defaulters and those re-borrowers who incurred unanticipated injury—the categories that represent the vast majority of overall borrowers of covered loans—dwarfs any benefits these consumers may receive in terms of a temporary reprieve and also dwarfs the speed and convenience benefits that the repayers may experience. The Bureau acknowledged that any benefits derived by any aforementioned ''false negatives'' may be reduced under the proposed rule, but it judged that the

[667] The Bureau recognizes that some defaulters may not default because they lack the ability to repay, but the Bureau estimates that the percentage of consumers who default despite having the ability to repay the loan is small. Moreover, any benefit such borrowers derive from the loan would not be diminished by the provisions of § 1041.4 precisely because these borrowers *do* have the ability to repay and thus would qualify for such loans.

limited benefits that may be received by this relatively small group are far outweighed by the substantial injuries sustained by the defaulters and re-borrowers, as discussed above. Further, the Bureau stated that under the proposed rule, many borrowers could be led to find more sustainable loan options, such as underwritten credit on terms that are more affordable and better tailored to their budget needs.

Turning to the benefits of the practice for competition, the Bureau acknowledged in the proposal that the current practice of lending without regard to consumers' ability to repay has enabled the payday industry to build a distinctive business model. Under this model, fully half or more of the revenue on these kinds of loans comes from consumers who borrow 10 or more times in succession. This, in turn, has enabled a substantial number of firms to extend such loans from a substantial number of storefront locations. The Bureau estimated that the top 10 storefront payday lenders controlled only about half of the market, and that 3,300 storefront payday lenders were small entities as defined by the SBA. The Bureau also acknowledged that the anticipated effect of limiting lenders to making loans that consumers can actually afford to repay would be to shrink the number of loans per consumer fairly substantially, which may, in turn, result in a more highly concentrated market in some geographic areas. Moreover, the Bureau acknowledged that the practices underlying their current business model enabled lenders to avoid many of the procedural costs that the proposed rule would impose.

However, the Bureau did not believe the proposed rule would materially reduce the competitiveness of the payday or title loan markets as a practical matter. As discussed in the proposal, most States in which such lending takes place have established a maximum price for these loans. Although in any given State there are a large number of lenders making these loans, located typically in close proximity to one another, the Bureau preliminarily found from existing research that there is generally no meaningful price competition among these firms. Rather, the Bureau stated that lenders generally charge the maximum possible price allowed in any given State. Lenders that operate in multiple States typically vary their prices from State to State to take full advantage of the parameters that are allowed by local law. Thus, for example, lenders operating in Florida are permitted to charge $10 per $100 loaned, and they do; when those same lenders are lending in South Carolina, they are permitted to charge $15 per $100, and they do that instead. In addition, despite some amount of consolidation that could be expected in the industry, the Bureau preliminarily found that under the proposed rule, based on experience of recent legislative reforms in various States, lenders would likely remain in relatively close proximity to the vast majority of borrowers.

In sum, the Bureau stated in the proposal that the benefits of the identified unfair practice for consumers and competition—failing to underwrite covered loans by making a reasonable assessment of the borrower's ability to repay the loan according to its terms—do not appear to outweigh the substantial injury that is caused or likely to be caused by the practice, and which is not reasonably avoidable by consumers. On the contrary, the Bureau preliminarily determined that the very significant injury caused by the practice outweighs the relatively modest benefits of the practice for consumers or for competition.

Comments Received

The Bureau received a number of comments on its proposed analysis of whether the substantial injury was outweighed by countervailing benefits to consumers or competition. Several industry participants and trade association commenters contended that this test was simply not met, arguing that the negative effects of the proposed rule would exceed its benefits. They argued that all consumers would be deprived of loans precluded by the rule, not just the ''false negatives'' or those who may be harmed by them.

Some commenters stated their point in a more general way, complaining that the Bureau had failed to present any objective metric or provide hard quantitative evidence to determine the costs and benefits of the identified practice to consumers or to competition in a more rigorous manner. Aside from attacking the general framework of the Bureau's analysis, commenters also maintained that the Bureau underestimated the costs that the rule would impose on lenders, greatly impeding the industry's ability to make appropriate covered loans. Some argued that the Bureau should have considered the costs of complying with the rule aggregated with the costs associated with complying with State law requirements.

Commenters listed a variety of potential benefits to consumers associated with covered short-term loans, and suggested that the Bureau both understated the benefits and overstated the extent of injury for re-borrowers. The list included that such loans help consumers cope with income shocks, achieve income smoothing, realize an overall improvement in their ability to manage accumulated debt, avoid bounced checks and problems with debt collection firms, reduce delinquency or defaults on other accounts, reduce unemployment, and reduce bankruptcies. Others emphasized that covered short-term loans can allow consumers to avoid riskier and more costly forms of credit, and thus these loans are simply the best and least expensive choice available for cash-strapped consumers with limited credit options. These commenters maintained that such loans allow consumers to avoid the inferior substitutes of even more costly alternatives, such as pawnbrokers, bank overdraft services, credit card cash advances, over-limit credit-card fees, and late-payment fees. As for vehicle title loans, commenters noted that they have the advantage of allowing consumers to tap into an asset to meet current needs and are structured to limit the potential harms to consumers because they are largely non-recourse loans; yet the restrictions posed by mandatory ability-to-repay underwriting would constrict the market for such loans and correspondingly impair the benefits to consumers.

Some commenters asserted that studies show that consumer access to payday loans has no negative effect on various measures of consumer financial health. They suggested that credit scores were better for longer-term borrowers as compared to borrowers who engaged in less re-borrowing and for borrowers in States with fewer payday loan restrictions as compared to States with greater restrictions, and that some studies conclude that payday lending bans lead to more bounced checks and overdraft fees as well as increased bankruptcy filings. They therefore surmised that covered loans improve the financial well-being of consumers. Several commenters cited as evidence of customer satisfaction the small proportion of complaints submitted to the Bureau about the product, the many positive accounts of covered loan usage in the ''Tell Your Story'' portion of the Bureau's Web site, and substantial product use without substantial levels of complaints to State regulators.

Similarly, as stated above in the substantial injury section, a number of commenters believed the identified practice was net beneficial. Many of these commenters argued that borrowers

were merely replacing other obligations with a covered short-term loan, and thus the harm of the one was offset by the benefit of being able to pay the other. Some commenters argued that borrowers were not harmed, or were only minimally affected, by defaulting on these loans because those defaults generally do not affect consumers' credit reports and some lenders do not pursue collection efforts on defaulted loans. The Bureau received a large volume of comments from consumers who attested to the benefits of payday lending from their own personal experiences, though it also received many other comments from individual borrowers and consumer groups complaining about the injuries identified in the proposed rule.

One respected academic in the field commented that while economists have generally concluded that payday loans may destroy consumer welfare in some situations and may improve consumer welfare in others, there is disagreement over how many consumers fall in each category. This commenter asserted that the Bureau would only have to resolve this debate about consumer welfare if it were choosing whether to ban payday lending entirely.

Many industry commenters, and other commenters including a group of State Attorneys General, argued that by eliminating or limiting access to covered loans, the proposed rule would make consumers worse off because they would be forced to seek more expensive or otherwise more harmful alternatives, and that the Bureau had failed to factor the benefit of being able to avoid these harmful alternatives into its preliminary analysis of unfairness (*i.e.,* countervailing benefits). A number of commenters including a trade group and a university-affiliated research center, among others, argued that consumer demand for credit will continue while the rule will only restrict supply. These comments were made about all of the proposed restrictions on making all three types of covered loans: Covered short-term loans, covered longer-term balloon-payment loans, and other covered longer-term loans (*i.e.,* certain high-cost installment loans). And many comments in this vein focused on particular proposed restrictions, with particular emphasis on the 30-day cooling-off periods after a sequence of three loans made under § 1041.5 or § 1041.6, and the limitation on the total number of conditionally exempt covered short-term loans under proposed § 1041.6 to six loans or 90 days of indebtedness in a 12-month period. These commenters asserted that these restrictions would force consumers to substitute alternative forms of credit that are more costly and harmful than covered loans, claiming this to be true of loans ranging from pawn loans, to overdraft, to loans from unlicensed and unregulated online lenders, and even to loans from neighborhood loan sharks. Numerous consumers writing as part of organized letter-writing campaigns raised similar issues, expressing concern about the possibility of not having unlimited access to covered loans and the lack of alternative options. Some commenters referenced or submitted research studies, law review articles, or other analyses of these issues, some of which are described in detail below in the responses to the comments.

Some commenters raised one countervailing benefit to the Bureau's attention that was not included in the proposed rule—that borrowers do not have to undergo a credit check when taking out a covered loan that is originated without underwriting. Others noted that the current practices of many lenders, which do not engage in ability-to-repay underwriting of covered loans, avoids the additional privacy and security risks of maintaining more documentation on borrowers.

In addition to the points they made about countervailing benefits for consumers, industry commenters also objected to the Bureau's analysis of the countervailing benefits to competition. The Bureau received some comments arguing that the Bureau's statement that there is ''generally no meaningful price competition'' was inaccurate. Lenders provided assessments of their own market experience that purported to rebut that claim and indicated that covered loans create additional competition for other types of credit. They also argued that the Bureau had not appropriately included in the countervailing benefits the efficiencies of not having to assess the borrower's ability to repay, which reduce procedural costs to the entity and thus the prices offered to consumers. Commenters further asserted that the Bureau had failed sufficiently to take account of how the identified practice fosters non-price competition among lenders. They also noted that the proposal impedes consumer free choice and that it fails to consider the negative effects it may have on rural consumers. Some commenters emphasized that the proposed rule would lead to market concentration, eliminating thousands of jobs while denying access to a form of credit that millions of consumers currently rely on. Others suggested that lack of clarity over the application of the proposed rule to banks and credit unions could lead them to stop making small-dollar loans to their customers.

A coalition of consumer groups commented that the market for short-term small-dollar credit is much broader than the payday and single-payment vehicle title loans covered by this rule. In their analysis, the broader market comprises substitute products they viewed as more advantageous than covered short-term loans, including credit cards, subprime credit cards, certain bank and credit union products, non-recourse pawn loans, employer funds, charitable funds, and payment plans that are often made available by utilities and others. They also suggested that other non-credit strategies, such as debt counseling and credit counseling, should be viewed as preferable alternatives to taking out payday and title loans. They went even further by arguing that payday loans should not even be considered as ''credit'' to be accessed, as in their view most of these loans generate their own demand through repeated rollovers, rather than meeting the independent credit needs of consumers.

The Final Rule

After having reviewed and analyzed the comments submitted in response to the proposed rule, the Bureau concludes that though the identified practice of making covered loans without reasonably assessing the borrower's ability to repay the loan according to its terms presents some countervailing benefits to consumers and competition, those benefits do not outweigh the substantial injury that consumers are unable reasonably to avoid and that stems from the identified practice.

Methodology

Again, the Bureau approaches this determination by first weighing substantial injury in the aggregate, then weighing countervailing benefits in the aggregate, and then assessing which of the two predominates. If the benefits predominate, then the practice is not unfair. If the benefits do not predominate, then the practice is unfair. As described above, the substantial injury is incurred through default, delinquency, re-borrowing, and the collateral consequences of making unaffordable payments, including harms from forgoing major financial obligations or basic living expenses in an attempt to avoid these other injuries.

It is important to start by recognizing that the Bureau is not assessing the benefits and injury of covered short-term loans. As one academic commenter noted, this would only be necessary if the Bureau were seeking to ban all

payday lending in its entirety. Rather, the Bureau is weighing the benefits and injury of the identified practice, which is making such loans without reasonably assessing that borrowers have an ability to repay the loan according to its terms. In other words, the countervailing benefits to consumers consist of the benefits that consumers receive as a result of lenders making these loans without assessing ability to repay (*i.e.,* not having to comply with any of the underwriting criteria of this rule). In weighing the countervailing benefits, the Bureau considers the various costs that a remedy would entail. Costs not incurred to remedy the practice, like costs of complying with independent State law requirements, are not included in the analysis.

As the Bureau noted in the proposal, unfairness determinations do not require an exact quantification of costs and benefits. To do so would be impracticable, despite the suggestion made by some commenters that a specific metric or objective quantification was needed to meet the requirements of the statute—a suggestion that was made without any specificity as to methodology and in reliance on no existing precedent. And, in fact, the Bureau has quantified such data as are available about the frequency and extent of re-borrowing, the frequency of default, the frequency of payment failures, the severity of the resulting harms, and various other relevant items, even if some factors (such as the frequency and extent of default avoidance, for example) are not subject to being quantified as a practical matter.

At the proposal stage, the Bureau believed that the injury caused by the practice outweighed the benefits to consumers or competition, the latter of which includes the costs associated with complying with the remedy to the extent they would be passed on to consumers (and thus the absence of which is a benefit to consumers). The Bureau has had the chance to process and digest over a million comments that were submitted on the proposed rule and now concludes that this assessment was correct. However, in light of the considerable volume of input received from the public, the Bureau has decided to modify certain parameters of the proposed rule so as to simplify its scope, reduce the potential impact on access to credit, streamline the underwriting process, and add more flexibility within the existing framework. The effect of these adjustments is to reduce the costs associated with complying with the rule and reduce the impact it will have on access to credit, thereby reducing the weight on the countervailing benefits side of the scale.

This is so because in assessing the identified practice, the Bureau weighs the injury against the countervailing benefits, and according to the FTC Statement on Unfairness, the costs associated with implementing the remedy (*i.e.,* assessing ability to repay) are included in the benefits that lenders could avoid if they did not have to comply with the underwriting criteria of the final rule. The Bureau's efforts to ensure that its remedy does not overly restrict access to credit, including adjustments made in § 1041.5 of the final rule that simplify and streamline some of the underwriting criteria that had been contained in the proposal, decrease the costs of the remedy, which in turn reduces the weight that is attributed to the countervailing benefits side of the scale. And the allowance of loans that can be made pursuant to § 1041.6 of the final rule without having to meet those specific underwriting criteria further reduces the weight on this side of the scale. In other words, the Bureau has reacted to commenters who feared the proposed rule was too complex and overly burdensome by reducing complexity and burden. These adjustments affect the balance between consumer injury and countervailing benefits, which results in the injury from the identified practice outweighing the countervailing benefits to consumers by even more than it did at the proposal stage.

With these changes, which are described more specifically in the relevant explanation of § 1041.5 of the final rule, the Bureau is reinforced in its conclusion that the substantial injury is not outweighed by countervailing benefits to consumers or to competition.

Assessing Benefits to Consumers

To evaluate this assessment in light of the points made by the commenters, it is useful again to divide consumers into several groups of different borrowing experiences, in order to analyze whether and how the practice of making covered short-term loans without reasonably assessing whether the consumer has the ability to repay the loan according to its terms yields countervailing benefits to consumers. Those groups, once again, can be characterized as ''repayers,'' ''defaulters,'' and ''re-borrowers'' for purposes of this analysis.

To begin with ''repayers,'' several commenters stated that the proposed rule would have such a substantial financial impact on lenders that even borrowers who have an ability to repay would not have access to covered loans as a result of the rule. The Bureau acknowledges that some borrowers who might end up repaying their loans because of windfalls or other unexpected developments would be unable to obtain a loan if they cannot meet the ability-to-repay criteria, though it does not anticipate there are large numbers of such consumers. Yet the Bureau stands by its analysis in the proposed rule on how the market will likely consolidate and thus survive as a result of the proposed rule, and thus that lenders will continue to make loans to borrowers who have the ability to repay. Any other conclusion would require the industry to concede that it cannot execute on a successful business model for making these loans unless it can be assured of a relatively large number of borrowers who find themselves caught up in extended loan sequences. The Bureau addresses more specific comments about its analysis of this point in part VII, which considers the benefits, costs, and impacts of the final rule on consumers and covered persons pursuant to section 1022(b)(2)(A) of the Dodd-Frank Act.[668]

As to whether the rule will drive up prices for borrowers with the ability to repay, the Bureau does not believe it will do so. The Bureau noted in the proposal, and above in Market Concerns—Underwriting, that many covered loans are already offered at the maximum price allowed under State law. Instead of increasing prices, which they typically cannot do, lenders will likely address additional compliance costs and reduced volume by consolidating to some degree, as the Bureau anticipated.

The Bureau also has no reason to believe that lenders will be overly conservative and restrictive by lending to an even smaller group of people than the rule would allow. Without evidence to the contrary, the Bureau expects that the industry will act rationally and make those loans that are allowed by the rule. It may be that some lenders will choose to take a conservative approach and decline to lend to borrowers who would be eligible under the rule due to concerns about compliance risk; if so, that would be an unfounded and imprecise reaction to the rule, yet it is a possible outcome in some instances. Even so, the effect on the countervailing benefits determination should be marginal at best. Nonetheless, as set out in the relevant explanation of § 1041.5 of the final rule, the Bureau has made certain adjustments to streamline and simplify the final rule's underwriting criteria with the intent of reducing the

[668] 12 U.S.C. 5512(b)(2)(A).

number of industry participants that would restrict access to credit based on overly conservative assessments of compliance risk.

Thus, the Bureau continues to be persuaded that lenders will be able to make covered short-term loans to the population of consumers who have the ability to repay them, and that the ''false negative'' category of borrowers will be low, especially in light of the adjustments that are made in the final rule to respond to these comments to streamline the underwriting criteria in certain respects. Further, the Bureau notes that the proposed rule, and now the final rule, allows lenders to make some covered loans under the terms set forth in § 1041.6, without all the specific underwriting criteria that would otherwise apply under § 1041.5 because other conditions are imposed that effectively prevent extended loan sequences. Based on the lack of persuasive evidence demonstrating otherwise—and in light of the further changes to the rule that simplify, reduce burden, add flexibility, and ensure broader access to credit—the Bureau concludes that the lending industry should be able to adjust to the rule, and consumers who can afford to repay covered short-term loans according to their terms will generally continue to have access to them. The Bureau thus concludes that restrictions on access to credit for borrowers who have the ability to repay will be minimal.

The Bureau also finds that it did not underestimate other benefits to these consumers, such as the speed and convenience associated with lenders not having to underwrite loans by making ability-to-repay determinations. The Bureau continues to maintain the view that the underwriting process for these loans can be largely automated. But as a matter of caution and in response to the comments received, the Bureau decided to make adjustments to further streamline some of the underwriting criteria contained in the proposed rule. For example, as discussed above and in contrast to the proposal, the Bureau has removed some of the complexity around the residual income test, changed the documentation requirements in a variety of ways (including by allowing lenders to rely on consumer statements to authenticate rental expenses), and allowed lenders to take account of income from someone other than the borrower if the borrower has a reasonable expectation of access to that income. Lenders also will be able to assess ability to repay, in the alternative, by using a debt-to-income ratio. And rental expenses can now be based solely on a borrower's statement without the need to validate such statements through survey or other data. In fact, under the final rule, most borrowers who have the ability to repay typically should be able to get a covered loan without having to present any more documentation of income than a pay stub or a paycheck,[669] which commenters indicated is the kind of income documentation that is already required by many lenders.

The second group of consumers consists of borrowers who eventually default on their loans, either on the first loan or later in a loan sequence after having re-borrowed, perhaps multiple times. As for these ''defaulters'' who lack the ability to repay the loan according to its terms, the Bureau did not underestimate the countervailing benefits to them. It is apparent, as a number of commenters attested, that these borrowers typically would not be able to obtain loans under the terms of the final rule. Put another way, the current practice of failing to make a reasonable assessment of whether a borrower can repay a covered loan results in this population of borrowers obtaining loans they do not have the ability to repay, which leads either immediately or eventually to default. As industry commenters noted, losing access to non-underwritten credit may have consequences for some consumers, including the inability to pay for other needs or obligations or the need to seek out alternative credit options or budgeting strategies. The Bureau considered the impact of the identified practice on access to credit in the proposal, which inherently included the natural consequences of losing access to such non-underwritten credit. The Bureau continues to regard the current access to credit that would be foreclosed under the ability-to-repay requirement as not an insignificant countervailing benefit.

While the vast majority of borrowers who would eventually become defaulters will not be able to obtain covered short-term loans, this forgone benefit must be weighed against the forgone injury. Again, the figures presented in the proposal are instructive in terms of the comparison at issue here. As discussed in the proposal, borrowers of 20 percent of payday and 33 percent of single-payment vehicle title loan sequences fall within this group of ''defaulters.'' For these consumers, their current access to non-underwritten credit may enable them to obtain a temporary ''reprieve'' from their current situation by obtaining the cash to pay a current bill or expense. But for many consumers, this reprieve is exceedingly brief: 31 percent of payday loan sequences that default are single-loan sequences, and an additional 27 percent of loan sequences that default are two or three loans long (meaning that 58 percent of defaults occur in loan sequences that are one, two, or three loans long). The proposal also stated that 29 percent of single-payment vehicle title loan sequences that default are single-loan sequences, and an additional 26 percent of loan sequences that default are two or three loans long (meaning that 55 percent of defaults occur in loan sequences that are one, two, or three loans long). Thus these consumers are merely substituting a payday lender or title lender for a pre-existing creditor, and they quickly find themselves in a new and potentially deeper hole by accruing finance charges, late fees, or other charges that are imposed at a high rate as well as the adverse consequences of ultimate default. Title loans can have an even more dire consequence for defaulters: 20 percent of them have their vehicle repossessed, with further adverse consequences, which may be take a severe toll on the consumer's economic situation if it affects their ability to get to work or carry on a variety of everyday household affairs. The Bureau thus finds that most defaulters do not obtain any significant benefits from the current lender practice of making loans to them without reasonably assessing their ability to repay the loan according to its terms.

There is another important point here about the calculus of benefits and injury with respect to ''defaulters'' that was not discussed in the proposal, yet which underscores the fact that their current access to non-underwritten credit does not benefit them and in fact leads to considerable harm. That is the adverse economic effect of the unsuccessful struggle to repay the unaffordable loan on the remaining population of ''defaulters'' that were omitted from the above discussion. Note that 58 percent of defaults on payday loans, and 55 percent of defaults on title loans, occur in loan sequences that are one, two, or three loans long. What this leaves aside is that fully 42 percent of default on payday loans, and 45 percent of defaults on title loans, occur after the borrower has already had an extended loan

[669] This should be true for borrowers unless they wish to rely on matters other than income to demonstrate the ability to repay a covered loan, such as income from another person that is reasonably available for use by the borrower. More specific description of the adjustments made in the final rule to the underwriting requirements contained in the proposed rule can be found in the explanation of § 1041.5 below.

sequence of four or more loans, *and then defaults.* In many instances, this scenario is strong evidence of consumer mistake, since a consumer who anticipates defaulting should not also incur the high and accumulating costs of re-borrowing (which, for a sequence of at least four loans, amounts to more than half of the principal of the original loan, with the total mounting as the sequence extends even further). It is thus quite implausible that these borrowers, who constitute a substantial segment of all ''defaulters,'' obtain any significant benefits from the current lender practice of making loans to them without reasonably assessing their ability to repay the loan according to its terms. Indeed, quite the contrary is very likely to be the case for the vast majority of these borrowers, and the harm they suffer in these circumstances will generally amount to a very substantial injury.

This account provides a strong refutation of the claim by certain commenters that borrowers who default on covered short-term loans do not sustain any substantial injury in light of the corresponding benefits, or that they experience a net benefit because they are able to keep the proceeds of the defaulted loan and perhaps avoid defaulting on some other obligation with more severe consequences. Although that might conceivably be true in some instances, it is implausible in any functioning market that it is likely to be true very often, and that is particularly the case in the context of title loans, where the damaging consequences of vehicle repossession multiply the potential harm even further. So even if there is a small number of such borrowers, it is unlikely to have any material impact on the analysis here. As for the commenters who asserted that default does not affect consumers' credit reports and sometimes does not lead to debt collection efforts, these are marginal matters when compared to the core harms associated with unaffordable loans that end in default. But in any event, the Bureau's experience from engaging in supervisory oversight and investigations of these types of lenders have led to numerous enforcement actions demonstrating that many such lenders do seek to collect debts that are due on defaulted loans, which have led to findings of illegal conduct in aggressively seeking to pursue collection of such loans.[670] And nothing prevents third party debt collectors or debt buyers from reporting negative information to consumer reporting agencies, which some collectors do to facilitate collection.

The third category of consumers is the ''re-borrowers'' who find themselves in extended loan sequences but eventually manage to find some way to repay the loan, even if only nominally. They are a majority of all borrowers—representing 58 percent of payday loan sequences and 56 percent of title loan sequences. For these consumers, as with the ''defaulters,'' the identified practice of making loans without reasonably assessing their ability to repay can allow them to obtain a temporary reprieve from the difficulties of their current financial situation. Some commenters suggested that many of them may benefit by literally buying time and to pay off some of their cumulative obligations later rather than sooner and that some financial indicia such as credit scores and bankruptcy filings appear to be more positive for these re-borrowers.

It is undoubtedly true that some borrowers who lack the ability to repay may gain an overall benefit from having access to covered short-term loans. Again, these could be borrowers who incur some sort of windfall or positive change in circumstances, or accurately anticipate the extent of their re-borrowing, and may be engaged in either income smoothing or spreading an unexpected cost across a longer time span. In some cases, these borrowers may be substituting a payday lender for some other creditor, such as a landlord or a utility company. It is however, the Bureau's judgment that the injury to other ''re-borrowers'' who do not accurately anticipate the length of re-borrowing, and many who find themselves unexpectedly trapped in extended loan sequences, is so substantial as to outweigh the benefits to these other consumers. This point is bolstered by comments received from individual borrowers, consumer groups, and faith groups who related many similar stories about the financial harms sustained by borrowers who found themselves caught up in extended loan sequences—whether or not those sequences ultimately ended in default, as some but not all do.

In this regard, it is notable that any such reprieve can pose a higher likelihood of risk and come at a greater cost than many borrowers may have initially expected, and a substantial population of ''re-borrowers'' can be expected to find that it will come at a much higher likelihood of risk and a substantially greater cost. It is worth restating why this is so. Once again, the dynamic of covered short-term loans is such that once the first loan has been made to a borrower who lacks the ability to repay it, the range of choices open to the borrower is sharply constrained. At the point of taking out the initial loan, the borrower can make a direct choice among competing alternatives as a means of meeting their immediate financial needs, and it is plausible that for some borrowers the decision to take out a covered short-term loan may seem or be superior to other available means of coping with the difficulties of their situation. But after the first loan has been made, the circumstances change significantly. When this first loan comes due, and for any and all subsequent loans, the borrower is no longer at liberty to make an unencumbered choice among competing alternatives. Instead, the borrower now must confront the range of risks and harms that are by now familiar, as they have been set out at length and discussed so often in the proposal and above—default, delinquency, re-borrowing, and the negative collateral consequences of making unaffordable payments, including harms from forgoing major financial obligations or basic living expenses in an attempt to avoid these other injuries.

This is the changed situation that borrowers confront as they find themselves facing the constrained choices that lead many of them into extended loan sequences, often unexpectedly, and cause them to bear the high costs of repeatedly rolling over their loans (which, by the time an extended loan sequence reaches seven loans, as one-third of storefront payday loan sequences actually do, means the borrower will have paid charges equal to 100 percent of the original amount borrowed and still owe the full amount of the principal). So while it is certainly likely that some borrowers may choose to take out these loans intentionally to spread a large, unexpected expense across a longer time span, it is equally apparent that many others find themselves in significant trouble if they have taken out such an unaffordable loan as an initial matter, even though they do find a way to manage to pay it back eventually after experiencing the types of harm that accompany the

[670] *See, e.g., In the Matter of Money Tree, Inc.,* File No. 2016–CFPB–0028; *In the Matter of EZCORP, Inc.,* File No. 2015–CFPB–0031; *CFPB* v. *NDG Financial Corp.,* Case No. 1:15–cv–05211–CM (S.D.N.Y.); *In the Matter of ACE Cash Express, Inc.,* File No. 2014–CFPB–0008; *In the Matter of Westlake Servs., LLC,* File No. 2015–CFPB–0026. The Bureau has also taken actions against debt collectors, some of which collect in part on small-dollar loans. *See, e.g., CFPB* v. *MacKinnon, et al.,* Case No. 1:16–cv–00880 (W.D.N.Y.).

experience of an extended loan sequence. For those borrowers who accurately predict the length of their re-borrowing, the Bureau does not count these costs on the ''injury'' side of the ledger as against countervailing benefits.

In evaluating whether most consumers would or would not be likely to make this choice intentionally and based on accurate predictions, it is relevant here that the evidence suggests that consumers seem to be best able to gauge the expected duration of re-borrowing when the loan sequences are shorter, and such empirical research as is available indicates that borrowers who end up in extended loan sequences are the least accurate in predicting their duration of re-borrowing. Again, about one-quarter of storefront payday loan sequences consist of 10 or more loans taken out in succession, and 23 percent of title loan sequences consist of 10 or more loans in succession. The Bureau does not find evidence that any significant number of consumers anticipated such lengthy loan sequences.

Another set of considerations that is germane to the circumstances of ''re-borrowers'' is the effect of lender practices in the market for covered short-term loans. Although these loans are presented and marketed as stand-alone short-term products, lenders are aware (though many consumers likely are not) that only a relatively small number of borrowers repay such loans without any re-borrowing, and their core business model relies on that fact. Moreover, the decision that many lenders have made to offer these loans without reasonably assessing the borrower's ability to repay the loan according to its terms is the identified practice that causes injury to consumers, which, as discussed above, is not reasonably avoidable by consumers who are often likely to fail to fully understand the likelihood and severity of the risks posed. The Bureau also has concluded that the manner in which lenders structure these products—including the term of the loan, its balloon-payment structure, and the common requirement that the borrower provide a cancelled check or ACH access or provide vehicle security—likely contributes significantly to the result that many borrowers have no good alternatives to ending up in extended loan sequences of repeated re-borrowing that often extend well beyond their initial expectations.

It is also worth emphasizing that even these ''re-borrowers'' who would not have access to most covered short-term loans under § 1041.5 of the final rule, because they lack the ability to repay the loan according to its terms, would have access to loans made subject to the protections found in § 1041.6, with a corresponding reduction in the weight that falls on the countervailing benefits side of the scale. In the end, after aggregating the injury and benefits of these three populations of borrowers, the Bureau believes that the aggregate injury clearly outweighs the aggregate benefits. Substantial groups of consumers suffer acute harm as a result of the various scenarios analyzed above. These outcomes are bolstered by commenters who provided examples of consumers who ended up in extremely long loan sequences and ultimately were required to pay many multiples of the original principal of the loan. Based on the Bureau's research, 62 percent of these loans were in loan sequences of seven or more, and 15 percent of loan sequences involved 10 or more loans.[671] The scope of that injury is quite substantial across the entire market for these loans. The Bureau concludes that this aggregate injury to many ''re-borrowers'' outweighs the countervailing access-to-credit benefits that other ''re-borrowers'' may receive as a result of lenders not reasonably assessing the borrower's ability to repay the loan according to its terms, in light of all the provisions of the final rule, including the effect that § 1041.6 will have in reducing the magnitude of those benefits.

As for the commenters who cited studies purporting to show that payday loans improved financial outcomes, the Bureau notes that all of the studies varied in their empirical rigor and the connection of their causal inferences to their documented findings. Based on its experience and expertise, the Bureau finds some studies to be more compelling than others. For example, several of these studies predicated their conclusions on comparisons of financial outcomes for consumers with and without access to payday loans, relying on access to payday loans based on geographic location as a proxy for actual use.[672] Others that reached conclusions about better or similar financial outcomes for these groups relied on changes in credit scores, a narrow measure of financial well-being for the population of payday loan borrowers, whose credit scores are already strongly skewed toward the bottom of the customary ranges.[673] The Bureau discussed many of these studies in the proposal; additional studies are mentioned here in light of comments received and are also discussed in further depth in the Section 1022(b)(2) Analysis in part VII below.

Findings based on the access proxy, which are possible largely due to State-level variation in payday lending laws, do not demonstrate better financial outcomes for actual payday loan borrowers. While certainly instructive, the Bureau finds these studies are generally less compelling than those based on individual-level data that can identify actual payday borrowers and their use. Further, this research has focused almost exclusively on the question of what happens when all access to a given form of credit is eliminated, as opposed to when it is merely restricted (or, as in this rule, restricted only as to borrowers who cannot demonstrate an ability to repay). The evidence available from States that have imposed strong restrictions on lending, but not outright or *de facto* bans, suggests that, even after large contractions in this industry, loans remain widely available, and access to physical locations is not unduly limited.[674]

One such study cited by commenters attempted to determine how households in North Carolina and Georgia fared following State actions to restrict payday lending. They reported an increase in the rate of bounced checks, Chapter 7 bankruptcy filings, and complaints against debt collectors and creditors.[675] In an update to that paper, the authors expanded the time frame, analyzed more State-level payday bans, and considered the effects of enabling payday lending as well.[676] They again found evidence that in response to limits on payday borrowing, bounced checks increased, as did complaints about debt collectors to the FTC, whereas Chapter 13 bankruptcy filings

[671] And again, the research shows those in longer sequences are less likely to anticipate the extent of re-borrowing.

[672] Adair Morse, *Payday Lenders: Heroes or Villains?,* 102 J. of Fin. Econ. 28 (2011); Jonathan Zinman, *Restricting Consumer Credit Access: Household Survey Evidence on Effects Around the Oregon Rate Cap,* at 5 (2008); Kelly D. Edmiston, *Could Restrictions on Payday Lending Hurt Consumers?,* Fed. Reserve Bank of K.C., Econ. Rev. 31, 37–38 (1st Qtr. 2011).

[673] Ronald Mann, *Do Defaults on Payday Loans Matter?,* (working paper Dec. 2014); Neil Bhutta, *Payday Loans and Consumer Financial Health* (April 27, 2014), Journal of Banking and Finance, Vol. 47, No. 1; Jennifer Priestley, *Payday Loan Rollovers and Consumer Welfare* (Dec. 4, 2014).

[674] *See* Section 1022(b)(2) Analysis, part VII below.

[675] Donald P. Morgan & Michael R. Strain, *Payday Holiday: How Households Fare after Payday Credit Bans,* FRB of New York Staff Reports, No. 309, (Revised Feb. 2008).

[676] Donald P. Morgan, Michael R. Strain & Ihab Selani, *How Payday Credit Access Affects Overdrafts and Other Outcomes,* Journal of Money, Credit, and Banking, 44(2–3): 519–531 (2012).

decreased. Numerous industry comments cited these studies, along with a related study that is no longer available.[677] However, these studies each rely on a methodology that severely undermines their conclusions. Specifically, the original study's assertion that checks are returned more frequently from States without payday lending—notably Georgia and North Carolina—relies on data that intermingles data from those States with data from numerous authorizing States (such as Louisiana, Alabama, Tennessee, and others), which makes the conclusions dubious at best. Indeed, in the original paper, more than half of the checks processed at the Charlotte, North Carolina check processing center actually came from States with payday loans. Additionally, the complaint data they cited are limited by the fact that the FTC is unlikely to receive complaints about payday lending (at the time, State regulators were more likely to receive such complaints). As such, the measure of complaints that the authors employ may not indicate the actual rate of credit-related complaints, let alone overall consumer satisfaction. While the later study improves on the previous studies by including more States, a longer period of analysis, and additional outcome measures, they still do not adequately address the shortcomings of their previous studies. This study also relies on data sources that commingle returned checks from States with payday bans with those from States that permit payday lending, which undermines its conclusions, and again relies on the simplistic measure of complaints received by the FTC.

Other studies, rather than using differences across States in the availability of payday loans, have used data on the actual borrowers who apply for loans and are either offered loans or are rejected. One study used this approach to find that taking out a payday loan increases the likelihood that the borrower will file for Chapter 13 bankruptcy.[678] The authors found that initial approval for a payday loan essentially doubled the bankruptcy rate of borrowers. Another study used a similar approach to measure the causal effects of storefront borrowing on borrowers' credit scores.[679] The authors found that obtaining a loan had no impact on how the consumers' credit scores evolved over the following months. The authors noted, however, that applicants generally had very poor credit scores both prior to and after borrowing (or being rejected for) a payday loan. In each of these studies, the authors were unable to determine whether borrowers who were rejected by the lender from which they had data were able to take out a loan from another lender.[680]

Two other studies have used data on payday borrowing and repayment behavior to compare changes over time in credit scores for different groups of borrowers. One measured changes over time in credit scores for borrowers who re-borrowed different numbers of times, and found that in some cases it appeared that borrowers who re-borrowed more times had slightly more positive changes in their credit scores.[681] These differences were not economically meaningful, however, with each additional loan being associated with less than one point in credit score increase.[682] The other compared the changes in credit scores of borrowers who defaulted on their loans with borrowers who did not, and also found no difference.[683] Neither study found a meaningful effect of payday loan borrowing behavior on credit scores.

Commenters also cited a laboratory experiment in which undergraduate students completed a novel computer exercise designed to test whether access to payday loans increased or decreased the likelihood of financial survival in the face of expense shocks. The experiment found that while subjects who used payday loans sparingly were more likely to survive the simulated 30-month period than those with no payday loans, heavy users that took out 10 payday loans or more over the course of the 30 months were less likely to survive than those who had no access to payday loans.[684]

One comment described the lender's use of the Bureau's financial well-being scale to compare the scores of its borrowers to those of consumers deemed by the commenter to be ''similarly situated'' who did not use payday loans or did not have access to payday loans due to their State prohibiting the product. However, the commenter's analytic methods cannot be used to determine causality, and their findings do not appear fully consistent with their conclusions. Furthermore, the comment noted that customers were more likely than non-customers to have incomplete surveys. It is unclear whether the survey may therefore have been affected by non-response bias by customers in greater financial distress. Non-customers may also have had characteristics that make them ineligible for a payday loan despite being ''similarly-situated'' based on other metrics. These factors, such as being unbanked or not having documented income, may also have influenced well-being scores.

In the commenter's first analysis, they report the median and mean financial well-being scale scores by State and overall for its payday customers and non-customer population and found that, in 11 States in which a high response rate was achieved, its median customer scored one point lower than a non-customer, and that the average customer scored 2.3 points lower than the average non-customer. The lender concluded this result showed no real negative effect of payday borrowing. However, the commenter also highlighted the findings from Texas, where customers had a higher score than non-customers, although the differences were the same or smaller than those reported nationally where the commenter surmised there was no significant effect. The Bureau recently conducted a national study of American consumers which found that the adults who reported using products such as payday, non-recourse pawn, and vehicle title loans in the previous 12 months had an average financial well-being score of 42, which was 13 points lower than adults who did not report using

[677] Donald P. Morgan, *Defining and Detecting Predatory Lending,*'' Federal Reserve Bank of New York Staff Reports No 273 (2007). FRBNY Web page indicates report was ''removed at the request of the author.''

[678] Paige Skiba and Jeremy Tobacman. *Do Payday Loans Cause Bankruptcy?,* Working Paper (2015).

[679] Neil Bhutta, Paige Marta Skiba & Jeremy Tobacman, *Payday Loan Choices and Consequences,* Journal of Money, Credit and Banking, 47(2–3): 223–260 (2015). doi: 10.1111/jmcb.1275

[680] As noted, some commenters had made dire predictions that the proposed rule might cause borrowers to turn to illegal lenders or ''loan sharks.'' As noted below in part VII, the Bureau is unaware of any data on the current prevalence of illegal lending in the United States, nor of data suggesting that such illegal lending is more prevalent in States where payday lending is not permitted than in States which permit it.

[681] Jennifer Priestly, *Payday Loan Rollovers and Consumer Welfare* (Dec. 5, 2014). Available at SSRN.

[682] The Priestley study also compared changes over time in credit scores of payday borrowers in different States, and attributed those differences to differences in the States' payday regulations. This ignores differences in who chooses to take out payday loans in different States, given both the regulatory and broader economic differences across States, and ignores the different changes over time in the broader economic conditions in different States.

[683] Mann, Ronald, *Do Defaults on Payday Loans Matter,* December 2014, Working Paper.

[684] Bart J. Wilson and David W. Findlay, and James W. Meehan, and Charissa P. Wellford, and Karl Schurter, *An Experimental Analysis of the Demand for Payday Loans* (April 28, 2010).

these products.[685] Additionally, there is little overlap in the distribution of financial well-being scores among those consumers who have and have not used payday, non-recourse, and vehicle title loans.[686]

A second analysis conducted by the lender compared the scores of customers across different levels of payday loan usage and borrowing outcomes. Customers within the last year were grouped into five categories by the number of transactions they had, and grouped into four categories based on the outcome they experienced. Based on the median scores for each of the 20 categories a customer could be placed in given their borrowing and outcome status, the commenter concluded that there is no correlation between borrowers' financial well-being score and the number of transactions. However, the commenter also acknowledged finding lower scores for those that have their balances written off. Despite this finding, the lender still concluded that there is no evidence to support a theory that payday loan use has a negative effect on financial well-being.

More generally, the Bureau notes that all of these studies sought to measure the impact of payday loans, or eliminating payday lending, on all consumers generally. The Bureau is not opining on whether the payday industry, generally, is beneficial to consumers taken as a whole. Rather, the Bureau is assessing the impact of the identified practice of making payday loans (and other covered short-term loans and covered longer-term balloon-payment loans) to borrowers without making reasonable determinations that the borrowers have the ability to repay the loans according to their terms. In fact, the Bureau believes that covered short-term loans will still be available to consumers facing a truly short-term need for credit in those States that allow them. More specifically, the Bureau believes the vast majority of consumers would be able to get at least six covered short-term loans in any 12-month period, with those borrowers who are able to satisfy an ability-to-repay assessment being able to get some number of additional loans. Notably, however, none of these studies was focused on the impact that payday lending has on the welfare of the sub-population of borrowers who do not have the ability to repay their loans.

Industry commenters also suggested that consumers seem to be satisfied with covered short-term loan products, as shown by low numbers of complaints and the submission of positive stories about them to the ''Tell Your Story'' function on the Bureau's Web site. In response, as noted earlier, the Bureau observed from its consumer complaint data that from November 2013 through December 2016 more than 31,000 debt collection complaints cited payday loans as the underlying debt, and over 11 percent of the complaints the Bureau has handled about debt collection stem directly from payday loans.[687] And when complaints about payday loans are normalized in comparison to other credit products, the numbers do not turn out to be low at all. For example, in 2016, the Bureau received approximately 4,400 complaints in which consumers reported ''payday loan'' as the complaint product and about 26,600 complaints about credit cards.[688] Yet there are only about 12 million payday loan borrowers annually, and about 156 million consumers have one or more credit cards.[689] Therefore, by way of comparison, for every 10,000 payday loan borrowers, the Bureau received about 3.7 complaints, while for every 10,000 credit cardholders, the Bureau received about 1.7 complaints. In addition, faith leaders and faith groups of many denominations from around the country collected and submitted comments, which suggested that many borrowers may direct their personal complaints or dissatisfactions with their experiences elsewhere than to government officials.

In addition, though the Bureau did receive a large number of comments from individual consumers relating their general satisfaction with these loan products, it also received a sizable number of comments to the contrary, where consumers or persons writing on their behalf detailed that many consumers experience negative effects with extended loan sequences.

Furthermore, based on the analysis set forth above in Market Concerns—Underwriting, the Bureau did not overstate the extent of the injury to ''re-borrowers'' who receive single-payment vehicle title loans, which were found to pose similar harms to consumers. Even though such loans may be non-recourse, which limits the extent of some harms, the injury to consumers of the risks of vehicle repossession often are extremely consequential on top of the other harms that flow from the structure and term of these loans, all of which leads to similar conclusions about the risks and harms of these loans.

In the proposal, the Bureau did not address one countervailing benefit to consumers resulting from the identified practice—some commenters noted that some borrowers, even ones with an ability to repay, are currently able to obtain a non-underwritten loan without inquiries showing up on the borrower's credit report. The Bureau acknowledges this can be a benefit to some consumers. However, the Bureau notes that the impact that a credit check will have on a borrower's overall credit profile is limited and uncertain, given that every consumer's consumer report differs and different creditors use different credit scoring models. One of the most experienced scoring companies, FICO, says the following about the impact of credit inquiries on a consumer's score: ''The impact from applying for credit will vary from person to person based on their unique credit histories. In general, credit inquiries have a small impact on one's FICO Scores. For most people, one additional credit inquiry will take less than five points off their FICO Scores. For perspective, the full range of FICO Scores is 300–850.'' [690]

[685] CFPB, Financial Well-Being in America, 57 (Sept. 2017), available at *http://files.consumerfinance.gov/f/documents/201709_cfpb_financial-well-being-in-America.pdf*.

[686] Financial Well-Being in America, 57–58.

[687] Bureau of Consumer Fin. Prot., Monthly Complaint Report, at 12 (Dec. 2016), *https://www.consumerfinance.gov/data-research/research-reports/monthly-complaint-report-vol-18/*.

[688] Bureau of Consumer Fin. Prot., Consumer Response Annual Report, Jan. 1–Dec. 31, 2016, at 27, 33, (March 2017), available at *https://www.consumerfinance.gov/documents/3368/201703_cfpb_Consumer-Response-Annual-Report-2016.PDF*.

[689] Bureau staff estimate based on finding that 63 percent of American adults hold an open credit card and Census population estimates. Bureau of Consumer Fin. Prot., *Consumer Credit Card Market Report,* at 36 (Dec. 2015), *available at http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf*; U.S. Census Bureau, *Annual Estimates of Resident Population for Selected Age Groups by Sex for the United States, States, Counties, and Puerto Rico Commonwealth and Municipios: April 1, 2010 to July 1, 2016* (Jun. 2017), *available at https://factfinder.census.gov/bkmk/table/1.0/en/PEP/2016/PEPAGESEX.* Other estimates of the number of credit card holders have been higher, meaning that 1.7 complaints per 10,000 credit card holders would be a high estimate. The U.S. Census Bureau estimated there were 160 million credit card holders in 2012, and researchers at the Federal Reserve Bank of Boston estimated that 72.1 percent of U.S. consumers held at least one credit card in 2014. U.S. Census Bureau, *Statistical Abstract of the United States: 2012,* at 740 tbl.1188, (Aug. 2011), *available at https://www.census.gov/library/publications/2011/compendia/statab/131ed.html;* Claire Greene, Scott Schuh, and Joanna Stavins, *The 2014 Survey of Consumer Payment Choice: Summary Results,* at 18 (Aug. 15, 2016), *available at https://www.bostonfed.org/-/media/Documents/researchdatareport/pdf/rdr1603.pdf.* And as noted above in the text, additional complaints related to both payday loans and credit cards are submitted as debt collection complaints with ''payday loan'' or ''credit card'' listed as the type of debt.

[690] *http://www.myfico.com/credit-education/credit-checks/credit-report-inquiries/.*

Thus this minor effect has little bearing on the Bureau's overall assessment of benefits and injury to consumers, especially in light of the adjustments made to the underwriting criteria in § 1041.5 of the final rule.

Substitute Products

The Bureau has several responses to the commenters asserting that the proposed rule's restrictions would make consumers worse off by forcing them to substitute more expensive and harmful credit products, and that the Bureau failed to account—or at least fully account—for the countervailing benefit that borrowers of covered loans do not incur the harms caused by these substitute products.

As noted above, the Bureau has decided not to finalize proposed §§ 1041.8 to 1041.10. These proposed sections would have required lenders making covered longer-term loans, including both high-cost installment loans and loans with balloon-payment features, to comply with the ability-to-repay requirements. The proposed rules as applied to longer-term installment loans were one focus of the comments described above. Accordingly, to the extent those comments were predicated on such restrictions applying to covered longer-term installment loans, they have been rendered largely moot by the Bureau's decision. The following discussion is thus limited to comments about the effects of the proposed restrictions on the making of covered short-term loans and covered longer-term balloon-payment loans.

As a threshold matter, it is important to put the effects of the final rule's restriction on borrowing in the proper context. A consumer would be denied an additional covered short-term or longer-term balloon-payment loan only if the consumer was neither able to demonstrate an ability to repay the loan nor eligible for a conditionally exempt covered short-term loan. Bureau simulations described in the Section 1022(b)(2) Analysis indicate the final rule would restrict only six percent of borrowers from initiating a sequence they would have started absent the rule. Furthermore, even if the impact of the decline in lending results in the closure of a substantial number of storefronts offering covered short-term or longer-term balloon-payment loans, the Bureau expects that the vast majority of consumers will not see a sizable increase in the distance to the nearest storefront. As discussed in more detail in the Section 1022(b)(2) Analysis, the Bureau's analysis of the impact of storefront closures in several States after the imposition of State restrictions on payday lending found that over 90 percent of payday borrowers had to travel no more than five additional miles to access their nearest payday lending storefront.[691] This is in addition to the option of obtaining a covered loan online.

It is equally important to note that predicting how this relatively limited number of consumers will react to a particular restriction on covered loans in a particular circumstance is an imprecise matter given that, as noted above, the particular suite of restrictions imposed by the final rule has not been imposed by any State. The best that can be done is to make reasonable predictions about how consumers will react to these restrictions based on research concerning similar restrictions imposed by various States and other types of research, and the Bureau accordingly relies on such research in this discussion to the extent possible.

In addition, even assuming that each of the alternatives identified by the commenters is in fact more expensive or harmful than covered short-term or longer-term balloon-payment loans, to the extent that a given consumer who cannot obtain a loan under § 1041.5 or § 1041.6 has access to other alternatives that are as or *less* expensive than other alternatives, that consumer could use those less expensive substitutes rather than one or more of the allegedly worse alternatives.

In this regard, it is important to note that the Bureau's decision not to finalize proposed §§ 1041.8 to 1041.10 means that covered longer-term installment loans will be at least as available after the rule goes into effect as they are in current market. Thus consumers who cannot obtain a covered short-term or longer-term balloon-payment loan may be able to turn to a longer-term installment loan which, in the view of the commenters who were concerned about inferior alternatives, is not injurious. The Bureau emphasizes, however, that it remains concerned about potential consumer harms from longer-term installment loans where loan pricing and structure may reduce the incentive for lenders to engage in careful underwriting, and the Bureau will monitor evolution of the market and take action under its supervisory and enforcement authorities as necessary to address identified consumer harms.

In addition, the Bureau observes that some consumers may have access to some forms of credit that are typically less harmful than covered short-term loans and covered longer-term balloon-payment loans. These include some of the types of loans excluded from the final rule, including non-recourse pawn loans (discussed further below), no-cost advances, and advances made under wage advance programs that enable employees to access earned and accrued wages ahead of their payday. These options also include loans made by lenders who choose to comply with the conditional exemptions for alternative loans (akin to the PAL products administered by the NCUA) and accommodation loans.

The Bureau now turns to a consideration of evidence and arguments concerning each of the alleged inferior alternatives identified by industry commenters.

Non-recourse pawn loans. As noted in the section-by-section analysis for § 1041.3(d)(5), which excludes non-recourse pawn loans from the scope of coverage of the final rule, the Bureau believes that non-recourse pawn loans do not pose the same risks to consumers as covered loans because consumers are more likely to understand and appreciate the risks associated with non-recourse pawn loans, and the loss of a pawned item that the lender has physical possession of is less likely to affect the consumer's other finances. In addition, a consumer who cannot afford to repay a non-recourse pawn loan at the end of the loan term has the option not to return for the previously-surrendered household item, thus ending his indebtedness to the lender without defaulting, re-borrowing, or impacting his ability to meet other financial obligations. A study described in the Section 1022(b)(2) Analysis found that non-recourse pawn lending increased in States that banned payday lending; a similar substitution effect may occur to some degree for consumers who are unable to obtain additional covered loans.[692]

Overdraft. Industry commenters and some individual consumer commenters expressed concern that consumers who are unable to access additional covered loans after exhausting the options permitted under the proposal will overdraw their bank accounts more frequently. Before considering whether there is likely to be a substitution effect towards overdraft, the Bureau notes that because many lenders of covered loans obtain access to a consumer's bank account for repayment, these loans are often the cause of overdrafts for consumers who are unable to repay, and

[691] CFPB Report on Supplemental Findings, at 79.

[692] Brian Baugh, ''What Happens When Payday Borrowers Are Cut Off from Payday Lending? A Natural Experiment,'' (Fisher College of Bus., Ohio State U. 2015).

they contribute to account closures. See Market Concerns—Payments and the section-by-section analysis for §§ 1041.7 and 1041.8 for more details. Thus, even if overdrafts and bounced checks were to serve as a substitute for covered loans among some consumers, there still might be a net reduction in overdraft usage as a result of the rule.

Further, Bureau research discussed in the proposal and the Supplemental Report calls into question certain commenters' assumptions that consumers who cannot obtain covered short-term or longer-term balloon-payment loans will overdraw their bank accounts more frequently. The Bureau analyzed substitution patterns among former users of the deposit advance product (DAP) offered by several depository institutions when the offering of this product was discontinued in the wake of the prudential regulator guidance.[693] With discontinuation of DAP, consumers who had previously taken DAP advances did not discernably substitute towards other credit products or exhibit sustained negative outcomes compared to their non-user counterparts. Specifically, the former DAP users did not overdraw their bank accounts more frequently relative to non-users after the discontinuance of DAP, nor did they experience long-term increases in bank account charge-off rates following DAP's discontinuation. In addition, the analysis also found that former DAP users did not change their use of payday loans offered by non-depository institutions in any meaningful way relative to those that did not use DAP. Additionally, an academic paper exploring the relationship between payday loan access and overdrafts shows that reduced access to payday loans leads to a decrease in the number of days a household experiences overdrafts or bounced checks.[694]

The Bureau notes, however, that if demand for short-term liquidity is inelastic and outside options were limited, a decrease in access to one option will necessarily increase the demand for its substitutes.[695] The Bureau also notes the 2008 Morgan and Strain study discussed in the Section 1022(b)(2) Analysis and cited by several commenters, updated in 2012, which found that bounced checks and complaints about debt collectors to the FTC increase, and Chapter 13 bankruptcy filings decrease, in response to limits on payday lending. The updated study found that the service fees received on deposit accounts by banks operating in a single State tend to increase with limits on payday lending, and the authors interpreted this as an indication that payday loans help to avoid overdraft fees. The Bureau reiterates its critiques of the Morgan and Strain study as described the Section 1022(b)(2) Analysis.

Unregulated Loans. As noted, some commenters argued that limiting the number of covered loans a consumer could obtain may result in a consumer who cannot obtain a loan under § 1041.5 or § 1041.6 using unregulated or illegal loans. Evidence does not suggest that additional regulation of covered loans leads to more borrowing of these loans. The Bureau notes that the comments often conflate two distinct things. The first is unregulated loans made over the Internet (sometimes from Tribal lands or offshore locations) to consumers who may live in States where payday loans are prohibited by usury restrictions. The second loans made by individuals associated with local criminal enterprises (*i.e.,* neighborhood loan sharks). For instance, commenters sometimes describe in vivid terms the possibility of the rule resulting in criminal loan sharking accompanied by violent behavior, but then go on to present as evidence for that possibility some data or anecdotes about unregulated lenders operating online. The Bureau treats these cases differently in turn below.

One study compared usage of online payday loans in States with restrictive payday lending regulations to usage in States with permissive payday lending regulations, since some unlicensed lenders of online payday loans may offer such loans without regard to the law of the State in which the consumer resided.[696] The study concludes that usage rates of online payday loans do not significantly differ between States with restrictive and permissive payday loan laws, calling into question the notion that more consumers would turn to illegal lending sources if covered loans offered by compliant lenders were curtailed. Similarly, another analysis examined the market penetration of non-licensed lending in States with varying payday lending regulations and found that the presence of non-licensed lenders was relatively minimal in all States, though somewhat higher in States with restrictive payday lending regulations overall in some years and somewhat lower in States with restrictive regulations in other years. However, States with restrictive payday lending regulations that also vigorously enforced those laws consistently had very low market penetration for non-licensed payday lending.[697]

A trade group critical of the proposal submitted a comment referencing a study that it stated ''confirms that where payday credit has been restricted, consumers turn to online and unlicensed lenders.'' [698] The Bureau has reviewed the underlying study and does not believe that it confirms the commenter's premise. The analysis posits that after Texas enacted its payday and vehicle title regulations in 2012, there was an increase in online payday lending applications and at the same time a subsequent decrease in storefront payday lending applications—which the author takes to mean that borrowers turned to online lenders when storefront loans became less available. However, the Texas regulations involved a licensing and disclosure regime that did not limit access to payday lending. An alternative explanation may be that these developments reflect the general market trends of storefront payday lending decreasing relative to online lending, which was experiencing large national growth during this period. Relatedly, the study's finding that non-licensed lenders increased their online lending market share in Texas between 2011 and 2012 is likely similar to what happened nationally and was not caused by Texas law. The author also found that payday lending occurs to some degree in all States, regardless of how intensely it is regulated. If the author's hypothesis held true that payday demand is inelastic and non-licensed lenders would step in to fill a void that licensed lenders could not, the Bureau would expect the usage rates to be fairly similar in each of these groups of States, since they are all indexed to the subprime population. But it should be

[693] CFPB Report on Supplemental Findings, part 2.

[694] Brian Baugh, ''What Happens When Payday Borrowers Are Cut Off From Payday Lending? A Natural Experiment,) Payday Lending? A Natural Experiment,) (Ph.D. dissertation, Ohio State University, 2015), *available at http://fisher.osu.edu/supplements/10/16174/Baugh.pdf.*

[695] *See* Romeo, Charles. 2017. ''Estimating the Change in Surplus from the Elimination of Deposit Advance Products.'' Working Paper, Office of Research, Consumer Financial Protection Bureau.

[696] PEW, Payday Lending in America: Who Borrows, Where They Borrow, and Why, p. 19–24, *available at http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf.*

[697] *See* NonPrime101, Report 2, Does State Regulation of Small-Dollar Lending Displace Demand to Internet Lenders?, p. 7 (2015), *available at https://www.nonprime101.com/wp-content/uploads/2013/10/Does-State-Regulation-of-Small-Dollar-Lending-Displace-Demand-to-Internet-Lenders2.pdf.*

[698] Anna Ellison, Policis. The Outcomes for Consumers of Differing Approaches to the Regulation of Small Dollar Lending. *See https://www.nonprime101.com/wp-content/uploads/2016/05/A_Ellison_nonPrime101_051016.pdf.*

noted that use in restrictive and banned States is lower than in permissive States.

Illegal lenders/loan sharks. Finally, the Bureau believes the risk that consumers will be denied access to credit due to the impacts of the final rule and will be forced to turn to illegal lenders such as loan sharks is not supported by available evidence. Although a number of commenters made this argument, they offered little to no specific evidence about the prevalence of loan sharking in States that restricted payday and vehicle title lending.

The Bureau notes the receipt of a comment letter from a trade group referencing a paper that discusses, among other issues, analyses of loan sharking activity in other countries. The Bureau does not find this analysis to be persuasive, since the regulatory context, access to credit for subprime populations, and characteristics of unlicensed lending are quite different in those jurisdictions than in the United States, as the author of the study acknowledges.[699] In addition, as noted above, under the final rule credit-impaired borrowers could still obtain credit through various alternatives discussed above (including conditionally exempt loans provided for in the rule and longer-term installment loans which are not subject to the ability-to-repay requirements of the final rule).

Similarly, a State trade group commenter argued that the Bureau had not properly accounted for the possibility of loan sharking in its assessment of costs and benefits, arguing that racketeering actions related to lending are more highly concentrated in jurisdictions that do not allow alternative forms of credit such as Pennsylvania, New York, and New Jersey. However, the Bureau views what was cited as supposed support to be anecdotal, non-specific, and lacking evidentiary weight.[700] Even if the Bureau assumed the commenter was correct that loan sharking activities are prevalent in those jurisdictions, the Bureau believes the evidence cited fails to establish even a basic correlation between loan sharking and State differences in authorizing small-dollar lending, let alone a causal link.

The Bureau also notes receipt of a comment letter attaching a law review article analyzing the history of loan sharking in the consumer credit markets and the relationship between loan sharking and usury caps in the United States. The article argues that the ''loan-shark thesis'' offered by proponents of deregulating the credit markets is ''seriously flawed.'' Among the evidence cited was that in Vermont, which has one of the lowest interest rate caps in the nation, no Federal indictments have been recorded in the State during the 20-year period prior to 2012 (when the article was published) for engaging in an extortionate credit transaction, nor had the local press published a single story in that time about local black-market lending.[701]

The Bureau further notes that the U.K. Financial Conduct Authority (the FCA) recently issued a report summarizing feedback it had received in assessing the impacts of the FCA's 2015 price cap on high-cost short-term credit.[702] The FCA wrote, ''We do not see strong evidence of a rise in illegal money lending because of the price cap.'' The report explains the basis for the prediction it had made, in imposing the price cap, that less than 5 percent of declined applicants would consider turning to illegal money sources, and in the recent report the FCA stated that the results from their recent survey confirmed this prediction. The FCA cautioned that the individuals who use illegal money lenders are difficult to reach and reluctant to talk about their experience, but noted that they gleaned information through discussions with social service organizations and other individuals who could speak with authority on the prevalence of illegal lending behavior in the United Kingdom. If the hypothesis was that regulating payday and vehicle title lending in ways that restrict access would lead to an increase in illegal lending, then a nationwide price cap is the type of broad, substantive restriction on small-dollar lending that one may surmise would cause such a rise. Given the difficulty in generalizing across different legal systems and credit markets, the Bureau does not view such findings as dispositive, but does view them as instructive. At the very least, they cast doubt on the assertions made by the trade group that had cited the study about illegal lending in Germany and Japan discussed above.

Finally, the Bureau reemphasizes that the various types of alternatives described above will remain available. Thus, the Bureau concludes that the number of consumers who would seek these illegal options as a first resort is next to zero, and as a last resort is still quite low.[703]

Assessing Benefits to Competition

In the proposal, the Bureau concluded that the rule would not have a significant impact on competition, in part because the Bureau had observed, as discussed above, that when lenders make covered short-term loans they typically charge the maximum price permitted under State law. Many lenders objected to that claim in their comments, and some provided examples of how prices can differ—including statistics on the difference between State-regulated lender prices and online lender prices, and differences between nationwide average prices versus industry medians. Other commenters noted that lenders compete on non-price terms. The Bureau acknowledges that a certain amount of market consolidation may impact the competition involved in non-price terms, meaning consumers may be presented with fewer choices as to where to go to obtain a loan. The impact that market consolidation has on pricing, however, is generally capped by existing State law requirements.

Another point made by industry commenters was that the Bureau's own analysis showed that the proposed rule would lead to increased concentration in the market for covered short-term loans, thereby undermining competition. Indeed, these commenters asserted that the Bureau had understated the amount of decline in revenue that would follow from its

[699] The trade group letter cites Todd J. Zywicki, ''The Case Against New Restrictions on Payday Lending,'' Mercatus Center, George Mason Univ., No. 09–28 (July, 2009), *available at https://www.mercatus.org/system/files/WP0928_Payday-Lending.pdf.* The author of the study wrote that, ''The flexibility of consumer credit markets in the United States has substantially reduced the importance of illegal loan-shark lending,'' and goes on to describe unregulated internet lending—rather than neighborhood loan sharking—as where credit-constrained consumers would turn. *Id.* at 20. The Bureau discusses issues relating to unregulated loans above. Moreover, the author notes that Japan and Germany both had strict price caps, which the Bureau is not authorized to impose. *See id.* at 18–19.

[700] The commenter asserts a mere search of FBI or DOJ records or Google Scholar cases, or a general internet search, ''all demonstrate the prevalence of loan shark and racketeering actions related to lending more highly concentrated in jurisdictions that do not allow alternative forms of credit.'' However, the commenter then provides an example of a single case of loan sharking in Philadelphia in 2013, without citation to news articles, court records, or any other evidence. The commenter also mentions ''other examples'' in New York and New Jersey without any specification.

[701] Robert Mayer, ''Loan Sharks, Interest-Rate Caps, and Deregulation,'' 69 Wash. & Lee L. Rev. 807, 841 (2012).

[702] Financial Conduct Authority, High-cost credit: Including review of the high-cost short-term credit price cap, Feedback Statement FS17/2 (July 2017) at 5 *https://www.fca.org.uk/publication/feedback/fs17-02.pdf.*

[703] The Bureau notes that other government entities have the authority to prosecute such actors under applicable criminal statutes at the State and Federal level.

proposal and thus had underestimated the impact of the proposal in reducing competition. These comments, however, largely misunderstood the Bureau's analysis of the actual effects on competition. The Bureau did believe that the requirement to underwrite covered loans by making a reasonable assessment of the borrower's ability to repay the loan according to its terms would cause consolidation in the market, which the Bureau attempted to estimate to the extent feasible. Yet the Bureau presented preliminary findings, based on its observed experience of the markets in States that had adopted modifications to their own payday lending regulations, which indicated that market consolidation would not reduce meaningful access to credit among consumers. As discussed above, the upshot of such consolidation was that lenders remained almost as proximate and available to consumers as before. To the extent the industry commenters present different estimates, the Bureau is not persuaded of their likely accuracy, and these issues are addressed further in part VII, which presents the Bureau's consideration of the benefits, costs, and impacts of the final rule on consumers and covered persons pursuant to section 1022(b)(2)(A) of the Dodd-Frank Act.[704]

Moreover, as discussed above, in light of the comments received, the Bureau has adjusted certain parameters of the proposed rule to simplify its scope, streamline the underwriting process, and add more flexibility within the existing framework, as described more fully below in the explanation of § 1041.5 of the final rule. The effect of these adjustments is to reduce the costs associated with complying with the rule, which likely will reduce the estimated amount of consolidation in the market for covered short-term loans.

For all of these reasons, the Bureau concludes, based on its judgment and expertise, the comments it received on all sides of these issues, and the data on injury and the effects of the identified practice set forth above in Market Concerns—Underwriting and the analysis in part VII below, which presents the Bureau's consideration of the benefits, costs, and impacts of the final rule on consumers and covered persons, that the practice of making covered loans without reasonably assessing the borrower's ability to repay the loan according to its terms is injurious to consumers, on net and in the aggregate, taking into consideration the countervailing benefits of the identified practice.

[704] 12 U.S.C. 5512(b)(2)(A).

Consideration of Public Policy

The Bureau's Proposal

Section 1031(c)(2) of the Dodd-Frank Act allows the Bureau to ''consider established public policies as evidence to be considered with all other evidence'' in determining whether a practice is unfair, as long as the public policy considerations are not the primary basis of the determination. In the proposal, the Bureau stated that public policy supports the proposed finding that it is an unfair practice for lenders to make covered loans without determining that the consumer will have the ability to repay the loan according to its terms.

Specifically, as noted in the proposal, several consumer financial statutes, regulations, and guidance documents require or recommend that covered lenders must assess the customer's ability to repay before extending credit. These include the Dodd-Frank Act provisions on closed-end mortgage loans,[705] the CARD Act provisions on credit cards,[706] guidance from the OCC on abusive lending practices,[707] guidance from the FDIC on small-dollar lending,[708] and guidance from the OCC [709] and FDIC [710] on deposit advance products. In addition, the Federal Reserve Board promulgated a rule requiring an ability-to-repay determination for higher-priced mortgages, although that rule has since been superseded by the Dodd-Frank Act's ability-to-repay requirement and the Bureau's implementing regulations, which apply generally to mortgages regardless of price.[711] In short, the Bureau stated in the proposal that Congress, State legislatures,[712] and other agencies have found consumer harm to result from lenders failing to determine that consumers have the ability to repay before extending credit to them. The Bureau stated that these established policies provide support for its preliminary finding that it is unfair for a lender to make covered loans without determining that the consumer will have the ability to repay; and they likewise were seen as supporting the Bureau's proposed imposition of the consumer protections in the proposed rule. The Bureau gave weight to the policy contained in these Federal consumer laws, and based its preliminary finding that the identified practice is unfair, in part, on that significant body of public policy. Yet the Bureau did not make this consideration the primary basis for its preliminary determination of unfairness.

Comments Received

The Bureau received comments relating to the public policy implications of the proposed rule. One industry commenter argued that because the Bureau lacked substantial evidence for its other determinations, it was essentially basing the unfairness determination primarily on public policy, which is prohibited by the Dodd-Frank Act. Other industry commenters contended that public policy considerations militate against promulgating a rule that restricts access to credit to the extent described in the proposal. For example, some commenters claimed that restricting access to credit for certain borrower populations conflicts with public policy considerations underlying fair lending laws.

Industry commenters also cited perceived conflicts with other sources of law as contravening public policy. One commenter made a similar argument about the proposal's coverage of the

[705] Dodd-Frank Act section 1411, codified at 15 U.S.C. 1639c(a)(1) (providing that no creditor may make a residential mortgage loan unless the creditor ''makes a reasonable and good faith determination'' based on verified and documented information that, at the time the loan is consummated, the consumer has a ''reasonable ability to repay the loan, according to its terms, and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments'').

[706] 15 U.S.C. 1665e (credit card issuer must ''consider[] the ability of the consumer to make the required payments'').

[707] OCC Advisory Letter 2003–3, Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans (Feb. 21, 2003), available at *http://www.occ.gov/static/news-issuances/memos-advisory-letters/2003/advisory-letter-2003-3.pdf* (cautioning banks not to extend credit without first determining that the consumer has the ability to repay the loan).

[708] FDIC Financial Institution Letter FIL–50–2007, Affordable Small-Dollar Loan Guidelines (June 19, 2007).

[709] OCC, Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 78 FR 70624, 70629 (Nov. 26, 2013) (''Deposit advance loans often have weaknesses that may jeopardize the liquidation of the debt. Customers often have limited repayment capacity. A bank should adequately review repayment capacity to assess whether a customer will be able to repay the loan without needing to incur further deposit advance borrowing.'').

[710] FDIC, Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 78 FR 70552 (Nov. 26, 2013) (same as OCC guidance).

[711] Higher-Priced Mortgage Loan Rule, 73 FR 44522, 44543 (July 30, 2008) (''the Board finds extending higher-priced mortgage loans or HOEPA loans based on the collateral without regard to the consumer's repayment ability to be an unfair practice. The final rule prohibits this practice.'').

[712] *See, e.g.,* 815 Ill. Comp. Stat. Ann. 137/20 (lender must assess ATR in making ''high risk home loan''); Nev. Rev. Stat. Ann. Sec. 598D.100 (it is unfair practice to make home loan without determining ATR); Tex. Educ. Code Ann. Sec. 52.321 (State board will set standards for student-loan applicants based in part on ATR).

furnishing and review of credit information, which it viewed as inconsistent with the Fair Credit Reporting Act and thus as inconsistent with public policy. Other commenters more simply argued that in addressing the perceived issues with covered loans, the Bureau should be required to defer to existing State regulatory approaches.

Some commenters stated quite different views, as discussed previously. One trade association, in particular, stated that Congress plainly recognized the problems created by unregulated and less regulated lenders, and for that reason conferred on the Bureau new authority to supervise and write rules for the payday lending industry for the first time ever at the Federal level. More generally, consumer groups were strongly supportive of the Bureau's legal authority to develop and finalize the proposed rule. Rather than viewing other ability-to-repay provisions in Federal consumer law as implied negative restrictions on the Bureau's authority, these commenters pointed to them and others (such as the Military Lending Act) as embodying a considerable trend of expanding public policy now supporting the principle that consumer lending generally should be premised on the borrower's ability to repay. They also noted that some States now embody this principle in statute, and many more do so by judicial precedent. They noted that general statements of this principle in Federal and State law tend to define this approach as requiring the lender to establish the borrower's ability to repay the loan while meeting basic living expenses and without re-borrowing.

One commenter argued that the proposed rule contradicts other recent Federal policy that authorizes and even promotes mortgages, auto loans, and other types of long-term lending. Several commenters argued that the rule violates the public policy of federalism because it would prohibit certain lending practices that are otherwise allowed and regulated by State laws, which reinforce the structure of such loans and mitigate harms to consumers. On the other side of the issue, commenters argued that the Bureau's rule is increasingly consistent with the evolving direction of State law.

The Final Rule

As an initial matter, the Bureau notes that public policy is only one factor that it uses to inform its unfairness assessments; it is not a prerequisite or an element of the legal determination or its primary basis. The Bureau has concluded that this rule is consistent with public policy, but commenters' argument that the rule is primarily based on public policy is inaccurate. As stated in the proposal, the identified practice of making covered loans without reasonably assessing the borrower's ability to repay the loan according to its terms is unfair because it meets the three legal elements of unfairness, and the rule is also supported by public policy.

The rule does not conflict with Federal fair lending laws. The Bureau will continue to expect creditors to treat borrowers of protected classes equally. Additionally, the rule does not conflict with the Fair Credit Reporting Act. Lenders can comply with the provisions of both this rule and the FCRA and will be expected to do so.

To the extent that Federal policy is intended to promote long-term lending, this rule does not conflict with that objective. First, the Bureau is unaware of any Federal policy that specifically prefers long-term lending simply for the sake of long-term indebtedness. Certain Federal policies may allow longer-term installment lending in order to reduce payment amounts, but the covered short-term loans at issue in this rule do not involve reduced payment amounts as a result of re-borrowing.

The Bureau does not agree with the commenters who claimed that this rule conflicts with general principles of federalism, even though some loans that would not be permissible under the rule would currently be permissible under State law. If the commenters' argument were to be accepted, then any Federal regulation (other than rules prohibiting only the exact conduct already prohibited by the States) would create an impermissible conflict with principles of federalism. Yet that is not how our system of federalism works. Under the Constitution, both the States and the Federal government have coexisting, overlapping authority. This rule preserves that settled framework by stating explicitly that it does not preempt any State law that is more restrictive in its effects than the provisions of this rule. Existing State regulatory frameworks will continue to exist alongside this rule, in a version of cooperative federalism that is analytically similar to the way parallel State and Federal laws have long operated in such fields as securities law, antitrust law, environmental law, and many others. The Bureau is unaware of any State laws that a lender of covered short-term loans cannot comply with as a consequence of this rule.

Indeed, the making of covered short-term loans pursuant to State regulatory frameworks is already subject to significant Federal laws and regulations, as many commenters acknowledge. Those Federal laws include the Truth in Lending Act, the Equal Credit Opportunity Act, the Fair Credit Reporting Act, and others. To the extent those laws control or modify various aspects of the covered loans made pursuant to State law, they do not thereby contravene the principles of federalism. In fact, the final rule adopted by the Bureau also provides support for those States that effectively prohibit the making of certain types of covered loans by imposing a hard usury cap on such lending, insofar as the rule will restrict lenders from offering non-underwritten covered loans on-line or by other avenues of cross-border lending into those States, which are also empowered to enforce their usury caps against cross-border loans that violate those caps.

The Bureau disagrees with the contention that it only has the authority to issue rules based on unfairness that incorporate an ability-to-repay standard if Congress expressly specified the use of such a standard. On the contrary, Congress created the Bureau and chartered it with the responsibility to identify and prevent unfair practices, employing general statutory definitional criteria as set forth in the Dodd-Frank Act. Congress did not explicitly preclude the issuance of rules based on unfairness that incorporate an ability-to-repay standard, and the Bureau has not found in the statute, its legislative history, or other authoritative sources any implied preclusion of rules based on unfairness that incorporate an ability-to-repay standard. And the Bureau is authorized to adopt appropriate rules when it has determined that an ability-to-repay standard is appropriate to address a practice that it has identified as meeting the definition of ''unfair'' under the criteria enunciated by Congress in the statute. Indeed, Congress reinforced the Bureau's authority to engage in rulemaking in this particular market by providing in section 1024(a)(1)(E) of the Dodd-Frank Act that this was one of three specified markets (along with mortgages and private student loans) where the Bureau had broad authority to adopt regulations that apply to ''any covered person who . . . offers or provides to a consumer a payday loan.'' [713]

As for those commenters who stated that the Bureau is obliged to consider and defer to State-law regimes for regulating covered loans, it suffices to note that this approach does not square with the terms of Federal law as

[713] 12 U.S.C. 5514(a)(1)(E).

prescribed in the Dodd-Frank Act. It also fails to recognize that even in light of varying State regulatory structures, the injury caused by covered loans persists in those States where it is permitted to exist. And those States, of course, are the sources of all the data that the Bureau has compiled on the harms of covered loans in the United States (since the so-called ''prohibition States'' cannot, by definition, be the source of any current data on the making or effects of those loans).

Finally, commenters who criticized the Bureau as violating some version of public policy by acting too aggressively to limit or even eliminate covered short-term loans altogether were overstating their point while at the same time missing the point. Again, the approach proposed by the Bureau and now adopted in the final rule does not eliminate such loans. Rather, it merely imposes a requirement that they be underwritten by the lender making a reasonable assessment that the borrower will be able to repay the loan according to its terms. And especially in light of various adjustments the Bureau has now made to simplify and streamline the underwriting provisions in § 1041.5 of the final rule, along with some ability to make covered loans under the alternative provisions of § 1041.6, the notion that the final rule will eliminate these loans altogether is not well grounded in any factual analysis.

Abusiveness

Under sections 1031(d)(2)(A) and (B) of the Dodd-Frank Act,[714] the Bureau may find an act or practice to be abusive in connection with a consumer financial product or service if the act or practice takes unreasonable advantage of: (A) A lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service or of (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service. In the proposal, the Bureau stated that it appeared that a significant population of consumers does not understand the often-hidden risks and costs of taking out payday, single-payment vehicle title, or other covered loans, and further lack the ability to protect their interests in selecting or using such loans. It also stated that it appeared that lenders take unreasonable advantage of these consumer vulnerabilities by making loans of this type without reasonably determining that the consumer will have the ability to repay the loan.

After considering the comments received, for the reasons described below, the Bureau concludes that it is an abusive practice to make covered short-term loans without reasonably assessing that the borrower will have the ability to repay the loan according to its terms. The Bureau concludes that many borrowers lack an understanding of the material risks and costs of these loans, based on evidence that many borrowers do not seem to understand the likelihood or the severity of the harms that can result from such unaffordable loans. The Bureau concludes that borrowers are unable to protect their interests based on the circumstances of many borrowers, such as their typically urgent need of credit, their perception that they often lack a realistic ability to shop for alternatives, and above all the difficulties they face after origination of the first unaffordable loan based on various features of the loan product that create and magnify the potential risks and harms. And finally, by making covered short-term loans without reasonably assessing the borrower's ability to repay the loan according to its terms, and based on various features of the structure of such loans, lenders are taking unreasonable advantage of these vulnerabilities.

General Comments

Before turning to its analysis of the statutory prongs of the abusiveness standard, the Bureau can first address a small set of general comments on its use of the abusiveness standard generally. Some commenters asserted that the proposed rule improperly amounts to a ''ban'' on certain products, instead of focusing on the identified practice of making covered loans without reasonably assessing consumers' ability to repay. Other commenters asserted that when a practice is expressly permitted by some applicable law, including State law, it cannot also be abusive. One commenter pointed to statements made in the Bureau's own exam manual as ostensible support for opposing the Bureau's use of its abusive authority to impose this rule.

The suggestions that the rule effectuates a ''ban'' on products rather than a prohibition against acts or practices are inaccurate. The Bureau did not propose, and this final rule does not provide, that any covered short-term loans are prohibited. The practice of failing to make such an assessment has been identified by the Bureau as the practice that is both unfair and abusive. In response, the rule simply requires that such loans must be underwritten with a reasonable assessment of the borrower's ability to repay the loan according to its terms. Further analysis on the effect of this rule on the market for such loans can be found above in the discussion of the statutory unfairness prong, as well as in part VII, where the Bureau presents its assessment of the costs, benefits, and impacts of the final rule on consumers and covered persons pursuant to section 1022(b)(2)(A) of the Dodd-Frank Act.[715]

As to the assertion that a practice cannot be abusive when it is expressly permitted by some applicable law, this statement seems overbroad and inaccurate, for when a new rule is promulgated, it would often be the case that the conduct it now addresses would previously have been permitted, and perhaps even explicitly permitted, before the law was changed by the new rule.[716] By the same token, the observation made about the Bureau's examination manual is irrelevant, because the manual would only have been describing the existing state of the law prior to the promulgation of this new rule. Many if not most new rules adopted by the Bureau that add new substantive requirements may not be anticipated by examination manuals written to guide examiners in applying the pre-existing legal landscape before the rule was adopted. As is common when new rules are adopted, the Bureau plans to produce new examination procedures to reflect the new substantive requirements of this final rule.

Moreover, the Bureau may properly exercise its statutory authority at any time to consider whether an identified practice meets the definitional prongs of unfairness or abusiveness, based on substantial evidence and research. When it does so, it reaches an appropriate conclusion that the identified practice is illegal under the provisions of the Federal statute, regardless of whether lenders had been engaging in the practice prior to the time the Bureau completed its new analysis. Furthermore, the fact that State laws on the same subject may be less restrictive in some respects than Federal law does not prohibit the promulgation of a regulation that is authorized by Federal statute, even though it may be more restrictive in some respects than those State laws. This is typical of how

[714] 12 U.S.C. 5531(d)(2)(A) & (B).

[715] 12 U.S.C. 5512(b)(2)(A).

[716] Without undermining this general point, it should be noted that where, as here, the Bureau is adopting rules pursuant to its authority to identify and prevent unfair and abusive practices, such rules are not necessarily creating new law so much as clarifying that these practices, which could have been addressed previously by the Bureau pursuant to its supervision and enforcement authority, are now addressed independently by essentially codifying them in the terms of the new rule.

federalism traditionally works in other areas of parallel Federal and State law, such as securities, antitrust, environmental law, and many other areas.

Consumers Lack an Understanding of Material Risks and Costs

The Bureau's Proposal

As discussed in the proposal, covered short-term loans, including payday and title loans, can and frequently do lead to a number of negative consequences that can pose serious financial problems for consumers. These effects flow from the identified practice of failing to underwrite such loans by making a reasonable assessment of the borrower's ability to repay the loan according to its terms. The harms that borrowers tend to experience once they have taken out an unaffordable loan of this kind include default, delinquency, re-borrowing, and the collateral consequences of making unaffordable payments, including forgoing basic living expenses and major financial obligations to avoid the other injuries. All of these potentially harmful effects—including the direct costs that the borrower has to pay to the lender, as well as other costs that often are incurred as well—are among the ''material risks and costs'' of these loans, as the Bureau understood and reasonably interpreted that phrase.

In the proposal, the Bureau recognized that borrowers who take out a payday, title, or other covered short-term loan typically understand that they are incurring a debt which must be repaid within a prescribed period of time and that if they are unable to do so, they will either have to make other arrangements or suffer adverse consequences. The Bureau stated, however, that it did not believe that such a generalized understanding suffices to establish that consumers actually understand the material risks and costs of these products, and in particular the magnitude and severity of the risks and harms. Rather, the Bureau stated that it believed it was reasonable to interpret ''understanding'' in this context to mean more than a mere awareness that it was within the realm of possibility that a negative consequence could be experienced as a result of using the product. For example, consumers may not understand that a certain risk is very likely to materialize or that—even though relatively rare—the impact of a particular risk would be severe.

As discussed in the proposal, the single largest risk to a consumer of taking out an initial covered short-term loan is that it will lead to an extended cycle of indebtedness that poses material risks and costs to the consumer. This occurs in part because of the identified practice, which can lead to lenders making unaffordable loans. It also occurs, in large part, because the term and structure of the loan generally require the consumer to make a lump-sum balloon payment within a short period, typically two weeks or a month after the loan is made, often absorbing such a large share of the consumer's disposable income as to leave the consumer unable to pay basic living expenses and major financial obligations.

As the Bureau stated in the proposal, in States where it is permitted, lenders often offer borrowers the enticing—but ultimately costly—alternative of paying a fee and rolling over the loan or taking out a new loan to pay off the previous one, leaving the principal amount intact. Many borrowers choose this option, and a substantial population of them ends up in extended loan sequences because when the loan next comes due, they are in exactly the same situation all over again. Alternatively, borrowers may repay the loan in full when it comes due, but find it necessary to take out another loan over the course of the ensuing expense cycle because the large amount of money needed to repay the first loan, relative to their income, leaves them without sufficient funds to meet their other obligations and expenses. This also can often lead to an extended cycle of debt, posing material risks and costs to the consumer's financial situation.

This cycle of indebtedness affects a large segment of borrowers: As described above in Market Concerns—Underwriting, half of all storefront payday loan sequences contain at least four loans.[717] One-third contain seven loans or more, by which point consumers will have paid charges equal to 100 percent of the original amount borrowed and still owe the full amount of the principal.[718] Almost one-quarter of loan sequences contain at least 10 loans in a row.[719] And looking just at loans made to borrowers who are paid weekly, bi-weekly, or semi-monthly, more than one-fifth (21 percent) of those loans are in sequences consisting of at least *20* loans.[720] For loans made to borrowers who are paid monthly, almost half (46 percent) of the loans are in sequences consisting of at least 10 loans.[721]

[717] CFPB Report on Supplemental Findings.

[718] *Id.*

[719] *Id.*

[720] *Id.*

[721] *Id.*

The evidence summarized in the proposal and reinforced above in Market Concerns—Underwriting and again in the section on unfairness also shows that many consumers who take out these loans appear not to understand, when they first take out the loan, how long they are likely to remain in debt and how costly and harmful that situation could be for them. Many borrowers tend to overestimate their likelihood of repaying the loan without re-borrowing and do not understand the likelihood that they will end up in an extended loan sequence. As the Bureau stated in the proposal, empirical evidence shows that a substantial population of borrowers, and especially those who end up in extended loan sequences, are not able to predict accurately how likely they are to re-borrow and thus how much they will end up paying over time. One study, in particular, found that consumers who end up re-borrowing numerous times—which are the consumers who suffer the most harm—are particularly bad at predicting the number of times they will need to re-borrow. Thus, many consumers who find themselves in a months-long cycle of indebtedness do not understand the material risks and costs of that consequence, and end up paying hundreds of dollars in fees above what they expected, while struggling to meet their other financial obligations.

As recounted in the same sections identified above and in the proposal, the Bureau has observed similar outcomes for borrowers of single-payment vehicle title loans. For example, 83 percent of title loans are re-borrowed on the same day that a prior loan was due, and 85 percent of vehicle title loans are re-borrowed within 30 days of a previous vehicle title loan.[722] Fifty-six percent of vehicle title loan sequences consist of more than three loans, 36 percent consist of at least seven loans, and almost one quarter—23 percent—consist of more than 10 loans.[723] While there is no comparable research on the subjective expectations of title borrowers, the Bureau preliminarily found that the research in the payday context can be extrapolated to these other single-payment short-term products, given the significant similarities in the product structures, the characteristics of the borrowers, and the outcomes that many borrowers experience, as detailed above in part II and in Market Concerns—Underwriting.

Consumers are also exposed to other material risks and costs in connection with these kinds of loans. As discussed

[722] CFPB Single-Payment Vehicle Title Lending.

[723] *Id.*

in more detail in Market Concerns—Underwriting, the unaffordability of the payments creates, for many consumers, a substantial risk of default. Indeed, 20 percent of payday loan sequences and 33 percent of title loan sequences end in default.[724] And 69 percent of payday loan defaults occur in loan sequences in which the consumer re-borrows at least once.[725] For a payday borrower, the cost of default generally includes the cost of at least one, and often multiple, NSF fees assessed by the borrower's bank when the lender attempts to cash the borrower's postdated check or debit the consumer's account via ACH transfer and the attempt fails. It is also known that NSFs on on-line payday loans are associated with a high rate of bank account closures, further jeopardizing the financial health and stability of these consumers. Defaults often expose consumers to other adverse consequences, such as aggressive debt collection activities. The consequences of default can be even more dire for a title borrower, including repossession of the consumer's vehicle—which is the result in 20 percent of single-payment vehicle title loan sequences and can greatly complicate the borrower's ability to earn the funds needed to repay such loans.[726]

The Bureau stated in the proposal that it believed a substantial population of consumers who take out payday, title, or other covered short-term loans do not understand the magnitude of these additional risks. The proposal also stated that borrowers—at least at the point where they are first deciding whether to take out the loan—are not likely to factor into their decision-making the severity of the harms they may suffer from default, delinquency, re-borrowing, and the collateral consequences of making unaffordable payments in an attempt to avoid these other injuries. Further adverse effects can include expensive bank fees, the potential loss of their bank account, aggressive debt collection efforts, and, with title loans, the risks and costs of losing their basic transportation to get to work or conduct their ordinary personal affairs.

As discussed in the proposal, several factors can impede consumers' understanding of the material risks and costs of these loans. At the outset, as discussed above, there is a mismatch between how payday and single-payment vehicle title loans are structured and marketed to consumers and how they operate in practice to support a business model based on repeated re-borrowing. Although the loans are presented and marketed as stand-alone short-term products, lenders know and rely on the fact that only a minority of payday loans are repaid without any re-borrowing. As discussed above, these loans often, instead, produce lengthy cycles of indebtedness through extended loan sequences of repeat re-borrowing. This is influenced by the term and the balloon-payment structure of the loans, which offer the limited options of either re-borrowing by paying additional fees without paying down the principal amount or requiring a large payment to be made all at once, which can lead to severe consumer harm if the lender makes an unaffordable loan without reasonably determining that the borrower has the ability to repay the loan according to its terms.

In addition, consumers in extreme financial distress tend to focus on their immediate liquidity needs, rather than potential future costs, in a way that makes them highly susceptible to lender marketing. Payday and title lenders are generally aware of this vulnerability and often advertise the speed with which the lender will provide funds to the consumer, which may further cloud consumers' ability to understand the risks and costs.[727] But while covered short-term loans are marketed as being intended for short-term or emergency use,[728] a substantial percentage of consumers do not repay the loan quickly and thus confront the harms of default, delinquency, re-borrowing, and the collateral consequences of making unaffordable payments in an attempt to avoid these other injuries. Many consumers find themselves caught in a cycle of re-borrowing that is both very costly and very difficult to escape.

Comments Received

The Bureau received many comments relating to this prong of the abusiveness definition concerning consumers' lack of understanding of material risks and costs associated with the kinds of loans covered by the rule. Industry participants, trade associations, and others who criticized the Bureau for proposing the rule in response to this concern maintained that consumers do understand the terms of the loans and the possible outcomes, making a more detailed understanding of the risks unnecessary, and making the rule unnecessary as well. They argue that it is unrealistic to require, as they believed the Bureau's proposed rule did, that consumers develop an expert understanding of the characteristics of covered short-term loans.

Those commenters who maintained that the risks and costs are sufficiently understood by consumers claimed that the proposed rule improperly substitutes the Bureau's own judgments for those of consumers, denying them the ability to make a free choice to purchase products about which they do, in fact, know and appreciate how they work. Many commenters, including individual users of covered short-term loans, asserted that consumers use them effectively to cope with unexpected temporary expenses or shortfalls in income, to manage uneven income and cash flow challenges, and to avoid more expensive alternatives for handling other debt. They cited various studies to support the proposition that consumers understand the challenges and disadvantages of these loans, but opt for them as the best choice available among unappealing alternatives. Other commenters stated that no evidence suggests borrowers of covered loans generally suffer from infirmity or ignorance, but rather are well-educated and sophisticated in how they use financial services.

Several commenters pointed to the relatively small number of consumer complaints submitted to the Bureau about these kinds of loans, and to the high volume of positive comments submitted about such loans in response to the proposal, which were viewed as showing that consumers who use these loans understand them. Many individual users of such loans likewise commented that they use these products advisedly to meet their particular needs.

In the alternative, industry commenters contended that the Bureau's method for determining that consumers do not understand these risks is flawed, such as by relying too heavily on concepts of behavioral economics, which would leave an essential premise for the rule unproven. Other commenters argued that consumers are generally accurate in predicting the duration of their borrowing, citing the Mann study and Professor Mann's response to the Bureau's proposal, a point that was raised and discussed earlier in Market

[724] CFPB Report on Supplemental Findings; CFPB Single-Payment Vehicle Title Lending.

[725] CFPB Report on Supplemental Findings.

[726] CFPB Single-Payment Vehicle Title Lending.

[727] In fact, during the SBREFA process for this rulemaking, numerous SERs commented that the Bureau's contemplated proposal would slow the loan origination process and thus negatively impact their business model, though these points may be addressed by the development of automated underwriting, as discussed earlier.

[728] For example, as noted above, the Web site for a national trade association representing storefront payday lenders analogizes a payday loan to a ''cost-efficient 'financial taxi' to get from one payday to another when a consumer is faced with a small, short-term cash need.''

Concerns—Underwriting, as well as in the section on unfairness.

Other commenters such as consumer groups agreed with the Bureau's assessment in the proposal that many consumers do not understand the material risks and costs associated with these kinds of loans, which they viewed as resting on sound underpinnings of the facts and data marshaled by the Bureau. Once again, the commenters said this was especially true of borrowers who end up in extended loan sequences, and the financial circumstances of these consumers are materially undermined by their experience with such loans. They are unable to repay the loans when they come due, which leads them to re-borrow repeatedly and, in many instances, to suffer the injuries associated with being trapped in extended loan sequences. Consumer groups expressly agreed with the weight placed by the Bureau on concepts from behavioral economics such as ''tunneling risk'' and ''optimism bias,'' which they stated are well-established phenomena. Another commenter noted that their experiences with legal assistance clients showed consistent confusion about the risks, costs, and conditions of these loans, as well as the excessive optimism many consumers have about their expected ability to pay off the loans as they come due. This perspective was supported by many comments by and about individual users of such loans, whose experiences contrasted sharply with other cohorts of borrowers who commented on the proposal in more critical terms.

Some industry commenters argued that lack of understanding must be evaluated at the level of each consumer and thus cannot serve as the basis for a broad rulemaking of general applicability. Some commenters pointed to prior statements by the Bureau's Director, who stated that abusiveness cases are ''unavoidably situational'' and depend on an individualized inquiry of the facts and circumstances presented. Other commenters noted that the abusiveness standard is worded in the singular—''a lack of understanding on the part of *the* consumer''—to support this assertion.[729]

Another commenter suggested that measures should be taken to combat advertising and marketing problems rather than accepting the restrictions on access to credit that would result from the proposed rule. Yet another industry commenter took a different approach, objecting that there was no evidence that the proposed rule could prevent the harms to consumers that it purported to address.

The Final Rule

After careful consideration of the comments received, the Bureau has concluded that when lenders make covered short-term loans without reasonably assessing whether borrowers have the ability to repay the loans according to their terms, consumers often lack understanding of the material risks and costs of these loans, which are often unaffordable and lead to the risks and harms of default, delinquency, re-borrowing, and the negative collateral consequences of forgoing basic living expenses and major financial obligations in order to avoid defaulting on their loans.

Many of the points made by commenters objecting to whether the rule satisfies this prong of the definition of abusive practices rely on arguments that conflict with credible evidence cited by the Bureau in support of the proposed rule. That evidence is discussed more thoroughly in Market Concerns—Underwriting, the Section 1022(b)(2) Analysis, and the preceding section on unfairness. After consideration of the evidence and perspectives propounded by commenters, the Bureau generally adopts the evidentiary basis it had preliminarily set forth in the proposed rule as the basis for meeting this prong of the definition of abusiveness for purposes of the final rule.

As stated in the proposal, the section on unfairness, Market Concerns—Underwriting, and the Section 1022(b)(2) Analysis, the Bureau has evidence showing that a significant proportion of consumers do not understand the kinds of harms that flow from unaffordable loans, including those imposed by default, delinquency, re-borrowing, and the collateral consequences of making unaffordable payments to attempt to avoid these other injuries. As noted above, the adverse effects for many consumers who find themselves caught up in extended loan sequences constitute severe harm, the likelihood of which is not understood by many consumers in advance. The Bureau thus concludes that a substantial population of borrowers lacks understanding of the material risks or costs of these loans.

The Bureau does not dispute that many consumers may be knowledgeable about covered short-term loans and use them effectively, including making accurate predictions about their duration of borrowing. Yet for all the reasons discussed previously, the Bureau concludes that a significant population of consumers does not understand the material risks and costs of unaffordable loans that are made without reasonably assessing the borrower's ability to repay the loan according to its terms. This does not mean that consumers are required to be experts in all aspects of how such loans function as a practical matter. But it does mean that if borrowers do not understand either their likelihood of being exposed to the risks of these loans or the severity of the kinds of costs and harms that may occur, then it is quite difficult to maintain the position that those same borrowers in fact understand the material risks and costs associated with unaffordable short-term loans. And the kinds of harms involved in the risks of default, delinquency, re-borrowing, and the collateral consequences of making unaffordable payments to avoid these other injuries—including the interrelations among these injuries—can pose complex dynamics that are not likely to be well understood by many consumers.

A number of commenters supported this view as well. Some noted that while some consumers might have a generalized understanding of how the debt associated with a covered loan can affect their economic circumstances, that understanding cannot be presumed to include an understanding of the broader risks and harms of such loans. These commenters also agreed with the Bureau that behavioral issues such as ''tunneling'' and ''optimism bias'' could have effects on decision-making that may affect consumers' ability to use and manage covered loans successfully. Although some commenters criticized this approach as ''novel'' and relying too heavily on behavioral economics, the Bureau has no reason to believe that these theories and methodologies are particularly unconventional at this point of their development in the field of economics. Regardless, however, the Bureau concludes that these behavioral phenomena are equally consistent with economic analyses that would rest on models of rational behavior, given the particular circumstances of the consumers of these kinds of loans.

The claim made here by industry commenters that payday loans have generated few consumer complaints, which mirrors the same claim made elsewhere by these commenters, is unpersuasive for reasons that have already been laid out in Market Concerns—Underwriting and the section on unfairness. When payday complaints are normalized, for example, in comparison to credit card complaints in view of the user population for each product, payday complaints occurred

[729] 12 U.S.C. 5531(d).

more than twice as frequently.[730] In any event, the volume of consumer complaints received by the Bureau is by no means an effective measure, by itself, to establish the presence or absence of consumer understanding. The Bureau believes there are a number of reasons why borrowers who find themselves in extended loan sequences do not submit a complaint to the Bureau about their negative experience with such loans. First, some borrowers may be embarrassed and thus less likely to submit complaints about their situation. Second, they may blame themselves for having gotten themselves caught up in a cycle of debt authorized by State law. Third, as some commenters indicated and the Bureau has observed around the country, faith leaders and faith groups may seem a more natural audience for some borrowers to appeal in relating their dissatisfactions with these experiences.

The claim that abusiveness claims are ''unavoidably situational,'' and therefore the Bureau must make an individualized determination of abusiveness for each consumer, is unfounded. All decisions consumers make are individualized, but that fact does not preclude the Bureau from developing a general rule based on the statutory definitions of unfairness or abusiveness, as Congress clearly contemplated in section 1031(b) of the Dodd-Frank Act. It is true that the abusiveness standard is expressed in the statute in the singular. However, the Bureau also notes that it has the authority to declare ''acts or practices'' abusive, and it would be a reasonable interpretation of the statute to assume that Congress would not label abusive conduct aimed at a single consumer a ''practice.'' Further, it is true that each practice must be assessed based on the specific facts and circumstances before coming to an abusiveness conclusion, yet the Bureau has done so here, and this does not mean it must assess the facts and circumstances as to each consumer.

Comments suggesting that the Bureau did not prove borrowers were either infirm or ignorant are beside the point. The Bureau did not reach that conclusion, nor is it relevant under the terms of the statute applicable here. Rather, this prong of abusiveness only requires a lack of understanding.

The final point raised by many industry and trade association commenters was that any lack of consumer understanding could be addressed by improved disclosures. They reinforced this point by asserting that the Bureau is obligated to seek reformed disclosures as a more modest intervention than requiring new underwriting criteria. These comments urging that the rule should mandate disclosures rather than adopt ability-to-repay requirements are addressed in more detail below in the section-by-section analysis of § 1041.5.

For these reasons, the Bureau finds that many consumers lack an understanding of the material risks and costs associated with covered short-term loans made according to the identified practice of failing reasonably to assess the borrower's ability to repay the loan according to its terms.

Consumer Inability To Protect Interests

The Bureau's Proposal

Under section 1031(d)(2)(B) of the Dodd-Frank Act, an act or practice is abusive if it takes unreasonable advantage of the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service.[731] As the Bureau stated in the proposal, consumers who lack an understanding of the material risks and costs of a consumer financial product or service often will also lack the ability to protect their interests in selecting or using that product. Nonetheless, if a consumer lacks understanding of the risks and costs of taking out such loans and yet could still find it easy to protect against them, then the consumer might be judged able to protect her interests. The Bureau also noted in the proposal that the structure of section 1031(d) is in the disjunctive, separately declaring it to be abusive to take unreasonable advantage *either* of consumers' lack of understanding of material risks and costs *or* of their inability to protect their interests in using or selecting a product or service. As a matter of logic, then, Congress has determined that there could be situations where consumers do understand the material risks and costs of covered short-term loans yet are nonetheless unable to protect their interests in selecting or using these products.

In particular, the Bureau stated in the proposal that consumers who take out covered short-term loans may be unable to protect their interests in selecting or using such loans, given their immediate need for credit and their inability in the moment to search out or develop alternatives that would enable them either to avoid the need to borrow or to borrow on terms within their ability to repay. As discussed in Market Concerns—Underwriting, consumers who take out these loans typically are financially vulnerable and have very limited access to other sources of credit. Their need is often acute. And consumers facing an immediate liquidity shortfall may believe that a covered loan is their only choice; a Pew study found that 37 percent of borrowers say they have been in such a difficult financial situation that they would take a payday loan on almost any terms offered.[732] They may not have the time or resources to seek out, develop, or take advantage of alternatives. These factors may place them in such a vulnerable position when taking out these loans that they are unable to protect their interests.

The Bureau also stated in the proposal that once consumers have commenced a loan sequence by taking out an unaffordable loan, they are likely to be unable to protect their interests in selecting or using subsequent loans. After they take out the initial loan, consumers are no longer able to protect their interests as a practical matter because they are already face to face with the competing injuries of default, delinquency, re-borrowing, or the collateral consequences of making unaffordable payments, with no other way to opt out of the situation. An unaffordable first loan can thus ensnare consumers in a cycle of debt from which they cannot extricate themselves without incurring some form of injury, rendering them unable to protect their interests in selecting or using these kinds of loans.

Comments Received

One commenter began by making a linguistic point that questioned whether the Bureau had conflated this prong of the abusive standard with the prior prong, suggesting that it was simply assuming that consumers taking out covered short-term loans inherently demonstrate an inability to protect their own interests, whereas many other consumers adequately protect their interests by deciding not to take out covered loans. More generally,

[730] Bureau of Consumer Fin. Prot., Consumer Response Annual Report, Jan. 1–Dec. 31, 2016, at 27, 33, (March 2017), *available at https://www.consumerfinance.gov/documents/3368/201703_cfpb_Consumer-Response-Annual-Report-2016.PDF.*

[731] 12 U.S.C. 5531(d)(2)(B).

[732] Pew Charitable Trusts, How Borrowers Choose and Repay Payday Loans, at 20 (2013), *http://www.pewtrusts.org/~/media/assets/2013/02/20/pew_choosing_borrowing_payday_feb2013-(1).pdf.* It bears note that commenters correctly pointed out that the Bureau overstated the results of the Pew study by recounting a question as asking consumers whether they would take out a payday loan on ''any terms,'' rather than on ''almost any terms.'' Yet the Bureau does not find that this changes the fundamental point made in the Pew study.

commenters argued that lack of understanding is not enough to prove that a borrower has an inability to protect his interests. Rather, these commenters asserted that the Bureau must show that it is actually impossible for consumers to protect their interests. In the same vein, an industry commenter argued that the Bureau's claim in the proposal that consumers believe there are no better alternatives or that it would be too costly to shop for them fails to show inability to protect where such alternatives actually exist.

Others repeated points they had made about the prior prong, observing that users of covered loans are not vulnerable or unsophisticated or irrational, but rather they do understand the terms and costs of those loans. One commenter analogized the language of this prong to the prohibition against unconscionable contracts in the Uniform Consumer Sales Practices Act, and asserted that the Bureau must therefore find consumers to be infirm, illiterate, or ignorant in order to satisfy this prong.

Industry commenters also repeated their arguments that consumers tend to be accurate in their estimates of the duration of borrowing, and contended that re-borrowing is simply a preference for many consumers, rather than indicating an inability to protect their interests. These commenters also questioned the Pew study relied on by the Bureau, noting that the fact that 37 percent of short-term borrowers acknowledge they have been in an ''immediate liquidity shortfall,'' which they would pay off with payday loans on almost any terms offered, does not demonstrate consumers' inability to protect their own interests. On the contrary, they argued that both competition and State laws protect consumers against problematic loan features and the study showed that the other 63 percent of consumers seek alternatives to covered loans when they perceived such loans to be harmful or problematic to them.

Commenters also asserted that no ''seller behavior'' occurs in making covered loans that deprives consumers of their ability to make informed decisions about their use of such loans.

By contrast, consumer groups commented that covered loan borrowers are faced with an array of bad options, none of which provides them with the ability to protect their own interests. They described the significant difficulties that consumers regularly face when they are using covered short-term loans, which are traceable directly to the initial decision to take out loans that may prove to be unaffordable. And they urged that this consistent pattern is a reasonable demonstration of the proposition that a substantial portion of consumers using covered short-term loans are unable to protect their own interests.

The Final Rule

After consideration of the comments received, the Bureau now concludes that when borrowers of covered loans are subjected to the identified lender practice of making such loans without reasonably assessing the borrower's ability to repay, they are unable to protect their interests in selecting or using the loan product given the dynamics of this market and the structure and terms of these loans as described above and in Market Concerns—Underwriting.

Once again, under section 1031(d)(2)(B) of the Dodd-Frank Act, an act or practice is abusive if it takes unreasonable advantage of the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service.[733] Consumers who lack an understanding of the material risks and costs of a consumer financial product or service often will be unable to protect their interests in selecting or using covered short-term loans because if they misunderstand the likelihood and extent of those material risks, they may not be aware that they should undertake efforts to protect their interests against those risks. And if they cannot reasonably estimate the nature and magnitude of the costs they could incur from unaffordable loans made in accordance with the identified practice, then they may not, as a practical matter, have the ability to protect their interests in the face of those material costs. To this extent, the provisions of section 1031(d)(2)(B) of the Dodd-Frank Act flow from the provisions of section 1031(d)(2)(A) on consumers who lack understanding, as noted in the proposal.

But there are further reasons why consumers may be unable to protect their interests in using these loan products even if they largely understand the risks and costs involved. As discussed in the proposal and above in the section on unfairness, consumers who take out covered short-term loans may be unable to protect their interests in selecting or using such loans because many of them typically have an immediate need for credit and they cannot, in the moment, effectively identify or develop alternatives that would vitiate the need to borrow, allow them to borrow on terms within their ability to repay, or even allow them to borrow on terms not within their ability to repay but nonetheless on terms more favorable than those of a covered short-term loan. And as discussed in Market Concerns—Underwriting, many borrowers of these loans are financially vulnerable and have very limited access to other sources of credit. Confronted with an immediate liquidity problem, they may determine that a covered loan is the only option they have, as shown by the Pew study cited in the proposal, which found that 37 percent of borrowers say they have been in such a difficult financial situation that they would take a payday loan on almost any terms offered.[734] Because they find themselves in such vulnerable circumstances when they are deciding whether to take out an initial covered short-term loan, they are unable, as a practical matter, to protect their interests.

At this point, moreover, the dynamic changes even more dramatically, as described earlier in Market Concerns—Underwriting. Borrowers who take out an initial loan on unaffordable terms are generally unable to protect their interests in selecting or using further loans. After the first loan in a sequence has been consummated, the borrower is legally obligated to repay the debt. Consumers who lack the ability to repay that initial loan are faced with making a choice among competing injuries: default, delinquency, re-borrowing, or making unaffordable payments in an effort to avoid these other injuries while forgoing basic living expenses or major financial obligations in order to repay the loan. At this juncture, the consumer has no way out of the situation other than by deciding among competing harms. Having taken out the unaffordable first loan, borrowers generally will be not be able to protect their interests in selecting or using these kinds of loans. But the Bureau acknowledges that there are exceptions to this rule. For example, there may be consumers who encounter a windfall after taking out the loan but before repaying, such that none of the injuries occurs even though at the time the loan was originated the borrower would not have had an ability to repay.

[733] 12 U.S.C. 5531(d)(2)(B).

[734] Pew Charitable Trusts, *How Borrowers Choose and Repay Payday Loans*, at 20 (2013), *http://www.pewtrusts.org/~/media/assets/2013/02/20/pew_choosing_borrowing_payday_feb2013-(1).pdf.* It bears note that commenters correctly pointed out that the Bureau overstated the results of the Pew study by recounting a question as asking consumers whether they would take out a payday loan on ''any terms,'' rather than on ''almost any terms.'' Yet the Bureau does not find that this changes the fundamental point made in the Pew study.

In addition, the set of problems faced by consumers who have already taken out an unaffordable loan can result in increased costs to consumers—often very high and unexpected costs—that harm their interests. Sometimes these harms can occur in combination at different points in a single loan sequence, and the dynamics of how they interact with one another in their effects on the consumer can be complex. An unaffordable first loan can thus ensnare consumers in a cycle of debt with no reasonable means to extricate themselves without incurring further harm, rendering them unable to protect their interests in selecting or using these kinds of loans.

The Bureau disagrees with the commenters who suggested that its determination that consumers taking out these loans are very often unable to protect their interests relied on the proposition that taking out such a loan is inherently demonstrative of an inability to protect oneself. Instead, the Bureau based its conclusions on the evidence that borrowers of these loans often have an urgent need and do not perceive any other options, especially once they have taken out an unaffordable loan and must confront the types of injury that they face when the next unaffordable payment comes due on their loan. A stark example of how consumers are unable to protect their interests by avoiding the injuries to which they are exposed by the identified practice is the substantial number of consumers who re-borrow—many of them repeatedly, and then eventually default—an outcome that is not in the interests of such consumers and thus one from which they would protect themselves if they were able.

Other factors also hinder consumers in being able to protect their interests, such as the mismatch between how these loans are presented to consumers—as short-term, liquidity-enhancing products that they can use to bridge an income shortfall until their next paycheck—and how they are actually designed and intended by lenders, as part of their business model, to function in long sequences of re-borrowing for a substantial population of consumers. Lenders offer a product whose term and balloon-payment structure, along with the common use of leveraged payment mechanisms or vehicle security all tend to magnify the risks and harms to the borrower who fails to avoid the injuries that occur with extended loan sequences. Many consumers are unlikely to be able to protect their interests if they are extended an unaffordable loan and are rigidly confined within the limited options of repaying in full or re-borrowing, with no low-cost repayment or amortization options being extended. Consumers in this situation have the ability to make choices among the competing harms of default, delinquency, re-borrowing, or the collateral consequences of making unaffordable payments—though even the dynamics of these interrelated harms can become complex—but they are unable to protect their interests in avoiding those harms.

The Bureau thus takes strong exception to the comment that re-borrowing is simply a preference for many consumers. If each loan in an extended loan sequence was itself an initial loan, such that it could be entered into simply with a view to the considerations moving the borrower to decide to take out a new credit obligation, then the comment would have more force. But a large volume of covered short-term loans is not at all of that kind: Many of these loans are repeat re-borrowing that occurs in a setting where consumers generally face an unavoidable choice among different harms, including potentially severe harms from unaffordable loans and thus are unable to protect their interests.

Therefore, the Bureau concludes that though borrowers of covered loans are not irrational and may generally understand their basic terms, these facts does not put borrowers in a position to protect their interests, given the nature of these loans if they are made on unaffordable terms. The Bureau again finds the comment that consumers accurately estimate their duration of borrowing to be a misleading account of the evidence it relies on here and elsewhere, which in fact shows that consumers who are best able to predict accurately the duration of their borrowing are those who repay after little or no re-borrowing, and borrowers who end up in extended loan sequences are especially likely to err in estimating how long their loan sequences will last, though they are least able to protect their interests. Here as elsewhere, the key point is not that all consumers are unable to protect their interests, but that a substantial population of borrowers is unable to protect their interests in these circumstances.

The Bureau does not agree that the language in the Dodd-Frank Act should be construed in light of the very different language of the Uniform Consumer Sales Practices Act, which one commenter urged should be interpreted as synonymous. The Dodd-Frank Act does not limit the instances in which a lender can take advantage of consumers' inability to protect their interests to those where that inability is caused by infirmity, ignorance, illiteracy, or inability to understand the language of an agreement.

Nor does the Bureau agree with commenters that asserted, in effect, that to satisfy the inability to protect condition, the Bureau must show there is no possible way for consumers to protect their interests. Rather, the Bureau reasonably interprets ''inability to protect'' in a practical manner under the circumstances. Thus, as the Bureau explained in the proposal and above, consumers who take out a covered short-term loan in the circumstance of their urgent need for funds, lack of awareness or availability of better alternatives, and no time to shop for such alternatives, are unable to protect their interests in selecting and using such a loan.

The claim that no ''seller behavior'' occurs in making covered short-term loans that causes consumers to be unable to protect their interests is both incorrect and beside the point. First, it is incorrect because the identified practice of making these loans without reasonably assessing the borrower's ability to repay the loan according to its terms is itself seller behavior that causes some consumers—those who have been extended a loan—to be unable to protect their interests when the loan comes due and the consumer is unable to repay. Second, though seller behavior does bear on the ''takes unreasonable advantage'' prong of the definition and will be discussed further below, it has no relevance to the question of whether consumers lack the ability to protect their interests in the selection or use of the product.

The Bureau does not find anything in the comments that undermines the soundness of the Pew study, which demonstrates that, by their own admission, consumers who take out these loans often find themselves in circumstances where they are not able to protect their interests. Moreover, the Bureau disagrees with the commenter that interpreted the negative answer to the survey question as meaning that 63 percent of respondents would seek alternatives to payday loans if the terms were perceived by them as harmful. This is pure speculation. One could likewise speculate that a negative response meant that the respondent would not seek an alternative loan and address their dire situation in some other manner. Moreover, there are many other reasons why a substantial majority of consumers may have opted not to utilize a covered loan, including that some do not need a loan at all. In contrast, there is only one plausible

interpretation of an affirmative answer to the survey question, which is the one the Bureau has provided.

The suggestion that consumers are adequately protected from the risks and consequences of covered short-term loans by industry competition and State laws is inaccurate in light of the data and analysis the Bureau has presented about the substantial risks and costs of these loans, which exist despite industry competition and the existing provisions of State laws.

Having considered the comments submitted, the Bureau has concluded that many consumers are unable to protect their interests in selecting or using covered short-term loans made in accordance with the identified practice of failing to make a reasonable assessment of the borrower's ability to repay the loan according to its terms.

Practice Takes Unreasonable Advantage of Consumer Vulnerabilities

The Bureau's Proposal

Under section 1031(d)(2) of the Dodd-Frank Act, a practice is abusive if it takes unreasonable advantage of any of several consumer vulnerabilities, including lack of understanding of the material risks, costs, or conditions of such loans or inability to protect their interests in selecting or using these loans.[735] The Bureau stated in the proposal that the lender practice of making these loans without reasonably assessing that the consumer will have the ability to repay may take unreasonable advantage of both types of consumer vulnerabilities, though either would suffice to meet this prong of the abusiveness definition.

The Bureau recognized that in any transaction involving a consumer financial product or service there is likely to be some information asymmetry between the consumer and the financial institution. Often the financial institution will have superior bargaining power as well. Section 1031(d) of the Dodd-Frank Act does not prohibit financial institutions from taking advantage of their superior knowledge or bargaining power to maximize their profit. Indeed, in a market economy, market participants with such advantages generally pursue their self-interests. However, section 1031 of the Dodd-Frank Act makes plain that there comes a point at which a financial institution's conduct in leveraging its superior information or bargaining power becomes unreasonable advantage-taking and thus is abusive.[736]

The Dodd-Frank Act delegates to the Bureau the responsibility for determining when that line has been crossed. Several interrelated considerations led the Bureau to believe that the practice of making payday, vehicle title, and other covered short-term loans without regard to the ability to repay may cross the line and take unreasonable advantage of consumers' lack of understanding and inability to protect their interests.

First, the Bureau noted in the proposal that the practice of making loans without regard to the consumer's ability to repay the loan according to its terms stands in stark contrast to the practice of lenders in virtually every other credit market, and upends traditional notions of responsible lending enshrined in safety-and-soundness principles as well as in a number of other laws.[737] The general principle of credit markets is that the interests of lenders and borrowers are closely aligned: Lenders succeed (*i.e.,* profit) only when consumers succeed (*i.e.,* repay the loan according to its terms). For example, lenders in other markets, including other subprime lenders, typically do not make loans without first making an assessment that consumers have the capacity to repay the loan according to the loan terms. Indeed, ''capacity'' is one of the traditional three ''Cs'' of lending and is often embodied in tests that look at debt as a proportion of the consumer's income or at the consumer's residual income after repaying the debt.

In the markets for covered loans, however, lenders have built a business model that—unbeknownst to borrowers—*depends* on repeated re-borrowing, and thus on the consumer's lack of capacity to repay such loans without needing to re-borrow. As explained in the proposal and in part II and Market Concerns—Underwriting above, the costs of maintaining business operations (which include customer acquisition costs and overhead expenses) often exceed the revenue that could be generated from making individual short-term loans that would be repaid without re-borrowing. Thus, in this market the business model of the lenders depends on a substantial percentage of consumers not being able to repay their loans when they come due and, instead, taking out multiple additional loans in quick succession. Indeed, upwards of half of all payday and single-payment vehicle title loans are made to—and an even higher percentage of revenue is derived from—borrowers in a sequence of 10 loans or more. This dependency on revenue from long-term cycles of debt has been acknowledged by industry stakeholders. For example, as noted in Market Concerns—Underwriting, an attorney for a national trade association representing storefront payday lenders asserted in a letter to the Bureau that ''[i]n any large, mature payday loan portfolio, loans to repeat borrowers generally constitute between 70 and 90 percent of the portfolio, and for some lenders, even more.'' [738]

Also relevant in assessing whether the practice identified here—of making covered short-term loans without reasonably assessing the borrower's ability to repay the loan according to its terms—involves unreasonable advantage-taking is the vulnerability of the consumers seeking these types of loans. As discussed above in Market Concerns—Underwriting, payday and vehicle title borrowers—and by extension borrowers of similar covered short-term loans—generally have modest incomes, little or no savings, and have tried and failed to obtain other forms of credit. They generally turn to these products in times of need as a ''last resort,'' and when the loan comes due and threatens to take a large portion of their disposable income, their situation becomes, if anything, even more desperate.

In addition, the evidence described above in Market Concerns—Underwriting suggests that lenders engage in practices that further exacerbate the risks and costs to the interests of consumers. In addition to the identified practice of making such loans without any underwriting to gauge their affordability, lenders rely on the term and balloon-payment structure of these loans to yield the intended result of extensive re-borrowing. Lenders market these loans as being for use ''until next payday'' or to ''tide over'' consumers until they receive income, thus encouraging overly optimistic thinking about how the consumer is

[735] 12 U.S.C. 5531(d)(2).

[736] A covered person taking unreasonable advantage of one or more of the three consumer vulnerabilities identified in section 1031(d) of the Dodd-Frank Act in circumstances in which the covered person lacks such superior knowledge or bargaining power may still be engaging in an abusive act or practice.

[737] Dodd-Frank Act section 1411, codified at 15 U.S.C. 1639c(a)(1); CARD Act, 15 U.S.C. 1665e; HPML Rule, 73 FR 44522, 44543 (July 30, 2008); OCC Advisory Letter 2003–3, Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans (Feb. 21, 2003), available at *http://www.occ.gov/static/news-issuances/memos-advisory-letters/2003/advisory-letter-2003-3.pdf;* OCC, Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 78 FR 70624 (Nov. 26, 2013); FDIC Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 78 FR 70552 (Nov. 26, 2013).

[738] *See* Miller letter, cited in footnote 53, *supra.*

likely to use the product. Lenders also make this re-borrowing option easy and salient to consumers in comparison to repayment of the full loan principal. Moreover, lenders typically limit the options available to borrowers by not offering or not encouraging borrowers to make use of alternatives that would reduce the outstanding principal over the course of a loan sequence, which would help consumers extricate themselves from the cycle of indebtedness more quickly and reduce their costs from re-borrowing. Storefront lenders, in particular, encourage extended loan sequences by encouraging or requiring consumers to repay in person in an effort to frame the consumer's experience in such a way to promote re-borrowing. Lenders often give financial incentives to employees to produce this outcome and thus reward them for maximizing loan volume.

Comments Received

One trade association commented that lenders are allowed to take advantage of their superior knowledge and bargaining power and doing so is not contrary to law. In their view, the Bureau's perspective that the re-borrowing model undergirding the market for covered loans stands in contrast to other markets is attributable to the restrictions imposed by State laws rather than by borrower needs and expectations. They also maintained that lenders have little incentive to take advantage of borrowers who they hope will return to them for subsequent loans after repaying those which are outstanding.

By contrast, although consumer groups agreed with the general proposition that lenders can take advantage of superior knowledge and bargaining power, they emphasized that the proposed rule would prevent lenders from taking *unreasonable* advantage of consumers. They also noted that the financial vulnerability of many consumers who are likely to seek covered short-term loans is relevant to this inquiry.

One commenter noted that a lender cannot take unreasonable advantage of a borrower through ''acts of omission,'' such as by failing to ask for pay stubs or other verification evidence or failing to check with consumer reporting agencies for information about the borrower's credit history. Others asserted that an unreasonable advantage is not taken when lenders make loans to consumers with damaged credit or in need of cash, or advertise their loans as ''quick'' or ''speedy'' to cater to borrower needs, or offer terms that are readily and easily understood by borrowers. Some argued that the rule simply substitutes the Bureau's judgment and risk tolerance for that of consumers. Still others argued that a lender cannot take unreasonable advantage of a consumer when the benefits of a loan exceed its costs.

The Final Rule

The Bureau now concludes, after consideration of the comments received, that when lenders make covered short-term loans without reasonably assessing whether the borrower has the ability to repay the loan according to its terms, lenders take unreasonable advantage of consumers' lack of understanding of the material risks, costs, and conditions of these loans, and also take advantage of their inability to protect their interests in selecting or using these loans.

The Bureau does not dispute the proposition that lenders may take reasonable advantage of their superior knowledge and bargaining power. Nonetheless, in the proposal the Bureau preliminarily found that many lenders who make such loans have crossed the threshold to take impermissible and unreasonable advantage of those to whom they lend. The suggestion that these lenders have little incentive to take advantage of borrowers who are likely to be repeat customers is unfounded—there is an enormous difference between a scenario in which a borrower successfully repays a loan and later returns to apply for another loan (*i.e.,* a true ''repeat customer''), as compared to a scenario in which a borrower is forced to re-borrow again and again to cope with the problems posed by an unaffordable loan. Given that such a large majority of covered loans (over 80 percent) consist of loans procured through re-borrowing, and given that this is the core of the business model, it is evident that lenders have very significant incentives to take advantage of consumers' lack of understanding of the material risks and their inability to protect themselves in the choice of the product. And once a consumer has taken a loan, lenders have at least equally significant incentives to take advantage of their inability to protect themselves with respect to the choice of the next loan in order to encourage re-borrowing. The factual background for the core elements of the Bureau's conclusion that the ''taking unreasonable advantage'' prong is met in these circumstances have been discussed at length in the section on unfairness and above in Market Concerns—Underwriting. For the sake of convenience, however, much of that analysis will be restated here.

First, many consumers may not be able to protect their interests or to understand either the likelihood or the extent of the risks and costs of loans made in accordance with the identified practice of failing to make a reasonable assessment of the borrower's ability to repay the loan according to its terms. In the face of these vulnerabilities, the general practice in this market is that lenders nonetheless make it their practice not to assess the borrower's ability to repay. As a result, they typically have a significant volume of loans that are unaffordable from the outset in accordance with their terms.

As discussed above in part II and in Market Concerns—Underwriting, this approach is in fact the core of the business model for most such lenders and reflects a deliberate decision on their part. Nothing in State or Federal law prohibits these lenders from engaging in meaningful underwriting on the loans they make. In this respect, the direction taken in this market is, in fact, out of step with traditional lender-borrower relationships in other loan markets, where the success of the lender is intertwined with the success of the borrower and determinations about loans that will be offered and accepted are preceded by underwriting assessments and determinations of this kind. Instead, the profitability of these lenders is built on, and depends upon, repeat re-borrowing by consumers.

This model of lending premised on very minimal underwriting—often limited to screening only for potential fraud—is exacerbated by another common practice of these lenders once the initial loan, often unaffordable according to its terms, has been made. At this point, these lenders typically provide the borrower with few or no repayment options other than either full repayment all at once or continued re-borrowing (which incurs another set of fees but provides no reduction of the loan principal). The array of repayment options provided in many other lending markets are virtually nonexistent here. Low-cost repayment or amortization options are typically not presented at all or are minimized or obscured in various ways. This again is a deliberate choice made by lenders in this market, not compelled by either State or Federal law. Indeed, the Bureau's close experience over the past five years from exercising its supervision and enforcement authority over this market indicates that, even when such options are supposed to be afforded under provisions of some State laws, lenders often find ways to mask or obscure them or otherwise impede borrowers from availing themselves of them. Indeed,

even consumers who are delinquent and have further demonstrated their inability to repay the loan according to its terms are encouraged to re-borrow, which leads many consumers to engage in extensive re-borrowing even where they eventually wind up in default. For many re-borrowers, the upshot is that they end up making repeated payments that become increasingly unaffordable in the aggregate over time, even though a substantial number of them still will sustain the harms associated with default.

The Bureau also has observed other lender conduct that greatly increases the risks and harms to consumers in these circumstances. Covered short-term loans, in particular, involve a basic mismatch between how they appear to function as short-term credit and how they are actually designed and intended by lenders, as part of their business model, to function in long sequences of re-borrowing for a substantial population of consumers. Lenders present these loans as short-term, liquidity-enhancing products that consumers can use to bridge an income shortfall until their next paycheck. But in practice, across the universe of borrowers, these loans often do not operate that way. Lenders have designed the term of the loan, its balloon-payment structure, and the common use of leveraged payment mechanisms, including vehicle security, so as to magnify the risks and harms to the borrower. The disparity between how these loans appear to function and how they actually function increases the difficulties that consumers experience with these loans.

Once consumers have taken out a loan, they have no practical means to avoid the injuries that will occur if the loan proves to be unaffordable. Consumers who obtain a covered short-term loan that is beyond their ability to repay confront the harms of default, delinquency, re-borrowing, or the collateral consequences of making unaffordable payments that would cause them to forgo basic living expenses or major financial obligations. They can make choices among these competing harms but not avoid them. And as discussed above in Market Concerns—Underwriting, and below in Market Concerns—Payments, lenders engage in other practices that further increase the likelihood and degree of harm, for instance by encouraging additional re-borrowing and its attendant costs even for consumers who are already experiencing substantial difficulties as they are mired in extended loan sequences, and by engaging in payment collection practices that are likely to cause consumers to incur substantial additional fees beyond what they already owe on the terms of the existing loan. Further adverse effects can include expensive bank fees, the potential loss of their bank account, aggressive debt collection efforts, and, with title loans, the risks and costs of having their vehicle repossessed, causing them to lose their transportation to work or conduct their ordinary personal affairs.

As discussed earlier, this practice of making loans without regard to the consumer's ability to repay contrasts sharply with the regular practice of lenders in virtually every other credit market, and upends traditional notions of responsible lending enshrined in safety-and-soundness principles as well as in a number of other laws.[739] The general principle of credit markets is that the interests of lenders and borrowers are aligned and lenders benefit only when their customers are successful in repaying their loans in accordance with the terms. For this reason, lenders in other markets, including other subprime lenders, typically do not make loans without first making an assessment that consumers have the capacity to repay the loan according to the loan terms.

Yet the set of effects found in the market for covered short-term loans has the cycle of indebtedness at its core, as intended and effectuated by lenders in this market. And it affects a large segment of borrowers: As described above in Market Concerns—Underwriting, half of all storefront payday loan sequences contain at least four loans.[740] One-third contain seven loans or more, by which point consumers will have paid charges equal to 100 percent of the original amount borrowed and still owe the full amount of the principal.[741] Almost one-quarter of loan sequences contain at least 10 loans in a row, and looking just at loans made to borrowers who are paid weekly, biweekly, or semi-monthly, more than one-fifth (21 percent) of those loans are in sequences consisting of at least *20* loans.[742] For loans made to borrowers who are paid monthly, almost half (46 percent) of the loans are in sequences consisting of at least 10 loans.[743] The figures for title loans are similar, and also are premised on a business model built around repeated re-borrowing: 56 percent of vehicle title loan sequences consist of more than three loans, 36 percent consist of at least seven loans, and almost one quarter—23 percent—consist of more than 10 loans.[744]

Regardless of what the outer bounds of ''taking unreasonable advantage'' may be, the Bureau concludes that the ways lenders have structured their lending practices here fall well within any reasonable definition of that concept. Here the identified practice of making loans without reasonably assessing the borrower's ability to repay the loan according to its terms leads to unaffordable loans and all the harms that follow upon them. At a minimum, lenders take unreasonable advantage of borrowers when they develop lending practices that are atypical in the broader consumer financial marketplace, take advantage of particular consumer vulnerabilities, rely on a business model that is directly inconsistent with the manner in which the product is marketed to consumers, and eliminate or sharply limit feasible conditions on the offering of the product (such as underwriting and amortization, for example) that would reduce or mitigate harm for a substantial population of consumers. The Bureau now affirms that lenders take such unreasonable advantage in circumstances where they make covered short-term loans or covered longer-term balloon-payment loans without reasonably assessing the consumer's ability to repay the loan according to its terms.

The Bureau does not disagree with the commenters who noted that lenders do not take unreasonable advantage of consumers when they make loans to consumers with damaged credit or in need of cash, or they advertise their loans as quick or speedy to cater to borrower needs, or they offer terms that are readily and easily understood by borrowers. Neither in isolation nor taken together do these particular acts or practices constitute abusive behavior. The Bureau concludes instead that, by engaging in the identified practice, lenders take unreasonable advantage of consumer vulnerabilities.

Moreover, the rule does not substitute the Bureau's judgment and risk tolerance for those of consumers. Instead, it simply seeks to assure that lenders do not take unreasonable

[739] Dodd-Frank Act section 1411, codified at 15 U.S.C. 1639c(a)(1); CARD Act, 15 U.S.C. 1665e; HPML Rule, 73 FR 44522, 44543 (July 30, 2008); OCC Advisory Letter 2003–3, Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans (Feb. 21, 2003), available at *http://www.occ.gov/static/news-issuances/memos-advisory-letters/2003/advisory-letter-2003-3.pdf;* OCC, Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 78 FR 70624 (Nov. 26, 2013); FDIC Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 78 FR 70552 (Nov. 26, 2013).

[740] CFPB Report on Supplemental Findings.

[741] *Id.*

[742] *Id.*

[743] *Id.*

[744] *Id.*

advantage of consumers' lack of understanding or inability to protect their interests through use of the identified practice. Even well-educated and sophisticated consumers can lack understanding of a loan product whose structural effects are complex and opaque, leading many of them to the negative consequences that flow from an extended cycle of indebtedness.

The Bureau disagrees with the commenters who noted that a lender cannot take unreasonable advantage of a borrower by failing to underwrite appropriately, such as by failing to ask for pay stubs or other verification evidence or failing to check with consumer reporting agencies for information about the borrower's credit history. The thrust of these comments is that the lender cannot ''take unreasonable advantage'' by seeking to reduce burdens and make life easier for consumers and, in particular, cannot do so by ''acts of omission.'' On the contrary, the Bureau has shown that lenders utilize these and related practices to position a substantial population of borrowers to take out unaffordable loans that lead directly to debt cycles of long-term re-borrowing. And as the law has long recognized in various contexts, there is no material distinction to be made between acts of omission and acts of commission, particularly here where these aspects of the identified practice take unreasonable advantage of consumer vulnerabilities.

With respect to the comments that a lender cannot take unreasonable advantage of a consumer when the benefits of a loan exceed its costs, as stated above in the unfairness section, the Bureau has concluded that the countervailing benefits of the *identified practice,* rather than of the product itself, do not outweigh the substantial injury. In determining whether the lender takes unreasonable advantage, the Bureau's focus is not on the variable experiences of the entire heterogeneous borrower universe, but rather on the adverse effects that the identified practice has on a substantial population of consumers where lenders are taking unreasonable advantage of their vulnerabilities by making unaffordable loans to them. Thus, for the sake of argument, even if it were true that a practice that is net beneficial for consumers cannot be found to take unreasonable advantage, that would not stand as an impediment to finding the practice at issue here to be abusive. Further, nothing in the final rule prevents any lender from offering loans whose benefits exceed their costs, regardless of the specific population for which that judgment is being made, as long as the lender does not engage in the identified practice of failing to make a reasonable assessment of ability to repay when making such loans.

In sum, the Bureau concludes that where a borrower lacks understanding of the material risks and costs of covered short-term loans, or where the borrower lacks an ability to protect his own interests by using or selecting these loans, the lender takes unreasonable advantage of these consumer vulnerabilities by making a covered short-term loan without reasonably assessing the borrower's ability to repay the loan according to its terms, where the natural result of that practice is that a substantial number of consumers will be caught up in extended loan sequences, with the adverse consequences that have been amply canvassed above and in Market Concerns—Underwriting. The Bureau does not take issue with the comment that it should take into consideration the array of State laws governing covered short-term loans. The Bureau has carefully considered the effects of those laws and concludes that the laws in those States that authorize such loans do not adequately protect consumers, because the negative effects for consumers that are described at length in Market Concerns—Underwriting continue to exist despite those State laws.

Having considered the comments submitted, the Bureau has concluded that there is substantial evidence and a sufficient basis to determine that the identified practice of making covered short-term and longer-term balloon-payment loans, without reasonably assessing the borrower's ability to repay the loan according to its terms, takes unreasonable advantage either of the borrower's lack of understanding of the material risks and costs of these loans or of the borrower's inability to protect his own interests by using or selecting these loans.

Section 1041.5 Ability-to-Repay Determination Required

General Approach in Proposed Rule

As discussed in the section-by-section analysis of § 1041.4 above, the Bureau tentatively concluded in the proposed rule that it is an unfair and abusive act or practice to make a covered short-term loan without reasonably determining that the consumer will have the ability to repay the loan. Section 1031(b) of the Dodd-Frank Act provides that the Bureau's rules may include requirements for the purpose of preventing unfair or abusive acts or practices. The Bureau thus proposed to prevent the abusive and unfair practice by including in proposed §§ 1041.5 and 1041.6 certain minimum requirements for how a lender may reasonably determine that a consumer has the ability to repay a covered short-term loan.

Proposed § 1041.5 set forth the prohibition against making a covered short-term loan (other than a loan that satisfies the protective conditions in proposed § 1041.7) without first making a reasonable determination that the consumer will have the ability to repay the covered short term loan. It also, in combination with proposed § 1041.6, specified the minimum elements of a baseline methodology that would be required for determining a consumer's ability to repay, using a residual-income analysis and an assessment of the consumer's prior borrowing history. In particular, proposed § 1041.6 would have required that a presumption of unaffordability applied if a consumer sought a new covered short-term loan within 30 days of a prior outstanding covered short-term loan, and applied a mandatory 30-day cooling-off period after the third such loan in a sequence.

The Bureau proposed similar ability-to-repay requirements for covered longer-term loans, including covered longer-term balloon-payment loans, in proposed §§ 1041.9 and 1041.10. Given the parallel nature of proposed §§ 1041.5 and 1041.6 for covered short-term loans and proposed §§ 1041.9 and 1041.10 for covered longer-term loans, the Bureau will generally refer just to proposed §§ 1041.5 and 1041.6 to describe the proposed ability-to-repay framework, but will note where proposed §§ 1041.9 and 1041.10 differed from the framework for covered short-term loans.

The baseline methodology in proposed § 1041.5 rested on a residual-income analysis—that is, an analysis of whether, given the consumer's projected income and major financial obligations, the consumer will have sufficient remaining (*i.e.,* residual) income to cover the payments on the proposed loan and still meet basic living expenses. The proposal also would have required lenders to track the timing of inflows and outflows of funds to determine whether there would be periods of shortfall that might prompt consumers to re-borrow soon after a previous covered short-term loan. In the proposal, the Bureau recognized that, in other markets and under other regulatory regimes, financial capacity is more typically measured by establishing a maximum debt-to-income (DTI)

ratio.[745] DTI tests generally rest on the assumption that as long as a consumer's debt burden does not exceed a certain threshold percentage of the consumer's income, the remaining share of income will be sufficient for a consumer to be able to meet non-debt obligations and other expenses. By its nature, DTI must be calculated by dividing total income and total expenses for the relevant time period, and does not permit the tracking of a consumer's individual income inflows and major financial obligation outflows on a continuous basis over a period of time.

For low- and moderate-income consumers, the Bureau expressed concern in the proposal that a DTI ratio would not be sufficiently sensitive to determine re-borrowing risk in the markets for covered loans. In particular, the Bureau noted that a DTI ratio that might seem quite reasonable for the ''average'' consumer could be quite unmanageable for a consumer at the lower end of the income spectrum and the higher end of the debt burden range.[746] Ultimately, the Bureau posited in the proposal, whether a particular loan is affordable will depend upon how much money the consumer will have left after paying existing obligations and whether that amount is sufficient to cover the proposed new obligation while still meeting basic living expenses.

The Bureau additionally stated in the proposal that, in contrast with other markets in which there are long-established norms for DTI levels that are consistent with sustainable indebtedness, the Bureau did not believe that there existed analogous norms for sustainable DTI levels for consumers taking covered short-term loans. The Bureau stated in the proposal that it thus believed that residual income was a more direct test of ability to repay than DTI and a more appropriate test with respect to the types of products covered in this rulemaking and the types of consumers to whom these loans are made.

The Bureau emphasized in the proposal that it had attempted to design the residual income methodology specified in proposed §§ 1041.5 and 1041.6 to ensure that ability-to-repay determinations can be made through scalable underwriting models. While it was proposing that the most critical inputs into the determination rest on documentation, the Bureau noted that its proposed methodology would allow for various means of documenting major financial obligations and also permit alternatives to documentation where appropriate. The Bureau recognized in particular that rent often cannot be readily documented and therefore would have allowed for estimation of rental expense based on the housing expenses of consumers with households in the locality of the consumer. The Bureau's proposed methodology also would not have mandated verification or detailed analysis of consumers' expenditures for basic living expenses. The Bureau stated in the proposal that it believed that such detailed analysis may not be the only method to prevent unaffordable loans and was concerned that it would substantially increase costs to lenders and consumers.

Finally, the Bureau emphasized that the proposed methodology would not dictate a formulaic answer to whether, in a particular case, a consumer's residual income is sufficient to make a particular loan affordable. For instance, the Bureau did not propose a specific minimum dollar threshold for adequate residual income. Instead, the proposed methodology would have allowed lenders to exercise discretion in arriving at a reasonable determination with respect to that question.

Proposed § 1041.5 outlined the methodology for assessing the consumer's residual income as part of the assessment of ability to repay. Proposed § 1041.5(a) set forth definitions used throughout proposed §§ 1041.5 and 1041.6.

Proposed § 1041.5(b) set forth the proposed requirement for a lender to determine that a consumer will have the ability to repay a covered short-term loan and set forth minimum standards for a reasonable determination that a consumer will have the ability to repay such a covered loan. In the standards in proposed § 1041.5(b), the Bureau generally proposed to require a lender to determine that the consumer's income will be sufficient for the consumer to make payments under a covered short-term loan while accounting for the consumer's payments for basic living expenses and major financial obligations.

Proposed § 1041.5(c) set forth standards for verification and projections of a consumer's income and major financial obligations on which the lender would be required to base its determination under proposed § 1041.5.

Proposed § 1041.6 would have augmented the basic ability-to-repay determination required by proposed § 1041.5 in circumstances in which the consumer's recent borrowing history or current difficulty in repaying an outstanding loan provides important evidence with respect to the consumer's financial capacity to afford a new covered short-term loan. For example, proposed § 1041.6 would have imposed a presumption of unaffordability in various circumstances suggesting that a consumer lacked the ability to repay a current or recent loan, so that a lender would have been permitted to extend a new covered short-term loan under proposed § 1041.5 only if there was particular evidence of a sufficient improvement in financial capacity. In addition, where a consumer took out a sequence of three covered short-term loans, each within 30 days of the prior outstanding loan, proposed § 1041.6 would have imposed a mandatory 30-day cooling-off period. The Bureau believed that these requirements would help consumers to avoid getting stuck in long cycles of debt. See section-by-section analysis for § 1041.5(d), below, for further discussion of proposed § 1041.6.

The Bureau explained in the proposal that as an alternative to the proposed ability-to-repay requirement, it had considered whether lenders should be required to provide disclosures to consumers warning them of the costs and risks of re-borrowing, default, and collateral harms from unaffordable payments associated with taking out covered short-term loans. However, the Bureau stated in the proposal that it believed that such a disclosure remedy would be significantly less effective in preventing the identified consumer harms, for three reasons. First, the Bureau stated that disclosures would not address the underlying incentives in the market for lenders to encourage consumers to re-borrow and take out long sequences of loans. As discussed in the proposal's section on Market Concerns—Short-Term Loans, the prevailing business model involves lenders deriving a very high percentage of their revenues from extended loan sequences. The Bureau stated in the proposal that while enhanced

[745] The Bureau noted in the proposal that, for example, DTI is an important component of the Bureau's ability-to-repay rule for mortgages in 12 CFR 1026.43. It is a factor that a creditor must consider in determining a consumer's ability to repay and also is a component of the standards that a residential mortgage loan must meet to be a qualified mortgage under that rule.

[746] The Bureau stated in the proposal that, for example, under the Bureau's ability-to-repay requirements for residential mortgage loans, a qualified mortgage results in a DTI ratio of 43 percent or less. But for a consumer with a DTI ratio of 43 percent and low income, the 57 percent of income not consumed by payments under debt obligations is unlikely to indicate the same capacity to handle a new loan payment of a given dollar amount, compared to consumers with the same DTI and higher income. The Bureau further stated in the proposal that this is especially true if the low-income consumer also faces significant non-debt expenses, such as high rent payments, that may consume significant portions of the remaining 57 percent of her income.

disclosures would provide additional information to consumers, the loans would remain unaffordable for consumers, lenders would have no greater incentive to underwrite more rigorously, and lenders would remain dependent for revenue on extended loan sequences of repeat re-borrowing by many consumers.

Second, the Bureau stated in the proposal that empirical evidence had led it to believe that disclosures would have only modest impacts on consumer borrowing patterns for short-term loans generally and negligible impacts on whether consumers re-borrow. In the proposal, the Bureau discussed evidence from a field trial of several disclosures designed specifically to warn of the risks of re-borrowing and the costs of re-borrowing that showed that these disclosures had a marginal effect on the total volume of payday borrowing.[747] Further, the Bureau discussed in the proposal its analysis of the impact of a change in Texas law (effective January 1, 2012) requiring payday lenders and short-term vehicle title lenders to provide a new disclosure to prospective consumers before each payday loan transaction.[748] The Bureau observed in the proposal that, using the Bureau's supervisory data, it had found that, with respect to payday loan transactions, there was an overall 13 percent decline in loan volume in Texas after the disclosure requirement went into effect, relative to the loan volume changes for the study period in comparison States.[749] As discussed in the proposal, the Bureau noted that its analysis of the impacts of the Texas disclosures also showed that the probability of re-borrowing on a payday loan only declined by approximately 2 percent once the disclosure was put in place.[750]

The Bureau stated in the proposal that this finding indicates that high levels of re-borrowing and long sequences of payday loans remain a significant source of consumer harm even with a disclosure regime in place.[751] Further, the Bureau stated in the proposal that, as discussed in the proposal's section on Market Concerns—Short-Term Loans, the Bureau has observed that consumers have a very high probability of winding up in very long loan sequences once they have taken out only a few loans in a row. The Bureau stated in the proposal that the extremely high likelihood that a consumer will wind up in a long-term debt cycle after taking out only a few loans contrasts sharply with the nearly negligible impact on consumer re-borrowing patterns of a required disclosure, which the Bureau viewed as providing further evidence that disclosures tend to be ineffective in addressing what the Bureau considered to be the core harms to consumers in this credit market.

Third, the Bureau stated in the proposal that it believed that behavioral factors made it more likely that disclosures to consumers taking out covered short-term loans would be ineffective in warning consumers of the risks and preventing the harms that the Bureau sought to address with the proposal. The Bureau stated in the proposal that due to general optimism bias and the potential for tunneling in their decision-making, as discussed in more detail in the proposal's section on Market Concerns—Short-Term Loans, consumers are likely to dismiss warnings of possible negative outcomes as not applying to them, and not to focus on disclosures of the possible harms associated with outcomes—re-borrowing and default—that they do not anticipate experiencing themselves. The Bureau stated in the proposal that to the extent consumers have thought about the likelihood that they themselves will re-borrow or default (or both) on a loan, a general warning about how often people re-borrow or default (or both) is unlikely to cause them to modify their approach by revising their own expectations about what the chances are that they themselves will re-borrow or default (or both).

Legal Authority

As noted above in the section-by-section analysis for § 1041.4, the Bureau has authority to prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.[752] The Bureau has done so in § 1041.4. Additionally, the Bureau may include in such rules requirements for the purpose of preventing such acts or practices.[753] It is based on that authority that the Bureau issues § 1041.5.

A number of commenters, including several industry trade associations and lenders, challenged the Bureau's authority to enact a prescriptive ability-to-repay requirement because Congress did not specifically authorize such a requirement with respect to payday loans and other loans the Bureau proposed to cover, in contrast to the mortgage and credit card markets. Consumer advocates and some other commenters, however, argued that the Bureau had ample authority to impose the proposed ability-to-repay requirement under the UDAAP authority granted to the Bureau under the Dodd-Frank Act. These comments are addressed in the section-by-section analysis for § 1041.4, above (''Identification of Unfair and Abusive Practice—Covered Loans'').

More generally, the Bureau received a number of comments asserting that its proposed rule had exceeded its authority to prevent the unfair and abusive practice identified in § 1041.4, by prescribing more detailed underwriting requirements than would be required to avoid engaging in the identified unfair or abusive practice.

By its terms, section 1031 of the Dodd-Frank Act authorizes the Bureau not only to ''prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive or abusive acts of practices'' but also provides that ''Rules under this section may include requirements for the purpose of preventing such acts or practices.'' This latter phrase would be surplusage if the Bureau's rulemaking authority were as circumscribed as these commenters suggest. Furthermore, as discussed above in part IV, courts have long held that rulemakings to remedy and prevent unfair acts and practices may include preventative requirements so long as those requirements have a ''reasonable relation to the unlawful practices found to exist.'' [754] The Bureau believes that the final underwriting requirements as set forth in § 1041.5 are reasonably related to, and crafted adequately to prevent, the abusive and unfair practice identified in § 1041.4. The unfair and abusive practice is making covered short-term and longer-term balloon-payment loans without reasonably determining that consumers will have an ability to repay the loans according to their terms. Section 1041.5 sets forth a balanced approach, providing flexibility in some areas and

[747] Marianne Bertrand and Adair Morse, ''Information Disclosure, Cognitive Biases and Payday Borrowing,'' 66 J. of Fin. 1865, at 1866 (2011).

[748] *See* CFPB Report on Supplemental Findings, at Chapter 3.

[749] *See* CFPB Report on Supplemental Findings, at 73.

[750] *See* CFPB Report on Supplemental Findings, 78–79.

[751] The Bureau stated in the proposal that the empirical data suggests that the modest loan volume reductions are primarily attributable to reductions in originations; once a consumer has taken out the initial loan, the disclosure has very little impact on re-borrowing.

[752] 12 U.S.C. 5531(b).

[753] *Id.*

[754] *AFSA,* 767 F.2d at 988.

bright-line guidance in others, that is aimed at ensuring that lenders account for net income, major financial obligations, and basic living expenses, and make a reasonable determination about whether a consumer will be able to repay the loan according to its terms, using those variables in a residual income or debt-to-income ratio calculation. And other provisions in § 1041.5, such as the cooling-off periods in paragraph (d), are likewise reasonably related to the identified practice in that they temporarily prohibit continued lending to consumers who have already received a sequence of three covered short-term loans or covered longer-term balloon-payment loans in quick succession, to both protect them from further unaffordable loans and potentially enable them to escape from a cycle of indebtedness.

General Comments Received

In this general section, before describing the details of proposed § 1041.5, comments, and changes in the final rule on specific paragraphs of § 1041.5 below, the Bureau is addressing comments about the Bureau's general proposed approach, including the overall burden of the proposed ability-to-repay requirements and general methodology proposed, the specificity of the rule, the comparison of the proposed approach to underwriting in other markets, the predictiveness of residual income methodologies, the decision not to adopt a disclosure-only remedy to the identified unfair and abusive practice, the decision not to permit a payment-to-income underwriting model and other alternatives suggested by commenters, and assertions that the rule will conflict with the interests of fair lending law.

The Bureau received a significant number of comments from a variety of stakeholders, including lenders of different types and sizes, industry trade associations, some service providers, some State and local elected officials, the SBA Office of Advocacy, a joint letter from five Members of Congress,[755] and others asserting that the Bureau's proposed ability-to-repay regime would, in the aggregate, be too burdensome, rigid, and complicated. One commenter stated that one of the chief virtues of payday and other covered loans is their lack of underwriting, and if underwriting were required, it is unlikely that businesses would make nearly as many covered short-term loans. Many commenters believed that the burden would be so high that it would significantly reduce access to credit, including even to consumers who do have the ability to repay. One commenter stated that some in the industry have estimated an increase in cost for each loan of about $30, and several commenters asserted that lenders would need to increase prices to cover the additional costs. Others argued that while the more burdensome underwriting requirements proposed in the rule may be common for banks making other types of loans; they would be new and quite difficult for non-bank lenders to implement. Relatedly, some commenters noted that the small balances of covered loans, particularly covered short-term loans which often are $500 or less, might not allow lenders to offset the additional costs required to comply with the underwriting requirements. Some commenters suggested that only large lenders would be able to survive the additional compliance cost. Several commenters, including a SER and five Members of Congress, cited a presentation by representatives of four specialty consumer reporting agencies which appeared to suggest that the proposed ability-to-repay requirements would disqualify any consumer who earned under $40,000 per year, asserting that would effectively result in denial of credit access to 140 million Americans.[756]

Some commenters also suggested that the burdensome and complex underwriting requirements would significantly increase the time needed to underwrite a loan, and did not agree with the Bureau that lenders would be able to automate sufficiently to keep origination times short. The Bureau received a number of estimates on the time it would take to originate a loan. For example, one commenter asserted that it would take more than 10 minutes. Another said it would take 15–20 minutes to originate a loan manually. One estimated that it would increase transaction time by 15–45 minutes, while another said it would increase the time by 6–25 minutes. Another commenter wrote that origination already takes 20 minutes, and the new documentation requirements would add to that timing. And one trade association asserted that it would take three hours.

Many of these commenters specifically focused on the Bureau's proposal to require a residual income underwriting requirement, which they argued was overly burdensome and prescriptive. Commenters argued that prescribing such an underwriting methodology would be a novel approach that is not common in other credit markets, and would be inconsistent with the general merits of preserving flexibility in underwriting models. Several commenters cited the preamble discussion to the Bureau's final ability-to-repay rule for mortgages as evidence of its novelty as an underwriting methodology.[757] Several commenters asserted that the proposed residual income methodology would not prevent the default and re-borrowing injuries identified in the Bureau's analysis, relying on studies that the commenters believed showed that residual income is not predictive of such outcomes.

Commenters also stated that they believed that the proposed underwriting requirements were not specific enough with regard to such issues as estimates for basic living expenses, the general reasonableness standard for lenders' ability-to-repay analyses, the lack of a numeric threshold or other guidance for what constitutes sufficient residual income, and what kinds of loan performance patterns would be evidence that a lender's ability-to-repay analysis was inadequate. These commenters recognized that the Bureau had attempted to leave some amount of flexibility and discretion to lenders, but argued that more clarity was needed to reduce compliance risk associated with choices made in the ''grey area.'' One commenter noted that the underwriting model for mortgage loans from the U.S. Department of Veterans Affairs involves a more prescriptive methodology based on residual income that sets forth

[755] In their letter, the Members made several critiques of the proposed ability-to-repay requirements along the lines of those made by other commenters as discussed below—that the proposed requirements would have been too complex, burdensome, and prescriptive; that they did not align with the underwriting rules in other credit markets; and that they would potentially constrict access to credit. However, unlike many of the other commenters who made similar arguments, the Members expressed general support for the proposal and expressed particular appreciation for the Bureau's approach to addressing long-term re-borrowing.

[756] A comment letter by a SER attached the presentation from the specialty consumer reporting agency officials. The Bureau did not receive a copy of this presentation directly from the specialty consumer reporting agencies, three of whom submitted individual comment letters. Nor did any of them make the specific negative claims about the impacts of the proposal as had been made in the slides, although one indirectly alluded to similar statistics cited in the presentation. The presentation is undated, although it appears from the context to have been developed during the comment period.

[757] Commenters cited a passage of the preamble from the mortgage ability-to-repay rule where the Bureau wrote that, ''Except for one small creditor and the [U.S. Department of Veterans Affairs], the Bureau is not aware of any creditors that routinely use residual income for underwriting, other than as a compensating factor.'' 78 FR 6407, 6486 (Jan. 30, 2013).

precise dollar figures for required residual income based on various variables,[758] and that if a residual income approach was going to be adopted, the commenter believed this was a more workable model.

Relatedly, a number of commenters, including several lenders and industry trade associations, suggested the Bureau permit use of a debt-to-income ratio as an alternative to residual income, citing the Bureau's mortgage and credit card regulations (12 CFR 1026.43 and 12 CFR 1026.51, respectively) as precedent for that approach. They also discussed how the DTI ratio is a more familiar and time-tested concept for lenders across other credit markets. Some of these commenters argued that the Bureau should permit, instead of require, a residual income underwriting model, and also allow lenders to use a more traditional method premised on a DTI ratio.

A number of commenters, including several lenders and industry trade associations, argued that the proposed rule set forth ability-to-repay requirements that were more rigorous and burdensome than that set forth in the Bureau's ability-to-pay rules for credit cards (12 CFR 1026.51) and ability-to-repay rules for mortgages (12 CFR 1026.43), and asserted that the inconsistency was unwarranted. The Bureau's regulations under the CARD Act generally require underwriting that considers the consumer's ability to make the required minimum periodic payments under the terms of the account based on the consumer's income or assets and the consumer's current obligations; provides that card issuers must establish and maintain reasonable written policies and procedures to consider the consumer's ability to make the required minimum payments; and provides that reasonable policies and procedures include consideration of at least one of the following: The ratio of debt obligations to income; the ratio of debt obligations to assets; or the income the consumer will have after paying debt obligations.[759] The Bureau's regulation on mortgage underwriting requires that a lender of covered transactions must make a reasonable and good faith determination at or before consummation that the consumer will have a reasonable ability to repay the loan according to its terms, and allows lenders to use either the consumer's monthly debt-to-income ratio or residual income in making that determination.[760] These commenters argued that the Bureau's underwriting regulations for these other markets were more flexible than the regulation proposed here. Some commenters believed it was illogical and unjustified to impose more prescriptive and restrictive underwriting and verification requirements for small-dollar loans when the Bureau imposes, in their view, less prescriptive and restrictive underwriting and verification requirements for other loans of much larger size (*e.g.,* mortgages). Several commenters noted that the proposal would require a determination of the consumer's ability to repay the entire principal amount while the credit card rules require a determination regarding the consumer's ability to make minimum payments, stating or implying that this was a difference in legal standards for ability to repay and questioning the basis for it; one commenter suggested the Bureau was imposing a different standard because it did not ''trust'' consumers in this market to make decisions for themselves. On a similar note, some commenters stated that the underwriting requirements would be greater than those in the student loan and automobile loan (for purchase money) markets.

Other commenters, including consumer advocates and at least some industry stakeholders (including several installment lenders), generally supported the underlying principle of the rule requiring lenders to make a reasonable determination that consumers have an ability to repay, noting that it is a fundamental, common-sense tenet of responsible lending in most loan markets. These commenters noted the precedent in the Bureau's regulations relating to mortgages and credit cards, as well as the other Federal precedent noted above in Market Concerns—Underwriting. Some consumer groups agreed that an underwriting methodology based on residual income was the most appropriate underwriting model for determining whether consumers have an ability to repay and asserted that alternative approaches were too permissive. Consumer advocates writing jointly suggested a number of specific changes to the proposal which in their view would strengthen elements of the ability-to-repay requirement, which are described in more detail below.

Some commenters argued that the Bureau should allow an approach that would permit lenders to lend up to a prescribed payment-to-income ratio (generally suggested by commenters as 5 percent) as an alternative to a residual income underwriting approach, an approach the Bureau had contemplated in the Small Business Review Panel Outline and on which it specifically solicited comment in the proposal. During inter-agency consultations on the final rule, a fellow financial regulator also expressed support for this concept. These commenters argued that a payment-to-income approach would provide a streamlined compliance option for lower-cost lenders for whom the proposed ability-to-repay requirements would prove too cumbersome and expensive. These commenters cited positively the Bureau's consideration of such a policy at the SBREFA process stage and criticized the Bureau's failure to include the option as an alternative in the proposed rule. One research and public policy organization discussed in its comment letter potential additional policy suggestions that it believed would address criticisms of the approach raised by other stakeholders, including restricting lenders from using the payment-to-income approach if they experience high default rates (over 10 percent) and limiting the total loan cost to 50 percent of the amount borrowed. This commenter also sent a separate comment letter in conjunction with a number of large and mid-sized banks and other stakeholders endorsing the payment-to-income concept, arguing it would provide a streamlined and more cost-effective approach for depository institutions to make small-dollar loans. That letter also provided a number of additional policy suggestions containing changes to the payment-to-income approach described in the Small Business Review Panel Outline, such as clarifying that evidence of regular deposits represents sufficient verification of income. The commenters also urged the Bureau to work with the federal prudential regulators to ensure sensible, streamlined regulatory oversight for small-dollar loans.

In contrast, a number of consumer groups and other commenters strongly urged the Bureau not to adopt a payment-to-income approach and supported the Bureau's decision not to propose it as an alternative. The consumer groups stated that they disagreed with a payment-to-income approach because it would not take into account consumer expenses, arguing that even a loan that is 5 percent of income could be unaffordable if the remaining income is allocated to expenses and emergency costs. One of these commenters noted that the

[758] 38 CFR 36.4340.

[759] 12 CFR 1026.51(a)(1).

[760] 12 CFR 1026.43(c).

Bureau's study found that more than 40 percent of loans made under a 5 percent payment-to-income ratio would still default or be re-borrowed.[761]

The Bureau also received a number of comments objecting to its proposal to remedy the identified unfair and abusive practice through an underwriting requirement instead of disclosures alone. In particular, commenters stated that disclosure was a more appropriate remedy for any perceived lack of consumer understanding rather than complicated new underwriting requirements. They also argued that disclosures were a less restrictive alternative to the proposed ability-to-repay requirements and that the Bureau had not taken the disclosure option seriously. They pointed to model disclosures developed by industry trade associations as sufficient already to inform consumers of the high costs of using payday loans for an extended period. They also stated that the Bureau had not presented evidence that disclosures cannot adequately address the issue. One commenter specifically objected to the conclusions the Bureau derived from its analysis of the impact of the new Texas disclosures, which showed that following their introduction the disclosures decreased lending by 13 percent and the probability of re-borrowing by only 2 percent. The commenter argued that the appropriate conclusion is not that disclosure is ineffective, but rather, that consumers understand the costs and risks of payday loans and choose to take them out anyway. This commenter argued that the Bureau should have instead studied the impact the disclosures had on consumer understanding.

Commenters raised other substantive and procedural arguments related to a disclosure alternative. An industry trade association argued that the Bureau had failed to respond to the trade association's proposals to study and test enhanced disclosures, including a plan to partner with a firm that assisted the Bureau with the form design on the Bureau's Know Before You Owe mortgage rulemaking. Several industry commenters argued that the Bureau's discussion in the proposal of the marginal impacts of disclosures contradicted statements by the Bureau's own researchers who had analyzed the impact of the Texas disclosures, noting that they had stated at a research conference in 2015 that enhanced disclosures can have economically meaningful impacts and that consumers who are more likely to end up in long-term debt cycles may be more responsive to disclosures.[762] A large non-bank lender commenter cited the Bureau's acknowledgment in a 2013 study that the Regulation E opt-in disclosures resulted in a majority of heavy over-drafters choosing not to opt-in to continued overdraft, as well as the lender's own data indicating that its customers use extended payment plans at a higher rate (17.25% vs. 5.67%) in States that require disclosure, as evidence that disclosure produces successful outcomes. This comment also suggested that the Bureau should use TILA authority to create disclosures comparing the ''all in'' cost of credit to other alternatives and to apply the requirement across all consumer loan products including overdrafts. A trade group criticized the reliance on ''dubious theories of behavioral economics'' as a reason for rejecting the efficacy of disclosures. Finally, a separate trade group suggested that a disclosure requirement could be dynamic and require consumers to fill out a form that would demonstrate how much residual income they have each month based on projected income and expenses.

Industry commenters, a joint letter from a number of State Attorneys General, letters from other attorneys general, SERs, and others argued that the Bureau had not considered as alternatives the less onerous approaches to regulating payday lending that many States have adopted. Commenters cited a variety of State laws, including laws about collection practices, disclosures, limits on the size and duration of loans, grace periods, limiting rollovers, principal repayment requirements, cooling-off periods, gross monthly income requirements, and even different ability-to-repay requirements. They also urged the Bureau to consider mixing and matching particular elements of the different State laws to find the right regulatory approach.[763] Others argued that the Bureau should exempt entities operating in States that have payday laws.

Other commenters urged the Bureau to consider additional less restrictive alternatives to the proposed ability-to-repay requirements, such as requiring lenders to offer extended payment plans, implementing a nationwide licensing and registration system, using existing enforcement authority to continue addressing ''bad actors'' or focus on unregulated or online lenders, or addressing consumer demand for payday loans by adopting measures to encourage consumer savings, similar to the Bureau's ''tools for saving.''[764]

Lastly, the Bureau received a number of comments asserting that the proposed rule conflicts with the Equal Credit Opportunity Act. They asserted that the proposal would have a disparate impact on women and minorities because they are more likely to be paid in cash, which is less documentable and would mean, as a result, that women and minority applicants for covered loans would be less likely to qualify for the loans under the ability-to-repay requirements. Additionally, some commenters argued that the proposal would prevent non-working consumers, such as stay-at-home spouses, from receiving covered loans because they would not have their own individual income on which to rely for underwriting. They criticized the fact that the proposal did not permit consumers to rely on income from another person to which the consumer has a reasonable expectation of access, which may be considered under the Bureau's credit card ability-to-pay rules. They noted, additionally, that the Bureau had amended those ability-to-pay rules in 2013 specifically to address a similar policy concern regarding access to credit for stay-at-home spouses, and questioned why the Bureau would apply a different standard in the proposal. Commenters further argued that the proposal's allowance of estimates for rental housing expenses using locality-based data could create a disparate impact and look similar to more traditional ''red-lining'' discrimination. Commenters also argued that the proposal's definition of basic living expenses, which would have included expenses of any dependents of the consumer, would run afoul of Regulation B's prohibition on seeking information about the consumer's spouse. And more generally, some commenters argued that because covered loans are disproportionately used by minorities and women, the proposed rule would affect minority

[761] CFPB Report on Supplemental Findings, at 25.

[762] One lender commenter included a slide deck from this presentation in its comment letter as an attachment.

[763] For example, one SER commenting proposed a hybrid of various State laws and other policy suggestions, calling for adoption of the Illinois gross monthly income requirement, a three-loan cap with provision of a fourth loan for emergencies with an off-ramp, and provision of reporting repayment of the off-ramp to nationwide consumer reporting agencies. An auto title lender suggested that the rule should permit the consumer to take advantage of all rollovers allowed by company policy and State law and require additional TILA disclosures.

[764] Bureau of Consumer Fin. Prot., ''Tools for saving: Using Prepaid Accounts to set aside funds; Innovation Insights,'' (2016), *available at https://www.consumerfinance.gov/data-research/research-reports/tools-saving-using-prepaid-accounts-set-aside-funds/*.

communities more significantly than other consumers.

Final Rule

As detailed below and in the discussion of specific parts of § 1041.5, the Bureau is finalizing the proposed ability-to-repay requirements for covered short-term loans and covered longer-term balloon-payment loans with substantial changes. These changes are designed to address various concerns raised by commenters, while still requiring lenders to engage in robust upfront underwriting procedures and providing targeted back-end protections to prevent consumers from getting stuck in long cycles of debt. In particular, the Bureau has made four substantial changes designed to make the final rule more flexible for both consumers and lenders, in order to facilitate efficient implementation and access to responsible credit: (1) The final rule permits use of a simplified underwriting calculation using either a residual income or debt-to-income methodology; (2) the final rule provides additional flexibility as to verification requirements, including permitting increased reliance by lenders on consumers' written statements in appropriate circumstances; (3) the final rule permits consideration of situations in which the consumer has a reasonable expectation of access to others' income or in which others regularly pay for certain of the consumer's expenses; and (4) the final rule does not apply presumptions that a consumer will not be able to repay the second or third covered short-term loan or covered longer-term balloon-payment loan within a sequence.

The final rule thus consolidates, with modifications, parts of proposed §§ 1041.5 and 1041.6 for covered short-term loans and §§ 1041.9 and 1041.10 for covered longer-term balloon-payment loans in final § 1041.5. The conditional exemption for covered short-term loans originated under the separate requirements contained in proposed § 1041.7 is thus now renumbered as § 1041.6 in the final rule, and discussed separately below. The Bureau details its analysis for the individual elements of § 1041.5 below, after providing an overview of its response to the high-level issues summarized above and discussing the overall balance struck in the final rule.

Burden, prescriptiveness, and complexity. As noted above, the Bureau received a significant number of comments from industry arguing that the underwriting requirements in the proposed rule would be too costly, take too much time to administer, be too restrictive, and require too much document verification. These commenters argued that the compliance burdens and underwriting restrictions would dramatically reduce loan origination volume, causing major impacts not only on lenders but on consumers as well through reduced access to credit, increased prices, and market consolidation. They also argued (as discussed separately further below) that the proposal unfairly imposed more rigorous underwriting requirements than the Bureau's rules for other credit markets.

As a general matter, the Bureau is sensitive to the concerns raised by many commenters regarding the burdens, prescriptiveness, and complexity of the proposal. The Bureau took some steps to address similar concerns that had been raised in response to the Small Business Review Panel Outline. For example, among the changes relative to the Outline, the proposal would have allowed lenders to use estimates of rental housing expenses instead of requiring verification of lease documents, and included a 30-day, rather than a 60-day, definition of loan sequence and cooling-off period after a three-loan sequence.

The Bureau also specifically sought comment in the proposal about automation and scalability, balancing the need for flexibility and innovation with the desire for regulatory certainty and related concerns. At the same time, the Bureau explained in the proposal that it believed that merely establishing a general requirement to make a reasonable determination that a consumer will have the ability to repay would provide insufficient protection for consumers and insufficient certainty for lenders. Rather, in light of stakeholder feedback to the Outline, Bureau experience, the experience with more general standards in some State laws, and the fact that lenders' current screening is designed for more limited purposes, the Bureau believed that it was important to specify minimum elements of a baseline methodology for evaluating consumers' individual financial situations.

After careful consideration, the Bureau continues to believe that specifying a baseline underwriting methodology is not just reasonably related to preventing the unfair and abusive practices identified above, but also is necessary to a successful regulatory regime, as are targeted back-end protections to prevent consumers from becoming stuck in long cycles of debt. By requiring common-sense underwriting steps that incorporate both certain activities that are routine in other credit markets and tailored measures for the specific market, the Bureau believes that the baseline methodology substantially reduces the risk that consumers will obtain an initial unaffordable loan and provides greater regulatory certainty to lenders. At the same time, in light of the back-end protections, concerns about impacts on consumers who may have difficulty documenting certain income sources, and the need to leave room for lenders to innovate and refine their methods over time, the Bureau believes that it possible to reduce the burdens, prescriptiveness, and complexity of the underwriting requirements in various ways relative to the proposal while still preserving the core of the essential consumer protections from the proposal. The four most significant changes to effectuate this revised framework, listed above, are summarized in the following discussion, with the section-by-section analysis of specific paragraphs within § 1041.5 below providing further elaboration and detail. Beyond the four significant areas of change from the proposal, the Bureau has also taken a number of smaller steps to calibrate the ability-to-repay analysis in ways that differ from the proposal, which are described in the more detailed section-by-section analysis.

First, as an initial matter, the Bureau agrees with commenters that the specific residual income methodology contained in the proposal for covered short-term loans would have been quite prescriptive in requiring lenders to track both the amount *and* timing of the consumer's receipt of net income and payment of major financial obligations, as well as to project the consumer's ability to cover major financial obligations and basic living expenses both during the loan term and for 30 days after the single highest payment.[765]

[765] In contrast, the methodology for covered longer-term loans under proposed § 1041.9(b)(2) would have generally allowed lenders to calculate residual income on a monthly basis, although lenders making covered longer-term balloon-payment loans would also have had to evaluate consumers' ability to cover major financial obligations and basic living expenses in the 30 days following the single highest payment on the loan. The proposal explained that for loans longer than 45 days, the Bureau generally believed that the particular number and amount of net income payments and payments for major financial obligations that will accrue between consummation and a payment due date were less instructive for determining a consumer's residual income than for covered short-term loans. However, proposed comments 9(b)(2)(i)–1 and 9(b)(2)(ii)–1 emphasized that lenders would have been required to evaluate residual income for the month with the highest sum of payments in cases in which loan payments were not even, and to consider the amount and timing of major financial obligations in the period after the highest loan payment on a covered longer-term balloon-payment loan.

The proposal would not have required lenders to engage in detailed tracking of basic living expenses, but the analysis during the 30 days after the highest loan payment in particular would have required specific attention to the timing of the consumer's net income inflows and major financial obligation outflows.[766] Upon further consideration, the Bureau believes it is appropriate to allow lenders a choice between residual income and debt-to-income methodologies, both of which would analyze the total amount of net income and major financial obligations during the month with the highest aggregate payments on the loan. Lenders can use this one-month snapshot to determine more generally whether the consumer has the ability to repay the loan without re-borrowing and can do so without having to track the specific timing of income receipts and major financial obligation payments. By simplifying the calculation to focus on the month in which the consumer is under the highest financial stress in connection with the covered short-term or covered longer-term balloon-payment loan, the final rule addresses concerns about compliance burden. The flexibility to use a debt-to-income methodology also allows lenders to use analyses that are more common in other credit markets, while maintaining appropriate tailoring in light of the variable payment structures and particular re-borrowing patterns evident in this market. See § 1041.5(a)(2) and (b)(2)(i) and the associated section-by-section analysis.

Second, the Bureau has also made a number of modifications to the proposed requirements regarding verification evidence for consumer's net income and major financial obligations. The final rule requires certain common-sense verification steps, such as requiring lenders generally to verify income, use a recent national consumer report to verify major financial obligations, and obtain a specialty consumer report from a registered information system in light of the fact that many covered loans are not reflected in national consumer reports. At the same time, the final rule reduces burden relative to the proposal and provides appropriate flexibility to consumers and lenders in cases in which verification is not reasonably available.

For example, the final rule does not require income verification in all instances, as the proposed rule would have required. In those circumstances where a lender determines that a reliable income record is not reasonably available—as, for example, when a consumer receives some income in cash and spends that money in cash—the lender can reasonably rely on the consumer's statements alone as evidence of income. See section-by-section analysis of § 1041.5(c)(2)(ii)(A) and associated commentary for further discussion.

In addition, the final rule also no longer requires lenders to obtain a national consumer report for every single new loan. Rather, lenders may rely on a national consumer report that was obtained for a previous loan if the lender did so within the last 90 days, unless during the previous 90 days the consumer had taken out a sequence of three loans and thereby triggered a cooling-off period since the previous report was obtained. See section-by-section analysis of § 1041.5(c)(2)(ii)(D) and associated commentary for further discussion. And with respect to evidence of rental housing expenses, the final rule does not require a lender to verify them with a lease or with estimates based on data about general housing expenses in the locality of the consumer, as the proposed rule would have required. Instead, lenders are able to reasonably rely on consumers' written statements for projecting rental housing expenses. See section-by-section analysis of § 1041.5(c)(2)(iii) and associated commentary for further discussion.

Third, unlike in the proposed rule, the final rule permits lenders and consumers to rely on income from third parties, such as spouses, to which the consumer has a reasonable expectation of access as part of the ability-to-repay analysis, as is generally true of the underwriting provisions for credit cards (although there are some distinctions described below, including that the lender must verify that the consumer has regular access to the funds). The final rule also permits the lender in certain circumstances to consider whether another person is regularly contributing to the payment of major financial obligations or basic living expenses. See section-by-section analysis of § 1041.5(a)(5), (b)(1), and (c)(1) and associated commentary for further discussion.

Fourth, the Bureau is not finalizing any of the presumptions of unaffordability from proposed § 1041.6 or § 1041.10. The Bureau had proposed presumptions of unaffordability during the period in which a consumer had a covered loan outstanding, or for 30 days thereafter, under the theory that one can presume a consumer who returns within 30 days after paying off a prior loan was unable to repay that loan while still meeting other expenses (and hence likely would not be able to afford to repay a new loan). In light of the complexity associated with implementing that presumption, the Bureau is not finalizing these provisions, and is instead leaving the determination of whether a consumer has the ability to repay a second or third loan in a sequence to the reasonable discretion of the lender consistent with the requirements under § 1041.5. The Bureau will, however, view extensive re-borrowing, as observed through the lender's performance metrics, as an indicator that the lender's ability-to-repay determinations may not be reasonable. See section-by-section analysis of § 1041.5(b)(1) and (d) and associated commentary for further discussion.

The Bureau has concluded that these significant changes will, collectively, reduce the upfront process burdens on lenders to underwrite these covered loans and provide more flexibility to consumers with regard to accounting for certain types of income, while maintaining the core elements of the proposal in reducing risks that consumers will become stuck in long cycles of unaffordable debt. The Bureau understands that any rule will impose some level of burden, especially for entities that have not previously had to comply with ability-to-repay standards. The Bureau is sensitive in particular to the concerns raised about the impacts on small lenders, by the SBA Office of Advocacy, the small entity representatives, and other stakeholders. The Bureau has analyzed these impacts in detail in the Regulatory Flexibility Analysis in part VIII, in addition to the compliance burdens on the industry in general in the Section 1022(b)(2) Analysis in part VII.

As discussed in more detail in those sections, the Bureau has found that the compliance burdens of § 1041.5 will not impose undue costs, particularly as those burdens have been modified from the proposal in the final rule. For instance, the Bureau continues to expect that underwriting in accordance with the rule can largely be automated and that the market will evolve toward greater automation to manage operational costs and the time it takes consumers to obtain loans. Rather, the Bureau believes that the main impacts to the industry—including with regard to consolidation—are likely to be driven

[766] The proposed commentary examples in comment 5(b)(2)(i)–1.A and 5(b)(2)(ii)–1.i illustrate the granular focus that would have been required on the part of the lender to ascertain the timing of income receipts and expense payments as part of the broader ability-to-repay determination for covered short-term loans under proposed § 1041.5(b)(2).

primarily by the question of how many consumers are reasonably determined to have the ability to repay covered short-term and longer-term balloon-payment loans and by the impact of the 30-day cooling-off period after the third loan in a sequence. As set forth in the Section 1022(b)(2) Analysis, the Bureau acknowledges that those impacts will be substantial and will likely drive significant consolidation and/or product diversification, especially with respect to lenders who currently offer only short-term vehicle title loans. But putting limits on lending to consumers who lack the ability to repay is at the very heart of the rulemaking, as lenders' failure to make reasonable ability-to-repay determinations in the market today is the crux of the unfair and abusive practice identified by the Bureau. As described above, the Bureau has concluded that it is necessary to proscribe that practice and adopt substantive regulatory measures reasonably designed to prevent it. The substantial changes in the final rule are intended to reduce the impact on lenders so that they are able to make reasonable ability-to-repay determinations without unnecessary cost. But the Bureau maintains its view expressed in the proposal that a robust ability-to-repay requirement is necessary or appropriate to prevent the unlawful practice identified by the Bureau, which leads to harms to many consumers.

With regard to industry commenters who argued that the ability-to-repay requirements would have negative impacts on consumers in the form of increased time needed to obtain loans, increased prices, fewer lenders in close geographic proximity, and reduced access to credit in general, those issues are also addressed in greater detail in the Section 1022(b)(2) Analysis. As discussed in that section as well as with regard to specific elements of § 1041.5 below, the Bureau concludes that these impacts will generally be relatively modest. For example, as discussed above, the Bureau expects that the market will evolve toward automation in response to the rule, but for any lenders that choose to maintain an entirely manual system that loan processing time will be between 15 and 45 minutes.[767] The Bureau also expects that compliance costs will not generally be passed through to consumers because many lenders are already charging the maximum amounts permitted by law, and that geographic impacts will be relatively modest in most areas. As described further below, the Bureau believes that a number of the modifications to final § 1041.5 will make it easier for consumers to access credit relative to the proposal, and consumers will also be able to access a limited number of covered short-term loans originated under § 1041.6 to deal with emergency situations or other needs. Indeed, the Bureau estimates that only six percent of current payday sequences would not be initiated due to the rule. Moreover, the Bureau disagrees with the commenters that argued that the proposal would preclude access to credit for any consumers who earn under $40,000 per year. As described in the Section 1022(b)(2) Analysis, the Bureau believes the analysis that underlies those comments rests on flawed assumptions and possible misunderstandings about the proposal.[768]

The Bureau notes that in making the changes to § 1041.5 to reduce the prescriptiveness of the upfront origination process requirements, it is not adopting many policy suggestions suggested by consumer groups that would have further increased verification requirements and other compliance burdens as well as further limiting re-borrowing. For example, consumer groups argued that lenders should never be permitted to rely on consumers' written statements alone; that the Bureau should impose a cooling-off period after two loans in a sequence, rather than three; and that the final rule should impose an annual limit on all covered short-term loans of six loans or 90 days of total indebtedness. The treatment of the consumer groups' specific policy suggestions is discussed below in the relevant portions of the section-by-section for § 1041.5. At a broad level, however, the Bureau has concluded that the elements of the final rule as described further below will be sufficient to require lenders to engage in robust upfront underwriting and to provide targeted back-end protections to prevent consumers from getting stuck in long cycles of debt. In particular, the Bureau is finalizing a 30-day cooling-off period after a sequence of three covered short-term loans and applying it to sequences involving covered longer-term balloon-payment loans as well. The Bureau believes that the final rule as modified from the proposal will be sufficient to produce meaningful change in the incentives and practices of lenders in the affected markets, and that as long as those impacts are achieved it is appropriate to provide consumers and lenders with appropriate flexibility to meet individual circumstances under the rule.

Furthermore, the Bureau acknowledges that in some cases the final rule provides more flexibility with respect to the ability-to-repay requirements than the Bureau indicated in the proposal that it was comfortable providing. For example, the Bureau is permitting lenders to reasonably rely on consumers' written statements of net income if verification evidence is not reasonably available, in contrast to the proposal where it expressed concern about permitting loans to be made based on consumers' written statements of income alone. The Bureau remains concerned about the same policy issues expressed in the proposal, but also sees merit in the arguments made by many commenters about the challenges of documenting certain types of income or obligations. The Bureau concludes that it has been able to calibrate this exception in the final rule appropriately to apply to those limited circumstances. As discussed further below, the Bureau has also specifically emphasized that the ultimate reasonableness of lenders' ability-to-repay determinations in such cases will be determined primarily by the pattern of outcomes for consumers. The Bureau has taken a similar approach with regard to other places where it has relaxed certain elements of the final rule relative to the proposal. The Bureau has judged that these changes strike an appropriate balance to ensure that the final rule provides core consumer protections that are necessary to address the identified harms in these markets, while at the same time reducing the burdens, complexity, and prescriptiveness of the proposed ability-to-repay requirements.

Comparison to other markets. The changes described above in the final rule mean that relative to the proposal the rule is more consistent with underwriting practices in other consumer credit markets—whether specifically mandated by Federal law or

[767] As discussed in the Section 1022(b)(2) Analysis, the Bureau believes that changes from the proposal will facilitate automation under the final rule. While the Bureau has increased the estimate for purely manual underwriting relative to the proposal because a number of commenters had asserted that the original estimate was too low, the Bureau believes that the estimates for the final rule are lower than they would have been if all elements of the proposal had been adopted. Further, the Bureau believes that time for manual underwriting and the costs for lenders who choose to move toward a more automated model are not so concerning as to outweigh the benefits of preventing the identified unfair and abusive practice and the consequent risks and harms to consumers.

[768] The Bureau also finds it significant that the undated presentation on which the commenters rely was not provided or discussed in individual comment letters submitted to the Bureau by three of the four specialty consumer reporting agencies that generated the analysis.

as a matter of standard industry practice—while maintaining appropriately tailored requirements where the Bureau finds it appropriate to do so in light of the characteristics of the consumers who rely on covered short-term and longer-term balloon-payment loans, the product structures used in these markets, and the particular patterns of re-borrowing seen in these markets. The Bureau notes that different markets warrant different regulatory interventions, as demonstrated by the fact that Congress itself has established very different regimes for underwriting mortgages and credit cards, and believes that calibration is appropriate to address particular consumer risks, industry practices, and product structures.[769]

At a basic conceptual level, the final rule requires lenders to assess both consumer income and expenses using either a residual income or debt-to-income analysis. This is broadly consistent with the Federal underwriting requirements for both mortgages and credit cards, although the three regimes vary as to certain details in light of the products' structure and the history of particular problems in their respective markets. For example, Congress specified a detailed regime for consideration of consumers' ability to repay mortgage loans, including verification of both income and current obligations, after substantial evidence that ''no-doc'' loans helped to fuel a crisis in that market.[770] In the credit card market, Congress imposed an obligation to consider consumers' ability to make required payments on a credit card account, including heightened standards for consumers under the age of 21, in light of particular concerns that college students were being provided with amounts of debt that substantially exceeded their ability to make even minimum payments on their accounts.[771] However, neither Congress nor the Federal Reserve Board, which was charged with implementing those requirements, chose to require specific verification requirements concerning income and expenses; the Board specifically noted that there had not been a record of the kinds of problems seen in the mortgage market and that certain market conditions created strong incentives for lenders to exercise appropriate diligence even in the absence of specific Federal requirements.[772]

Similarly, the Bureau has tailored the details of the verification requirements and underwriting methodology in § 1041.5 based on the particular product structures and history of specific problems in the markets for covered short-term and longer-term loans. These include such factors as the frequency of lump-sum and irregular payment structures, the fact that many covered short-term and longer-term balloon-payment loans do not appear on national consumer reports, concerns that consumers who are in financial distress may tend to overestimate income or underestimate expenses, and lenders' strong incentives to encourage mistaken estimates to the extent that doing so tends to result in more re-borrowing. The resulting final rule takes a common-sense approach by generally requiring lenders to obtain what verification evidence is reasonably available, while allowing reliance on consumer statements where other evidence is not. In their details, the income and expense verification requirements of the final rule are somewhat less onerous than the Bureau's mortgage rules in 12 CFR 1026.43 and more onerous than the credit card rules for various groups of consumers in 12 CFR 1026.51.[773] The final rule also has been modified in response to comments, discussed below, to allow consideration of situations in which consumers have a reasonable expectation of access to the income of other people and where another person regularly pays for certain expenses of a consumer, which is somewhat similar to the credit card rules but with more tailoring in light of the overall structure of § 1041.5 and general concerns about incentives to inflate income in the affected markets.

As noted above, the Bureau received many comments from industry stakeholders suggesting that it apply the same rules as for credit card ability-to-pay rules under Regulation Z. The Bureau believes the response to these comments merits more extensive discussion.

First, the Bureau disagrees with commenters that stated or implied that the proposed ability-to-repay requirement reflected a different legal standard for underwriting than the credit card ability-to-pay rule and questioned the basis for that difference, including the one commenter's argument that the Bureau was imposing a different standard because it did not ''trust'' consumers in this market to make decisions for themselves. It is true that the credit card rules focus only on a consumer's ability to make ''required minimum payments,'' which under credit card contracts are typically minimum monthly payments—typically finance charges, fees, and a small amount of principal—for however long it takes to pay off the principal.[774] The ability-to-repay test set forth in the final rule requires the lender to determine whether the consumer can make ''all payments on the loan.'' As a legal standard, however, that is no different

[769] With regard to student and automobile purchase-money loans, the Bureau notes that neither Federal consumer financial statutes nor regulations establish underwriting requirements for such loans. As the Bureau noted in proposing to exclude them from the scope of the final rule, both are quite distinct product markets that raise issues that are not present in the markets for covered short-term and longer-term balloon-payment loans. The Bureau therefore disagrees with commenters that suggested that the proposal was somehow improper for failing to account for underwriting practices in these separate markets. As for check and ACH overdraft, the alternative to those fees is usually an NSF fee. For debit overdraft, the Federal Reserve Board created an opt-in regime which took effect in 2010 and which the Bureau is responsible for administering and enforcing. The Bureau has been studying the effects of that still-recent regime and opportunities to improve it. The Bureau also has been studying consumer outcomes with a particular focus on frequent overdrafters and is continuing to study the extent to which overdrafts occur in sequences that may suggest that repaying a prior overdraft led to a subsequent overdraft.

[770] 15 U.S.C 1639c(a)(1), (3), (4) (requiring assessment of consumer's ability to repay a mortgage loan based on ''verified and documented information,'' including the consumer's credit history, current income, current obligations, and various other factors).

[771] 15 U.S.C. 1637(c)(8), 1665e (requiring consideration of consumer's ability to make required payments on a credit card account, but not verification).

[772] The Board was also concerned about particular logistical problems where consumers wanted to open a credit card account at the point of sale with a retailer. 75 FR 7658, 7721 (Feb. 22, 2010); 74 FR 54124, 54161 (Oct. 21, 2009). The rules therefore require creditors to consider information about income and current obligations, but not specifically to verify information supplied by a consumer. 12 CFR 1026.51(a)(1)(i). For a current description of industry's routine reliance on consumer reports, *see* Bureau of Consumer Fin. Protection, ''The Consumer Credit Card Market,'' at 140–141 (2015), *available at http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf.*

[773] To the extent that commenters asserted that the proposal's verification and other requirements were disproportionate simply because covered short-term and longer-term balloon-payment loans have smaller balances than other credit products and mortgages in particular, the Bureau believes that there are certain fixed costs involved in responsible lending that do not vary much with size and that reducing below those minimums is unlawful. More generally as to overall processing times and burden, the Bureau concludes as summarized above and discussed in more detail in the Section 1022(b)(2) Analysis that a purely manual underwriting process for covered short-term and longer-term balloon-payment loans would still be quite modest, particularly compared to mortgage originations.

[774] As the Board noted in issuing rules to implement the CARD Act standard, ''Because credit card accounts typically require consumers to make a minimum monthly payment that is a percentage of the total balance (plus, in some cases, accrued interest and fees), the final rule requires card issuers to consider the consumer's ability to make the required minimum payments.'' 75 FR 7658, 7660 (Feb. 22, 2010).

than the test under the CARD Act. That is, in both cases the rule requires that the lender assess the consumer's ability to repay the payments required under the contract. What differs in the two contexts is the structure of the loan and thus the size of the required payments under the contract.

Consumers under the typical covered short-term or longer-term balloon-payment loan have a legal obligation to repay the full amount of the loan when due in a single or large balloon payment, and the loans are presented to consumers as having a definite term. Consumers do not have the right to roll over or re-borrow; that is up to the discretion of the lender. Thus, to the extent that commenters implied that the Bureau should require that lenders inquire only about consumers' ability to pay finance charges, such an approach would be fundamentally inconsistent with the structure of these loans and would ignore the fact that at some point the principal must be repaid in a single or large balloon payment. Indeed, to apply the ability-to-repay test only to the finance charges would perpetuate one of the core concerns underlying this rule: that, as discussed in Market Concerns—Underwriting, these loans are presented to consumers as short-term loans to bridge until the next paycheck whereas in practice the loans operate quite differently.[775] As discussed below in the 1022(b)(2) Analysis in more detail, there is substantial evidence that many consumers end up re-borrowing more than they expect and that consumers who end up in very long loan sequences in particular do not predict their usage patterns accurately.[776]

The Bureau, furthermore, disagrees with commenters who asserted that the Bureau should follow the model of the credit card rules and not require verification of income. The Bureau believes that in view of the particular concerns about reliance on stated income in the market for covered short-term loans and covered longer-term balloon-payment loans, it is appropriate to include a baseline verification requirement in the final rule. Under the final rule, in § 1041.5(c)(2)(ii)(A), the lender must verify the consumer's net income amount if verification evidence is reasonably available. If verification evidence as to some or all of the net income is not reasonably available, the lender may reasonably rely on the consumer's statement of the amount. As described in the section-by-section analysis for § 1041.5(c)(2)(ii)(A) below, permitting lenders to reasonably rely on consumer statements of income in absence of verification evidence is a change from the proposal that addresses commenters' concerns that consumers paid in cash will not be able to receive a loan if they otherwise would pass the ability-to-repay requirements. The Bureau does not believe, however, that merely requiring consideration of consumers' *stated* amounts for net income and debt obligations as a baseline rule would provide sufficient consumer protections in this market. The Bureau notes that the income verification requirement in the final rule is generally aligned with current practices in the market for covered short-term loans (other than with regard to some vehicle title loans), where lenders typically request the consumer provide evidence of one pay cycle of income. Moreover, as discussed above, the Bureau understands that credit card issuers typically obtain a national consumer report for card applicants to ascertain ''current obligations'' under the credit card ability-to-repay rules, which is similar to the obligation under the final rule for lenders making covered short-term loans and covered longer-term balloon-payment loans to obtain a national consumer report to verify debt obligations.[777]

Specificity. As discussed above in connection with the proposal and with regard to the final rule, the Bureau has attempted to balance the interests of specificity, which reduces uncertainty, with the interests of flexibility, which allows for innovation, competition, and diversification in business models. The Bureau received incompatible comments requesting that it shift further in both directions on the specificity-flexibility spectrum—sometimes from the same commenter when addressing different issues. Ultimately, as compared to the proposed rule, the Bureau found the commenters requesting more flexibility rather than additional prescriptiveness with regard to upfront underwriting procedures to raise the more compelling arguments, and decided to add more flexibility to the final rule as discussed generally above and with regard to individual elements below. At the same time, as discussed below, the Bureau has also refined the regulation text and commentary as appropriate in specific areas, for instance to provide clearer guidance on particular elements of the ability-to-repay analysis such as net income and estimation of basic living expenses and to discuss various fact patterns in examples.

With regard to commenters who criticized the general reasonableness standard, sought numerical thresholds or guidance on what constitutes sufficient residual income (or a specific debt-to-income ratio), or urged the Bureau to provide per se rules regarding what types of loan performance patterns indicate that a lender's ability-to-repay analysis was unreasonable, those issues are discussed in more detail below in connection with § 1041.5(b)(1). While this rule provides substantial specificity as to upfront procedures, the Bureau does not provide a formulaic residual-income threshold or debt-to-income ratio to answer the question of whether a consumer has the ability to repay. The same is true for the Bureau's mortgage and credit card ability-to-repay rules.[778]

[775] As discussed in Market Concerns—Underwriting and the section-by-section analysis for § 1041.4, the Bureau's extensive research on the small-dollar lending market has focused to a large degree on the problem of consumers rolling over their loans on the due date or re-borrowing within 14 to 30 days of repayment of the prior loan. The product structure typically associated with covered short-term loans—a lump-sum payment due within 14 or 30 days of consummation and tied to the consumer's payday—leads to the re-borrowing problem.

[776] In contrast, credit cards are commonly understood to be an ongoing product. The Bureau further notes that the final rule does not cover open-end credit which amortizes over a period of more than 45 days without a balloon payment. Thus the rule does not restrict lenders from offering open-end credit plans with affordable minimum payments which amortize a loan over time.

[777] Finally, a few commenters noted that the credit card rules allow lenders to consider the consumer's debt-to-assets ratio as a means of satisfying the ability-to-pay requirement. The Bureau notes that this highlights the differences in the markets being regulated. While that approach might make sense in the context of credit cards, in the context of the markets at issue in this rule, many consumers will have exhausted their cash assets before seeking a covered loan. Moreover, as discussed in Market Concerns—Underwriting and the section-by-section analysis for §§ 1041.4 and 1041.6, the Bureau has concluded that vehicle title loans pose substantial harm to consumers in absence of robust underwriting that is tied to a consumer's income and expenses, not the value of the vehicle. The Bureau is concerned that permitting lenders to rely on a debt-to-asset ratio for underwriting would potentially validate current practices by vehicle title lenders and fail to result in a meaningful change in current practices to remedy the identified harms.

[778] The Bureau did adopt a 43 percent debt-to-income threshold for one type of ''qualified mortgage,'' which is subject to either a conclusive or rebuttable presumption of compliance with ability-to-repay requirements under the mortgage rules depending on particular loan terms. 12 CFR 1026.43(e)(2)(vi). However, the Bureau emphasized in adopting this threshold that it was based on longstanding benchmarks in the mortgage market (which do not exist in the markets for covered short-term loans and covered longer-term balloon-payment loans), that other types of qualified mortgages would allow lending to consumers with ratios in excess of 43 percent, and that the Bureau did not believe it was appropriate to set an across-the-board threshold for determining consumers' ability to repay mortgage loans for similar reasons

The Bureau does not believe it is possible to eliminate lender judgment in making these determinations, and thus believes that the general reasonableness standard is a critical element of the rule. Reasonableness is a widely used legal concept in both State and Federal law, and is what Congress required with respect to the underwriting of mortgages. The Bureau believes the standard in the final rule—which has been revised to include a substantial amount of new commentary clarifying how the reasonableness of ability-to-repay determinations will be evaluated—should provide a sufficiently discernible standard.

As for loan performance, as discussed in final comments 5(b)–2.iii and 5(b)–2.iv, the Bureau will, among other things, use various outcome metrics on an aggregate basis to assess whether various underwriting models are indeed working as a practical matter to yield reasonable determinations of consumers' ability to repay. However, such metrics must also be evaluated in their specific context, particularly given that the harms that arise from unaffordable loans may play out in different ways depending on lender practices and other variables. For example, lenders might have higher patterns of re-borrowing relative to defaults depending on their particular sales and collection practices, so establishing a single set of thresholds for all situations would be difficult. As discussed below, the Bureau has provided more specific guidance on the types of potentially relevant loan performance metrics and more examples discussing particular fact patterns, but believes that it is not practicable to establish numeric performance thresholds that would definitively demarcate whether a lender's ability-to-pay determinations meet the reasonableness standard. See the discussion below regarding § 1041.5(b)(1) for more details.

Using Residual-Income Analysis to Predict and Prevent Harms. As described above, several industry commenters asserted that the proposed requirement to determine consumers' ability to repay is arbitrary because it will not actually predict and prevent the harms identified in the Bureau's UDAAP analysis, particularly default and re-borrowing. For example, an industry commenter cited a study that uses what the researchers said was the residual income methodology specified in the proposed rule to examine the relationship between such residual income and default. Applying the residual income methodology to a large sample of storefront payday loan borrowers, the study compares consumers deemed to have positive residual income to consumers deemed to have negative residual income with respect to whether they repaid or defaulted on a particular test loan. In one such analysis using the borrower's income most recently observed by the lender, loans in which the borrower had positive residual income had a default rate of 11 percent, compared with a default rate of 14.7 percent for loans in which the borrower had negative residual income. The study concluded that little difference in default rates exists between these two populations, and that the residual-income analysis is not highly predictive of default. On the basis of these results, the industry commenter inferred that the proposed rule's ability-to-repay requirement will not prevent consumers from defaulting.

Setting aside the issue of whether the difference in default rates among loans for which the borrowers did and did not have residual income was meaningful,[779] the Bureau does not agree with the commenter's inference that an ability-to-repay requirement will not reduce the harms identified in the Bureau's unfairness and abusiveness analyses above. The study focuses only on defaults in isolation, despite the fact that as the Bureau has explained numerous times (both in the proposed rule and elsewhere in the final rule), when consumers are faced with an unaffordable covered short-term loan, their most frequent response is to roll over short-term loans (in States where doing so is permitted) or nominally repay the loans, only to have to re-borrow shortly thereafter. In its analysis, the Bureau found that only 28 percent of loan sequences consisted of single loans, with the remaining 72 percent of loan sequences consisted of at least one re-borrowing. For that 28 percent, 22 percent were repaid without re-borrowing, and only 6 percent defaulted.[780] Where the lender has account access, such repayment is accomplished by a debit of the consumer's account. Where the lender has obtained a postdated check, such repayment is made either by way of that check or in light of the fact that the lender may deposit the check at any time. All of this explains why the default rate of covered short-term loans for which the consumer does not have the ability to repay is relatively low. Indeed, the commenter effectively conceded this point when it claimed that by imposing a cooling-off period after the third loan in a sequence, the proposed rule will drive default rates higher.

In addition, even if looking solely at default rates were a relevant metric, the study itself identifies a number of possible explanations for its finding of similar default rates for the two populations, including that account access may incentivize borrowers to prioritize paying the loan notwithstanding cash flow shortages affecting other expenses, which is one of the factors noted in the preceding paragraph.[781]

A specialty consumer reporting agency commenter made a similar argument based on a study it conducted using its own borrowing data. At a high level of generality, the study found very similar default rates for loans made to consumers with positive residual income compared to consumers with negative or zero residual income (with default rates of 16.1 percent and 16.2 percent, respectively). However, a more detailed analysis that disaggregates these consumers into varying degrees of residual income, ranging from those with negative residual income of negative $2,500 or less to those with more than $2,500 in positive residual income, showed higher default rates among consumers who have the most negative residual income (20.0 percent) compared to those with far less negative or positive residual income (15–16 percent). Relatedly, the study reported that first-time borrowers with positive residual incomes had slightly lower default rates than first-time borrowers with residual incomes that were zero or negative. In addition, the study found that consumers who triggered any of the proposed 30-day cooling-off periods had markedly lower default rates than consumers that did not trigger the criteria. Like the industry commenter, this commenter concludes that residual income is not a good predictor of

---

to those discussed here. *See generally* 78 FR 6408, 6460–62, 6470, 6526–28, 6533–35 (Jan. 30, 2013).

[779] The Bureau notes that the residual income test performed using the consumer's recently-documented income as observed by the lender indicated that consumers with negative residual income defaulted on their loans 34 percent more often than consumers with some amount of positive residual income.

[780] CFPB Supplemental Report, at 120.

[781] The study does not, however, include in its list of explanations the main factor identified above, namely, that default rates for borrowers who lack the ability to repay are relatively low because their re-borrowing rates are so high. More generally, given that (i) re-borrowing rates are significantly higher than default rates, and (ii) it appears that the data used for this study could have been used to conduct a similar study of the re-borrowing rates for the two population, it is not clear why the researcher chose to conduct a study solely on default rates rather than a study on re-borrowing rates (or rather than a study that included both).

default.[782] The commenter likewise forecasted that the proposed rule's restrictions on re-borrowing will drive up default rates. In addition, citing the study results, the commenter urged the Bureau to modify the rule in three respects: (1) Replace the ability-to-repay requirement with a propensity-to-repay requirement; (2) limit such an ability-to-repay requirement to first-time borrowers and those with low propensity to repay; and (3) eliminate all of the 30-day cooling-off periods.

Given the close similarity of this commenter's argument regarding the relationship between residual income and default to the argument of the industry commenter discussed above, the Bureau believes its response above to that argument applies equally to this one. For essentially the same reasons, the Bureau believes that the commenter's proposed modifications of the rule are unwarranted and would, in fact, result in perpetuating most of the harm experienced by consumers in the current market.[783]

In addition to making the comment discussed above about default, the same industry commenter made a similar argument about re-borrowing: The commenter argued that ability to repay is no more predictive of re-borrowing than it is of default. In support of this claim, the commenter cited two studies. The first is the same study it cited in support of the ''default'' argument. In this instance, instead of describing the study as finding that there is a weak correlation between residual income and default, the commenter described it as finding that there is a weak correlation between ability to repay and repayment. The Bureau is not persuaded that this study provides such support. To be sure, if a study considers only default and repayment, its findings about default could be presented as findings about repayment, which is the mirror image of default in such a study. By the same token, however, given that such a study does not consider re-borrowing rates at all, it is unclear how findings about such rates can be derived from findings about default, or from mirror-image findings about repayment.

The second study, which predated the proposed rule, contained a number of slides that reference ability to repay, the most pertinent of which appears to be one that includes the claim that consumers with large amounts of residual income are as likely to roll over their loans as consumers with limited residual income. Just below that is what appears to be a screen shot of a portion of a database or spreadsheet with various numbers and percentages. On its face, the statement does not appear to provide support for the commenter's assertion. Nor does the commenter make any attempt to explain this page of the presentation.[784]

Disclosure alternative. The Bureau disagrees with commenters that asserted that a disclosure remedy would be sufficient to prevent either the unfair or abusive practice itself or the risks and harms to consumers from such practice, that the Bureau is compelled as a matter of law to adopt disclosure remedies to address any unfair or abusive practices that involve a lack of understanding by consumers, and that the Bureau erred in proceeding with the rulemaking instead of delaying it to conduct further disclosure research. The Bureau notes that consumer disclosures can be an important and effective tool in different circumstances and indeed has adopted disclosures to communicate various pieces of information to consumers in connection with this final rule. But for the reasons discussed in the proposal and below, the Bureau concludes that disclosures would not be sufficient to prevent the unfair and abusive practices identified in this rule.

More generally, the Bureau concludes that it is not required to mandate disclosures to address any unfair or abusive practices that involve a lack of understanding by consumers, as opposed to adopting other approaches, such as the ability-to-repay provisions here, to prevent the unfair or abusive practices. Neither Congress [785] nor other agencies [786] nor the courts [787] have adopted such a position. The Bureau is authorized by section 1031(b) of the Dodd-Frank Act to prescribe rules to identify unfair, deceptive, or abusive acts or practices and to include in such rules requirements for the purpose of preventing such acts or practices. The unfair and abusive practice the Bureau has identified in § 1041.4 is making covered short-term or longer-term balloon-payment loans without reasonably determining that consumers will have the ability to repay the loans according to their terms. No commenter claims that providing disclosures will prevent that practice. At most, effective disclosures could mitigate some of the harms from the failure to underwrite. In theory at least, disclosures could be so effective that any harms would be reasonably avoidable by the consumer and that consumers would no longer lack understanding of the material costs and risks of the product. However, as discussed below, the Bureau concludes that disclosures here would not have any such effect.

The Bureau agrees that informing consumers that covered short-term loans or covered longer-term balloon-payment loans have high risks of default, re-borrowing, or default avoidance harms or that lenders are not underwriting such loans using the same sorts of practices that are common to other credit markets may cause some consumers to be more generally cautious in taking out such loans. Indeed, the Bureau's analysis of the response by consumers to the new disclosure in Texas is consistent with this outcome. The Bureau finds it likely

[782] This commenter also argued that it would therefore be inappropriate for the Bureau to base assessments of lenders' compliance with the ability-to-repay requirements on their default rates.

[783] The Bureau also addresses the recommendations to replace ability to repay with propensity to repay, and to remove all cooling-off periods, in the discussion of § 1041.5(d) below.

[784] Without citing any studies about either default or re-borrowing, another industry commenter argued that the Bureau had assumed without evidence that satisfaction of the proposed residual income test would predict and prevent injury from re-borrowing and default, and thus that it would be inappropriate for the Bureau to assess a lender's compliance with that test based on performance metrics. The Bureau disagrees, as it has based the ability-to-repay requirement on a substantial body of evidence, including the evidence of re-borrowing rates cited above.

[785] For instance, in the Dodd-Frank Act, Congress authorized the Bureau *both* to take action to identify and prevent unfair or abusive acts or practices *and* to impose disclosure requirements regarding any consumer financial product or service. If Congress had determined that disclosures were adequate and in fact required to address any unfair or abusive act or practice that involves consumer misunderstanding, then Congress could have directed the Bureau to adopt disclosures in such circumstances. Congress did not do so.

[786] For example, the Federal Reserve Board promulgated a rule in 2010 prohibiting mortgage loan originator compensation from varying based on loan terms due to concerns about the steering of mortgage borrowers into less favorable terms than those for which they otherwise qualified. 75 FR 58509 (Sept. 24, 2010). The Board issued this rule under its TILA section 129(p)(2) authority to regulate unfair and deceptive practices in the mortgage market and had determined that a substantive approach was necessary. The Board found that, based on its experience with consumer testing, ''disclosure alone is insufficient for most consumers to avoid the harm caused by this practice.'' The Board also in its unfairness analysis discussed how a Regulation X disclosure promulgated by the Department of Housing and Urban Development similarly ''is not likely by itself to prevent consumers from incurring substantial injury from the practice.'' *Id.* at 58514–15.

[787] *See AFSA,* 767 F.2d at 989 (upholding a rulemaking that ''reasonably concluded'' that the most effective way to eliminate an unfair practice concerning adoption of certain contractual remedies was to proscribe the contract clauses outright because '''[d]isclosure alternatives would deal only partially with limited seller incentives to promote alternative remedies . . . and would not address at all consumers' limited incentives to search for information about remedies.' '').

that the marginal difference in lending (around a 13 percent decrease in loan volumes) in fact resulted from consumers whose decisions were affected by the disclosures and decided not to borrow after better understanding the risks.

However, generalized or abstract information does not inform the consumer of the risks of the particular loan in light of the consumer's particular financial situation. Lenders would still have strong incentives, given their overall business models, to make loans to consumers who cannot in fact afford to repay them according to their terms, as long as such consumers do not default early in their loan sequences. Because consumers using these loans—or at least those who end up in extended loan sequences—are not good predictors of how long it will take them to repay their loans, generalized disclosures are particularly unlikely to position consumers effectively to appreciate the risks they themselves would face from their loans and to make their decisions accordingly. In light of these circumstances, the Bureau finds that generalized disclosures to consumers will not prevent the unfair and abusive practice identified above or equip consumers to avoid the harms it causes as effectively as prohibiting lenders from engaging in the unfair and abusive practice in the first instance.

The only disclosure that the Bureau could envision that could come close to positioning consumers to mitigate the unfair and abusive practice effectively would be an individualized forecast of whether the consumer could afford to repay the loan according to its term, and if not, a forecast of how long such repayment would be reasonably expected to take. While consumers are most familiar with their particular financial situations, lenders have the most information about their business models and the performance of their credit products over hundreds or thousands of individual cases. The Bureau notes, however, that no commenter has suggested such an approach, which would be unprecedented as a matter of mandatory disclosures under federal consumer financial law. Moreover, if anything, an individualized disclosure might require more compliance burden than the final rule to the extent that it would require a lender to forecast how many rollovers or re-borrowing might be required in the event that a consumer is not likely to repay the entire balance during the initial loan term.[788]

Further, with disclosures in this specific context, the only option for a consumer warned about the risks of an unaffordable loan is simply not to take out the loan at all, since once a consumer takes out a loan that in fact turns out to be unaffordable the consumer's only options are to choose between the harms associated with default, re-borrowing, or forgoing other major financial obligations or basic living expenses. Thus, the Bureau believes that it is telling that while the Texas disclosures appear to have caused some consumers to seek different options altogether, in the first instance, once they had already taken out a loan, there was only a 2 percent decrease in the probability of re-borrowing.[789]

The Bureau also addresses three other arguments commenters raised about disclosures. First, as to the specific trade group commenter's argument that the Bureau was wrong to reject a formal invitation to engage in a study to test enhanced disclosures, the Bureau notes that this commenter had engaged in outreach with the Bureau for several years during the course of the rulemaking, yet did not present the disclosure trial proposal until less than two weeks before the proposal was released and requested that the Bureau delay issuing a proposal or hold the comment period open during the pendency of the proposed study.[790] Thus, in addition to the substantive reasons discussed above for why the Bureau concludes that generalized disclosures are insufficient to prevent the practice or harms identified, the Bureau rejected the request to delay the proposal in light of this strategic procedural posturing. The Bureau did indicate that it would be open to considering the results of any new research as part of the comment process, but no such evidence has been forthcoming.

Second, the Bureau finds that commenters overstate the degree to which the Bureau is relying on behavioral economics in rejecting a disclosure alternative. As discussed above, there are both theoretical and data-driven explanations for why the Bureau does not share the view that disclosures will sufficiently remedy the observed harms. Lastly, the Bureau does not view as a viable option one commenter's suggestion of requiring a new TILA disclosure that would potentially capture the ''all-in'' cost of credit. The Bureau finds that this disclosure would not be effective at preventing the unfair and abusive practice or rectifying the identified harms for the same reasons as described above.

Payment-to-income alternative. While the Bureau is now allowing lenders to choose between underwriting approaches based either on a debt-to-income ratio or on residual income, the Bureau is not adopting an alternative approach centered on a payment-to-

[788] As noted earlier, one commenter suggested that a disclosure requirement could be dynamic and require consumers to fill out a form that would demonstrate how much residual income they have each month based on projected income and expenses. The Bureau notes that this suggestion bears some conceptual similarity to traditional installment lenders who, as noted in the proposal, work with their customers to prepare a budget itemizing income and expenses. However, in that case the lenders use the information to conduct an ability-to-repay analysis, which would not happen under the commenter's suggested regime. As such, the Bureau believes this type of approach would not sufficiently address the identified harms.

[789] For these reasons, the Bureau disagrees with the commenter that asserted that the Bureau's economists made statements at a conference undermining the Bureau's statements in the NPRM regarding the effectiveness of disclosures. The Bureau views those statements as compatible with its statements on this issue in the proposal and in this final rule. Specifically, the presentation asserted ''borrowers more likely to end up in long-term debt cycles *may* be more responsive to disclosures'' (emphasis added). The Bureau also notes that, even if these borrowers are relatively more responsive to disclosures, that fact would not equate to such disclosures being an effective means to reduce these sequences, let alone a viable substitute for the ability-to-repay approach set forth by the rule.

[790] The Bureau notes that the commenter presented the disclosure trial proposal to the Bureau at a meeting shortly after numerous press reports had already indicated that the proposal release was imminent. *See, e.g.,* ''CFPB to Propose Payday-Loan Rule on June 2,'' Wall St. J. (May 18, 2016), *available at https://www.wsj.com/articles/cfpb-to-propose-payday-loan-rule-on-june-2-1463615308*; ''CFPB Set to Release Payday Lending Proposal on June 2,'' Am. Banker, May 18, 2016, *available at https://www.americanbanker.com/news/cfpb-set-to-release-payday-lending-proposal-on-june-2*. The Bureau also notes receipt of a comment from an executive at a large lender who stated that he had sent correspondence to the Bureau in June 2015 following the Small Business Review Panel Outline release and the Small Business Review Panel meeting, which offered to make the commenter's company available to conduct a controlled field trial to measure consumer outcomes relating to the proposals under consideration. The commenter noted that he had raised the idea again when he met with Bureau officials, along with trade groups and other lenders, in July of 2015. The commenter argued further that, at the meeting, Bureau officials were dismissive of the idea because it was ''not a test and learn environment'' and that the Bureau had not spoken to consumers and did not think it necessary to do so. The Bureau does not agree with the commenter's assertions. To the extent any statements were made referring to a ''test and learn'' environment, Bureau officials were referring to the difficulty of incorporating a sandbox approach to testing policy ideas into an ongoing formal Federal rulemaking process, which was well underway at the time (see discussion elsewhere regarding other commenters' ideas about sandbox approaches). Moreover, the Bureau has heard from consumers during the rulemaking process and views such feedback as meaningful, including its review of more than one million comments from individual commenters. *See* part III.

income ratio. The Bureau recognizes that many commenters have expressed strong support for this approach, including depository institutions interested in making lower-cost small-dollar loans. However, the Bureau notes that the particular proposal under consideration at the SBREFA stage and which these commenters have elaborated upon in their comments—namely a safe harbor for loans with a payment that takes up 5 percent or less of a consumer's income—is far more relevant to the market for longer-term installment loans than for the loans covered by §§ 1041.4 and 1041.5, as those loans generally have lump-sum or other large irregular payments that far exceed a 5 percent payment-to-income ratio for the vast majority of consumers.

Consider, for example, a consumer making $2,000 per month. A 5 percent payment-to-income ratio safe harbor would mean the consumer is only eligible for a $100 loan, assuming all payments on the loan would be due in one month; for loans due in two weeks—as is common for payday loans—the maximum loan amount would be only $50. Accordingly, the Bureau does not believe that lenders or consumers would be likely to use a 5 percent payment-to-income option in the short-term space, particularly where it is permissible to make loans under § 1041.6 in amounts of up to $500.[791] To the extent the Bureau engages in further study and potential future rulemaking on longer-term installment products, the Bureau will continue to consider whether a payment-to-income approach either in the specific form suggested by the commenters or in other forms would be a reasonable alternative to an ability-to-repay requirement.

State law regulatory approaches. As discussed above, many commenters argued that the Bureau failed to rigorously study existing State laws regulating small-dollar loans and consider more seriously whether one or more existing regulatory approaches in the States would be sufficient to address the concerns the Bureau identified in the market rather than the ability-to-repay requirements. The Bureau also notes that in some cases, State Attorneys General or other State or local officials in the States cited by the aforementioned commenters as having model State regulatory approaches wrote in support of the proposed ability-to-repay requirements and of the proposal in general, reflecting a diversity of opinion about the sufficiency of the laws in those States to address the identified harms at the Federal level.

The Bureau has over the past several years studied the regulatory approaches of many States carefully and, as discussed in part III, has engaged in outreach with a wide variety of stakeholders including elected officials and regulators in States that permit covered lending. The development of the proposal framework and the final rule has been informed by this understanding of these State laws. The Bureau provides more detail on State laws in part II, but some examples follow.

A number of States set rollover thresholds that are higher than those in this final rule. Delaware permits four rollovers on payday loans, Missouri permits six on payday loans, and New Hampshire permits 10 rollovers on short-term title loans.[792] Idaho, on the other hand, sets their rollover cap at three, similar to this rule.[793] Other States, like California and Kentucky, impose fewer restrictions but cap payday loans at, for example, $500 (Kentucky) or $300 (California).

Other commenters argued that States have imposed less onerous, but nonetheless effective, ability-to-repay frameworks that the Bureau should consider adopting instead of the proposed ability-to-repay requirements. For example, some commenters noted Utah as an example. Utah lenders must determine that a consumer has the ability to repay a loan based on one or more of the following sources: A consumer report from a consumer reporting agency, verification or proof of income, the borrower's self-affirmation of ability to repay, or prior payment history with the lender from its own records.[794] In addition, lenders may not roll over loans beyond 10 weeks, and once a year consumers may request extended repayment plans. It appears one significant difference between Utah law and this rule is in how that State treats re-borrowing. In Utah a lender need only determine whether the consumer can repay the loan in the ordinary course, ''which may include rollovers or extended payment plans,'' and need not make a separate repayment determination on rollovers.[795] To comply with § 1041.5(b), lenders will need to determine whether consumers have an ability to repay each loan according to its terms, without re-borrowing. And Utah law allows 10 weeks of re-borrowing, as opposed to the Bureau's cap of three loans in a sequence (under § 1041.5(d)), which would result in a shorter period for consumers taking out 14-day loans (approximately six weeks of re-borrowing), but a longer period for consumers taking out 30-day loans (approximately 12 weeks of re-borrowing).

Of course, the Bureau's approach is not more restrictive than that used by all the States. For example, only a minority of States, 19 by the Bureau's count, permit vehicle title lending with lump-sum (typically short-term) structures, and 15 States and the District of Columbia either ban payday loans or set fee or interest caps that payday lenders find too low to sustain the business model (*see* part II). Even in States that do allow payday lending, certain parts of their payday lending laws may be more restrictive. For example, the cooling-off period imposed by Virginia in certain circumstances lasts 45 or 90 days,[796] while the Bureau's rule sets cooling-off periods, such as the one in § 1041.5(d), at 30 days.

Commenters also raised Colorado's laws as a model. However, following such an approach would involve banning covered short-term lending altogether since that State only allows loans of at least six months in term. To the extent the Bureau engages in further study and potential future rulemaking concerning longer-term installment products, the Bureau will continue to consider whether the Colorado model may provide additional insight.[797]

Though the Bureau closely studied the various States' approaches as it

[791] The Bureau also has some skepticism that a consumer's ability to repay a covered short-term loan or covered longer-term balloon-payment loan can be evaluated without some consideration of major financial obligations and basic living expenses, particularly in light of their lump sum or irregular payment features. For example, the Bureau notes that some States have limited short-term loans to 25 percent of income, but such limitations do not appear to have produced any substantial improvement in re-borrowing rates. *See, e.g.,* Nev. Rev. Stat. sec. 604A.425.1(a); *see also* State Law Regulatory Approaches below.

[792] 5 Del. Laws. Sec. 2235A(a)(2); Mo. Rev. Stat. sec. 408.500(6); N.H. Rev. Stat. sec. 399–A:19.

[793] Idaho Code Ann. Sec. 28–46–413(9).

[794] Utah Code Ann sec. 7–23–401.

[795] *Id.*

[796] Va. Code Ann. sec. 6.2–1816. Specifically, the law requires a 45-day cooling-off period after a consumer has taken out five loans in 180 days and a 90-day cooling-off period after a consumer completes an extended payment plan. The Bureau received a comment letter from the State Attorney General in Virginia that urged the Bureau to finalize a 60-day cooling-off period or, at minimum, a 45-day cooling-off period, and discussed the above referenced 45-day cooling-off period under Virginia law as context for the request. See the discussion of § 1041.5(d) below for a more detailed description of the Bureau's decision to adopt a 30-day cooling-off period in the final rule.

[797] The Bureau also notes that Colorado does require lenders to obtain detailed information and credit histories from consumers for creditworthiness analysis in cases in which the loan exceeds a certain size threshold.

developed this rule, the Bureau concludes that none of these State law frameworks, alone, would suffice to prevent the harms the Bureau has identified. As the Bureau noted in the proposal, above in Market Concerns—Underwriting and the section-by-section analysis for § 1041.4, and below in the Section 1022(b)(2) Analysis, the regulatory frameworks in most States do not appear to have had a significant impact on reducing re-borrowing and other harms that confront consumers of short-term loans.

For example, the Bureau's evidence shows that 24- and 48-hour cooling-off periods have a minimal impact on overall re-borrowing rates.[798] As noted in the proposal, the Bureau studied re-borrowing rates from 2010–2011 in most of the States noted by commenters and found that, generally, over 80 percent of loans were re-borrowed regardless of the type of State restriction studied. This evidence suggests that the laws in those States at that time had not meaningfully prevented re-borrowing. Commenters have not rebutted these findings directly. Some instead challenge the premise that re-borrowing is an indicator of consumer harms. The Bureau addresses that issue above in Market Concerns—Underwriting and the section-by-section analysis for § 1041.4.

Thus, the Bureau continues to believe that there is a need to adopt minimum Federal standards that apply consistently across all of these States. In setting the parameters of this final rule, the Bureau sought to prevent the harms identified in § 1041.4 from continuing. For that reason, the Bureau declines to exempt entities operating in any given State on the basis of the given State's laws. The Bureau recognizes that States may wish to prevent more harms than are prevented by this rule, and they are free to do so because, as noted earlier, this rule should be considered a floor and not a ceiling. *See* part IV (discussing preemption under the Dodd-Frank Act and noting that State usury caps are an example of State consumer protections that may extend beyond the floor of Federal law).

Other alternatives. The Bureau does not believe that any of the other posited alternative approaches to regulating covered short-term or longer-term balloon-payment loans would be less onerous than, but as effective as, an ability-to-repay requirement. As noted in part II and Market Concerns—Underwriting sections and discussed at some length in the proposal, about 18 States require payday lenders to offer repayment plans to borrowers who encounter difficulty in repaying payday loans. The usage rate of these repayment plans varies widely, but in all cases it is relatively low.[799] The Bureau believes the low take-up rate on these repayment plans may be due to lenders discouraging use of the plans or failing to promote their availability.[800] At the very least, a rule that required only that lenders offer extended repayment plans would create significant evasion risk absent more complex provisions to try to prevent lenders from discouraging the use of repayment plans in order to make it more likely that such consumers will instead re-borrow. The Bureau is aware, from confidential information gathered in the course of statutory functions, that one or more payday lenders train their employees not to mention repayment plans until after the employees have offered renewals, and then only to mention repayment plans if borrowers specifically ask about them.

Another alternative posited by commenters was increased or sustained enforcement attention focusing on the worst market actors, or focused on specific sub-markets like unregulated or offshore online lenders. As noted in part III, the Bureau has already engaged in extensive enforcement and supervisory activity in this market focused on a wide variety of practices. But, as noted in Market Concerns—Underwriting, the identified unfair and abusive practice in § 1041.4 is a market-wide practice. Continued enforcement and supervisory activity focused on the worst actors would simply not prevent the market-wide harms identified by the Bureau. In addition, the Bureau is sometimes criticized for ''regulation through enforcement.'' Thus, while the Bureau could bring enforcement actions against individual lenders for engaging in the practices identified here as unfair and abusive, the Bureau believes that it provides more consistent protection for consumers and compliance guidance for industry to address market-wide harms through a detailed rulemaking that both defines the unfair and abusive practice, carefully outlines affirmative standards to prevent that practice, and provides a reasonable period for lenders to come into compliance with those standards.

With regard to implementing a nationwide licensing and registration system, the Bureau has authority under the Dodd-Frank Act to prescribe rules regarding registration requirements applicable to covered persons, including those covered by this rule. The Bureau also has authority under 12 U.S.C. 5514(b)(7)(C) to prescribe rules to ensure that lenders under the Bureau's nonbank supervision authority are legitimate entities and are able to perform their obligations to consumers, including by requiring background checks and bonding. Indeed, the Bureau has noted in its recent semi-annual regulatory agendas that it is evaluating stakeholder suggestions about creating such a system for these markets.[801] But while such an action may assist with enforcement and supervision efforts (discussed above) and provide a better means of identifying lenders operating

[798] CFPB Supplemental Findings, at 100–109.

[799] Washington permits borrowers to request a no-cost installment repayment schedule prior to default. In 2014, 14 percent of payday loans were converted to installment loans. Wash. Dep't of Fin. Insts., ''2014 Payday Lending Report,'' at 7 (2014), *available at http://www.dfi.wa.gov/sites/default/files/reports/2014-payday-lending-report.pdf.* Illinois allows payday loan borrowers to request a repayment plan with 26 days after default. Between 2006 and 2013, the total number of repayment plans requested was less than 1 percent of the total number of loans made in the same period. Ill. Dep't. of Fin. & Prof. Reg., ''Illinois Trends Report All Consumer Loan Products Through December 2015,'' at 19 (Apr. 14, 2016), *available at http://www.idfpr.com/DFI/CCD/pdfs/IL_Trends_Report%202015-%20FINAL.pdf?ActID=1204&ChapterID=20.* In Colorado, in 2009, 21 percent of eligible loans were converted to repayment plans before statutory changes repealed the repayment plan. State of Colorado, Dep't of Law, Office of the Att'y Gen., ''2009 Deferred Deposit Lenders Annual Report,'' at 2 (2009), *available at http://www.coloradoattorneygeneral.gov/sites/default/files/contentuploads/cp/ConsumerCreditUnit/UCCC/AnnualReportComposites/2009_ddl_composite.pdf.* In Utah, 6 percent of borrowers entered into an extended payment plan. G. Edward Leary, Comm'r of Fin. Insts. for the State of Utah to Hon. Gary R. Herbert, Governor, and the Legislature, (Report of the Commissioner of Financial Institutions for the Period July 1, 2013 to June 30, 2014), at 135, (Oct. 2, 2014), *available at http://dfi.utah.gov/wp-content/uploads/sites/29/2015/06/Annual1.pdf.* Florida law also requires lenders to extend the loan term on the outstanding loan by 60 days at no additional cost for borrowers who indicate that they are unable to repay the loan when due and agree to attend credit counseling. Although 84 percent of loans were made to borrowers with 7 or more loans in 2014, fewer than 0.5 percent of all loans were granted a cost-free term extension. *See* Brandon Coleman & Delvin Davis, ''Perfect Storm: Payday Lenders Harm Florida Consumer Despite State Law,'' at 4 (Ctr. for Responsible Lending, 2016), *available at http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_perfect_storm_florida_mar2016_0.pdf.*

[800] Colorado's 2009 annual report of payday loan activity noted lenders' self-reporting of practices to restrict borrowers from obtaining the number of loans needed to be eligible for a repayment plan or imposing cooling-off periods on borrowers who elect to take a repayment plan. State of Colorado, Dep't of Law, Office of the Att'y Gen., ''2009 Deferred Deposit Lenders Annual Report,'' at 2 (2009), *available at http://www.coloradoattorneygeneral.gov/sites/default/files/contentuploads/cp/ConsumerCreditUnit/UCCC/AnnualReportComposites/2009_ddl_composite.pdf.* This evidence was from Colorado under the state's 2007 statute, which required lenders to offer borrowers a no-cost repayment plan after the third balloon loan. The law was changed in 2010 to prohibit balloon loans, as discussed in part II.

[801] *See, e.g.,* 82 FR 40386, 40387 (Aug. 24, 2017).

without State lending licenses, the Bureau does not believe that it would be effective in lieu of ability-to-repay requirements at remedying the identifying harms. A well-bonded lender with officers with a clean record, which is registered, would still be able to cause all of the identified harms noted in Market Concerns—Underwriting and the section-by-section analysis for § 1041.4 unless the Bureau took more substantive action (like adopting this rule).

In response to the comment urging the Bureau to forgo rulemaking and instead focus on consumer education initiatives, the Bureau does not find that this would be a viable option for significantly reducing the observed harms. While financial education is an important pillar of the Bureau's work, and it will continue those efforts, it does not believe that its financial education efforts would impact saving rates broadly enough to have a substantial impact on the need to borrow to cover cash shortfalls across all consumers. Nor does the Bureau believe that generalized financial education, even if it succeeded in reaching all would-be-borrowers, could enable consumers to accurately predict their own likelihood of re-borrowing or defaulting. The Bureau recognizes that there will continue to be demand for credit from consumers who lack the ability to repay covered short-term or longer-term balloon-payment loans. See the discussion in the section-by-section analysis for § 1041.4 regarding substitution to alternative products.

Fair lending. The Bureau expects that certain of the burden-reducing changes to the final rule will also address commenters' concerns relating to fair lending. For example, under the final rule, when a reliable record to verify income is not reasonably available, a lender may now rely on a consumer's statement of net income, provided such reliance is reasonable (see discussion of § 1041.5(c)(2)(ii)(A) and comment 5(c)(2)(ii)(A)–3 and –4, below). This change should reduce concern that members of protected classes would be denied access to credit solely because of the difficulty in verifying their income. Additionally, unlike the proposed rule, the final rule permits lenders to include in the consumer's net income any income of another person to which the consumer has a reasonable expectation of access if the consumer documents that he or she has regular, verifiable access to such income (*see* 1041.5(a)(5) and comment 5(a)(5)–3). In the final rule, the lender is also permitted to rely on the consumer's statement for rental housing expenses, provided such reliance is reasonable; this is a change from the proposal, which would have required a projection of rental housing expense using a reliable record or an estimate based on survey or other data with respect to the consumer's neighborhood (*see* § 1041.5(c)(2)(iii) and associated commentary). More generally, the Bureau notes that inquiries relating to dependents for purposes of estimating basic living expenses can be made consistent with Regulation B.[802] For the foregoing reasons, the Bureau believes that the final rule is consistent with the requirements of ECOA and Regulation B.

5(a) Definitions

Proposed § 1041.5(a) would have provided definitions of several terms used in proposed §§ 1041.5 and 1041.6. Virtually identical definitions and commentary appeared in proposed § 1041.9(a) for covered longer-term loans (including covered longer-term balloon-payment loans), with minor adjustments to account for the difference in the term of the products. In the final rule, the Bureau has revised several of the six proposed definitions for substance or clarity, made them applicable to both covered short-term loans and covered longer-term balloon-payment loans, and has added two more definitions in part to effectuate the new underwriting methodology based on debt-to-income ratio. A discussion of the proposed definitions, the comments received on those definitions, and the final definitions follows.

5(a)(1) Basic Living Expenses

Proposed Rule

Proposed § 1041.5(a)(1) would have defined basic living expenses as a component of the ability-to-repay determination as established in the proposed rule. The Bureau proposed to define basic living expenses as expenditures, other than payments for major financial obligations, which a consumer makes for goods and services necessary to maintain the consumer's health, welfare, and ability to produce income, and the health and welfare of members of the consumer's household who are financially dependent on the consumer. Accordingly, the proposed definition of basic living expenses was a principle-based definition and did not provide a comprehensive list of all the expenses for which a lender must account. Proposed comment 5(a)(1)–1 provided illustrative examples of expenses that would be covered by the definition. It provided food and utilities as examples of goods and services that are necessary for maintaining health and welfare, and transportation to and from a place of employment and daycare for dependent children as examples of goods and services that are necessary for maintaining the ability to produce income.

Proposed comment 5(b)–2.i.C would have clarified that as part of the reasonable ability-to-repay determination, the lender's estimates of basic living expenses must be reasonable. Proposed comment 5(b)–4 would have provided examples of approaches to estimating basic living expenses that were reasonable or unreasonable. For discussion of how the final rule addresses the reasonableness of lender estimates of basic living expenses, see the section-by-section analysis of § 1041.5(b), where the commentary provisions relating to basic living expenses have been revised, as well as the immediately following discussion.

The Bureau's proposed definition gave lenders some flexibility in how lenders determine dollar amounts that meet the proposed definition, provided they do not rely on amounts that are so low that they are unreasonable for consumers to pay for the types and levels of expenses provided in the definition. The Bureau specifically noted in the proposal that a lender would not be required to verify or conduct a detailed analysis of every individual consumer expenditure. In contrast to major financial obligations, the Bureau explained that recent expenditures might not reflect the amounts a consumer needs for basic living expenses during the term of a prospective loan. The Bureau expressed concern that such a requirement could substantially increase costs for lenders and consumers while adding little protection for consumers.

The Bureau sought comment in the proposal on whether an alternative formulation focusing on expenses that are of the types that are likely to recur through the term of the loan and in amounts below which a consumer cannot realistically reduce them would be preferable; the Bureau had used similar concepts to define which expenses should be treated as major financial obligations as discussed further below in connection with § 1041.5(a)(3). The Bureau also sought comment on whether there are standards in other contexts that can be relied upon by the Bureau. The Bureau

[802] 12 CFR 1002.5(d)(3) (''A creditor may inquire about the number and ages of an applicant's dependents or about dependent-related financial obligations or expenditures, provided such information is requested without regard to sex, marital status, or other prohibited basis.'').

explained in the proposal that, for example, it was aware that the Internal Revenue Service (IRS) and bankruptcy courts have their own respective standards for calculating amounts an individual needs for expenses while making payments toward a tax delinquency or bankruptcy-related repayment plans.

Comments Received

The Bureau received many comments on the proposed definition of basic living expenses from a variety of stakeholders. In general, industry commenters criticized the proposed definition as overly vague and argued it would create uncertainty for lenders trying to comply with the proposed rule. A number of industry commenters asked for the Bureau to provide additional clarity on the definition. Some, including a trade association for payday lenders, suggested the Bureau include safe harbor amounts for basic living expenses due to the costs of having to establish a framework to estimate such expenses, particularly for smaller lenders. Some commenters argued that the standards were so vague that different lenders in good faith could apply different definitions. One State Attorney General expressed concern that the vagueness in the proposed definition would lead to inconsistent interpretation of the rule.

Industry commenters also raised a number of more discrete issues with the proposed definition. Some argued that the Bureau should let lenders assume that consumers could cut back on discretionary spending on items like restaurant meals, gym memberships, and the like, and that the proposed rule was not clear whether those types of expenses were included in the definition and whether lenders could assume that consumers would undertake some reductions in spending on those items for purposes of the basic living expenses estimates. Another commenter noted that the Bureau had not taken account of the fact that prices may change seasonally (as with back-to-school sales). Several commenters criticized the definition for including expenses for the health and welfare of the consumer's dependents when, they argued, consumers may have spouses or other persons paying a portion of the household expenses, including those of dependents. (These issues are noted above in the discussion of general comments regarding ECOA and Regulation B.) They argued that the definition should be modified to account for such sharing of expenses.

Most consumer advocates commenting on the rule expressed support for the concept of lenders having to estimate basic living expenses, but argued that the definition was under-inclusive. For example, they questioned why the Bureau only included four examples of specific expenses. They also expressed support for including within the definition any expense that is likely to recur. They also criticized what they viewed as too permissive provisions in commentary regarding reasonable estimates of basic living expenses. Some of these commenters suggested specific expenses that should be explicitly added to the definition, such as alimony, health insurance premiums other than those deducted from a consumer's paycheck, cell phone payments, car insurance payments, and a number of other categories. Another suggestion was to change the definition to include typical expenses based on geography, income, and household size.

In contrast, one organization generally supportive of the rule criticized the approach on this element of the financial analysis and argued that lenders should be expected to itemize basic living expenses because of the risk that estimates would be too low. The Bureau notes that it is responding to this comment in the discussion below of comment 5(b)–2.i.C.*1.* A public policy and research organization argued that childcare expenses, including diaper costs for new parents, could consume a large percentage of a consumer's budget and therefore should be treated not as a basic living expense but as a major financial obligation to be verified.

Several commenters urged the Bureau to use the IRS Collection Financial Standards to define the ambit of basic living expenses. They argued that the proposed definition was too ambiguous and could lead to confusion and potentially lender evasion; they argued that the IRS Collection Financial Standards would provide needed clarity for all parties involved. A lender commenter, a SER, took a different view, arguing that the IRS Collection Financial Standards should not be used for either estimating basic living expenses or rental housing and citing the average housing cost in Orange County, California, as an example of the Standards being ''unrealistic.''

Final Rule

The Bureau has decided to finalize the proposal's framing of the definition of basic living expenses as expenses that are ''necessary'' to maintain the consumer's health, welfare, and ability to produce income and the health and welfare of the members of the consumer's household who are financially dependent on the consumer. As such, the regulatory text is being finalized with only minor wording changes from the proposal for clarity. However, the Bureau in response to comments is making a number of modifications to the commentary clarifying the definition, as described in more detail below.

The Bureau concludes that the conceptual framework of the proposal remains the appropriate formulation for defining basic living expenses. The ''necessary to maintain'' language in the proposed definition is adapted largely from the IRS Collection Financial Standards, which set forth necessary expenses for repayment of tax delinquencies by taxpayers.[803] The Bureau considered finalizing the alternative formulation on which it had sought comment (*i.e.,* personal and household goods and services that are likely to recur and that are types of expenditures that the consumer cannot reasonably be expected to reduce or forgo during the term of the loan). However, while the focus on recurring obligations has been helpful in defining major financial obligations as discussed below, the Bureau is concerned about the complexity that would result from trying to differentiate recurring from non-recurring expenses and reducible from non-reducible expenses when it comes to more discretionary expenditures. To give an example, newspaper and magazine subscriptions and health club memberships are not typically thought of as necessary expenses, but they generally are recurring. And whether such expenses are reducible during the term of the loan generally and the relevant monthly period that is the focus of the residual-income or debt-to-income analysis in particular may depend on such factors as the term of the relevant contracts (for

[803] Internal Revenue Servs., ''Collection Financial Standards,'' *https://www.irs.gov/businesses/small-businesses-self-employed/collection-financial-standards* (last revised Mar. 27, 2017) (providing that ''Collection Financial Standards are used to help determine a taxpayer's ability to pay a delinquent tax liability. Allowable living expenses include those expenses that meet the necessary expense test. The necessary expense test is defined as expenses that are necessary to provide for a taxpayer's (and his or her family's) health and welfare and/or production of income.''). The IRS Collection Financial Standards contain Local Standards for transportation expenses and housing expenses and utilities, and National Standards for other categories, such as food, clothing, out-of-pocket medical expenses, and miscellaneous items. The National and Local Standards are tied to different data sources, including the Bureau of Labor Statistics Consumer Expenditure Survey, U.S. Census Data, and the American Community Survey. The Standards are updated periodically. Both the categories and the amounts provided as estimates are found on the IRS Web site.

both the loan and the product or service), the method by which payments are made (*e.g.,* automatic debit versus monthly bill pay), and the applicable termination policies and penalties (*e.g.,* advance notice of termination). The Bureau also is not aware of data sources that categorize the types and amounts of recurring expenses as distinguished from non-recurring expenses, in contrast to the ''necessary'' expense formulation which as noted above is derived from the IRS Collection Financial Standards.

With regard to the commentary to § 1041.5(a)(1), the Bureau revised comment 5(a)(1)–1 and created a new comment 5(a)(1)–2. The revised comment 5(a)(1)–1 clarifies that estimating basic living expenses is part of the broader ability-to-repay determination under § 1041.5(b). The comment also clarifies that a lender may make a reasonable estimate of basic living expenses without making an individualized determination and includes a cross-reference to comment 5(b)–2.i.C. With regard to the amounts of basic living expenses, comment 5(b)–2.i.C has been revised in a number of ways to provide more guidance on how to reasonably estimate basic living expenses. Those changes are described below in the discussion of § 1041.5(b) and are to be read in tandem with the changes to commentary for the definition of basic living expenses in § 1041.5(a)(1).

Comment 5(a)(1)–2 expands the examples of basic living expenses described in the proposal with some additional clarification to six items, which are: (1) Food, (2) utilities not paid as part of rental housing expenses, (3) transportation, (4) childcare, (5) phone and Internet service, and (6) out-of-pocket medical expenses (which would include insurance premiums to the extent not deducted from consumer's paychecks as well as co-pays, prescriptions, and similar expenses). The comment also includes new language clarifying that basic living expenses do not include expenditures for discretionary personal and household goods or services and gives examples of newspaper subscriptions and vacation activities. Additionally, comment 5(a)(1)–2 notes that if the consumer is responsible for payment of household goods and services on behalf of the consumer's dependents, those expenditures are included in basic living expenses. The comment further clarifies that the lender may reasonably consider whether another person is regularly contributing toward the consumer's payment of basic living expenses when conducting a reasonable ability-to-repay determination (with a cross-reference to comment 5(b)–2.i.C.*2*). The Bureau agrees with the commenters who suggested that, when a lender estimates basic living expenses on an individualized basis, the Bureau should permit lenders to take this fact into account given that the proposed definition of basic living expenses included members of the consumer's household who are financially dependent on the consumer.

The inclusion of additional examples of basic living expenses in comment 5(a)(1)–2 and the new language describing examples of items that are not included in the definition are in response to comments asking for more specificity on what expenses are included in and what are excluded from the definition of basic living expenses. Commenters had specifically asked about the status of the items now addressed. The categories of out-of-pocket medical expenses and phone and Internet service have been added in view of comments urging the Bureau either to clarify the status of the items or to include them because of the view by the commenters that they are necessary expenses. The category of utility payments also has been clarified to note that it includes utilities not paid as part of rental housing expense, in response to interagency comments from a Federal prudential regulator. The example of transportation as a basic living expense also has been broadened from the proposal, which included transportation to work as an example. The Bureau finds that transportation expenses for both personal and household use and for work is more consistent with the notion of ''necessary'' expenses for health, welfare, and the ability to work.

The Bureau concludes that the six categories of expenses provided as examples are sufficient for estimating basic living expenses. To this end, the Bureau has included language in comment 5(b)–2.i.C.*1* clarifying that a lender is not required to itemize the basic living expenses of each consumer but may instead arrive at estimates for the amount needed to cover the costs of food, utilities not paid as part of rental housing expenses, transportation, out-of-pocket medical expenses, phone and Internet services, and childcare. The comment also clarifies it would be reasonable for the lender to use data about these expenses from the Consumer Expenditure Survey of the Bureau of Labor Statistics or the IRS Collection Financial Standards, or a combination of the two data sources, to develop non-individualized estimates of basic living expenses for consumers seeking covered short-term or longer-term balloon-payment loans. The comment also clarifies that in using the data from those sources to estimate the amount spent on a particular category, the lender may make reasonable adjustments to arrive at an estimate of basic living expenses, for instance where a data source's information on a particular type of basic living expenses overlaps with a type of major financial obligation as defined in § 1041.5(a)(3). More explanation of the comment is provided in the section-by-section analysis for § 1041.5(b)(1), below.

With regard to the comments requesting that the Bureau should provide safe harbor categories and amounts for basic living expenses, the Bureau believes that the IRS Collection Financial Standards are a useful source for developing estimates of basic living expenses. As explained earlier, the ''necessary'' expense concept at the heart of the definition in § 1041.5(a) is derived from the Standards. Lenders can use the Standards to estimate both the amounts and categories of expenses, and the Bureau would view such an approach as reasonable. As described above, comment 5(b)–2.i.C.*1* now contains language recognizing that fact. At the same time, the Bureau recognizes that lenders may well want to make reasonable adjustments from that framework. The Bureau believes that in some cases the Standards may capture expenses that would not be relevant for a lender making a basic living expenses estimate for the relevant monthly period, which is the calendar month with the highest payments on the loan.[804] And there also is overlap between some of the categories provided in the Standards and the items deemed in this rule as major financial obligations (such as automobile lease payments). A direct application of the Standards thus in some cases may create operational difficulty or result in an over-inclusive estimate for purposes of what is required under § 1041.5.[805]

The Bureau also considered whether to use the Consumer Expenditure

[804] For example, a consumer might not have transportation expenses such as licenses, registration, and maintenance, but the consumer presumably will have gas costs if she owns a car.

[805] Regarding the comment by a SER who argued that using the IRS Collection Financial Standards would be unrealistic for estimating basic living expenses and rental housing expenses, as discussed below the Bureau is clarifying in comment 5(b)–2.i.C.*1* that it would be reasonable to use the Standards to estimate the amounts or categories of basic living expenses, but the Bureau is not requiring use of the Standards, and the Bureau expects that lenders would have to make adjustments if they do use them. Moreover, the final rule no longer requires the lender to estimate housing expenses based on locality-based data. *See* § 1041.5(c)(2)(iii).

Survey of the Bureau of Labor Statistics (CEX) as a safe harbor. Like the Standards, the CEX is a useful source for information about consumers' household expenditures which could inform estimates of basic living expenses. As with the IRS Collection Financial Standards, comment 5(b)–2.i.C.*1* now clarifies that use of the CEX would be a reasonable method for estimating the categories and amounts of basic living expenses. However, because the CEX collects data at the household level, not the individual consumer level, and because of how it groups the categories of expenses, it too may be over-inclusive as to the amounts of the expenses, depending on whether the consumer has dependents or not match precisely the list of categories in comment 5(a)(1)–2.

Put another way, the Bureau views both data sources as reliable and useful for the purposes of estimating various categories of basic living expenses, and believes it would be reasonable for lenders to draw on one or both of them or on their own experience (or on a combination of the lenders' experience and these extrinsic data sources). But since the IRS Collection Financial Standards and the CEX each may be potentially over-inclusive or not match precisely the list of categories in comment 5(a)(1)–2, the Bureau expects that most lenders who use those sources will choose to make some reasonable adjustments or turn to supplemental sources.

The Bureau finds that, cumulatively, the changes to comments 5(a)(1)–2 and 5(b)–2.i.C.*1* described above will address commenters' concerns. To recap, the commentary now contains: (1) Additional examples of expense categories that are included in the definition; (2) clarification that it would suffice for lenders to estimate the six categories of expenses described in comment 5(a)(1)–2; (3) clarification around what is excluded from the definition; (4) new commentary language clarifying that use of particular government data sources (IRS Collection Financial Standards and/or CEX) would be reasonable methods of estimating expenses; and (5) commentary explaining that lenders have flexibility to make adjustments based on the lender's experiences and for other reasonable considerations. The Bureau recognizes that estimating basic living expenses will involve some complexity and burden, particularly initially while lenders are developing a system to comply with the rule's requirements. (This is discussed in the Section 1022(b)(2) Analysis.) The Bureau does expect that, at least in some cases, service providers would be positioned to provide software to permit lenders to develop this capability. Indeed, some commenters appear to have developed their own methodologies in the course of researching the affected markets and commenting on the proposal. The Bureau does not want to unduly restrict the flexibility of lenders and service providers to develop innovative methods of estimating basic living expenses, which a more prescriptive approach might do.

More generally, the Bureau emphasizes that at bottom the question will be whether the lender is acting reasonably in developing the estimates. The rule gives lenders substantial flexibility to develop estimates by consulting reliable data sources or developing reasonable estimates based on their own experience with similarly-situated consumers using at least the six categories of expenses provided as examples. Assuming a lender follows these procedural steps, the Bureau concludes that the strongest evidence of whether the estimations were in fact reasonable will be the performance of the loans in question; if a lender is consistently making unreasonable estimates of basic living expenses, the Bureau expects to see substantial re-borrowing and default activity.

In response to one commenter, the Bureau has declined to modify the commentary to address specifically whether a lender should take account of the fact that prices may change seasonally. The Bureau finds this to be adequately covered by the general reasonableness standard, such that a lender could choose to do so if there were reason to believe, for example, that the monthly averages that a lender is using in estimating basic living expenses are not representative of expenses during a particular term. At least in certain regions, a lender could make a reasonable determination based on historical and local trends that the estimated expense allocation for utilities declines in the spring and fall, when electricity and gas bills are lower.

The Bureau does not agree with the commenters who argued childcare expenses (including the costs of supplies for infant children) should not be basic living expenses and instead should be defined as major financial obligations and subject to verification. The Bureau believes that childcare expenses, particularly to the extent of including such items as diapers, could be difficult to verify and would not lend themselves to categorization as major financial obligations for which the primary source of verification is consumer reports from a nationwide consumer reporting agency. Therefore, the Bureau concludes that these expenses are better categorized as basic living expenses.

The Bureau has determined that the changes to the basic living expenses definition described above, along with revisions to comment 5(b)–2.i.C described below, appropriately balance the weight of the comments. The Bureau acknowledges that it has left some flexibility in the definition, but believes this flexibility will permit lenders to develop methodologies that work best for them consistent with the requirement that the estimates are reasonable.

5(a)(2) Debt-to-Income Ratio

The Bureau has added a new definition at § 1041.5(a)(2) for debt-to-income ratio in light of its decision, in response to the criticisms of the proposed residual income approach, to permit lenders to choose to use that underwriting methodology. Due to the addition of this new definition, the remaining subparagraphs of § 1041.5(a) are renumbered accordingly.

The final rule defines debt-to-income ratio as the ratio, expressed as a percentage, of the sum of the amounts that the lender projects will be payable by the consumer for major financial obligations during the relevant monthly period and the payments under the covered short-term loan or covered longer-term balloon-payment loan during the relevant monthly period, to the net income that the lender projects the consumer will receive during the relevant monthly period, all of which projected amounts are determined in accordance with § 1041.5(c). The Bureau has also added a definition for relevant monthly period in § 1041.5(a)(7), which consists of the calendar month in which the highest sum of payments under the loan is due. The section-by-section analysis for § 1041.5(a)(7) below describes why the Bureau chose this particular time period as the relevant monthly period.

The Bureau has added a new comment 5(a)(2)–1 to clarify aspects of the debt-to-income definition. Most notably, the comment clarifies that for covered longer-term balloon-payment loans, where the relevant monthly period may fall well into the future relative to the consummation of the loan, the lender must calculate the debt-to-income ratio using the projections made under § 1041.5(c) and in so doing must make reasonable assumptions about the consumer's net income and major financial obligations during the relevant monthly period compared to the period covered by the verification

evidence. The comment clarifies that, for example, the lender cannot assume, absent a reasonable basis, that there will be a substantial increase in net income or decrease in major financial obligations between consummation and the relevant monthly period.

The addition of this new definition ties to the broader revision of § 1041.5(b)(2) in the final rule. The changes to § 1041.5(b)(2) are described in more detail in the associated section-by-section analysis below, but they bear some mention here given the interplay. As noted in the general § 1041.5 discussion above, under proposed § 1041.5(b)(2), the reasonable ability-to-repay determination would have required the lender to project both the amount *and* timing of the consumer's net income and major financial obligations, and to analyze the consumer's finances during *two* distinct time periods: First for the shorter of the term of the loan or 45 days after consummation of the loan, and then also for 30 days after having made the highest payment under the loan. For covered longer-term loans (including covered longer-term balloon-payment loans), the two periods would have been the month with the highest payments on the loan and also for 30 days after having make the single highest payment on that loan.

Upon further consideration of comments concerning the burdens involved in the proposed residual-income analysis and other factors, the Bureau has decided to streamline the calculations needed to support lenders' determination of consumers' ability to repay. Accordingly, the final rule simply requires lenders to make a projection about net income and major financial obligations and calculate the debt-to-income ratio or residual income, as applicable, during only a *single* monthly period, *i.e.,* the relevant monthly period, which is the calendar month with the highest sum of payments on the loan. The debt-to-income ratio during this period is used as a snapshot of the consumer's financial picture to draw conclusions about the consumer's ability to pay, since it is the month in which the loan will cause the highest amount of financial strain. Specifically, under § 1041.5(b)(2), the lender uses this information to reach a reasonable conclusion about whether the consumer has the ability to repay the loan while meeting basic living expenses and major financial obligations during: (1) The shorter of the term of the loan or 45 days after consummation of the loan, for covered short-term loans, and the relevant monthly period, for covered longer-term loans, and (2) for 30 days after having made the highest payment under the loan. This simplified approach—which also has been incorporated into the definition of residual income in § 1041.5(a)(8) for purposes of making the standards for both alternatives consistent—dovetails with the inclusion of the debt-to-income ratio methodology as an alternative to residual income. As discussed above, a debt-to-income methodology does not track a consumer's individual income inflows and major financial obligation outflows on a continuous basis over a period of time.

Section 1041.5(b) requires that lenders using debt-to-income ratios leave a sufficiently large percentage of income to cover basic living expenses. Commentary to § 1041.5(b) elaborates on this reasonableness standard in more detail. Comment 5(b)–2.ii.B clarifies that it would be unreasonable for the lender to assume that the consumer needs an implausibly low percentage of income to meet basic living expenses. The comment also clarifies in an example that a 90 percent debt-to-income ratio would leave an implausibly low percentage of income to meet basic living expenses. The Bureau does not intend to require lenders to set individualized thresholds for each consumer; instead, a lender could set its own internal thresholds in its policies and procedures, which would then be applied to individual loan applications. Whether a lender would be able to rely on one debt-to-income threshold for all borrowers, or enact multiple thresholds based on income tiers or other characteristics, would depend on whether application of a single threshold or multiple thresholds resulted in reasonable ability-to-repay determinations in the run of cases, informed in part by the factors listed in comment 5(b)–2.iii.

Lenders using a debt-to-income ratio will, in essence, be taking an individualized accounting of the consumer's projected net income and major financial obligations within the relevant monthly period, which is the month in which a consumer will have to pay the most under the covered short-term or longer-term balloon-payment loan. The snapshot provided by the debt-to-income ratio, coupled with the lender's estimate of the consumer's basic living expenses during the relevant monthly period, will enable the lender to draw a reasonable conclusion about whether the consumer will be able to make payments for major financial obligations, make all payments under a covered longer-term balloon-payment loan, and meet basic living expenses during the loan term or 45 days following consummation (for covered short-term loans) or the relevant monthly period (for covered longer-term balloon-payment loans) and for 30 days after making the highest payment under the loan.

This accounting of the consumer's financial picture using a debt-to-income ratio is less granular than the proposed residual-income methodology, which would have required lenders to track the timing and amounts of net income and major financial obligations, and to analyze the consumer's finances for two separate periods in proposed § 1041.5(b)(2). The Bureau had expressed concern in the proposal that a debt-to-income approach might be problematic in the context of the market for covered loans, due to the lack of long-established debt-to-income norms in this market, and noted that debt-to-income ratios which might seem quite reasonable for an ''average'' consumer might be quite unmanageable for a consumer at the lower end of the income spectrum and higher end of the debt burden range. Upon further consideration of the comments focused on the complexity and burdens of the proposal, the Bureau concludes that it is appropriate to move to a simplified analysis that concentrates on the total inflows and outflows for the month in which the loan places the most financial strain on the consumer. In light of this change, the Bureau expects that lenders may be able to use either a debt-to-income ratio or a residual-income analysis, as long as they think carefully about the need for consumers to cover basic living expenses. For instance, lenders using a debt-to-income analysis may decide to set a more conservative ratio than lenders might use in other markets to account for the financial profiles of consumers in the markets for covered short-term loans or covered longer-term balloon-payment loans. Another option as referenced above may be to use different ratios for different subgroups of customers to account for differences in income, debt obligations, and other relevant factors.[806]

As described below, in the discussion of § 1041.5(b), the Bureau has not set particular debt-to-income ratios for lenders to use. As with other aspects of the ability-to-repay requirements, lenders would be expected to be reasonable. Section 1041.5(b)

[806] The Bureau recognizes that the particular debt-to-income ratio approach in the final rule, while drawing inspiration from and sharing some similarities with the standard in credit card underwriting rules, has differences which the Bureau finds are justifiable as described in the general discussion of § 1041.5.

commentary, as described below, has been revised extensively to include additional clarification and examples of the reasonableness of ability-to-repay determinations, in response to many comments urging the Bureau to provide additional clarity. See discussion of § 1041.5(b) for further elaboration.

5(a)(3) Major Financial Obligations

Proposed Rule

The Bureau proposed a definition for major financial obligations as a component of the ability-to-repay determination specified in proposed § 1041.5(b). Specifically, proposed § 1041.5(a)(2) would have defined the term to mean a consumer's housing expense, minimum payments and any delinquent amounts due under debt obligations (including outstanding covered loans), and court- or government agency-ordered child support obligations. In comment 5(a)(2)–1, the Bureau proposed to further clarify that housing expense includes the total periodic amount that the consumer applying for the loan is responsible for paying, such as the amount the consumer owes to a landlord for rent or to a creditor for a mortgage. It would have provided that minimum payments under debt obligations include periodic payments for automobile loan payments, student loan payments, other covered loan payments, and minimum required credit card payments.

The Bureau explained in the proposal that the obligations that it included in the proposed definition were obligations that are typically recurring; that can be significant in the amount of a consumer's income that they consume; and that a consumer has little or no ability to change, reduce, or eliminate in the short run, relative to their levels up until application for a covered short-term or longer-term balloon payment loan. The Bureau stated its belief that the extent to which a particular consumer's net income is already committed to making such payments was highly relevant to determining whether that consumer has the ability to make payments under a prospective covered short-term loan. As a result, the Bureau believed that a lender should be required to inquire about such payments, that they should be subject to verification for accuracy and completeness to the extent feasible, and that a lender should not be permitted to rely on income already committed to such payments in determining the consumer's ability to repay. The Bureau further elaborated in the proposal that obligations included in the proposed definition are roughly analogous to those included in total monthly debt obligations for calculating monthly debt-to-income ratio and monthly residual income under the Bureau's ability-to-repay requirements for certain residential mortgage loans, citing 12 CFR 1026.43(c)(7)(i)(A).

In the proposal, the Bureau noted that it had adjusted its approach to major financial obligations based on feedback from SERs and other industry stakeholders in the Small Business Review Panel Outline. In the SBREFA process, the Bureau stated that it was considering including within the category of major financial obligations ''other legally required payments,'' such as alimony, and had considered an alternative approach that would have included utility payments and regular medical expenses. However, the Bureau noted in the proposal that it believed that it would be unduly burdensome to require lenders to make individualized projections of a consumer's utility or medical expenses. With respect to alimony, the Bureau noted its belief that relatively few consumers seeking covered loans have readily verifiable alimony obligations and that, accordingly, inquiring about alimony obligations would impose unnecessary burden. The Bureau also noted that it did not include a category of ''other legally required payments'' because it believed that category, which was included in the Small Business Review Panel Outline, would leave too much ambiguity about what other payments are covered. The Bureau sought comment on whether to include alimony as a major financial obligation, as well as regarding other expenses such as telecommunication services.

Comments Received

The Bureau received a number of comments on its definition of major financial obligations. Some commenters argued that the proposal did not do enough to clarify the scope of obligations that are included in major financial obligations. For example, commenters questioned whether a medical debt would be included. Consumer advocates and some other commenters urged the Bureau to include additional expenses in the definition, like taxes, childcare, medical expenses, telecommunications services, health insurance premiums, and homeowners insurance. Some commenters, including a Federal financial regulator during interagency consultation, asked for clarification on the treatment of alimony or questioned why it was excluded from the definition while child support obligations were included. Other commenters interpreted the proposed definition to mean that the definition of major financial obligations did not include the payments on non-covered loans and urged the Bureau to include them.

Some industry commenters objected to the proposal to include delinquent amounts due on debt obligations in the definition of major financial obligations. They suggested that errors on credit reports often include defaulted debt, like medical debt, which could effectively halt the application process. Some commenters cited a Bureau report on the prevalence of consumers with outstanding medical debt in arguing that the proposal would impede credit access if medical debt was included as a major financial obligation. Others noted that, more generally, given how many consumers have accounts in collections on their credit reports, and the fact that the entire defaulted amount would need to be considered as a major financial obligation, this requirement would result in many consumers failing to demonstrate ability to repay and effectively being excluded from the market. Other commenters took a different view, arguing that delinquent amounts on non-covered loans should be part of the definition of major financial obligations.

Some commenters asked the Bureau to pinpoint the exact amount of time after which evidence on major financial obligations would become stale, and how long the calculations for major financial obligations remain valid. Similarly, commenters noted that it will be impossible to detect major financial obligations taken out the same day, or otherwise not reflected on national consumer reports because there is a delay between when a consumer takes out an obligation and when companies furnish to nationwide consumer reporting agencies.

Some commenters argued that where basic living expenses or major financial obligations were deducted from a paycheck, they would be deducted twice from residual income because they would count as major financial obligations or basic living expenses but would not be counted in the definition of net income. The commenters cited examples of such ''double deductions'' where consumers sign up directly for bill-pay from a paycheck or if the deduction is required under State law in connection with payment of child support obligations.

The Bureau received a comment suggesting that some of the categories of major financial obligations may not be able to be verified through national consumer reports, including escrowed

amounts for property insurance and taxes. More broadly, industry commenters raised concerns about the accuracy of consumer reports, and being held accountable for inaccuracies in them.

One commenter, a State trade association, criticized the proposal for not clarifying how lenders should treat debts of non-applicant spouses, as well as their income, in a community property State where debt obligations are considered equally owned and are split equally upon dissolution of the marriage. The commenter argued that the proposed ability-to-repay requirements were significantly flawed because did not take into account the interplay with State community property laws. The commenter requested that the Bureau withdraw the proposal until it had adequately studied the issue.

Finally, one consumer suggested that the Bureau's identification of major financial obligations effectively prioritizes payment of other debts over covered loans. This commenter argued that the Bureau had not provided evidence that these debts were more important than covered loans.

Final Rule

The Bureau is finalizing the definition of major financial obligation at § 1041.5(a)(3) with certain substantive changes. The most significant change is that the Bureau has revised the reference to debt obligations to focus on ''required payments under debt obligations (including, without limitation, outstanding covered loans).'' In comment 5(a)(3)–1, the Bureau has provided further clarifications with regard to treatment of debt obligations to address commenters' concerns about treatment of medical debt and other issues.

First, comment 5(a)(3)–1 clarifies that the term ''debt obligation'' for purpose of § 1041.5(a)(3) does not include amounts due or past due for medical bills, utilities, and other items that are generally defined as basic living expenses under § 1041.5(a)(1). Second, the Bureau has provided a more robust definition of ''required payments under debt obligations'' drawing largely on language that was contained in proposed comments 5(a)(3)–1 and 5(c)(3)(ii)(B)–1. Third, the Bureau has added language to final comment 5(a)(3)–1 to include delinquent amounts on debt obligations within the concept of ''required payments'' only to the extent that such delinquent amounts are due as of the relevant monthly period, and not in cases in which an obligation on a covered short-term loan or a covered longer-term balloon-payment loan is no longer outstanding or where the obligation is listed as charged off on a national consumer report. The Bureau has also included an example of a creditor adding delinquent amounts on periodic payments to the consumer's next regularly scheduled periodic payment for an automobile loan payment.

The Bureau believes that these changes cumulatively will address a significant portion of commenters' concerns, particularly that resolving disputes about medical debts could effectively halt the application process. The Bureau has always intended that major financial obligations and basic living expenses be distinct categories, as evidenced by language in proposed and final § 1041.5(a)(1) defining the latter term, and the Bureau believes this further clarification will be helpful to reinforce the distinction. The Bureau recognizes that because of insurance and other factors, collections on medical bills can pose particular challenges for consumers. The Bureau believes that it may be appropriate for both consumers and lenders to exclude such irregular items from consideration. Because the general intent of the definition of major financial obligations generally is to capture recurring payments, the Bureau believes that a different rule is logical with regard to delinquent amounts on traditional consumer credit products by focusing on those amounts due in the relevant monthly period.

The Bureau made a few other changes to § 1041.5(a)(3) and comment 5(a)(3)–1. The Bureau specified in the text of the regulation that required payments under debt obligations could include, but are not limited to, outstanding covered loans, to address the impression expressed by commenters that non-covered loans are not considered debt obligations. The Bureau also added language to the commentary to reflect the new underwriting approach regarding timing—namely that the projections and calculations lenders will need to conduct will be in relation to the relevant monthly period, as defined in § 1041.5(a)(7). And the Bureau has clarified in comment 5(a)(3)–1 that the payments which must be included for a mortgage include principal, interest, and escrow if required.

Second, the Bureau has revised § 1041.5(a)(3) to include child support obligations and alimony obligations in general, rather than focusing solely on court- or government agency-ordered child support as in the proposal. As described above, at the SBREFA stage the Bureau had contemplated including both types of obligations generally within the definition of major financial obligations, but at the proposal stage decided to focus only on the obligations that were likely to be reflected in a national consumer report due to concerns that requiring lenders to verify other types of alimony or child support would be burdensome. Upon further consideration, the Bureau has concluded that the most reasonable approach is to include both types of expenses generally within the definition, and to permit lenders to rely on the information contained in consumers' written statements about such obligations to the extent that they are not listed on national consumer reports. The Bureau has added associated regulatory text and commentary to § 1041.5(c) to effectuate this requirement.

Finally, the Bureau has added a new comment 5(a)(3)–2 to specify that for purposes of the rule, motor vehicle leases shall be treated as a debt obligation. As explained in the Bureau's separate rulemaking to define larger participants in the market for automobile financing, automobile leases often function similarly to automobile loans.[807] In the Bureau's experience, they are reported on national consumer reports—and, indeed, are often listed on such reports as installment loans—and the Bureau believes that it will promote more effective determinations of consumers' ability to repay a new covered short-term or covered longer-term balloon-payment loan to treat them as the equivalent of an automobile purchase loan.

Regarding the comments asking for a broader definition of major financial obligations, the general theory behind the distinction between major financial obligations and basic living expenses under the final rule is that a major financial obligation is something a lender will need to calculate individually and generally to verify, while a lender will not need to do so for basic living expenses. The Bureau's decision about what to include in the definition of major financial obligations has been influenced in part by considerations of administrability as well as size—all payments on debt obligations are included because they are generally both easily ascertained from a consumer report and tend to be large in amount. The other expenses

[807] *See generally* 80 FR 37496, 37499 (June 30, 2015) (explaining that certain automobile leases are defined by statute as consumer financial products and services under the Dodd-Frank Act, and using the Bureau's discretionary authority to define certain additional leasing arrangements as consumer financial products and services).

that commenters recommended the Bureau include, such as childcare expenses, would not be ascertainable from a consumer report. Also, because housing is typically the largest recurring expense and is reflected on a credit report if the consumer has a mortgage, the Bureau thought it prudent for lenders to account specifically for that expense when performing their underwriting rather than including it in basic living expenses more generally.

The Bureau does not agree that the definition for major financial obligations should be vaguer and more flexible. It includes rental housing payments and payments on debt obligations. The Bureau has generally provided flexibility in this rule, but where lenders are required to itemize specific obligations, the Bureau concludes that it is more reasonable to prescribe the specific obligations for which the Bureau will expect heightened attention.

As to commenters that expressed concerns about duplicative deductions, the Bureau has added comments 5(c)(2)(ii)(B)–2 and 5(c)(2)(ii)(C)–2 to address this issue, both of which clarify the provisions on verification evidence for debt obligations and child support and alimony obligations. The comments provide that if verification evidence shows that a debt obligation or child support or alimony obligation is deducted prior to the receipt of take-home pay, the lender does not include the obligation in the projection of major financial obligations under § 1041.5(c). The Bureau also added an example to comment 5(c)(1)–1 relating to similar facts.

With regard to the comment that it would be difficult to verify some debt obligations on national consumer reports, the Bureau understands from its market monitoring that the nationwide consumer reporting agencies do in fact include most debt obligations in their national consumer reports, including payments necessary to cover escrowed items for mortgages. But, to the extent a consumer report does not include a debt obligation, lenders may reasonably rely on the information in the consumer's written statement. As described in final § 1041.5(c)(1), a lender must consider major financial obligations that are listed in a consumer's written statement even if they cannot be verified by the required sources.

If the national consumer report does not show a consumer's obligation because it is too recent or is not reported to a nationwide consumer reporting agency, and the consumer's statement does not include the payment on the obligation in listing major financial obligations, a lender would be reasonable in not accounting for that obligation in the lender's projection of major financial obligations and its residual income or debt-to-income calculation. Comment 5(c)(2)(ii)(B)–3 provides detailed guidance to lenders about how to reconcile inconsistent information as between a consumer's written statements and the verification evidence required under § 1041.5(c)(2)(ii)(B).

With regard to the commenter writing about State community property laws, the Bureau does not believe there is a fundamental tension between the proposed ability-to-repay requirements and State community property laws and declines the request to withdraw the proposal based on this issue. As an initial response to this comment, the Bureau notes that it has revised the final rule based on other commenters' input requesting that the final rule account for a consumer's reasonable expectation of access to spousal or third-party income, as well as the payment by another person of a consumer's major financial obligations or basic living expenses. Specifically, the Bureau has revised § 1041.5(a)(5), the definition of net income, and other provisions of § 1041.5 to provide that lenders may count as net income of the consumer any third party's income to which the consumer has a reasonable expectation of access, which must be verified. The Bureau has also added a comment that clarifies that lenders may factor into the projections of major financial obligations the regular contributions of third parties to those obligations (comment 5(c)(1)–2). Similarly, the Bureau has clarified that if a lender is individually itemizing a consumer's basic living expenses, the lender may consider whether other persons are regularly contributing to the consumer's payment of basic living expenses (comment 5(b)–2.i.C.*2*). These changes are described in more detail in other parts of the section-by-section analysis for § 1041.5.

Thus, a consumer's access to spousal income or the spouse's contributions toward payment of a consumer's major financial obligations or basic living expenses may be accounted for by the lender under the final rule, regardless of whether the consumer lives in a community property State. The Bureau believes these changes would achieve for some consumers the same result as, for example, a rule that would permit a consumer to rely on the income of his spouse in a community property State.[808]

The Bureau does not find it sensible to create separate ability-to-repay requirements for community property States and common law property States.[809] This would add complexity to the rule, pose challenges for examination and uniform enforcement of the rule, and add compliance burdens on providers operating in multiple States with different family law regimes. Furthermore, such an adjustment would not fit with the final rule's orientation towards *practical* assessments of how much consumers pay in the short term for basic living expenses and major financial obligations, and practical access to income. For example, the final rule does not direct lenders to ascertain a consumer's *legal* entitlement to income where the consumer does not have practical access to the funds. Nor did the commenter present any evidence that lenders in the market today have been taking into account State community property laws in making lending decisions.

The Bureau disagrees with the commenter that argued that its identification of major financial obligations as obligations that must be itemized by category in underwriting suggests that the Bureau is prioritizing payment of other debt obligations over covered loans for which the lender is making an ability-to-repay determination. In fact, covered loans can also be major financial obligations (such as where a consumer has a concurrent loan outstanding). Rather, the Bureau is simply differentiating between major financial obligations that the consumer is already committed to and the obligation that would be incurred in connection with a *new* covered short-term or longer-term balloon-payment loan.

Finally, the Bureau declines the suggestion by commenters to include as major financial obligations property taxes and insurance that is not required

[808] The Bureau acknowledges that the credit card ability-to-pay rules under Regulation Z discuss in commentary how reasonable expectation of access to the income of another person includes a legal entitlement to that income under a Federal or State regulation, including State community property laws. The Bureau is declining to adopt that standard in this final rule. See the section-by-section analysis of § 1041.5(a)(5) (net income definition) and the general discussion above in § 1041.5 about why the Bureau is imposing different ability-to-repay standards for this market in contrast to the credit card market.

[809] The commenter did not provide specific policy suggestions to address the issue, other than withdrawing the proposal which the Bureau is declining to do. The Bureau infers from the comment that this is one such policy option short of withdrawal.

to be paid in escrow to a mortgagee. The Bureau believes that the pool of consumers taking out covered short-term and longer-term balloon-payment loans who both own a home and who do not escrow their property taxes and insurance will be quite low.[810] In the presumably small number of cases where consumers have a mortgage and do not pay taxes or insurance through a regular escrow arrangement, the Bureau also believes that the payments may be infrequent, particularly with regard to property taxes which, unless escrowed, are typically not paid monthly. Therefore, the Bureau believes it is unlikely in the vast majority of cases that these items would actually bear on the consumer's financial balance sheet for purposes of the ability-to-repay requirement for a covered short-term loan,[811] and thus these items should not be treated as a major financial obligation. The Bureau also is not treating them as a basic living expense for similar reasons, as well as the difficulty lenders would have in developing a non-individualized estimate of property taxes.

5(a)(4) National Consumer Report

In proposed § 1041.5(a)(3), the Bureau defined national consumer report to mean a consumer report, as defined in section 603(d) of the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681a(d), obtained from a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis, as defined in section 603(p) of the FCRA, 15 U.S.C. 1681a(p). In proposed § 1041.5(c)(3)(ii), the Bureau provided that a lender would have to obtain a national consumer report as verification evidence for a consumer's required payments under debt obligations and under court- or government agency-ordered child support obligations. Reports that meet the proposed definition are often referred to informally as a credit report or credit history from one of the three major nationwide consumer reporting agencies or bureaus. A national consumer report may also be furnished to a lender from a consumer reporting agency that is not a nationwide agency, such as a consumer reporting agency that is a reseller.

The Bureau did not receive comments on the specific definition of national consumer report, though it did receive comments on the requirement to obtain national consumer reports. The Bureau addresses those comments in the discussion regarding major financial obligations and § 1041.5(c). Therefore, the Bureau finalizes the definition as proposed, except renumbered as § 1041.5(a)(4).

5(a)(5) Net income

Proposed Rule

In proposed § 1041.5(a)(4), the Bureau set forth a definition for net income as a component of the calculation for the ability-to-repay determination specified in proposed § 1041.5(b). Specifically, the Bureau proposed to define the term as the total amount that a consumer receives after the payer deducts amounts for taxes, other obligations, and voluntary contributions, but before deductions of any amounts for payments under a prospective covered short-term loan or for any major financial obligation.

The Bureau explained in the proposal that the proposed definition was similar to what is commonly referred to as ''take-home pay,'' but is phrased broadly to apply to income received from employment, government benefits, or other sources. It would exclude virtually all amounts deducted by the payer of the income, whether deductions are required or voluntary, such as voluntary insurance premiums or union dues. The Bureau stated its belief that the total dollar amount that a consumer actually receives after all such deductions is the amount that is most instructive in determining a consumer's ability to repay. Certain deductions (*e.g.,* taxes) are beyond the consumer's control. The Bureau further stated in the proposal that other deductions may not be revocable, at least for a significant period, as a result of contractual obligations into which the consumer has entered. Even with respect to purely voluntary deductions, most consumers are unlikely to be able to reduce or eliminate such deductions immediately—that is, between consummation of a loan and the time when payments under the loan would fall due. The Bureau also stated in the proposal that it believed that the net amount a consumer actually receives after all such deductions is likely to be the amount most readily known to consumers applying for a covered short-term loan (rather than, for example, periodic gross income) and is also the amount that is most readily verifiable by lenders through a variety of methods. The Bureau stated in the proposal that the proposed definition would clarify, however, that net income is calculated before deductions of any amounts for payments under a prospective covered short-term loan or for any major financial obligations. The Bureau stated that it was proposing the clarification to prevent double-counting of any such amounts when making the ability-to-repay determination.

Comments Received

The Bureau received a number of comments on its proposed definition of net income, raising a variety of issues. Several industry commenters argued that the Bureau should explicitly state that the definition includes a number of other sources of income that are paid at irregular times or in irregular amounts, including seasonal income, tips, bonuses, overtime pay, or commissions. Commenters also asked the Bureau to state explicitly that receipt of a number of other types of income should be included, such as child support, annuities, alimony, retirement, disability, prizes, jury awards, remittances, investment income, tax refunds, and legal settlements. A consumer advocate commenter took the opposite view, arguing that one-time lump-sum payments, tax refunds, legal settlements, or other income that is ''not consistently reliable'' should not be counted. This commenter argued that these income sources often are speculative and that consumers relying on them often take out payday or vehicle title loans in reliance on the expected funds only to see the payment delayed or to receive less funds than expected or not at all, leading to inability to repay and collateral consequences.

Other commenters argued that the Bureau should allow lenders to include in net income any third-party income, like spousal income, because many individuals' finances are managed on a household basis. Some suggested that the Bureau's failure to do so was inconsistent with CARD Act regulations, which permit card issuers to consider as the applicant's income the income of another person if the applicant has a reasonable expectation of access to the

[810] As discussed in Market Concerns—Underwriting, for the population of payday borrowers, renting is twice as common as in the general U.S. population. *See* Skiba and Tobacman, ''Payday Loans, Uncertainty, and Discounting: Explaining Patterns of Borrowing, Repayment, and Default,'' at 5 (Apr. 1, 2008). Moreover, a recent analysis by CoreLogic shows that currently almost 80 percent of all mortgage borrowers are paying their taxes (and insurance) through escrow accounts. *See Dominique Lalisse, Escrow* vs. *Non-escrow Mortgages: The Trend is Clear* (June 21, 2017), *available athttp://www.corelogic.com/blog/authors/dominique-lalisse/2017/06/escrow-vs-non-escrow-mortgages-the-trend-is-clear.aspx#.WdRrL3IUns0.* Finally, mortgage borrowers with higher loan-to-value ratios are more prone to have required escrow arrangements, which could mean that payday borrowers are more likely to have escrow arrangements than the mortgage borrowing population at large.

[811] Similarly, for a covered longer-term balloon-payment loan, it is relatively unlikely that such irregular expenses would come due in the relevant monthly period.

other person's income.[812] The commenters argued that this created a disadvantage to stay-at-home spouses and would result in loss of credit access. They criticized the proposal for not addressing this issue in the same manner as the Bureau's rulemaking in 2013 amending the CARD Act regulations. (Commenters raised related Regulation B issues addressed in the general § 1041.5 discussion above.) One commenter made arguments similar to those it made regarding major financial obligations, discussed with regard to § 1041.5(a)(3) above, arguing that the Bureau should have taken into account spousal income in community property States.

Some commenters argued that the Bureau should use gross income instead of net income. One trade association argued that one of its members currently uses gross income, and that just this minor change would require training, systems updates, and changes to forms. Another noted that for Federal student loans, income-based repayment plans are assessed using adjusted gross income, and asserted that the Bureau's proposal to use net income was merely a method of ensuring that fewer consumers would meet the standard.

Some commenters argued that the Bureau should not require lenders to subtract voluntary deductions from the net income calculation, arguing that because these deductions are voluntary they thus could be diverted to cover basic living expenses, major financial obligations, or loan payments. Other commenters asked for further clarification of what ''other obligations'' and ''voluntary contributions'' would include. Still others argued that it would be very difficult in many instances to verify whether an employer was deducting for taxes or other items. Those commenters questioned whether lenders would be required to ascertain the consumer's tax liability or be held responsible if the take-home pay figure used for the projection of net income was found to be based on erroneous information about tax deductions. A small rural lender commented that the proposed definition would create an inconsistent standard, positing that a loan applicant who withholds the maximum permitted amount would be less likely to pass the ability-to-repay requirement than another applicant who withholds the minimum amount, even if they work at the same job and earn the same salary. Another commenter asked for clarification on the situation where the verification evidence does not identify the payee or purpose of a deduction; the commenter noted this would likely occur with deposit account transaction history.

Several industry commenters believed that the Bureau should allow lenders to include in net income the proceeds from the covered loan itself.[813] These commenters argued that while it may make sense not to include proceeds in net income when a consumer is using those proceeds to pay for emergency expenses, it is conceptually inconsistent to exclude proceeds when they are being used to pay for basic living expenses or major financial obligations. For example, if a consumer uses proceeds to pay rent—which is a major financial obligation—commenters believed it would be unfair to have to treat rent as an obligation that the consumer would still have to pay in order to determine whether she would have the ability to repay the loan, unless the proceeds can be included in the net income calculation. They viewed this approach as improper ''double-counting'' of the major financial obligation or basic living expense paid with proceeds.

Final Rule

The Bureau is finalizing the definition of net income in § 1041.5(a)(5) with two changes from the proposal. The Bureau, moreover, has added three new comments to address various issues raised by the commenters.

The first change is a technical change that aligns with the change in scope of the final rule. The proposal defined net income as the total amount the consumer receives after the payor deducts amounts for taxes, other obligations, and voluntary contributions, qualified with a parenthetical phrase reading ''but before deductions of any amounts for payments under a prospective covered short-term loan or for any major financial obligation.'' The definition of net income in proposed § 1041.9(a)(5) contained similar language referring to covered longer-term loans. In light of its decision not to finalize the ability-to-repay requirements as to all covered longer-term loans and to consolidate into § 1041.5 provisions from § 1041.9 relating to covered longer-term balloon-payment loans, the Bureau has changed the language to refer to ''but before deductions of any amounts for payments under a prospective covered short-term loan or covered longer-term balloon-payment loan or for any major financial obligation.''

Second, the Bureau agreed with commenters that it should allow lenders to include income from third parties where the consumer has a reasonable expectation of access to that income, and § 1041.5(a)(5) of the final rule allows lenders to do so. In new comment 5(a)(5)–3, the Bureau clarifies that a consumer has a reasonable expectation of access to a third party's income if the consumer has direct, practical access to those funds on a regular basis through a bank account in which the consumer is an accountholder. The Bureau also provided examples in comment 5(a)(5)–3 of what reasonable expectation of access would entail, including evidence of a joint bank account or of regular deposits from said third party into an account in the consumer's name.

A number of commenters had cited the Bureau's CARD Act regulations as precedent for the request to include the income of another person in net income. The Bureau notes that the CARD Act regulations in 12 CFR 1026.51(a)(1)(i) contain commentary including a number of examples of whether an applicant had a reasonable expectation of access to the income of another person.[814] This commentary was added in the Bureau's amendments to the credit card ability-to-pay rules in 2013. The Bureau notes that it drew inspiration from this commentary in drafting the examples in comment 5(a)(5)–3, but the Bureau has not incorporated all of the examples. In particular, one example posited that the

[812] The CARD Act regulations in commentary to 12 CFR 1026.51(a)(1)(i) clarify when card issuers may consider for purposes of the ability-to-pay test the income of another person to which the consumer has reasonable expectation of access. Two comments directly or indirectly reference community property laws. Comment 51(a)(1)(i)–4.iii clarifies that, consideration of the income or assets of authorized users, household members, or other persons who are not liable for debts incurred on the account does not satisfy the requirement to consider the consumer's current or reasonably expected income or assets, ''unless a Federal or State statute or regulation grants a consumer who is liable for debts incurred on the account an ownership interest in such income and assets (*e.g.,* joint ownership granted under State community property laws),'' such income is being deposited regularly into an account on which the consumer is an accountholder (*e.g.,* an individual deposit account or a joint account), or the consumer has a reasonable expectation of access to such income or assets even though the consumer does not have a current or expected ownership interest in the income or assets. Comment 51(a)(1)(i)–6.iv includes an example of where there is not reasonable expectation of access because, among other facts, ''no Federal or State statute or regulation grants the applicant an ownership interest in that income.''

[813] Including proceeds in income, or deducting them from basic living expenses or major financial obligations, are mathematically and conceptually equivalent. Here, the Bureau addresses this line of argument as a request to include proceeds in income. But the Bureau's response applies to both versions of the concept.

[814] *See* 12 CFR 1026.51(a)(1)(i), comment 51(a)(1)(i)–6.

consumer has reasonable expectation of access where another person is regularly paying the consumer's expenses, and another comment cited above includes an example of where there is not reasonable expectation of access because, among other facts, no Federal or State statute or regulation grants the applicant an ownership interest in that income. The former example, in the Bureau's view, does not align well with the final rule insofar that the credit card example blends the distinction between income and expenses; as with the proposal, the final rule creates separate definitions for net income, major financial obligations, and basic living expenses. Accordingly, the Bureau has dealt with contributions toward basic living expenses and major financial obligations in comment 5(b)–2.i.C.*2* and comment 5(c)(1)–2, respectively, of the final rule rather than in connection with the definition of net income. Also, the Bureau is not adapting the language referencing Federal or State statutes or regulations granting an ownership interest in income for similar reasons to those described above with regard to State community property laws in connection with major financial obligations. For further discussion on the differences more generally between the final rule and the CARD Act ability-to-pay regulations, see general § 1041.5 discussion above.

Regarding the commenter that discussed State community property laws, similar to the treatment of this issue as applied to major financial obligations, the Bureau concludes that whether a consumer lives in a community property State does not change the consumer's practical access to income, and thus the regulation does not need to distinguish between how lenders should treat net income from one State to another. However, as noted above, in response to other comments the Bureau has decided to allow lenders to rely on third-party income, including income from a spouse, if the consumer has a reasonable expectation of access to that income (*see* discussion of § 1041.5(a)(5) and comment 5(a)(5)–3). This is consistent with the Bureau's general approach to whether a consumer has *practical* access to a spouse's (or other third party's) income. Given that this rule is closely focused on whether consumers will be able to meet their major financial obligations, make the payments on the loan, and pay basic living expenses in the near term, the Bureau determined that practical access to income was more important than legal entitlement to income. The Bureau also notes that attributing all community property to a consumer would not necessarily increase the odds that the consumer would be able to meet the ability-to-repay requirement relative to the final rule, because in community property States, liabilities are also imputed to the spouse. The Bureau also noted in the earlier discussion that creating separate underwriting regimes depending on the family law of the State would create added complexity and also challenges for examination, enforcement, and compliance.

The Bureau also agrees with commenters that the final rule should provide more clarity about and examples of what sources of income could be included in net income. The Bureau has added a detailed new comment, 5(a)(5)–1, addressing these issues. Specifically, the comment clarifies that net income includes income that is regularly received by the consumer as take-home pay, whether the consumer is treated as an employee or independent contractor, and also includes income regularly received by the consumer from other sources, such as court-ordered child support or alimony received by the consumer and any payments received by the consumer from retirement, social security, disability, or other government benefits, or annuity plans.

Comment 5(a)(5)–1 further clarifies that lenders may include in net income irregular or seasonal income, such as tips, bonuses, and overtime pay, and that net income does not include one-time payments anticipated to be received in the future from non-standard sources, such as legal settlements, tax refunds, jury prizes, or remittances, unless there is verification evidence of the amount and expected timing of such income. The Bureau has included the verification requirement with regard to future one-time payments because they generally are uncertain as to timing or amount. Before basing an ability-to-repay determination on a projection of this sort, the Bureau believes it is important to be confident that income will be received during the relevant monthly period in the expected amount. Of course, lenders must always collect verification evidence about net income where it is reasonably available (see § 1041.5(c)(2)(ii)(A) and comment 5(c)(2)(ii)(A)–3). Therefore, the effect of comment 5(a)(5)–1 is that when verification evidence is not reasonably available to project one-time income payment, then unlike with other sources of income, the lender cannot rely on the consumer's statement of the amount alone. The Bureau does not agree with the commenter requesting the rule prohibit inclusion of these types of one-time income sources altogether, because if verification evidence as described is available, the Bureau believes it is appropriate to include such types of income in the definition of net income.

The Bureau does not agree with commenters that it is more appropriate to calculate debt-to-income or residual income based on gross income than net income. The ability-to-repay determination is intended to capture the amount of money the consumer will actually have available to pay for major financial obligations, basic living expenses, and loan payments in the month with the highest sum of payments on the loan. Income that is automatically diverted to taxes or other deductions would not be available to cover any of those expenses. While it is true, as one commenter noted, that student loan income-driven repayment plans are based on gross income, that is because an income-driven repayment plan is a flat percentage of income and does not account for basic living expenses or major financial obligations (see the discussion above about why a payment-to-income approach has not been adopted in this rule).

At the same time, with regard to commenters that raised concerns about compliance burdens where they are relying on verification sources that do not clearly reflect whether deductions have been made from take-home pay, the Bureau believes it is not practicable to require lenders to engage in detailed inquiries and individual adjustments. Thus, the Bureau has clarified in comment 5(a)(5)–1 that the lender may draw reasonable conclusions from information provided by the consumer and is not required to inquire further about deductions for the consumer's taxes, other obligations, or voluntary contributions. This may mean that a lender could rely on gross income on a pay stub, if net income and/or deductions are not otherwise on the pay stub. Similarly, if a lender is verifying income via a bank statement, the lender may assume that the amount deposited is net of deductions.

The Bureau also is adding commentary language to address the comments asking for clarification on the meaning of voluntary contributions and whether the lender must, or can, assume that voluntary contributions will be discontinued during the term. The Bureau has added comment 5(a)(5)–2 to provide further clarification about what would be included as a voluntary contribution deducted from income, giving an example of a consumer's contribution to a defined contribution plan commonly referred to as 401K plans. In light of comments received,

comment 5(a)(5)–2 also clarifies that a lender may inquire about and reasonably consider whether the voluntary contributions will be discontinued prior to the relevant monthly period, in which case deductions for those voluntary contributions would not need to be accounted for in the income calculation. New comment 5(a)(5)–2 also clarifies that an example of an ''other obligation'' is a consumer's portion of payments for premiums for employer-sponsored health insurance plans.

Treatment of loan proceeds. After careful consideration, the Bureau has decided not to include the loan proceeds in net income, or otherwise allow the lender to give a credit for or otherwise account for the proceeds in the estimation of basic living expenses or projection of major financial obligations. The Bureau acknowledges that some consumers use loan proceeds to cover basic living expenses or major financial obligations, but believes on balance that treating for loan proceeds as income is not appropriate for multiple reasons.

First, many consumers take out covered short-term or covered longer-term balloon-payment loans specifically to pay unusual, non-recurring or emergency expenses, or because covering such expenses in the recent past has left them without sufficient funds to cover basic living expenses or major financial obligations. The Bureau received many comments, including many from individual consumers, describing how consumers often use payday loans and other covered loans to cover emergency expenses. Payday lenders in their advertising also tend to cite this usage category as the primary purpose for using the product, and industry commenters noted it as a use case as well. Academic literature and surveys discussing usage patterns on payday loans have consistently found that a sizable number of consumers report using payday loans and other covered loans for non-recurring and emergency expenses. *See* part II and Market Concerns—Underwriting (citing a 2012 study by Center for Financial Services Innovation).

Because money is fungible, the Bureau is concerned that disentangling the interplay between regular and irregular expenses would create significant compliance and examination challenges. Lenders would be expected to adhere to different rules depending on the stated intended use of the loan proceeds. This would put the lenders in the position of having to inquire in detail about consumers' intended use for the loans, which consumers may feel is unduly intrusive. Such a provision would also be difficult to enforce given the fungible nature of the funds in question and raise questions about lender compliance burden and liability under the rule if they rely on a consumer's statement of intended use that does not prove accurate. It also would create incentives for evasion.

In addition, simply assuming that all consumers will use the loan proceeds to pay basic living expenses or major financial obligations would be as simple as the approach taken by the Bureau, but is a problematic approach on policy grounds. Because many consumers use loan proceeds for reasons other than payment of major financial obligations or basic living expenses, such a rule would lead to lenders making loans to many consumers who plan to use the funds to cover a non-recurring or emergency expense, and thus the ability-to-repay determinations would be inaccurate in the opposite direction. As a result, the harms identified in Market Concerns—Underwriting and the section-by-section analysis for § 1041.4 would continue to exist and would likely be prevalent.

Moreover, there is a question of timing. As referenced above and described in more detail below in connection with § 1041.5(a)(7) and (b)(2), the Bureau has decided to focus the calculation of debt-to-income or residual income on the relevant monthly period, which is the calendar month with the highest sum of loan payments. This snapshot is intended to focus on the month in which the loan places the greatest strain on the consumer's finances, which is then used in turn by the lender to forecast the consumer's ability to cover loan payments, major financial obligations, and basic living expenses both during the loan term *and* for 30 days after the single highest payment. To the extent that consumers use loan proceeds to cover major financial obligations or basic living expenses, that is likely to occur soon after consummation. Thus, except for loans with short terms made near the beginning of a calendar month, the Bureau believes that the proceeds will have been disbursed to cover expenses before the relevant monthly period and/or the 30 days after the single highest payment on the covered loan.

Indeed, in light of the concern about high risk of re-borrowing in the markets for covered short-term and longer-term balloon-payments, this is precisely why the Bureau has focused the analysis on the period of time in which the consumer is making the largest payment(s) on the loan and the major financial obligations and basic living expenses that are due soon thereafter.

5(a)(6) Payment Under the Covered Short-Term or Longer-Term Balloon-Payment Loan

Proposed Rule

The Bureau proposed to define payment under the covered short-term loan, which was a component of the calculation for the ability-to-repay determination as specified in proposed § 1041.5(b). Specifically, the proposed definition of payment under the covered short-term loan in proposed § 1041.5(a)(5)(i) and (ii) would have included all costs payable by the consumer at a particular time after consummation, regardless of how the costs are described in an agreement or whether they are payable to the lender or a third party. Proposed § 1041.5(a)(5)(iii) would have set special rules for projecting payments on lines of credit if they are provided for under a covered short-term loan for purposes of the ability-to-repay test, since actual payments for lines of credit may vary depending on usage.

Proposed § 1041.5(a)(5)(i) would have applied to all covered short-term loans. It defined payment under the covered short-term loan broadly to mean the combined dollar amount payable by the consumer in connection with the covered short-term loan at a particular time following consummation. The proposed definition further would have provided that, for short-term loans with multiple payments, in calculating each payment under the covered loan, the lender must assume that the consumer has made the preceding required payments and has not taken any affirmative act to extend or restructure the repayment schedule or to suspend, cancel, or delay payment for any product, service, or membership provided in connection with the covered loan. Proposed § 1041.5(a)(5)(ii) similarly would have applied to all covered short-term loans and clarified that payment under the covered loan included all principal, interest, charges, and fees.

The Bureau stated in the proposal that it believed that a broad definition was necessary to capture the full dollar amount payable by the consumer in connection with the covered short-term loan, including amounts for voluntary insurance or memberships and regardless of whether amounts are due to the lender or another person. The Bureau noted that it is the total dollar amount due at each particular time that is relevant to determining whether or not a consumer has the ability to repay

the loan based on the consumer's projected net income and payments for major financial obligations. The amount of the payment is what is important, not whether the components of the payment include principal, interest, fees, insurance premiums, or other charges. In the proposal, the Bureau recognized, however, that under the terms of some covered short-term loans, a consumer may have options regarding how much the consumer must pay at any given time and that the consumer may in some cases be able to select a different payment option. The Bureau explained that the proposed definition would include any amount payable by a consumer in the absence of any affirmative act by the consumer to extend or restructure the repayment schedule, or to suspend, cancel, or delay payment for any product, service, or membership provided in connection with the covered short-term loan. Proposed comment 5(a)(5)(i) and 5(a)(5)(ii)–1 would have included three examples applying the proposed definition to scenarios in which the payment under the covered short-term loan includes several components, such as voluntary fees owed to a person other than the lender, as well as scenarios in which the consumer has the option of making different payment amounts.

Proposed § 1041.5(a)(5)(iii) included additional provisions for calculating the projected payment amount under a covered line of credit for purposes of assessing a consumer's ability to repay the loan. As explained in proposed comment 5(a)(5)(iii)–1, the Bureau believed such rules were necessary because the amount and timing of the consumer's actual payments on a line of credit after consummation may depend on the consumer's utilization of the credit (*i.e.,* the amount the consumer has drawn down) or on amounts that the consumer has repaid prior to the payments in question. As a result, if the definition of payment under the covered short-term loan did not specify assumptions about consumer utilization and repayment under a line of credit, there would be uncertainty as to the amounts and timing of payments to which the ability-to-repay requirement applies. Proposed § 1041.5(a)(5)(iii) therefore prescribed assumptions that a lender must make in calculating the payment under the covered short-term loan. It would have required the lender to assume that the consumer will utilize the full amount of credit under the covered loan as soon as the credit is available to the consumer, and that the consumer will make only minimum required payments under the covered loan. The lender would then apply the ability-to-repay determination to that assumed repayment schedule.

Proposed § 1041.9(a)(5)(iii) would have included parallel provisions, with a supplemental provision to account for the fact that it applied to longer-term loan structures. In addition to the same two assumptions that a lender must make in calculating the payment under proposed § 1041.5(a)(5)(iii), proposed § 1041.9(a)(5)(iii) also would have required the lender to assume that, if the terms of the covered longer-term loan would not provide for a termination of access to the credit line by a date certain and for full repayment of all amounts due by a date certain, the consumer must repay any remaining balance in one payment on the date that is 180 days following the consummation date.

Comments Received

The Bureau received a number of comments that were generally supportive of the Bureau's definition of payment under the covered short-term loan.

A trade group representing open-end credit providers criticized this rule generally for reflecting what was, in the commenter's view, the Bureau's lack of understanding about open-end credit provisions. They specifically criticized the proposal for, in the commenter's view, not addressing how lines of credit with principal paydown requirements or with a specified duration would be treated. The Bureau also received a comment objecting to proposed § 1041.9(a)(5)(iii)(C), the parallel definition for the proposed underwriting section for covered longer-term loans, which would have provided that the whole balance of open-end longer-term credit should be considered to be due 180 days following the consummation date if there is not a date certain for termination of the line and repayment of any remaining balance. The commenter argued instead that the Bureau should use the maximum required payment under the terms of the agreement.

Final Rule

The Bureau has finalized the definition as proposed in § 1041.5(a)(6), with minor wording clarifications and the addition of references to payments for covered longer-term balloon-payment loans. The Bureau also has made minor adjustments to the examples in comment 5(a)(6)(i)–1 and 5(a)(6)(ii)–1 to reflect that the same definition applies to covered longer-term balloon-payment loans.

With regard to the rules for calculating payments on open-end loans, the Bureau has not imported the text from proposed § 1041.9(a)(5)(iii)(C) into this definition, which would have made a lender assume, for purposes of the ability-to-repay determination, that all advances under a longer-term open-end credit line would be due within 180 days of consummation if there is not a date certain for termination of the line and repayment of any remaining balance. Because the Bureau has decided to apply the ability-to-repay requirements only to covered longer-term balloon-payment loans that have the payment features as described in § 1041.3(b)(2), the Bureau does not believe that this provision is necessary to help lenders calculate potential loan payments. Put another way, if a loan without a date certain for termination of the line and repayment of any remaining balance qualifies as a covered longer-term balloon-payment loan under the rule, the Bureau believes the terms of the loan contract that create that balloon payment feature will be sufficient for lenders to calculate payments using the assumptions in § 1041.5(a)(6)(iii)(A) and (B).

In comment 5(a)(6)(iii)–1, in addition to corresponding technical updates, the Bureau added a description of how a lender should calculate the payment amount for open-end credit when underwriting for a new advance, including when there is an outstanding balance. The comment states that lenders should use the same test with the same assumptions when they make a new ability-to-repay determination under § 1041.5(b)(1)(ii) prior to an advance under the line of credit that is more than 90 days after the date of a prior ability-to-repay determination for the line of credit, in order to determine whether the consumer still has the ability to repay the current credit line.

The Bureau also disagrees with the commenter that argued the proposal reflects a lack of understanding of open-end credit provisions. The commenter's primary focus in asserting a lack of understanding appears to have been on

certain assumptions about credit line usage and repayment that the proposal would have required lenders to use in periodically re-underwriting open-end loans. Those assumptions were admittedly complicated by the fact that the proposal would have applied to a broad range of product structures. However, the Bureau has since simplified and clarified those assumptions particularly in light of the narrowed scope of the final rule's ability-to-repay requirements, which now apply only to covered short-term loans and covered longer-term balloon-payment loans. The Bureau believes the remaining assumptions—that consumers draw the maximum amount allowed on the loan and make minimum payments for as long as permitted under the loan contract—are logical for assessing consumers' ability to repay and relatively simple to apply in conjunction with covered loans' contractual terms governing principal pay-down and other matters.

5(a)(7) Relevant Monthly Period

As described above, the Bureau has added a definition for relevant monthly period, which is the calendar month in which the highest sum of payments under the loan is due. This definition will be used as the period for which a lender will need to calculate residual income or a debt-to-income ratio. As noted in the discussion regarding debt-to-income ratio above, the concept of the relevant monthly period flows from the larger streamlining and reconceptualization of the requirements under § 1041.5(b)(2). The Bureau believes that instead of requiring lenders to make separate calculations to analyze consumers' ability to cover major financial obligations, basic living expenses, and payments on the covered loan both during the term of the loan and for 30 days after the highest payment on the loan, it would be more administrable to allow lenders to make a single monthly calculation that can then be used to evaluate more generally whether the consumer has the ability to cover all relevant expenses during the time periods described in § 1041.5(b)(2).

Because the month with the highest sum of payments on the covered short-term or covered longer-term balloon-payment loan will be the month in which the loan places the greatest strain on the consumer's finances, the Bureau believes that it is the logical period to use as a snapshot. Indeed, the Bureau had proposed to focus the underwriting analysis for covered longer-term balloon-payment loans on this specific period for this same reason.[815] The Bureau considered starting the monthly clock on the date of the first of the loan payment(s), but ultimately concluded that a calendar month was easier to administer. Since billing cycles typically correspond to calendar months, the Bureau believes that it will be relatively straightforward for lenders to project income and major financial obligations based on consumer statements, income documentation, and national consumer reports. The Bureau also believes that calculating the residual income and debt-to-income ratio for a relevant monthly period defined by reference to a calendar month will generally give lenders a sense of total monthly inflows and outflows that can be projected to the time periods for which the lender must make a reasonable conclusion that, based on residual income or the debt-to-income ratio, the consumer can make payments for major financial obligations, make all payments under the loan, and meet basic living expenses. See discussion of § 1041.5(b)(2)(i) and (ii) and commentary for further information. The relevant monthly period is also the time period referenced under § 1041.5(b)(2)(i)(B) and (b)(2)(ii)(B).

The Bureau considered alternative time periods for the relevant monthly period, such as the 30-day period starting at consummation, the 30-day period ending on the contractual due date, or the calendar month in which consummation occurred. The Bureau chose the specific calendar month in which the highest sum of payments under the loan will be due for the reasons discussed above, because it believes that the residual income and debt-to-income ratio will only be demonstrative of ability to repay if they reflect the calendar month in which the loan will strain the consumer's monthly balance sheet the most. The Bureau notes that for covered longer-term balloon-payment loans, there may be challenges to projecting major financial obligations and net income, as the relevant monthly period may fall far into the future. Commentary in the definitions of debt-to-income ratio and residual income addresses this issue; see comments 5(a)(2)–1 and 5(a)(8)–1 which provide that for covered longer-term balloon-payment loans, lenders must make reasonable assumptions about that period compared to the period covered by the verification evidence, and gives examples.

5(a)(8) Residual Income

The Bureau proposed § 1041.5(a)(6) to define residual income as a component for the calculation of the ability-to-repay determination specified in proposed § 1041.5(b). It proposed to define the term as the sum of net income that the lender projects the consumer obligated under the loan will receive during a period, minus the sum of amounts that the lender projects will be payable by the consumer for major financial obligations during that same period. Proposed § 1041.5(b) would have generally required a lender to determine that a consumer will have sufficient residual income to make payments under a covered short-term loan and to meet basic living expenses.

The Bureau discussed above the comments that generally criticized its approach to requiring a residual-income analysis, which led the Bureau in the final rule to add the debt-to-income ratio as another option for lenders to use. Other comments about the Bureau's general ability-to-repay framework were also listed above, and will be discussed further in addressing § 1041.5(b).

The Bureau made a few changes to the definition of residual income as finalized in § 1041.5(a)(8). First, there were a number of technical edits, and the Bureau included ''relevant monthly period'' where appropriate to incorporate the revised approach to the timing of the underwriting calculations that must be made and thus parallel the definition of debt-to-income ratio. As discussed above, the Bureau has modified its approach to residual income calculations to allow lenders to calculate them on a net basis for the relevant monthly period, rather than focusing in detail on the timing of inflows and outflows within the time periods specified in § 1041.5(b)(2)(ii).

The Bureau has also added into the residual income calculation the payments under the covered short-term or longer-term balloon-payment loan. This was a shift in structure from the proposal, but not substance. In the proposed rule, residual income was net income minus major financial obligations, and the result was used to make sure a consumer could afford the loan payments and basic living expenses. Now residual income is net

[815] Specifically, for covered longer-term loans, proposed § 1041.9(b)(2) set out a two-part test. All lenders for all covered loans would have had to evaluate consumers' residual income for the term of the loan under § 1041.9(b)(2)(i), which comment 9(b)(2)(i)–1.i explained could be satisfied by analyzing residual income for the month with the highest sum of payments (if applicable) under the loan. The second part of the test under proposed § 1041.9(b)(2)(ii) applied only to covered longer-term balloon-payment loans and would have required lenders to evaluate consumers' ability to cover major financial obligations and basic living expenses for 30 days after the highest single payment.

income minus major financial obligations *and* loan payments, and the results will be used to determine whether consumers can afford basic living expenses only. The Bureau thought it would be easier to reposition these variables so that the numbers for which the lender will need to make an individualized assessment—net income, major financial obligations, and loan payments—will all be used to come up with a single number. That will allow a lender to isolate the only estimated figure—basic living expenses. The Bureau notes that this ''back-end'' approach is consistent with the formulation in the Bureau's mortgage ability-to-repay requirements and the definition of debt-to-income ratio in § 1041.5(a)(2).

In addition, the Bureau added comment 5(a)(8)–1, which restates the definition of residual income and provides further clarification on how to project net income and major financial obligations for covered longer-term balloon-payment loans where the relevant monthly period may be well into the future. The Bureau states that the lender cannot assume, absent a reasonable basis, that there will be a substantial increase in income or decrease in major financial obligations between consummation and the relevant monthly period. As for all loans made under § 1041.5, lenders will generally be using figures verified by evidence of past payment amounts and income to project into the future. The Bureau recognizes that this projection will likely become somewhat less accurate as the time between verification evidence and the relevant monthly period lengthens, but notes that any further augmentations to amounts derived from verification evidence should be made only if a lender has a reasonable basis for doing so.

5(b) Reasonable Determination Required

Overview

The Bureau proposed to prohibit lenders from making covered short-term loans without first making a reasonable determination that the consumer will have the ability to repay the loan according to its terms, unless the loans were made in accordance with the conditional exemption in proposed § 1041.7. Specifically, proposed § 1041.5(b)(1) would have required lenders to make a reasonable determination of ability to repay before making a new covered short-term loan, increasing the credit available under an existing loan, or before advancing additional credit under a covered line of credit if more than 180 days have expired since the last such determination.

Proposed § 1041.5(b)(2) would have specified minimum elements of a baseline methodology that would be required for determining a consumer's ability to repay, using a residual-income analysis and an assessment of the consumer's prior borrowing history. It would have required the assessment to be based on projections of the consumer's net income, basic living expenses, and major financial obligations that are made in accordance with proposed § 1041.5(c). It would have required that, using such projections, the lender must reasonably conclude that the consumer's residual income will be sufficient for the consumer to make all payments under the loan and still meet basic living expenses during the shorter of 45 days or the term of the covered short-term loan. It would have further required that a lender must reasonably conclude that the consumer, after making the highest payment under the loan (typically, the last payment), will continue to be able to meet major financial obligations as they fall due, make any remaining payments on the loan, and meet basic living expenses for a period of 30 additional days.[816] Finally, proposed § 1041.5(b)(2) would have required that, in situations in which the consumer's recent borrowing history suggests that she may have difficulty repaying a new loan as specified in proposed § 1041.6, a lender must satisfy the requirements in proposed § 1041.6 before extending credit (*i.e.,* the proposed presumptions of unaffordability and prohibitions on lending contained therein).

As noted above in the general § 1041.5 discussion above, the Bureau received a significant number of comments asserting that the proposed ability-to-repay requirements were overly burdensome. Many commenters argued that they would lead to undue lost access to credit and excessive costs. The Bureau also received comments asserting that various aspects of the proposed ability-to-repay requirements were too restrictive and, on the other hand, too vague. Some commenters specifically argued that the reasonableness test animating the entirety of proposed § 1041.5 was overly vague and would lead to uncertainty about the Bureau's expectations for compliance and potential challenges for examination and enforcement. These commenters included a wide spectrum of parties, including industry stakeholders, State banking supervisors, and some State Attorneys General. Consumer advocates, on the other hand, generally supported the proposed requirements while suggesting various means of strengthening them in their view. These comments are discussed in more detail in the discussion of individual subparagraphs within § 1041.5(b).

As stated above, the Bureau has made a number of changes to § 1041.5(b) and its associated commentary in the final rule. As a general matter, these changes have been made in response to comments and have two primary purposes: To provide a streamlined set of requirements for evaluating the consumer's ability to repay, which the Bureau believes will reduce burden, and to clarify the ''reasonableness'' standard for ability-to-repay determinations, which the Bureau believes will reduce uncertainty about the standards for compliance. The specific changes to the rule and commentary to achieve these purposes are found in two areas: First, the Bureau has made substantial revisions to § 1041.5(b)(2), which sets forth the specific parameters of the general ability-to-repay determination in § 1041.5(b)(1), *i.e.,* that the lender use the projections of net income and major financial obligations for the relevant monthly period and calculations of debt-to-income ratio or residual income for that same period to draw reasonable conclusions about the consumer's ability to make the loan payments, pay for major financial obligations, and meet basic living expenses during specified time periods as described in final § 1041.5(b)(2)(i) and (ii).

Second, the Bureau has substantially revised and expanded the commentary to § 1041.5(b) to provide additional clarity on the expected components of a ''reasonable'' ability-to-repay determination and how reasonableness will be evaluated through the lender's loan performance. Specifically, comment 5(b)–2.i has been revised to provide additional discussion of reasonable ability-to-repay determinations, in particular, additional clarification on reasonable estimates of basic living expenses. Comment 5(b)–2.ii now provides additional discussion of what constitutes an unreasonable ability-to-repay determination, including a new example involving a specific debt-to-income ratio. The final rule also significantly expands comment 5(b)–2.iii, which in the proposal described how evidence of the lender's objective and comparative loan

[816] Under proposed § 1041.9(b)(2) and comments 9(b)(2)(i)–1 and 9(b)(2)(ii)–1, the focus for analyzing covered longer-term balloon-payment loans would have been on two similar periods: (1) The month with the highest sum of loan payments; and (2) the 30 days after the single highest payment on the loan.

performance (*i.e.,* rates of delinquency, re-borrowing, and default) may be evaluated to assess the reasonableness of ability-to-repay determinations. The comment now contains a broader list of indicators than the proposal (including default rates, re-borrowing rates, patterns of lending across loan sequences, evidence of delinquencies and collateral effects, and patterns of lenders ''bridging'' covered loans with non-covered loans) and provides more detail on how the Bureau will use the loan performance metrics to evaluate lenders' ability-to-repay determinations. The final rule also contains a new comment 5(b)–2.iv, which complements the expanded comment 5(b)–2.iii and provides four detailed examples of whether the lender is making reasonable or unreasonable ability-to-repay determinations.

The Bureau also made several changes throughout § 1041.5(b) and its commentary to implement the decision to incorporate the part of proposed § 1041.9(b) that would have imposed similar ability-to-repay requirements for covered longer-term balloon-payment loans into § 1041.5.

Thus, as finalized, at a high level, § 1041.5(b)(1) provides that lenders must make reasonable determinations that the consumer will have the ability to repay the loan according to its terms. Section 1041.5(b)(1)(i) applies to covered short-term loans and covered longer-term balloon-payment loans generally, while § 1041.5(b)(1)(ii) imposes requirements to determine consumers' ability to repay periodically for open-end lines of credit. Finalized § 1041.5(b)(2) sets forth that a lender's determination is reasonable only if it uses a debt-to-income ratio methodology as set forth in § 1041.5(b)(2)(i), or a residual income methodology as set forth in § 1041.5(b)(2)(ii). Under § 1041.5(b)(2), both the residual income and debt-to-income methodologies are used to project the consumer's finances during the relevant monthly period so that the lender in turn can draw conclusions about the consumer's ability to repay covered short-term loans or covered longer-term balloon-payment loans without re-borrowing. This broader determination focuses for covered short-term loans on whether the consumer can make payments for major financial obligations, payments under the loan, and basic living expenses during the shorter of the loan term or 45 days following consummation, and for 30 days after the highest payment under the loan, and for covered longer-term balloon-payment loans, on whether the consumer can make the same payments during the relevant monthly period and for 30 days after the highest payment under the loan. However, as described in the general § 1041.5 discussion and the discussion of the debt-to-income ratio definition in § 1041.5(a)(2), above, the debt-to-income ratio and residual income would not need to be calculated for all of those periods. Rather, the lender only needs to project net income and major financial obligations and calculate debt-to-income ratio or residual income, as applicable, for one calendar month—the relevant monthly period.

The final rule reduces burden in at least two ways relative to the proposal, in addition to permitting use of a debt-to-income ratio as well as a residual-income analysis. Under proposed § 1041.5(b)(2), the reasonable ability-to-repay determination would have required the lender to project both the amount *and* timing of the consumer's net income and major financial obligations, as well as to make separate calculations about the consumer's finances during *two* distinct time periods: First for the shorter of the term of the loan or 45 days after consummation of the loan, and then also for 30 days after having made the highest payment under the loan. Under the final rule, however, lenders are instead required to make a projection about net income and major financial obligations and calculate the debt-to-income ratio or residual income, as applicable, during only the relevant monthly period, which is the calendar month with the highest payments on the loan. The debt-to-income ratio or residual income during this period is used as a snapshot of the consumer's financial picture to draw conclusions about the consumer's ability to pay. The lender then uses this information to make a reasonable conclusion that the consumer has the ability to repay the loan while meeting basic living expenses and major financial obligations during the two specified time periods (which are not necessarily the same as the relevant monthly period, but may often overlap).

The nature of the calculation has changed as well. While the proposal would have required lenders to pay particularly close attention to the *timing* of income and major financial obligations in the 30 days after the loan's highest payment, the final rule requires that the calculations for the relevant monthly period focus on the total amount of net income and major financial obligations. The Bureau also notes that this simplified approach dovetails with the inclusion of the debt-to-income ratio methodology as an alternative to residual income. As discussed above, a debt-to-income methodology does not permit the tracking of a consumer's individual income inflows and major financial obligation outflows on a continuous basis over a period of time. The same approach has also been incorporated into the definition of residual income in § 1041.5(a)(8) for purposes of making the standards for both alternatives consistent. As explained in more detail below, the Bureau believes that this approach will streamline the process for making the ability-to-repay determination required under 1041.5(b) because the lender will only be required to project net income and major financial obligations and make the calculation of debt-to-income ratio or residual income for one calendar month. The Bureau believes the revised approach will prove simpler for consumers as well.[817]

5(b)(1)

Proposed Rule

In proposed § 1041.5(b)(1), the Bureau proposed generally that, except as provided in proposed § 1041.7, a lender must not make a covered short-term loan or increase the credit available under a covered short-term loan unless the lender first makes a reasonable determination of the consumer's ability to repay the covered short-term loan. The proposed provision would also have imposed a requirement to determine a consumer's ability to repay before advancing additional funds under a covered short-term loan that is a line of credit, if such advance would occur more than 180 days after the date of a prior required determination. Proposed § 1041.9(b)(1) would have included parallel provisions to proposed § 1041.5(b)(1) as applied to covered longer-term loans, except for certain conditional exemptions that are discussed above in connection with final § 1041.3(d)(7) and (8).

Proposed § 1041.5(b)(1) would have required the ability-to-repay determination before a lender actually takes one of the triggering actions. The Bureau recognized in the proposal that lenders decline covered loan applications for a variety of reasons, including to prevent fraud, avoid possible losses, and to comply with State law or other regulatory requirements. Accordingly, the requirements of proposed § 1041.5(b)(1) would not have required a lender to make the ability-to-repay determination

[817] For example, both consumers and lenders will not need to be as precise in tracking the timing of inflows and outflows within the periods in § 1041.5(b)(2)(i) and (ii).

for every covered short-term loan application it receives, but rather only before taking one of the enumerated actions with respect to a covered short-term loan. Similarly, the Bureau explained in the proposal that nothing in proposed § 1041.5(b)(1) would have prohibited a lender from applying screening or underwriting approaches in addition to those required under proposed § 1041.5(b) prior to making a covered short-term loan.

Proposed § 1041.5(b)(1)(ii) would have provided that, for a covered short-term loan that is a line of credit, a lender must not permit a consumer to obtain an advance under the line of credit more than 180 days after the date of a prior required determination, unless the lender first makes a new reasonable determination that the consumer has the ability to repay the covered short-term loan. As the Bureau wrote in the proposal, under a line of credit, a consumer typically can obtain advances up to the maximum available credit at the consumer's discretion, often long after the covered loan was consummated. Each time the consumer obtains an advance under a line of credit, the consumer becomes obligated to make a new payment or series of payments based on the terms of the covered loan. But when significant time has elapsed since the date of a lender's prior required determination, the facts on which the lender relied in determining the consumer's ability to repay may have changed significantly. As the Bureau explained in the proposal, during the Bureau's outreach to industry, the Small Dollar Roundtable urged the Bureau to require a lender to periodically make a new reasonable determination of ability to repay in connection with a covered loan that is a line of credit. The Bureau stated in the proposal that it believed that the proposed requirement to make a new determination of ability to repay for a line of credit 180 days following a prior required determination appropriately balanced the burden on lenders and the protective benefit for consumers.

Reasonable determination. Under § 1041.5(b)(1) of the proposed rule, a lender would have to make a reasonable determination that a consumer will be able to repay a covered short-term loan according to its terms. A consumer would have the ability to repay a covered short-term loan according to its terms, under the proposed rule, only if the consumer is able to make all payments under the covered loan as they fall due while also making payments under the consumer's major financial obligations as they fall due and continuing to meet basic living expenses during the shorter of the term of the loan or 45 days following consummation. The proposed rule would have also required that the lender determine if, for a period of 30 days after making the highest payment on the loan, the consumer will be able to pay major financial obligation as they fall due, make any remaining payments under the loan, and meet basic living expenses.[818]

Proposed comment 5(b)–1 would have provided an overview of the baseline methodology that would be required as part of a reasonable determination of a consumer's ability to repay in proposed §§ 1041.5(b)(2) and (c) and § 1041.6.

As noted in the general discussion of proposed § 1041.5(b), above, proposed comment 5(b)–2 would have identified standards for evaluating whether a lender's ability-to-repay determinations under proposed § 1041.5 are reasonable. It would have clarified the minimum requirements of a reasonable ability-to-repay determination; identified assumptions that, if relied on by the lender, would render a determination not reasonable; and established that the overall performance of a lender's covered short-term loans is evidence of whether the lender's determinations for those loans are reasonable.

The Bureau explained in the proposal that the proposed standards would not have imposed bright-line rules prohibiting covered short-term loans based on fixed mathematical ratios or similar criteria. Moreover, the Bureau stated that it did not anticipate that a lender would need to perform a manual analysis of each prospective loan to determine whether it meets all of the proposed standards. Instead, the Bureau explained that each lender would be required under proposed § 1041.18 to develop and implement policies and procedures for approving and making covered loans in compliance with the proposed standards and based on the types of covered loans that the lender makes. The Bureau noted in the proposal that a lender would then apply its own policies and procedures to its underwriting decisions, which the Bureau anticipated could be largely automated for the majority of consumers and covered loans.

Minimum requirements. Proposed comment 5(b)–2.i set out some of the specific respects in which a lender's determination must be reasonable under the proposed rule with respect to covered short-term loans. For example, it noted that the determination must include the applicable determinations provided in proposed § 1041.5(b)(2), be based on reasonable projections of a consumer's net income and major financial obligations in accordance with proposed § 1041.5(c) and be based on reasonable estimates of a consumer's basic living expenses (which were further clarified under proposed comment 5(b)–4). It would also have to be consistent with the lender's written policies and procedures required under proposed § 1041.18(b) and must be grounded in reasonable inferences and conclusions in light of information the lender is required to obtain or consider.

Proposed comment 5(b)–2.i would have clarified that for a lender's ability-to-repay determination to be reasonable, the lender must appropriately account for information known by the lender, whether or not the lender is required to obtain the information under proposed § 1041.5, that indicates that the consumer may not have the ability to repay a covered short-term loan according to its terms. For example, the Bureau explained, proposed § 1041.5 would not have required a lender to inquire about a consumer's individual transportation or medical expenses, but if the lender learned that a particular consumer had a transportation or recurring medical expense that was dramatically in excess of the amount the lender used to estimate basic living expenses for consumers generally, proposed comment 5(b)–2.i would have clarified that the lender could not ignore that fact. The Bureau wrote in the proposal that, instead, it would have to consider the transportation or medical expense and then reach a reasonable determination that the expense did not negate the lender's otherwise reasonable ability-to-repay determination.

For covered longer-term loans, proposed comment 9(b)–2.i would have paralleled comment 5(b)–2.i in all respects except for the addition of proposed comment 9(b)–2.i.F, would have provided that for covered longer-term loans, the reasonable determination must include appropriately accounting for the possibility of volatility in the consumer's income and basic living expenses during the term of the loan, with a cross-reference to proposed comment 9(b)(2)(i)–2.

Determinations that are not reasonable. Proposed comment 5(b)–2.ii would have provided an example of an ability-to-repay determination that is not reasonable for covered short-term loans. The example, in proposed

[818] Under proposed § 1041.9(b)(2) and comments 9(b)(2)(i)–1 and 9(b)(2)(ii)–1, the focus for analyzing covered longer-term balloon-payment loans would have been on two similar periods: (1) The month with the highest sum of loan payments; and (2) the 30 days after the single highest payment on the loan.

comment 5(b)–2.ii.A, was a determination that relies on an assumption that the consumer will obtain additional consumer credit to be able to make payments under the covered short-term loan, to make payments under major financial obligations, or to meet basic living expenses. The Bureau stated in the proposal that it believed that a consumer whose net income would be sufficient to make payments under a prospective covered short-term loan, to make payments under major financial obligations, and to meet basic living expenses during the applicable period only if the consumer supplements that net income by borrowing additional consumer credit is a consumer who, by definition, lacks the ability to repay the prospective covered short-term loan.

Similarly, proposed comment 9(b)–2.ii would have included two examples of unreasonable ability-to-repay determinations with respect to covered longer-term loans. The first example, proposed comment 9(b)–2.ii.A, was a parallel example to proposed comment 5(b)–2.ii.A. The second example, in proposed comment 5(b)–2.ii.B, would have clarified that an unreasonable ability-to-repay determination is one that relies on an assumption that a consumer will accumulate savings while making one or more payments under a covered longer-term loan and that, because of such assumed future savings, will be able to make a subsequent loan payment under a covered longer-term loan. The Bureau explained in the proposal that, like the prior comment, the Bureau is including this comment in an abundance of caution lest some lenders seek to justify a decision to make, for example, a multi-payment, interest-only loan with a balloon payment on the ground that during the interest-only period the consumer will be able to accumulate savings to cover the balloon payment when due. The Bureau explained further in the proposal that a consumer who finds it necessary to seek a covered longer-term loan typically does so because she has not been able to accumulate sufficient savings while meeting her existing obligations and expenses. The Bureau noted in the discussion in the proposal's Market Concerns—Longer-Term Loans section regarding the high incidence of re-borrowing and refinancing coinciding with balloon payments under longer-term loans strongly and stated that it suggests that consumers are not, in fact, able to accumulate sufficient savings while making lower payments to then be able to make a balloon payment. The Bureau wrote in the proposal that a projection that a consumer will accumulate savings in the future is purely speculative, and basing an ability-to-repay determination on such speculation presents an unacceptable risk of an erroneous determination. The Bureau explained that believed that basing a determination of a consumer's ability to repay on such speculative projections would not be reasonable.

Performance of covered loans as evidence. The Bureau stated in the proposal that in determining whether a lender has complied with the requirements of proposed § 1041.5, there is a threshold question of whether the lender has carried out the required procedural steps, for example by obtaining consumer statements and verification evidence, projecting net income and payments under major financial obligations, and making determinations about the sufficiency of a consumer's residual income. The Bureau explained that in some cases, a lender might have carried out these steps but still have violated § 1041.5 by making determinations that are facially unreasonable, such as if a lender's determinations assume that the amounts a consumer needs to meet basic living expenses are clearly insufficient for that purpose. The Bureau explained further in the proposal that, in other cases, the reasonableness or unreasonableness of a lender's determinations might be less clear. Accordingly, proposed comment 5(b)–2.iii provided that evidence of whether a lender's determinations of ability to repay for covered short-term loans are reasonable may include the extent to which the lender's determinations subject to proposed § 1041.5 result in rates of default, delinquency, and re-borrowing for covered short-term loans that are low, equal to, or high, as compared to the rates of other lenders making similar covered loans to similarly situated consumers.

The Bureau stated in the proposal that proposed comment 5(b)–2.iii would not mean that a lender's compliance with the requirements of proposed § 1041.5 for a particular loan could be determined based solely on the performance of that loan. Nor, the Bureau stated in the proposal, would this proposed comment mean that comparison of the performance of a lender's covered short-term loans with those of other lenders could be the sole basis for determining whether that lender's underwriting complies with the requirements of proposed § 1041.5. The Bureau wrote in the proposal that, for example, one lender may have default rates that are much lower than the default rates of other lenders because it uses aggressive collection tactics, not because its determinations of ability to repay are reasonable. The Bureau wrote that similarly, the fact that one lender's default rates are similar to the default rates of other lenders does not necessarily indicate that their determinations of ability to repay are reasonable; the similar rates could instead reflect that their respective determinations of ability to repay are similarly unreasonable. The Bureau wrote in the proposal that it believed, however, that such comparisons would provide important evidence that, considered along with other evidence, would facilitate evaluation of whether a lender's ability-to-repay determinations are reasonable.

The Bureau elaborated in the proposal that for example, a lender may use estimates for a consumer's basic living expenses that initially appear unrealistically low, but if the lender's determinations otherwise comply with the requirements of proposed § 1041.5 and otherwise result in covered short-term loan performance that is materially better than that of peer lenders, the covered short-term loan performance may help show that the lender's determinations are in fact reasonable. Similarly, the Bureau wrote, an online lender might experience default rates significantly in excess of those of peer lenders, but other evidence may show that the lender followed policies and procedures similar to those used by other lenders and that the high default rate resulted from a high number of fraudulent applications. The Bureau stated in the proposal that, on the other hand, if consumers experience systematically worse rates of default, delinquency, and re-borrowing on covered short-term loans made by one lender, compared to the rates of other lenders making similar loans, that fact may be important evidence of whether that lender's estimates of basic living expenses are, in fact, unrealistically low and therefore whether the lender's ability-to-repay determinations are reasonable.

With respect to covered longer-term loans, the discussion in the proposal's section-by-section analysis for proposed § 1041.9(b) and comment 9(b)–2.iii paralleled the discussion above.

Payments under the covered short-term loan. Proposed comment 5(b)–3 noted that a lender is responsible for calculating the timing and amount of all payments under the covered short-term loan. The Bureau explained in the proposal that the timing and amount of all loan payments under the covered short-term loan were essential

components of the required reasonable determination of a consumer's ability to repay under proposed § 1041.5(b)(2)(i), (ii), and (iii). Calculation of the timing and amount of all payments under a covered loan was also necessary to determine which component determinations under proposed § 1041.5(b)(2)(i), (ii), and (iii) apply to a particular prospective covered loan. Proposed comment 9(b)–3 mirrored the discussion in comment 5(b)–3 with regard to payments under the covered longer-term loan.

Basic living expenses. A lender's ability-to-repay determination under proposed § 1041.5(b) would have been required to account for a consumer's need to meet basic living expenses during the applicable period, while also making payments for major financial obligations and payments under a covered short-term loan. The Bureau explained in the proposal that if a lender's ability-to-repay determination did not account for a consumer's need to meet basic living expenses, and instead merely determined that a consumer's net income is sufficient to make payments for major financial obligations and for the covered short-term loan, the Bureau believed the determination would greatly overestimate a consumer's ability to repay a covered short-term loan and would be unreasonable. The Bureau further explained that doing so would be the equivalent of determining, under the Bureau's ability-to-repay rule for residential mortgage loans, that a consumer has the ability to repay a mortgage from income even if that mortgage would result in a debt-to-income ratio of 100 percent. The Bureau stated in the proposal that it believed there would be nearly universal consensus that such a determination would be unreasonable.

However, the Bureau recognized in the proposal that in contrast with payments under most major financial obligations, which the Bureau stated it believes a lender can usually ascertain and verify for each consumer without unreasonable burden, it would be extremely challenging to determine a complete and accurate itemization of each consumer's basic living expenses. Moreover, the Bureau stated, a consumer may be somewhat more able, at least in the short-run, to reduce some expenditures that do not meet the proposed definition of major financial obligations. For example, the Bureau noted that a consumer may be able for a period of time to reduce commuting expenses by ride sharing.

Accordingly, the Bureau did not propose to prescribe a particular method that a lender would be required to use for estimating an amount of funds that a consumer needs to meet basic living expenses for an applicable period. Instead, proposed comment 5(b)–4 stated the principle that whether a lender's method complies with the proposed § 1041.5 requirement for a lender to make a reasonable ability-to-repay determination depends on whether it is reasonably designed to determine whether a consumer would likely be able to make the loan payments and meet basic living expenses without defaulting on major financial obligations or having to rely on new consumer credit during the applicable period.

Proposed comment 5(b)–4 provided a non-exhaustive list of methods that may be reasonable ways to estimate basic living expenses. The first method was to set minimum percentages of income or dollar amounts based on a statistically valid survey of expenses of similarly situated consumers, taking into consideration the consumer's income, location, and household size. The Bureau explained in the proposal that this example was based on a method that several lenders had told the Bureau they use in determining whether a consumer will have the ability to repay a loan and is consistent with the recommendations of the Small Dollar Roundtable. The Bureau noted that the Bureau of Labor Statistics conducts a periodic survey of consumer expenditures that may be useful for this purpose.

The second method was to obtain additional reliable information about a consumer's expenses other than the information required to be obtained under proposed § 1041.5(c) to develop a reasonably accurate estimate of a consumer's basic living expenses. The Bureau explained in the proposal that this example was not meant to suggest that a lender would be required to obtain this information, but was intended to clarify that doing so may be one effective method of estimating a consumer's basic living expenses. The Bureau wrote that the method described in the second example may be more convenient for smaller lenders or lenders with no experience working with statistically valid surveys of consumer expenses, as described in the first example. The third example was any method that reliably predicts basic living expenses. The Bureau wrote that it was proposing to include this broadly phrased example to clarify that lenders may use innovative and data-driven methods that reliably estimate consumers' basic living expenses, even if the methods are not as intuitive as the methods in the first two examples. The Bureau wrote that it expected to evaluate the reliability of such methods by taking into account the performance of the lender's covered short-term loans in absolute terms and relative to other lenders, as discussed in proposed comment 5(b)–3.iii.

Proposed comment 5(b)–4 also provided a non-exhaustive list of unreasonable methods of determining basic living expenses. The first example was a method that assumes that a consumer needs no or implausibly low amounts of funds to meet basic living expenses during the applicable period and that, accordingly, substantially all of a consumer's net income that is not required for payments for major financial obligations is available for loan payments. The second example was a method of setting minimum percentages of income or dollar amounts that, when used in ability-to-repay determinations for covered short-term loans, have yielded high rates of default and re-borrowing, in absolute terms or relative to rates of default and re-borrowing of other lenders making covered short-term loans to similarly situated consumers.

Proposed comment 9(b)–4 would have paralleled the language of proposed comment 5(b)–4, and the relevant discussion in the proposal's section-by-section analysis regarding this comment mirrored the discussion above.

Comments Received

The Bureau received a significant amount of comments on the standard set forth in § 1041.5(b)(1). The Bureau first addresses comments focused on the general ability-to-repay requirement itself, and then separately discusses comments received regarding the standards for assessing reasonableness of the ability-to-repay requirements, including proposed commentary in 5(b)–2.

General ability-to-repay requirement. A wide spectrum of commenters wrote in support of the ability-to-repay requirement as a general matter, including a group of United States Senators, a number of State Attorneys General, many local and State elected officials, civil rights organizations, faith groups and individual clergy members, other advocacy organizations, numerous individual consumers writing as part of organized comment campaigns, and other commenters. Relatedly, consumer groups agreed with the Bureau's basic premise in the proposal that true ability to repay on a covered loan is not determined merely by whether a consumer repays the loan, but rather by whether the consumer has the ability to repay the loan, major financial

obligations, and basic living expenses without the need to re-borrow. In fact, some consumer groups urged Bureau to revise the general ability-to-repay requirement in § 1041.5(b)(1) to read ''ability to repay the loan according to its terms *while meeting other obligations and expenses and without re-borrowing*'' to more expressly reflect that the standard was not just focused on lenders' ability to collect payments from consumers no matter what the downstream consequences. These commenters cited statutory and regulatory language as precedent, such as language from HOEPA and the Federal Reserve Board's higher-priced mortgage loan rule.

Commenters who criticized the general reasonableness standard in proposed §§ 1041.5(b)(1) and 1041.9(b)(1) were split as to whether it was too vague, particularly as to the use of loan performance as a factor of the analysis, or too prescriptive, particularly in mandating specific upfront procedures. In one camp, several commenters objected generally to the use of a reasonableness standard, arguing that it is overly vague and would create uncertainty for compliance and examination. A group of State banking regulators commented that the proposed ability-to-repay requirement would be difficult to enforce because of the uncertain standards for making a reasonable determination. Other commenters criticized the proposal for not specifying the expected level of residual income that would be necessary for a determination to be reasonable. Some commenters referred to the lack of clarity on both front-end and performance standards as creating a ''gotcha'' regime.

On the other hand, some commenters argued that the final rule should be less prescriptive and designed to provide flexibility for innovation. A lender and a policy and research organization both argued that the Bureau's rule should embrace a ''sandbox'' or pilot approach to the ability-to-repay requirements that would test policy interventions in the market before enshrining them into specific rules. One of these commenters suggested that a sandbox could, for example, be used to ''test out and 'right-size''' a payment-to-income or payment-to-deposits approach to underwriting. The other suggested that the Bureau establish a process for approving data sources used in underwriting.

Relatedly, several commenters argued that the rule should embrace a principles-based approach to the ability-to-repay requirements which leaves more flexibility to lenders on the process and more closely scrutinizes the outcomes. One commenter cited its experience lending in the United Kingdom and discussed how the U.K. Financial Conduct Authority (FCA) in recent years has imposed regulations on small-dollar loans that are non-prescriptive. This lender described how it had successful implemented the FCA regulations and encouraged the Bureau to consider such an approach in this rulemaking.

A number of commenters argued that the Bureau should create an exception or safe harbor to the rule for various scenarios, including for unusual, non-recurring, or emergency expenses. A group of State Attorneys General writing in opposition to the proposal questioned the Bureau's reasoning for declining to create such an exemption. They argued that creating an exception for unusual circumstances—such as where a consumer has a documented medical emergency or a necessary furnace repair during the winter—would be no more difficult to implement than the proposal's other requirements such as income and expense verification. They argued that such an exemption would be invoked rarely, and also would provide States with more flexibility to impose their own requirements. They argued that failing to provide for an exception is ''particularly incongruous'' given that the proposal would require lenders to consider unusual expenses in determining a consumer's ability to repay, citing the section-by-section analysis describing proposed comment 5(b)–2.i.E.

Several commenters argued that the Bureau had failed to take into account a factor that lenders are currently using in their basic underwriting models—willingness to repay. These commenters argue that willingness to repay is often indicative of whether a consumer will default, and several commenters provided data regarding default rates.

Several commenters discussed proposed comment 5(b)–2.i.E, which would have clarified that a reasonable determination includes the lender appropriately accounting for information known to the lender indicating the consumer may not have the ability to repay, even if the lender is not required to obtain the information. Consumer advocates urged that this language be included in the regulatory text. They also asked that the language be broadened to provide that ''information known to the lender'' include the following: (1) Information on the national consumer report or registered information system reflecting delinquencies or defaults on covered loans, other forms of credit or debt obligations, basic living expenses within the past year; and (2) a pattern of re-borrowing known to the lender. A group of State Attorneys General commenting on the proposal interpreted this proposed comment to mean the rule would require lenders to consider unusual expenses in determining a consumer's ability to repay.

With regard to treatment of open-end lines of credit specifically under proposed § 1041.5(b)(1)(ii), consumer groups commenting on the rule also urged the Bureau to treat each advance on a covered loan that is an open-end line of credit as a new loan for purposes of the ability-to-repay requirement. They expressed concern about the risks of open-end credit lines that are covered loans and believed the rule should have stricter requirements to prevent evasion and debt traps.

One commenter, a State trade group representing open-end credit providers, took the opposite view. This commenter argued that the Bureau should exempt open-end lines of credit from the proposal and, in the alternative, that the Bureau should either address open-end lines of credit in a separate rulemaking along with credit cards or apply the requirements of the CARD Act in connection with open-end lines of credit that are covered in this rule. This commenter also argued that the condition under § 1041.5(b)(1)(ii) imposing a requirement to conduct an additional ability-to-repay determination after 180 days would contravene the definition of open-end credit under Regulation Z, 12 CFR 1026.2(a)(20), which has a replenishment element. This commenter also argued that the proposal did not address the parameters for when the open-end credit provider can increase the amount of the line or when the consumer no longer has the ability to repay amounts outstanding after 180 days due to a deterioration of the consumer's income or increase in expenses.

Performance of a lender's loans as evidence of ability to repay. As discussed briefly above, the Bureau received a substantial number of comments focusing specifically on proposed comment 5(b)–2.iii, which would have clarified that certain portfolio-wide backward-looking metrics of loan performance such as a lender's re-borrowing and default rates, may be indicative of whether a lender's determinations of ability to repay are reasonable.

Some commenters objected to the use of loan performance data, for instance by arguing that the use of performance metrics would unfairly penalize lenders for choices made by consumers. A

number of commenters also argued that use of defaults or other metrics as measures of reasonableness could lead to unintended consequences, like creating a heightened incentive to aggressively collect delinquent loans. Several commenters also took particular issue with the Bureau's use of defaults as a performance metric.

Other commenters did not disagree that loan performance was potentially relevant to the question of whether a lender had made a reasonable determination of a consumer's ability to repay the loan, but urged the Bureau to provide more concrete guidance. Several commenters encouraged the Bureau to set objective performance metric standards rather than relying on clarifying principles in commentary. For instance, a group of consumer advocates wrote that the Bureau should set a 5 percent default rate for vehicle title loans and payroll deduction loans and a 10 percent default rate for payday loans as thresholds that, if exceeded by the lender on a portfolio basis, would trigger heightened scrutiny of the lender's practices to determine whether the ability-to-repay determinations are unreasonable.[819] They also suggested that lenders whose loan performance exceeds those benchmarks would potentially be subject to enforcement actions or other required steps to mitigate such as refunding late fees, waiving back interest, or reducing loan principal. Another commenter similarly argued for the Bureau to treat lenders with a portfolio default rate on covered loans above 10 percent with heightened scrutiny. Other commenters argued that the Bureau should add more examples about the patterns of re-borrowing that would be indicative of unreasonable ability-to-repay determinations.

Some commenters actively advocated to use particular metrics. One commenter, a research and policy organization, generally supported the approach to use default data as a metric for evaluating ability to repay, stating that the clearest proof of effective underwriting processes should be found in consumer repayment outcome data rather than by assessing inputs into the product design alone. This commenter also argued that first-payment defaults would be a key indicator for the success of an underwriting model because absent fraud they clearly points to a mis-calibration in underwriting. Others argued that the Bureau should look to see whether consumers met expenses during the 30 or 60 days following the highest or last payment. Consumer groups also provided a list of additional performance metrics that they urged the Bureau to monitor as indicative of deficient ability-to-repay analyses, such as failed payments, late payments, requests for forbearance, aggressive collection practices, indications of consumers' overdrafting or having trouble paying other expenses, and the extent of consumer injury (which they argued was influenced by a number of factors including late fees, debt collection practices, the interest rate and for how long interest was charged, and whether the lender sells or sues on the debt).

In contrast, other commenters who generally supported the proposal and the reasonableness approach criticized the proposed comment 5(b)–2.iii for very different reasons and in particularly strong terms. These commenters objected to the language in the proposed comment suggesting that a review of the *comparative* performance metrics among lenders would be relevant to the evaluation of ability to repay. They suggested that this approach would perpetuate high default or delinquency rates by incentivizing lenders to achieve only marginally better results than their competitors rather than meaningfully improved performance. A group of consumer advocates wrote that this provision was ''among the most dangerous parts of the proposal'' and ''strongly impl[ies] that the metric for evaluating loan performance is simply not to be the worst of the worst.'' The commenters noted the Bureau's statements in the section-by-section analysis for the proposal that comparative performance metrics could not be the sole basis for a reasonableness determination and that factors such as aggressive collection efforts could be the reason for one lender's default rates to appear lower than another, rather than ability to repay, but they argued that such statements were cautionary and would ''be exploited.'' Other commenters, including a large number of individual commenters writing as part of organized commenter campaigns, expressed concern that this provision would be a ''business as usual loophole.'' However, one commenter expressed support for the language regarding comparative performance metrics, arguing that such an analysis of comparative loan performance would help control for macroeconomic shifts that could affect large groups of consumers similarly.

Final Rule

The Bureau finalized the text of § 1041.5(b)(1) with adjustments to apply it to covered longer-term balloon-payment loans and a change to the time period for re-underwriting open-end lines of credit from every 180 days to every 90 days. The justification for this latter change is discussed below in the context of the Bureau's response to comments asking for additional protections regarding open-end credit products covered by the proposal. The Bureau concluded that it was not necessary to further revise the regulation text in § 1041.5(b)(1) to refer expressly to consumers repaying the covered loan while meeting other obligations and expenses and without re-borrowing, as these elements are expressly addressed in various other parts of the regulation text and commentary.

The Bureau also made minor adjustments to the regulation text and commentary for clarity and conformity, such as to reflect policy decisions discussed elsewhere to permit lenders to analyze either a consumer's debt-to-income ratio or residual income for the relevant monthly period and to cross reference other relevant commentary.[820] In addition, the Bureau is making several substantive changes to the commentary to address various concerns raised in comments on the proposal.

Specific elements of the ability-to-repay analysis. The Bureau made a number of substantive changes to the commentary for final § 1041.5(b)(1)(i) to address specific concerns about specific elements of the ability-to-repay test.

First, with regard to basic living expenses, the Bureau has significantly revised comment 5(b)–2.i.C to elaborate on the estimation methods posited in the proposal. The Bureau did so in part in response to comments and also because of the Bureau's decision to consolidate this comment with proposed comment 5(b)–4. The Bureau is not finalizing proposed comment 5(b)–4 because it believes it had some redundancy with other commentary language on basic living expenses, would have added complexity, and would have created some tension with comment 5(b)–2.i and –2.ii. The Bureau

[819] In justifying the suggested default rate thresholds, consumer advocates made several arguments: That the 10 percent default rate threshold for payday loans was double the default rate chosen by the Bureau in the proposed conditional exemption for covered longer-term loans under proposed § 1041.12; that mainstream credit products have single-digit default rates; that the leveraged payment mechanism substantially lowers the default rate lenders otherwise would experience; and, that vehicle title loans present unique harms justifying an even lower threshold.

[820] For example, the Bureau revised final comment 5(b)–3 to reflect that the calculation of payments under the covered short-term loan or covered longer-term balloon loan focuses on the payments due during the relevant monthly period.

has chosen to harmonize the language regarding reasonable estimates of basic living expenses into one comment under § 1041.5(b).

Specifically, comment 5(b)–2.i.C now has two subparagraphs. Comment 5(b)–2.i.C.*1* emphasizes that the final rule does not specify a particular method that must be used to estimate basic living expenses, and that the lender is not required to itemize them for individual consumers. The comment goes on to clarify that a lender may instead arrive at estimates for the amount needed to cover the six categories of costs identified in § 1041.5(a)(1) based upon such sources as the lender's own experience in making covered short-term loans or covered longer-term balloon-payment loans to similarly-situated consumers, reasonably reliable information available from government surveys or other publications about the basic living expenses of similarly-situated consumers, or some combination thereof. The Bureau disagrees with commenters who argued that the Bureau should require itemization, as that would create potentially substantial burdens for lenders and consumers and make automation harder.

With regard to reliance on government sources, the comment also specifically clarifies that it would be reasonable for the lender to use data about the amounts spent on the six categories of basic living expenses identified in comment 5(a)(1)–2 from the IRS Collection Financial Standards or the CEX to develop non-individualized estimates of basic living expenses. However, the comment also notes that in using the data from those sources to estimate the amount spent on a particular category, the lender may make reasonable adjustments to arrive at an estimate of basic living expenses, for instance where a data source's information on a particular type of basic living expenses overlaps with a type of major financial obligation as defined in § 1041.5(a)(3) or where a source groups expenses into different categories than comment 5(a)(1)–2.

As discussed above in connection with the final commentary to § 1041.5(a)(1), the Bureau intends to make clear that lenders have flexibility to make reasonable non-individualized estimates of basic living expenses and that, in doing so, they can rely on their own experience in estimating basic living expenses for similarly-situated consumers or upon governmental survey or data sources, some of which are now listed as examples. At the same time, for the reasons discussed above, while the Bureau believes that it would be reasonable for lenders to rely on either the IRS Collection Financial Standards or the Consumer Expenditure Survey, there is reason to believe that both may be over-inclusive or reflect some differences as to expense categorization. The Bureau believes it is therefore appropriate to emphasize that further reasonable adjustments are permitted to estimates that are primarily based on such sources. These changes are in part responsive to comments asserting that the standards in proposed comment 5(b)–4, which were consolidated with this comment, were too vague.

The Bureau also has not finalized language in comment 5(b)–4 that would have referenced an example of reasonable basic living expense estimates being based on a survey taking into consideration a consumer's income, household size, and location. The Bureau received a number of questions and comments about these categories, including those suggesting that consideration of location and household size would implicate fair lending law issues. As noted earlier, the Bureau does not believe estimates based on these categories would raise fair lending law issues, and the Bureau believes it will be difficult for lenders to arrive at reasonable estimates that apply without regard to household size or, for lenders operating in multiple States, without regard to differences in living costs. However, the Bureau believes including commentary language of this sort might suggest that the final rule requires more precision in estimating than the Bureau intends.

The Bureau has also added a comment 5(b)–2.i.C.*2* regarding basic living expenses. This comment provides that if the lender is conducting an individualized estimate by itemizing the consumer's basic living expenses (which earlier commentary clarifies the lender is not required to do), the lender may reasonably consider other factors specific to the consumer that are not required to be projected under § 1041.5(c). The comment clarifies that this could include whether other persons are regularly contributing toward the payment of basic living expenses. The comment clarifies that the lender can consider such consumer-specific factors only when it is reasonable to do so, and further notes that it is not reasonable for the lender to consider whether other persons are contributing toward the consumer's payment of basic living expenses if the lender is also separately including in its projection of net income any income of another person to which the consumer has a reasonable expectation of access.

As discussed above, the Bureau has made these changes to this comment based on comments to the proposal arguing that lenders should be permitted to account for the fact that other persons besides consumers themselves sometimes contribute to pay basic living expenses. The Bureau notes that it is permitting consideration of consumer-specific factors only if the lender is making an individualized determination. The Bureau believes it would be unworkable operationally and also potentially create a loophole if consumer-specific factors were permitted to be considered when the lender makes *non-individualized* estimates of basic living expenses. For example, the Bureau would be concerned if lenders developed a model for estimating basic living expenses that applied to all of their consumers or relevant subsets of them, and the model assumed that a percentage of basic living expenses is always paid by persons other than the consumer. The comment also reflects the Bureau's policy concern that if lenders were able to count both the income of another person to which the consumer has a reasonable expectation of access and assume that the consumer's basic living expenses were being paid by that same person, it could result in a double-counting problem and an artificial inflation of net income (or deflation of basic living expenses); that is, the same income of another person to which the consumer claims access could be the income being used to pay for the consumer's expenses. The Bureau believes it is a reasonable response to the comments asking for flexibility on this point to permit lenders to do one or the other—consider payment of basic living expenses by another person toward the estimate, or count as net income the other person's income to which the consumer has a reasonable expectation of access.

The Bureau also has decided not to finalize comment 5(b)–2.i.E, which would have stated that for a reasonable determination of ability to repay, the lender must appropriately account for information known by the lender whether or not the lender is required to obtain the information. The Bureau believes that this language created potential tension with other commentary indicating that lenders need not individually analyze basic living expenses because it would potentially have required substantial individual follow up that would negate the decision to allow lenders to rely on survey data and other generalized sources. The Bureau believes there is

even more potential for this risk under the final rule, given that it now also allows lenders to rely on their historical experiences. The Bureau is therefore not finalizing the comment, but notes that it has had added other commentary as discussed separately below clarifying that lenders must, for example, take into account major financial obligations that consumers list on their written statements even if those items are not reported on other sources. The Bureau believes that this more tailored guidance in particular circumstances will be more helpful to lenders in reconciling information from multiple sources. As such, the Bureau is declining the consumer groups' suggestion to embed concepts into the rule that were discussed in the proposal's section-by-section analysis for this proposed comment.

General reasonableness standard. More generally, with regard to comments that expressed broader concerns about prescriptiveness, vagueness, and flexibility under § 1041.5(b)(1)'s reasonableness standard, the Bureau has made a number of adjustments to the commentary. First, the Bureau has expanded comment 5(b)–2.ii to provide more examples of front-end underwriting that would not meet the reasonableness standard. In addition, as discussed separately below, the Bureau added substantial additional text to comments 5(b)–2.iii regarding consideration of loan performance and added a new comment 5(b)–2.iv with illustrative examples of how the factors in 5(b)–2.iii would be used to evaluate the reasonableness of ability-to-repay determinations on the back end. The latter two comments are discussed separately below.

With regard to comment 5(b)–2.ii, the Bureau has added a new subparagraph B to clarify that a lender's determination would not be reasonable if it assumed a consumer needs implausibly low amounts or percentages of funds to meet basic living expenses. In the proposal, this language appeared in proposed comment 5(b)–4.ii.A, but the Bureau moved it for purposes of the final rule and revised it to address an example where a lender makes an unreasonable ability-to-repay determination by making a loan to consumer with a 90 percent debt-to-income ratio. The Bureau is adding this example in part to address the comments that the proposal did not provide any indication of what thresholds would be considered sufficient for purposes of a reasonable ability-to-repay determination. The Bureau believes that a debt-to-income ratio in the range of 90 percent would not leave sufficient net income to cover consumers' basic living expenses for purposes of this requirement.

However, more generally, the Bureau is finalizing the general framework of considering whether an entity's ability-to-repay determinations are reasonable. Reasonableness is a widely used legal concept in both State and Federal law, and is what Congress required with respect to the underwriting of mortgages, and so the Bureau believes the standard in the final rule—which, again, has been revised to include a substantial amount of new commentary clarifying how the reasonableness of ability-to-repay determinations will be evaluated—should provide a sufficiently discernible standard.

The Bureau also declines to set more specific parameters about the level of residual income or debt-to-income ratio that would be considered reasonable or unreasonable for purposes of § 1041.5(b). Outside of extreme cases such as a 90 percent debt-to-income ratio, the Bureau believes that with regard to individual determinations of ability to repay, the acceptable level of residual income or debt-to-income ratio for a reasonable determination will depend on the circumstances. This question may also depend on whether lenders are using across-the-board DTI or residual income-thresholds or whether they are sorting their consumers into different categories and applying different thresholds for acceptable levels of DTI or residual income for consumers within those categories. There may be some debt-to-income thresholds that are sufficiently low that it would be reasonable to use a uniform debt-to-income threshold for all of the lender's customers, whereas as thresholds get higher it may be reasonable to apply the threshold to only subsets of the lender's customers (such as customers in higher income tiers). The overarching principle, of course, is that the lender must make reasonable determinations of consumers' ability to repay. Moreover, as discussed below, the Bureau believes that at least for lenders who follow the procedural requirements set forth in § 1041.5(c), the primary evidence with respect to the reasonableness of a lenders' determinations will be the pattern of outcomes for consumers found to have the ability to repay. That is why the Bureau is adding detailed commentary to 5(b)–2.iii and a new comment 5(b)–2.iv clarifying the performance factors that would be reviewed for purposes of assessing reasonableness and giving examples.

The Bureau declines the suggestion by some commenters to take a ''sandbox'' approach to components of the ability-to-repay requirement. The Bureau as a general matter supports innovation and policy experimentation through Project Catalyst and other initiatives. It simply does not believe this rulemaking is the best candidate for such an approach. Given the nature of the Federal rulemaking process and the particular history of this rulemaking—which has involved to date many years of study, outreach and deliberation, and where the compliance date of §§ 1041.2 through 1041.10, 1041.12, and 1041.13 will not be for another 21 months after publication in the **Federal Register**—the Bureau is concerned that failing to finalize necessary components of the rule, such as the ability-to-repay requirement, and instead testing ideas in the market would not prove a fruitful value proposition in view of the further delays in finalizing the rule. Any policy ideas emanating from the sandbox would have to be reintegrated into a rulemaking process in any event, further forgoing valuable consumer protections in the Bureau's view.

With regard to the commenters suggesting a principles-based approach where outcomes are more important that procedures, the Bureau notes that the final rule strikes a balance between a rules-based and an outcomes-based approach, with more emphasis than the proposal on the latter. First, the Bureau is taking a less prescriptive approach on certain key components of the ability-to-repay requirements, such as by permitting reasonable reliance on stated amounts for income in absence of reasonably available verification evidence. Second, as discussed below, the Bureau is expanding the discussion of how loan performance metrics will be used to evaluate ability-to-repay determinations. These changes reflect a greater emphasis on lender performance as a means of evaluating compliance with the ability-to-repay requirements.

As to commenters asserting that the Bureau should allow for exceptions to the ability-to-pay framework for consumers who are seeking loans to pay for non-recurring, unusual, and emergency expenses, the Bureau declines this suggestion for several reasons. First, lenders will already have an alternative to § 1041.5 by lending under § 1041.6 of the final rule, which is not subject to the ability-to-repay requirements. That approach is available for consumers up to six times per year and can be used in any of the circumstances—including emergency situations—that the commenters noted, unless the consumer is in a cooling-off period. Second, the Bureau continues to believe that the policy challenges described in the proposal with crafting

such an exception are profound, such as the difficulty of defining, by rule, unusual and emergency expenses, and disagrees that this would pose the same or less challenges as with the implementation of other aspects of the rule.[821]

Third, the Bureau believes that this type of exception would be extremely difficult to administer, for some the same reasons discussed in the section-by-section analysis for § 1041.5(a)(5) in connection with suggestions made by other commenters to count the proceeds of the loan toward net income or as a credit against major financial obligations or basic living expenses. As discussed in the section-by-section analysis for § 1041.5(a)(5), the Bureau believes it is difficult if not impossible to construct a workable rule that would carve out from the requirement one type of usage case for a consumer—here, emergency expenses—but include other usage cases, such as payment of basic living expenses, given the fungibility of money, the potential intrusiveness of asking about why the consumer is taking out the loan, and the challenges of policing such a rule. Lastly, the Bureau does not agree that this exception would be used sparingly. This assertion contravenes empirical evidence, assertions by other commenters including many individual consumers, and lender advertising about the purpose of the loans.[822] Moreover, the difficulty of enforcing this type of provision would create an incentive for evasion, where consumers simply state a reason that would fall under the exception and lenders accept that reason without further inquiry.

Performance of a lender's loans as ability to repay. As noted above, the Bureau received many comments asking for additional guidelines and clarity on what constitutes a reasonable ability-to-repay determination, including in some cases numerical thresholds above which would trigger heightened scrutiny or even consumer remedies. The Bureau appreciates the concerns raised by the commenters and has substantially expanded the language in comment 5(b)–2.iii and added new comment 5(b)–2.iv to further clarify how it will use loan performance metrics and analysis in assessing whether a lender's determinations of consumers' ability to repay are reasonable. The specifics of the revised language are described in more detail below.

The Bureau is declining, however, to provide a prescriptive standard or exhaustive list of factors that would show reasonableness, or a set of numerical thresholds tied to the factors such as a specific default rate that would constitute a per se violation or grounds for closer scrutiny. While the Bureau understands that reasonableness tests and multi-factor back-end performance metrics, without specific numerical thresholds, may not give lenders perfectly clear direction on how exactly to underwrite, the Bureau believes that on balance the more prudent option at this time is to preserve the principles-based approach of the proposal but add detail and illustrations. The Bureau believes it may be challenging to set thresholds that would apply across the board, given that lenders who make unaffordable loans may experience different rates of default, re-borrowing, and other harms depending on collections practices and other factors. Furthermore, the Bureau also does not believe there is enough evidence at this time to codify specific numerical thresholds for default rates, re-borrowing rates, and the like, given that the practices identified in this rule are market-wide and that there is not currently a Federal ability-to-repay rule for this market. And the Bureau is concerned that setting particular benchmarks at this time would incentivize lenders to take steps to manage their rates aggressively through enhanced debt collection or even to manipulate the metrics to fall just beneath the threshold, neither of which would be a beneficial result.

Further, to the extent that consumer group commenters urged the Bureau to establish numeric thresholds for enhanced scrutiny of particular lenders rather than outright thresholds for per se violations, such as 5 percent default rates for vehicle title loans and employer-based loans and 10 percent threshold for payday loans, such a policy decision would not be made as part of a rulemaking, but rather, in the Bureau's prioritization decisions regarding supervision or enforcement activity as the market evolves over time in response to the rule and other business developments. As noted above, comment 5(b)–2.iii does state that default rates can provide evidence that a lender's ability-to-pay determinations were not reasonable.[823]

The Bureau also declines some commenters' request to change the ability-to-repay standard to one focused on willingness or propensity to pay. The Bureau recognizes that many lenders today already employ predictive underwriting tools to screen out those with a propensity to default, a point noted in some comments. However, the Bureau's core concern in this rulemaking is the determination of whether consumers have the *ability* to repay, *i.e.,* the financial capacity to make the loan payments, pay for major financial obligations, and meet basic living expenses. The Bureau expects that lenders will continue to utilize in their underwriting models various methods for detecting fraud or willingness to repay, and nothing in the final rule precludes that from happening as long as they comply with the requirements of this rule.

The assertion made by some commenters that default and re-borrowing are caused simply by consumer choice and not at all by lender practices—including the identified unfair and abusive practice that is the Bureau's focus in this rule—runs counter to the analysis provided above in Market Concerns—Underwriting and seems to contradict their own comments that their customers are often living paycheck to paycheck.

Regarding the comments about the use of comparative performance metrics and how that would create a ''business as usual loophole,'' as an initial matter the Bureau agrees with the concern voiced by consumer advocates, individual consumers, and others about a rule that would judge the reasonableness of ability-to-repay determinations based solely (or primarily) on a comparison of loan performance across lenders. The Bureau did not intend to promulgate a standard that would evaluate loan performance simply on not being ''the worst of the

[821] While the proposal discussed the challenges to this exception in the context of alternatives considered to the presumption of unaffordability in proposed § 1041.6, the commenter referred to this language in the broader context of the ability-to-repay requirements.

[822] As noted in the section-by-section analysis for § 1041.5(a)(5) in discussion of the loan proceeds issue, the Bureau received many comments, including a large number from individual consumers, describing how consumers often use payday loans and other covered loans to cover their new needs or emergency expenses; payday lenders in their advertising tend to cite this usage category as the primary purpose for using the product; and academic literature and surveys discussing usage patterns on payday loans have consistently found that a sizable number of consumers report using payday loans and other covered loans for non-recurring and emergency expenses.

[823] The Bureau also notes that with regard to the specific thresholds suggested by the consumer groups, the Bureau does not find the justification compelling that the Bureau should designate a 10 percent portfolio default rate for payday loans because it is double the 5 percent rate included as part of a larger set of conditions for a proposed exemption for longer-term, and generally lower-cost, loans—an exemption which the Bureau is not finalizing. Nor does the Bureau believe commenters provided a compelling reason for why there should be a separate, and more stringent, 5 percent threshold for vehicle title and employer-based loans.

worst.'' The Bureau expressly noted in the proposal that comparative metrics are not the sole basis of judging compliance, that lenders cannot rely on comparative performance to excuse poor loan performance as measured more objectively, and that comparatively lower default rates could be caused by factors extrinsic to ability-to-repay determinations (such as aggressive debt collection).

To further underscore and memorialize this intent, the Bureau has revised comment 5(b)–2.iii to state specifically that evidence about comparative performance is *not dispositive* as to the evaluation of a lender's ability-to-repay determinations. Additionally, this comment has been revised more generally to provide a more expansive discussion of the types of performance metrics used to evaluate the reasonableness of ability-to-repay determinations, along with several examples in comment 5(b)–2.iv showing lending patterns that indicate either reasonable or unreasonable ability-to-repay determinations. The combination of these changes provides more clarity that the reasonableness of ability-to-repay determinations are to be measured over a variety of dimensions (*e.g.,* default rates, re-borrowing rates, patterns of lending across loan sequences, and delinquency-related harms such as late fees); non-comparative measures of loan performance will be primary; and comparative performance metrics will be complementary. These changes are discussed in detail below.

However, the Bureau has decided not to eliminate reference to comparative performance metrics altogether, as requested by the consumer advocates and other commenters. Although as noted above the fact that a lender's outcomes are not among the worst of its peers is not sufficient to establish that the lender is making reasonable ability-to-repay determinations, outlier outcomes surely are probative of the unreasonableness of a particular lender's ability-to-repay determinations. That is the import of comment 5(b)–2.iii and 5(b)–2.iv.

The Bureau agrees with the consumer advocates that evaluating the ability-to-repay determinations should involve looking at indicators beyond default rates. Again, revised comment 5(b)–2.iii provides additional clarification on the types of performance metrics that will be evaluated. The list of factors has been expanded from the proposal. The commentary states that a variety of factors may be relevant, including rates of default, patterns of re-borrowing within loan sequences, patterns of re-borrowing across loan sequences, rates of delinquency-related harms (*e.g.,* late fees and failed presentments), and patterns of lenders making non-covered loans that bridge gaps between sequences of covered loans. The Bureau has also clarified that loan performance may be evaluated across the lender's entire portfolio of covered short-term or longer-term balloon-payment loans, as well as with respect to particular products, geographic regions, time periods during which the loans were made, or other relevant categorizations. Finally, the Bureau provides several new illustrative examples of lending patterns that would indicate reasonable or unreasonable ability-to-repay determinations in comment 5(b)–2.iv. More discussion and explanation of these revised commentary provisions are found below.

Comment 5(b)–2.iii has been revised and expanded in a number of important ways. First, it now states that evidence that a lender's determinations of ability to repay are not reasonable may include, without limitation, the factors described under paragraphs (A) through (E) of the comment. This change refers to how the comment now lists the factors in separate paragraphs rather than the main body of the comment for organizational purposes and due to the additional level of detail provided. Second, comment 5(b)–2.iii now clarifies that these factors may be evaluated across a lender's entire portfolio of covered short-term loans or covered longer-term balloon-payment loans *or* with respect to particular products, geographic regions, particular time periods during which the loans were made, or other relevant categorizations, and clarifies that other relevant categorizations would include, without limitation, loans made in reliance on consumer statements of income in the absence of verification evidence. The Bureau believes that this approach is important to identify potential troublesome patterns insofar as lenders could not simply blend the categories of covered loans evidencing poor performance with other types of covered loans made by the lender with better performance. Third, the comment now clarifies that the factors may be considered either individually or in combination with one another; that the factors are not absolute in their application and instead exist on a continuum and may apply to varying degrees; and that each of the factors is viewed in the context of the facts and circumstances relevant to whether the lender's ability-to-repay determinations are reasonable. Finally, the comment clarifies that relevant evidence may also include a comparison of the factors listed in the comment on the part of the lender to that of other lenders making covered short-term loans or covered longer-term balloon-payment loans to similarly situated consumers, but that such evidence about comparative performance is not dispositive as to the evaluation of a lender's ability-to-repay determinations. This revised language above is a response to the criticisms of the proposed comment 5(b)–2.iii language regarding comparative performance metrics as evaluative tools, as discussed above.

Comment 5(b)–2.iii is then organized into five sub-paragraphs elucidating the factors that will be evaluated. Comment 5(b)–2.iii.A addresses default rates, clarifying that this evidence includes defaults during and at the expiration of covered loan sequences as calculated on a per sequence or per consumer basis. The Bureau believes that a per-loan basis for calculating default rates would not be as accurate for purposes of evaluating whether reasonable ability-to-repay determinations are being made, because then a lender's re-borrowing rate would substantially distort the metric. For example, on a per loan basis, a consumer who re-borrows twice and then defaults would have one-third the impact on the default rate that a consumer who defaults after the first loan would, even though both loan sequences end the same way. The Bureau also notes that the consumer advocates in their joint comment letter urged that any default rate metric that is used should be a per-customer or per-sequence default rate, for similar reasons.

Comment 5(b)–2.iii.B addresses re-borrowing rates, which the comment clarifies as including the frequency with which the lender makes consumers multiple covered short-term loans or covered longer-term balloon-payment loans within a loan sequence as defined in § 1041.2(a)(14), *i.e.,* consecutive or concurrent loans taken out within 30 days of a prior loan being outstanding. As discussed in many places in the final rule, including Market Concerns—Underwriting and the section-by-section analysis for § 1041.4, the Bureau has identified repeat re-borrowing as a problem in this market meriting intervention and is requiring lenders to determine whether consumers have the ability to repay a covered short-term or longer-term balloon-payment loan without the repayment triggering a need to re-borrow over the ensuing 30 days. Thus, within-sequence re-borrowing rates will be critical in evaluating compliance with the ability-to-repay

determination, as that is one of the core consumer harms that the requirements of the final rule are aiming to prevent.

Comment 5(b)–2.iii.C lists patterns of lending across loan sequences as a third factor and clarifies that this evidence includes the frequency with which the lender makes multiple sequences of covered short-term loans or covered longer-term balloon-payment loans to consumers. The comment clarifies that this evidence also includes the frequency with which the lender makes new covered short-term loans or covered longer-term balloon-payment loans immediately or soon after the expiration of a cooling-off period under § 1041.5(d)(2) or the 30-day period that separates one loan sequence from another, referencing the loan sequence definition in § 1041.2(a)(14). As noted in the section-by-section analysis for § 1041.4, while the Bureau has established a 30-day period as the measure for determining whether a consumer is likely to be re-borrowing the prior loan, there are circumstances in which new loans beyond the 30-day period would also be the result of the unaffordability of a prior loan rather than the result of a new borrowing need. For example, if a consumer does not have funds to pay major financial obligations or basic living expenses as they come due because the consumer used income that would pay those obligations to pay off a covered short-term loan, and the consumer falls behind on an obligation during the month after repaying a short-term loan and then returns to obtain a new loan 31 days after the prior loan was repaid, that would effectively mean that the prior loan was not affordable. A pattern of consumers frequently returning to take out a new loan immediately after the end of a cooling-off period would thus be relevant in assessing whether the lender's ability-to-repay determinations were reasonable.

Comment 5(b)–2.iii.D lists a fourth factor, rates of delinquencies and collateral impacts. The comment clarifies that this evidence includes the proportion of consumers who incur late fees, failed presentments, delinquencies, and repossessions. The Bureau believes that evaluating the rates of late fees, failed presentments, delinquencies, and repossessions is highly relevant to the evaluation of ability-to-repay determinations because those metrics would indicate that consumers are struggling to repay their loans, even if they do not necessarily wind up in default. The Bureau discusses the consumer harms associated with failed presentments in § 1041.7.

Comment 5(b)–2.E lists a fifth factor, patterns of non-covered lending. The comment clarifies that this evidence includes the frequency with which the lender makes non-covered loans shortly before or shortly after consumers repay a covered short-term loan or covered longer-term balloon-payment loan, and the non-covered loan bridges all or a substantial part of either the time period between two loans that otherwise would be part of a loan sequence or of a cooling-off period. The comment lists an example where the lender, its affiliate, or a service provider frequently makes 30-day pawn loans to consumers shortly before or soon after repayment of covered short-term loans made by the lender, and where the lender then makes additional covered short-term loans to the same consumers soon after repayment of the pawn loans. The Bureau included this factor as a way to address concerns, discussed by the Bureau in the proposal, about the possibility of lenders using non-covered loans as a way of ''bridging'' gaps between the making of covered loans in order to evade the cooling-off period and other aspects of the proposal. The proposal attempted to address this issue more directly through rule provisions justified under the Bureau's Dodd-Frank Act anti-evasion authority,[824] but as described in the discussion below of §§ 1041.5(d) and 1041.6(d), the Bureau is not finalizing these provisions due to concerns about their efficacy and complexity and to the Bureau's decision to significantly streamline the re-borrowing restrictions that had been in proposed § 1041.6 based on public comments. Upon further consideration, however, the Bureau has realized that if lenders are making these ''bridge'' loans on a frequent basis, it may be an indication that the consumers are struggling to repay the preceding covered short-term or covered longer-term balloon-payment loan and therefore the underlying ability-to-repay determination on the earlier loan may have been unreasonable.

The Bureau believes that revised comment 5(b)–2.iii provides a relatively comprehensive list of factors that broadly capture the types of ascertainable outcomes that would be useful in evaluating the reasonableness of lenders' ability-to-repay determinations. As such, the Bureau declines to include all of the factors urged to be added by the consumer advocates, including the loan's interest rate and the ''extent and aggressiveness of the lender's debt collection practices.'' At least some of the examples suggested by the consumer groups would be very difficult if not impossible to measure quantitatively; others may be more aptly described as potential examples of evasion rather than indicators of unreasonable ability-to-repay determinations; and still others in the Bureau's view are overly restrictive, such as the suggestion regarding interest rates.

Other commenters' suggestions about which metrics would be most indicative of a failure to make a reasonable ability-to-repay determination, such as first-payment defaults absent those due to fraud, are helpful and may help inform Bureau analyses once the rule takes effect. However, the Bureau is not at this time rank-ordering the metrics because it believes that, depending on the facts and circumstances, any one of the factors, or multiple factors working in tandem, may be indicative of whether an ability-to-repay methodology is unreasonable.

As a complement to revised comment 5(b)–2.iii, the Bureau has also added a new comment 5(b)–2.iv. This comment contains four detailed examples of fact scenarios illustrating how the factors in comment 5(b)–2.iii might constitute evidence about whether lenders' ability-to-repay determinations are reasonable under § 1041.5(b). The Bureau is including these examples as a further response to criticisms that proposed comment 5(b)–2.iii, and § 1041.5(b) more broadly, did not provide sufficient guidance on how reasonableness on ability-to-repay determinations would be evaluated. These examples are non-exhaustive. The examples focus on fact scenarios where lenders' portfolios include multiple factors from comment 5(b)–2.iii and where the factors are present to varying degrees, thus illustrating how the factors will be evaluated in combination.

The first example, in comment 5(b)–2.iv.A, describes a scenario in which a significant percentage of consumers who obtain covered short-term loans from a lender under § 1041.5 re-borrow within 30 days of repaying their initial loan, re-borrow within 30 days of repaying their second loan, and re-borrow shortly after the end of the

[824] The proposal would have defined ''non-covered bridge loan'' in proposed § 1041.2(a)(13) and provided in proposed § 1041.6(h) that if the lender or an affiliate made a non-covered bridge loan while a covered short-term loan under proposed § 1041.5 or § 1041.7 or a covered longer-term balloon-payment loan under proposed § 1041.9 was outstanding or for 30 days thereafter, the days during which a non-covered bridge loan is outstanding would not have counted toward any of the time periods in proposed § 1041.6, including the proposed 30-day cooling-off period following a three-loan sequence. More explanation of this provision and the reasons for why the Bureau is not finalizing it are found in the discussion of § 1041.5(d), below.

cooling-off period that follows the initial loan sequence of three loans, and how, based on the combination of these factors, this evidence suggests that the lender's ability-to-repay determinations are not reasonable. This example illustrates a pattern where the lender's consumers experience frequent re-borrowing—specifically, where a significant percentage of the lender's consumers take out a full sequence of three covered short-term loans and then return to borrow shortly after the end of the cooling-off period, beginning another sequence. This would implicate the factors in both comment 5(b)–2.iii.B and 5(b)–2.iii.C.

The second example, in comment 5(b)–2.iv.B, describes a scenario in which a lender frequently makes at or near the maximum number of covered short-term loans permitted under the conditional exemption in § 1041.6 to consumers early within a 12-month period (*i.e.,* the loans do not require ability-to-repay determinations) and then makes a large number of additional covered short-term loans to those same consumers under § 1041.5 (*i.e.,* the loans require ability-to-repay determinations) later within the 12-month period. The example assumes that the loans made under § 1041.5 are part of multiple loan sequences of two or three loans each and the sequences begin soon after the expiration of applicable cooling-off periods or 30-day periods that separate one loan sequence from another. The example clarifies that this evidence suggests that the lender's ability-to-repay determinations for the covered short-term loans made under § 1041.5 are not reasonable. The example notes further that the fact that some of the loans in the observed pattern were made under § 1041.6 and thus are conditionally exempted from the ability-to-repay requirements does not mitigate the potential unreasonableness of the ability-to-repay determinations for the covered short-term loans that were later made under § 1041.5.

This example is intended to illustrate the potential interaction of the provisions under §§ 1041.5 and 1041.6 and how the reasonableness of the lender's ability-to-repay determinations for loans made under § 1041.5 would be evaluated if the lender makes a combination of loans under the different provisions to consumers during a given time period. Here, the lender is making loans to many consumers more or less continuously throughout the year (*i.e.,* long loan sequences, borrowing shortly after cooling-off periods expire), with the § 1041.6 loans made toward the beginning of the year and § 1041.5 loans made later in the year. This pattern suggests that the lender is not making reasonable ability-to-repay determinations for the loans made under § 1041.5. This is the case even though some of the loans in the pattern did not require such an ability-to-repay determination. Put another way, the mere fact that the first set of loans in the pattern did not require an ability-to-repay determination does not insulate the lender from scrutiny if the subsequent loans show a pattern of long loan sequences and frequent borrowing shortly after cooling-off periods expire.

The third example, in comment 5(b)–2.iv.C, is a variation of the preceding example. The facts are that a lender frequently makes at or near the maximum number of loans permitted under § 1041.6 to consumers early within a 12-month period and then only occasionally makes additional covered short-term loans to those same consumers under § 1041.5 later within the 12-month period, and that very few of those additional loans are part of loans sequences longer than one loan. The example clarifies that absent other evidence that the ability-to-repay determination is unreasonable (*i.e.,* presence of the factors in comment 5(b)–2.iii.A through E), this evidence suggests that the lender's ability-to-repay determinations for the loans made under § 1041.5 are reasonable. In contrast to the preceding example where the lender made a large number of § 1041.6 loans and a large number of § 1041.5 loans within a given time period and the latter loans were made in long sequences and close in time (broken up only by the cooling-off periods), under this example the vast majority of loans are made under § 1041.6, and there is little to no evidence of re-borrowing on the § 1041.5 loans. Therefore, this pattern reflects the permissible maximization of lending under § 1041.6 and the incidental making of additional § 1041.5 loans within the given time period, a pattern that is not suggestive of unreasonableness.

Comment 5(b)–2.iv.D contains the final example. The pattern described is that within a lender's portfolio of covered short-term loans, a small percentage of loans result in default; consumers generally have short loan sequences (fewer than three loans); the consumers who take out multiple loan sequences typically do not begin a new loan sequence until several months after the end of a prior loan sequence; and there is no evidence of the lender or an affiliate making non-covered loans to consumers to bridge cooling-off periods or the time periods between loan sequences. The example clarifies that this evidence suggests that the lender's ability-to-repay determinations are reasonable. Although this example does indicate the presence of two factors from comment 5(b)–2.iii (*i.e.,* defaults and re-borrowing), it illustrates that the degree to which these factors are present is germane to the overall evaluation. The re-borrowing is typically less than a full loan sequence, defaults are infrequent, and while there are some consumers who borrow multiple sequences, they are spread further apart, suggesting that new borrowing needs are driving the re-borrowing rather than the spillover effects of the prior loans. Therefore, this pattern does not indicate potentially unreasonable ability-to-repay determinations.

Re-underwriting of open-end credit. Finally, with regard to the special rule requiring re-underwriting of open-end credit on a periodic basis under § 1041.5(b)(1)(ii), the Bureau is concerned that the consumer group commenters' suggestion to require lenders to underwrite each individual advance separately would be unduly burdensome particularly as to small advances. However, the Bureau has further considered the timeline it proposed, and decided to adjust the final rule to require in § 1041.5(b)(1)(ii) that the lender must make a new ability-to-repay determination prior to an advance on an open-end line of credit if more than 90 days has elapsed since the initial determination, rather than every 180 days as proposed. The Bureau believes it is reasonable to require a new ability-to-repay determination once a quarter for an open-end line of credit, which for example would mean that a consumer would be re-underwritten after taking a monthly advance three times in a row. This revised time period also aligns with the revised requirement in § 1041.5(c)(2)(ii)(D), which as discussed below generally exempts lenders from the requirement to obtain a new national consumer report to verify debt obligations, child support obligations, and alimony obligations if the lender or its affiliates has previously obtained such a report in the prior 90 days (unless the consumer had triggered a cooling-off period since the report was last obtained).

The Bureau disagrees with the commenter that argued that the Bureau should exempt open-end lines of credit from the proposal or, in the alternative, should address open-end lines of credit in a separate rulemaking along with credit cards or apply the requirements of the CARD Act in connection with open-end lines of credit that are covered in this rule. The Bureau notes that while

open-end products are not as common in the affected markets as closed-end products, the Bureau did conduct substantial research as part of this rulemaking concerning deposit advance products, which can be structured as open-end credit. The Bureau believes that consumers can be harmed just as much by unaffordable open-end credit as unaffordable closed-end credit, and that both products are therefore appropriately subject to the final rule. With regard to why the Bureau is not imposing the same rules for open-end products as the CARD Act regulations—an alternative approach suggested by the commenter—see the general discussion above for § 1041.5 about the comparison between the two rules. The Bureau also disagrees with the more technical arguments made by the same commenter about the proposed requirement to assess consumers' ability to repay an open-end line of credit where the consumer requests a new advance more than 180 days after the lender's last assessment of the consumer's ability to repay.[825]

5(b)(2)

Proposed Rule

Proposed § 1041.5(b)(2) set forth the Bureau's specific proposed methodology for making a reasonable determination of a consumer's ability to repay a covered short-term loan. Specifically, it would have provided that a lender's determination of a consumer's ability to repay is reasonable only if, based on projections in accordance with proposed § 1041.5(c), the lender reasonably makes the applicable determinations provided in proposed § 1041.5(b)(2)(i), (ii), and (iii). Proposed § 1041.5(b)(2)(i) would have required an assessment of the sufficiency of the consumer's residual income during the term of the loan, and proposed § 1041.5(b)(2)(ii) would have required an assessment of an additional 30-day period after having made the highest payment on the loan in light of the harms from loans with short-term structures. In proposed § 1041.5(b)(2)(iii), the Bureau would have required compliance with further requirements in proposed § 1041.6 in situations where consumers' borrowing history suggests that they may have difficulty repaying additional credit. Proposed § 1041.9(b)(2) would have imposed similar requirements on covered longer-term balloon-payment loans.

More specifically, proposed § 1041.5(b)(2)(i) would have provided that for any covered short-term loan subject to the ability-to-repay requirement of proposed § 1041.5, a lender must reasonably conclude that the consumer's residual income would be sufficient for the consumer to make all payments under the covered short-term loan and to meet basic living expenses during the shorter of the term of the loan or for 45 days following consummation. The Bureau believed that if the payments for a covered short-term loan would consume so much of a consumer's residual income that the consumer would be unable to meet basic living expenses, then the consumer would likely suffer injury from default or re-borrowing, or suffer collateral harms from having to make unaffordable payments. The parallel provision in § 1041.9(b)(2)(i) applicable to covered longer-term loans would have provided for a reasonable conclusion about the sufficiency of the residual income during the loan term. Proposed comment 9(b)(2)(i)–1.i would have clarified that for covered longer-term loans, a reasonable conclusion about the sufficiency of the residual income for the month in which the highest sum of payments were due on the loan would have satisfied this requirement.

In proposing § 1041.5(b)(2)(i), the Bureau recognized that, even when lenders determine at the time of consummation that consumers will have the ability to repay a covered short-term loan, some consumers may still face difficulty making payments on these loans because of changes that occur after consummation. The Bureau noted in the proposal that, for example, some consumers would experience unforeseen decreases in income or increases in expenses that would leave them unable to repay their loans. Thus, the fact that a consumer ended up in default is not, in and of itself, evidence that the lender failed to reasonably assess the consumer's ability to repay the loan *ex ante.* The Bureau explained that proposed § 1041.5(b)(2)(i) would instead have looked to the facts that were reasonably knowable prior to consummation and prohibited a lender from making a covered short-term loan if the lender lacked a reasonable basis at consummation to conclude that the consumer would be able to repay the covered loan while also meeting basic living expenses and major financial obligations.

The Bureau further explained in the proposal that while some consumers may have so little (or no) residual income as to be unable to afford any loan at all, for other consumers the ability to repay will depend on the amount and timing of the required repayments. Thus, the Bureau noted, even if a lender concludes there is no reasonable basis for believing that a consumer can pay a particular prospective loan, proposed § 1041.5(b)(2)(i) would have not prevented a lender from making a different covered loan with more affordable payments to such a consumer, provided that the loan is consistent with State law and that the more affordable payments would not consume so much of the consumer's residual income that she would be unable to meet basic living expenses.

Proposed comment 5(b)(2)(i)–1 would have provided more detailed guidance on the calculations needed for the applicable period under § 1041.5(b)(2)(i), explaining that a lender complies with the requirement in § 1041.5(b)(2)(i) if it reasonably determines that the consumer's projected residual income during the shorter of the term of the loan or the period ending 45 days after consummation of the loan will be greater than the sum of all payments under the covered short-term loan plus an amount the lender reasonably estimates will be needed for basic living expenses during the term of the covered short-term loan. The Bureau explained in the proposal that this method of compliance would have allowed the lender to make one determination based on the sum of all payments that would be due during the term of the covered short-term loan, rather than having to make a separate determination for each respective payment and payment period in isolation in cases where the short-

[825] Specifically, the commenter argued that this provision would be inconsistent with the definition of open-end credit under Regulation Z. One element of that definition focuses on whether the amount of credit that may be extended to the consumer is generally made available to the extent that any outstanding balance is repaid. 12 CFR 1026.2(a)(20)(iii). The commentary to Regulation Z distinguishes open-end credit on this ground from situations in which the consumer has to apply for each advance individually under a closed-end credit feature. However, the Regulation Z commentary also emphasizes that this distinction does not prevent creditors offering open-end products from periodically adjusting their credit limits or refusing to make an individual extension of credit ''due to changes in the creditor's financial condition or the consumer's creditworthiness.'' Comment 1026.2(a)(20)–5. The Bureau believes that the final rule here is consistent with this Regulation Z commentary, in that the final rule periodically requires a lender to evaluate whether the consumer has the ability to repay the entire amount available under an open-end line of credit. With regard to how the lender would decide after such an assessment whether to increase the line or to take other action where the consumer's credit has deteriorated such that she can no longer make the outstanding payments, the Bureau would expect lenders to make decisions in accordance with the updated ability-to-repay analysis as to whether a change in the credit line is appropriate in either direction.

term loan provide for multiple payments.

Under the proposed rule, the lender would have had to make the determination for the actual term of the loan, accounting for residual income (*i.e.,* net income minus payments for major financial obligations) that would actually accrue during the shorter of the term of the loan or the period ending 45 days after consummation of the loan. The Bureau wrote that it believed that for a covered loan with short duration, a lender should make the determination based on net income the consumer will actually receive during the term of the loan and payments for major financial obligations that will actually be payable during the term of the loan, rather than, for example, based on a monthly period that may or may not coincide with the loan term. The Bureau explained that when a covered loan period is under 45 days, determining whether the consumer's residual income will be sufficient to make all payments and meet basic living expenses depends a great deal on, for example, how many paychecks the consumer will actually receive during the term of the loan and whether the consumer will also have to make no rent payment, one rent payment, or two rent payments during that period.

Proposed comment 9(b)(2)(i)–1 contained similar content but also emphasized that determination of whether residual income will be sufficient for the consumer to make all payments and to meet basic living expenses during the term of a covered longer-term loan (including covered longer-term balloon-payment loans) requires a lender to reasonably account for the possibility of volatility in the consumer's residual income and basic living expenses over the term of the loan. The Bureau further stated in that proposed comment that a lender reasonably accounts for the possibility of volatility in income and basic living expenses by reasonably determining an amount (*i.e.,* a cushion) by which the consumer's residual income must exceed the sum of the loan payments under the loans and the amount needed for basic living expenses.

Proposed comment 5(b)(2)(i)–2 clarified what constitutes ''sufficient'' residual income for a covered short-term loan, explaining that residual income is sufficient as long as it is greater than the sum of payments that would be due under the covered loan plus an amount the lender reasonably estimates will be needed for basic living expenses. Proposed comment 9(b)(2)(i)–2 was identical.

The proposal also would have required lenders who make covered short-term loans and covered longer-term balloon-payment loans to assess consumers' finances for a second, distinct time period under §§ 1041.5(b)(2)(ii) and 1014.9(b)(2)(ii), respectively. Specifically, those sections would have required that before making such loans, a lender must reasonably conclude that the consumer will be able to make payments required for major financial obligations as they fall due, make any remaining payments under the loan, and meet basic living expenses for 30 days after having made the highest payment under the loan on its due date.

Proposed comment 5(b)(2)(ii)–1 noted that a lender must include in its determination under proposed § 1041.5(b)(2)(ii) the amount and timing of net income that it projects the consumer will receive during the 30-day period following the highest payment, in accordance with proposed § 1041.5(c). Proposed comment 5(b)(2)(ii)–1 also included an example of a covered short-term loan for which a lender could not make a reasonable determination that the consumer would have the ability to repay under proposed § 1041.5(b)(2)(ii). The Bureau noted in the proposal that it proposed to include the requirement in § 1041.5(b)(2)(ii) for covered short-term loans because research showed that these loan structures are particularly likely to result in re-borrowing shortly after the consumer repays an earlier loan. As discussed in the proposal, when a covered loan's terms provide for it to be substantially repaid within 45 days following consummation, the fact that the consumer must repay so much within such a short period makes it especially likely that the consumer will be left with insufficient funds to make subsequent payments under major financial obligations and meet basic living expenses. The Bureau noted that the consumer may then end up falling behind in paying major financial obligations, being unable to meet basic living expenses, or borrowing additional consumer credit. Such consumers may be particularly likely to borrow new consumer credit in the form of a new covered loan.

The Bureau further elaborated in the proposal that this shortfall in a consumer's funds is most likely to occur following the highest payment under the covered short-term loan (which is typically but not necessarily the final payment) and before the consumer's subsequent receipt of significant income. The Bureau noted, however, that depending on the regularity of a consumer's income payments and payment amounts, the point within a consumer's monthly expense cycle when the problematic covered short-term loan payment falls due, and the distribution of a consumer's expenses through the month, the resulting shortfall may not manifest itself until a consumer has attempted to meet all expenses in the monthly expense cycle, or even longer. The Bureau noted that indeed, many payday loan consumers who repay a first loan and do not re-borrow during the ensuing pay cycle (*i.e.,* within 14 days) nonetheless find it necessary to re-borrow before the end of the expense cycle (*i.e.,* within 30 days).

The Bureau noted in the proposal that in the Small Business Review Panel Outline, the Bureau described a proposal under consideration to require lenders to determine that a consumer has the ability to repay a covered short-term loan without needing to re-borrow for 60 days, consistent with the proposal in the same document to treat as part of the same loan sequence a loan taken out within 60 days of having a prior covered short-term loan outstanding. The Bureau noted in the proposal that several consumer advocates had argued that consumers may be able to juggle expenses and financial obligations for a time, so that an unaffordable loan may not result in re-borrowing until after a 30-day period. The Bureau proposed a 30-day period for both purposes.

The Bureau wrote that it believed that the incidence of re-borrowing caused by such loan structures would be somewhat ameliorated simply by determining that a consumer would have residual income during the term of the loan that exceeds the sum of covered loan payments plus an amount necessary to meet basic living expenses during that period. But if the loan payments consume all of the consumer's residual income during the period beyond the amount needed to meet basic living expenses during the period, the Bureau wrote in the proposal, then the consumer will have insufficient funds to make payments under major financial obligations and meet basic living expenses after the end of that period, unless the consumer receives sufficient net income shortly after the end of that period and before the next set of expenses fall due. The Bureau noted that often, though, the opposite is true: A lender schedules the due dates of loan payments under covered short-term loans so that the loan payment due date coincides with the consumer's receipt of income. The Bureau noted that this practice maximizes the probability that the lender will timely receive the payment under the covered

short-term loan, but it also means the term of the loan (as well as the relevant period for the lender's determination that the consumer's residual income will be sufficient under proposed § 1041.5(b)(2)(i)) ends on the date of the consumer's receipt of income, with the result that the time between the end of the loan term and the consumer's subsequent receipt of income is maximized.

Thus, in the proposal, the Bureau wrote that even if a lender made a reasonable determination under proposed § 1041.5(b)(2)(i) that the consumer would have sufficient residual income during the loan term to make loan payments under the covered short-term loan and meet basic living expenses during the period, there would remain a significant risk that, as a result of an unaffordable highest payment (which may be the only payment, or the last of equal payments), the consumer would be forced to re-borrow or suffer collateral harms from unaffordable payments. The Bureau wrote that the example included in proposed comment 5(b)(2)(ii)–1 was intended to illustrate just such a result.

In proposed § 1041.5(b)(2)(iii), the Bureau would have required the lender to determine that the requirements of proposed § 1041.6 are satisfied when making a covered short-term loan for which a presumption of unaffordability under proposed § 1041.6 applies.

Comments Received

The Bureau received a number of comments on proposed § 1041.5(b)(2), and specifically the time period and sufficiency of the residual income model. Many of the comments pertaining to this section were already discussed above in the discussion of comments received pertaining to § 1041.5 more generally and § 1041.5(a) and (b)(1).

On the time period, several consumer advocate commenters suggested that residual income should be assessed under § 1041.5(b)(2)(ii) for 60 days following the highest payment. Other commenters argued that the time period in question should run from the last payment instead of the highest payment, arguing that this would ensure that the consumer does not need to re-borrow throughout the entirety of the loan term and thereafter. As articulated by the commenters, if a consumer's highest payment came more than 30 days before the end of the loan term, then under the Bureau's proposed requirement, the lender would only need to make a reasonable conclusion about whether the consumer could repay until the end of the loan term (and there would not be a 30-day period after to assess for re-borrowing).

Industry commenters asserted that forecasting for income and expenses as they come due, including the timing of those payment and expenses, during the various overlapping proposed time periods would be infeasible. Others made the opposite argument, asserting that lenders should at least be encouraged to assess actual basic living expenses during the two time periods specified in proposed § 1041.5(b)(2).

As discussed above, a number of commenters asserted that the residual income model was unduly restrictive or otherwise inadequate for assessing whether a consumer has the ability to repay. Some argued that if the Bureau is using a residual income approach, it should model its test after the Department of Veterans Affair's residual income test, which includes objective numerical standards. Many other commenters, as noted in the general § 1041.5 discussion above, asserted that a debt-to-income ratio was a more well-accepted and time-tested underwriting model. Other commenters argued, as noted above, for a loan-to-income or payment-to-income approach instead. Others argued, also as noted above, that a residual income test would be too burdensome. Still other commenters pointed to data showing that residual income is not indicative of whether a consumer will default. These comments are discussed in more detail in the introduction to § 1041.5 and the summary of § 1041.5(b)(1) above.

The Bureau also received a number of comments relating to how proposed § 1041.9(b) would have required lenders to include a cushion to account for income volatility over the course of a covered longer-term loan, arguing that to do so would be purely speculative.

Final Rule

As described in the general § 1041.5 discussion and in the discussion of the debt-to-income ratio definition in § 1041.5(a)(2) above, the Bureau has made a substantial number of changes to § 1041.5(b)(2) of the final rule.

To summarize, as described in the general § 1041.5 discussion above, under proposed § 1041.5(b)(2) the reasonable ability-to-repay determination would have required the lender to project both the amount *and* timing of the consumer's net income and major financial obligations and draw reasonable conclusions about the consumer's ability to repay during *two* distinct time periods: First for the shorter of the term of the loan or 45 days after consummation of the loan,[826] and then also for 30 days after having made the highest payment under the loan. This requirement is being streamlined in the final rule. Lenders are instead required to make a projection about net income and major financial obligations and calculate the debt-to-income ratio or residual income, as applicable, during only a *single* monthly period, *i.e.,* the relevant monthly period. The Bureau has defined that term in § 1041.5(a)(7) as the calendar month with the highest payments on the loan, which is generally consistent with the analysis that the Bureau proposed to use for covered longer-term balloon payment loans under proposed § 1041.9(b)(2)(i) and focuses on the time in which the loan places the greatest strain on the consumer's finances.

Lenders can use the debt-to-income ratio or residual income during this relevant monthly period as a snapshot of the consumer's financial picture to draw conclusions about the consumer's ability to repay the covered short-term loan or covered longer-term balloon-payment loan without re-borrowing. Specifically, under § 1041.5(b)(2), the lender uses this information to make a reasonable conclusion that the consumer has the ability to repay the loan while meeting basic living expenses and major financial obligations during: (1) The shorter of the term of the loan or 45 days after consummation of the loan, for covered short-term loans, and the relevant monthly period, for covered longer-term balloon-payment loans, and (2) for 30 days after having made the single highest payment under the loan. This simplified approach also dovetails with the inclusion of the debt-to-income ratio methodology as an alternative to residual income. As discussed above, a debt-to-income methodology does not permit the tracking of a consumer's individual income inflows and major financial obligation outflows on a continuous basis over a period of time.

In response to commenters arguing that forecasting the timing of income flow and payment obligations over the applicable period will be difficult, the Bureau has adjusted the rule. While § 1041.5(b)(2) still requires the lender to generally make a reasonable conclusion about whether the consumer can pay major financial obligations, loan payment amounts, and basic living expenses for the loan term and 30 days after the largest payment, the Bureau has adjusted the rule such that the

[826] The proposal would have designated this time period to cover the term of the loan for covered longer-term loans.

lender *does not* need to specifically project both the amount of the payments *and* the timing of the payments during those periods. Rather, the lender is required to account only for the amounts of such payments—and not the timing of them—during a single calendar month, the relevant monthly period. The relevant monthly period is defined in § 1041.5(a)(7) as the calendar month in which the payments on the loan are highest.

The Bureau has also revised commentary to § 1041.5(b)(2) to discuss how lenders are to use the projections of net income and major financial obligations during the relevant monthly period as a baseline of information to then make reasonable inferences and draw a reasonable conclusion about the time periods described in § 1041.5(b)(2).

As noted above, § 1041.5(b)(2) has been revised and expanded largely as a way of accommodating the inclusion in the final rule of an option for lenders to use a debt-to-income methodology in lieu of a residual income methodology. Although some of the revisions are substantive and are described below, most of the changes reflect the creation of a parallel set of provisions to apply to the debt-to-income methodology. Thus § 1041.5(b)(2) of the final rule is now split so that paragraph (b)(2)(i) addresses the debt-to-income ratio methodology, and paragraph (b)(2)(ii) addresses the residual income methodology. Lenders will only have to comply with one or the other subparagraph depending on which methodology they choose.

The Bureau described the debt-to-income ratio methodology above in the discussion of § 1041.5(a), but, to recap, a lender may determine whether a consumer will have a high enough percentage of net income remaining to pay for basic living expenses after paying major financial obligations and the loan payments during the relevant monthly period. As discussed earlier, the Bureau has not set the threshold for how high a percentage would meet the test and will allow lenders to use their reasoned judgment. The Bureau believes that a lender may find that different thresholds are effective for consumers with different income levels and family sizes. However, a lender could conceivably use a single threshold, and lenders that choose to vary the thresholds will almost surely develop different approaches of doing so. The test will be whether the thresholds deployed by any given lender lead to reasonable determinations of whether consumers have the ability to repay their loans according to the loan terms. Of course, if lenders set thresholds based on reasoned judgment, but then find they do not work in practice, the Bureau will expect them to adjust accordingly.

The Bureau has not imported the requirement under proposed comment 9(b)(2)(i)–2 (also cross-referenced in proposed comment 9(b)–2.i.F) that lenders must allow a cushion for income volatility. The proposal did not include a requirement to account for income volatility for covered short-term loans, and the Bureau sees no reason to add one in the final rule. The Bureau is skeptical that such a requirement is needed for covered short-term loans due to their shorter duration.

Moreover, the Bureau is not finalizing this comment as to covered longer-term balloon-payment loans, which are included in the scope of § 1041.5(b)(2). The Bureau proposed the cushion requirement with respect to covered longer-term loans because installment loans would have predominated that category. For those loans, the proposed ability-to-repay requirement would have focused on the affordability of the regular periodic payment. The Bureau believed that if a consumer had only just enough money to cover that payment in a ''normal'' month, the loan would prove unaffordable over its term due to income or expense volatility. The final rule, however, covers only longer-term loans with a balloon payment and requires underwriting such loans to assess whether the consumer will be able to make the payments in the month with the highest sum of payments. Therefore, the Bureau does not believe it is necessary to add a cushion to that calculation.

In addition to substantially revising the text of § 1041.5(b)(2) in light of these major changes, the Bureau has also revised the comments. Comment 5(b)(2)–1 reiterates the general methodology, and notes that if there are two payments that are equal to each other in amount and higher than all other payments, the highest payment under the loan is considered the later in time of the two. Comments 5(b)(2)(i)–1 and –2 explain how the relevant monthly period for calculating the debt-to-income ratio is not identical to the periods for which a lender is assessing ability to repay in § 1041.5(b)(2)(i), and explains that in fact they may overlap. Comment 5(b)(2)(i)–2 explains that the lender uses the projections about the consumer's net income and major financial obligations during the relevant monthly period and the calculation of the consumer's debt-to-income ratio as a baseline of information on which to make reasonable inferences and draw a reasonable conclusion about whether the consumer will be able to pay major financial obligations, make the payments on the loan, and meet basic living expenses during the periods specified in § 1041.5(b)(2)(i). The comment further states that the lender cannot assume, for example, in making those reasonable inferences, that the consumer will defer payment on major financial obligations or basic living expenses until after the 30-day period that follows the date of the highest payment on the loan, or assume that the obligations and expenses will be less than in the relevant monthly period. The Bureau provides examples of this dynamic in comment 5(b)(2)(i)–3. Comments 5(b)(2)(ii)–1 through –3 provide parallel guidance as to covered longer-term balloon-payment loans.

Lastly, the Bureau did not finalize the content in proposed § 1041.5(b)(2)(iii), which would have required lenders to satisfy further requirements under proposed § 1041.6 before making a covered short-term loan in circumstances where the consumer's recent borrowing or current difficulties paying off an existing loan suggested that they did not have the ability to repay a new loan. As discussed below, the Bureau has instead finalized certain elements of proposed § 1041.6 as final § 1041.5(d).

5(c) Projecting Consumer Net Income and Payments for Major Financial Obligations

Overview

Proposed § 1041.5(c) specified the requirements for obtaining information directly from consumers as well as various forms of verification evidence for use in projecting consumers' net income and major financial obligations for purposes of the ability-to-repay requirements under proposed § 1041.5(b). Following the Bureau's review and consideration of the comments to the proposal, the Bureau is finalizing § 1041.5(c) with substantial changes to provide more flexibility with regard to verification requirements and to provide more detailed guidance for how lenders should treat discrepancies between consumers' written statements and verification evidence. The Bureau has carefully balanced the final rule to require substantial improvements in current industry verification practices, while providing appropriate flexibility for lenders and consumers in situations in which verification evidence is not reasonably available.

Specifically, the Bureau had proposed § 1041.5(c) in the following manner: Paragraph (c)(1) set forth the general evidentiary standards for reasonably

projecting net income and major financial obligations and the standards for addressing inconsistencies between the consumers' stated amounts for such items and verification evidence; paragraph (c)(2) addressed one narrow way in which lenders could deviate from information in verification evidence; and paragraph (c)(3) governed how and when lenders must obtain verification evidence for net income and major financial obligations. The Bureau is not finalizing much of the content in paragraph (c)(2), as described below, and, for increased clarity, the Bureau is now placing the content from paragraph (c)(2), to the extent that content is being finalized or amended, into paragraph (c)(1). Accordingly, final § 1041.5(c)(1) describes the general evidentiary standards, the standards for addressing inconsistencies between the consumers' stated amounts for net income and major financial obligations and the verification evidence, and the process for when lenders can deviate from the information in verification evidence; and § 1041.5(c)(2) governs how and when lenders must obtain verification evidence for net income and major financial obligations.

5(c)(1) General

Proposed Rule

With regard to covered short-term loans, in proposed § 1041.5(c)(1), the Bureau provided that for a lender's projection of the amount and timing of net income or payments for major financial obligations to be reasonable, the lender must obtain both a written statement from the consumer as provided for in proposed § 1041.5(c)(3)(i) and verification evidence as provided for in proposed § 1041.5(c)(3)(ii). Proposed § 1041.5(c)(1) further provided that for a lender's projection of the amount and timing of net income or payments for major financial obligations to be reasonable, it may be based on a consumer's statement of the amount and timing only to the extent the stated amounts and timing are consistent with the verification evidence.

As the Bureau explained in the proposal, the Bureau believed verification of consumers' net income and payments for major financial obligations was an important component of the reasonable ability-to-repay determination. Consumers seeking a loan may be in financial distress and inclined to overestimate net income or to underestimate payments for major financial obligations to improve their chances of being approved. Lenders have an incentive to encourage such misestimates to the extent that as a result consumers find it necessary to re-borrow. The Bureau further stated in the proposal that this result is especially likely if a consumer perceives that, for any given loan amount, lenders offer only a one-size-fits-all loan repayment structure and will not offer an alternative loan with payments that are structured to be within the consumer's ability to repay. As the Bureau noted, an ability-to-repay determination that is based on unrealistic factual assumptions will yield unrealistic and unreliable results, leading to the very consumer harms that the Bureau's proposal was intended to prevent.

Accordingly, proposed § 1041.5(c)(1) would have permitted a lender to base its projection of the amount and timing of a consumer's net income or payments for major financial obligations on a consumer's written statement of amounts and timing under proposed § 1041.5(c)(3)(i) only to the extent the stated amounts and timing are consistent with verification evidence of the type specified in proposed § 1041.5(c)(3)(ii). Proposed § 1041.5(c)(1) also provided that in determining whether and the extent to which stated amounts and timing are consistent with verification evidence, a lender may reasonably consider other reliable evidence the lender obtains from or about the consumer, including any explanations the lender obtains from the consumer.

In the proposal, the Bureau stated its belief that the proposed approach would appropriately ensure that the projections of a consumer's net income and payments for major financial obligations will generally be supported by objective, third-party documentation or other records. The Bureau further stated, however, that the proposed approach also recognized that reasonably available verification evidence may sometimes contain ambiguous, out-of-date, or missing information. For example, the net income of consumers who seek covered loans may vary over time, such as for a consumer who is paid an hourly wage and whose work hours vary from week to week. In fact, a consumer is more likely to experience financial distress, which may be a consumer's reason for seeking a covered loan, immediately following a temporary decrease in net income from more typical levels. Accordingly, the Bureau stated that the proposed approach would not have required a lender to base its projections exclusively on the consumer's most recent net income receipt shown in the verification evidence. Instead, it allowed the lender reasonable flexibility in the inferences the lender draws about, for example, a consumer's net income during the term of the covered loan, based on the consumer's net income payments shown in the verification evidence, including net income for periods earlier than the most recent net income receipt. At the same time, the proposed approach would not have allowed a lender to mechanically assume that a consumer's immediate past income as shown in the verification evidence will continue into the future if, for example, the lender has reason to believe that the consumer has been laid off or is no longer employed.

The Bureau stated in the proposal, that in this regard, the proposed approach recognized that a consumer's own statements, explanations, and other evidence can be important components of a reliable projection of future net income and payments for major financial obligations. Proposed comment 5(c)(1)–1 included several examples applying the proposed provisions to various scenarios, illustrating reliance on consumer statements to the extent they are consistent with verification evidence and how a lender may reasonably consider consumer explanations to resolve ambiguities in the verification evidence. It included examples of when a major financial obligation in a consumer report is greater than the amount stated by the consumer and of when a major financial obligation stated by the consumer does not appear in the consumer report at all.

The Bureau stated in the proposal that it anticipated that lenders would develop policies and procedures, in accordance with proposed § 1041.18, for how they project consumer net income and payments for major financial obligations in compliance with proposed § 1041.5(c)(1) and that a lender's policies and procedures would reflect its business model and practices, including the particular methods it uses to obtain consumer statements and verification evidence. The Bureau stated its belief that many lenders and vendors would develop methods of automating projections, so that for a typical consumer relatively little labor would be required.

In proposed § 1041.5(c)(2), the Bureau proposed an exception to the requirement in proposed § 1041.5(c)(1) that projections must be consistent with the verification evidence that a lender would be required to obtain under proposed § 1041.5(c)(3)(ii). As discussed below, the required verification evidence would have normally consisted of third-party documentation

or other reliable records of recent historical transactions or of payment amounts. Proposed § 1041.5(c)(2) would have permitted a lender to project a net income amount that is higher than an amount that would otherwise be supported under proposed § 1041.5(c)(1), or a payment amount for a major financial obligation that is lower than an amount that would otherwise be supported under proposed § 1041.5(c)(1), only to the extent and for such portion of the term of the loan that the lender obtains a written statement from the payer of the income or the payee of the consumer's major financial obligation of the amount and timing of the new or changed net income or payment.

As the Bureau explained in the proposal, the exception was intended to accommodate situations where a consumer's net income or payment for a major financial obligation will differ from the amount supportable by the verification evidence. For example, a consumer who has been unemployed for an extended period of time, but who just accepted a new job, may not be able to provide the type of verification evidence of net income that generally would have been required under proposed § 1041.5(c)(3)(ii)(A). Proposed § 1041.5(c)(2) would have permitted a lender to project a net income amount based on, for example, an offer letter from the new employer stating the consumer's wage, work hours per week, and frequency of pay. The lender would have been required to retain the statement in accordance with proposed § 1041.18.

Proposed § 1041.9(c) included parallel requirements applicable to covered longer-term loans.

Comments Received

The Bureau received many comments on the proposed verification requirements from a variety of stakeholders. Many of these commenters argued that the verification requirements were overly burdensome, too prescriptive, and not appropriate to this credit market in contrast to the mortgage and credit card markets. Other industry commenters asked the Bureau to provide more specificity around verification requirements to reduce uncertainty. These commenters included both industry stakeholders and other parties, such as several State Attorneys General and the SBA Office of Advocacy. Many individual consumers, often commenting as part of letter-writing campaigns, also criticized aspects of the verification requirements, particularly the requirement for lenders to obtain a national consumer report for each loan to verify debt obligations. Consumer advocates, on the other hand, generally argued that the verification requirements were calibrated appropriately or, in some places, were too permissive. Some of these arguments are described in the general § 1041.5 discussion at the outset of the section-by-section analysis for this section. These arguments are also described with more particularity in discussion below of paragraphs of this overall section, such as the requirements under § 1041.5(c)(2)(ii)(A) and (B) (verification evidence for net income and major financial obligations, respectively).

Commenters generally argued that there are many consumers who have an ability to repay, but who cannot verify income, and that they would be harmed by the verification requirements. Specifically, many commenters cited consumers who work in the cash economy or who had seasonal or sporadic work as consumers who would be unable to access credit under the proposal because of the income verification requirements. One industry trade group representing community banks argued that some consumers use cash to pay for basic living expenses, so deposit account records would not provide accurate verification evidence. These comments are addressed in the discussion of § 1041.5(c)(2).

One commenter argued that the Bureau should not impose any verification evidence requirements until the Bureau could prove that consumers were harmed by lenders failing to collect evidence to verify consumer claims.

A number of industry commenters asserted that the Bureau had failed to explain why it was applying more vigorous verification requirements to payday loans than to mortgages and credit cards. Some of these arguments are described in the general § 1041.5 discussion above. Some commenters argued that requiring similar verification requirements undermined the business model of payday and title loan companies, which they argued are built around speed, convenience, and lack of intrusive underwriting, and that consumers desire these features of the business model. Many individual consumers, often writing as part of organized letter-writing campaigns made similar comments. They described favorably their experience with payday loans based on the lack of a credit check requirement, the ease of the application process, and the respect they feel they receive from the origination process at payday lenders (in contrast to their experience at banks, which they argued was more intrusive and impersonal).

Other commenters argued that the Bureau could and should provide safe harbors or exceptions for certain lenders who meet various criteria. For example, one commenter, an online lender, argued that the Bureau should not impose any income verification requirements on short-term lenders with below market average charge-offs and that the Bureau should set a safe harbor loss rate of under 15 percent for first-time customers.

A trade group representing vehicle title lenders commented that income verification is incompatible with the business model for the vehicle title loan product and its customer base. The commenter argued that vehicle title lenders would have difficulty obtaining the information from consumers; that the time it would add to the process is disproportionate for this type of loan; and that it would undermine the value and competitiveness of the product.

A number of commenters argued that the more rigorous underwriting requirements would involve personal questions that many consumers would believe violate their privacy and so would resist answering, or viewed such questions as too intrusive for a small-dollar loan as opposed to a much larger extension of credit. Similarly, many individual commenters expressed concerns about providing their personal information to lenders, and were concerned about their privacy and also the risk of data breach. Some industry commenters provided similar comments, stating that the need to create real-time, centralized databases for obtaining information on consumers during underwriting would increase consumers' exposure to data breach risk.

A number of commenters, including several lenders and consumer reporting agencies, argued that the Bureau should adopt a validation instead of a verification model, in which lenders could compare statements about income, basic living expenses, or major financial obligations to various third-party data sources or data models, and perform manual processing and verification only when the validation process identifies an anomaly. Some of these commenters noted that the U.K. Financial Conduct Authority guidelines on small-dollar lending permit such an approach. Another provided data comparing deviations from historical 12-month average stated income to default rates, finding that the further a consumer's stated income deviated from that consumer's historic average, the higher the default rate (with significantly higher default rates as

consumers' stated income is multiples higher than the historic average).

More broadly, commenters argued that the proposed verification requirements did not take into consideration shared payment of major financial obligations by consumers and other persons, such as expenses shared with spouses and cohabitants. Consumer advocates argued, alternatively, that claims of shared major financial obligations should be allowed only with verification evidence. The issues raised in these comments in some cases overlap with the issues discussed in the section-by-section analysis for § 1041.5(a)(1) (definition of basic living expenses) and § 1041.5(a)(3) (definition of major financial obligations).

The Bureau received a number of comments relating to how proposed § 1041.5(c)(1) and (2) would have addressed inconsistencies between the consumers' stated amounts and the verification evidence, when deviation from the stated amounts would have been permitted, and what additional steps would have been required in those circumstances. Consumer advocates argued that lenders should not be allowed to rely on consumer statements that are inconsistent with verification evidence unless relying on the consumer statements would result in a projection of a lower income amount or a higher major financial obligations amount. Others expressed concern that the ability to deviate from amounts in the verification evidence based on explanations from the consumer would be an easy way to skirt the verification requirements in the proposal. On the other hand, industry commenters suggested that lenders should be able to deviate from amounts in verification evidence based on borrower statements. Specific to proposed § 1041.5(c)(2), a number of industry commenters argued that a requirement to procure statements from payors or payees would pose significant privacy concerns for consumers.

Online lenders and their trade groups expressed concerns about the practicality and burdens on both the consumer and the lender with respect to the verification requirements. They argued that document verification disadvantages online lenders because documents submitted by fax, mobile image capture, or email scan are frequently illegible or easily misinterpreted; mobile image capture does not work for pay stubs; and even if the customers could submit the documents via mobile app, lenders would need to manually process them on the back end. They also expressed concerns about the fraud and security risks related to consumers taking photos of sensitive documents to submit to online lenders via a smartphone.

Lastly, some commenters noted concerns about potential double-deductions, where a national consumer report identifies a debt obligation or child support obligation that may have already been deducted from the consumer's gross income prior to the consumer's receipt of take-home pay. The concern was that the portion of the gross income deducted for this obligation would not be included in net income but would still be counted as a major financial obligation.

Final Rule

After carefully considering the comments received, the Bureau has finalized the core elements of § 1041.5(c)(1) to require lenders to obtain consumers' written statements and various forms of verification evidence in order to reasonably project net income and major financial obligations for the relevant monthly period as required by § 1041.5(b). However, the Bureau has adopted a number of changes to the proposed approach to provide lenders with greater flexibility to rely on consumers' written statements in appropriate circumstances and to clarify how lenders should address situations in which there are inconsistencies between consumers' written statements and consumer reports or other verification evidence. The Bureau has also incorporated some elements of proposed § 1041.5(c)(2) into the commentary on § 1041.5(c)(1), but is not adopting a categorical requirement that lenders may only project increases in net income or decreases in major financial obligations if they obtain a written statement from the payer of the income or the payee of the obligation.

Specifically, final § 1041.5(c) specifies that a lender must obtain the consumer's written statement in accordance with § 1041.5(c)(2)(i), obtain verification evidence as required by § 1041.5(c)(2)(ii), assess information about rental housing expense as required by § 1041.5(c)(2)(iii), and make a reasonable projection of the amount of a consumer's net income and payments for major financial obligations during the relevant monthly period. As described in more detail in connection with final § 1041.5(c)(2) below, each of those provisions has been modified in turn to allow lenders more flexibility in reasonably relying on information in consumers' written statements where particular income or major financial obligations cannot be verified through reasonably available sources. For example, § 1041.5(c)(2)(ii)(A) allows lenders to reasonably rely on consumers' written statements with regard to income that cannot be verified through pay records, bank account records, or other reasonably available sources. Section 1041.5(c)(2)(iii) also allows lenders to reasonably rely on consumers' written statements with regard to rental housing expense, but not with regard to mortgages that can be verified from a national consumer report.

The Bureau also revised § 1041.5(c)(1) to address different types of potential inconsistencies between consumers' written statements and verification evidence in more detail. Thus, final § 1041.5(c)(1) specifically requires lenders to consider major financial obligations that are listed in a consumer's written statement, even if they cannot be verified by the sources provided for as verification evidence under § 1041.5(c)(2)(ii)(B). This requirement is consistent with various Bureau statements in the proposal and with proposed comment 5(c)(1)–1.G, which included an example in which a consumer's child support payment did not appear on a national consumer report, but the Bureau has concluded that the requirement implicit in the example should be reflected in a more direct statement in the regulation text. With regard to other types of inconsistencies between the consumer's written statement and verification evidence, the final rule provides that a lender may base the amounts of net income or major financial obligations on the consumer's written statement only as specifically permitted under § 1041.5(c)(2) or to the extent the stated amounts are consistent with the verification evidence. Consistent with the proposal, § 1041.5(c)(1) states that in determining consistency with verification evidence, the lender may reasonably consider other reliable evidence the lender obtains from or about the consumer, including any explanations the lender obtains from the consumer.

While the basic elements of proposed § 1041.5(c)(1) remain intact in the final rule, the Bureau has made a number of significant changes to § 1041.5(c)(1). First, as discussed above in connection with § 1041.5(a) and (b), the Bureau is not requiring lenders to project the specific timing of major financial obligations or income. Thus, the Bureau has eliminated all references to the need to verify timing throughout this provision.

Second, the Bureau is not finalizing proposed § 1041.5(c)(2). That section

would have required a lender to obtain a written statement from a payor of income or a payee of major financial obligations in order to project income in a higher amount, or to project major financial obligations in a lower amount, than would otherwise have been supported by the verification evidence. The Bureau upon further consideration believes this requirement would be too onerous and inflexible, and may also raise privacy concerns if a consumer had to explicitly ask for a written statement from an employer. Because the Bureau is not finalizing proposed § 1041.5(c)(2), it is renumbering proposed § 1041.5(c)(3), which is being finalized (as described in further detail below), as § 1041.5(c)(2).

The Bureau believes that the final rule strikes an appropriate balance that will require substantial and reasonable improvements in current industry verification procedures while also addressing concerns that the proposal would be too burdensome to implement and would deny consumers access to credit in situations in which their finances are difficult to verify. The Bureau agrees with consumer advocates that verifying net income and major financial obligations is important to ensure the soundness of ability-to-repay determinations. But the Bureau also found the concerns raised by industry commenters regarding the burden of the verification requirements to be compelling in some instances, as noted below.

In response to commenters asserting that the Bureau must first determine that lack of verification evidence is causing harms to consumers before imposing verification requirements, the Bureau notes that it has found harms associated with failing to make reasonable determinations that a consumer has the ability to repay the loan, and had identified the practice as unfair and abusive (as discussed in the section-by-section analysis for § 1041.4 of the final rule). To make a reasonable determination that a consumer has the ability to repay, lenders must satisfy certain reasonable verification requirements, which have been loosened somewhat in light of the concerns raised by commenters. In other words, the verification requirements are reasonably related to preventing the identified unfair and abusive practice in § 1041.4. As discussed above, this is the legal standard for exercise of the Bureau's prevention authority under section 1031(b) of the Dodd-Frank Act.

Moreover, as consumer groups noted and as the proposal stated, there are particular concerns in this market that that consumers who are in financial distress may tend to overestimate income or underestimate expenses, and lenders have strong incentives to encourage misestimates to the extent that doing so tends to result in more re-borrowing. Thus, the Bureau believes that the practice of making loans without verification evidence is a contributing cause of the harms previously discussed. This premise was further validated by data submitted by a commenter, on 1.2 million covered loan applicants in 2014 to support arguments on a different issue. The analysis tracked the degree to which consumers' stated income deviated from a 12-month historical average for that consumer and compared it to default rates. The data showed that default rates increased as a consumer's stated income deviated from that same consumer's 12-month average. Some of this could be due of course to unexpected changes in income after the point of prediction, but it may also suggest that the stated income predictions were inaccurate in the first instance. Indeed, the commenter's data suggests that 35 percent of the 1.2 million applicants studied provided stated income that was 1.5 or more times higher than their own 12-month averages and that those borrowers saw significantly higher default rates than other applicants.

The Bureau disagrees with arguments that the proposal would have imposed more rigorous verification requirements than it has in the mortgage market under Regulation Z, but in any event as discussed in detail in the introduction to § 1041.5 above, the Bureau believes that the final rule's income and expense verification requirements are somewhat less onerous than the Bureau's mortgage rules in 12 CFR 1026.43 and more onerous than the credit card rules for various groups of consumers in 12 CFR 1026.51.[827] The Bureau recognizes that the Regulation Z rules for credit cards do not impose similar verification requirements for income, although pulling consumer reports is a widespread industry practice. As noted above, each credit market is different and warrants different regulations. For further explication on this issue, see the discussion at the beginning of the section-by-section analysis for § 1041.5.

The Bureau does not agree with comments requesting the Bureau grant safe harbors regarding the verification requirements for lenders meeting certain criteria such as below-market average charge-off rates. The Bureau does not believe the comments provided adequate data or justification for the particular safe harbors suggested. These changes also would add certain amounts of operational complexity. Additionally, the Bureau is not convinced that, as finalized, the verification requirements are so onerous as to warrant a safe harbor; see discussion elsewhere in this section of the various ways in which the requirements are being relaxed from the proposal. Allowing lenders to collect any less information, for example, through a safe harbor, would significantly undermine the lender's ability-to-repay determinations under § 1041.5(b), which rely on a reasonable projection of net income and major financial obligations which is grounded in relevant evidence concerning the consumer's current or recent income and obligations.

The Bureau is not revising the final rule to allow lenders to rely on validation or modeling of income or expenses in lieu of verification, as suggested by a number of commenters. As described in the section-by-section analysis for § 1041.5(c)(2), the final rule relaxes the verification requirement in a variety of ways, such as not requiring verification of rental housing expenses and permitting reliance on stated amounts of income where verification evidence is not reasonably available. Thus, one of the reasons for expressly permitting the validation or modeling of income and expenses in the final rule as a broad alternative to verification—that it would permit lenders to make loans to consumers with undocumented cash income—has been addressed in a different manner. Furthermore, the rule permits income verification to be done electronically via transaction account data or payroll data, which may be particularly useful to online lenders.

Additionally, the Bureau does not have reason to believe that income validation or modeling is a viable option in many contexts covered by § 1041.5, at least as an across-the-board substitute for income verification. The loans covered by § 1041.5 are, for the most part, short-term loans and the rule requires the lender to project net income for the relevant monthly period. Whatever the reliability of income validation or income estimation modeling may be in assessing a consumer's average monthly income or

[827] In determining whether a consumer will have a reasonable ability to repay the loan according to its terms, a mortgage lender must verify all information that the creditor relies upon, including income, assets, and debt obligations. 12 CFR 1026.43. The mortgage ability-to-repay rules under Regulation Z do not contain an exception that permits lenders to rely on a consumer's statement of income if verification evidence is not reasonably available, for example. Nor do those rules permit a lender to dispense with obtaining a consumer report if the lender has done so with respect to the consumer in the prior 90 days.

annual income, the Bureau does not believe that these techniques provide an adequate substitute for obtaining verification evidence, when reasonably available, of the consumer's current income or income in the recent past. However, the Bureau has no objection to lenders using validation or modeling methods as a backstop in situations in which consumers' income cannot be verified through traditional means or continuing to experiment with them in addition to traditional verification methods in order to develop a more complete picture of the strengths and weaknesses of those methods. The Bureau will continue to monitor developments in this area.

As noted in Background and Market Concerns—Underwriting, the Bureau understands that obtaining verification evidence for income is a common practice in most of the covered markets (except with regard to some vehicle title lending), and thus, the Bureau's requirement to verify income is unlikely to upend current norms in those markets. The Bureau notes that the Small Dollar Roundtable, including several lenders, supported an income verification requirement.

The Bureau agrees with commenters representing vehicle title lenders who argued that requiring income verification would present more of an adjustment for vehicle title lenders than payday lenders. However, the Bureau is not convinced that this is a compelling reason to not require income verification for vehicle title lenders. Commenters' arguments are essentially that because a vehicle title lender has security for the loan, the lender's business model is to forgo underwriting, and not obtain evidence of income, and that the Bureau's rule should permit that business model to continue as is. But the Bureau has identified particular consumer harms associated with this business model (*see* Market Concerns—Underwriting), and that is precisely why the Bureau believes it is important that vehicle title lenders be required to underwrite the loans based on consumers' ability to repay and not rely on the asset value as a substitute for underwriting. Were the Bureau to exclude vehicle title lenders from the verification provisions of the rule, it would be antithetical to one of the goals of this rule, which is to require reasonable determinations that consumers have the ability to repay loans according to their terms.

More broadly, the Bureau added comment 5(c)(1)–2 as one of several steps taken to address commenters who urged the Bureau to allow lenders to recognize situations in which other persons regularly contribute to a consumer's income or regularly pay a consumer's expenses. Specifically, this comment clarifies that, when it is reasonable to do so, a lender may take into account consumer-specific factors, such as whether other persons are regularly contributing toward paying the consumer's major financial obligations. Comment 5(c)(1)–2 also notes, however, that it is not reasonable for the lender to consider whether other persons are regularly contributing toward the consumer's payment of major financial obligations if the lender is separately including in its projection of net income any income of another person to which the consumer has a reasonable expectation of access. As discussed also in connection with § 1041.5(a)(1) and (5) concerning others' contributions to basic living expenses and net income, respectively, this clarification is intended to avoid double-counting.

Regarding comments by online lenders and their representatives that the proposed verification requirements would disadvantage and prove impractical to online lenders and would raise fraud or security risks, the Bureau believes that these comments are largely overstated or mooted in view of the scope and substance of the final rule's ability-to-repay requirements. First, the Bureau understands that online lenders generally fund the loans they make by depositing those loans into consumers' checking accounts and collect payment by debiting those accounts. Thus, consumers obtaining online loans have transaction accounts that can be used to verify income electronically. As discussed below in the section-by-section analysis, comment 5(c)(2)(ii)(A)–3 has been added to clarify that the consumer's recent transaction account deposit history is a reliable record (or records) that is reasonably available if the consumer has such an account and to note that that with regard to such bank account deposit history, the lender could obtain it directly from the consumer or, at its discretion, with the consumer's permission via an account aggregator service that obtains and categorizes consumer deposit account and other account transaction data.[828] Furthermore, in the rare case in which a consumer without a transaction account seeks an online loan, the consumer may be able to provide verification evidence through online payroll records or by electronically transmitting a picture of a pay stub from her smart phone. Thus, the concern of commenters that the income verification requirement will require a scanner or fax machine, or will implicate widespread issues around data transmission or fraudulent documentation, seems misplaced. The Bureau also notes that the commenters' concerns are moot to the extent that they were focused primarily on longer-term loans without balloon payments, given that such loans are not covered by the ability-to-repay requirements in the final rule.

In light of the significant revisions it has made to the proposed rule, the Bureau has re-written many of the examples in the commentary for § 1041.5(c)(1). In response to the comments received, the Bureau has also added commentary in both § 1041.5(c)(1) and (2) to clarify exactly when lenders can deviate from verification evidence. As discussed further below with regard to specific types of information, the Bureau recognizes that there is some risk of evasion, as consumer groups noted, but has decided to allow lenders to rely on consumers' written statements in limited circumstances to augment the picture painted by verification evidence, as long as those statements are consistent and reasonable. The Bureau does so in recognition of the evident fact that many borrowers of covered loans have cash income that they spend in cash rather than deposit in a transaction account, and thus would be adversely affected by an overly rigid income verification requirement. For example, in comment 5(c)(1)–1.iii, the Bureau notes that it would be reasonable to rely on consumers' written statements to supplement verified income (by, for example, identifying and explaining a separate source of cash income in a reasonable amount), so long as there is no reasonably available evidence to verify that other source (like deposit account statements). Additionally, and consistent with the proposal, comment 5(c)(1)–1.iv states that a lender acts reasonably in relying on a consumer's explanation to project income where there is inconsistent verification evidence such as, for example, where a consumer explains that she was sick and missed two days of work, and thus made less income than usual in the most recent period covered by the verification evidence and that the prior period covered by the evidence is more representative of the consumer's income.

Similarly, other examples in the commentary address inconsistencies between a consumer's written statement and verification evidence with regard to major financial obligations. Specifically,

[828] As noted in the proposal, based on its market outreach the Bureau understands that at least some online lenders utilize account aggregator services.

comment 5(c)(1)–1.vi emphasizes that lenders must consider major financial obligations that are listed on the consumer's written statement but not on a national consumer report or other verification sources, while comment 5(c)(1)–1.vii addresses a situation in which a national consumer report lists a debt obligation that does not appear on the consumer's written statement. Lastly, the Bureau added comment 5(c)(1)–1.viii, to provide an example clarifying that a lender can deduct from major financial obligations the child support payments that a lender reasonably determines, based on a combination of verification evidence and an explanation from the consumer, have already been deducted from net income, a concept that is further described in § 1041.5(c)(2).

5(c)(2) Evidence of Net Income and Payments for Major Financial Obligations

Overview

Proposed § 1041.5(c)(3) provided more detailed requirements for collection of a written statement from the consumer concerning the amount and timing of net income and required payments for various major financial obligations, as well as various types of verification evidence for particular categories of major financial obligations. As explained above in connection with proposed § 1041.5(c)(1) and (2), proposed § 1041.5(c)(3) generally would have required lenders to base their projections on amounts shown in the verification evidence, with only limited reliance on the written statements. In light of the challenges in documenting housing expenses where a consumer does not have a formal mortgage or lease, however, proposed § 1041.5(c)(2)(ii)(D) would have permitted lenders to use a reliable estimate of rental housing expenses for consumers with households in the same locality as the consumer, based either on a source such as the American Community Survey of the United States Census Bureau or a lender's own applicants, provided that the lender periodically reviewed the reasonableness of its estimates by comparing them to statistical survey data or other reliable sources. The Bureau had proposed that more permissive approach to rental housing expense following feedback during the SBREFA process and other outreach about a stricter verification approach to rental housing expense.

The Bureau is finalizing proposed § 1041.5(c)(3) as § 1041.5(c)(2) of the final rule, with a number of modifications to the proposal that are intended to relieve unnecessary burdens of verification and to provide greater flexibility and clarity to lenders and consumers in situations in which a source of net income or a major financial obligation cannot be verified through the sources that lenders are required to obtain under the final rule. The Bureau has also modified the final rule to reflect policy decisions addressed in more detail above, including the decision to relax proposed requirements for lenders to project the timing of individuals' net income and major financial obligations as part of the broader ability-to-repay determination, the decision to include alimony as a major financial obligation, and the decision to allow lenders to account for situations in which the consumer has a reasonable expectation of access to others' income or in which other parties regularly pay for a consumer's major financial obligation.

5(c)(2)(i) Consumer Statements

Proposed Rule

Proposed § 1041.5(c)(3)(i)—which is being finalized, with adjustments, in § 1041.5(c)(2)(i) of the final rule—would have required a lender to obtain a consumer's written statement of the amount and timing of net income, as well as of the amount and timing of payments required for categories of the consumer's major financial obligations (*e.g.,* credit card payments, automobile loan payments, housing expense payments, child support payments, and the like). The lender would then use the statements as an input in projecting the consumer's net income and payments for major financial obligations during the term of the loan. The lender would also have been required to retain the statements in accordance with proposed § 1041.18. These statements were intended to supplement verification evidence because verification evidence may sometimes contain ambiguous, out-of-date, or missing information.

Proposed comment 5(c)(3)(i)–1 would have clarified that a consumer's written statement includes a statement that the consumer writes on a paper application or enters into an electronic record, or an oral consumer statement that the lender records and retains or memorializes in writing and retains. It further would have clarified that a lender complies with a requirement to obtain the consumer's statement by obtaining information sufficient for the lender to project the dates on which a payment will be received or will be paid through the period as required under proposed § 1041.5(b)(2). This proposed comment included the example that a lender's receipt of a consumer's statement that the consumer is required to pay rent every month on the first day of the month is sufficient for the lender to project when the consumer's rent payments are due. Proposed § 1041.5(c)(3)(i) did not specify any particular form or even particular questions or particular words that a lender must use to obtain the required consumer statements.

Comments Received and Final Rule

The Bureau received few comments about the written statements in their own right, and is finalizing the proposed regulation and commentary as § 1041.5(c)(2)(i) in the final rule. The Bureau has revised the regulation text slightly for clarity and to reflect the decision to allow consideration of the amount of any income of another person to which the consumer has a reasonable expectation of access, as discussed above in connection with § 1041.5(a)(5) (definition of net income). The regulation text and commentary have also been edited to omit references to the timing of particular income and major financial obligation payments, in light of the final rule's changes with regard to use of debt-to-income ratios and revisions to the residual-income analysis as discussed above in connection with § 1041.5(a)(2) (debt-to-income ratio definition) and § 1041.5(b)(2) (ability-to-repay determination methodologies). Comments concerning lenders' ability to rely on written statements in the absence of verification evidence are discussed in more detail below.

5(c)(2)(ii) Verification Evidence

In proposed § 1041.5(c)(3)(ii), the Bureau would have required a lender to obtain verification evidence for the amounts and timing of the consumer's net income and payments for major financial obligations for a fixed period prior to consummation. It separately specified the type of verification evidence required for net income and each component of major financial obligations. The Bureau explained in the proposal that the requirements were designed to provide reasonable assurance that lenders' projections of consumers' finances were based on accurate and objective information, while also allowing lenders to adopt innovative, automated, and less burdensome methods of compliance.

5(c)(2)(ii)(A)

Proposed Rule

In proposed § 1041.5(c)(3)(ii)(A), the Bureau specified that for a consumer's

net income, the applicable verification evidence would be a reliable record (or records) of an income payment (or payments) covering sufficient history to support the lender's projection under proposed § 1041.5(c)(1). It did not specify a minimum look-back period or number of net income payments for which the lender must obtain verification evidence. The Bureau explained in the proposal that it did not believe it was necessary or appropriate to require verification evidence covering a look-back period of a prescribed length. Rather, the Bureau indicated that the sufficiency of the history for which a lender would obtain verification evidence may depend on the source or type of income, the length of the prospective covered longer-term loan, and the consistency of the income shown in the verification evidence that the lender initially obtains, if applicable.

Proposed comment 5(c)(3)(ii)(A)–1 would have clarified that a reliable transaction record includes a facially genuine original, photocopy, or image of a document produced by or on behalf of the payer of income, or an electronic or paper compilation of data included in such a document, stating the amount and date of the income paid to the consumer. It further would have clarified that a reliable transaction record also would include a facially genuine original, photocopy, or image of an electronic or paper record of depository account transactions, prepaid account transactions (including transactions on a general purpose reloadable prepaid card account, a payroll card account, or a government benefits card account), or money services business check-cashing transactions showing the amount and date of a consumer's receipt of income.

The Bureau explained in the proposal that the proposed requirement was designed to be sufficiently flexible to provide lenders with multiple options for obtaining verification evidence for a consumer's net income. For example, the Bureau noted that a paper pay stub would generally satisfy the requirement, as would a photograph of the pay stub uploaded from a mobile phone to an online lender. In addition, the Bureau noted that the requirement would also be satisfied by use of a commercial service that collects payroll data from employers and provides it to creditors for purposes of verifying a consumer's employment and income. Proposed comment 5(c)(3)(ii)(A)–1 would also have allowed verification evidence in the form of electronic or paper bank account statements or records showing deposits into the account, as well as electronic or paper records of deposits onto a prepaid card or of check-cashing transactions. Data derived from such sources, such as from account data aggregator services that obtain and categorize consumer deposit account and other account transaction data, would also generally satisfy the requirement. During outreach, service providers informed the Bureau that they currently provide such services to lenders.

The Bureau explained in the proposal that this approach was designed to address concerns that had been raised during the SBREFA process and other industry outreach prior to the proposal. In particular, some SERs and industry representatives had expressed concern that the Bureau would require outmoded or burdensome methods of obtaining verification evidence, such as always requiring a consumer to submit a paper pay stub or transmit it by facsimile (fax) to a lender. Others questioned requiring income verification at all, stating that many consumers are paid in cash and therefore have no employer-generated records of income. The Bureau explained in the proposal that proposed § 1041.5(c)(3)(ii)(A) was intended to respond to many of these concerns by providing a wide range of methods to obtain verification evidence for a consumer's net income, including electronic methods that can be securely automated through third-party vendors with a consumer's consent. The Bureau explained that in developing the proposal, Bureau staff met with more than 30 lenders, nearly all of which stated they already use some method—though not necessarily the precise methods the Bureau was proposing—to verify consumers' income as a condition of making a covered loan. The Bureau stated that its proposed approach thus would accommodate most of the methods they described and that the Bureau was aware of from other research and outreach. It was also intended to provide some accommodation for making covered loans to many consumers who are paid in cash. For example, under the Bureau's proposed approach, a lender would have been able to obtain verification evidence of net income for a consumer who is paid in cash by using deposit account records (or data derived from deposit account transactions), if the consumer deposits income payments into a deposit account. The Bureau explained in the proposal that lenders often require consumers to have deposit accounts as a condition of obtaining a covered loan, so the Bureau believed that lenders would be able to obtain verification evidence for many consumers who are paid in cash in this manner.

The Bureau recognized in the proposal that there would be some consumers who receive a portion of their income in cash and do not deposit it into a deposit account or prepaid card account. For such consumers, a lender may not be able to obtain verification evidence for that portion of a consumer's net income, and therefore generally could not base its projections and ability-to-repay determinations on those amounts. The Bureau stated in the proposal that where there is no verification evidence for a consumer's net income, the Bureau believed the risk would be too great that projections of net income would be overstated and that payments under a covered short-term loan consequently would exceed the consumer's ability to repay, resulting in all the harms from unaffordable covered loans identified in the proposal.

For similar reasons, the Bureau did not propose to permit the use of predictive models designed to estimate a consumer's income or to validate the reasonableness of a consumer's statement of her income. The Bureau noted that it had received recommendations from the Small Dollar Roundtable, comprising a number of lenders making the kinds of loans the Bureau was considering whether to cover in this rulemaking and a number of consumer advocates, urging the Bureau to require income verification.

Comments Received

Many commenters, particularly industry stakeholders, were generally concerned that the income verification requirements would create inaccurate portrayals of consumers' income because many types of income would not be verifiable. These commenters specifically focused on consumers who are paid in cash, noting that these consumers would likely not have a way, except account statements, to verify income. One trade group commenter said even then, some consumers use cash income directly to pay basic living expenses (without depositing it in an account). Commenters similarly argued that the Bureau's verification regime had not accounted for consumers who have seasonal or irregular income, such as tips, bonuses, and overtime pay. Commenters also asked for clarity on how income earned in amounts and from sources other than regular payroll would be handled under the rule, and expressed concern with strict verification requirements that would

make it difficult for consumers with these types of income to prove future income with past documentation. Commenters argued that these consumers who work in the ''cash economy'' make up a substantial portion of the customer base for covered lenders, and cited numerous examples of occupations such as restaurant workers, hair stylists, or day laborers who are routinely paid in cash. Others argued that the Bureau should allow stated income based on consumer statements, noting that credit card issuers do not need to verify income.

Consumer groups generally supported the income verification requirements and urged the Bureau not to permit lenders to rely on stated income in any circumstances. They argued that variations from verification evidence based on the consumer statements should be permitted only if they result in a lower projection of income (*i.e.,* a more conservative estimate).

Also, as stated earlier, many commenters argued that the Bureau had not established a way to account for income from third parties to which a lender has a reasonable expectation of access (or even a legal right), like spousal income. These comments are described in the section-by-section analysis for § 1041.5(a)(5).

Some commenters argued that consumers of online loans would need a fax machine or scanner to submit evidence of income, something that many of their customers do not own. These comments are described in more detail above in the section-by-section analysis for § 1041.5(c)(1).

Commenters asked for further detail about what constitutes a ''sufficient history'' of net income for purposes of the verification requirement, a phrase appearing in the proposed regulation text without corresponding commentary. These commenters asked how long a lender should look back (*e.g.,* for how many pay stubs) to establish a sufficient history. One trade group asked for a safe harbor of two pay cycles of verification evidence for covered longer-term loans, citing NCUA requirements. Other lenders asked whether they could look far back into the past, for example, at the bonus payment from last year, to help establish whether the borrower is likely to receive one this year. Consumer advocates argued that for longer-term loans with a duration of longer than six months, ''sufficient history'' should correspond to the length of the loan.

Final Rule

The Bureau has carefully considered the comments received and has concluded that it is appropriate to make two significant modifications to proposed § 1041.5(c)(3)(ii)(A). First, while the Bureau continues to believe that it is critical for lenders to obtain reliable records of net income if they are reasonably available, the Bureau has decided to permit lenders discretion to reasonably rely on consumers' written statements of net income where such records cannot be obtained. Second, with regard to situations in which the consumer has a reasonable expectation of access to the income of another person, the Bureau has decided to permit lenders discretion to reasonably rely on such income but only if they have obtained verification evidence of regular access to that income, such as documentation of a joint account.

Specifically, in the final rule, § 1041.5(c)(2)(ii)(A)(*1*) has been revised to provide that the lender must obtain a reliable record (or records) of an income payment (or payments) directly to the consumer covering sufficient history to support the lender's projection under § 1041.5(c)(1) if a reliable record (or records) is reasonably available. Section 1041.5(c)(2)(ii)(A)(*1*) has also been revised in the final rule to provide that if a lender determines that a reliable record (or records) of some or all of the consumer's net income is not reasonably available, then the lender may reasonably rely on the consumer's written statement described in § 1041.5(c)(2)(i)(A) for that portion of the consumer's net income.

The Bureau has added two comments in the final rule to accompany these changes in the regulation text. First, comment 5(c)(2)(ii)(A)–3 clarifies the meaning of ''reasonably available'' records. The comment clarifies that a reliable record of the consumer's net income is reasonably available if, for example, the consumer's source of income is from her employment and she possesses or can access a copy of her recent pay stub. The comment clarifies that the consumer's recent transaction account deposit history is a reliable record (or records) that is reasonably available if the consumer has such an account. The comment further clarifies that with regard to such bank account deposit history, the lender could obtain it directly from the consumer or, at its discretion, with the consumer's permission via an account aggregator service that obtains and categorizes consumer deposit account and other account transaction data. The comment also clarifies that in situations in which income is neither documented through pay stubs or transaction account records, the reasonably available standard requires the lender to act in good faith and exercise due diligence as appropriate for the circumstances to determine whether another reliable record (or records) is reasonably available.

Second, comment 5(c)(2)(ii)(A)–4 clarifies when a lender can reasonably rely on a consumer's statement if a reliable record is not reasonably available. The comment clarifies that § 1041.5(c)(2)(ii)(A) does not permit a lender to rely on a consumer's written statement that the consumer has a reasonable expectation of access to the income of another person. The comment further clarifies that a lender reasonably relies on the consumer's written statement if such action is consistent with a lender's written policies and procedures required under § 1041.12 and there is no indication that the consumer's stated amount of net income on a particular loan is implausibly high or that the lender is engaged in a pattern of systematically overestimating consumers' income. The comment clarifies that evidence of the lender's systematic overestimation of consumers' income could include evidence that the subset of the lender's portfolio consisting of the loans where the lender relies on the consumers' written statements to project income in absence of verification evidence perform worse, on a non-trivial level, than other covered loans made by the lender with respect to the factors noted in comment 5(b)–2.iii indicating poor loan performance (*e.g.,* high rates of default, frequent re-borrowings). The comment also clarifies that if the lender periodically reviews the performance of covered short-term loans or covered longer-term balloon-payment loans where the lender has relied on consumers' written statements of income and uses the results of those reviews to make necessary adjustments to its policies and procedures and future lending decisions, such actions indicate that the lender is reasonably relying on consumers' written statements. The comment provides an example of how such necessary adjustments could include, for example, the lender changing its underwriting criteria for covered short-term loans to provide that the lender may not rely on the consumer's statement of net income in absence of reasonably available verification evidence unless the consumer's debt-to-income ratio is lower, on a non-trivial level, than that of similarly situated applicants who provide verification evidence of net income. Finally, the comment clarifies that a lender is not required to consider income that cannot be verified other

than through the consumer's written statement.

The Bureau emphasizes four points relating to the changes in the final rule permitting lenders to reasonably rely on consumer statements of net income where reliable records for verification are not reasonably available. First, the test for whether a reliable record is reasonably available is not whether the consumer brings it with him to the store, but rather is akin to whether such records *could* have been brought because they do, in fact, exist. Pay stubs and transaction account history records documenting income are considered reliable records as clarified by comment 5(c)(2)(ii)(A)–3. If the consumer possesses or can access these types of records, the consumer has to provide them as needed to verify the consumer's written statement and the lender cannot merely rely on the consumer's written statement.

Second, the Bureau expects that such reliance on consumers' written statements will occur in relatively narrow circumstances. These would include situations where a consumer has a primary job where she receives a traditional pay stub but has a side business or job where the consumer is paid in cash and cannot document the income, and the small number of cases where a consumer is paid entirely in cash for her primary job and has no transaction account or deposits only a portion of cash wages in the account. In the vast majority of cases, the Bureau expects that the consumer will have a pay stub or transaction account history that can serve as a reliable record to verify the relevant net income.

Third, as stated in comment 5(c)(2)(ii)(A)–4, lenders are not required to consider income that cannot be verified other than through the consumer's written statement (*i.e.,* where a reliable record is not reasonably available). However, if they do so they are still subject to a reasonableness standard. The comment specifically notes that a lender reasonably relies on the consumer's written statement only if such action is consistent with a lender's written policies and procedures required under § 1041.12 and there is no indication that the consumer's stated amount of net income on a particular loan is implausibly high or that the lender is engaged in a pattern of systematically overestimating consumers' income. The comment also discusses what types of performance patterns might constitute evidence of a lender's systematic overestimation of income and ways in which lenders could monitor and make adjustments to their policies and future lending decisions in the face of such evidence. The Bureau thus expects to monitor lenders for systematic overestimation of income where lenders are relying on consumers' stated income amounts. The Bureau will look at whether lenders themselves are monitoring such loans and making appropriate adjustments to their underwriting policies and procedures and lending decisions.

Fourth, the Bureau recognizes that, generally, the current practice among storefront payday lenders (but not vehicle title lenders) is to verify at least one pay stub of income for an initial loan. The Bureau thus believes that lenders have strong incentives to continue that practice rather than shift toward a widespread model of relying on stated income. With vehicle title lenders there are greater incentives for lenders to forgo verification and rely on the asset value of the vehicle. But under the final rule, even for vehicle title lenders, the lender can only reasonably rely on the consumer's statement of income when a reliable record is not reasonably available.

The Bureau believes this approach responds appropriately to the comments from industry and other stakeholders about how the proposed verification requirements would not have accounted for, and potentially would have disadvantaged, individuals who are paid in cash and could afford to repay the loan but may not have the necessary documentation. At the same time, the Bureau believes that the final rule's requirements that lenders' reliance on consumers' written statements of income must be reasonable and that lenders can only rely on such written statements when the records are not ''reasonably available''—along with the detailed guidance in commentary about the meaning of those terms and the expectations around lender monitoring—will provide guardrails against lender overreliance on consumers' written statements of income and the potential for abuse of this provision. For these reasons, as well as those noted in the several paragraphs above, the Bureau disagrees with the suggestion by the consumer group commenters that lenders should not be permitted to rely on consumers' written statements of income in any circumstances or that they should only be permitted to use a more conservative estimate.

The other significant change is in response to statements by commenters that some consumers rely on income from third parties such as spouses or partners. The Bureau has added § 1041.5(c)(2)(ii)(A)(*2*) which permits consumers to rely on third party income, but only when the lender obtains verification evidence to support the fact that the consumer has a reasonable expectation of access to that income. The Bureau recognizes that many consumers either pool their income in households or rely on third-party income, such as contributions from siblings or from parents to adult children. Given this fact, the Bureau in finalizing the rule is allowing lenders to rely on third-party income when calculating net income. However, the Bureau is adopting a different approach with regard to verification of such income relative to income received directly by the consumer. As described above, for a consumer's income, a lender must obtain verification evidence unless it is not reasonably available. For third-party income, a lender must obtain verification evidence that the consumer has a reasonable expectation of access to that income for such income to be included in the ability-to-repay analysis. Comment 5(c)(2)(ii)(A)–1 clarifies that such evidence could consist of bank account statements indicating that the consumer has an account into which the other person's income is regularly deposited. With regard to income that is not the consumer's own income, the Bureau judges it is important for lenders to obtain objective evidence of regular access. The Bureau acknowledges that in this regard the rule imposes a more demanding verification requirement than applies under the CARD Act with respect to ''accessible income'' but notes again that, as explained earlier, differences between the credit card market and the market for short-term and balloon-payment loans warrant the differences in treatment; see the general discussion of § 1041.5 and the discussion of § 1041.5(a)(5) and comment 5(a)(5)–3 for further detail.

In response to commenter requests for clarification about what constitutes ''sufficient history'' for purposes of projecting income, the Bureau has added a new comment 5(c)(2)(ii)(A)–2 to provide general guidance. The comment states that: For covered short-term loans, one pay cycle would typically constitute sufficient history; and for longer-term balloon payment loans, two pay cycles generally would constitute sufficient history. However, the comment also clarifies that additional verification evidence may be needed to resolve inconsistency between verification evidence and consumers' written statements, and depending on the length of the loan.

For covered longer-term balloon-payment loans, a national trade association for online lenders suggested a safe harbor for sufficient history of two

pay stubs, citing National Credit Union Administration requirements for certain loans. In contrast, consumer groups argued that for covered longer-term loans greater than six months in duration, the final rule should require a look-back period of the length of the loan. The Bureau declines to adopt the consumer groups' suggestion, because such a long look-back period would impose significant burdens on lenders and consumers to provide many months of pay stubs or bank statements, at least for loans of significant length. At the same time, the Bureau does not believe a safe harbor of two pay cycles would be appropriate, given that in some circumstances more income history might be necessary to project future income. The Bureau has structured comment 5(c)(2)(ii)(A)–2 to take into account these competing considerations.

In response to a comment to the proposal seeking clarification on how far back lenders may look to make reasonable projections of future net income, specifically citing the issue of annual bonuses, § 1041.5(c)(2)(ii)(A), as clarified by new comment 5(c)(2)(ii)(A)–2, does not preclude the lender from requesting additional verification evidence dating back to earlier periods where needed to make the lender's projection of income reasonable.

5(c)(2)(ii)(B), (C), and (D)

Proposed Rule

The Bureau proposed separate provisions to detail the verification requirements for different types of major financial obligations in proposed § 1041.5(c)(3)(ii)(B) (debt obligations), § 1041.5(c)(3)(ii)(C) (child support), and § 1041.5(c)(3)(ii)(D) (rental housing expense), respectively. Specifically, in proposed § 1041.5(c)(3)(ii)(B) the Bureau specified that for a consumer's required payments under debt obligations, the applicable verification evidence would be a national consumer report, the records of the lender and its affiliates, and a consumer report obtained from an information system currently registered pursuant to § 1041.17(c)(2) or (d)(2), if available. The Bureau believed that most typical consumer debt obligations other than covered loans would appear in a national consumer report. Many covered loans are not included in reports generated by the nationwide consumer reporting agencies, so the lender would also be required to obtain, as verification evidence, a consumer report from consumer reporting agency that specifically registers with the Bureau under part 1041. As discussed above, proposed § 1041.5(c)(1) would have permitted a lender to base its projections on consumer statements of amounts and timing of payments for major financial obligations (including debt obligations) only to the extent the statements are consistent with the verification evidence. Proposed comment 5(c)(1)–1 included examples applying that proposed requirement in scenarios where a major financial obligation shown in the verification evidence is greater than the amount stated by the consumer and where a major financial obligation stated by the consumer does not appear in the verification evidence at all.

Proposed comment 5(c)(3)(ii)(B)–1 would have clarified that the amount and timing of a payment required under a debt obligation are the amount the consumer must pay and the time by which the consumer must pay it to avoid delinquency under the debt obligation in the absence of any affirmative act by the consumer to extend, delay, or restructure the repayment schedule. To the extent the national consumer report and the consumer report from a registered information system omit information for a payment under a debt obligation stated by the consumer, the Bureau explained in the proposal that the lender would simply base its projections on the amount and timing stated by the consumer.

The Bureau also emphasized in the proposal that proposed § 1041.5(c)(3)(ii)(B) would not have required a lender to obtain a consumer report unless the lender is otherwise prepared to make a loan to a particular consumer. Because obtaining a consumer report adds some cost, the Bureau assumed in the proposal that lenders would order such reports only after determining that a consumer otherwise satisfied the ability-to-repay test so as to avoid incurring costs for applicants who would be declined without regard to the contents of the report.

Similarly, in proposed § 1041.5(c)(3)(ii)(C), the Bureau specified that for a consumer's required payments under court- or government agency-ordered child support obligations, the applicable verification evidence would be the same national consumer report that serves as verification evidence for a consumer's required payments under debt obligations under proposed § 1041.5(c)(3)(ii)(B). To the extent the national consumer report omitted information for a required payment, the Bureau explained in the proposal that the lender could simply base its projections on the amount and timing stated by the consumer, if any.

Comments Received

Many industry commenters and many individual consumer commenters objected broadly to the proposed requirements to collect verification evidence on major financial obligations on the grounds of burden, efficacy, and negative consequences for consumers. For example, many individual consumer commenters and several lenders and industry trade groups argued that requiring a credit check for every loan will harm consumers' credit by lowering their credit scores. Others stated that many consumers do not have a credit history, and so the credit check will not work. Still others claimed that the credit check and requirement to obtain a report from a registered information system would be costly for lenders. The SBA Office of Advocacy encouraged the Bureau to eliminate the credit check requirement because they argued it is an unnecessary hurdle based on feedback from small business roundtable participants. They also noted the costs to small businesses, citing the Bureau's estimate in the proposal that a consumer report will cost approximately $2.00 for small lenders versus $0.55 for larger lenders. They also reported that SERs stated that the actual cost of a consumer report may be as high as $12.00. Commenters more specifically asked the Bureau to require that registered information systems only charge lenders a fee if a report is actually obtained (as opposed to an inquiry that generates no hits). Other commenters asked for a safe harbor when they rely on information from a consumer report, noting that the information in a consumer report may be inaccurate.

A specialty consumer reporting agency commenting on the proposed provision requiring lenders to obtain a national consumer report to verify debt obligations and child support obligations wrote that it agreed with the Bureau's assumption that lenders will stage the ordering of credit reports. The commenter wrote that it expected lenders will have a ''two-step process'' for obtaining national consumer reports—they would first order the separate required report from the registered information system to determine the borrowing history on covered loans and would conduct a preliminary underwriting assessment, and that only if the applicant passed that first phase would the lender then order the national consumer report as part of the final ability-to-repay determination.

Commenters noted that credit report information is for the past, and not the

future for which the lender would need to project major financial obligations. The commenters asked for clarification on whether in these instances a lender can trust a consumer's statements regarding future payments, or how the lender will be able to project for any changes to the obligation in the future.

Final Rule

After careful consideration of the comments, the Bureau is finalizing proposed § 1041.5(c)(3)(ii)(B) and (C) as final § 1041.5(c)(2)(ii)(B) and (C), respectively, to address verification evidence for debt obligations and for alimony and child support.

With regard to debt obligations, the final rule is consistent with the proposal in that it generally requires that lenders search their own records and those of affiliates and obtain consumer reports from both a nationwide consumer reporting agency and from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered pursuant to § 1041.11(d)(2), if available. However, in recognition of commenters' concerns about the burdens on lenders with regard to the requirement to obtain a national consumer report (particularly on small lenders as described by the SBA Office of Advocacy) and the possibility of small negative impacts on some consumers' credit scores as discussed further below, the Bureau has adopted new § 1041.5(c)(2)(ii)(D) to permit lenders and their affiliates to rely on a national consumer report that was obtained within the prior 90 days, provided that the consumer did not complete a three-loan sequence and trigger the mandatory 30-day cooling-off period under § 1041.5(d)(2) since the prior report was obtained.

Even with this change, the Bureau acknowledges that there will be some costs associated with obtaining consumer reports from nationwide consumer reporting agencies, and costs associated with obtaining a report from a registered information system. The Bureau has estimated, in its Section 1022(b)(2) Analysis below, that the cost of obtaining a report from a registered information system will likely be around $0.50 ''per-hit,'' and has estimated that the cost of pulling a consumer report from a nationwide consumer reporting agency will run somewhere between $0.50 and $2.00 each, depending on the report. The Bureau agrees that these are not small costs. However, they are essential to making sure that the lender can adequately determine that a borrower has an ability to repay, and are essential to the proper administration of the cooling-off period found in § 1041.5(d). In particular, given the importance of tracking consumers' borrowing patterns with regard to covered short-term loans and covered longer-term balloon-payment loans under § 1041.5 in order to comply with § 1041.6 and with the cooling-off period provisions of § 1041.5(d), the Bureau believes it is important to require that lenders obtain new reports from registered information systems for each such loan where available.

Further, as noted in the section-by-section analysis for § 1041.4, the Bureau believes that any impact on consumer's credit scores will be minimal as a result of the requirements under § 1041.5(c)(2)(ii), for several reasons. First, as discussed above, the final rule in general only requires a credit check no more than once every 90 days, rather than for every loan. Second, as discussed in the proposal, the Bureau expects that lenders making loans under § 1041.5 will only order national consumer reports after determining that the consumer otherwise satisfies the rule's eligibility requirements and the ability-to-repay test using a consumer report from a registered information system so as to avoid incurring these costs for applicants who would be declined without regard to the contents of the national consumer report. In this regard, the Bureau notes the comment described earlier from a specialty consumer reporting agency which predicted that lenders would develop a ''two-step process'' for obtaining credit reports—they would first order the report from the registered information system and would determine the borrowing history on covered loans, along with a preliminary underwriting assessment, and that only if the applicant passed that first phase would the lender then order the national consumer report as part of the final ability-to-repay determination. Thus, the Bureau expects that many consumers who apply for loans but are denied based on information reflected in a report from a registered information system will have no negative impacts on their credit scores.[829] Third, as discussed in the 1022(b)(2) Analysis, the Bureau is projecting that the majority of covered short-term loans that would be made under the final rule would be made under § 1041.6, not § 1041.5, so this particular requirement may affect only a small number of consumers.

Moreover, as a more general matter, the impact that any credit check with a nationwide consumer reporting agency will have on a borrower's overall credit profile is limited and uncertain, given that every consumer report differs and different creditors use different credit scoring models. One of the most experienced scoring companies, FICO, says the following about the impact of credit inquiries on a consumer's score: ''The impact from applying for credit will vary from person to person based on their unique credit histories. In general, credit inquiries have a small impact on one's FICO Scores. For most people, one additional credit inquiry will take less than five points off their FICO Scores. For perspective, the full range of FICO Scores is 300–850.'' Through the Bureau's market monitoring and outreach it also understands that such a decrease in credit score may only be reflected on consumer reports for up to 12 months or could be fixed during that time period. For these reasons, the Bureau believes that the negative impacts claimed by commenters resulting from lenders having to obtain national consumer reports will be minimal.

The Bureau recognizes, as commenters note, that consumer reports always include historical information. Thus, in projecting forward to the relevant monthly period, there will be times when lenders will have to make reasonable adjustments based on the consumer's written statement and other sources as discussed in § 1041.5(c)(1) and (2) and related commentary.

In addition, the Bureau reconsidered, as commenters noted, whether it was inconsistent to count child support but not alimony as a major financial obligation, especially where alimony is court- or government agency-ordered, and thus, likely reported on a consumer report. (Commenters also had questioned why receipt of alimony or child support was not included as net income, as discussed in the section-by-section analysis for § 1041.5(a)(5)). In light of the fact that, like other major financial obligations, alimony could potentially appear on a consumer report, or alternatively, a lender could rely on a written statement from the consumer about alimony, and the fact that alimony meets the general definition of a major financial obligation, the Bureau has decided to adjust § 1041.5(c)(2)(ii)(C) and the corresponding commentary to state that

[829] The Bureau notes that in the Section 1022(b)(2) Analysis, there is discussion of how lenders may potentially minimize the cost impacts of these requirements by obtaining both the consumer report from the registered information system and a national consumer report as part of a consolidated report. Even with the consolidated reports envisioned there, however, lenders and the providers for the registered information systems could stagger the delivery of such reports such as to minimize the negative scoring impacts on consumers.

both alimony and child support obligations should be verified where possible from a national consumer report and that lenders may otherwise reasonably rely on information provided in a consumer's written statement for purposes of verification.

In addition, in response to commenters asking for a safe harbor for instances where information in a consumer report is inaccurate, the Bureau has added comment 5(c)(2)(ii)(B)–3 to clarify more specifically how lenders should resolve conflicting information about major financial obligations as between a consumer's written statement and various forms of verification evidence. The comment also clarifies that a lender is not responsible for information about a major financial obligation that is not owed to the lender, its affiliates, or its service providers if such obligation is not listed in a consumer's written statement, a national consumer report, or a consumer report from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered pursuant to § 1041.11(d)(2). A similar provision addressing inaccurate or incomplete information in consumer reports from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered pursuant to § 1041.11(d)(2) has been included in the commentary for § 1041.6.

With regard to the privacy concerns raised by commenters, the lender need only obtain information about the borrower's individual income, information that is on consumer reports (including a report from a registered information system), and information contained in the borrower's written statement. In the modern era, it is quite typical for creditors to have access to consumer reports, and many other parties, including employers, often do as well. The Bureau expects lenders to act in accordance with permissible use restrictions as prescribed in the Fair Credit Reporting Act and other privacy laws and regulations to the extent applicable. Lenders will also ask consumers questions about, and receive verification evidence on, income. In the payday market, this will likely make only a marginal difference with respect to privacy because the payday market typically already collects this information. It will have a more significant impact for vehicle title lending borrowers, who would now have to obtain income verification. The Bureau recognizes that some consumers will be troubled by the increased scrutiny into borrowers' private information, as noted by many individual commenters, but believes that these concerns have been somewhat reduced by changes to the final rule and in any event are worth the benefits of requiring income verification.

The Bureau has made a number of technical and structural, as well as substantive, changes to § 1041.5(c)(2)(ii) and the related commentary to implement the policy changes discussed above, and the policy changes found throughout other paragraphs in § 1041.5.

Lastly, in response to commenters' concerns that lenders may ''double-count'' certain major financial obligations if they are deducted from income, the Bureau notes that it has added comment 5(c)(2)(ii)(B)–2 and comment 5(c)(2)(ii)(C)–2, which specify that if verification evidence shows that a debt obligation, child support obligation, or alimony obligation is deducted from the consumer's income, the lender does not include those amounts in the projection of major financial obligations. This change and the comments underlying the change are discussed in more detail in the section-by-section analysis for § 1041.5(a)(3) (definition of major financial obligations), above.

5(c)(2)(iii)

Proposed Rule

The Bureau proposed a more flexible approach with regard to rental housing expenses in proposed § 1041.5(c)(3)(ii)(D) than with regard to other major financial obligations. Specifically, proposed § 1041.5(c)(3)(ii)(D) specified that for a consumer's housing expense (other than a payment for a debt obligation that appears on a national consumer report obtained by the lender under proposed § 1041.5(c)(3)(ii)(B)), the applicable verification evidence would be either a reliable transaction record (or records) of recent housing expense payments or a lease, or an amount determined under a reliable method of estimating a consumer's housing expense based on the housing expenses of consumers in the same locality.

Proposed comment 5(c)(3)(ii)(D)–1 described each of the options for verification evidence in more detail. Most importantly, proposed comment 5(c)(3)(ii)(D)–1.iii provided examples of situations in which a lender used an amount determined under a reliable method of estimating a consumer's share of housing expense based on the individual or household housing expenses of similarly situated consumers with households in the same locality, such as relying on the American Community Survey of the U.S. Census Bureau to estimate individual or household housing expense in the locality (*e.g.,* in the same census tract) where the consumer resides. In the alternative, the comment also provided that a lender may estimate individual or household housing expense based on housing expense and other data (*e.g.,* residence location) reported by applicants to the lender, provided that it periodically reviews the reasonableness of the estimates that it relies on using this method by comparing the estimates to statistical survey data or by another method reasonably designed to avoid systematic underestimation of consumers' shares of housing expense. It further explained that a lender may estimate a consumer's share of household expense by reasonably apportioning the estimated household housing expense among the people sharing the housing expense as stated by the consumer, or by another reasonable method.

The Bureau explained in the proposal that this approach was designed to address concerns that had been raised in the SBREFA process and other industry outreach prior to the proposal. In particular, the Small Business Review Panel Outline had referred to lender verification of a consumer's rent or mortgage payment using, for example, receipts, cancelled checks, a copy of a lease, and bank account records. As discussed in the proposal, some SERs and other lender representatives stated that many consumers would not have these types of documents readily available. Few consumers receive receipts or cancelled checks for rent or mortgage payments, they stated, and bank account statements may simply state the check number used to make a payment, providing no way of confirming the purpose or nature of the payment. Consumers with a lease would not typically have a copy of the lease with them when applying for a covered loan, they stated, and it would be unduly burdensome, if not impracticable for them to locate and transmit or deliver a copy of the lease to a lender.

Comments Received

Several commenters argued that the Bureau's standards around verifying housing expenses were unfair and would lead to a significant number of ''false negatives'' (*i.e.,* unintended denials of credit) for consumers who can, and do regularly, pay for rental housing expense but do not possess the requisite verification evidence. Commenters claimed that many consumers have non-traditional living

arrangements where there is no documented lease, or live rent-free with a relative, and thus would not have any verification evidence of rent. Some commenters argued that asking consumers for verification of rental housing expense would be considered intrusive, particularly for those consumers living in informal rooming arrangements. The Bureau also received a number of comments arguing that the proposal had not accounted for consumers who share rental housing expense and where the formal documentation does not reflect the arrangement. For example, if two roommates pay rent on the same lease, the verification evidence would indicate that only one of them may have to pay the full rent.

Other commenters claimed that rental agreements were difficult to procure, and thus, it would be impractical to require one. Commenters also argued that bank statements would not be sufficient to verify housing expenses because they might not show the names of the recipients of the rental payments.

A number of commenters raised issues with the provision in proposed § 1041.5(c)(3)(ii)(D) that lenders could estimate rental housing expenses by using a reliable method (either locality-based data or data on their own customers) as an alternative to collecting a reliable record of rental housing expense such a lease. As explained earlier, the Bureau had included the alternative in response to feedback during the SBREFA process and outreach that the Small Business Review Panel Outline took too strict of an approach to verification of rental housing expense. Commenters were critical of this proposed provision on a number of grounds. Some argued it would be burdensome for lenders, particularly small lenders, to develop statistical estimates. Other commenters argued that using census tract data, as given in a proposed commentary example, could substantially overstate housing expenses by failing to account for the greater amount of shared living arrangements among payday borrowers or the demographics of this borrowing population. One trade group argued that, at minimum, the Bureau should allow ''validation'' of housing expenses based on a consumer's stated history and circumstances. Some commenters also raised concerns that taking into account locality-based information on housing expenses in underwriting decisions could violate ECOA and Regulation B (*see* discussion of these issues in the more general § 1041.5 discussion above).

Consumer groups, on the other hand, commented that the proposal's treatment of rental housing expenses was too permissive. They argued that rental housing expense should be verified wherever possible, and that if verification evidence is not available, the lender should have to use the *larger* of the locality-based average or the consumer's statement. They also argued that if there is a shared arrangement, lenders should obtain verification evidence (such as a lease or checking account activity) or reliable third-party evidence (like a co-tenant statement). They expressed concern about proposed commentary language permitting lenders to apportion household expense based solely on the consumer's statement. And they argued that the Bureau should consider providing ''portfolio-level guardrails'' that indicate whether housing estimates not based on verification evidence and lender assertions of shared housing expense are more likely to be unreasonable, and subjecting lenders whose portfolios have those indicators to higher scrutiny.

Final Rule

The Bureau is finalizing proposed § 1041.5(c)(3)(ii)(D) as final § 1041.5(c)(2)(iii) with a number of significant changes as discussed below. In response to the many comments criticizing the Bureau for proposing to require, for rental housing, either a reliable record or an estimate based on the housing expenses of consumers with households in the same locality (including concerns about fair lending interests discussed above), the Bureau has adjusted § 1041.5(c)(2)(iii) to provide that lenders may reasonably rely on the consumer's written statement to project rental housing obligations. New comment 5(c)(2)(iii)–1 states that a lender reasonably relies on the consumer's written statement if such actions are consistent with a lender's policies and procedures, there is no evidence that the stated amount on a particular loan is implausibly low, and there is no pattern of the lender underestimating consumers' rental housing expense. The Bureau views these clarifications as analogous to those in comment 5(c)(2)(ii)(A)–4 regarding reasonable reliance on stated amounts for net income, and refers to the explanatory explanation above.

The Bureau recognizes that there are likely a significant number of consumers, as noted by commenters, that have non-traditional living situations, live with roommates without being on the lease, rent on a month-to-month basis without a lease or a current lease, sublet, or live with a third party (like parents). The Bureau also recognizes that requiring consumers with a lease to present those documents to obtain a loan could prove burdensome, especially for consumers applying online. For these reasons, the proposal did not require applicants to provide a lease even where one existed. Instead, the proposal allowed lenders instead to rely on verification evidence consisting of data that could be used to validate the reasonableness of a consumer's statement of rental housing expenses. However, the Bureau is persuaded by the weight of the comments suggesting that the proposal's approach to estimation of expenses raised a number of challenges.

Specifically, the Bureau is persuaded by commenters who argued that data on the median or average rental expenses for households in the same locality may not accurately reflect the median or average demographic or housing expenses of customers of covered short-term and longer-term balloon-payment loans and would thus potentially overstate the amount of rental housing expense for prospective borrowers. Furthermore, the Bureau is persuaded that even if it were possible to determine the average or median rental expense for these consumers, such data would not be useful in validating the reasonableness of any individual consumer's statement of her rental housing expenses, which could be vastly different from the average or median consumer. Finally, the Bureau agrees with commenters who noted that small lenders would be at a disadvantage in obtaining statistical validation evidence. The Bureau continues to recognize the risks entailed in permitting lenders to rely on stated rental expenses—including the risk that consumers will misstate or be induced to misstate their expenses—which are concerns echoed by the consumer groups in their comment. But the Bureau nonetheless is persuaded that the available alternatives are not practical and therefore is permitting lenders to rely on consumers' written statements of rental housing expense where it is reasonable to do so.

5(d) Additional Limitations on Lending—Covered Short-Term Loans and Covered Longer-Term Balloon-Payment Loans

Proposed § 1041.6 would have augmented the basic ability-to-repay determination in proposed § 1041.5 in circumstances in which the consumer's recent borrowing history or recent difficulty repaying an outstanding loan provides important evidence with respect to the consumer's financial

capacity to afford a new covered short-term loan. In particular, proposed § 1041.6 would have imposed a presumption of unaffordability when a consumer returned for a covered short-term loan within 30 days of a prior covered short-term or covered longer-term balloon-payment loan being outstanding. Presumptions would also have been imposed in particular circumstances indicating that a consumer was having difficulty repaying an outstanding covered or non-covered loan outstanding that was made or was being serviced by the same lender or its affiliate. Under the proposed approach, lenders would have been able to overcome a presumption of unaffordability only in circumstances where there was a sufficient improvement in financial capacity. This would have applied, for instance, where there was evidence that the prior difficulty with repayment was due to an income shock that was not reasonably expected to recur or where there was a reasonable projected increase of income or decrease in major financial obligations during the term of the new loan. However, after the third covered short-term loan in a sequence, proposed § 1041.6 would have imposed a mandatory 30-day cooling-off period. The proposed section also contained certain additional provisions that were designed to address concerns about potential evasion and confusion if consumers alternated in quick succession between covered short-term loans under proposed § 1041.5 and other types of credit products.

Similarly, proposed § 1041.10 would have applied parallel presumptions of unaffordability to new covered longer-term loans based on consumers' recent borrowing history on certain types of covered loans or difficulty repaying a current covered or non-covered loan, that was made or was being serviced by the same lender or its affiliate, although it would not have imposed a mandatory cooling-off period after a three loan sequence. Proposed § 1041.10 also would have imposed certain restrictions to address concerns about potential evasion and confusion if consumers alternated in quick succession between a covered short-term loan under proposed § 1041.7 and other types of credit products.

After consideration of the comments received as discussed further below, the Bureau has decided to finalize only selected elements of proposed §§ 1041.6 and 1041.10, consolidated as § 1041.5(d) of the final rule. Specifically, the Bureau is finalizing a 30-day mandatory cooling-off period after a consumer has completed a three-loan sequence of covered short-term loans, covered longer-term balloon-payment loans, or a combination thereof. It is also finalizing restrictions on certain re-borrowing within 30 days of a covered shorter-term loan made under final rule § 1041.6 (which was § 1041.7 in the proposal) being outstanding.[830] As explained below in detail, the Bureau is not finalizing several provisions, including any of the proposed presumptions of unaffordability. Thus, the Bureau is finalizing adjusted portions of proposed § 1041.6(a)(2), (f), and (g) and proposed § 1041.10(a)(2) and (e) on a combined basis in § 1041.5(d) for both covered short-term and longer-term balloon-payment loans as discussed further below.

Proposed Rule

In proposed § 1041.6, the Bureau proposed to require the lender to factor evidence about the consumer's recent borrowing history and difficulty in repaying an outstanding loan into the ability-to-repay determination and, in certain instances, to prohibit a lender from making a new covered short-term loan to the consumer under proposed § 1041.5 for 30 days. The Bureau proposed the additional requirements in § 1041.6 for the same basic reason that it proposed § 1041.5: To prevent the unfair and abusive practice identified in proposed § 1041.4 and the consumer injury that results from it. The Bureau explained in the proposal that it believed that these additional requirements would be needed in circumstances where proposed § 1041.5 alone might not suffice to prevent a lender from making a covered short-term loan that the consumer would lack the ability to repay.

Proposed § 1041.6 would have generally imposed a presumption of unaffordability on continued lending where evidence suggested that the prior loan was not affordable for the consumer, indicating that the consumer could have particular difficulty repaying a new covered short-term loan. Specifically, such a presumption would have applied in three circumstances: (1) Under proposed § 1041.6(b), when a consumer sought a covered short-term loan during the term of a covered short-term loan made under proposed § 1041.5 and for 30 days thereafter; (2) under proposed § 1041.6(c), when a consumer sought a covered short-term loan during the term of a covered longer-term balloon-payment loan made under proposed § 1041.9 and for 30 days thereafter; and (3) under proposed § 1041.6(d), when a consumer sought to take out a covered short-term loan when there were indicia that the consumer was already struggling to repay an outstanding loan of any type—covered or non-covered—with the same lender or its affiliate.

The Bureau explained in the proposal that a central component of the preventive requirements in proposed § 1041.6 was the concept of a re-borrowing period—a period following the payment date of a prior loan during which a consumer's borrowing of a covered short-term loan is deemed evidence that the consumer is seeking additional credit because the prior loan was unaffordable. When consumers have the ability to repay a covered short-term loan, the loan should not cause consumers to have the need to re-borrow shortly after repaying the loan. As discussed in the proposal, including in the proposal's discussion of Market Concerns—Short-term Loans, however, the Bureau believed that the fact that covered short-term loans require repayment so quickly after consummation makes such loans more difficult for consumers to repay consistent with their basic living expenses and major financial obligations without needing to re-borrow. Moreover, as the Bureau explained, most covered short-term loans—including payday and vehicle title loans—also require payment in a single lump sum, thus exacerbating the challenge of repaying the loan without needing to re-borrow.

For these loans, the Bureau stated in the proposal that it believed that the fact that a consumer returns to take out another covered short-term loan shortly after having a previous covered short-term loan outstanding frequently indicates that the consumer did not have the ability to repay the prior loan and meet the consumer's basic living expenses and major financial obligations. This also may provide strong evidence that the consumer will not be able to afford a new covered short-term loan. The Bureau further explained that a second covered short-term loan shortly following a prior covered short-term loan may result from a financial shortfall caused by repayment of the prior loan. The Bureau noted that evidence shows that re-borrowing for short-term loans often occurs on the same day that a loan is due, either in the form of a rollover of the existing loan (where permitted by State law) or in the form of a new loan taken out on the same day that the prior loan was repaid. Some States require a

[830] *See also* the section-by-section analysis of final § 1041.6(d) below, which discusses a related provision limiting loans by lenders or their affiliates within 30 days of a prior outstanding loan under § 1041.6 by the same lender or its affiliates.

cooling-off period between loans, typically 24 hours, and the Bureau found that in those States, if consumers take out successive loans, they generally do so at the earliest time that is legally permitted.[831] The Bureau interpreted these data to indicate that these consumers could not afford to repay the full amount of the loan when due and still meet their basic living expenses and major financial obligations.

In the proposal, the Bureau stated that it is less facially evident whether a particular loan is a re-borrowing that was prompted by the unaffordability of a prior loan when that new loan is taken out after some time has elapsed since a consumer has repaid the prior loan (and after the expiration of any State-mandated cooling-off period). The fact that consumers may cite a particular income or expense shock is not dispositive, since a prior unaffordable loan may be the reason that the consumer cannot absorb the new change. The Bureau stated in the proposal that on balance, the Bureau believed that for new loans taken out within a short period after a prior loan ceases to be outstanding, the most likely explanation is the unaffordability of the prior loan—*i.e.,* the fact that the size of the payment obligation on the prior loan left these consumers with insufficient income to make it through their monthly expense cycle.

The Bureau explained in the proposal that to provide a structured process that accounts for the likelihood that the unaffordability of an existing or prior loan is driving re-borrowing and that ensures a more rigorous analysis of consumers' individual circumstances, the Bureau believed that an appropriate approach would be to impose presumptions when new loans fall within a specified re-borrowing period, rather than engaging in an open-ended inquiry. The Bureau thus proposed to delineate a specific re-borrowing period, during which a new loan will be presumed to be a re-borrowing.[832] In determining the appropriate length of the re-borrowing period, the Bureau described how it had considered several different possible periods. The Bureau proposed a 30-day period, but also considered periods of 14, 45, 60, or 90 days in length. The Bureau also considered an option that would tie the length of the re-borrowing period to the term of the preceding loan.

In evaluating the alternative options for defining the re-borrowing period (and, in turn, the definition of a loan sequence), the Bureau described in the proposal how it was seeking to strike a balance between two alternatives. The first would be a re-borrowing period that is too short, thereby not capturing substantial numbers of subsequent loans that are in fact the result of the spillover effect of the unaffordability of the prior loan and inadequately preventing consumer injury. The second would be a re-borrowing period that is too long, thereby covering substantial numbers of subsequent loans that are in fact the result of a new need for credit, independent of such effects. The Bureau further described how this concept of a re-borrowing period is also intertwined with the definition of loan sequence. Under proposed § 1041.2(a)(12), the Bureau would have defined loan sequence as a series of consecutive or concurrent covered short-term loans in which each of the loans is made while the consumer currently has an outstanding covered short-term loan or within 30 days after the consumer ceased to have such a loan outstanding.

The Bureau explained in the proposal that the Bureau's 2014 Data Point analyzed repeated borrowing on payday loans using a 14-day re-borrowing period reflecting a bi-weekly pay cycle, the most common pay cycle for consumers in this market.[833] For the purposes of the 2014 Data Point, a loan was considered part of a sequence if it was made within 14 days of the prior loan. The Bureau stated in the proposal that it had adopted this approach in its early research in order to obtain a relatively conservative measure of re-borrowing activity relative to the most frequent date for the next receipt of income. However, the 14-day definition had certain disadvantages, including the fact that many consumers are paid on a monthly cycle, and a 14-day definition thus does not adequately reflect how different pay cycles can cause somewhat different re-borrowing patterns.

The Bureau stated in the proposal that upon further consideration of what benchmarks would sufficiently protect consumers from re-borrowing harm, the Bureau turned to the typical consumer expense cycle, rather than the typical income cycle, as the most appropriate metric.[834] The Bureau noted that consumer expense cycles are typically a month in length with housing expenses, utility payments, and other debt obligations generally paid on a monthly basis. Thus, where repaying a loan causes a shortfall, the consumer may seek to return during the same expense cycle to get funds to cover downstream expenses.

The proposals under consideration in the Small Business Review Panel Outline relied on a 60-day re-borrowing period, based on the premise that consumers for whom repayment of a loan was unaffordable may nonetheless be able to juggle their expenses for some time so that the spillover effects of the loan may not manifest themselves until the second expense cycle following repayment. As explained in the proposal, upon additional analysis and extensive feedback from a broad range of stakeholders, the Bureau tentatively concluded that the 30-day definition incorporated into the proposal may strike a more appropriate balance between the competing considerations, chiefly because so many expenses are paid on a monthly basis.

The Bureau stated its belief that loans obtained during the same expense cycle are relatively likely to indicate that repayment of a prior loan may have caused a financial shortfall. Similarly, in analyzing supervisory data, the Bureau found that a considerable segment of consumers who repay a loan without an immediate rollover or re-borrowing nonetheless return within the ensuing 30 days to re-borrow.[835] The Bureau stated in the proposal that accordingly, if the consumer returned to take out another covered short-term loan—or, as described in proposed § 1041.10, certain types of covered longer-term loans—within the same 30-

[831] CFPB Report on Supplemental Findings, at Chapter 4.

[832] The Bureau explained in the proposal that re-borrowing takes several forms in the market for covered short-term loans. As used throughout the proposal, re-borrowing and the re-borrowing period include any rollovers or renewals of a loan, as well as new extensions of credit. The Bureau explained that a loan may be a ''rollover'' if, at the end of a loan term, a consumer only pays a fee or finance charge in order to ''roll over'' a loan rather than repaying the loan. The Bureau noted that similarly, the laws of some States permit a lender to ''renew'' a consumer's outstanding loan with the payment of a finance charge, and that more generally, a consumer may repay a loan and then return to take out a new loan within a fairly short period. The Bureau stated in the proposal that it considers rollovers, renewals, and re-borrowing within a short period after repaying the prior loan to be functionally the same sort of transaction—and generally used the term re-borrowing in the proposal to cover all three scenarios, along with concurrent borrowing by a consumer whether from the same lender or its affiliate or from different, unaffiliated lenders.

[833] *See generally* CFPB Data Point: Payday Lending.

[834] The Bureau noted in the proposal that researchers in an industry-funded study also concluded that ''an entire billing cycle of most bills—rent, other loans, utilities, etc.—and at least one paycheck'' is the ''appropriate measurement'' for purposes of determining whether a payday loan leads to a ''cycle of debt.'' Marc Anthony Fusaro & Patricia J. Cirillo, ''Do Payday Loans Trap Consumers in a Cycle of Debt?,'' (2011), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1960776.*

[835] CFPB Report on Supplemental Findings, at Chapter 5.

day period, the Bureau believed that this pattern of re-borrowing indicated that the prior loan was unaffordable and that the following loan may likewise be unaffordable. On the other hand, the Bureau stated its belief that for loans obtained more than 30 days after a prior loan, there is a higher likelihood that the loan is prompted by a new need on the part of the borrower, and is not directly related to potential financial strain from repaying the prior loan. The Bureau further explained that while a prior loan's unaffordability may cause some consumers to need to take out a new loan as many as 45 days or even 60 days later, the Bureau believed that the effects of the previous loan are more likely to dissipate once the consumer has completed a full expense cycle following the termination of a prior loan that has been fully repaid.

For these reasons, the Bureau believed at the time it developed the proposed rule that a 45-day or 60-day definition would be too broad. The Bureau also stated in the proposal that a re-borrowing period that would vary with the length of the preceding loan term would be operationally complex for lenders to implement and, for consumers who are paid either weekly or bi-weekly, may also be too narrow.

Accordingly, using this 30-day re-borrowing window, the Bureau proposed a presumption of unaffordability for covered short-term loans made while a prior loan is outstanding or within a 30-day period after the end of the term of the prior loan. As proposed, however, the presumption could have been overcome in various circumstances suggesting that there is sufficient reason to believe the consumer would, in fact, be able to afford the new loan even though she is seeking to re-borrow during the term of or shortly after a prior loan. The Bureau recognized, for example, that there may be situations in which the prior loan would have been affordable but for some unforeseen disruption in income that occurred during the prior expense cycle and which is not reasonably expected to recur during the term of the new loan. The Bureau also recognized that there may be circumstances, albeit less common, in which even though the prior loan proved to be unaffordable, a new loan would be affordable because of a reasonably projected increase in net income or decrease in major financial obligations.

To effectuate these policy decisions, proposed § 1041.6(a) would have set forth the general requirement for lenders to obtain and review information about a consumer's borrowing history from the records of the lender and its affiliates, and from a consumer report obtained from an information system currently registered pursuant to proposed § 1041.17(c)(2) or (d)(2), if available, and to use this information to determine a potential loan's compliance with the requirements of proposed § 1041.6.

Proposed § 1041.6(b) through (d) would have defined the set of circumstances in which the Bureau believed that a consumer's recent borrowing history makes it unlikely that the consumer can afford a new covered short-term loan, including concurrent loans.[836] In such circumstances, a consumer would be presumed not to have the ability to repay a covered short-term loan under proposed § 1041.5. Specifically, the presumption of unaffordability would have applied: (1) Under proposed § 1041.6(b), when a consumer sought a covered short-term loan during the term of a covered short-term loan made under proposed § 1041.5 and for 30 days thereafter; (2) under proposed § 1041.6(c), when a consumer sought a covered short-term loan during the term of a covered longer-term balloon-payment loan made under proposed § 1041.9 and for 30 days thereafter; and (3) under proposed § 1041.6(d), when a consumer sought to take out a covered short-term loan when there are indicia that the consumer is already struggling to repay an outstanding loan of any type—covered or non-covered—with the same lender or its affiliate. Proposed § 1041.6(e) would have defined the additional determinations that a lender would be required to make in cases where the presumption applies in order for the lender's ability-to-repay determination under proposed § 1041.5 to be reasonable despite the unaffordability of the prior loan.

The presumption of unaffordability in proposed § 1041.6(c) would have provided that a consumer is presumed not to have the ability to repay a covered short-term loan under proposed § 1041.5 during the time period in which the consumer has a covered longer-term balloon-payment loan made under proposed § 1041.9 outstanding and for 30 days thereafter. The Bureau stated in the proposal that it believed that when a consumer seeks to take out a new covered short-term loan that would be part of a loan sequence, there is substantial reason for concern that the need to re-borrow is being triggered by the unaffordability of the prior loan. Similarly, covered longer-term balloon-payment loans, by definition, require a large portion of the loan to be paid at one time. The Bureau described its research suggesting that the fact that a consumer seeks to take out another covered longer-term balloon-payment loan shortly after having a previous covered longer-term balloon-payment loan outstanding will frequently indicate that the consumer did not have the ability to repay the prior loan and meet the consumer's other major financial obligations and basic living expenses. The Bureau stated that it had found that the approach of the balloon payment coming due is associated with significant re-borrowing. However, the need to re-borrow caused by an unaffordable covered longer-term balloon is not necessarily limited to taking out a new loan of the same type. The Bureau explained that if the borrower takes out a new covered short-term loan in such circumstances, it also is a re-borrowing. Accordingly, in order to prevent the unfair and abusive practice identified in proposed § 1041.4, the Bureau proposed a presumption of unaffordability for a covered short-term loan that would be concurrent with or shortly following a covered longer-term balloon-payment loan.

In proposed § 1041.6(d), the Bureau would have established a presumption of unaffordability when a lender or its affiliate sought to make a covered short-term loan to an existing consumer in which there are indicia that the consumer cannot afford an outstanding loan with that same lender or its affiliate. The triggering conditions would have been a delinquency of more than seven days within the preceding 30 days, expressions by the consumer within the preceding 30 days that he or she cannot afford the outstanding loan, certain circumstances indicating that the new loan is motivated by a desire to skip one or more payments on the outstanding loan, and certain

[836] In the proposal, the Bureau noted that the proposed ability-to-repay requirements would have not prohibited a consumer from taking out a covered short-term loan when the consumer has one or more covered short-term loans outstanding, but instead accounted for the presence of concurrent loans in two ways: (1) A lender would have been required to obtain verification evidence about required payments on debt obligations, which were defined under proposed § 1041.5(a)(2) to include outstanding covered loans; and (2) any concurrent loans would have been counted as part of the loan sequence for purposes of applying the presumptions and prohibitions under proposed § 1041.6. The Bureau explained in the proposal that this approach differs from the conditional exemption for covered short-term loans under proposed § 1041.7, which generally would have prohibited the making of such a loan if the consumer has an outstanding covered loan. The Bureau noted that for further discussion, see the section-by-section analysis of proposed § 1041.7(c)(1), including an explanation of the different approaches and notation of third-party data about the prevalence of concurrent borrowing in this market.

circumstances indicating that the new loan is solely to obtain cash to cover upcoming payments or payments on the outstanding loan. The Bureau believed that the analysis required by proposed § 1041.6(d) would have provided greater protection to consumers and certainty to lenders than requiring that such transactions be analyzed under proposed § 1041.5 alone. Proposed § 1041.5 would have required generally that the lender make a reasonable determination that the consumer will have the ability to repay the contemplated covered short-term loan, taking into account existing major financial obligations that would include the outstanding loan from the same lender or its affiliate. However, the presumption in proposed § 1041.6(d) would have provided a more detailed roadmap as to when a new covered short-term loan would not meet the reasonable determination test.

In proposed § 1041.6(f), the Bureau also would have established a mandatory cooling-off period prior to a lender making a fourth covered short-term loan in a sequence. As stated in the proposal, the Bureau believed that it would be extremely unlikely that a consumer who twice in succession returned to re-borrow during the re-borrowing period, and who seeks to re-borrow again within 30 days of having the third covered short-term loan outstanding, would be able to afford another covered short-term loan. Because of lenders' strong incentives to facilitate re-borrowing that is beyond the consumer's ability to repay, the Bureau believed it appropriate, in proposed § 1041.6(f), to impose a mandatory 30-day cooling-off period after the third covered short-term loan in a sequence, during which time the lender cannot make a new covered short-term loan under proposed § 1041.5 to the consumer. This period was intended to ensure that after three consecutive ability-to-repay determinations have proven inconsistent with the consumer's actual experience, the lender could not further worsen the consumer's financial situation by extending additional unaffordable debt to the consumer.

In its discussion of proposed § 1041.6(f), the Bureau stated that the ability-to-repay determination required by proposed § 1041.5 is intended to protect consumers from what the Bureau believes may be the unfair and abusive practice of making a covered short-term loan without making a reasonable determination of the consumer's ability to repay the loan. If a consumer who obtains such a loan seeks a second loan when, or shortly after, the payment on the first loan is due, that suggests that the prior loan payments were not affordable and triggered the new loan application, and that a new covered short-term loan will lead to the same result. The Bureau stated that it believes that if a consumer has obtained three covered short-term loans in quick succession and seeks to obtain yet another covered short-term loan when or shortly after payment on the last loan is due, the fourth loan will almost surely be unaffordable for the consumer.

In the proposal, the Bureau described how the Bureau's research underscores the risk that consumers who reach the fourth loan in a sequence of covered short-term loans will wind up in a long cycle of debt. Most significantly, the Bureau found that 66 percent of loan sequences that reach a fourth loan end up having at least seven loans, and 47 percent of loan sequences that reach a fourth loan end up having at least 10 loans.[837] For consumers paid weekly, bi-weekly, or semimonthly, 12 percent of loan sequences that reach a fourth loan end up having at least 20 loans during a 10-month period.[838] And for loans taken out by consumers who are paid monthly, more than 40 percent of all loans to these borrowers were in sequences that, once begun, persisted for the rest of the year for which data were available.[839]

The Bureau explained in the proposal, further, that the opportunity to overcome the presumption for the second and third loan in a sequence means that by the time that the mandatory cooling-off period in proposed § 1041.6(f) would apply, three prior ability-to-repay determinations will have proven inconsistent with the consumer's actual experience. If the consumer continues re-borrowing during the term of or shortly after repayment of each loan, the pattern suggests that the consumer's financial circumstances do not lend themselves to reliable determinations of ability to repay a covered short-term loan. After three loans in a sequence, the Bureau stated that it believes it would be all but impossible under the proposed framework for a lender to accurately determine that a fourth covered short-term loan in a sequence would be affordable for the consumer.

[837] Results calculated using data described in Chapter 5 of the CFPB Report on Supplemental Findings.

[838] Results calculated using data described in Chapter 5 of the CFPB Report on Supplemental Findings.

[839] CFPB Report on Supplemental Findings, at Chapter 1.

The Bureau stated in the proposal that in light of the data described above, the Bureau believed that by the time a consumer reaches the fourth loan in a sequence of covered short-term loans, the likelihood of the consumer returning for additional covered short-term loans within a short period of time warrants additional measures to mitigate the risk that the lender is not furthering a cycle of debt on unaffordable covered short-term loans. To prevent the unfair and abusive practice identified in proposed § 1041.4, the Bureau stated the belief that it may be appropriate to impose a mandatory cooling-off period for 30 days following the third covered short-term loan in a sequence.

The Bureau's overall approach to the re-borrowing restrictions in proposed § 1041.6 was fairly similar to the framework included in the Small Business Review Panel Outline, but contained some adjustments in response to feedback from the SERs, agency participants, and other stakeholders. For instance, the Bureau proposed a 30-day definition of loan sequence and a 30-day cooling-off period rather than a 60-day definition of loan sequence and a 60-day cooling-off period which was in the Small Business Review Panel Outline. The Bureau also proposed to provide greater specificity and flexibility about when a presumption of unaffordability would apply, for example, by proposing in § 1041.6(b)(2) certain exceptions to the presumption of unaffordability for a sequence of covered short-term loans where the consumer is seeking to re-borrow no more than half the amount that the consumer has already paid on the loan. In those instances, the Bureau explained, the predicate for the presumption of unaffordability may no longer apply. The proposal also provided somewhat more flexibility about when a presumption of unaffordability could be overcome by permitting lenders to determine that there would be sufficient improvement in the consumer's financial capacity for the new loan, under proposed § 1041.6(e). This standard would have included both documented increases in income or decreases in expenses since the prior borrowing (the Small Business Review Panel Outline standard of "changed circumstances") plus where reliable evidence indicated that the need to re-borrow was caused by a specific income decline that would not recur. The Bureau also continued to assess potential alternative approaches to the presumptions framework, as

outlined in the proposal,[840] and specifically sought comment in response to the Small Business Review Panel Report on whether a loan sequence should be defined with reference to a period shorter or longer than 30 days.

Proposed § 1041.10 would have applied a parallel set of presumptions of unaffordability to new covered longer-term loans where consumers had had a covered short-term or covered longer-term balloon-payment loan outstanding within the last 30 days or where there were indicia that consumers were having difficulty repaying a current loan of any type from the same lender or its affiliates. The Bureau's logic in proposing to apply these presumptions was the same as described above with regard to proposed § 1041.6: Because covered longer-term balloon-payment loans also involve lump-sum or other large irregular payments that appear to exacerbate the challenge of repaying such loans without needing to re-borrow, there is substantial reason for concern that the need to re-borrow within a short time period is being triggered by the unaffordability of the prior loan. The Bureau did not specifically propose to impose a mandatory cooling-off period after a sequence of covered longer-term loans (whether they had a balloon payment or not), but sought comment on the general issue of whether a consumer's intensity of use during a defined period of time warranted additional protections.

Finally, proposed §§ 1041.6 and 1041.10 would also have established certain rules with regard to the prospect that consumers might switch back and forth between different types of covered or non-covered loans over time. In particular, proposed §§ 1041.6(g) and 1041.10(e) would have prohibited lenders under certain circumstances from making a covered short-term loan or a covered longer-term loan, respectively, while a prior covered short-term loan to the same consumer made under the conditional exemption in proposed § 1041.7 was outstanding or for 30 days thereafter. Because loans under that exemption are subject to certain principal reduction requirements over a sequence of three loans, the Bureau was concerned that the protections provided by that provision could be abrogated if a consumer were induced instead to take out a different kind of covered loan.

Also, proposed §§ 1041.6(h) and 1041.10(f) would have suspended the 30-day count for purposes of determining whether a loan was subject to a presumption of unaffordability or the mandatory cooling-off period for short-term loans if a lender or its affiliate made a non-covered bridge loan within 30 days of a prior outstanding covered short-term loan or covered longer-term balloon-payment loan. The Bureau would have defined non-covered bridge loan in proposed § 1041.2(a)(13) as a non-resource pawn loan made by the same lender or its affiliate that is substantially repayable within 90 days of consummation. In the proposal, the Bureau described how this provision would address the concern that these types of loans could be used by lenders or their affiliates to bridge gaps between the making of covered loans, creating a continuous series of loans as a way of evading the proposed re-borrowing restrictions.

Comments Received

The Bureau received numerous comments on the proposed re-borrowing restrictions. Stakeholders generally supportive of the rule criticized the restrictions for not going far enough, and stakeholders generally critical of the rule thought these restrictions went too far in a number of ways.

Many consumer groups and other commenters argued that the Bureau should adopt a 45, 60, or 90 day cooling-off and re-borrowing period instead of a 30-day period, asserting that it takes longer than 30 days for a consumer to reach financial equilibrium. These arguments were based largely on arguments that had already been raised in response to the Small Business Review Panel Outline. The consumer advocates raised additional arguments for why the 30-day period was too short, including evidence from the U.S. Financial Diaries project and from national delinquency data on unsecured debt that they interpreted to suggest that consumers who take covered loans have monthly expense cycles greater than 30 days, and often in excess of 60 days. A State Attorney General urged that if the Bureau were not to adopt a 60-day cooling-off period, the Bureau should consider a 45-day cooling-off period as a more restrictive alternative to the proposed 30-day cooling-off period.

Consumer groups and a broad spectrum of other commenters—including a group of U.S. Senators, several State Attorneys General, faith leaders, civil rights organizations, and other stakeholders generally supportive of the proposal—asked that the Bureau limit covered short-term lending overall to 6 loans per year and 90 days per year. As discussed in the section-by-section analysis for § 1041.6, these stakeholders opposed the inclusion of the exemption for covered short-term loans, which contained these loan and time-in-debt limits as conditions of the proposed exemption. They argued that those same limits should apply to the making of *all* covered short-term loans, in addition to the ability-to-repay requirements applicable to each loan and the various presumptions of unaffordability. The consumer groups asserted that these limits are ''rooted in significant precedent'' such as the FDIC's 2005 guidelines on payday lending and State loan limits in Washington and Delaware.

Consumer advocates also argued that that the Bureau should adopt a two-loan cap instead of a three-loan cap, because they believed that after two loans the ability-to-repay analysis already will have proven to be flawed. They argued that the rationale for imposing the three-loan limit in proposed § 1041.6(f) was equally applicable after two loans, *i.e.,* it is extremely unlikely that a consumer attempting to borrow a third loan within a short period of time will be able to repay that loan given the prior re-borrowing.

A number of commenters urged the Bureau to adopt additional restrictions under proposed § 1041.6. Several commenters raised concerns about the potential ability of consumers to take out multiple loans at a time, or to switch back-and-forth either between covered and non-covered loans or between short-term and longer-term loans, which could be ways of evading the proposed rule's requirements. One commenter argued that the Bureau should consider any type of loan to be a non-covered bridge loan—rather than just non-recourse pawn loans of 90 days or fewer in duration—if it is used to bridge a gap between two sequences (or through a cooling-off period). Similarly, a number of other commenters argued that the Bureau should make the intra-sequence

[840] As discussed in the proposal, the Bureau had considered a number of alternative approaches to address re-borrowing in circumstances indicating the consumer was unable to afford the prior loan. One alternative was to limit the overall number of covered short-term loans that a consumer could take out within a specified period, rather than using the loan sequence and presumption concepts, and when and if a mandatory cooling-off period should apply. Another was to simply identify circumstances that might be indicative of a consumer's inability to repay that would be relevant to whether a lender's determination under proposed § 1041.5 or § 1041.9 is reasonable. A third was whether there was a way to account for unusual expenses within the presumptions framework without creating an exception that would swallow the rule. The Bureau explained its concerns about each of these approaches in the proposal and broadly sought comment on alternative approaches to addressing the issue of repeat borrowing in a more flexible manner, including the alternatives described above, and on any other framework for assessing consumers' borrowing history as part of an overall determination of ability-to-repay.

presumptions stronger, arguing that lenders would likely still lend, and allow some amount of re-borrowing, unless there were stronger restrictions after the first and second loan. Consumer groups argued that tighter verification requirements should apply to loans being made that overcome the presumption of unaffordability. One State Attorney General expressed concern about consumers taking out short-term and longer-term loans in quick succession as a way of evading the proposal and urged the Bureau to place greater restrictions on this type of lending pattern. Several commenters argued that the presumptions should apply in other scenarios, such as whenever a loan went delinquent, or when a consumer had repaid a loan made by an unaffiliated lender within 30 days. Others asked whether lenders can rely on consumer statements to determine whether a consumer had a prior loan with an unaffiliated lender.

Consumer advocates also criticized the proposed exception to the presumption of unaffordability when the amount being borrowed was no more than half of the amount paid on the prior loan. They argued that this would incentivize lenders to make loans larger than consumers could initially afford at the outset and ''then flip the clearly unaffordable portions, extracting excess costs each time.''

Industry commenters, along with some other stakeholders, generally criticized the re-borrowing restrictions in proposed § 1041.6. Many of them focused specifically on the proposed presumptions of unaffordability. Several industry commenters argued that the specific standards for overcoming presumptions provided too little flexibility or that they were vague and needed to be clarified. One trade group commenter argued that lenders essentially would have to become ''financial planners'' to determine whether a consumer had a ''sufficient improvement in financial capacity''—the standard for overcoming the presumption—which the commenter viewed as untenable. Others asked for exceptions to the presumptions in various scenarios. Some commenters offered alternatives, such as off-ramps or exemptions for consumers who were taking out smaller or less expensive loans than they had previously.

A State trade association for lenders also criticized the exception to the presumption of unaffordability. The commenter argued that it would harm a more responsible consumer who borrowed a smaller amount initially but then developed a need for additional funds in excess of 50 percent of the initial loan amount.

Several commenters argued that the Bureau should eliminate the presumptions against unaffordability and the cooling-off periods because consumers who have previously repaid are the most likely to repay in the future. One commenter, a specialty consumer reporting agency, discussed its analysis of data which it interpreted to show that a consumer who triggered the cooling-off period was more likely to repay than a consumer who had not, citing default rates. Similarly, commenters argued that consumers who pay off a loan have factually proven that they have an ability to repay, and thus there should be no limitation on future lending. Still other commenters argued that under the proposal consumers would be penalized twice for taking out a new loan while another loan remains outstanding, because the other loan would already be considered a major financial obligation. One lender commented that it was generally supportive of the proposed ability-to-repay requirements and viewed those requirements as sufficient, mitigating the need for additional re-borrowing restrictions.

More broadly, many commenters argued that the cooling-off period should trigger after more loans have been made, or should be shorter, primarily arguing that the cooling-off periods as proposed would have a substantial impact on revenue, and would prevent consumers from obtaining credit when they need it. One commenter argued that the cooling-off period alone would reduce revenue by 71 to 76 percent. Others claimed that a cooling-off period would bar consumers from access to credit, and consumers cannot control when they might need it. A small entity representative criticized the cooling-off period and the impacts it would have on this person's small business. Several commenters argued that setting loan limits would cause consumers to over-borrow in order to tide themselves through the period when they would be restricted from borrowing.

Commenters suggested a number of alternatives to the cooling-off period proposed, arguing that these alternatives would be less restrictive. Some commenters recommended that the Bureau create an off-ramp or repayment plan as an alternative to a cooling-off period, or alternatively, provide for exceptions where a consumer can prove that a new need has arisen. And some commenters asked the Bureau to take a more flexible approach when setting cooling-off periods, which would allow lenders to fluidly set their own thresholds based on outcomes, or give safe harbors while various industry participants try out different options. Some commenters called this a ''sandbox'' regulatory approach.

A group of State Attorneys General opposed the proposed approach and asked the Bureau to allow the States to set their own restrictions, such as rollover caps, limits on the number of loans that may be taken out in a given timeframe, and cooling-off periods, to better reflect local conditions and allow for experimentation. They argued that States that impose rollover or annual limits, such as Washington and Missouri, should be allowed to continue that practice within a broader minimum Federal regulatory framework.

The SBA Office of Advocacy encouraged the Bureau to reconsider the proposed cooling-off period and suggested that, if one were deemed necessary, it should be shortened from 30 days. The SBA Office of Advocacy noted that small entity representatives had criticized the cooling-off period based on its negative revenue impacts. It also passed along feedback from small entities attending roundtables that some of their clients do not operate on a 30-day billing cycle, including some who pay their rent on a weekly basis; the 30-day cooling-off period would prevent these consumers from obtaining funds that may be needed for essential expenses. In its comment letter, the SBA Office of Advocacy acknowledged and expressed appreciation for the fact that the Bureau had shortened the period from the Small Business Review Panel Outline, which contemplated a 60-day period, but nonetheless argued that 30-days was too restrictive.

An industry trade group criticized what it perceived as the proposal setting a blanket limit of six loans in a 12-month period for all covered short-term loans, not just exempt loans. The commenter argued the number was arbitrary and not backed by data. The commenter wrote that a more ''appropriate limit that strikes the balance'' between preventing consumers from relying too much on short-term loans and allowing the market for these loans to continue would be to limit covered short-term loans to eight loans during a 12-month consecutive period. The Bureau discusses substitutes and general considerations of access to credit in the Section 1022(b)(2) Analysis, as well as in the section-by-section analysis for § 1041.4.

The Bureau received a significant number of comments from individual consumers who wrote as part of organized letter-writing campaigns.

Among the more common themes in the letters was opposition to loan limits and cooling-off periods. Many individual consumers of such loans argued vehemently that these measures would intrude on consumer choice, would harm consumers who had no other credit options, and would cause consumers to turn to unsavory lending options. A number of them were concerned specifically about the burden and length of the 30-day cooling-off period, noting that it ignored the urgency of the need for immediate funds. Some were concerned that the re-borrowing limitations would result in loan denials and impede their ability to access needed funds easily and quickly. These commenters specifically noted the need for funds for unexpected emergencies, like car repairs. Some simply declared these limits ''unwarranted''. Many of these commenters believed the proposal to be setting firm annual limits on the making of all types of covered short-term loans.

Lastly, the Bureau received some comments on the requirement to review borrowing history under proposed § 1041.6(a) by obtaining and reviewing information about a consumer's borrowing history from a consumer report obtained from a registered information system. Consumer groups argued that a lender should have to check a State registry, if available, when a registered information system is unavailable. Others asked whether lenders would need to establish a backup registered information system in anticipation of potential periods in which the one the lender regularly uses may be unavailable.

Final Rule

After carefully considering the comments, the Bureau has decided to finalize only selected elements of §§ 1041.6 and 1014.10 in final § 1041.5(d).[841] In particular, the Bureau has decided not to adopt the presumptions framework specified in the proposal, but rather rely primarily on the mandatory 30-day cooling-off period after the third loan in a sequence of covered short-term loans, covered longer-term balloon-payment loans, or a combination thereof. As specified below, the Bureau believes that this ''circuit breaker,'' when combined with the front-end ability-to-repay determination required under final § 1041.5(a) through (c), will protect consumers from long cycles of debt and strongly incentivize lenders to adopt more consumer-friendly business models rather than relying on extensive consumer re-borrowing. At the same time, the Bureau believes that this shift will substantially simplify the final rule relative to the proposal, giving consumers more flexibility to manage their finances within short sequences and reducing burden on lenders. The Bureau is also adopting certain other parts of proposed §§ 1041.6 and 1014.10 concerning the basic obligation to review consumers' borrowing history to determine whether a cooling-off period is triggered, and the restrictions on making covered short-term loans or covered longer-term balloon-payment loans under § 1041.5 within 30 days after an outstanding covered short-term loan under § 1041.6. The Bureau has made conforming changes to the commentary, as well as adding examples and other clarifications as discussed further below.

Presumptions of unaffordability. The Bureau continues to believe the basic premise articulated in the proposal, as summarized above, that re-borrowing shortly after a previous covered short-term loan or covered longer-term balloon-payment loan can be important evidence that a consumer lacked the ability to repay the initial loan and that a consumer likely will not be able to afford a similar subsequent loan. When consumers have the ability to repay a covered short-term or covered longer-term balloon-payment loan, the loan should not cause consumers to have the need to re-borrow soon after repaying the balance, or when the prior loan is outstanding. Thus, the Bureau believes that the most likely explanation for a consumer returning to re-borrow shortly after paying off a previous covered short-term loan or covered longer-term balloon-payment loan is that the prior loan's payment obligation left the consumer with insufficient income to make it through the balance of their expenses.

However, the Bureau also recognizes that there are occasional situations in which a consumer may experience an income or expense shock while a loan is already outstanding, and that the proposed presumptions framework did not provide a simple method of distinguishing such cases. In particular, the Bureau recognizes that defining the standard for overcoming the presumption would have either required extremely detailed inquiries of consumers, risked substantial evasion, or both. The Bureau agrees with the commenters who criticized the vagueness and workability of that standard contained in the proposal. As a result, the presumptions framework both would have imposed substantial compliance burdens on lenders and would have risked denying credit in some situations to consumers who had experienced an intervening borrowing need while a loan was already outstanding and would have been able to repay a second or third loan.

Upon further consideration, the Bureau believes that the general ability-to-repay analysis under § 1041.5 in combination with a mandatory cooling-off period under § 1041.5(d)(2) provides a more appropriate way to balance the competing considerations with regard to re-borrowing. The Bureau concludes that if a lender appropriately complies with § 1041.5(b) and (c) and makes a reasonable determination that the consumer will have the ability to repay the loan, the separate presumptions of unaffordability should be unnecessary to prevent re-borrowing in cases where the re-borrowing is attributable to the unaffordability of the prior loan. Of course, the presumptions were intended to be triggered in instances where it appeared that the lender was not making reasonable determinations of ability to repay. In the final rule, the Bureau has instead decided to rely on the reasonableness of ability-to-repay determinations. The determination of reasonableness will be based on whether a lender complies with the reasonable determination and verification requirements in § 1041.5(b) and (c), including whether the outcome-related factors listed in comment 5(b)–2.iii indicate that the lender's ability-to-repay determinations are reasonable as required in § 1041.5(b). Those factors include the frequency with which a lender makes multiple covered short-term or longer-term balloon-payment loans within a sequence. The Bureau believes that these requirements and measures will ensure that lenders shift their approach away from relying on extended loan sequences, and that lenders will appropriately factor in consumers' prior borrowing history in making ability-to-pay determinations, especially with respect to loans that would constitute second or third loans in a sequence. If a lender fails to do so, the lender's determinations would not be considered reasonable under § 1041.5(b).

For the same reasons, the final rule does not include the presumptions framework of the proposal to address circumstances where there are indicia that consumers are struggling to repay a current loan—whether covered or non-covered or made by the same lender or its affiliate—as had been proposed in §§ 1041.6(d) and 1041.10(c),

[841] As noted above, § 1041.6(d) is a related provision that restricts a lender and its affiliates from making loans within 30 days after a prior outstanding loan under § 1041.6 by the same lender or its affiliates.

respectively. Here, too, the Bureau believes that the combination of the ability-to-pay requirements coupled with a 30-day cooling-off period applied after the third covered short-term loan or covered longer-term balloon-payment loan in a sequence will be sufficient to prevent the unfair and abusive practice identified in § 1041.4.

Cooling-off period. As noted above, a significant number of commenters objected to the cooling-off period, which the Bureau is finalizing largely as proposed for covered short-term loans and extending to covered longer-term balloon-payment loans in § 1041.5(d)(2). Thus, under the final rule, a lender cannot make a covered short-term loan or covered longer-term balloon-payment loan during the time period in which the consumer has one of those types of loans outstanding or for 30 days thereafter if the new loan would be the fourth loan in a sequence of covered short-term loans, covered longer-term balloon-payment loans, or a combination thereof.

Some commenters argued that consumers who have repaid a previous loan (or two or three loans in a sequence) and come back to borrow again within 30 days are consumers who are able to repay because they did not previously default, and thus, the Bureau should not impose cooling-off periods based on patterns of re-borrowing. But this ignores one of the central premises of §§ 1041.4 and 1041.5 of the final rule, which is that when a consumer avoids default by re-borrowing, it does not reflect that the consumer has the ability to repay the loan *according to its terms.* The industry's current underwriting models do not account for re-borrowing risk because such re-borrowing helps to ensure that the lenders' business model produces consistent revenue. But the very purpose of this rule is to ensure that lenders determine whether a consumer will be able to repay the loan and pay basic living expenses and major financial obligations *without the need to re-borrow,* thereby avoiding a significant harm identified above in Market Concerns—Underwriting and in the section-by-section analysis of § 1041.4.

The Bureau's decision to finalize the cooling-off period is also tied to its decision not to finalize the presumptions for the first or second loan in a sequence, as described above. The Bureau continues to believe that most consumers who return for a new loan within 30 days of paying off a previous loan had trouble meeting their obligations and needed to take out a new loan to cover the deficit left by paying off the old loan. For these consumers, such an ''early return'' suggests the consumer is beginning or continuing a cycle of re-borrowing, and the prior ability-to-repay determination was insufficient in some way. But there are other consumers who did have an ability to repay, but who simply encountered an independent need for borrowing again within 30 days of paying off a prior loan, such as an unexpected car repair. The Bureau did not finalize the presumptions, in part, because the high bar for overcoming the presumptions would have prevented such consumers from obtaining additional credit that they can repay. But when a consumer returns to take out a fourth loan in a sequence, the Bureau concludes that is sufficient evidence to suggest that the consumer is not borrowing because of an independent need for funds, such as a non-recurring, unusual, or emergency expense. After all, at that point, the consumer would have had four such ''new needs'' during a relatively short period of time, each within 30 days of each other. Rather, it is much more likely that a cycle of re-borrowing has become manifest and the need for additional borrowing is due to the spillover effects of the prior borrowing.

This conclusion is borne out in the Bureau's data. The data show that consumers who take out more than three loans in a row are significantly more likely to be in a cycle of indebtedness that leads to 10 or more loans in a sequence than they are to repay that fourth loan and not re-borrow.[842] Relatedly, the Bureau reiterates the data points noted in the proposal as support for this conclusion. The Bureau found that 66 percent of loan sequences that reach a fourth loan end up having at least seven loans, and 47 percent of loan sequences that reach a fourth loan end up having at least 10 loans.[843] For consumers paid weekly, bi-weekly, or semimonthly, 12 percent of loan sequences that reach a fourth loan end up having at least 20 loans during a 10-month period.[844] And for loans taken out by consumers who are paid monthly, more than 40 percent of all loans to these consumers were in sequences that, once begun, persisted for the rest of the year for which data were available.[845] The Bureau thus concludes that though it is not finalizing the presumptions, it is appropriate to finalize the cooling-off period after three loans in a sequence to prevent the unfair and abusive practice identified in § 1041.4, and that doing so will still leave room for consumers who experience a new need to obtain credit via a second and even third loan in a sequence.

Additionally, as the Bureau first stated in the proposal, if a lender's ability-to-repay determinations resulted in re-borrowing three consecutive times in a sequence, the Bureau believes that is sufficient to suggest that either the lender's ability-to-repay determinations are generally not reasonable, or the lender's underwriting methodology does not work for the specific consumer's circumstances. Of course, even well-underwritten credit includes some consumer defaults. But if a consumer returns to re-borrow three times in a sequence, that would likely suggest that the determinations are coming to erroneous results. Again, the Bureau believes that if a lender's ability-to-repay determinations lead to the need to re-borrow three times in a row, it is unlikely that the fourth loan will produce a better outcome. The Bureau is finalizing a three-loan cap, instead of a different threshold such as a two-loan cap as suggested by certain consumer groups. As discussed above, a consumer's taking three loans in a row is very strong evidence that the consumer did not have the ability to repay the prior loans and likely would not be able to repay another loan. It is not as apparent whether a consumer's taking two loans in a row would provide such clear evidence.

Furthermore, the Bureau notes that by including covered longer-term balloon-payment loans, it has also changed the additional limitations on lending for longer-term balloon-payment loans as compared to what was in proposed § 1041.10. Again, in proposed § 1041.10(b), the Bureau proposed a rebuttable presumption that a consumer would not have the ability to repay a longer-term loan (including a longer-term balloon-payment loan) if taken out while a covered short-term loan made under § 1041.5 or a longer-term balloon-payment loan made under § 1041.9 was outstanding and for 30-days thereafter. In the same way and for the same reasons that the Bureau is not finalizing

[842] CFPB Report on Supplemental Findings, at Chapter 5. Specifically, approximately 22 percent of consumers repaid their first short-term loan without taking out another, and roughly 10 percent repaid the sequence with the second loan, but the percentage of consumers who repaid after the third, fourth, fifth, and sixth loans without re-borrowing continued to drop, to approximately 5 percent and below, and more than 20 percent of consumers took longer than 10 loans to repay their loan sequence.

[843] Results calculated using data described in Chapter 5 of the CFPB Report on Supplemental Findings.

[844] Results calculated using data described in Chapter 5 of the CFPB Report on Supplemental Findings.

[845] CFPB Report on Supplemental Findings, at Chapter 1.

the presumptions for covered short-term loans, the Bureau is not finalizing the presumptions for longer-term balloon-payment loans in proposed § 1041.10. However, after three longer-term balloon-payment loans in a sequence, or a combination of three covered short-term and longer-term balloon-payment loans in a sequence, there will now be a 30-day cooling-off period for all covered short-term and longer-term balloon-payment loans. Because the Bureau views covered short-term and longer-term balloon-payment loans as having similar risks, as noted above in the section-by-section analysis for § 1041.4, the Bureau's analysis on why cooling-off periods are warranted for short-term loans made under § 1041.5 is applicable to longer-term balloon-payment loans made under § 1041.5. Three longer-term balloon-payment loans in a sequence, or a combination of three covered short-term or longer-term balloon-payment loans in a sequence, indicates both that the lender's ability-to-repay determinations have not been reasonable, and that the consumer has begun a cycle of re-borrowing.

Relatedly, the Bureau is not finalizing proposed comment 6(f)–1, which clarified that the cooling-off period did not limit a lender's ability to make covered longer-term loans. That is still the case for most longer-term loans, because the cooling-off period only applies to loans made under §§ 1041.5 and 1041.6. However, as § 1041.5 now includes covered longer-term balloon-payment loans, the cooling-off period now prohibits that subset of longer-term loans. Again, as noted above, the Bureau is concerned that covered longer-term balloon-payment loans, where a large amount of funds are due at once and can potentially drive consumers to need to re-borrow, may be joined together, or joined with covered short-term loans to form a re-borrowing sequence. For this reason, the Bureau believes covered short-term loans and covered longer-term balloon-payment loans should be treated the same with regard to the cooling-off period.

In crafting the preventive remedy to the unfair and abusive practice identified, the Bureau is attempting to maintain a significant amount of flexibility and not unduly restrain access to credit. And the Bureau recognizes that, as one commenter put it, ''life happens.'' There are likely to be a number of consumers who have an ability to repay when they take out the first loan, and who do repay the loan, but then encounter a new emergency expense or other independent borrowing need, and seek to take out a second loan to cover it (though as stated earlier, the Bureau continues to believe that most will in fact be re-borrowing even after the first loan due to the spillover effects of that loan). That this would happen again, two times in a row, is much less likely, but in the interest of maintaining access to credit and flexibility, the Bureau does not wish to categorically prevent such loans where there are likely to be at least some of these instances. There may even be a few instances where this would occur three times in a row, but the Bureau has made the judgment that at this point the likelihood that the consumer is instead re-borrowing is overwhelmingly more likely. The Bureau believes that very few consumers who return for a fourth loan in row would have the ability to repay that loan.

With regard to comments about the negative revenue impacts of the cooling-off period for lenders, the Bureau recognizes that this cooling-off period will reduce revenue for covered lenders. The Bureau has accounted for that revenue reduction in the costs, benefits, and impacts analysis below. As the Bureau has previously noted, the Bureau's data suggest that many payday lenders rely on continuous re-borrowing for a substantial amount of their revenue. While a majority of consumers currently finish their payday loan sequences within the first three loans in a sequence, the majority of loans, and thus revenue, comes from loans made in sequences of 10 or more in a row.[846] And as noted in the proposal, 21 percent of payday loans made to borrowers paid weekly, bi-weekly, or semi-monthly are in loan sequences of 20 loans or more. It is this very business model that is at the core of the unfair and abusive act or practice identified in § 1041.4, and thus, the Bureau cannot prevent the identified unfair and abusive practice without significantly impacting revenue made by lenders with this kind of business model.

The Bureau is sensitive to the comments from many individual consumers who expressed concern and frustration over the proposed cooling-off period. The Bureau has carefully considered these comments, as well as related comments from consumers and other stakeholders about whether consumers affected by the cooling-off period will have available credit alternatives, and whether the rule will cause these consumers to seek out loans from more expensive or less reputable sources. And the Bureau recognizes that consumers who have obtained three covered short-term or longer-term balloon-payment loans in a sequence will be unable to obtain a fourth for 30 days, and that these consumers may be at risk of defaulting on their loans, or alternatively, defaulting on other expenses or obligations. However, the Bureau concludes that by requiring an ability-to-repay determination for each loan in a sequence, it is unlikely that many consumers will obtain a third loan in a sequence and not be able to repay that loan. Moreover, the cooling-off period will create an incentive that would not otherwise exist for lenders to offer no-cost payment plans to consumers who come to the end of a sequence and cannot afford to repay since otherwise the lender may face a default. In contrast, the Bureau believes that the risk of perpetuating cycles of unaffordable loans would be far greater without a cooling-off period.

Further, the Bureau declines commenters' suggestions to create an exception to the cooling-off period where a consumer can individually prove an independent borrowing need. As discussed in detail above in connection with § 1041.5(a)(5) and (b)(1), differentiating between re-borrowing that is prompted by a prior unaffordable loan and a new need can be complicated in practice, such that an exception would be very difficult to administer and would introduce significant risks of evasion. Where consumers are already three loans into a sequence, the Bureau believes for the reasons stated above that there is a substantial risk that they have become trapped in what would otherwise become a long-term cycle of debt. Further, such an approach would effectively turn the cooling-off period into a presumption, which the Bureau now disfavors for the reasons noted above.

Some industry commenters believed that requiring lenders to offer an off-ramp option after a certain number of loans would be more advisable than a prohibition on new loans during a cooling-off period. As discussed in Market Concerns—Underwriting and in the introduction to the section-by-section analysis for § 1041.5, the Bureau is concerned, however, that if lenders remained free to continue loan sequences, they would find ways to do so and discourage consumers from using an off-ramp. Thus, the Bureau does not believe that an off ramp can substitute for a cooling-off period. The Bureau notes, however, that under the rule a lender may offer a no-cost off ramp after a consumer hits a cooling-off period and, indeed, may be required to do so under some State laws. These further protections are not prohibited by the

[846] CFPB Report on Supplemental Findings, at Chapter 1.

rule, and the Bureau encourages lenders to find ways to work with their customers on repayment plans within the boundaries of the rule.

Similarly, the Bureau does not agree with the comment by a group of State Attorneys General that the Bureau should allow the States to set their own re-borrowing restrictions to better reflect local conditions and that the Bureau should exempt from the requirements of this section any State that has extended repayment plans. As discussed in Market Concerns—Underwriting and in the introduction to the section-by-section analysis for § 1041.5, the Bureau has considered various policy alternatives suggested by commenters as well as current State laws, both of which include extended repayment plans, but the Bureau has concluded that a Federal rule is necessary to protect consumers and that extended repayment plans imposed at the State level would not be adequate to prevent the unfair and abusive practice identified by the Bureau in this rulemaking, in part because evidence suggests low take rates for State mandated off-ramps or extended repayment plans.

The Bureau does not believe that the suggestion by some commenters of a more flexible ''sandbox'' approach to the cooling-off periods, or safe harbors while industry participants experiment with different cooling-off periods, is warranted. The Bureau's rulemaking process has involved several years of analysis and experience and the Bureau does not believe that the potential benefits from a period of further experimentation warrant delaying the consumer protection that would be provided by this rule. The Bureau set the length of the cooling-off period for the reasons described herein and in the proposed rule. This final rule does, however, take a more flexible approach than the proposal in prescribing how lenders must make ability-to-repay determinations, which the Bureau accomplished, in part, by not finalizing the proposed presumptions after each loan in a three-loan sequence as described above. Given that those presumptions are not being finalized, the Bureau believes that the remaining bright-line backstop of a strict cooling-off period is warranted.

Length of Cooling-off Period. The Bureau concludes that, when a consumer has borrowed three covered short-term or longer-term balloon-payment loans in a sequence, the cooling-off period before the consumer can take out another such loan should be set at 30 days rather than some longer or shorter period of time. The Bureau believes that a 30-day cooling-off period strikes the appropriate balance and accordingly is finalizing that duration in § 1041.5(d).

The Bureau's rationale for doing so is largely the same as the reasons the Bureau chose a 30-day period to define the parameters of a loan sequence: Namely, that major financial obligations generally are due on a monthly basis. During the SBREFA process, and in considering the comments on the proposal, including from the SBA Office of Advocacy, the Bureau heard examples of some consumers who paid for major financial obligation on a different cycle—like weekly rent. However, that does not change the fact that the traditional billing cycle in the United States is monthly. The Bureau has concluded that a consumer who returns to a lender to borrow again after paying a loan within a period consisting of a 30-day billing cycle is very likely to have shifted money around to pay the loan instead of expenses. Again, the Bureau's test for whether a consumer has the ability to repay is whether the consumer has the ability to repay the loan *as well as* major financial obligations and still meet basic living expenses. By contrast, if a consumer makes it through an entire billing cycle without needing to re-borrow, then it is more likely that she reached equilibrium and if the consumer then returns to borrow that may well reflect a new and independent borrowing need. As noted in the proposal, there is always some chance that a consumer will have a new need for a new loan within any re-borrowing period, no matter what time period it is based on. There also is some chance that the spillover effects of repaying an unaffordable loan will be felt for a prolonged period of time after the payment. Nonetheless, the Bureau has concluded that a 30-day re-borrowing period is the appropriate threshold for the definition of a sequence—accounting for one billing cycle, but not extending so far as to capture a significant number of genuine new credit needs. Similarly, the Bureau believes that a 30-day cooling-off period is the appropriate length of time to ensure that a consumer who has just re-borrowed twice in a row is sufficiently free from the spillover effects of those unaffordable loans before she borrows additional covered short-term or longer-balloon-payment loans.

The Bureau is also aligning the length of the cooling-off periods with the length of the re-borrowing period for purposes of greater simplicity and practicality. Extending the cooling-off period to 60 or 90 days, as some commenters recommended, would reduce access to credit to a significant extent. The Bureau does not judge that approach to be warranted at this time. The Bureau notes that it has considered whether to impose a cooling-off period of a different length than the re-borrowing period, and also has considered whether to impose a graduated cooling-off period, an alternative on which the Bureau sought comment (*e.g.,* 30 days after the first full loan sequence, 60 days after the second, 90 days after the third). The Bureau has judged these alternatives to be too complex to administer. The Bureau again believes that the logic for setting the re-borrowing period at 30 days is applicable here as well, and that in addition setting the cooling-off period and re-borrowing period at the same length is the simplest and most intuitive approach.

Treatment of Covered Longer-Term Balloon-Payment Loans. As noted above, the Bureau proposed to subject covered longer-term balloon-payment loans to the same presumptions that would have applied to covered short-term loans in situations in which the consumer's re-borrowing or struggles to repay a current loan suggested that they may not have the ability to repay a new loan. The Bureau did not specifically propose to impose a 30-day cooling-off period after the third longer-term balloon-payment loan in a sequence, but did seek comment on whether particular patterns of re-borrowing within a particular timeframe warranted additional protections. Consumer groups responded with proposals to strengthen the presumptions for longer-term loans, or add to the number of facts that would trigger a presumption.

After additional consideration, the Bureau has concluded that covered longer-term balloon-payment loans should be treated in the same manner as covered short-term loans where there is a sequence of three loans (*i.e.,* where the loans are each taken out within 30 days of each other). In such circumstances, three prior ability-to-repay determinations will have proven inconsistent with the consumer's actual experience. For consumers who reach that point, the Bureau believes that terminating a loan sequence may assist the consumer to escape from the cycle of indebtedness. Particularly for loans with terms that slightly exceed the limits for a covered short-term loan and that have very large end payments—such as a 46-day lump-sum loan structure—the Bureau believes that the risks of consumers becoming stuck in a long cycle of borrowing absent a mandatory cooling-off period would be

similar to those for covered short-term loans.

Borrowing history. As in the proposal, a lender will need to obtain a report from a registered information system to assess whether a consumer has or had loans from other lenders that would make a new loan violate either § 1041.5(d)(2) or (3). The Bureau received comments about what happens (or should happen) if no registered information system is available. Section 1041.5(d)(1) requires that a lender obtain a consumer report from a registered information system only if such a report is available. If no report is available, either because no entity has been registered as an information system for 180 days or more or because no registered information system is capable of producing a report at the time the lender is contemplating making a covered loan (for example, due to temporary system outage), a lender does not violate § 1041.5 if it makes a covered loan without obtaining a consumer report from a registered information system.[847]

Regarding the comment from consumer groups that the rule should provide for mandatory checking of State databases when no report from a registered information system is available, the Bureau declines to impose this requirement because it does not believe it would be useful for compliance with this part.[848] The Bureau also does not believe such a requirement is necessary; State laws already require such activity, and this rule would not preempt any such requirements. With regard to comments asking whether lenders must obtain a consumer report from another registered information system in the event the registered information system from which the lender regularly obtains reports is unavailable for some reason (*e.g.,* a temporary system outage), the Bureau believes that it is reasonable and appropriate to impose such a requirement given the importance of the information contained in a registered information system report in assessing whether the lending limitations contained in § 1041.5(d) are triggered. The Bureau notes that lenders are required to furnish information to every registered information system and thus a lender should not experience difficulty in maintaining a backup purchasing relationship with a registered information system other than the one from which the lender regularly obtains reports.

Annual loan limits. The Bureau addresses the comments it received regarding annual loan limits. At the outset, the Bureau finds it necessary to address a common misperception in the comments, including those submitted by many individual commenters and a trade group commenter described above. Some commenters perceived that the restrictions in proposed § 1041.7 (now § 1041.6 of the final rule) on the number of exempt covered short-term loans and the time of indebtedness on such loans within a 12-month period applied to *all* covered short-term loans. However, under the proposal, if consumers took out the maximum number of covered short-term loans under proposed § 1041.7 in a 12-month period and therefore could no longer obtain an exempt covered short-term loan under that provision, the proposal still would have permitted them to obtain a covered short-term loan within the 12-month period as long as they met the ability-to-repay requirements under proposed § 1041.5.

The final rule contains a similar framework. Section 1041.6 permits a consumer to obtain loans under that provision so long as the consumer has not taken out six covered short-term loans or become indebted on covered short-term loans for 90 days within a 12-month period. After reaching either of those caps, a consumer could continue obtaining loans under § 1041.5, subject to the requirements of § 1041.5, including the ability-to-repay determination and the cooling-off period that applies after three loans in a sequence.

The Bureau received many comments from stakeholders who were supportive of the proposal in general, including consumer advocates, elected officials, and others, but who urged the Bureau to impose a cap on covered short-term lending of six loans or 90 days of indebtedness in a 12-month period. The Bureau declines to impose such a limit. The Bureau has imposed such a cap on loans made under § 1041.6 because such loans can be made without assessing the consumer's ability to repay. As explained in the discussion of that section, the Bureau is concerned about the risks of making such loans to consumers who have demonstrated a pattern of extensive borrowing. However, that same logic does not extend to § 1041.5 since loans made under that section do require an ability-to-repay determination.

The Bureau is concerned that blanket caps limiting all consumers to no more than six covered short-term loans in a 12-month period and to 90 days of indebtedness within a 12-month period would unduly restrict access to credit. A consumer may have several unusual and non-recurring borrowing needs over the course of a 12-month period, with several months in between any loan sequence. A cap of this sort would deny access to credit to such consumers later in the year, regardless of their particular circumstances, even if they have the ability to repay. This restriction also would mean that a consumer who takes the maximum number of permitted exempt covered short-term loans under § 1041.6 could not take out another covered short-term loan during the 12-month period—even one for which they have the ability to repay. The Bureau is also mindful of the high number of individual consumers who commented on the concerns they had about potential restrictions on access to credit. The provisions in § 1041.5 of the final rule requiring ability-to-repay underwriting according to specific criteria directly address the risks and harms created by the identified unfair and abusive practice. That practice of making loans without reasonably determining the borrower's ability to repay the loan according to its terms enables lenders to make unaffordable loans that mire many consumers in extended loan sequences through repeat re-borrowing—or else leads them to experience default, delinquency, or the collateral consequences of forgoing basic living expenses or major financial obligations to avoid defaulting on their unaffordable loans. Without moving to the stricter specification of an overall loan cap, the Bureau believes that the measures in § 1041.5 are sufficiently calibrated to prevent consumers from experiencing the risks and harms associated with the unfair and abusive practice.

Furthermore, the Bureau has eliminated the specific regulatory requirements around non-covered bridge loans—in proposed §§ 1041.6(h) and 1041.10(f)—because it has determined that these requirements would be too complex to implement. At the same time, the Bureau recognizes, as

[847] This is in contrast to loans under § 1041.6, which are not permitted if a consumer report from a registered information system is unavailable.

[848] The Bureau does not believe that such State databases provide information that lenders would need to comply with this part. For example, the Bureau understands that most if not all of such databases issue an eligibility determination under State law to lenders contemplating making loans, rather than information about outstanding and prior loans that lenders will need to comply with this part. Such databases typically simply indicate whether the contemplated loan may or may not be made under State law. Further, certain information required for compliance with this part is specific to this part and likely will not be required to be reported to State databases by lenders under State law. For example, § 1041.10(c)(1)(iii) requires lenders to furnish whether the loan is a covered short-term loan or a covered longer-term balloon-payment loan as those terms are defined in this part.

noted by consumer groups, that any kind of non-covered loan could be used as a means to bridge over a re-borrowing period or cooling-off period. Thus, the Bureau is addressing the concerns animating these proposed provisions by adding an example in comment 5(b)–2.iv.E, noting that frequent instances of using any kind of non-covered loans to bridge between loan sequences could indicate that the ability-to-repay determinations are not reasonable.

In § 1041.5(d)(3), the Bureau has finalized the prohibition against making covered short-term loans or longer-term balloon payment loans under § 1041.5 within 30 days of a loan made under § 1041.6 (as was proposed in proposed §§ 1041.6(g) and, to a certain extent, 1041.10(e)). These provisions were designed to ensure that protections in proposed § 1041.7 requiring a step-down of the amount of principal over three loans in a sequence worked as intended, and is otherwise based on the same rationale as was in the proposal.[849]

5(e) Prohibition on Evasion of § 1041.5

The Bureau is also adding a new § 1041.5(e), which states that a lender must not take any action with the intent of evading the requirements of § 1041.5 of the final rule. The Bureau had proposed a general anti-evasion provision in proposed § 1041.19, and is finalizing that more generalized anti-evasion provision at § 1041.13 of the final rule. Nonetheless, the Bureau has decided to add this more specific paragraph to § 1041.5 so that it can provide guidance on anti-evasion within the specific context of that section. Comment 5(e)–1 clarifies that the standard for what constitutes evasion is the same as that in the broader provision, § 1041.13 of the final rule, which is applicable to part 1041 in its entirety. The Bureau addresses comments about that more general standard below in the section-by-section analysis of § 1041.13.

For illustrative purposes, the Bureau provided one example at comment 5(e)–2, which is a particular fact pattern that may be considered an evasion of § 1041.5.[850] Modified in response to comments received, the substance of the example in comment 5(e)–2 is based on the illustrative example that had been presented in proposed comment 19–2.ii. For ease of reference, it has been moved here. Consumer groups requested that the Bureau alter the example to clarify that late fees are considered rollovers or re-borrowing, and that the example was not viewed as exhaustive, meaning other scenarios could lack elements from this fact pattern and still constitute possible evasions. The Bureau does not believe these clarifications are necessary. The example is not exhaustive. All late fees would not be considered rollovers or re-borrowing, but as noted in the example, when combined with other features, may prove intent to evade the rule. The final comment 5(e)–2 consists, among other things, of a covered short-term or longer-term balloon-payment loan structure that requires a consumer to accrue a late fee for every two weeks of non-payment, in an amount that meets or exceeds the normal finance charge. The comment further explains that depending on the relevant facts and circumstances, including the lender's prior practices, the lender may have taken these actions with the intent of evading its obligations in § 1041.5(b) (underwriting) and § 1041.5(d) (cooling-off period, if the late fees accrue beyond the time when the cooling-off period would begin if the late fees instead were new loans) and as a result the lender may have violated § 1041.5(e). The explanation of how the conduct may violate § 1041.5(e) was not contained in the proposed comment, but was added to provide more clarity on specific actions that may indicate an intent to violate the provision and thereby support a possible violation of § 1041.5(e) of the final rule.

Section 1041.6 Conditional Exemption for Certain Covered Short-Term Loans

Proposed § 1041.7 would have exempted covered short-term loans that satisfy certain conditions from proposed §§ 1041.4, 1041.5, and 1041.6. The Bureau is finalizing the proposed conditional exemption for certain covered short-term loans, largely as proposed, but with several substantive adjustments and renumbered as § 1041.6 in light of other changes to the rule. This section first describes the Bureau's general approach to the exemption in the proposed rule, the Bureau's legal authority for the exemption, some comments received on the general approach to the exemption, and a high-level summary of the final rule. Then the Bureau will discuss each portion of § 1041.6, the comments received, and the final rule in turn.

General Approach in the Proposed Rule

The Bureau proposed to exempt covered short-term loans under proposed § 1041.7 from proposed §§ 1041.4, 1041.5, and 1041.6. Because loans made under proposed § 1041.7 would not have been subject to the underwriting criteria in proposed § 1041.5 and the additional borrowing limitations in proposed § 1041.6, proposed § 1041.7 would have included a number of screening and structural provisions to protect consumers in place of those other requirements. The Bureau believed that these protections would reduce the likelihood and magnitude of the kinds of risks and harms to consumers from unaffordable payments on covered short-term loans that were discussed in the section in the proposal on Market Concerns—Short-Term Loans, including the harms that result to consumers from extensive re-borrowing in long sequences of short-term loans.[851]

In the proposal, the Bureau recognized, based on its own research and that of others, that even where lenders do not engage in any meaningful underwriting, some consumers are in fact able to repay a short-term loan when it comes due without further re-borrowing. These consumers thus avoid at least some, if not all, of the risks and harms with which the Bureau is concerned. For example, as described in the CFPB Report on Supplemental Findings, approximately 22 percent of new payday loan sequences do not result in any re-borrowing within the ensuing 30 days.[852] While the Bureau believed that most of these consumers would be able to demonstrate their ability to repay and thus could continue to obtain loans under the proposal, the Bureau recognized there may be a subgroup of consumers for whom this is not true and who would be denied loans even though they could, in fact, afford to repay them.

[849] As noted above, § 1041.6(d), which is also based on proposed § 1041.10(e), places a related limitation on lenders and their affiliates making loans within 30 days of a prior outstanding loan under § 1041.6 by the same lender or its affiliates.

[850] Note that this example is similar to a real-life fact pattern. *See* Press Release, S.D., Dep't of Labor and Regulation, ''Statement from Division of Banking on Dollar Loan Center,'' (Sept. 13, 2017), *http://dlr.sd.gov/news/releases17/nr091317_dollar_loan_center.pdf.*

[851] The Bureau's legal authority to grant conditional exemptions from its rules in certain circumstances is discussed below, as is its authority to prescribe rules for accurate and effective disclosures as well as the use of model forms.

[852] *See* CFPB Report on Supplemental Findings, Chapter 5. The Bureau's finding may overstate the extent to which payday borrowers are able to avoid re-borrowing, since the Bureau's study looked at borrowing from a single lender. A study that tracks borrowers across five large lenders, who together make up 20 percent of the storefront payday market, found that 21 percent of borrowers switch lenders and of those borrowers roughly two-thirds did so within 14 days of paying off a prior loan. *See* Clarity Services, ''Finding the Silver Lining in Regulatory Storm Clouds: Consumer Behavior and Borrowing Capacity in the New Payday Market,'' at 4, 9 (2015) (hereinafter ''Finding the Silver Lining in Regulatory Storm Clouds''), *available at https://www.nonprime101.com/wp-content/uploads/2015/10/FISCA-10-15.pdf.*

The proposal noted that some of these consumers may take out a payday or title loan, repay it on the contractual due date, and never again use such a loan. Others may return on another occasion, when a new need arises, likely for another single loan or a short sequence.[853] Further, even among those who do re-borrow, the Bureau's research indicated that about 16 percent of payday sequences ended with final repayment within three loans, without either defaulting or re-borrowing within 30 days after the last payment has been made.[854]

In addition, the proposal noted that the Bureau's research suggested that even consumers who re-borrow many times might have shorter loan sequences if they were offered the option of taking out smaller loans each time they returned to re-borrow—instead of being presented only with the binary option of either rolling over the loan without paying down any principal (in States where rollovers are permitted) or repaying the full amount of the loan plus the finance charge, which often leads the borrower to take out another loan in the same amount.[855]

Finally, the Bureau recognized that the verification and other underwriting criteria in proposed §§ 1041.5 and 1041.6 would have imposed compliance costs that some lenders, especially smaller lenders, may have found difficult to absorb for covered short-term loans, particularly for those loans that are relatively small in amount.

In light of these considerations, the Bureau believed that it would further the purposes and objectives of the Dodd-Frank Act to provide a simpler alternative to the specific underwriting criteria in proposed §§ 1041.5 and 1041.6 for covered short-term loans, but with robust alternative protections against the harms that consumers experience from loans with unaffordable payments. Proposed § 1041.7 would have permitted lenders to extend to consumers a sequence of up to three loans, in which the principal is reduced by one-third at each stage and certain other conditions are met, without following the underwriting criteria specified in proposed § 1041.5 and without satisfying the limitations of proposed § 1041.6.

The Bureau's approach to a conditional exemption for covered short-term loans garnered discussion from stakeholders even before the proposal was issued. During the SBREFA process and the Bureau's outreach following its release of the Small Business Review Panel Report, many lenders and other industry stakeholders argued that the alternative requirements for covered short-term loans presented in the Report would not provide sufficient flexibility to sustain a lender's profitability in making covered short-term loans.[856] In contrast, during the Bureau's outreach before and after the release of the Report, many consumer advocates argued that permitting covered short-term loans to be made without meeting specified underwriting criteria would weaken the overall framework of an ability-to-repay rule, and urged the Bureau not to adopt any alternatives that would sanction a series of repeat loans.[857]

The Bureau carefully considered this feedback in developing the proposed rule and in particular in developing proposed § 1041.7. With regard to the industry argument that the approach described in the Report would not allow lenders to remain profitable, the Bureau believed that reflected the heavy reliance of many lenders on revenue from borrowers who experience long sequences of covered short-term loans. Since the Bureau began studying the market for payday, vehicle title, and similar loans several years ago, it has noted its significant concern with the amount of long-term re-borrowing observed in the market, and the apparent dependence of many lenders on such re-borrowing for a significant portion of their revenues.[858] The Bureau was sensitive to the impact that the proposed rule would have had on small entities, but to the extent they are relying on repeated re-borrowing and long loan sequences for a substantial portion of their revenues, the Bureau had the same concerns here about significant harm to consumers that it found to exist more generally with this market. Proposed § 1041.7 would have permitted consumers with emergencies or occasional shortfalls to receive a limited number of covered short-term loans without having to meet the underwriting criteria in proposed §§ 1041.5 and 1041.6, but would have addressed the risks and harms to consumers from such loans by providing them with an alternative set of protective requirements.

The Bureau acknowledged in the proposal that a substantial number of loans currently being made in the marketplace would not qualify for the exemption under proposed § 1041.7 because they are part of extended cycles of re-borrowing that are very harmful to many consumers. The Bureau noted that some lenders may be able to capture scale economies and build a business model that relies solely on making loans under proposed § 1041.7, with their approach to underwriting such loans likely having to be adjusted to take account of substantial declines in re-borrowing revenue. For other lenders, the Bureau expected that loans made under proposed § 1041.7 would become one element of a business model that would also incorporate covered short-term and longer-term loans, loans that are not covered by this rule, and perhaps other financial products and services as well.

As for the consumer advocates that disfavored any alternatives to requiring lenders to meet specified underwriting criteria for covered short-term loans, the Bureau issued its proposal because it did not believe that providing a carefully constructed alternative to the specific underwriting criteria proposed in §§ 1041.5 and 1041.6 would significantly undermine consumer protections. The Bureau noted that the proposed exemption would provide a simpler means of obtaining a covered short-term loan for consumers where the loan is likely to prove less harmful. That was so, the Bureau noted, because proposed § 1041.7 included a number of safeguards, including the principal step-down requirements and the fixed limit on the number of loans in a sequence of

[853] The study described in the previous footnote, using data over a four-year period, found that 16 percent of borrowers took out one payday loan, repaid it on the contractual due date, and did not return again during the period reviewed; that the median such borrower had 2 sequences over four years; and that the average such borrower had 3.37 sequences. (This study defined sequence, as did the Bureau's 2014 Data Point, by using a 14-day period.). *See* Finding the Silver Lining in Regulatory Storm Clouds, at 8, 14.

[854] CFPB Report on Supplemental Findings, Chapter 6.

[855] CFPB Report on Supplemental Findings, Chapter 6.

[856] *See* Small Business Review Panel Report, at 22. During and after the SBREFA process, the Bureau was considering two options, one of which would have allowed three-loan sequences with a subsequent off-ramp stage for consumers who had not been able to repay the principal, and one that would have required principal step-downs similar to the approach the Bureau ended up proposing. SERs and other industry stakeholders criticized both approaches because they would have limited lending to three-loan sequences and imposed limits on how many alternative loans could be taken out per year.

[857] Letter from Americans for Financial Reform to the Hon. Richard Cordray, Director, Bureau of Consumer Fin. Prot., (Oct. 23, 2014) (regarding proposed payday loan rules), *available at http://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/payday_letter_director_cordray_cfpb_102314.pdf*.

[858] *See* Market Concerns—Underwriting. *See also* Richard Cordray, Director, Bureau of Consumer Fin. Prot., ''Prepared Remarks of CFPB Director Richard Cordray at the Field Hearing on Payday Lending,'' (Mar. 26, 2015), Richmond, Virginia), *available at http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-field-hearing-on-payday-lending/*.

such loans, to ensure that consumers cannot become trapped in long-term debt on an ostensibly short-term loan. The Bureau believed that those safeguards also would reduce the risk of harms from default, delinquency, re-borrowing, and the collateral consequences of making unaffordable loan payments while forgoing basic living expenses or major financial obligations during a short sequence of these loans. The proposal reflected the Bureau's view that the requirements in proposed § 1041.7 would appropriately balance the goal of providing strong consumer protections with the goal of permitting access to less risky credit on less prescriptive terms.

The Bureau noted that by including an alternative set of requirements under proposed § 1041.7, the Bureau was not suggesting that regulation of covered short-term loans at the State, local, or Tribal level should encompass only the provisions of proposed § 1041.7. On the contrary, proposed § 1041.7(a) would not have provided an exemption from any other provision of law. The Bureau noted that many States and other non-Federal jurisdictions have made and likely will continue to make legislative and regulatory judgments about how to treat such loans, including usury limits, prohibitions on making high-cost covered short-term loans, and other strong consumer protections under legal authorities that in some cases extend beyond those conferred on the Bureau. The proposed regulation would have coexisted with—rather than supplanted—State, local, and Tribal regulations that impose a stronger framework that is more protective of consumers, as discussed in part IV. In the same vein, the Bureau noted that proposed § 1041.7 also would not have permitted loans to servicemembers and their dependents that would violate the Military Lending Act and its implementing regulations.

The Bureau requested comment generally on whether to provide an alternative to the requirement that lenders meet the specific underwriting criteria in proposed §§ 1041.5 and 1041.6 for covered short-term loans that satisfy certain requirements. The Bureau also sought comment on whether proposed § 1041.7 would appropriately balance the considerations regarding consumer protection and access to credit that presents a lower risk of harm to consumers. The Bureau sought further comment on whether covered short-term loans could be made in compliance with proposed § 1041.7 in States and other jurisdictions that permit covered short-term loans. In addition, the Bureau sought comment on the appropriateness of each of the proposed requirements in proposed § 1041.7, and more generally on the costs and other burdens that would be imposed on lenders, including small entities, by proposed § 1041.7.

General Comments Received

The Bureau here is addressing the general comments that it received on the conditional exemption in proposed § 1041.7, and discusses the comments pertaining to its more specific components when addressing them below.

A significant number of industry members and trade associations opposed the Bureau's proposed conditional exemption. Several argued that the conditions in the proposed exemption are too restrictive and would severely reduce revenue, profits, and access to credit. A number of State Attorneys General similarly argued that the exemption in proposed § 1041.7 was not workable and would generate too little revenue to allow lenders to remain in business. Some industry commenters argued that the Bureau had not adequately justified the conditions of the proposed exemption, arguing that there was no data supporting the structural limitations of the exemption. One commenter, in connection with its argument that the Bureau had not shown that payday loans cause consumer harm, contended that the Bureau has provided no justification for providing the exemption in proposed § 1041.7.

Several industry commenters opposed § 1041.7 as proposed because, they argued, the conditionally exempt loans would fail to meet the needs of borrowers, especially those who needed a loan for an emergency expense.[859] Commenters argued that the requirements of proposed § 1041.7 would reduce the speed and convenience of the product, diminishing its value and therefore harming borrowers who are currently able to repay. Some commenters argued that the Bureau had underestimated how much its proposed approach would reduce lending volumes and thus the availability of credit, citing either their own studies or the studies of others.[860]

One industry commenter argued that the disclosures that would have been required by proposed § 1041.7(e) for loans made under § 1041.7 demonstrate that disclosures can be effective and maintained that the rule as a whole should focus on disclosures rather than on imposing more restrictive provisions such as ability-to-repay requirements. Another industry commenter argued that instead of offering an exemption under proposed § 1041.7, the rule should consider setting limits on the number of consecutive transactions a consumer may obtain under proposed § 1041.5 or requiring an ''off-ramp'' after a certain period of indebtedness.

Some commenters argued that the exemption in proposed § 1041.7 was not broad enough and that it should exempt lenders from other requirements. For example, several commenters affiliated with banks or credit unions urged the Bureau to expand the exemption. Commenters asserted that even conditionally exempt loans would require banks or credit unions to comply with other portions of the rule, and this compliance would impose significant costs, causing them to leave the market.

Some State officials took a different tack, urging the Bureau to further limit the extent of the exemption in proposed § 1041.7 and arguing that if the exemption existed at all, it should be limited to loans with APRs below 25 percent because loans with higher interest rates risk being unaffordable to consumers. Another commenter urged the Bureau to require lenders to refund finance charges if the borrower paid back a loan early. The commenter asserted that requiring a partial refund of fees when a borrower paid back a loan sequence early would encourage borrowers to make earlier payments and would reduce the amount of money that borrowers ultimately paid over the course of the loan sequence.

Consumer groups and many individual commenters urged the Bureau to eliminate the conditional exemption in proposed § 1041.7. They argued that ability-to-repay determinations are necessary to prevent the identified unfair or abusive practice, and thus there should be no exemptions from those portions of the rule. A coalition of consumer groups argued that the exemption would not prevent substantial payments from coming due in a short amount of time, which would not be affordable to borrowers. Another commenter argued that lenders making covered short-term loans will exploit any loophole, and thus lenders would exploit the exemption. Some commenters also argued that the exemption would allow for unaffordable loans and that unaffordable loans cause substantial harm. Others pointed to data suggesting that conditionally exempt

[859] Hereinafter these loans made pursuant to § 1041.7 of the proposed rule or § 1041.6 of the final rule will be referred to as ''conditionally exempt loans.''

[860] Comments assessing the Bureau's estimates of the impact of proposed § 1041.7 are discussed below in part VII.

loans would be unaffordable for borrowers. They argued that even small payments are often unaffordable and that even one unaffordable loan can cause substantial harm. Because the exemption would allow loans to be made without meeting specific underwriting criteria, they argued that it would increase the incidence of these harms.

Consumer groups also urged the Bureau not to adopt the exemption in proposed § 1041.7 because they viewed it as inconsistent with the rest of the rule. They said the Bureau had persuasively demonstrated in proposed § 1041.4 that loans made without an ability-to-repay determination cause substantial harm. Because the exemption would allow loans that did not meet that standard, they argued that it was inconsistent with the rest of the rule. These commenters also suggested that the proposal's reasoning about why conditionally exempt loans under proposed § 1041.7 should not be permitted to include a security interest in an auto title applies to payday loans as well. And they stated that they were unaware of any precedent from other regulators for adopting a similar exemption.

A non-profit group argued that the exemption was likely to be ineffective because lenders would make more money on longer-term loans and therefore would not offer conditionally exempt loans under proposed § 1041.7. It also argued that the exemption would not allow lower-cost lenders to make loans.

Several State Attorneys General argued that the rule should not include any exemption from the ability-to-repay requirements, though one stated that if the Bureau were to retain an exemption, it should be structured as in proposed § 1041.7. One attorney general urged the Bureau to monitor the effectiveness of the exemption periodically in order to ensure that it did not permit lenders to continue to make unaffordable loans on a regular basis.

Some consumer groups criticized proposed § 1041.7 because it would not have required lenders to verify income for conditionally exempt loans, which they argue is necessary for all loans. Others also urged the Bureau not to adopt the proposed exemption because it could risk undermining State laws that restrict payday lending if lenders were to cite the exemption as evidence that payday loans are deemed to be safe.

Both consumer group and industry commenters asked the Bureau to clarify how the requirements of the proposed rule would interact with existing State law. One commenter noted that some cities allow loans to roll over three times—for a total of four loans—while the proposed rule would only allow two rollovers. This commenter also urged the Bureau to promulgate a definition to clarify when the provisions of the rule would provide ''greater consumer protection'' than other measures, especially State laws for purposes of preemption under the Dodd-Frank Act. Industry commenters similarly expressed concerns about interactions with State law, asserting that many States mandate extended payment plans, and arguing that the Bureau does not have the authority to displace those State laws.

Final Rule

The Bureau is finalizing proposed § 1041.7 as § 1041.6 of the final rule to provide for conditionally exempt loans, with several technical changes to accommodate other changes in the rule, and with one more substantive change that is summarized below and explained in more detail in the section-by-section analysis of § 1041.6(d).

Proposed § 1041.7(d) would have required that, for the purpose of calculating the period for determining whether loans made under proposed § 1041.7 would be part of the same loan sequence, a lender or its affiliate must not count the time when it had a non-covered bridge loan (as defined in proposed § 1041.2(a)(13)) outstanding with the consumer. As discussed in more detail in the section-by-section analysis of § 1041.6(d), in the final rule, the Bureau has replaced the ''tolling'' provision in proposed § 1041.7(d) relating to non-covered bridge loans with § 1041.6(d), which prohibits a lender or its affiliate from making any covered or non-covered loans (other than a loan under § 1041.6) within 30 days of a loan made under § 1041.6 of the final rule.

The Bureau is finalizing the exemption substantially as proposed based on the grounds set forth in the proposal and discussed above. As described and explained further in § 1041.6(c)(3) and (d) below, the exemption has been carefully designed to minimize the risk of borrowers becoming trapped in cycles of re-borrowing. In § 1041.4 of the final rule, the Bureau has identified the substantial risks and harms to consumers associated with lending without making reasonable determinations that borrowers have the ability to repay—default, delinquency, re-borrowing, and other harms associated with avoiding default. Because loans made under § 1041.6 would not be required to meet the specific underwriting criteria in § 1041.5, the specific features of this conditional exemption are designed to mitigate those harms. Certain requirements for loans made under § 1041.6 (and described in more detail below), including the 3-loan cap, the cooling-off period, and the specific limitation on indebtedness in a 12-month period, are all intended to prevent extended re-borrowing. Other requirements for loans made under § 1041.6, including the principal-reduction requirements, the prohibition on security interests in vehicle titles, and the limits on loan amounts, are intended to prevent re-borrowing, and prevent or reduce the risks and harms associated with default, delinquency, and forgoing basic living expenses or major financial obligations to avoid default.

The Bureau also has concluded that, compared to specific alternatives suggested by certain commenters, the exemption in § 1041.6 is likely to be more effective at balancing the need for consumer protections with preservation of access to credit. As noted above, an industry commenter argued that instead of offering an exemption under proposed § 1041.7, the rule should consider setting limits on the number of consecutive transactions a consumer may obtain under proposed § 1041.5 or requiring an ''off-ramp'' after a certain period of indebtedness. The Bureau agrees that prescribing certain limits on sequential borrowing would help limit the harms that result from repeated re-borrowing and has prescribed certain limits in § 1041.6(c)(2) for conditionally exempt loans made under § 1041.6, as well as in § 1041.5(d) for loans made under the ability-to-repay requirements in § 1041.5. However, as discussed in the section-by-section analysis for §§ 1041.5 and 1041.6, the Bureau has concluded that additional protections are necessary to protect consumers against the risks and harm from unaffordable loans.

The Bureau is not persuaded by the commenter's argument that because the disclosures proposed for these conditionally exempt loans under § 1041.6 can be effective; it follows that the entire substance of this rule can therefore be replaced with a disclosure-only rule. The Bureau recognizes that disclosures like those finalized in § 1041.6(e) can be valuable and effective in educating consumers on how their choices may be affected by the restrictions prescribed in the final rule. Yet the Bureau does not believe that prescribing disclosures to explain the provisions of § 1041.6 is inconsistent with the conclusion that disclosures alone do not suffice to protect

consumers against the harms targeted in this rulemaking. As discussed above in the section-by-section analysis for § 1041.5, the Bureau has concluded that disclosures alone are not enough to protect consumers against the risks and harms of unaffordable loans.

With respect to the recommendation to require off-ramps instead of providing for a conditional exemption, the Bureau concludes that off-ramps alone would not provide sufficient protection to consumers. As discussed in the section-by-section analysis of § 1041.6(b) through (e), the Bureau believes those provisions offer important protections against harms from default, delinquency, re-borrowing, and forgoing basic living expenses or major financial obligations to avoid default. While off-ramps likely would help consumers who are struggling to repay their loans by giving them additional time and reducing their payments, they would not mitigate the potential harms as effectively as the suite of protections in § 1041.6. Moreover, as some commenters noted, lenders frequently have managed to find ways to discourage consumers from taking advantage of off-ramp options under existing State laws, and therefore the Bureau has determined that off-ramps would be less effective at improving the chances that consumers will be able to repay covered short-term loans without becoming mired in extended loan sequences.

As noted above, the Bureau has concluded that the structural requirements of the exemption are well-designed to prevent or mitigate the harm that results from unaffordable short-term loans, but the Bureau also has concluded that making the requirements of the exemption more demanding would restrict its value to consumers and lenders. A range of commenters argued that the exemption should be limited to loans with certain APRs, that conditionally exempt loans should remain subject to income verification, or that lenders should be required to pay back finance charges if borrowers repay early. While the requirements in § 1041.5 of the final rule are designed to prevent the harms identified in § 1041.4, the Bureau has recognized that those requirements may be burdensome to some lenders and consumers, and thus finds it prudent to offer a less restrictive alternative to address the identified harms.

As noted above, some industry commenters argued that the underwriting requirements in proposed §§ 1041.5 and 1041.6 would be unworkable and that the exemption in proposed § 1041.7 would not provide a feasible alternative. The Bureau has endeavored to substantially address the concerns raised about the complexity and burdens of the underwriting requirements, as adopted in § 1041.5, through revisions to those requirements as discussed above. Section 1041.6 was intended to reduce burden and allow for a more feasible alternative to loans made under § 1041.5. In particular, it does not require lenders to meet the specific underwriting criteria set out in § 1041.5. It does, however, still impose some restrictions, which in turn involve some burden. The Bureau acknowledges this, but considers each of the restrictions imposed in § 1041.6 necessary or appropriate to ensure that the exemption does not allow significant amounts of harms to continue under the exemption.

Having said that, the Bureau recognizes, as commenters noted, that allowing lenders to continue making covered short-term loans without requiring the loans to meet the underwriting criteria specified in § 1041.5 poses some risk, even with the protections that are built into the exemption. Those risks include the likelihood that at least some loans meeting the conditions under § 1041.6 may be unaffordable at least to some consumers. The Bureau acknowledges these concerns, and agrees that finalizing § 1041.5 without this exemption would create a more rigid framework that would more completely prevent the risks and harms identified in § 1041.4. But a significant animating influence in the Bureau's decision to include this exemption was the aim of acting prudently in fashioning its first underwriting rule for this market, while recognizing as noted above that some borrowers that likely cannot satisfy the ability-to-repay test may still be able to repay their loans without re-borrowing.[861]

As some commenters suggested, the Bureau will monitor how lenders use conditionally exempt loans to see if the risks and harms identified in this rule are being perpetuated, and stands ready to take action if it sees this occurring. Of course, lenders will also need to comply with more restrictive State laws as applicable, which is consistent with the notion that this rule is a floor and not a ceiling on consumer protections, both in general and for purposes of preemption as discussed in part IV.[862]

Additionally, the Bureau judges it likely that lenders will find it in their self-interest to engage in additional underwriting before making conditionally exempt loans given that the re-borrowing restrictions with respect to such loans will mean that lenders cannot count on revenue from extended loan sequences to cover the costs of defaults. Put differently, the distinct conditions for these loans will likely lead to modifications in the lending practices of those lenders choosing to utilize the provisions of § 1041.6. Those conditions are likely to prompt more caution in making such loans, because the costs incurred by making unaffordable loans cannot be offset by heavy volumes of re-borrowing fees.

The Bureau also disagrees with the claim made by some commenters that after having identified as an unfair and abusive practice the making of covered short-term loans without reasonably determining that the borrower has the ability to repay the loans according to their terms, the Bureau must prohibit all such loans in all circumstances. As explained further below, the Bureau has express legal authority to issue exemptions from its rules. The Bureau agrees that the measures intended to mitigate the harms caused by the practice identified as unfair and abusive in § 1041.4 may not entirely mitigate those harms when lenders make conditionally exempt loans without underwriting according to the criteria laid out in § 1041.5. At this time, however, the Bureau deems it prudent to accept that level of risk in light of the positive effects that § 1041.6 will have on reducing burden and providing access to credit while continuing to mitigate most of the harms caused by the practice identified in § 1041.4.

Both consumer and industry commenters asked the Bureau to clarify how the requirements of § 1041.6 would interact with existing State law. The provisions to which the commenters objected are merely conditions for loans to satisfy the § 1041.6 exemption, not

[861] It should be recognized that with the modifications made to § 1041.5, the Bureau has determined that the population of people who cannot establish the ability to repay, yet can actually repay, has reduced substantially.

[862] In response to commenters' that expressed concerns that this exemption may influence State law, or be used by others to influence State law, the Bureau has no comment on what State legislatures should do in the future, and trusts that they will advance their own policy goals while keeping in mind that, as a matter of preemption, this rule acts as a floor rather than a ceiling on consumer protections, and beyond that threshold the States are free to engage in further regulation of covered loans as they may determine to be appropriate, including by imposing usury caps as a number of States have chosen to do, whereas Congress prohibited the Bureau from imposing any usury limits. *See* 12 U.S.C. 5517(o) (Bureau may not impose a ''usury limit''); *see also* part II (discussing different State approaches to these issues); part IV (discussing legal authorities and preemption under section 1041 of the Dodd-Frank Act).

new requirements that the Bureau is imposing on all loans. If a lender cannot legally offer a loan meeting such conditions in the State or city where a conflicting requirement exists, then that lender simply cannot offer loans that qualify for the § 1041.6 exemption, though it always can underwrite loans under the provisions of § 1041.5 where State law permits such loans to be made. To be clear, however, nothing in this rule categorically prohibits extended repayment plans. To the extent that some jurisdictions presently allow loans to be rolled over three times, the cap of two partial rollovers (subject to the prescribed limits on the amounts that can be rolled over) in § 1041.6 nevertheless must be met for loans to qualify for the conditional exemption.

Legal Authority

Section 1041.6 establishes an alternative set of requirements for covered short-term loans that, if complied with by lenders, conditionally exempts them from § 1041.4 and the specific underwriting criteria in § 1041.5.[863] The requirements of § 1041.6 have been developed pursuant to section 1022(b)(3)(A) of the Dodd-Frank Act, which authorizes the Bureau to grant conditional exemptions in certain circumstances from its rules. With respect to § 1041.6(e), the Bureau developed the proposed disclosures by relying on its authority under section 1032(a) of the Act, which allows it to prescribe rules to ensure that the features of a consumer financial product or service are fully, accurately, and effectively disclosed to consumers, and section 1032(b) of the Act, which provides for the use of model forms. These sources of legal authority for § 1041.6 of the final rule are explained more fully below.

Section 1022(b)(3)(A) of the Dodd-Frank Act—Exemption Authority

Section 1022(b)(3)(A) of the Dodd-Frank Act authorizes the Bureau, by rule, to ''conditionally or unconditionally exempt any class of . . . consumer financial products or services'' from any provision of Title X of the Act or from any rule issued under Title X as the Bureau determines ''necessary or appropriate to carry out the purposes and objectives'' of Title X.[864] The purposes of Title X are set forth in section 1021(a) of the Act, which provides that the Bureau shall 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 [such markets] are fair, transparent and competitive.'' [865]

The objectives of Title X are set forth in section 1021(b) of the Dodd-Frank Act.[866] This section authorizes the Bureau to exercise its authorities under Federal consumer financial law for five specified purposes, two of which are relevant here. In particular, the Bureau may exercise its authorities under Federal consumer financial law 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;'' [867] (2) consumers ''are protected from unfair, deceptive, or abusive acts and practices and from discrimination;'' [868] (3) ''outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens;'' [869] (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;'' [870] and (5) ''markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.'' [871]

When issuing an exemption under section 1022(b)(3)(A) of the Dodd-Frank Act, the Bureau is required under section 1022(b)(3)(B) of the Act to take into consideration, as appropriate, three factors: (1) The total assets of the class of covered persons; [872] (2) the volume of transactions involving consumer financial products or services in which the class of covered persons engages; [873] and (3) existing provisions of law which are applicable to the consumer financial product or service and the extent to which such provisions provide consumers with adequate protections.[874]

The conditional exemption for covered short-term loans in § 1041.6 is appropriate to carry out the purposes and objectives of Title X of the Dodd-Frank Act, for three primary reasons. First, § 1041.6 is consistent with the Bureau's statutory purposes and its statutory objective under section 1021(b)(5) of the Dodd-Frank Act: Seeking to implement Federal consumer financial law consistently to ensure that consumers have access to fair, transparent, and competitive markets for consumer financial products and services; and ensuring that such markets operate transparently and efficiently to facilitate access to consumer financial products and services. Section 1041.6 will help preserve access to credit by providing lenders with an option for making covered short-term loans that is an alternative to—and a conditional exemption from—the requirements of § 1041.5. Because lenders making these conditionally exempt loans under proposed § 1041.6 will be conditionally exempt from complying with the specific underwriting criteria under § 1041.5, making loans under § 1041.6 will reduce the compliance costs for lenders that make covered short-term loans relative to the costs of complying with the underwriting requirements under § 1041.5.[875] This reduction in compliance costs will help facilitate access to credit.

Second, the conditional exemption for covered short-term loans is consistent with the Bureau's statutory objective under section 1021(b)(2) of the Dodd-Frank Act, which is to ensure that consumers are protected from unfair or abusive acts and practices. In § 1041.4, the Bureau has stated that it is an unfair and abusive practice for a lender to make covered short-term loans without making a reasonable determination that consumers have the ability to repay the loans according to their terms. In § 1041.5, the Bureau prevents this unfair and abusive practice by prescribing specific underwriting criteria for lenders making certain covered loans. Although lenders making conditionally exempt loans are not required to satisfy these

[863] The Bureau finalizes those provisions pursuant to its separate authority under section 1031(b) of the Dodd-Frank Act to ''prescribe rules identifying as unlawful unfair, deceptive or abusive acts or practices'' and to include in such rules ''requirements for the purpose of preventing such acts or practices.'' 12 U.S.C. 5531(b).

[864] 12 U.S.C. 5512(b)(3)(A).

[865] 12 U.S.C. 5511(a).

[866] 12 U.S.C. 5511(b).

[867] 12 U.S.C. 5511(b)(1).

[868] 12 U.S.C. 5511(b)(2).

[869] 12 U.S.C. 5511(b)(3).

[870] 12 U.S.C. 5511(b)(4).

[871] 12 U.S.C. 5511(b)(5).

[872] 12 U.S.C. 5512(b)(3)(B)(i).

[873] 12 U.S.C. 5512(b)(3)(B)(ii).

[874] 12 U.S.C. 5512(b)(3)(B)(iii).

[875] Note that the relative difference in compliance costs and access in the proposal would likely be reduced in the final rule because the Bureau made changes to proposed § 1041.5 intended to reduce complexity and burden and to maintain access to credit. For example, in the proposal, the Bureau stated that borrowers who are paid in cash would be able to obtain a loan under proposed § 1041.7, even though they would be unable to obtain a loan under proposed § 1041.5. Now borrowers who are paid in cash can get a loan under either § 1041.5 or § 1041.6 of the final rule.

same requirements, they will be required to satisfy the alternative requirements for the conditional exemption under § 1041.6. These alternative requirements are designed to protect consumers from the harms that result from lenders making covered short-term loans that are unaffordable—namely, default, delinquency, repeat borrowing, and collateral harms from making unaffordable loan payments. These are the same kinds of harms that the requirements in § 1041.5 were designed to address.

Third, the conditional exemption in § 1041.6 is consistent with the Bureau's statutory objective under section 1021(b)(1) of the Dodd-Frank Act to ensure that consumers are provided with timely and understandable information to make responsible decisions about financial transactions. Under § 1041.6(e), the Bureau is prescribing a series of disclosure requirements in connection with the making of these conditionally exempt loans. The disclosures notify the consumer about important aspects of how these transactions operate, and are designed to contribute significantly to consumers having timely and understandable information about taking out these conditionally exempt loans.

The Bureau also considered the statutory factors listed in section 1022(b)(3)(B) of the Dodd-Frank Act, as appropriate. The first two factors are not materially relevant because they pertain to exempting a class of covered persons, whereas § 1041.6 conditionally exempts a class of transactions from certain requirements of the rule. Nor did the Bureau base the conditional exemption on the third factor. Certain requirements under § 1041.6 are similar to requirements under certain applicable State and local laws. However, the Bureau is not aware of any State or locality that has combined all the elements that the Bureau has concluded are necessary or appropriate to adequately protect consumers from the risks and harms associated with unaffordable loans when covered short-term loans are not underwritten under the terms of § 1041.5.[876]

The Bureau emphasizes that the conditional exemption in § 1041.6 is a partial exemption. That is, these conditionally exempt loans are still subject to all of the requirements of the Bureau's proposed rule other than the specific underwriting criteria in § 1041.5.

Sections 1032(a) and (b) of the Dodd-Frank Act—Disclosures

In § 1041.6(e), the Bureau is requiring disclosures related to covered short-term loans made under § 1041.6. The Bureau is doing so pursuant to its authority under section 1032(a) and (b) of the Dodd-Frank Act. Section 1032(a) of the Act provides that the Bureau may prescribe rules to ''ensure that the features of any consumer financial product or service,'' both initially and over the term of the product or service, are ''fully, accurately, and effectively disclosed to consumers'' in a manner that ''permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.''[877] This authority is broad, and it empowers the Bureau to prescribe rules on disclosures about the features of consumer financial products and services generally. Accordingly, the Bureau may prescribe disclosure requirements for particular features even if other Federal consumer financial laws do not specifically require such disclosures. Specifically, the Bureau is requiring lenders to provide notices before making the first and third loan in a sequence of conditionally exempt loans, which would inform consumers of the risk of obtaining such a loan and restrictions on taking out further conditionally exempt loans in a sequence.

Under section 1032(b)(1) of the Dodd-Frank Act, ''any final rule prescribed by the Bureau under [section 1032] requiring disclosures may include a model form that may be used at the option of the covered person for provision of the required disclosures.''[878] Any model form must contain a clear and conspicuous disclosure which, at a minimum, must use plain language comprehensible to consumers, contain a clear format and design, and succinctly explain the information that must be communicated to the consumer. Section 1032(b)(3) of the Act provides that any model form the Bureau issues shall have been validated through consumer testing. Accordingly, in developing the model forms for the proposed notices, the Bureau conducted two rounds of qualitative consumer testing in September and October of 2015, contracting with Fors March Group (FMG) to conduct qualitative user testing of the forms, which presented its results in the FMG Report. Dodd-Frank Act section 1032(d) provides that, ''Any covered person that uses a model form included with a rule issued under this section shall be deemed to be in compliance with the disclosure requirements of this section with respect to such model form.''[879]

6(a) Conditional Exemption for Certain Covered Short-Term Loans

Proposed Rule

In proposed § 1041.7(a), the Bureau proposed to establish a conditional exemption for certain covered short-term loans. Under proposed § 1041.7(a), a covered short-term loan that is made in compliance with the requirements set forth in proposed § 1041.7(b) through (e) would have been exempt from §§ 1041.4 through 1041.6. The Bureau also proposed in § 1041.7(a) to require the lender, in determining whether the proposed requirements in paragraphs (b), (c), and (d) are satisfied, to obtain information about the consumer's borrowing history from the records of the lender or its affiliates, and a consumer report from an information system registered under proposed § 1041.17(c)(2) or (d)(2).

Proposed comment 7(a)–1 explained that a lender could make a covered short-term loan without making the ability-to-repay determination under proposed § 1041.5, provided it complied with the requirements set forth in proposed § 1041.7(b) through (e). Proposed comment 7(a)–2 clarified that a lender cannot make a covered short-term loan under proposed § 1041.7 if no information system is both registered under proposed § 1041.17(c)(2) or (d)(2) and available when the lender seeks to make the loan. Proposed comment 7(a)–2 also clarified that a lender may be unable to obtain a report on the consumer's borrowing history if, for example, information systems are not yet operational or are temporarily unavailable.

Comments Received

Commenters urged the Bureau not to adopt the prohibition on making these conditionally exempt loans if no registered information system is operational and available. They argued that this requirement would be unfair or irrational because, even if a lender complied with all of the regulatory requirements under the alternative approach, the lender would still have to rely on a third-party reporting agency's compliance with the new and untested rules. One commenter observed that this was especially problematic given that most lenders will come to depend

[876] *See also* discussion in Market Concerns—Underwriting about the prevalence of harms in the short-term loan market in spite of existing regulatory approaches.

[877] 12 U.S.C. 5532(a).

[878] 12 U.S.C. 5532(b)(1).

[879] 12 U.S.C. 5532(d).

primarily on the approach to lending provided in the conditional exemption, and hence this restriction will reduce access to credit for consumers.

Consumer groups supported the requirement that a lender check a registered information system before making a conditionally exempt loan. They asserted that restrictions based on borrower history are the primary limit on conditionally exempt loans and that without this requirement the exemption would only work on a lender-by-lender basis. Because of the risk of multiple lenders making loans to the same borrower absent the requirement, the commenters argued that this requirement is appropriate.

Several commenters requested a safe harbor from the requirements in the rule where the lender relies on information from a registered information system where the information turns out to be incorrect. For example, if a borrower were to have previously taken out three consecutive conditionally exempt loans under proposed § 1041.7 at a different lender, and applied for a fourth such loan within 30 days at a new lender, and those prior three loans did not appear on the report obtained from the registered information system, one commenter believed the new lender should not be held liable for failing to comply with the requirements in proposed § 1041.7 when it makes the loan in accordance with the erroneous information that the registered information system had provided to it.

Final Rule

The final rule adopts § 1041.7(a) as proposed, renumbered in this final rule as § 1041.6(a), with some technical edits and one addition—that the information system from which the lender obtains a consumer report must have been registered for 180 days or more pursuant to § 1041.11(c)(2) or registered pursuant to paragraph (d)(2). In addition, the final rule clarifies that the lender must use this borrowing history information to determine a potential loan's compliance with the requirements in § 1041.6(b) and (c); the reference to § 1041.6(d) is removed. Lenders will not need to obtain a separate report from a registered information systems to comply with § 1041.6(d), which prohibits a lender from making a loan within 30 days of a conditionally exempt loan made by that lender itself (other than another conditionally exempt loan following the conditions of § 1041.6).[880] And § 1041.6(c), as well as § 1041.5(d), restrict covered short-term loans made by other lenders, as well as loans made by the same lender and its affiliates.

The Bureau added the provision specifying that, when a lender is relying on a report from an information system registered pursuant to § 1041.11(c)(2) to satisfy § 1041.6, the registered information system must have been registered for 180 days or more. Under § 1041.10(b), a lender is not required to begin furnishing information to registered information systems registered pursuant to § 1041.11(c)(2) until 180 days after they are registered. A consumer report obtained from an information system registered for less than 180 days would not contain any information about borrowers' use of covered short-term and longer-term balloon payment loans.

In the final rule, the Bureau is retaining the proposed requirement that, prior to making a covered short-term loan under § 1041.6, a lender must review the consumer's borrowing history in its own records, the records of the lender's affiliates, and a consumer report from a registered information system. The Bureau concludes that lenders should not be permitted to make conditionally exempt loans under § 1041.6 if lenders do not obtain and review a report from a registered information system, even in instances where a report from a registered information system is unavailable. The Bureau maintains its view that reports from registered information systems are important for ensuring that the protections put in place by § 1041.6 are fully realized, and, based on outreach during the rulemaking process, the Bureau expects to register at least one information system sufficiently in advance of the compliance date of §§ 1041.5 and 1041.6 that reports from a registered information system will be available and may be relied upon on such date.

If no report from a registered information systems is available and a lender is therefore unable to obtain reliable information about a consumer's borrowing history with other lenders, the Bureau is concerned that conditionally exempt lending could result in consumers continuing to experience extended cycles of re-borrowing. Consumers could refinance a loan under § 1041.6 from one lender with another lender, and repeat continuously, severely undermining many of the protections contained in § 1041.6. In the unlikely circumstance that no information system has been registered for at least 180 days as of the compliance date of §§ 1041.5 and 1041.6, the Bureau will consider its options at that time, but does not at this time wish to leave open the possibility of § 1041.6 lending without lenders first obtaining borrower history from a registered information system. If lenders are unable to make loans under § 1041.6 absent a report from a registered information system, the Bureau has concluded that lenders will have an incentive to ensure that there is at least one registered information system that has been registered for at least 180 days as of the compliance date of §§ 1041.5 and 1041.6. If the Bureau were to allow lenders to make § 1041.6 loans without obtaining a report from a registered information system, the opposite could be true—industry would have an incentive to impede or slow the development of registered information systems.

The Bureau is finalizing comment 6(a)–1 as proposed, with the addition of citations of §§ 1041.8 and 1041.9 to clarify the meaning of ''other applicable laws'' (which in essence means that these conditionally exempt loans are still subject to the payment-related provisions of this rule). The Bureau has adjusted comment 6(a)–2 to clarify the requirement that the registered information system from which the lender obtains a consumer report must have been registered under § 1041.11(c)(2) for 180 days or more or must be registered under § 1041.11(d)(2).

The Bureau has added comment 6(a)–3 in response to commenters requesting a safe harbor when they rely on information obtained from a registered information system to make a loan determination and the information they are provided later turns out to have been erroneous. This comment clarifies that a lender is not responsible for inaccurate or incomplete information contained in a consumer report from a registered information system. If a lender relies on information obtained from a registered information system that is inaccurate, and based on that inaccurate information makes a loan that does not comply with the requirements of § 1041.6 because of inaccurate information in that report, the loan nonetheless qualifies for the exemption in § 1041.6.

6(b) Loan Term Requirements

In proposed § 1041.7(b), the Bureau proposed to require a covered short-term loan that is made under proposed § 1041.7 to comply with certain requirements as to the loan terms and

[880] Lenders that make covered short-term loans under § 1041.6 will have to check their own records and records of affiliates before making loans to ensure that they are complying with § 1041.6(b) and (c).

structure. The requirements under proposed § 1041.7(b), in conjunction with the other requirements set forth in proposed § 1041.7(c) through (e), were presented as an alternative to the underwriting criteria specified in § 1041.5, and were likewise intended to reduce the likelihood that consumers who take out these conditionally exempt loans would suffer the competing harms of default, delinquency, re-borrowing, or the collateral harms from making unaffordable loan payments to avoid default. These proposed requirements were also intended to limit the harm to consumers if they are unable to repay the loan as scheduled.

6(b)(1)

Proposed Rule

In proposed § 1041.7(b)(1), the Bureau proposed certain principal amount limitations for a conditionally exempt loan. Specifically, proposed § 1041.7(b)(1)(i) would have required that the first loan in a sequence of conditionally exempt loans have a principal amount that is no greater than $500. Proposed § 1041.7(b)(1)(ii) would have required that the second loan in a sequence of conditionally exempt loans have a principal amount that is no greater than two-thirds the principal amount of the first loan in the sequence. Proposed § 1041.7(b)(1)(iii) would have required that the third loan in a sequence of conditionally exempt loans have a principal amount that is no greater than one-third of the principal amount of the first loan in the sequence.

Proposed comment 7(b)(1)–1 cross-referenced the definition and commentary for loan sequences. Proposed comment 7(b)(1)–2 clarified that the principal amount limitations apply regardless of whether the loans are made by the same lender, an affiliate, or unaffiliated lenders. Proposed comment 7(b)(1)–3 noted that the principal amount limitations under proposed § 1041.7 apply to both rollovers of an existing loan when they are permitted under State law and new loans that are counted as part of the same loan sequence. Proposed comment 7(b)(1)–4 gave an example of a loan sequence in which the principal amount is stepped down or amortized in increments of one-third.

The Bureau believed that the principal cap and principal reduction requirements under proposed § 1041.7(b)(1) were critical to reducing both the risk of extended loan sequences and the risk that the loan payments over a limited, shorter loan sequence would prove unaffordable for consumers. Because proposed § 1041.7 would not require the borrower to meet the underwriting criteria set forth in proposed § 1041.5 for a covered short-term loan, some consumers may not be able to repay these loans as scheduled. Absent further protections, these consumers would be in the position of choosing among the harms that borrowers confront when they have to make the payments on an unaffordable loan—default on the loan, or re-borrow, or fail to meet basic living expenses or other major financial obligations in an effort to avoid default as the loan comes due. As discussed in the proposal, the Bureau found that in this predicament, consumers in the market today generally re-borrow for the same amount as the prior loan, rather than pay off a portion of the principal and reduce their debt burden. As a result, consumers may face a similar situation when the next loan comes due and all succeeding loans after that, except that they have paid substantial fees for re-borrowing with every additional loan. The Bureau has found that this lack of principal reduction, or ''self-amortization,'' over the course of a loan sequence is correlated with higher rates of re-borrowing and default.[881]

Proposed § 1041.7(b)(1) was designed to work in tandem with proposed § 1041.7(c)(3), which proposed to limit a loan sequence of these conditionally exempt loans to no more than three loans. The proposed requirements together would ensure that a consumer may not receive more than three consecutive covered short-term loans under proposed § 1041.7 and that the principal would decrease from a maximum of $500 on the first loan over the course of a loan sequence. The proposed principal reduction feature was intended to steadily reduce consumers' debt burden and permit them to pay off the original loan amount in its entirety in more manageable increments over the course of a loan sequence with three loans.

The Bureau believed that the proposed $500 limit for the first loan was appropriate in light of current State regulatory limits and would reduce the risks that unaffordable payments would cause consumers to default, re-borrow, or fail to meet basic living expenses or other major financial obligations during a loan sequence. Many State statutes authorizing payday loans impose caps on the loan amount, with $500 being a common limit.[882] In States that have lower limits on loan amounts, those lower limits would prevail. In addition, the Bureau's empirical research found that average loan sizes are well under this threshold.[883] Finally, without applying the underwriting criteria under proposed § 1041.5, the Bureau believed that loans with a principal amount larger than $500 would carry a significant risk of unaffordable payments.

The Bureau also gave extensive consideration to proposing an ''off-ramp'' for consumers who are struggling to repay a covered short-term loan, in lieu of the principal reduction structure.[884] Under this approach, lenders would be required to provide a no-cost extension of the third loan in a sequence (the off-ramp) if a consumer is unable to repay the loan according to its terms.

The Bureau believed that the off-ramp approach would have three significant disadvantages relative to the principal reduction structure outlined above. First, an off-ramp, which began after a sequence of three loans, would delay the onset of the principal reduction and compel consumers to carry the burden of unaffordable payments for a longer time, increasing the likelihood of default and collateral harms from making unaffordable loan payments. Second, the Bureau believed that an off-ramp provision likely could not be designed in a way so as to ensure that consumers actually receive the off-ramp. The Bureau's analysis of State regulatory reports indicated that even where off-ramps are made available under State law, actual consumer use of available off-ramps has been quite limited.[885] Third, to make an off-ramp

[881] *See* CFPB Data Point: Payday Lending, at 16, 17 panel A & panel B.

[882] *E.g.,* Ala Code sec. 5–18A–12(a); Alaska Code sec. 06.50.010; Col. Code sec. 5–3.1–101; Fla. Code sec. 560.402; Iowa Code sec. 533D.10(1)(b); Kan. Code secs. 16a–2–404–05; Ken. Code sec. 286.9–010; Miss. Code sec.75–67–501; Mo. Code secs. 408.500–06; Neb. Code sec. 45–901; N.H. Code sec. 399A:1; Ohio Rev. Code sec.1321.35; Okla. Code sec. 59–3101; R.I. Code secs. 19–14.1–11; S.D. Code sec. 54–4–36; Tenn. Code sec. 45–17–101; Va. Code sec. 6.2–1800.

[883] The Bureau's analysis of supervisory data indicated that the median loan amount for payday loans is around $350. *See* CFPB Payday Loans and Deposit Advance Products White Paper, at 15. Another study found that the average loan amount borrowed was $375. *See* Pew Charitable Trusts, ''Payday Lending in America: Who Borrows, Where They Borrow, and Why,'' at 9 (Report 1, 2012), *available at http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf.*

[884] *See* Small Business Review Panel Report, at 8.

[885] The experience in Florida also suggests that off-ramps are not likely to be made available to all consumers who struggle to repay covered short-term loans. For borrowers who indicate that they are unable to repay the loan when due and agree to attend credit counseling, Florida law requires lenders to extend the loan term on the outstanding loan by 60 days at no additional cost. Although 84

Continued

approach less susceptible to such defects, additional provisions would be necessary, including disclosures alerting consumers to their rights to take the off-ramp and prohibitions on false or misleading information regarding off-ramp usage and collections activity prior to completion of the full loan sequence. These measures would be of uncertain effectiveness and would increase complexity, burdens on lenders, and challenges for enforcement and supervision.

Comments Received

Several industry commenters urged the Bureau not to adopt the $500 cap in proposed § 1041.7(b)(1) because it is too low. These groups argued that the Bureau had not sufficiently demonstrated that $500 was a large enough amount of money to meet consumer demand and that consumers routinely needed more money, especially for potential emergencies. One commenter was concerned that the $500 cap was inconsistent with the definition of small-dollar loans in some States and could lead to compliance problems and costs, causing lenders to leave the market and producing a reduction in available credit.

In contrast, consumer groups urged the Bureau not to adopt the $500 cap in the proposed rule because it is too high. The group argued that the median loan amount for current borrowers is $350 to $375 and this smaller median loan amount did not support the $500 cap.

Several commenters supported the principal reduction requirements in proposed § 1041.7(b)(1). An academic commenter suggested this feature would benefit borrowers by helping them make incremental progress on their loans, and argued that a 3-loan sequence would help provide borrowers with sufficient time to repay their loans.

Several consumer groups urged the Bureau not to adopt the conditional exemption, yet supported the 3-loan framework with an amortizing structure if the exemption was part of the final rule. Some commenters argued that roughly two-thirds of borrowers are unable to pay off these kinds of loans in three payments or less, so the provision would likely be ineffective, but stated that it may be worth trying nonetheless.

percent of loans were made to borrowers with seven or more loans in 2014, fewer than 0.5 percent of all loans were granted a cost-free term extension. *See* Brandon Coleman & Delvin Davis, ''Perfect Storm: Payday Lenders Harm Florida Consumers Despite State Law,'' Ctr. for Responsible Lending,'' at 4 & n.7 (2016), *available at http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_perfect_storm_florida_mar2016_0.pdf.*

Several consumer groups and a legal services organization supported the Bureau's choice to use principal reduction and amortization instead of using off-ramps. These commenters asserted that consumers often are not informed about or are discouraged from using off-ramps, which makes them ineffective. In contrast, some industry commenters wrote in support of adding an off-ramp option. One said it would be more in keeping with existing approaches by the States and would adequately address the Bureau's concerns about the number of consecutive transactions in extended loan sequences.

Some industry commenters urged the Bureau not to adopt the proposed structure of three loans with amortization. They asserted that emergency expenses are not predictable, and so a rigid 3-loan schedule with amortization would not meet borrower needs.

Several industry commenters urged the Bureau to allow more conditionally exempt loans in order to reduce the size of the step-down between each loan, and thus reduce the amount that the borrower would be unable to re-borrow after each loan, which would also reduce the burden and impact on lenders by allowing more re-borrowing. A number of State Attorneys General similarly noted that some States have implemented smaller principal-repayment requirements that permit more rollovers and more time for consumers to repay. One commenter suggested that five step-down loans was a better limit than three because it would allow for smaller and more affordable payments. Another recommended a 4-loan sequence with an indebtedness limit of 104 days during a 12-month period.

In contrast, consumer groups urged the Bureau not to extend the number of loans. These commenters argued that increasing the number of loans from the proposed level of three loans even to four loans would result in more harm to borrowers because of the longer payment period.

Final Rule

The Bureau has considered the comments and is adopting proposed § 1041.7(b)(1), renumbered in this final rule as § 1041.6(b)(1), as proposed. The Bureau adopts proposed comments 7(b)(1)–1 through 7(b)(1)–4 as proposed, renumbered in this final rule as comments 6(b)(1)–1 through 6(b)(1)–4, with only technical modifications.

The Bureau does not agree with the industry commenters that urged the Bureau not to adopt the $500 cap because it is too low to meet consumer demand, especially for potential emergencies. The Bureau also does not agree with consumer groups that the Bureau should set the cap closer to the median loan amount for current borrowers of $350 to $375.

For the reasons discussed in the proposed rule and noted above, the Bureau has determined that the $500 limit for the first loan is appropriate in light of current State regulatory limits and ordinances, and will reduce the risks that unaffordable payments will cause consumers to default, re-borrow, or seek to avoid default by failing to meet basic living expenses or other major financial obligations over the course of a loan sequence. The Bureau's empirical research, confirmed by commenters, has also found that average loan sizes are well under this threshold.[886] In addition, without applying the underwriting criteria set out in § 1041.5, the Bureau concludes that short-term loans with a principal amount larger than $500 would carry a significant risk of having unaffordable payments with the ensuing harms to consumers that are discussed more fully above in Market Concerns—Underwriting. Of course, lenders could always choose to proceed by underwriting loans according to the criteria set out in § 1041.5, or they could instead make other types of loans that are not covered by the rule, in amounts higher than $500 to the extent permitted by State law.

Similarly, the Bureau is not persuaded by the concern that the $500 cap is inconsistent with the definition of small-dollar loans in some States, and could lead to compliance problems and costs that would cause lenders to leave the market and reduce the availability of credit. The Bureau determined that many State statutes authorizing payday loans already impose caps on the loan amount, with $500 as a common limit.[887] In States with lower limits on

[886] The Bureau's analysis of supervisory data indicated that the median loan amount for payday loans is around $350. *See* CFPB Payday Loans and Deposit Advance Products White Paper, at 15. Another study found that the average loan amount borrowed was $375. *See* Pew Charitable Trusts, ''Payday Lending in America: Who Borrows, Where They Borrow, and Why,'' at 9 (Report 1, 2012), *available at http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf.*

[887] *See, e.g.,* Ala Code sec. 5–18A–12(a); Alaska Code sec. 06.50.010; Col. Code sec. 5–3.1–101; Fla. Code sec. 560.402; Iowa Code sec. 533D.10(1)(b); Kan. Code secs. 16a–2–404–05; Ken. Code sec. 286.9–010; Miss. Code sec.75–67–501; Mo. Code secs. 408.500–06; Neb. Code sec. 45–901; N.H. Code sec. 399A:1; Ohio Rev. Code sec.1321.35; Okla. Code sec. 59–3101; R.I. Code secs. 19–14.1–1; S.D. Code sec. 54–4–36; Tenn. Code sec. 45–17–101; Va. Code sec. 6.2–1800.

loan amounts, those lower limits would prevail. In States with higher limits, lenders could still make underwritten loans under § 1041.5 at those higher amounts.

The Bureau also concludes that the 3-loan step-down will provide borrowers with sufficient time to repay the loan and mitigate harm to borrowers. It adopted this framework for § 1041.6(b)(1) of the final rule in an attempt to balance the interests of limiting re-borrowing while also providing for a gradual step-down. For each additional loan, the step-down would be less steep (*i.e.,* the amount that would not be refinanced and thus would need to be ''repaid'' would decrease), but the borrower would incur that much more re-borrowing. For example, if the Bureau adopted a 5-loan limit, the second loan would be 80 percent of the original, the third loan 60 percent, the fourth loan 40 percent, and the fifth loan 20 percent. That would allow for more affordable payments, but would also add two additional loans, with the attendant costs. Ultimately, the Bureau had to determine where to draw the line, which is often an unavoidable exercise in the rulemaking process, and it concluded that the combination of the $500 cap and the 3-loan step-down, resulting in fees from three loans and a maximum ''repayment amount'' of $166.66 (the amount not refinanced on each step) in principal for each loan, strikes a reasonable balance between these competing concerns.

The Bureau recognizes that some borrowers may not be able to use loans under § 1041.6 to meet new credit needs because of the step-down in loan amounts for the second and third conditionally exempt loan. For example, a borrower who takes out a first loan of $300 under § 1041.6, and then has a new need arise before 30 days has passed, would only be able to take out a further loan of $200 (which is the remaining amount under the principal cap), which may not be sufficient to cover the need. But, as stated above, and in the discussion for § 1041.6(c) and (d), borrowers who return for loans within a 30-day period are often re-borrowing because of difficulty in repaying their previous loan and meeting their obligations rather than taking out a new loan in response to a new need that is separate and independent from the original need. Further, those borrowers may be able to get other types of credit from other lenders to supplement the amount obtainable under § 1041.6, including a loan that would be underwritten in accordance with the provisions of § 1041.5.

One further benefit from the limitations on re-borrowing imposed in the principal cap and the principal reduction feature in § 1041.6(b)(1), as mentioned earlier, is that they are likely to improve the care and consideration with which lenders make these conditionally exempt loans, even though they are not required to be underwritten in accordance with the criteria specified in § 1041.5. As noted above in Market Concerns—Underwriting, a major reason why lenders in this market are willing to lend to borrowers who are unable to repay their loans is that the costs of default are substantially offset by the revenues generated by high levels of re-borrowing; and indeed, many defaults may be deferred rather than immediate because the borrower can opt to re-borrow some number of times—and often in extended loan sequences—before finally defaulting. By strictly limiting the amount of re-borrowing that can occur with loans made under § 1041.6, the Bureau's conditional exemption thus is likely to lead to improved underwriting of these loans, even without imposing any mandatory underwriting criteria upon their origination.

6(b)(2)

Proposed Rule

Proposed § 1041.7(b)(2) would have imposed certain safeguards in the event that a lender chose to structure the loan with multiple payments, such as a 45-day loan with three required payments. Under the proposed requirement, the loan would have required payments that are substantially equal in amount, fall due in substantially equal intervals, and amortize completely during the term of the loan. Proposed comment 7(b)(2)–1 provided an example of a loan with an interest-only payment followed by a balloon payment, which would not satisfy the loan structure requirement under proposed § 1041.7(b)(2).

The requirement under proposed § 1041.7(b)(2) was intended to address covered short-term loans made under proposed § 1041.7 that are structured to have multiple payments. Absent the requirements in proposed § 1041.7(b)(2), the Bureau was concerned that lenders could structure loans to pair multiple interest-only payments with a significantly larger payment of the principal amount at the end of the loan term. The Bureau believed that consumers are better able to manage repayment obligations for payments that are due with reasonable frequency, in substantially equal amounts, and within substantially equal intervals.

Comments Received

One commenter urged the Bureau not to adopt the approach in proposed § 1041.7(b)(2) that requires a payment schedule based on applying a fixed rate of interest. It observed that the States generally regulate payday loan finance charges by limiting fees charged per amount lent instead of using an interest rate, and argued that requiring a payment schedule based on an interest rate would force lenders to reprogram their systems on a scale that goes beyond the Bureau's statutory mandate.

On the other hand, several consumer groups supported the Bureau's proposal to allow multi-payment loans under the exemption, assuming it remained a part of the rule. They asserted that the risk of including the multi-payment loans did not increase the inherent risk of the exemption. They also supported the position taken in the proposal that permitting balloon payments for multiple-payment loans under the conditional exemption would be antithetical to the purpose of the exemption.

Final Rule

The Bureau has considered the comments and is adopting proposed § 1041.7(b)(2), renumbered in this final rule as § 1041.6(b)(2), as proposed. The Bureau also adopts proposed comment 7(b)(2)–1 as proposed, renumbered in this final rule as comment 6(b)(2)–1, with only technical modifications.

As discussed in more detail in the proposed rule and above, § 1041.6(b)(2) provides certain safeguards in the event that a lender chooses to structure a covered short-term loan with multiple payments. Absent the requirements in § 1041.6(b)(2), the Bureau is concerned that lenders could structure loans to pair multiple interest-only payments with a significantly larger payment of the principal amount at the end of the loan term. The Bureau has concluded that consumers are better able to manage repayment obligations for payments that are due with reasonable frequency, in substantially equal amounts, and within substantially equal intervals. The Bureau agrees with commenters that the principal reduction feature will help borrowers make incremental progress on loans. The Bureau also judges that the concern regarding supposed inconsistency with State laws is overstated. Section 1041.6(b)(2) only applies in circumstances where one individual loan has multiple payments, and there is nothing in the text of § 1041.6(b)(2) that limits the imposition of fees, so long as the fees are repaid

equally during every scheduled payment.

6(b)(3)

Proposed Rule

In proposed § 1041.7(b)(3), the Bureau proposed to prohibit a lender, as a condition of making a covered short-term loan under proposed § 1041.7, from obtaining vehicle security, as defined in proposed § 1041.3(d). A lender seeking to make a covered short-term loan with vehicle security would have had to make an ability-to-repay determination under proposed § 1041.5 instead. Proposed comment 7(b)(3)–1 clarified this prohibition on a lender obtaining vehicle security on a conditionally exempt loan.

The Bureau proposed this requirement because it was concerned that some consumers obtaining a loan under proposed § 1041.7, without meeting the underwriting criteria in proposed § 1041.5, would not be able to afford the payments required to pay down the principal over a sequence of three loans. Allowing lenders to obtain vehicle security in connection with such loans could substantially increase the harm to consumers by putting their vehicle at risk. The Bureau believed the proposed requirement would protect consumers from the harms of default, re-borrowing, and making unaffordable loan payments to avoid defaulting on covered short-term vehicle title loans. First, the Bureau was particularly concerned about default that could result in the loss of the consumer's vehicle, which could jeopardize their livelihood or their ability to carry out essential everyday affairs. The Bureau found that sequences of short-term vehicle title loans are more likely to end in default than sequences of payday loans are,[888] and that fully 20 percent of loan sequences of single-payment vehicle title loans result in repossession of the consumer's vehicle.[889] Second, due to the potentially serious consequences of defaulting on title loans, the Bureau was concerned that consumers may take extraordinary measures to repay such loans and, as a result, would suffer harm from failing to meet basic living expenses or other major financial obligations. Third, even with the other protections against re-borrowing in proposed § 1041.7, the Bureau was concerned that, due to the serious consequences of defaulting on vehicle title loans, consumers may feel pressure to re-borrow up to the maximum allowed on unaffordable vehicle title loans.[890]

Furthermore, the Bureau believed that proposed § 1041.7(b)(3) is necessary or appropriate to restrict lenders' incentives to make these conditionally exempt loans with unaffordable payments. Because loan sequences would be limited to a maximum of three conditionally exempt loans under proposed § 1041.7(c)(3) and subject to principal reduction under § 1041.7(b)(1), the Bureau believed a lender that makes these conditionally exempt loans would have a strong incentive to underwrite effectively, even without having to comply with the specific underwriting criteria in proposed § 1041.5. However, with vehicle title loans, in which the lender obtains a security interest in an asset of significantly greater value than the principal amount on the loan,[891] the Bureau was concerned that a lender would have much less incentive to evaluate the consumer's ability to repay, because the lender could always simply repossess the vehicle if the loan were not repaid in full, even after the first loan in the sequence.

Comments Received

Consumer groups supported the proposed prohibition on auto title lending under the conditional exemption in proposed § 1041.7. They asserted that the repossession of a borrower's vehicle represented significant harm, especially given the high rate of repossessions. They argued that the harm from repossession is so severe that lenders should not be allowed to make vehicle title loans without assessing ability to repay.

In contrast, commenters associated with the vehicle title lending industry wrote in opposition to the proposed prohibition on title lending under the conditional exemption. An industry trade association argued that requiring all short-term vehicle title loans to satisfy the proposed ability-to-repay standards would have a devastating impact on lenders and on the availability of such loans. They argued that the Bureau had not sufficiently demonstrated that vehicle title lending presents greater risks than other forms of short-term lending and had overstated the rate and impact of repossession, asserting that only about 8 percent of title loans result in repossession. The commenter further argued that the Bureau had exaggerated the effects of repossession, contending that many consumers own a second vehicle and that surveys indicate consumers would have alternative transportation options if their vehicle were repossessed. The industry trade association also argued that the prohibition was inconsistent with the Bureau's mandate to regulate the market fairly and consistently, and that by prohibiting vehicle title lenders from using the conditional exemption the proposed rule would provide an unfair advantage for other types of lenders.

Final Rule

The Bureau has considered the comments and, for the reasons noted in the proposal and above and for the additional reasons discussed below, is adopting proposed § 1041.7(b)(3), renumbered in this final rule as § 1041.6(b)(3), as proposed. The Bureau is also adopting comment 7(b)(3)–1 as proposed, renumbered as comment 6(b)(3)–1. The Bureau concludes, as the consumer groups argued, that the risk of severe consumer harm from repossession of the borrower's vehicle makes it inappropriate to allow lenders to make covered short-term vehicle title loans without satisfying the underwriting requirements in § 1041.5. The Bureau does not agree with the argument of the title lending industry commenters that the Bureau had not sufficiently demonstrated that vehicle title lending presents greater risks than other forms of short-term lending.

The structure of § 1041.6 is intended to reduce defaults and re-borrowing, and if lenders were permitted to make vehicle title loans under this structure, the protections in § 1041.6 might reduce defaults and repossessions to some degree. But the Bureau is concerned that the reduction in defaults may be less likely than for unsecured short-term loans, such as payday loans. As noted in the proposal, as a general matter in this market, sequences of short-term vehicle title loans are more likely to end in default than sequences of payday loans are.[892] Although an industry commenter argued that the Bureau had overstated the rate of repossession, that commenter focused on the per-loan default rate. As discussed in Market Concerns—Underwriting, the Bureau has concluded that a per-sequence

[888] CFPB Single-Payment Vehicle Title Lending, at 11; CFPB Report on Supplemental Findings, at 120.

[889] CFPB Single-Payment Vehicle Title Lending, at 23.

[890] A single-payment short-term vehicle title loan is less likely to be repaid after one loan than a payday loan. *See* CFPB Single-Payment Vehicle Title Lending, at 11; CFPB Report on Supplemental Findings, at 120.

[891] For further discussion of how vehicle security affects the market for such loans, see CFPB Single-Payment Vehicle Title Lending, and see also part II above.

[892] CFPB Single-Payment Vehicle Title Lending, at 11; CFPB Report on Supplemental Findings, at 120.

rather than per-loan default rate provides a better measure for short-term loans. One in five loan sequences of single-payment vehicle title loans result in repossession of the consumer's vehicle.[893] Moreover, as noted above, once the revenues from repeated re-borrowing are constrained, as they are by the conditions imposed in § 1041.6, the incentive for lenders to make unsecured loans on which the borrower is likely to default are sharply diminished. But the change in incentives is far less pronounced for vehicle title loans, where even as re-borrowing revenues decrease, the lender still has the leverage of a fully securitized loan available to cope with any defaults.

Therefore, even with the protections of § 1041.6, there would still be some borrowers who cannot afford to repay loans made under § 1041.6. And for the reasons just stated, there are likely to be more such borrowers of vehicle title loans than of other covered short-term loans. In addition, the harm produced by unaffordable title loans is greater than for other such loans. If lenders could take vehicle security for loans under § 1041.6, then consumers who could not afford to repay their loans would face the threat of having their vehicles repossessed, and, in many cases, would suffer the severe harms of repossession. The harms from repossession (and comments about those harms) are discussed above in Market Concerns—Underwriting and in the section-by-section discussion of § 1041.4, and, contrary to the assertions by industry commenters, the Bureau has concluded that such harms are often severe. First, consumers facing repossession would suffer the potential loss of transportation to work or school and for many other everyday activities, such as securing food and health care, with consequential losses that may greatly exceed the original cost of the loan.[894] Second, due to the potentially serious consequences of defaulting on title loans, the Bureau is concerned that consumers may take extraordinary measures to repay such loans and, as a result, would suffer greater harm more frequently from failing to meet basic living expenses or other major financial obligations. Third, even with the other protections against re-borrowing in § 1041.6, the Bureau is concerned that, due to the serious consequences of defaulting on vehicle title loans, consumers may feel greater pressure to re-borrow up to the maximum allowed on unaffordable vehicle title loans, since a vehicle title loan is less likely to be repaid after one loan than are other types of covered short-term loans.[895]

In addition, there are still other economic collateral harms of repossession, which is usually a self-help process performed by agents of the lender and which often results in significant consumer fees associated with the costs of the repossession and preparing a vehicle for auction.[896] These processes can put the consumer at greater risk of harm, and often more severe harm, than when a consumer defaults on an unsecured loan. The Bureau has observed typical repossession fees charged to borrowers ranging from $100 to $400 or even higher, which could be larger than the small balance of the defaulted loan made under § 1041.6 (with a maximum of $500 on the first loan, $333.33 on the second loan, and $166.66 on the third loan). And there are additional harms often associated with repossessions, including the potential loss of any property in the vehicle.[897] These harms persist even in States that limit vehicle title lending to so-called non-recourse loans.

For all of these reasons, vehicle title loans that are not subject to the specific underwriting criteria of § 1041.5 present significant additional risks as compared to unsecured loans that are not subject to § 1041.5. Moreover, the harms to consumers that flow from these risks are greater for vehicle title loans. Accordingly, the Bureau has concluded that it is appropriate in § 1041.6 to require lenders making such loans not to take a security interest in the consumer's vehicle.

The Bureau recognizes that, because lenders making short-term vehicle title loans are highly dependent on the revenue from re-borrowing, requiring short-term vehicle title loans to comply with the ability-to-repay requirements in § 1041.5 will have a significant impact on such lenders. Title lenders that are unable to adjust their business models or obtain a license to make unsecured small-dollar loans or installment title loans thus may face greater challenges than payday lenders because they would not be able to make loans under § 1041.6 that would be exempt from the ability-to-repay requirements of § 1041.5. (The Bureau notes that, by its own count, 18 of the 24 States that permit title lending allow title installment lending that would not be covered by § 1041.5.) Nonetheless, the Bureau concludes that, under § 1041.6, covered short-term loans with vehicle security would present more risks and more severe harms than unsecured covered short-term loans. The Bureau therefore is requiring that if a lender takes a security interest in the consumer's vehicle, then it must underwrite any covered short-term loans that it makes pursuant to § 1041.5. Finally, since the rule does not differentiate based on whether a lender is a depository or non-depository lender, or based on any other characteristics of the lender, and instead makes differentiations based on the loan products themselves and the risks associated with them, the Bureau is not imposing inconsistent obligations here on lenders based on their status as depository or non-depository lender.

6(b)(4)

Proposed § 1041.7(b)(4) would have required that, as a condition of making a covered short-term loan under proposed § 1041.7, the loan must not be structured as an open-end loan. Proposed comment 7(b)(4)–1 clarified this prohibition on a lender structuring a conditionally exempt loan as an open-end loan. The Bureau was concerned that permitting open-end loans under proposed § 1041.7 would present significant risks to consumers, as consumers could repeatedly draw down credit without the lender ever determining the consumer's ability to repay. In practice, consumers could re-borrow serially on a *single* conditionally exempt loan that was structured as an open-end loan. The Bureau also believed that attempting to develop restrictions for open-end loans in proposed § 1041.7 would add undue complexity without providing appreciable benefit for consumers. The Bureau received very limited comments

[893] CFPB Single-Payment Vehicle Title Lending, at 23.

[894] Even for those consumers who may have access to some other mode of transportation, the Bureau notes that there are hardships and inconveniences associated with having to use other forms of transportation, especially in non-urban areas of the country. And for at least 15 percent of title loan borrowers, their personal vehicles are essential for numerous transportation needs. *See See* Pew Charitable Trusts, ''Auto Title Loans: Market Practices and Borrowers' Experiences,'' at 14 (2015), *available at http://www.pewtrusts.org/~/media/Assets/2015/03/AutoTitleLoansReport.pdf?la=en.*

[895] *See* CFPB Single-Payment Vehicle Title Lending, at 11; CFPB Report on Supplemental Findings, at 120.

[896] Uniform Commercial Code section 9–615 provides that cash proceeds of the sale of collateral should be applied first to the ''reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing'' incurred by the secured party. Under the U.C.C., these expenses are repaid to the lender and other third parties even before satisfying the outstanding balances of the secured loan.

[897] See, *e.g.,* Bureau of Consumer Fin. Prot., ''Supervisory Highlights,'' at 5–6 (Fall 2016), available at *https://www.consumerfinance.gov/data-research/research-reports/supervisory-highlights-issue-no-13-fall-2016/.*

on this provision, with consumer groups supporting the Bureau's proposed prohibition on using the conditional exemption to extend open-end credit and agreeing with its rationale.

For the reasons stated, the Bureau is adopting the proposed prohibition against structuring loans as open-end loans under the conditional exemption, now renumbered as § 1041.6(b)(4). The Bureau is also adopting proposed comment 7(b)(4)–1, renumbered as comment 6(b)(4)–1.

6(c) Borrowing History Requirements

The Bureau proposed to require lenders to determine that the borrowing history requirements under proposed § 1041.7(c), renumbered in this final rule as § 1041.6(c), are satisfied before making a conditionally exempt loan. The Bureau is finalizing this paragraph as proposed, with a few adjustments to reduce redundancy and to reflect the fact that the Bureau is not finalizing the rule as to covered longer-term loans at this time, yet is finalizing the underwriting requirements for covered short-term and longer-term balloon-payment loans in one section, § 1041.5 of the final rule.

One adjustment that the Bureau is making, in particular, is not to finalize proposed § 1041.7(c)(1), which would have required a lender to determine, before making a conditionally exempt loan, that the consumer does not have a covered outstanding loan made under proposed § 1041.5, § 1041.7, or § 1041.9, not including a loan made by the same lender or its affiliate under proposed § 1041.7 that the lender is rolling over. As a result of this change, the Bureau also is not adopting proposed comments 7(c)(1)–1 and 7(c)(1)–2. For purposes of simplification and in light of other changes made to the rule, the Bureau has concluded that this proposed provision could be consolidated with § 1041.7(c)(2), which addresses restrictions on taking out conditionally exempt loans in light of prior loans in specified circumstances. As a result of eliminating § 1041.7(c)(1), the other proposed paragraphs of § 1041.7(c) and the proposed comments are all renumbered in the final rule to conform to this change.

6(c)(1)

Proposed Rule

Proposed § 1041.7(c)(2) would have required that, prior to making a covered short-term loan under proposed § 1041.7, the lender must determine that the consumer has not had an outstanding loan in the past 30 days that was either a covered short-term loan made under proposed § 1041.5 or a covered longer-term balloon-payment loan made under proposed § 1041.9. The requirement under proposed § 1041.7(c)(2) would have prevented a consumer from obtaining a covered short-term loan under proposed § 1041.7 soon after repaying a covered short-term made under proposed § 1041.5 or a covered longer-term balloon-payment loan made under proposed § 1041.9. Proposed comment 7(c)(2)–1 explained that this requirement would apply regardless of whether the prior loan was made by the same lender, an affiliate of the lender, or an unaffiliated lender. The proposed comment also provided an illustrative example.

Proposed § 1041.7(c)(2) would have protected consumers who lack the ability to repay a current or recent covered short-term or longer-term balloon-payment loan from the harms of a covered short-term loan made without meeting the specific underwriting criteria in proposed § 1041.5. As explained above, the Bureau observed that such re-borrowing frequently reflects the adverse budgetary effects of the prior loan and the unaffordability of the new loan.

Moreover, the Bureau believed that permitting a consumer to transition from a covered short-term loan made under proposed § 1041.5 or a covered longer-term balloon-payment loan made under proposed § 1041.9 to a covered short-term loan made under proposed § 1041.7 would be inconsistent with the basic purpose of proposed § 1041.7. As previously noted, proposed § 1041.7 creates an alternative to the underwriting criteria specified in proposed § 1041.5 and features carefully structured consumer protections. If lenders were permitted to make a conditionally exempt loan shortly after making a covered short-term loan under proposed § 1041.5 or a covered longer-term balloon-payment loan under proposed § 1041.9, it would be very difficult to apply all of the requirements under proposed § 1041.7 that are designed to protect consumers. If a consumer were permitted to transition from a proposed § 1041.5 loan to a covered short-term loan made under proposed § 1041.7, for example, the principal reduction requirements under proposed § 1041.7(b)(1) would be undermined.

The Bureau also believed that providing separate paths for covered short-term loans that are made under the specific underwriting criteria in proposed § 1041.5 and under the framework in proposed § 1041.7 would make the rule's application more consistent across provisions and also simpler for both consumers and lenders. The Bureau intended these two proposed lending frameworks to work in tandem, but not in harness, to ensure that lenders could not transition consumers back and forth between covered short-term loans made pursuant to the underwriting criteria specified in proposed § 1041.5 and those made without the same criteria but subject to other consumer protections under proposed § 1041.7. Furthermore, with these proposed provisions in place, and with the two lending frameworks largely kept separate from one another, consumers and lenders would have clear expectations of the types of covered short-term loans that they could and could not make if the consumer were to re-borrow.

Comments Received

Several commenters, including a coalition of consumer groups, two non-profit groups, three faith-based groups, and a State Attorney General urged the Bureau to increase the cooling-off periods in proposed § 1041.7(c), including the cooling-off period in proposed § 1041.7(c)(2) so that, after making a covered short-term loan under § 1041.5, a lender would have to wait 60 days, rather than 30 days, before it could make a conditionally exempt loan under § 1041.6. They argued that a 60-day cooling-off period was more appropriate and more protective, and would do more to help ensure that loans were affordable.

On the other hand, industry commenters generally opposed having a cooling-off period of any length, arguing that it would restrict access to credit for consumers with emergency or unexpected needs that may arise during the cooling-off period. Commenters argued that covered loans are often used for unexpected expenses, which can happen at any time, and that a cooling-off period would harm consumers by restricting their flexibility and reducing access to credit when borrowers needed it.

A large number of individual commenters, including payday loan customers, also criticized the cooling-off periods, objecting to the prospect that they would be restricted from getting more credit after paying off a prior loan.

Final Rule

The Bureau is finalizing proposed § 1041.7(c)(2), renumbered as § 1041.6(c)(1), with a few adjustments. For purposes of simplification and in light of other changes made to the rule, the Bureau has concluded that proposed § 1041.7(c)(1) and (2) can be consolidated together, with technical

corrections to accommodate changes to other sections of the rule, including the fact that the underwriting requirements for covered longer-term loans (other than those with balloon payments) are not being finalized. Accordingly, § 1041.6(c)(1) provides that a condition of making a loan under § 1041.6 is that the consumer has not had in the past 30 days an outstanding covered short-term loan under § 1041.5 or a covered longer-term balloon-payment loan under § 1041.5. The Bureau is also adopting proposed comment 7(c)(2)–1, renumbered as 6(c)(1)–1, with similar adjustments.

In response to the commenters that had advocated extending the cooling-off period to 60 days, the Bureau continues to rely on the research and analysis that were used initially to set the 30-day re-borrowing period. In the proposal, the Bureau had chosen the cooling-off period to match the re-borrowing period because the primary objective served by cooling-off periods in this rule is to prevent re-borrowing. The main approach to preventing re-borrowing is to separate out any linkage between different types of loans or different permitted loan sequences by having sufficient time pass to diminish the plausibility that the prior loan was paid off only by taking out another loan that provided the money to do so. Under the Bureau's definition, based on its analysis of the market, loans made after 30 days would not be considered re-borrowing. The Bureau's research found that the number of loans in the average loan sequence increases when the re-borrowing window for identifying a sequence increases from 14 days to 30 days, suggesting that borrowers are returning to re-borrow within 30 days.

The Bureau also concluded that a 30-day cooling-off period is a reasonable and sufficient representation of most consumers' debt and payment cycles. Because payments for basic living expenses and most major financial obligations are due at least monthly, if not more frequently, the Bureau concludes that a consumer who goes more than 30 days between two short-term loans is more likely to be experiencing a new need, rather than continuing to service the need that gave rise to the prior loan, and thus extending the same cycle of indebtedness. The Bureau thus has concluded that setting a cooling-off period of 30 days between a § 1041.5 loan and a § 1041.6 loan is a reasonable exercise in line-drawing that is likely to prevent the perpetuation of hard-to-escape cycles of indebtedness, while allowing consumers greater flexibility for borrowing to cover emergency or other unexpected expenses. While the Bureau acknowledges that a 60-day cooling-off period would do even more to prevent re-borrowing, as some consumers might be able to shuffle around certain expenses in order to reach day 31 in order to re-borrow, the Bureau concludes that the number of such loans is likely to be small given the data noted above, and that preventing relatively few additional consumers from remaining in a cycle of debt is not worth restricting credit to other consumers who may need it for genuine emergency expenses and new needs that may arise during that period (and subject to the protections conferred by this rule).

As for the commenters who objected to cooling-off periods of any kind, including many individual commenters, the effect of this provision is that for 30 days after a § 1041.5 loan, a borrower would not be eligible for a § 1041.6 loan. The Bureau notes that where a lender has already made a § 1041.5 loan, the borrower has succeeded in demonstrating the ability to repay the loan in accordance with the underwriting criteria set forth in § 1041.5 and presumably is likely to continue to qualify for further loans by meeting that same standard. Therefore, if borrowers in that situation are now seeking a § 1041.6 loan instead, that may be because their circumstances have changed and they are now struggling to repay their loans and could no longer meet the underwriting criteria required by § 1041.5. To prevent lenders from using a mixture of § 1041.5 loans and § 1041.6 loans to create continuous cycles of debt where the borrower is confronting unaffordable loans, which would defeat a central purpose of § 1041.6, the Bureau has set this specific restriction. For the same reason of avoiding a mix of loans that could defeat the protections that the Bureau has intended to confer upon consumers under § 1041.6 (although the circumstances are somewhat different), the Bureau has also specified that no lender can make a § 1041.5 loan within 30 days of a § 1041.6 loan.[898]

6(c)(2)

Proposed Rule

Proposed § 1041.7(c)(3) would have provided that a lender cannot make a covered short-term loan under proposed § 1041.7 if the loan would result in the consumer having a loan sequence of more than three conditionally exempt loans made by any lender. Proposed comment 7(c)(3)–1 would have clarified that this requirement applies regardless of whether any or all of the loans in the loan sequence are made by the same lender, an affiliate, or unaffiliated lenders, explained that loans that roll over count toward the sequence as well, and included an example.

The Bureau proposed § 1041.7(c)(3) for several reasons. First, the limitation on the length of loan sequences was aimed at preventing further harms from re-borrowing. Second, the Bureau believed that a 3-loan limit would be consistent with evidence presented in the Bureau's Supplemental Findings on Payday Loans, Deposit Advance Products, and Vehicle Title Loans, that approximately 38 percent of new loan sequences end by the third loan without default.[899] Third, a 3-loan limit would work in tandem with the main restrictions in proposed § 1041.7(b)(1) to allow consumers to repay a covered short-term loan in manageable one-third increments over a loan sequence. Fourth, the Bureau concluded that a 3-loan limit would provide lenders with a strong incentive to evaluate the consumer's ability to repay before making conditionally exempt loans, albeit without complying with the specific underwriting criteria in proposed § 1041.5.

Comments Received

As noted above, a number of commenters urged the Bureau to increase the cooling-off periods in proposed § 1041.7(c) from 30 days to 60 days, including also the period after a borrower had received three loans under the conditional exemption in proposed § 1041.7. It should be noted that though proposed § 1041.7(c)(3) simply prohibited a lender from making a loan that would result in a consumer having a loan sequence of more than three loans under proposed § 1041.7, this provision in combination with the definition of loan sequence under proposed § 1041.2(a)(12) in effect created a 30-day cooling-off period after a three-loan sequence. Here too, consumer groups and others argued that a 60-day cooling-off period would be more protective of consumers and would help ensure that loans were more affordable.

Industry commenters again were generally opposed to a cooling-off period after the loan sequence had ended, contending that it would restrict access to credit for consumers generally, including those with unexpected needs that could come up during a time when the borrower is not permitted to obtain

[898] *See* § 1041.5(d)(3).

[899] *See* CFPB Report on Supplemental Findings, at 122.

another loan. Relatedly, and as discussed above, several industry commenters raised concerns about whether a three-loan sequence was the appropriate length for sequences of loans made under the conditional exemption, and suggested that the conditional exemption should permit longer loan sequences.

As previously mentioned, large number of individual commenters, including payday loan customers, took issue with the cooling-off period and expressed concern that they might be blocked from getting a loan when they need it.

Final Rule

The Bureau is finalizing proposed § 1041.7(c)(3), renumbered as § 1041.6(c)(2) with certain technical edits. The Bureau is also adopting proposed comment 7(c)(3)–1, renumbered as comment 6(c)(2)–1, with technical edits.

Again, for much the same reasons as explained in the preceding discussion, the Bureau has relied on the same basic research and analysis to set the 30-day re-borrowing period and then has chosen this cooling-off period to match the re-borrowing period. Again, at the end of a 3-loan sequence the purpose of the cooling-off period remains essentially the same, which is to prevent re-borrowing by preventing the borrower from linking different types of loans or different permitted sequences in such a manner as to continue taking out new loans or re-borrowing as the means of paying off the prior loans. Again, loans made after 30 days would not be considered re-borrowing under the Bureau's definition.

As discussed above, the Bureau has determined that a 30-day period is a sound representation of most consumers' debt and payment cycles. Because payments for basic living expenses and most major financial obligations are due at least monthly, if not more frequently, the Bureau concludes that a consumer who goes more than 30 days between loans is more likely to be experiencing a new need, rather than continuing to labor under pressure from the need that gave rise to the prior loan, and thus to be extending a cycle of indebtedness. The Bureau therefore determines that 30 days is a reasonable line to draw in setting a cooling-off period after completing a 3-loan sequence. Again, it helps prevents the perpetuation of hard-to-escape cycles of indebtedness, while allowing greater flexibility for further borrowing as needed to cover emergency or other unexpected expenses. While the Bureau acknowledges that a 60-day cooling-off period would be even more protective of consumers, as some might be able to stretch certain expenses in order to exceed the 30-day cycle before having to re-borrow, the Bureau concludes that the number of such loans will be small and is outweighed by the benefits of having more credit available (with the other protections afforded by this rule) to consumers to meet any new needs that may arise during that period.

As for the commenters that opposed a 30-day cooling-off period after three § 1041.6 loans, the Bureau acknowledges that some borrowers may experience a bona fide new need during that 30-day period and would be prevented from obtaining a new loan. As noted above when discussing the re-borrowing period, the Bureau concludes that borrowing within 30 days of a prior covered short-term loan will more typically reflect the continuing pressure that leads to re-borrowing rather than the emergence of a separate and independent need that prompts the borrower to take out a new loan. One of the primary purposes of this rule is to prevent consumers from falling into long-term re-borrowing cycles that result from loans with unaffordable payments. The Bureau concludes that the rule would fall far short of one of its chief purposes of preventing the risks and harms associated with unaffordable loans if § 1041.6 were to allow re-borrowing to create extended loan sequences in the period immediately after a 3-loan sequence has just been completed. Some built-in mechanism to disrupt a re-borrowing cycle is necessary or appropriate, and the Bureau has concluded that a cooling-off period of 30 days is the most effective way to accomplish that.

Finally, the rationale for limiting loan sequences under § 1041.6(c)(3) to three loans is discussed above in the section-by-section analysis of § 1041.6(b)(1) and that discussion is incorporated here.

6(c)(3)

Proposed Rule

Proposed § 1041.7(c)(4) would have required that a covered short-term loan made under proposed § 1041.7 cannot result in the consumer having more than six such loans outstanding during any consecutive 12-month period or having covered short-term loans outstanding for an aggregate period of more than 90 days during any consecutive 12-month period. The lender would have to determine whether any such loans were outstanding during the consecutive 12-month period. If a consumer obtained a covered short-term loan prior to that period and was obligated on the loan during part of the period, this loan and the time it was outstanding during the consecutive 12-month period would count toward these overall limits.

Under proposed § 1041.7(c)(4), the lender would have to count the proposed new loan toward the loan limit and count the anticipated contractual duration of the new loan toward the indebtedness limit. Under the proposal, because the new loan and its proposed contractual duration would count toward these limits, the lookback period would not start at the consummation date of the new loan. Instead, the lookback period would start at the proposed contractual due date of the final payment on the new loan and consider the full 12 months immediately preceding this date.

Proposed comment 7(c)(4)–1 would have clarified that a consecutive 12-month period begins on the date that is 12 months prior to the proposed contractual due date of the new conditionally exempt loan and ends on the proposed contractual due date. Proposed comment 7(c)(4)–1 would have explained further that the lender would have to obtain information about the consumer's borrowing history on covered short-term loans for the 12 months preceding the proposed contractual due date on that loan, and it also provided an example.

As a general matter, the Bureau was concerned about consumers' frequent use of covered short-term loans made under proposed § 1041.7 for which lenders would not have been required to underwrite the loan in accordance with the criteria specified in proposed § 1041.5. The frequent use of covered short-term loans that do not require such an assessment may be a signal that consumers are struggling to repay such loans without re-borrowing. For purposes of determining whether the making of a loan would satisfy the loan and indebtedness limits in proposed § 1041.7(c)(4), the Bureau proposed to require the lender also to count covered short-term loans made under both proposed § 1041.5 and proposed § 1041.7. Although loans made under proposed § 1041.5 would require the lender to make a reasonable determination of a consumer's ability to repay, the Bureau believed that the consumer's decision to seek a conditionally exempt loan, after previously obtaining a covered short-term loan based on the underwriting criteria in proposed § 1041.5, suggested that the consumer may now lack the ability to repay the loan and that the earlier loan approval may not have fully captured this particular consumer's

expenses or obligations. Under proposed § 1041.7(c)(4), consumers could receive up to six conditionally exempt loans and accrue up to 90 days of indebtedness on these loans, assuming the consumer did not also have any covered short-term loans made under proposed § 1041.5 during the same period. Because the duration of covered short-term loans is typically tied to how frequently a consumer receives income, the Bureau believed that the two overlapping proposed requirements were necessary to provide more complete protections for consumers.

Proposed § 1041.7(c)(4)(i) included the proposed requirement that a covered short-term loan made under proposed § 1041.7 cannot result in the consumer having more than six covered short-term loans outstanding during any consecutive 12-month period. Proposed comment 7(c)(4)(i)–1 explained certain aspects of proposed § 1041.7(c)(4)(i) relating to the proposed loan limit. Proposed comment 7(c)(4)(i)–1 clarified that, in addition to the new loan, all covered short-term loans made under either proposed § 1041.5 or proposed § 1041.7 that were outstanding during the consecutive 12-month period would count toward the proposed loan limit. Proposed comment 7(c)(4)(i)–1 also clarified that, under proposed § 1041.7(c)(4)(i), a lender may make a loan that when aggregated with prior covered short-term loans would satisfy the loan limit even if proposed § 1041.7(c)(4)(i) would prohibit the consumer from obtaining one or two subsequent loans in the sequence. Proposed comment 7(c)(4)(i)–2 provided examples.

The Bureau believed that a consumer who seeks to take out a new covered short-term loan after having taken out six covered short-term loans during a consecutive 12-month period may very well be exhibiting an inability to repay such loans. The Bureau believed that if a consumer were seeking a seventh covered short-term loan under proposed § 1041.7 in a consecutive 12-month period, this would be an indicator that the consumer may, in fact, be using covered short-term loans to cope with regular expenses and compensate for chronic income shortfalls, rather than to cover an emergency or other non-recurring need.[900] In these circumstances, the Bureau believed that the lender should make an ability-to-repay determination in accordance with proposed § 1041.5 before making additional covered short-term loans and ensure that the payments on any subsequent loan are affordable for the consumer.

Proposed § 1041.7(c)(4)(ii) included the proposed requirement that a covered short-term loan made under proposed § 1041.7 cannot result in the consumer having covered short-term loans outstanding for an aggregate period of more than 90 days during any consecutive 12-month period. Proposed comment 7(c)(4)(ii)–1 clarified certain aspects of the proposed rule as they relate to the proposed indebtedness limit. Proposed comment 7(c)(4)(ii)–1 explained that, in addition to the new loan, the period in which all covered short-term loans made under either proposed § 1041.5 or proposed § 1041.7 were outstanding during the consecutive 12-month period would count toward the indebtedness limit. The same proposed comment also clarified that, under proposed § 1041.7(c)(4)(ii), a lender may make a loan with a proposed contractual duration, which when aggregated with the time outstanding of prior covered short-term loans, would satisfy the indebtedness limit even if proposed § 1041.7(c)(4)(ii) would not prohibit the consumer from obtaining one or two subsequent loans in the sequence. Proposed comment 7(c)(4)(ii)–2 provided examples.

The Bureau believed it was important to complement the proposed 6-loan limit with the proposed 90-day indebtedness limit in light of the fact that loan durations could vary under proposed § 1041.7. For the typical two-week payday loan, the two thresholds would have reached the same result, since a limit of six loans under proposed § 1041.7 means that the consumer could have been in debt on such loans for up to approximately 90 days per year or one quarter of the year. For 30- or 45-day loans, however, a 6-loan limit would have meant that the consumer could have been in debt for 180 or even 270 days out of a 12-month period. The Bureau believed these kinds of results would be inconsistent with protecting consumers from the harms associated with long cycles of indebtedness.

Given the income profile and borrowing patterns of consumers who borrow monthly, the Bureau believed that the proposed indebtedness limit is an important protection for these consumers. Consumers who receive 30-day payday loans are more likely to live on fixed incomes, and typically are recipients of Social Security.[901] Fully 58 percent of monthly borrowers were identified as recipients of government benefits in the Bureau's 2014 Data Point.[902] These borrowers are particularly vulnerable to default and collateral harms from making unaffordable loan payments. The Bureau found that borrowers receiving public benefits are more highly concentrated toward the lower end of the income range. Nearly 90 percent of borrowers receiving public benefits reported annual incomes of less than $20,000, whereas less than 30 percent of employed borrowers reported annual incomes of less than $20,000.[903] Furthermore, because public benefits are typically fixed and do not vary from month to month,[904] in contrast to wage income that is often tied to the number of hours worked in a pay period, the Bureau believed that monthly borrowers are more likely than bi-weekly borrowers to use covered short-term loans to compensate for a chronic income shortfall rather than to cover an emergency or other non-recurring need.

The Bureau found that borrowers on fixed incomes are especially likely to struggle with repayments and face the burden of unaffordable loan payments for an extended period. As noted in the Supplemental Findings on Payday Loans, Deposit Advance Products, and Vehicle Title Loans, for loans taken out by consumers who are paid monthly, more than 40 percent of all loans to these borrowers were in sequences that, once begun, persisted for the rest of the year for which data were available.[905] The Bureau also found that approximately 20 percent of borrowers[906] who were paid monthly

[900] *See* Market Concerns—Underwriting; Rob Levy & Joshua Sledge, ''A Complex Portrait: An Examination of Small-Dollar Credit Consumers,'' at 12 (Ctr. for Fin. Servs. Innovation, 2012), *available at https://www.fdic.gov/news/conferences/consumersymposium/2012/A%20Complex%20Portrait.pdf.*

[901] Due dates on covered short-term loans generally align with how frequently a consumer receives income. Consumers typically receive public benefits, including Social security and unemployment, on a monthly basis. *See* CFPB Payday Loans and Deposit Advance Products White Paper, at 19.

[902] *See* CFPB Data Point: Payday Lending, at 14.

[903] The Bureau previously noted in the CFPB White Paper from April 2013 that a significant share of consumers (18 percent) reported a form of public assistance or other benefits as an income source (*e.g.,* Social Security payments); these payments are usually of a fixed amount, typically occurring on a monthly basis; and that borrowers reporting public assistance or benefits as their income source are more highly concentrated toward the lower end of the income range for the payday borrowers in our sample. *See* CFPB Payday Loans and Deposit Advance Products White Paper, at 18–20.

[904] CFPB Payday Loans and Deposit Advance Products White Paper, at 19.

[905] CFPB Report on Supplemental Findings, at 131.

[906] CFPB Report on Supplemental Findings, at 125.

averaged at least one loan per pay period.

In light of these considerations, the Bureau believed that a consumer who has been in debt for more than 90 days on covered short-term loans, made under either proposed § 1041.5 or proposed § 1041.7, during a consecutive 12-month period may very well be exhibiting an inability to repay such loans. If a consumer is seeking a covered short-term loan under proposed § 1041.7 that would result in a total period of indebtedness on covered short-term loans of greater than 90 days in a consecutive 12-month period, the Bureau believed that this consumer may, in fact, be using covered short-term loans to cover regular expenses and compensate for chronic income shortfalls, rather than to cover an emergency or other non-recurring need.[907] Under these circumstances, the Bureau believed that the lender should make an ability-to-repay determination in accordance with the underwriting criteria proposed § 1041.5 before making additional covered short-term loans and ensure that the payments on any subsequent loan are affordable for the consumer.

Comments Received

Consumer groups wrote in support of the Bureau's proposal to have both a 6-loan limit and a 90-day limit. Some asserted that having these overlapping limits was important because a limit that only covered the number of loans would not protect borrowers who took out somewhat longer 30-day or 45-day loans. A State Attorney General supported the 90-day limitation because it would limit many borrowers in that State to three loans a year, which would be significant.

Two faith-based groups went further and urged the Bureau to further limit the number of short-term conditionally exempt loans. They argued that any re-borrowing is a sign of unaffordability, and suggested that the rule allow at most a single short-term conditionally exempt loan per year.

Consumer groups and legal aid organizations further suggested that the 6-loan cap and the limitation of 90 days of indebtedness in a 12-month period should apply to all loans. They pointed to existing guidance from prudential regulators that provides no exceptions to the limit of six deposit advances in a year. A coalition of consumer groups also proposed that the Bureau adopt a further restriction on loans where the borrower would be unable to take out a full sequence of three conditionally exempt loans. The commenter noted that if a borrower took out a conditionally exempt loan but was close to either the 6-loan limit or the 90-day limit then the borrower would be unable to take advantage of the principal step-down requirements. The commenter asserted that this was inconsistent with the importance of the principal step-down requirement and suggested either that no loan be permitted in these circumstances or that the loan be capped at a lower value based on the number of loans the borrower would still be permitted to take out.

Some commenters urged the Bureau to expand some of the definitions relevant to the conditional exemption to capture more conduct. In response to the Bureau's solicitation, commenters suggested that when computing the 90-day indebtedness limit it would be better to measure the days by the longer of contractual indebtedness or actual indebtedness because this measure is more relevant to whether borrowers are able to afford a loan. They also argued that loans which fall partially within the 12-month measuring period should be counted toward the 6-loan limit. They further suggested that the look-back period for determining whether a borrower had six loans or 90 days of indebtedness should involve a two-step process: first the lender should look back 365 days from the first day of a new loan, then the lender should consider whether any days when the borrower has the loan would result in a violation of the 6-loan or 90-day limit.

Industry commenters urged the Bureau not to adopt the proposed 6-loan and 90-day limits. They asserted that rigid limits on re-borrowing were inappropriate because short-term loans are generally used to pay for emergency expenses and thus are not predictable, so the limits would be too inflexible to meet borrower needs. Industry commenters also argued that the restrictions would negatively affect borrowers who were paid monthly because they would only be able to take out three loans. Some commenters asserted that limits on days of indebtedness and numbers of loans would cause small lenders to go out of business, reducing the supply of credit. One industry commenter argued that the limit of six loans in a year was not supported by the data and urged the Bureau to adopt a limit of eight loans per year instead, a comment also discussed in the section-by-section analysis for § 1041.5(d). Another industry commenter suggested that the Bureau consider engaging in more tests and experiments on loan limits. It argued that a limit on the number of loans may encourage borrowers to take out larger loans than they need because of uncertainty about their continuing ability to access credit.

Another commenter opposed the proposed conditional exemption because of concerns about communications with borrowers and adverse action notices. This commenter observed that the rule might prohibit a conditionally exempt loan during some periods and not others, because of the restrictions, and that these variations would be difficult to explain adequately to consumers both more generally, and in adverse action notices.

Final Rule

For the reasons set forth in the proposal and discussed above and for the further reasons explained below, the Bureau is adopting proposed § 1041.7(c)(4), renumbered as § 1041.6(c)(3) of the final rule with certain technical edits. In addition, the Bureau is adopting proposed comment 7(c)(4)–1, renumbered as 6(c)(3)–1, with only technical edits. The Bureau adopts proposed comments 7(c)(4)(i)–1, 7(c)(4)(i)–2, 7(c)(4)(ii)–1, and 7(c)(4)(ii)–2, renumbered in this final rule as 6(c)(3)(i)–1, 6(c)(3)(i)–2, 6(c)(3)(ii)–1, and 6(c)(3)(ii)–2, with only technical adjustments. The Bureau modified the respective examples in comments 6(c)(3)(i)–2 and 6(c)(3)(ii)–2, however, in order to clarify that a lender could not make a conditionally exempt loan if either the 6-loan cap or the limit of 90 days of indebtedness was reached, even if that means a borrower had not yet reached the end of his 3-loan limit for a particular loan sequence.

The limits on making conditionally exempt loans pursuant to § 1041.6 during a 12-month period are intended to ensure that the conditional exemption does not become a mechanism that would allow for extensive repeat borrowing of potentially unaffordable covered short-term loans. The Bureau concludes that these limits on overall lending are not necessary for loans made under § 1041.5 because those loans must be underwritten according to criteria designed to prevent them from becoming unaffordable loans that pose special risks and harms to consumers as described above in Market Concerns—Underwriting.

The Bureau has carefully considered the competing arguments that many commenters raised about the

[907] *See* Market Concerns—Underwriting; Rob Levy & Joshua Sledge, ''A Complex Portrait: An Examination of Small-Dollar Credit Consumers,'' at 12 (Ctr. for Fin. Servs. Innovation, 2012), *available at https://www.fdic.gov/news/conferences/consumersymposium/2012/A%20Complex%20Portrait.pdf.*

appropriate limits on lending under § 1041.6 of the final rule, with some suggesting that the Bureau should tighten the limits further from the proposed levels and others arguing that the limits as proposed should either be increased or eliminated entirely. The Bureau originally proposed the 6-loan limit based on considerable feedback as a reasonable limitation on the use of the conditionally exempt loans, which generally comprises two full loan sequences under § 1041.6. As noted above, the Bureau also proposed the overlapping 90-day limitation on indebtedness for such loans out of concerns specific to borrowers who are paid monthly and take out 30-day or 45-day loans, which, in the absence of a 90-day (or other durational) limit, could result in borrowers being indebted on covered short-term loans under § 1041.6 for half or even three-quarters of the year. If a borrower has the need to seek a loan more frequently than the exemption contemplates, the borrower can still receive an underwritten loan under § 1041.5 of the final rule or many other types of loans not covered by this rule. If in fact a borrower's credit needs can only be met by arranging more extended credit than the limits under § 1041.6 would allow, the Bureau believes this may be a strong indicator that forms of underwritten longer-term credit would be better suited to that consumer than the kinds of covered short-term loans under consideration here.

In sum, the Bureau has considered the comments on both sides of this issue and declines to set higher limits. The limits set on loans made under § 1041.6 are the conditions that lenders must follow in order to be exempted from the underwriting criteria required in § 1041.5, which do not include any similar annual lending limitations. In setting these limitations, the Bureau has also relied in part on norms and precedents that have been set in this market by other Federal regulators, most notably the FDIC and the OCC, which both have issued guidance to the banks under their supervisory authority and have effectively limited borrowers of these kinds of loans to six loans in a 12-month period.[908]

As noted in the proposal, and in the Section 1022(b)(2) Analysis at part VII below, the Bureau recognizes that the broader combination of regulatory requirements in this rule, including the limitations on making conditionally exempt loans under § 1041.6 within a 12-month period, will have a significant economic impact on lenders that rely on extensive repeat re-borrowing for their operating revenue. The Bureau has also concluded, however, that the availability of loans under the exemption in § 1041.6, as well as underwritten loans made under § 1041.5 and other loans not covered by this rule, taken altogether, will still allow a large, albeit reduced, volume of lending to continue in this market.[909] As noted in the Section 1022(b)(2) Analysis below at part VII, even as some market consolidation occurs, consumers nevertheless are likely to retain convenient access to covered short-term loans.

As clarified in Comments 6(c)(3)(i)–2 and 6(c)(3)(ii)–2, borrowers who reach one of the 12-month lending limitations in the midst of a loan sequence will not receive the full step-down for that sequence. In this particular situation, the Bureau has weighed the alternatives and concludes that the overall goal of limiting extensive repeat re-borrowing—a concern that is closely tied to the unfair and abusive practice identified in § 1041.4 and its harmful effects on consumers—takes precedence over the narrower goal of providing full amortization on each conditionally exempt loan that is made in this market. This decision involved a line-drawing exercise, and the Bureau has determined that this resolution steers a middle course between prohibiting the loan altogether in these circumstances, which seems too restrictive of access to credit, or allowing a full loan sequence to run its course, which would undermine the broader goal noted above of imposing the aggregate limits on re-borrowing over a 12-month period. The Bureau believes that were it to permit the full 3-loan sequence as long as the first loan would comply with the limitations on lending within a 12-month period, it could create incentives for lenders to structure their lending practices in order to ensure that a sixth loan is the beginning of a new sequence, and/or that a first loan in a sequence would end right at 90 days of indebtedness for that 12-month period, significantly undermining the effect of these limitations. Other ways to resolve this situation are also possible, but as this example demonstrates, as they become more complex, they would also become more difficult to administer.

As for whether the 90-day limitation will negatively affect borrowers who are paid monthly because they would only be able to take out three conditionally exempt loans pursuant to § 1041.6 in a 12-month period, the Bureau notes that the situations of borrowers who are paid monthly were one of the reasons that the 90-day limitation was included in the rule. The Bureau is concerned that borrowers who take out 30-day or 45-day loans, without the 90-day limit, could find themselves indebted more often than not, which would be antithetical to the purpose of the conditional exemption to allow for credit for an emergency or other non-recurring need without having to comply with the full underwriting regime in § 1041.5. The Bureau recognizes that this framework will limit the ability of some borrowers to take out loans under the exemption, but reiterates that underwritten loans under § 1041.5 remain available, as do various loans not covered by this rule.

6(d) Restrictions on Making Other Loans Following a Loan Made Under the Conditional Exemption

Proposed Rule

The proposed rule included a number of provisions designed to address the concern that lenders might seek to evade the protective features of proposed § 1041.7, such as the cooling-off period or principal step-down—and thereby keep consumers in long cycles of re-borrowing—through a combination of conditionally exempt loans and other loans. That proposed framework would have worked as follows. Under proposed § 1041.6(g), lenders would not have been allowed to make covered short-term loans pursuant to proposed § 1041.5 while a conditionally exempt loan is outstanding and for 30 days thereafter. That provision, modified to include longer-term balloon-payment loans, is being finalized as § 1041.5(d)(3), as discussed above. Similarly, under proposed § 1041.10(e), lenders would not have been allowed to make covered longer-term loans under proposed § 1041.9 while a conditionally exempt loan made by the lender or its affiliate is outstanding and for 30 days thereafter. And under proposed § 1041.7(d), if the lender or its affiliate made a non-covered bridge loan (a certain type of non-recourse pawn loan)

[908] FDIC, ''Financial Institution Letters: Guidelines for Payday Lending,'' (Revised Nov. 2015), *available at https://www.fdic.gov/news/news/financial/2005/fil1405a.html.* (stating that institutions should ensure payday loans are not provided to customers who had payday loans for a total of 3 months during the previous 12-month period); Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 78 FR 70624 (Nov. 26, 2013); Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 78 FR 70552 (Nov. 26, 2013).

[909] The Bureau's estimate in the Section 1022(b)(2) Analysis below is that the rule will reduce credit by approximately 6 percent, which would be much higher without the exemption in § 1041.6.

while a conditionally exempt loan made by the lender or its affiliate is outstanding and for 30 days thereafter, the days during which the non-covered bridge loan is outstanding would ''toll'' the running of the 30-day re-borrowing and cooling-off periods included in proposed § 1041.7. The latter two provisions are discussed immediately below because they are the basis of final § 1041.6(d).

Proposed § 1041.10(e) provided that, during the time period in which a covered short-term loan made by a lender or its affiliate under proposed § 1041.7 is outstanding and for 30 days thereafter, the lender or its affiliate must not make a covered longer-term loan under proposed § 1041.9 to a consumer. Proposed comment 10(e)–1 clarified that, during the time period in which a covered short-term loan made by a lender or its affiliate under proposed § 1041.7 is outstanding and for 30 days thereafter, a lender or its affiliate could make a covered longer-term loan under proposed § 1041.11 or proposed § 1041.12 to a consumer.

In the proposal, the Bureau explained that although proposed § 1041.10(e) was functionally a component of the proposed conditional exemption in § 1041.7, it was being included in proposed § 1041.10 for ease of reference for lenders so they could look to a single provision of the rule for a list of prohibitions and presumptions that affect the making of covered longer-term loans under proposed § 1041.9. More substantively, the Bureau explained that it was proposing the prohibition contained in § 1041.10(e) to effectuate the principal reduction requirements under proposed § 1041.7(b)(1) and the three-loan limit on a sequence of loans under proposed § 1041.7(c)(3), which were designed to allow consumers to repay the principal gradually over a three-loan sequence. The Bureau noted that this proposed protection could be circumvented if, in lieu of making a loan subject to such principal reduction, a lender were free to make a high-cost covered longer-term loan under proposed § 1041.9 during the 30 days following repayment of the first loan—or second loan—in a sequence of covered short-term loans made under proposed § 1041.7 or while such first or second loan in the sequence was outstanding.

Furthermore, the Bureau stated its belief that the prohibition in proposed § 1041.10(e) would prevent lenders from using a covered short-term loan made under proposed § 1041.7 to induce consumers into taking a covered longer-term loan made under proposed § 1041.9. The Bureau noted that, in the absence of the proposed requirement, as a covered short-term loan made under proposed § 1041.7 that was unaffordable comes due, the lender could leverage the consumer's financial vulnerability and need for funds to make a covered longer-term loan that the consumer otherwise would not have taken. For a lender, this business model would generate more revenue than a business model in which the lender adhered to the proposed path for a sequence of loans made under proposed § 1041.7 and would also reduce the upfront costs of customer acquisition on covered longer-term loans. Lenders who desire to make covered longer-term loans under proposed § 1041.9 ordinarily would have to take steps and perhaps incur costs to acquire customers willing to take those loans and to disclose the terms of those loans upfront. For the consumer, what is ostensibly a short-term loan may, contrary to the consumer's original expectations, result in long-term debt.

The Bureau sought comment, *inter alia,* on whether any alternative approaches exist that would address the Bureau's concerns related to effectuating the conditional exemption in proposed § 1041.7 while preserving the ability of lenders to make covered longer-term loans under proposed § 1041.9 close in time to covered short-term loans under proposed § 1041.7.

Turning to proposed § 1041.7(d), it provided that if a lender or an affiliate made a non-covered bridge loan during the time any covered short-term loan made by the same lender or an affiliate under proposed § 1041.7 is outstanding and for 30 days thereafter, the lender or affiliate would have had to modify its determination of loan sequence for the purpose of making a subsequent conditionally exempt loan. Specifically, the lender or an affiliate would not have been able to count the days during which the non-covered bridge loan is outstanding in determining whether a subsequent conditionally exempt loan made by the lender or an affiliate is part of the same loan sequence as the prior conditionally exempt loan. Non-covered bridge loan was defined in proposed § 1041.2(a)(13) as a non-recourse pawn loan made within 30 days of an outstanding covered short-term or longer-term balloon-payment loan that must be substantially repaid within 90 days.

Proposed comment 7(d)–1 provided a cross-reference to proposed § 1041.2(a)(13) for the definition of non-covered bridge loan. Proposed comment 7(d)–2 clarified that proposed § 1041.7(d) would provide certain rules for determining whether a loan is part of a loan sequence when a lender or an affiliate makes both covered short-term loans under § 1041.7 and a non-covered bridge loan in close succession. Proposed comment 7(d)–3 provided an example.

The Bureau intended proposed § 1041.7(d) to maintain the integrity of a core protection in proposed § 1041.7(b). If a lender could make a non-covered bridge loan to keep a consumer in debt and reset a consumer's loan sequence after 30 days, it could make a lengthy series of $500 loans and evade the principal step-down requirements in proposed § 1041.7(b)(1). In the absence of this proposed restriction, the Bureau believed that a consumer could experience an extended period of indebtedness after taking out a combination of covered short-term loans under § 1041.7 and non-covered bridge loans and not have the ability to gradually pay off the debt obligation and exit the loan sequence by means of the principal reduction requirement in proposed § 1041.7(b)(1). Proposed § 1041.7(d) paralleled the restriction in proposed § 1041.6(h) applicable to covered short-term loans made under proposed § 1041.5.

The Bureau sought comment on whether this proposed restriction is appropriate, and also sought comment on whether lenders would anticipate making covered short-term loans under proposed § 1041.7 and non-covered bridge loans to consumers close in time to one another, if permitted to do so under a final rule.

Comments Received

The Bureau received a number of comments from consumer groups generally supporting both proposed § 1041.10(e) and proposed § 1041.7(d). Echoing the rationale provided by the Bureau for proposed § 1041.10(e), they asserted that, absent the prohibition, lenders would entrap consumers into an initial loan without assessing their ability-to-repay and then switch them to a longer-term installment loan. But they urged the Bureau to extend the 30-day period specified in proposed § 1041.10(e) to 60 days. As regards proposed § 1041.7(d), the consumer groups urged the Bureau to expand the definition of non-covered bridge loan to include any loan from a lender or affiliate because the risks of evasion presented by non-covered bridge loans were equally present with other types of loans. In addition, they recommended that the proposed ''tolling' approach be replaced with a ''reset'' approach. That is, instead of tolling the running of the 30-day re-borrowing and cooling-off

periods in proposed § 1041.7 during the pendency of a non-covered bridge loan, the period should reset to 30 days at the end of such a loan. Here as well, they urged the Bureau to extend the applicable periods from 30 to 60 days.[910]

Final Rule

In the final rule, the Bureau has made a number of changes to the way it addresses the risk of lenders using other loans or a combination of loans to undercut the limitations in the conditional exemption as a way to evade the specific protections in § 1041.6 of the final rule and keep consumers in extended cycles of indebtedness. These changes have been made against the backdrop of the Bureau's decisions not to finalize the underwriting requirements for covered longer-term loans (other than those with balloon payments) in proposed § 1041.9; to move the provisions on covered longer-term balloon-payment loans into § 1041.5; and not to finalize the presumptions in proposed § 1041.6 and proposed § 1041.10. As noted, one such change consists in modifying proposed § 1041.6(g) to include covered longer-term balloon-payment loans as well as covered-short term loans, such that lenders would not be allowed to make either type of loan while a conditionally exempt loan is outstanding and for 30 days thereafter. The resulting provision is being finalized as § 1041.5(d)(3).

In the same vein, § 1041.6(d) of the final rule is another example of these changes. It combines aspects of proposed § 1041.10(e) and proposed § 1041.7(d) into a single provision that applies to a broader range of loans. Under § 1041.6(d) of the final rule, a lender or its affiliate may not make any loan to a consumer, other than one governed by § 1041.6, for 30 days after making a prior § 1041.6 loan to that consumer. It thus applies to all loans other than § 1041.6 loans, not just covered longer-term loans (as in proposed § 1041.10(e)). Moreover, it prohibits all such loans being made during that 30-day period, rather than merely tolling the running of this period when the lender or its affiliate makes a non-covered bridge loan. With this restriction in place, a lender may or may not choose to opt in to the alternative lending framework created by the conditional exemption by making a loan to a consumer under § 1041.6 without meeting the specific underwriting criteria under § 1041.5. But if the lender does choose to make a loan to the borrower pursuant to § 1041.6, then it must make any further loans to that same consumer pursuant only to § 1041.6 until 30 days after any such conditionally exempt loans are no longer outstanding.

As noted, under § 1041.5(d)(3), the lender also cannot make a conditionally exempt loan under § 1041.6 while a loan made under § 1041.5 is outstanding and for 30 days thereafter. The upshot is that if lenders want to make covered short-term loans without meeting the specified underwriting criteria under § 1041.5, one temporary condition they must accept is that the only loan they can make to the same borrower during the 30-day periods following the first and second loans in a sequence of loans made under § 1041.6 is another conditionally exempt loan, and that they cannot make any loans to the borrower during the 30-day cooling-off period following the third loan in such a sequence of loans

The Bureau has concluded that § 1041.6(d) of the final rule is necessary or appropriate for several reasons. As discussed, proposed § 1041.10(e) and proposed § 1041.7(d) had each been proposed to effectuate and prevent evasion of the protections provided by the principal-reduction requirement and 30-day cooling-off period, as such evasion could result in long cycles of indebtedness. Proposed § 1041.7(d) was focused only on the limited bridging concern presented by making certain non-recourse pawn loans. In considering whether this restriction is appropriate—a point on which the Bureau explicitly sought comment—the Bureau came to view this treatment of the issues as much too narrow. The Bureau had been aware of some mergers and dual-channel operations that had created increased links between payday lending and pawn lending. But in thinking about the problems posed by any kind of loan that could be used by lenders to bridge between successive covered loans, the Bureau came to recognize that if the same lender could make other loans to the same borrower during the temporary period when the lender has opted into the alternative framework of the conditional exemption, then the lender could disrupt and potentially evade the alternative lending framework so carefully established in proposed § 1041.7. Instead of being restricted only to making amortizing loans in limited step-down sequences that were established as a means of protecting consumers against the dangers of unaffordable loans that did not comply with the underwriting criteria specified in § 1041.5, it became clear that lenders could potentially move in and out of this framework and gain certain advantages by doing so.

In considering the ways in which the proposed restriction might or might not be appropriate, the Bureau needed to confront two distinct issues: Whether the tolling provision as proposed was properly calibrated and adequate to the task at hand, and which loans in addition to certain non-recourse pawn loans should be identified as improper bridge loans when viewed from within the framework of the conditional exemption. As noted, consumer groups urged the Bureau to expand proposed § 1041.7(d) in two ways: (1) By including any type of loan made by the lender or its affiliate, not just non-covered bridge loans; and (2) by replacing the ''tolling'' approach with a ''reset'' approach. As regards the first comment, the Bureau agrees that there is no significant difference between non-covered bridge loans and all other loans when it comes to the potential to use the loan to bridge between conditionally exempt loans and loan sequences, and thus to potentially exacerbate their effects upon the borrower. Accordingly, the Bureau has designed final § 1041.6(d) of the final rule to apply to any loan made by the lender or its affiliate (other than a loan made under § 1041.6 itself, of course). Regarding longer-term loans, in particular, the Bureau has concluded that the prohibition in proposed § 1041.10(e) on lenders making such loans during the 30-day period following a conditionally exempt loan is needed for the reasons set forth in the proposal and reiterated above. Indeed, the fact that the Bureau has decided not to finalize the underwriting requirements on such loans in proposed § 1041.9, and the attendant presumptions in proposed § 1041.10, only heightens the need for this prohibition—which is now incorporated in § 1041.6(d) of the final rule.

As regards the second comment, the Bureau generally agrees with the commenters' concerns about the proposed tolling provision. The Bureau has concluded that merely tolling the cooling-off or re-borrowing periods is an inadequate measure to prevent lengthy debt cycles or bridging between conditionally exempt loans or sequences in an effort to evade the requirements of the rule. Merely tolling the running of the 30-day re-borrowing period or the 30-day cooling-off period for the duration of any loan—including those the proposed rule defined as non-covered bridge loans—could negate the

[910] The Bureau's response to the recommendations to extend the re-borrowing and cooling-off periods from 30 to 60 days are provided in the discussion of § 1041.6(c)(2) above.

purpose of the period being tolled because the time periods are intended to run continuously. For example, a non-covered bridge loan made in the middle of the cooling-off period would mean that a consumer would not be in debt for only 15 days at a time, on either end of the non-covered bridge loan, which may be an inadequate period for the consumer's finances to recover. Similarly, the justification for setting the re-borrowing period at 30 days is undermined where a borrower only has 15 days between a § 1041.6 loan and a bridge loan, on either end. The bridge loan would effectively be a re-borrowing of the prior loan, and the loan after the bridge loan would effectively be a re-borrowing of the bridge loan, if there was only 15 days in between each. Further, the principal step-down would not work as designed if a second or third conditionally exempt loan under § 1041.6 came after an intervening non-covered bridge loan in a higher amount than the prior loan.

The Bureau recognizes that the reset approach suggested by consumer groups would be somewhat more protective than the tolling approach in certain respects. However, several of the weaknesses of the tolling approach detailed above likewise apply to the reset approach. In addition, the reset approach would not address the concern animating proposed § 1041.10(e)—which has been intensified by the Bureau's decision not to finalize the underwriting requirements for covered longer-term loans—that a lender could leverage the consumer's financial vulnerability and need for funds after having taken out an unaffordable conditionally exempt loan to make a longer-term loan that the consumer otherwise would not have taken, indeed one that would be unaffordable in its own right. Further, the tolling provision would have added considerable complexity to the rule, and for that reason may have been difficult to comply with and enforce. The same would be largely true of a revised provision using the reset approach.

For all of these reasons, the Bureau concludes that the most effective means of fully achieving the purposes of proposed § 1041.10(e) and proposed § 1041.7(d)—as well as the simplest means—is a straightforward limitation on any other lending occurring between the specific lender and borrower who had opted in to the § 1041.6 framework by choosing to consummate a conditionally exempt loan during the 30-day re-borrowing and cooling-off periods of § 1041.6. The Bureau also concludes, as discussed above in the discussion of § 1041.6(c), that by prohibiting loans within 30 days of a conditionally exempt loan, the finalized approach will protect the effectiveness of the principal reduction requirements of § 1041.6(b), and will also best serve the purposes of the 30-day re-borrowing and cooling-off periods.

The Bureau therefore has reframed § 1041.6(d) to prohibit all loans that may be made within 30 days after a covered short-term loan is made under the exemption, rather than prohibiting covered loans and tolling or resetting time periods during non-covered bridge loans. The final rule provides that the only loan that a lender or its affiliate may make to a borrower, while a loan made under § 1041.6(d) from that lender is outstanding to the borrower or for 30 days thereafter, is a short-term loan that complies with the principal reduction and other provisions of § 1041.6.

As was true of both proposed § 1041.10(e) and proposed § 1041.7(d), § 1041.6(d) of the final rule does not apply to all lenders, but only to the lender or affiliate that has made a § 1041.6 loan to the consumer, for essentially the same reasons provided in the proposal with respect to this aspect of proposed § 1041.10(e) and proposed § 1041.7(d). A lender in a non-covered market would not otherwise have a reason or a need to check a registered information system, and thus would be unaware of a prior § 1041.6 loan. This also reduces the impact that § 1041.6(d) will have on limiting access to credit that is not used for bridging, but nonetheless falls within the period of a conditionally exempt loan. If, for example, a borrower wants to take out a 5-year installment loan 15 days after he obtains a loan under § 1041.6, the borrower could do so, as long as he did so with a different lender. Moreover, the concerns that animated proposed § 1041.10(e) and are in part the basis for final § 1041.6(d)—that a lender could use an unaffordable loan it had made under § 1041.6 to induce a consumer to take out a different kind of loan—are not present or are present to a much lesser degree if a consumer is considering a loan from a different lender.

Two new comments have been added to reflect the revisions to § 1041.6(d). Comment 6(d)–1 explains that while a covered short-term loan made under § 1041.6 is outstanding from a lender to a consumer, and for 30 days thereafter, that lender and its affiliates may only make a covered short-term loan to that borrower if it complies with § 1041.6. The comment also expressly clarifies that the lender and its affiliates may not make any other types of loans to the same borrower during that period.

Comment 6(d)–2 includes an example involving a consumer who seeks a loan from a lender during the 30 days after repaying a prior conditionally exempt loan from that lender. The example explains that the rule does not prohibit the lender from making a covered short-term loan under § 1041.6, and clarifies that the consumer could obtain a non-covered installment loan from a lender that is unaffiliated with the original lender. The example also illustrates how the 30-day cooling-off period works by identifying the first date on which the lender or its affiliate could make a non-covered installment loan (or a covered loan under § 1041.5) to the consumer.

6(e) Disclosures

Proposed Rule

In proposed § 1041.7(e), renumbered in this final rule as § 1041.6(e), the Bureau proposed to require a lender to provide disclosures before making the first and third loan in a sequence of conditionally exempt loans under § 1041.6. Under the proposal, the notices in proposed § 1041.7(e)(2)(i) and (ii) would have had to be substantially similar to model forms provided in the proposal. Proposed § 1041.7(e) would have required a lender to provide the notices required under proposed § 1041.7(e)(2)(i) and (ii) before the consummation of a loan. Proposed comment 7(e)–1 would have clarified the proposed disclosure requirements.

The proposed disclosures were designed to provide consumers with key information about how the principal amounts and the number of loans in a sequence would be limited for covered short-term loans made under proposed § 1041.7 before they take out their first and third loans in a sequence. The Bureau developed model forms for the proposed disclosures through consumer testing.[911]

The Bureau believed that the proposed disclosures would, consistent with section 1032(a) of the Dodd-Frank Act, ensure that these costs, benefits, and risks are fully, accurately, and effectively disclosed to consumers. In the absence of the proposed disclosures, the Bureau was concerned that consumers would be less likely to appreciate the risk of taking out a loan with mandated principal reductions or understand the proposed restrictions on conditionally exempt loans that were

[911] *See generally* FMG Report, ''Qualitative Testing of Small Dollar Loan Disclosures, Prepared for the Consumer Financial Protection Bureau,'' at 2–6 (Apr. 2016), *available at http://files.consumerfinance.gov/f/documents/Disclosure_Testing_Report.pdf.*

designed to protect consumers from the harms of unaffordable loan payments.

The Bureau believed that it was important for consumers to receive the proposed notices before they would be contractually obligated on a conditionally exempt loan. By receiving the proposed notices before consummation, a consumer could make a more fully informed decision, with greater awareness of the features of such loans, including specifically the limits on taking out more conditionally exempt loans in the near future.

Proposed § 1041.7(e)(1), renumbered in this final rule as § 1041.6(e)(1), provided the form of disclosures that would be utilized under proposed § 1041.7. The format requirements generally would have paralleled the format requirements for disclosures related to payment transfers under proposed § 1041.15 (now renumbered as § 1041.9 of the final rule). Proposed § 1041.7(e)(1)(i) would have required that the disclosures be clear and conspicuous. Proposed § 1041.7(e)(1)(ii) would have required that the disclosures be provided in writing or through electronic delivery. Proposed § 1041.7(e)(1)(iii) would have required the disclosures to be provided in retainable form. Proposed § 1041.7(e)(1)(iv) would have required the notices to be segregated from other items and to contain only the information in proposed § 1041.7(e)(2), other than information necessary for product identification, branding, and navigation. Proposed § 1041.7(e)(1)(v) would have required electronic notices to have machine readable text. Proposed § 1041.7(e)(1)(vi) would have required the disclosures to be substantially similar to the model forms for the notices set out under proposed § 1041.7(e)(2)(i) and (ii). Proposed § 1041.7(e)(1)(vii) would have allowed lenders to provide the disclosures that would have been required by proposed § 1041.7(e) in a foreign language, provided that the disclosures must be made available in English upon the consumer's request.

Proposed comment 7(e)(1)(i)–1, renumbered in this final rule as 6(e)(1)(i)–1, clarified that disclosures are clear and conspicuous if they are readily understandable and their location and type size are readily noticeable to consumers. Proposed comment 7(e)(1)(ii)–2, renumbered in this final rule as 6(e)(1)(ii)–2, explained that the disclosures required by proposed § 1041.7(e)(2) may be provided electronically without regard to the Electronic Signatures in Global and National Commerce Act.[912] Proposed comment 7(e)(1)(iii)–1, renumbered in this final rule as 6(e)(1)(iii)–1, explained that electronic disclosures are considered retainable if they are in a format that is capable of being printed, saved, or emailed by the consumer. Proposed comment 7(e)(1)(iv)–1, renumbered in this final rule as 6(e)(1)(iv)–1, explained how segregated additional content can be provided to a consumer. Proposed comment 7(e)(1)(vi)–1, renumbered in this final rule as 6(e)(1)(vi)–1, explained the safe harbor provided by the model forms, providing that although the use of the model forms and clauses is not required, lenders using them would be deemed to be in compliance with the disclosure requirement with respect to such model forms.

In proposed § 1041.7(e)(2), renumbered in this final rule as § 1041.6(e)(2), the Bureau proposed to require a lender to provide notices to a consumer before making a first and third loan in a sequence of conditionally exempt loans. Proposed § 1041.7(e)(2)(i) would have required a lender before making the first loan in a sequence of conditionally exempt loans to provide a notice. Proposed § 1041.7(e)(2)(ii) would have required a lender before making the third loan in a sequence of conditionally exempt loans to provide another, different notice. More generally, these proposed notices were intended to help consumers understand the availability of conditionally exempt loans in the near future.

In proposed § 1041.7(e)(2)(i) the Bureau proposed to require a lender before making the first loan in a sequence of conditionally exempt loans to provide a notice that warns the consumer of the risk of a conditionally exempt loan that is unaffordable and informs the consumer of the Federal restrictions governing subsequent conditionally exempt loans. Specifically, the proposed notice would have warned the consumer not to take the loan if the consumer is unsure whether the consumer can repay the loan amount, which would include the principal and the finance charge, by the contractual due date. In addition, the proposed notice would have informed the consumer, in text and tabular form, of the Federally-required restriction, as applicable, on the number of subsequent loans and their respective amounts in a sequence of conditionally exempt loans. The proposed notice would have been required to contain the identifying statement ''Notice of restrictions on future loans,'' using that phrase. The other language in the proposed notice would have had to be substantially similar to the language provided in proposed Model Form A–1 in appendix A. Proposed comment 7(e)(2)(i)–1, renumbered in this final rule as 6(e)(2)(i)–1, explained the ''as applicable'' standard for information and statements in the proposed notice. It stated that, under proposed § 1041.7(e)(2)(i), a lender would have to modify the notice when a consumer is not eligible for a sequence of three covered short-term loans under proposed § 1041.7.

The Bureau believed the proposed notice would ensure that certain features of conditionally exempt loans are fully, accurately, and effectively disclosed to consumers in a manner that permits them to understand certain costs, benefits, and risks of such loans. Given that the restrictions on obtaining covered short-term loans under proposed § 1041.7 would be new and conceptually unfamiliar to many consumers, the Bureau believed that disclosing them would be critical to ensuring that consumers understand the restriction on the number of and principal amount on subsequent loans in a sequence of conditionally exempt loans. The Bureau's consumer testing of the notice under proposed § 1041.7(e)(2)(i) indicated that it aided consumer understanding of the proposed requirements on conditionally exempt loans.[913] In contrast, the consumer testing of notices for covered short-term loans made under § 1041.5 indicated that these notices did not improve consumer understanding of the ability-to-repay requirements under proposed § 1041.5.[914] Since the notice under proposed § 1041.7(e)(2)(i) would be provided in retainable form, the

[912] Also known as the E-Sign Act, 15 U.S.C. 7001 *et seq.*

[913] In Round 1 of consumer testing of the notice under proposed § 1041.7(e)(2)(i), ''[n]early all participants who saw this notice understood that it was attempting to convey that each successive loan they took out after the first in this series had to be smaller than the last, and that after taking out three loans they would not be able to take out another for 30 days.'' FMG Report, ''Qualitative Testing of Small Dollar Loan Disclosures, Prepared for the Consumer Financial Protection Bureau,'' at 11(Apr. 2016), *available at http://files.consumerfinance.gov/f/documents/Disclosure_Testing_Report.pdf.* In Round 2 of consumer testing of the notice under proposed § 1041.7(e)(2)(i), ''participants . . . noticed and understood the schedule detailing maximum borrowable amounts, and the schedule appeared to influence their responses when asked about the form's purpose.'' *Id.* at 40.

[914] *See* FMG Report, ''Qualitative Testing of Small Dollar Loan Disclosures, Prepared for the Consumer Financial Protection Bureau,'' at 9–11, 38–39 (Apr. 2016), *available at http://files.consumerfinance.gov/f/documents/Disclosure_Testing_Report.pdf.*

Bureau believed that the incremental informational value of providing the same or similar notice before the consummation of the second loan in a sequence of conditionally exempt loans would be limited.

Proposed § 1041.7(e)(2)(ii), renumbered in this final rule as § 1041.6(e)(2)(ii), would have required a lender before making the third loan in a sequence of conditionally exempt loans to provide a notice that informs a consumer of the restrictions on the new and subsequent loans. Specifically, the Bureau's proposed notice would state that the new conditionally exempt loan must be smaller than the consumer's prior two loans and that the consumer cannot take another similar loan for at least another 30 days after repaying the new loan. Under the proposal, the language in this proposed notice must be substantially similar to the language provided in proposed Model Form A–2 in appendix A. The proposed notice would have to contain the identifying statement ''Notice of borrowing limits on this loan and future loans,'' using that phrase. The other language in this proposed notice would have to be substantially similar to the language provided in proposed Model Form A–2 in appendix A.

The Bureau believed the proposed notice would be necessary to ensure that the restrictions on taking conditionally exempt loans are fully, accurately, and effectively disclosed to consumers. Since several weeks or more may have elapsed since a consumer received the notice under proposed § 1041.7(e)(2)(i), this proposed notice would remind consumers of the prohibition on taking another similar loan for at least the next 30 days. Importantly, it would present this restriction more prominently than it is presented in the notice under proposed § 1041.7(e)(2)(i). The Bureau's consumer testing of the notice under proposed § 1041.7(e)(2)(ii) indicated that it would aid consumer understanding of the prohibition on taking a subsequent conditionally exempt loan.[915]

Proposed § 1041.7(e)(3), renumbered in this final rule as § 1041.6(e)(3), proposed to require a lender to provide the notices required under proposed § 1041.7(e)(2)(i) and (ii) before the consummation of a loan. Proposed comment 7(e)(3)–1, renumbered in this final rule as 6(e)(3)–1, explained that a lender can provide the proposed notices after a consumer has completed a loan application but before the consumer has signed the loan agreement. It further clarified that a lender would not have to provide the notices to a consumer who merely makes an inquiry about a conditionally exempt loan but does not complete an application for this type of loan. Proposed comment 7(e)(3)–2, renumbered in this final rule as 6(e)(3)–2, stated that a lender must provide electronic notices, to the extent permitted by § 1041.7(e)(1)(ii), to the consumer before a conditionally exempt loan is consummated. It also offered an example of an electronic notice that would satisfy the timing requirement.

The Bureau believed that it would be important for consumers to receive the proposed notices before they are contractually obligated on a conditionally exempt loan. By receiving the proposed notices before consummation, a consumer could make a more fully informed decision, with an awareness of the restrictions on the current loan and on additional conditionally exempt loans or similar loans in the near future.

Comments Received

A number of stakeholders commented on the Bureau's consumer testing process for the model forms. Some commenters believed that the Bureau's sample size of 28 consumers was too small, noting that the Bureau and other agencies had used larger sample sizes for the qualitative testing of other disclosures (such as the TILA–RESPA integrated disclosure),[916] and supplemented them with quantitative testing. These commenters asked the Bureau to clarify that the notices do not need to be exactly the same as the model forms, so that lenders could conduct their own testing. Others claimed that the level of research rigor for the model disclosures was weak as compared to what would be considered a best practice in the industry. One commenter criticized both the sample size and the geographical representation of the sample, and recommended that the Bureau remove the model forms from the proposal. This commenter stated that it conducted its own user testing of the ''Notice of Restrictions on Future Loans,'' a notice that would have been required by § 1041.7(e), with 50 participants, and found that 18 percent understood the table accurately (with 54 percent having a limited understanding and 24 percent who did not understand) and 22 percent had a solid understanding of the purpose of the notice (with 48 percent noting limited knowledge and 30 percent having no knowledge or an inaccurate understanding). The commenter also argued that the Bureau's use of qualitative testing on its own, without pairing it with quantitative testing, suggested that its findings may not be projectable to the broader population. However, other industry commenters supported the Bureau's use of a model form.

Several consumer groups commented that the proposed disclosures were well designed. But they doubted that disclosures would effectively prevent the harm they perceived as persisting under the exemption. They did support the Bureau's proposed requirements that disclosures contain machine readable text, be clear and conspicuous, be retainable, be segregated, contain only the specified information, and be substantially similar to the model forms.

Industry commenters generally supported the proposal's approach to electronic disclosures, and urged the Bureau not to adopt a rule requiring email or paper disclosures. Commenters argued that if a borrower chooses to receive disclosures via text, including texts with click-through links, then the borrower should not need email or paper disclosures.

The Bureau received a number of comments about the proposed approach to foreign language disclosures. Several commenters argued against requiring foreign language notices (which the Bureau did not propose but did seek comment on) because doing so would impose substantial costs and could involve wide-ranging consequences that deserve thoughtful consideration in a separate rulemaking. Other commenters argued that lenders should offer the model form in the language of the consumer's preference, or in the language that the lender uses to negotiate the transaction. A consumer group asked the Bureau to go further and prescribe specific contract language in addition to the specific language for disclosures.

A legal aid group proposed that the Bureau add a provision that would make the failure to provide any required disclosure or provision of a dissimilar disclosure a deceptive act.

A coalition of consumer groups wrote in support of more extensive requirements regarding disclosures, urging the Bureau to go further by:

[915] In Round 1 of consumer testing of the notice under proposed § 1041.7(e)(2)(ii), ''[t]he majority of participants who viewed this notice understood it, acknowledging that it would not be possible to refinance or roll over the full amount of the third loan they had taken out, and that they would have to wait until 30 days after it was paid off to be considered for another similar loan.'' FMG Report, ''Qualitative Testing of Small Dollar Loan Disclosures, Prepared for the Consumer Financial Protection Bureau,'' at 14–15 (Apr. 2016), *available at http://files.consumerfinance.gov/f/documents/Disclosure_Testing_Report.pdf.* The notice under proposed § 1041.7(e)(2)(ii) was not tested in Round 2.

[916] 78 FR 79730 (Dec. 31, 2013).

Requiring a disclosure for the second loan in a sequence; requiring disclosures at application and just before consummation; requiring paper disclosures for in-person transactions (with electronic disclosures as a supplement); allowing text or mobile disclosures only as supplements to paper or email disclosures because of problems with retainability; imposing a requirement that a URL should be persistent for at least three years after the final payment; imposing a requirement that the full text of a disclosure be provided in an email without a click-through; imposing a requirement that a paper disclosure should be sent if an email is returned; and imposing a requirement that lenders follow E-SIGN requirements, specifically requiring confirmation that borrowers are able to receive and view electronic communications.

Final Rule

The Bureau is finalizing proposed § 1041.7(e) and all of its subparagraphs as § 1041.6(e) of the final rule with identical subparagraphs. The only differences between proposed § 1041.7(e) and final § 1041.6(e) are numbering changes: The number of the section itself is updated to § 1041.6, and one internal reference to proposed § 1041.7 is replaced with an internal reference to § 1041.6 of the final rule. The Bureau is also finalizing all proposed commentary to proposed § 1041.7(e), again only making renumbering changes. The Bureau continues to believe that the disclosures will, consistent with section 1032(a) of the Dodd-Frank Act, ensure that costs, benefits, and risks associated with § 1041.6 loans are fully, accurately, and effectively disclosed to consumers.

The Bureau concludes, based on its considerable experience with consumer testing, that the qualitative user testing process for the model forms and notices is sufficient for purposes of this rule. That is because, unlike the TILA–RESPA model disclosures, the model forms for this rule are relatively short and less complicated. The Bureau contracted with FMG to conduct qualitative user testing of the forms. While the sample size was relatively small—28 test subjects—each subject was given a one-on-one interview with FMG for about an hour. The interviews were conducted in two geographical locations—New Orleans and Kansas City. After the round of testing in New Orleans, Bureau staff used the feedback to improve the model forms before the second round of testing in Kansas City. The Bureau did not conduct quantitative testing, which could have provided some additional information, but the Bureau finds that the testing suffices to show that the disclosures use plain language that is comprehensible to consumers, contains a clear format and design, and succinctly explains the information that must be imparted to the consumer.

The commenter that tested the notice of restrictions on future lending, which purportedly found that 18 percent understood the table accurately and 54 percent had a limited understanding, while 22 percent had a solid understanding of the purpose and 48 percent had a limited knowledge of the form's purpose, does not necessarily discount the efficacy of the model forms. The Bureau does not know whether participants were shown the letters in an appropriate environment and manner, and does not know whether the wording or substance of the questions asked could have contributed to the lower numbers. Participants who did not understand the content of the table may not have had enough of the context to understand the form being tested (in fact, the commenter suggested that the participants did not understand its purpose).

In response to comments relating to text message disclosures, the Bureau notes that nothing in § 1041.6(e) prohibits transmission by text. Without being able to review a specific method of delivery, the Bureau cannot opine on whether any specific provision of disclosures via text with a click-through link satisfies the requirements for disclosures in § 1041.6(e)—particularly the requirement of retainability in § 1041.6(e)(1)(iii)—but the Bureau acknowledges that such disclosures could, if correctly administered, satisfy the requirements of § 1041.6(e).

In response to the commenter contending that the initial disclosure, if sent by email, could be prevented by a spam filter, the Bureau does not find this to be a valid ground for not finalizing the text of § 1041.6(e). While the Bureau understands that email disclosures may not be feasible for all lenders, it concludes that providing paper disclosures in those instances where companies cannot provide an adequate text or email message notification to all borrowers is necessary or appropriate to ensure that borrowers receive notice of their first scheduled payment—receipt of such notice is particularly important to both borrowers and lenders, as it will begin the repayment cycle. More broadly, the Bureau is not convinced that it is difficult for industry to provide a written or electronic disclosure to borrowers before the borrower enters a loan agreement. After all, the Bureau would expect that the lender would need to transmit or provide a loan agreement and TILA disclosure to the borrower through some means; and the lender could use those means to provide the disclosure.

As proposed, the Bureau is not requiring non-English disclosures; instead, it is finalizing the rule as proposed, which merely allows non-English disclosures. Certain of the Bureau's rules, like its remittance rule,[917] require disclosures in foreign languages in certain circumstances. The Bureau continues to view disclosures in languages other than English as a positive development in all markets for consumer financial products or services, where the customer base has become increasingly more diverse. The Bureau is not, however, prepared to make non-English disclosures mandatory at this time with respect to these forms. The Bureau so concludes for several reasons, including its recognition that the current final rule will involve a significant amount of implementation work, including the work needed to design and implement the disclosures in English. The Bureau is making the judgment not to add required foreign language notices at this time, but may consider supplemental rulemakings or model forms in the future when industry has fewer regulatory adjustments to manage and has developed more experience with the English-language forms.

In response to commenters asking the Bureau to go further and prescribe specific contract language in addition to the specific language for disclosures, the Bureau concludes that a loan made pursuant to any contract which creates terms that are incompatible with the requirements of § 1041.6 would disqualify the loan from coverage under the § 1041.6 exemption. Accordingly, the Bureau believes there would be minimal benefit to prescribing specific contract language, and that doing so would restrict the ability of individual lenders to comply with specific requirements of local contract law.

In response to commenters proposing that the Bureau add a provision to the rule that would make failure to provide any required disclosure or provision of a dissimilar disclosure a deceptive act, the Bureau concludes that such a provision is unnecessary. A lender that fails to make required disclosures would already be in violation of the rule, and labeling that violation as deceptive would not add anything to the lender's liability.

[917] 12 CFR 1005.31(g).

The Bureau does not find that it needs to require a notice before the second loan. That would be inconsistent with the more general approach the Bureau is taking in finalizing this rule, which is to attempt to make the rule more streamlined and capable of being administered more easily and practically. The payment notices, for example, now only require a notice before the first withdrawal and any unusual withdrawals, under the theory that borrowers could refer back to the initial notice. Similarly, borrowers here could refer back to the notice sent before the first loan was made under § 1041.6 of the final rule.

The Bureau also finds insufficient evidence to support the claim that additional prescriptive requirements are necessary to ensure that borrowers receive electronic or written notices in any particular manner. Unlike with the payment notices, the Bureau concludes that the risk associated with borrowers missing the notice is lower. The payment notices are intended to warn borrowers of an impending event—thus, borrowers are not engaged in a decision at the very moment when those notices are sent. For this reason, the Bureau has provided further requirements for those notices to ensure they are received. However, here, the Bureau expects that the notices associated with making loans under § 1041.6 would be provided as part of the pre-loan package when the borrower is inquiring about the contours of the transaction. In order to take out the loan, the borrower already must engage with that pre-loan package, so the Bureau concludes that a more permissive approach to transmission is sufficient for these specific notices.

Subpart C—Payment Practices

Overview of the Proposal

In the proposed rule, the Bureau proposed to identify it as an unfair and abusive act or practice for a lender to attempt to withdraw payment from a consumer's account in connection with a covered loan after the lender's second consecutive attempt to withdraw payment from the account has failed due to a lack of sufficient funds, unless the lender obtains the consumer's new and specific authorization to make further withdrawals from the account. To avoid committing this unfair and abusive practice, a lender would have to cease attempting to withdraw payments from the consumer's account or obtain a new and specific authorization to make further withdrawals.

Using the Bureau's authority in section 1031 of the Consumer Financial Protection Act, the proposed rule would have prevented the unlawful practice by prohibiting further payment withdrawal attempts after two unsuccessful attempts in succession, except when the lender has obtained a new and specific authorization for further withdrawals. It also included requirements for determining when the prohibition on further payment withdrawal attempts has been triggered and for obtaining a consumer's new and specific authorization to make additional withdrawals from the consumer's account.

The predicate for the proposed identification of an unfair and abusive act or practice that the Bureau identified in the proposed rule—and thus for the prevention requirements—was a set of preliminary findings with respect to certain payment practices for covered loans and the impact on consumers of those practices. Those preliminary findings, the comments received on them, and the Bureau's responses to the comments are addressed below in Market Concerns—Payments.

The proposed rule would have provided a different set of interventions based on the Bureau's disclosure authority found in section 1032, which would have required lenders to provide a notice to a consumer prior to initiating a payment withdrawal from the consumer's account. It also proposed to require lenders to provide a notice alerting consumers to the fact that two consecutive payment withdrawal attempts to their accounts have failed—thus triggering operation of the new authorization requirements—so that consumers can better understand their repayment options and obligations in light of the severely distressed condition of their accounts.

Market Concerns—Payments

As the Bureau laid out in the proposal, at the time of loan origination, it is a common practice among many lenders to obtain authorization to initiate payment withdrawal attempts from the consumer's transaction account. Such authorization provides lenders with the ability to initiate withdrawals without further action from the consumer. Like other industries that commonly use such authorizations for future withdrawals, consumers and lenders have found that they can be a substantial convenience for both parties. However, they also expose the consumer to a range of potential harms. Indeed, Congress has recognized that such authorizations can give lenders a special kind of leverage over borrowers, for instance by prohibiting in EFTA the conditioning of credit on the consumer granting authorizations for a series of recurring electronic transfers over time.[918]

This section reviews the available evidence on the outcomes that consumers experience when lenders obtain and use the ability to initiate withdrawals from consumers' accounts to secure payments on covered loans, including the comments that were submitted on the proposed rule. As detailed below, the available evidence reinforces the Bureau's conclusion that despite various regulatory requirements, lenders in this market are using their ability to initiate payment withdrawals in ways that harm consumers. Moreover, the Bureau finds that, as a practical matter, consumers have little ability to protect themselves from the injuries caused or likely caused by these practices, and that private network attempts to restrict these behaviors are limited in various ways.

The Bureau's research with respect to payment practices focused on online payday and payday installment loans, where payment attempts generally occur through the ACH network and thus can be readily tracked at the account and lender level. Other publicly available data and the Bureau's enforcement experience indicate that returned payments likewise occur with great frequency in the storefront payday market; indeed, a comparison of this data with the Bureau's findings suggests that the risks to consumers with respect to failed payments may be as significant or even greater in the storefront market than in the online market.

The Bureau reviewed the available evidence, which can be summarized as follows:

- Lenders in these markets often take broad, ambiguous payment authorizations from consumers and vary how they use these authorizations, thereby increasing the risk that consumers will be surprised by the amount, timing, or channel of a particular payment and will be charged overdraft or NSF fees as a result. Commenters took both sides on these factual points, with industry commenters arguing that the Bureau had overstated the extent of the problems and any lack of understanding on the part of consumers, and consumer groups arguing that problems exist and cause harm that often is not understood by consumers.
- When a particular withdrawal attempt fails, lenders in these markets often make repeated attempts at re-presentment, thereby further multiplying the fees imposed on

[918] Electronic Fund Transfer Act, 15 U.S.C. 1693k(1); Regulation E, 12 CFR 1005.10(e).

consumers. Some commenters said that the Bureau had overstated the occurrence of re-presentments, arguing that the Bureau's reliance on data from 2012 was improper in light of recent developments that may have driven down re-presentment rates; others disagreed.[919]

- These cumulative practices contribute to return rates that vastly exceed those in other markets, substantially increasing consumers' costs of borrowing, their overall financial difficulties, and the risk that they will lose their accounts. Here again, commenters offered perspectives on both sides of these factual issues, with critics disputing the fact and the evidence that return rates here are disproportionately higher than in other markets and taking issue with the extent of the effect on consumers having their accounts closed, and others providing additional evidence that return rates were in fact disproportionately high.
- Consumers have little practicable ability to protect themselves from these practices. This point was sharply disputed by industry and trade association commenters, with others such as consumer groups and some research organizations offering support for this point.
- Private network protections necessarily have limited reach and impact, and are subject to change. This point was also disputed by commenters who argued that the private networks do provide appropriate and sufficient protections, while others strongly disagreed and supported the preliminary views as stated by the Bureau.

a. Multiple Presentments Varied by Timing, Frequency, and Amount of Payments

As discussed in the proposal and in the Background section, obtaining authorization to initiate withdrawals from consumers' transaction accounts is a standard practice among payday and payday installment lenders. Lenders often control the parameters of how these authorizations are used. Storefront payday lenders typically obtain a post-dated paper check signed by the consumer, which in fact can be deposited before the date listed and can be converted into an ACH withdrawal. Online lenders typically obtain bank account information and authorizations to initiate ACH withdrawals from the consumer's account as part of the consumer's agreement to receive the funds electronically.[920] Many lenders obtain authorization for multiple payment methods, such as taking a post-dated check along with the consumer's ACH authorization or debit card information. Banks and credit unions often have additional payment channel options, such as using internal transfers from a consumer's deposit account to collect loan payments. One commenter provided additional information on internal bank transfers, explaining that, when initiating internal bank transfers, financial institutions do not necessarily coordinate internally so that the initiator knows the amount of funds in a consumers' account. Generally, commenters did not take issue with this account of the types of payment methods obtained by lenders.

Once lenders have obtained the authorizations, payday and payday installment lenders frequently execute the withdrawals in ways that consumers do not expect. In some cases, these actions may violate authorizations, contract documents, Federal and State laws, and/or private network rules, and in other cases they may exploit the flexibility provided by these sources, particularly when the underlying contract materials and authorizations are broadly or vaguely phrased. The unpredictability for consumers can be exacerbated by the fact that lenders often also obtain authorizations to withdraw varying amounts up to the full loan amount, in an apparent attempt to bypass EFTA notification requirements that would otherwise require notification of transfers of varying amounts.[921]

The Bureau's study on online payday and payday installment loan payments shows how common multiple payment presentments are.[922] In the study, the Bureau reviewed presentment activity relating to online payday and payday installment loans using checking account files from several large depository institutions. The data was from 2011–2012. The study showed that lenders re-presented after one failed attempt 75 percent of the time, re-presented after the second failed attempt 66 percent of the time, re-presented after the third failed attempt 50 percent of the time, and re-presented after the fourth failed attempt 29 percent of the time.[923] The data also showed that re-presentments tend to come much sooner than do withdrawal attempts that follow a successful payment.[924]

Industry commenters disputed the Bureau's point that withdrawals are executed in ways that consumers do not expect, or at least asserted that the Bureau failed to present sufficient evidence to support this point. Part of this criticism took issue with the Bureau's partial reliance on confidential supervisory data to support its position, which some commenters viewed as improper. This line of comments echoed a broader concern from several commenters, who argued that it was improper for the Bureau to rely on confidential data in the rulemaking. Some commenters argued that data from 2012 is no longer indicative of current practices, given several changes in the market since that time in light of enforcement actions and adjustments to the NACHA Rules. They also argued that the data may have been based on only a few lenders, or lenders that were no longer in the market. Commenters further argued that the Bureau did not establish that these negative payment practices extended to all lenders, and should not have lumped together online and storefront lenders, unlicensed and State-licensed lenders, and bank products with non-bank products. On the other side, consumer groups and some research organizations submitted comments and data in support of the Bureau's points, providing consumer stories about payment experiences and citing several reports that are publicly available on overdraft and NSF fees caused by lender re-presentments and irregular debiting of consumer accounts.

The Bureau also does not agree that it is improper to cite supervisory information in the rulemaking process; this is information the Bureau collects as part of its lawful and authorized

---

[919] Note that in this rule preamble, the Bureau uses ''presentment,'' and ''re-presentment'' to refer to payment attempts and payment re-attempts. Technically, these terms are often reserved for ACH payment attempts only. However, in the context of this rule, which is applicable across all payment methods, the Bureau uses the terms interchangeably with other types of payment withdrawals.

[920] Although, as noted above, the EFTA and Regulation E prohibit lenders from conditioning credit on a consumer ''preauthorizing'' recurring electronic fund transfers, in practice online payday and payday installment lenders are able to obtain such authorizations from consumers for almost all loans through various methods. Lenders are able to convince many consumers that advance authorizations will be more convenient, and some use direct incentives such as by making alternative methods of payment more burdensome, changing APRs, or providing slower means of access to loan proceeds for loans without preauthorized withdrawals. The Bureau is not addressing in this rulemaking the question of whether any of the practices described are consistent with the EFTA and Regulation E.

[921] *See* part II.D for a more detailed discussion of the flexibility provided under laws and private network rules and other lender practices with regard to obtaining initial authorizations.

[922] CFPB, Online Payday Loan Payments (April 2016), *available at http://files.consumerfinance.gov/f/201604_cfpb_online-payday-loan-payments.pdf.*

[923] *Id.* at 14.

[924] *Id.* at 16.

activities, and it provides insight into the issues addressed here. Data from the Bureau's published reports were collected through its supervision function, and the Bureau's regulations protect confidential supervisory information from disclosure.[925] Courts have held that an agency can rely on confidential information in its rulemaking so long as the agency discloses information to allow interested parties to comment on the methodology and general data.[926] The Bureau disclosed how it obtained the data, the methodologies used to analyze the data, the number of accounts reviewed, characteristics about the accounts reviewed, and the results of the various studies.[927] For example, in the Bureau's payments report, most applicable to this section, the Bureau disclosed the number of accounts reviewed (19,685) and the methodology and results in a 25-page report.[928] That was enough information to allow commenters to adequately comment on the proposed rule. The Bureau believes that more detail could have revealed the identity of depository institutions, running counter to the Bureau's rules governing confidential supervisory information.

The Bureau continues to adhere to the view that its study based on 2012 data is relevant. Commenters were very concerned about impacts of the NACHA same-day ACH program, the impact of more recent enforcement actions, and more recent innovations like ApplePay, arguing that more recent market developments render the 2012 data stale. It is true that NACHA has revised some of its rules, and provided more explicit guidance on others. The NACHA Rule most relevant to lender payment presentments—the reinitiation limit of a total of three presentments per entry—was already in place during the sample period, though NACHA has since provided further guidance on that rule. Various enforcement actions relating to problematic use of payment authorizations (or lack thereof) by payday lenders—including various cases pursued by the FTC—had become public before the 2012.[929] It is also true that various enforcement actions have come after,[930] but it is the Bureau's common experience that industry often does not react uniformly to the Bureau's enforcement actions. Despite pre-existing enforcement actions, the NACHA reinitiation cap, other NACHA Rules about authorizations, and Regulation E requirements, the Bureau observed a high amount of returned presentments that were causing harm to consumers. Even if industry has stopped or lessened the prevalence of problematic payment practices since the report sample period—a claim that the Bureau did not receive any evidence on and is purely speculative—consumer harm from repeated re-presentments continues to be of concern to the Bureau. Furthermore, as some commenters acknowledged, recent changes in the market (such as the NACHA return rate inquiry threshold) do not apply to all payment channels and lenders may be continuing problematic practices through other payment channels, like remotely created checks. Moreover, the Bureau continues to receive complaints on payment practices.

Some commenters raised that NACHA has passed a 15 percent return rate inquiry threshold, which allows NACHA to request information from merchants who have high return rates, and that NACHA issued guidance to reiterate the two re-presentment threshold. For reasons discussed below, the Bureau believes that there are still significant risks to consumers despite these rule changes and clarifications. Even if this inquiry threshold has affected ACH payment practices, NACHA Rules do not apply to other types of payments. As for the 2014 clarification regarding NACHA's re-presentment cap, even assuming that clarification significantly impacted compliance rates for the pre-existing rule, there are a number of ways for lenders to avoid the cap, the cap allows more re-presentments than this rule, and again, it only applies to ACH and not other payment methods. NACHA itself raised concerns that lenders are shifting towards other payment methods when they tightened the restrictions—suggesting that the practices that the NACHA Rules were trying to address may have shifted off of the ACH network.

As for the makeup of the participants included in the study, the participant with the largest amount of ACH transactions accounted for 14 percent of the transactions, while the next largest accounted for six percent. Given the high number of transactions and that individual participants accounted for a relatively small share of the transactions, the Bureau believes that it is unlikely the overall results of its 2012 study would be primarily driven by potential departure of any one participant from the market.

More generally, the commenters only questioned whether the data is still relevant as to the current prevalence of lenders making multiple repeated payment presentments. They did not suggest that the practice has ceased entirely or that the likelihood that a payment attempt would succeed has been impacted by new NACHA Rules or intervening enforcement actions. Thus the Bureau does not find any reason to conclude that the last few years have cast in doubt the relevance of those aspects of its study.

The Bureau acknowledges that the payments report was based on online payday and payday installment loans only, and did not include loans by storefronts or depository institutions. The study, however, is informative of what occurs when a lender re-presents multiple times, and data from other sources—including public enforcement actions about depository institution practices, public filings for storefront lenders, and industry data about return rates—shows that these lenders have outlier payment practices. The Bureau believes that this information shows that lenders of loans covered by this rule are more likely to engage in harmful payment practices.

The data and analysis that the Bureau presented in the proposal is further bolstered by the studies cited by other

[925] 12 U.S.C. 5512(c)(6)(A); 12 CFR part 1070.

[926] *See NRDC* v. *Thomas,* 805 F.2d 410, 418 n.13 (D.C. Cir. 1986); *see also Riverkeeper Inc.* v. *EPA,* 475 F.3d 83, 112 (2d Cir. 2007) (Sotomayor, J.); rev'd on other grounds, 556 U.S. 208 (2009).

[927] For a summary of the Bureau's reports in this market, *see* CFPB, Payday Loans, Auto Title Loans, and High-cost Installment Loans: Highlights from CFPB Research (June 2, 2016), *available at http://files.consumerfinance.gov/f/documents/Payday_Loans_Highlights_From_CFPB_Research.pdf.*

[928] CFPB, Online Payday Loan Payments (April 2016), *available at http://files.consumerfinance.gov/f/201604_cfpb_online-payday-loan-payments.pdf.*

[929] *See, e.g.,* Press Release, FTC (Aug. 1, 2011), *FTC Charges Marketers with Tricking People Who Applied for Payday Loans; Used Bank Account Information to Charge Consumers for Unwanted Programs, available at https://www.ftc.gov/news-events/press-releases/2011/08/ftc-charges-marketers-tricking-people-who-applied-payday-loans;* Press Release, FTC, *FTC Obtains Court Order Halting Internet Payday Lenders Who Failed to Disclose Key Loan Terms and Used Abusive and Deceptive Collection Tactics* (Feb. 23, 2009), *available at https://www.ftc.gov/news-events/press-releases/2009/02/ftc-obtains-court-order-halting-internet-payday-lenders-who.*

[930] *See, e.g.,* Press Release, Bureau of Consumer Fin. Prot., *CFPB Takes Action Against Moneytree for Deceptive Advertising and Collection Practices* (Dec. 16, 2016), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-moneytree-deceptive-advertising-and-collection-practices/;* Press Release, Bureau of Consumer Fin. Prot., *CFPB Orders EZCORP to Pay $10 Million for Illegal Debt Collection Tactics* (Dec. 16, 2015), *available at http://www.consumerfinance.gov/newsroom/cfpb-orders-ezcorp-to-pay-10-million-for-illegal-debt-collection-tactics/;* Press Release, Bureau of Consumer Fin. Prot., CFPB Takes Action Against Online lender for Deceiving Borrowers (Nov. 18, 2015), *available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-online-lender-for-deceiving-borrowers/.*

commenters such as consumer groups and other research organizations. One published study on checking account activity showed that one-third of payday borrowers experienced at least one incident in which their checking account was overdrawn on the same day that the payday lender withdrew a payment, triggering one or more fees, even where the payment withdrawal itself succeeded.[931] Nearly half of them incurred an overdraft or NSF fee in the two weeks after a payday loan transaction. A 2013 report found that 27 percent of payday borrowers said that a payday lender making a withdrawal from their bank account caused an overdraft.[932] Among storefront borrowers, 23 percent had this experience while 46 percent of online borrowers reported that a payday lender's withdrawal caused an overdraft.[933] The same study went on to note that while these borrowers may choose payday loans in order to avoid overdrafts, a finding consistent with an earlier national survey which found that 90 percent of those who overdrew their account did so by mistake, many end up paying both payday loan and overdraft fees. Another national survey showed that 22 percent of borrowers reported closing their checking accounts or having them closed by the bank in connection with an online payday loan.[934]

Going back to the discussion in the proposal, these payment practices increase the risk that the payment attempt will be made in a way that triggers fees on a consumer's account. Unsuccessful payment attempts typically trigger bank fees. According to deposit account agreements, banks charge an average NSF fee of approximately $34 for returned ACH and check payments.[935] Some prepaid card providers charge fees for returned or declined payments.[936] Even if the payment goes through, the payment may exceed the funds available in the consumer's account, thereby triggering an overdraft fee, which also averages approximately $34, and in some cases ''extended'' overdraft fees ranging from $5 to $38.50, if the consumer is unable to clear the overdraft within a specified period of time.[937] These failed payment fees charged to the consumer's deposit account may be exacerbated by returned payment fees and late fees charged by lenders, since many lenders also charge a returned-item fee for any returned check or returned electronic payment.[938] The Bureau noted in the proposal that some depository institutions have charged overdraft and NSF fees for payments made within the institutions' internal systems, including a depository institution that charged overdraft and NSF fees on payments related to its own small-dollar loan product.[939] The commenters generally did not dispute that attempted withdrawals generate these kinds of fees to consumers, though some said that if the issue is the high fees that are charged, then the Bureau should pursue that problem separately rather than by adopting this rule.

Despite these potential risks to consumers, many lenders vary the timing, frequency, and amount of payment attempts over the course of the lending relationship. For example, the Bureau has received a number of consumer complaints about lenders initiating payments before the due date, sometimes causing the borrower's accounts to incur NSF or overdraft fees. The Bureau has received consumer complaints about bank fees triggered when lenders initiated payments for more than the scheduled payment amount. The Bureau is also aware of payday and payday installment lender policies that vary the days on which a payment is initiated based on prior payment history, payment method, and predictive products provided by third parties. Bureau analysis of online loan payments shows differences in how lenders space out payment attempts and vary the amounts sought in situations when a payment attempt has previously failed.[940]

Same-Day Attempts

The Bureau also noted in the proposal that some lenders make multiple attempts to collect payment on the same day, contributing to the unpredictable nature of how payment attempts will be made and further exacerbating fees on consumer accounts. For example, the Bureau has observed storefront [941] and online payday and payday installment lenders that, as a matter of course, break payment attempts down into multiple attempts on the same day after an initial attempt fails. This practice has the effect of increasing the number of NSF or overdraft fees for consumers because, in most cases when the account lacks sufficient funds to pay the balance due, attempts will trigger NSF or overdraft fees.[942] In the Bureau's analysis of ACH payments submitted by online payday lenders, approximately 35 percent [943] of the payments were attempted on the same day as another payment attempt. This includes situations in which a lender makes three attempts in one day

[931] Center for Responsible Lending, Payday Mayday: Visible and Invisible Payday Lending Defaults (March 31, 2015), *available at http://www.responsiblelending.org/research-publication/payday-mayday-visible-and.*

[932] The PEW Charitable Trusts, *Payday Lending in America: Report 2, How Borrowers Choose and Repay Payday Loans,* p. 35 (Feb. 2013), *available at http://www.pewtrusts.org/~/media/assets/2013/02/20/pew_choosing_borrowing_payday_feb2013-(1).pdf.*

[933] *Id.*

[934] The PEW Charitable Trusts, *Payday Lending in America: Report 4, Harmful Practices in Internet Payday Lending,* p. 16 (Oct. 2014).

[935] *CFPB Study of Overdraft Programs White Paper,* at 52.

[936] There does not appear to be a standard charge for returned and declined payments by prepaid card providers, though the fees currently appear to be lower than those on depository accounts. The Bureau has observed fees ranging from 45 cents to $5.

[937] *CFPB Study of Overdraft Programs White Paper.* Some extended overdraft fees are charged repeatedly if the overdraft is not cleared.

[938] *See, e.g.,* ACE Cash Express, *Loan Fee Schedule—Texas, available at https://www.acecashexpress.com/~/media/Files/Products/Payday/Internet/Rates/TX_FeeSchedule.pdf* (last visited May 18, 2016) (charging $30 ''for any returned check, electronic payment, or other payment device''); Cash America, *Rates and Fees—Texas, available at http://www.cashamerica.com/LoanOptions/CashAdvances/RatesandFees/Texas.aspx* (last visited May 18, 2016) (''A $30 NSF charge will be applied for any returned payment.''); Advance America 2011 Annual Report (Form 10–K), at 8 (''Fees for returned checks or electronic debits that are declined for non-sufficient funds ('NSF') vary by State and range up to $30, and late fees vary by State and range up to $50. For each of the years ending December 31, 2011 and 2010, total NSF fees collected were approximately $2.9 million and total late fees collected were approximately $1 million and $0.9 million, respectively.''); *Mypaydayloan.com, FAQs, https://www.mypaydayloan.com/faq#loancost* (last visited May 17, 2016) (''If your payment is returned due to NSF (or Account Frozen or Account Closed), our collections department will contact you to arrange a second attempt to debit the payment. A return item fee of $25 and a late fee of $50 will also be collected with the next debit.''); Great Plains Finance, *Installment Loan Rates, https://www.cashadvancenow.com/rates.aspx*) (last visited May 16, 2016) (explaining returned payment fee of $25 and, for payments more than 15 days late, a $30 late fee).

[939] *See, e.g.,* CFPB Consent Order, Regions Bank, CFPB No. 2015–CFPB–0009 (Apr. 28, 2015), *available at http://files.consumerfinance.gov/f/201504_cfpb_consent-order_regions-bank.pdf* (finding that Regions charged overdraft and NSF fees with its deposit advance product, despite stating that it would not do so after a change in policy. Specifically, if the bank collected payment from the consumer's checking account and the payment was higher than the amount available in the account, it would cause the consumer's balance to drop below zero. When that happened, the bank would either cover the transaction and charge an overdraft fee, or reject its own transaction and charge an NSF fee.), *available at http://files.consumerfinance.gov/f/201504_cfpb_consent-order_regions-bank.pdf.*

[940] CFPB Online Payday Loan Payments, at 16–17 figs. 2–3.

[941] See Consent Order, EZCORP, CFPB No. 2015–CFPB–0031 (Dec. 16, 2015), available at *http://files.consumerfinance.gov/f/201512_cfpb_ezcorp-inc-consent-order.pdf.*

[942] With the exception that overdraft fees cannot be charged on one-time debit card transactions when a borrower does not opt in. 12 CFR 1005.17.

[943] *CFPB Online Payday Loan Payments,* at 20 tbl.3.

(four percent of payments observed) and four or more attempts in one day (two percent of payments observed). The most extreme practice the Bureau has observed was a lender who attempted to collect payment from a single account 11 times in one day. The Bureau also has received consumer complaints about lenders making multiple attempts to collect in one day, including an instance of a lender reported to have made nine payment attempts in a single day.

When multiple payment requests are submitted to a single account on the same day by an online payday lender, the payment attempts usually all succeed (76 percent) or all fail (21 percent), leaving only three percent of cases where one but not all attempts succeed.[944] In other words, multiple presentments are seven times more likely to result in multiple NSF events for the consumer than they are to result in a partial collection by the lender.

Re-Presentment

The Bureau also finds that when a lender's presentment or multiple presentments on a single day fail, online payday lenders typically repeat the attempt to collect payment multiple times on subsequent days.[945] According to the Bureau's analysis of ACH payments, 75 percent of ACH payments presented by online payday lenders that initially fail are re-presented by the lender.[946] Because six percent of initial payments originally fail, the result is that four and half percent of all initial payments had an accompanying re-presentment. Of those re-presentments, 70 percent fail, and after the second failed attempt, 66 percent of failed payments are re-presented. That means a little over two percent of all initial payments involved three presentments (this rule would cut off the third presentment). Of these third re-presentments, 73 percent fail, and 50 percent are re-presented after three failures. Consumers have complained to the Bureau that lenders attempt to make several debits on their accounts within a short period of time, including one consumer who had taken out multiple loans from several online payday lenders and reported that the consumer's bank account was subject to 59 payment attempts over a two-month period.[947]

Online payday lenders appear to make a second payment attempt more quickly after a failed payment than after a successful payment. According to Bureau analysis, 60 percent of payment attempts following a failed payment came within one to seven days of the initial failed attempt, compared with only three percent of payment attempts following a successful payment.[948] The Bureau observed a lender that, after a returned payment, made a payment presentment every week for several weeks.

In addition to deviations from the payment schedule, some lenders adopt other divergent practices to collect post-failure payments. For example, the Bureau preliminarily found in the proposal that after an initial failure, one storefront payday and payday installment lender had a practice of breaking an ACH payment into three smaller pieces on the consumer's next payday: One for 50 percent of the amount due, one for 30 percent of the amount due, and one for 20 percent of the amount due.[949] Approximately 80 percent of these smaller attempts resulted in all three presentments being returned for non-sufficient funds, thus triggering multiple NSF fees. Some commenters suggested that they believe the Bureau's points about same-day attempts and re-presentment were overstated. For example, they cited the Bureau's data showing a high level of storefront payment failures by ACH transfer failures and bounced checks, and suggested that these figures did not take sufficient account of other cash transactions that were completed successfully. It is true that many payday loan payments are made in cash, and so not implicated by this rule. The Bureau' study also focused on only online payday and payday installment lenders, which do not take cash payments. Online payday and payday installment lenders continue to have high outlier return rates despite having all payments included in the denominator. The Bureau believes, however, that many cash transactions are likely to come from the population of consumers who would have funds in their accounts if instead the only method of payment were ACH (as in the studied online payday markets), and many would not come out of the population for which a payment withdrawal fails (because we know those consumers do have the funds to cover a payment).

The Bureau received a number of comments, including some from industry, asserting that lenders continue to engage in making repeat attempts to debit payments from consumer accounts.

b. Cumulative Impacts

These practices among payday and payday installment lenders have substantial cumulative impacts on consumers. Industry analyses, outreach, and Bureau research suggest that the industry is an extreme outlier with regard to the rate of returned items. As a result of payment practices in these industries, consumers suffer significant NSF, overdraft, and lender fees that substantially increase financial distress and the cumulative costs of their loans.

Outlier Return Rates

Financial institution analysis and Bureau outreach indicate that the payday and payday installment industry is an extreme outlier with regard to the high rate of returned items generated. These returns are most often for non-sufficient funds, but also include transactions that consumers have stopped payment on or reported as unauthorized. The high rate of returned payment attempts suggests that the industry is causing a disproportionate amount of harm relative to other markets.[950]

---

[944] *Id.* at 21 tbl.4.

[945] *See, e.g.,* First Cash Fin. Servs., 2014 Annual Report (Form 10–K), at 5 (Feb. 12, 2015), *available at https://www.sec.gov/Archives/edgar/data/840489/000084048915000012/fcfs1231201410-k.htm* (explaining that provider of online and storefront loans subsequently collects a large percentage of returned ACH and check payments by redepositing the customers' checks, ACH collections, or receiving subsequent cash repayments by the customers); CashNet USA, *FAQs, https://www.cashnetusa.com/faq.html* (last visited Dec. 18, 2015) (''If the payment is returned for reason of insufficient funds, the lender can and will re-present the ACH Authorization to your bank'').

[946] *CFPB Online Payday Loan Payments,* at 14. In the CFPB analysis, any payment attempt following a failed payment attempt is considered a ''re-presentment.'' Failed requests submitted on the same day are analyzed separately from re-presentments submitted over multiple days.

[947] This consumer reported that their bank account was ultimately closed with charges of $1,390 in bank fees.

[948] *CFPB Online Payday Loan Payments,* at 16.

[949] See Consent Order, EZCORP, CFPB No. 2015–CFPB–0031 (Dec. 16, 2015), available at *http://files.consumerfinance.gov/f/201512_cfpb_ezcorp-inc-consent-order.pdf.*

[950] High return rates for non-sufficient funds may also be indicative of lenders' problematic authorization practices. In developing its rules to monitor overall ACH return rates, NACHA explained:

> Moreover, while some level of Returns, including for funding-related issues such as insufficient funds or frozen accounts, may be unavoidable, excessive total Returns also can be indicative of problematic origination practices. For example, although some industries have higher average return rates because they deal with consumers with marginal financial capacity, even within such industries there are outlier originators whose confusing authorizations result in high levels of Returns for insufficient funds because the Receiver did not even understand that s/he was authorizing an ACH transaction. Although such an Entry may be better characterized as ''unauthorized,'' as a practical matter it may be returned for insufficient funds before a determination regarding authorization can be made.

NACHA, *Request for Comment and Request for Information—ACH Network Risk and Enforcement Topics, Rule Proposal Description,* at 3 (Nov. 11,

A major financial institution has released analysis of its consumer depository account data to estimate ACH return rates for payday lenders, including both storefront and online companies.[951] In a 2014 analysis of its consumer account data, the institution found that industry lenders had an overall return rate of 25 percent for ACH payments.[952] The institution observed individual lender return rates ranging from five percent to almost 50 percent. In contrast, the average return rate for debit transactions in the ACH network across all industries was just 1.36 percent. Among individual industries, the industry with the next highest return rate was cable television at 2.9 percent, then mobile telephones at 1.7 percent, insurance at 1.2 percent, auto and mortgage at 0.8 percent, utilities at 0.4 percent, and credit cards at 0.4 percent.[953] Clearly, the numbers for the kinds of loans covered under this rule are so high as to contrast dramatically with consumer's experience with payment practices in the markets for all of these other types of consumer services, including consumer financial services. The Bureau also considers this evidence that the practices identified in § 1041.7 are more common or more likely to occur in the covered markets than in other markets.

In addition to this combined financial institution analysis, Bureau research and outreach suggest extremely high rates of returned payments for both storefront and online lenders. As noted earlier, for example, storefront lenders report failure rates of approximately 60 to 80 percent when they deposit consumers' post-dated checks or initiate ACH transfers from consumer accounts in situations where the consumer has not come into the store to repay in cash.[954] Bureau research of ACH payments finds that online lenders experience failure rates upwards of 70 percent where they attempt to re-present an ACH withdrawal one or more times after an initial failure.[955] Moreover, of the 30 percent of second attempts and 27 percent of third attempts that succeed, Bureau research indicates that approximately a third of them only do so by creating overdrafts on the consumer's account, which trigger further fees.[956]

It may be the case that, as commenters noted, high return payment rates are influenced significantly by the fact that lenders are making loans to borrowers who are less likely to have funds in their accounts, or that the one-time balloon payment structure of these loans are more prone to failed payment attempts. But that argument also implies that borrowers in this market are more vulnerable to harm from engaging in multiple presentments than consumers are in other markets.

Account Fees

The proposal cited the Bureau's analysis, consumer complaints, and public litigation documents, which show that the damage done to consumers from these payment attempts can be substantial.[957] Fifty percent of checking accounts of online borrowers in the Bureau's analysis of online payday and payday installment loans incurred at least one overdraft or NSF return in connection with their loans, with average fees for these consumers at $185.[958] Indeed, 10 percent of these accounts experienced at least 10 payment withdrawal attempts that resulted in an overdraft or NSF return over an 18-month period.[959] A small but significant percentage of consumers suffer extreme incidences of overdraft and NSF fees on their accounts; for consumers with at least one online payday attempt that resulted in an overdraft or NSF return, 10 percent were charged at least $432 in related account fees over the 18-month sample period.[960] This recounting of the types and amounts of fees charged to consumers in these circumstances was generally accepted by commenters on both sides of the proposed rule, though one commenter took issue with the Bureau's use of averages, noting that they can be skewed by outliers and that citing the median experience would be more reliable. While that may be so as a logical matter, the Bureau cited the average fees because it was interested in assessing the total harm of the conduct in question, and not just the harm incurred by the typical borrower.

Account Closure

Lender attempts to collect payments from an account may also contribute to account closure. The Bureau has observed that the accounts of borrowers who use loans from online payday lenders are more likely to be closed than accounts generally (17 percent versus

2013), *available at https://www.shazam.net/pdf/ach_networkRisk_propRulesDesc_1113.pdf* (last visited May 17, 2016). *See also* Federal Financial Institutions Examinations Council (''FFIEC''), Bank Secrecy Act/Anti-Money Laundering Exam Manual, at 237 (2014), *available at https://www.ffiec.gov/bsa_aml_infobase/documents/BSA_AML_Man_2014_v2.pdf* (''High levels of RCCs and/or ACH debits returned for insufficient funds or as unauthorized can be an indication of fraud or suspicious activity. Therefore, return rate monitoring should not be limited to only unauthorized transactions, but include returns for other reasons that may warrant further review, such as unusually high rates of return for insufficient funds or other administrative reasons.''); FDIC, Financial Institution Letter FIL–3–2012, *Payment Processor Relationships,* at 5 (rev'd July 2014), *available at https://www.fdic.gov/news/news/financial/2012/fil12003.pdf* (''Financial institutions that initiate transactions for payment processors should implement systems to monitor for higher rates of returns or charge backs and/or high levels of RCCs or ACH debits returned as unauthorized or due to insufficient funds, all of which often indicate fraudulent activity.'').

[951] JP Morgan Chase is one of the largest banks in the country, with $2.4 trillion in assets and an average of $200 billion in consumer checking accounts. *See* JP Morgan Chase, *About Us, https://www.jpmorganchase.com/corporate/About-JPMC/about-us.htm* (last visited Mar. 17, 2015); JP Morgan Chase & Co., *Annual Report 2014* (2015), *available at http://files.shareholder.com/downloads/ONE/1717726663x0x820066/f831cad9-f0d8-4efc-9b68-f18ea184a1e8/JPMC-2014-AnnualReport.pdf.*

[952] *Monitoring for Abusive ACH Debit Practices,* Presentation by Beth Anne Hastings of JP Morgan Chase at Spring 2014 NACHA Conference in Orlando, FL (Apr. 7, 2014). This RDFI analysis included returns due to non-sufficient funds, stop-payment orders, and unauthorized activity; administrative returns were not included. However, most of these returns were triggered by non-sufficient funds; lenders generally had an unauthorized return rate below 1 percent. *See also* First Cash Fin. Servs., 2014 Annual Report (Form 10–K), at 5 (''Banks return a significant number of ACH transactions and customer checks deposited into the Independent Lender's account due to insufficient funds in the customers' accounts.'') (discussion later in the document indicates that the CSO section covers both online and storefront loans).

[953] NACHA Q4 2014.

[954] QC Holdings 2014 Annual Report (Form 10–K), at 7 (reporting a return rate of 78.5 percent); Advance America 2011 Annual Report (Form 10–K), at 27 (reporting return rates of 63 percent for checks and 64 percent for ACH attempts).

[955] Bureau analysis of ACH payments by online lenders shows an initial ACH payment failure rate due to NSFs of six percent. However, among the ''successful'' payments, Bureau research indicates that approximately six percent are paid only by overdrawing the consumer's account. CFPB Report: Online Payday Loan Payments, Table 1, at 13. The Bureau's analysis includes payday lenders and payday installment lenders that only operate online; the dataset excludes lenders that provide any storefront loans. In comparison, the Chase dataset includes both storefront and online payday lenders. As discussed in the proposal, many payments to storefront lenders are provided in person at the store. The fact that the consumer has not shown up at the store is a sign that the consumer may be having trouble making the payment. In contrast, online lenders generally collect all payments electronically and succeed more often on the initial payment attempt. Given that storefront lenders have higher rates of return on the first payment attempt, this sample difference may explain the relatively lower failure rate for first-attempt online ACH payments observed by the Bureau.

[956] *CFPB Online Payday Loan Payments,* at 13, tbl. 1.

[957] *See, e.g.,* Complaint at 19, *Baptiste* v. *JP Morgan Chase Bank,* No. 1:12–CV–04889 (E.D.N.Y. Oct. 1, 2012) (alleging that during a two-month period, 6 payday lenders debited the plaintiff's bank account 55 times, triggering a total of approximately $1,523 in NSF, overdraft, and service fees).

[958] *CFPB Online Payday Loan Payments,* at 10–11.

[959] *Id.* at 10.

[960] *Id.* at 12.

three percent, respectively).[961] In particular, 36 percent of borrowers had their account closed involuntarily following an unsuccessful attempt by an online payday lender to collect a payment from the account, a rate that is four times greater than the closure rate for accounts that only had NSFs from non-payday transactions. Additionally, the Bureau found that borrowers with two consecutive failures by the same lender are significantly more likely to experience an involuntary closure than accountholders generally (43 percent versus three percent, respectively).[962] For accounts with failed online payday loan transactions, account closures typically occur within 90 days of the last observed online payday loan transaction; in fact, 74 percent of account closures in these situations occur within 90 days of the first NSF return triggered by an online payday or payday installment lender.[963] This suggests that the online loan played a role in the closure of the account, or that payment attempts failed because the account was already headed toward closure, or both.[964]

Commenters provided further data suggesting a connection between payment presentment practices and account closures. For example, a Pew survey found that 22 percent of online payday borrowers claimed to have lost bank accounts because of online payday loans.[965] Some commenters took issue with the Bureau's reliance on its 2016 report on online payday loan payments to establish the link between payday payment practices and account closures. They asserted certain methodological limitations of the report and accused the Bureau of using the data to assert causation when all it showed was correlation. They noted that the report itself had recognized the possibility that other confounding factors might explain the correlation. But the Bureau did not fail to recognize these points; on the contrary, the Bureau had been careful to note the limitations of its study and to caution that correlation is not necessarily show causation.

Similarly, commenters contended that the Bureau's report did not sufficiently distinguish between truly voluntary and truly involuntary account closures. Yet the Bureau did distinguish between voluntary account closures by the consumer and involuntary account closures initiated by the bank. Practically, it would be quite difficult to parse individual circumstances any further. A consumer might have pulled all of his money out of an account, making the eventual bank closure seem more ''voluntary,'' but those kinds of individual circumstances are difficult to account for in a broader study. Due to variations in borrower circumstances, the Bureau agrees that the study does not necessarily show that the presentment practices described were the actual cause of every observed involuntary account closure. However, the Bureau believes the high correlation between account closure and problematic payment practices indicates that these consumers may be experiencing harms beyond the fees immediately triggered by the transactions.

c. Limited Consumer Control

Consumers' ability to protect their accounts from these types of payment attempt problems is limited due to a combination of factors, including the nature of the lender practices themselves, lender revocation procedures (or lack thereof), costs imposed by depository institutions in connection with consumer efforts to stop-payment attempts, and the operational limits of individual payment methods. In some cases, revoking authorization and stopping payment may be infeasible, and at a minimum they are generally both difficult and costly.

Consumers Have Difficulty Stopping Lenders' Ability to Access Their Accounts

In the proposal, the Bureau indicated its preliminary view that lenders and account-holding institutions may make it difficult for consumers to revoke account access or stop withdrawals.[966] One way that consumers could attempt to stop multiple attempts to collect from their accounts would be to direct their lender to stop initiating payments. To do so, however, the consumer must be able to identify and contact the lender, which can be difficult or impossible for consumers who have borrowed from an online lender. Moreover, lenders that can be contacted often make it difficult to revoke access. For example, several lenders require consumers to provide another form of account access in order to effectively revoke authorization with respect to a specific payment method—some lenders require consumers to provide this back-up payment method as part of the origination agreement.[967] Some lenders require consumers to mail a written revocation several days before the effective date of revocation.[968] These same lenders automatically debit payments through another method, such as a remotely created check, if a consumer revokes the ACH authorization. Others explicitly do not allow revocation, even though ACH private network rules require stop-payment rights for both one-time and recurring ACH transactions.[969] For example, one lender Web site states that ACH revocation is not allowed for its single-payment online loans.[970] Other lenders may not have obtained proper authorization in the first place[971] or

[961] *Id.* at 24 tbl. 5.

[962] *CFPB Report on Supplemental Findings,* at p. 151.

[963] *Id.* at 23.

[964] *See also* Complaint at 14, *Baptiste,* No. 1:12–CV–04889 (alleging plaintiff's bank account was closed with a negative balance of $641.95, which consisted entirely of bank's fees triggered by the payday lenders' payment attempts); *id.* at 20–21 (alleging plaintiff's bank account was closed with a negative balance of $1,784.50, which consisted entirely of banks fees triggered by the payday lender's payment attempts and payments provided to the lenders through overdraft, and that plaintiff was subsequently turned down from opening a new checking account at another bank because of a negative ChexSystems report stemming from the account closure).

[965] Pew Charitable Trusts, ''Payday Lending in America: Report 4, Harmful Practices in Internet Payday Lending,'' at 16 (Oct. 2014).

[966] The Bureau is not addressing in this rulemaking the question of whether any of the practices described are consistent with the EFTA and Regulation E.

[967] *See, e.g.,* Castle Payday Loan Agreement, Ex. A, *Parm* v. *BMO Harris Bank,* N.A., No. 13–03326 (N.D. Ga. Dec. 23, 2013), ECF No. 60–1 (''You may revoke this authorization by contacting us in writing at *ach@castlepayday.com* or by phone at 1–888–945–2727. You must contact us at least three (3) business days prior to when you wish the authorization to terminate. If you revoke your authorization, you authorize us to make your payments by remotely-created checks as set forth below.''); Press Release, Bureau of Consumer Fin. Prot., CFPB Takes Action Against Online Lender for Deceiving Borrowers (Nov. 18, 2015), *available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-online-lender-for-deceiving-borrowers/.*

[968] *See id.*

[969] *See* NACHA Rule 3.7.1.2, RDFI Obligation to Stop Payment of Single Entries (''An RDFI must honor a stop-payment order provided by a Receiver, either verbally or in writing, to the RDFI at such time and in such manner as to allow the RDFI a reasonable opportunity to act upon the order prior to acting on an ARC, BOC, POP, or RCK Entry, or a Single Entry IAT, PPD, TEL, or WEB Entry to a Consumer Account.'').

[970] Advance America provides the following frequently asked question in regard to its online loan product:

Can I revoke my ACH payment?

No. The ACH Authorization can only be revoked AFTER we have received payment in full of the amount owed. Because our advances are single payment advances (that is, we advance a sum of money that is to be repaid in a lump sum), we are permitted to require ACH repayment in accordance with the Federal Electronic Funds Transfer Act (''EFTA'').

See Advance America, *Frequently Asked Questions, https://www.onlineapplyadvance.com/faq* (last visited May 17, 2016).

[971] Hydra Group, a purported online payday lender against which the Bureau brought an enforcement action, allegedly used information bought from online lead generators to access consumers' checking accounts to illegally deposit

take broad authorizations to debit any account associated with the consumer.[972]

Consumer complaints sent to the Bureau also indicate that consumers struggle with anticipating and stopping payment attempts by lenders of covered loans. As of December 31, 2016, complaints where the consumer has identified the issues ''can't stop lender from charging my bank account'' or ''lender charged my bank account on wrong day or for wrong amount'' account for nearly 10 percent of the more than 16,600 payday loan complaints the Bureau has handled since November 2013.[973] In addition, the Bureau handled approximately 31,000 debt collection complaints relating to payday loans during this same period. More than 11 percent of debt collection complaints received by the Bureau stem from payday loans. The Bureau also handled more than 15,800 installment loan complaints. Review of those complaints suggests that there are consumers who labeled their complaints as falling under those categories who also experience difficulties anticipating and stopping payment attempts.

The other option for consumers is to direct their bank to stop payment, but this too can be challenging. Depository institutions typically charge a fee of approximately $32 for processing a stop-payment order, making this a costly option for consumers.[974] In addition, some lenders charge returned-item fees if the stop-payment order successfully blocks an attempt.[975] The Bureau has received complaints from consumers who were charged overdraft and NSF fees after merchants with outstanding stop-payment orders were able to withdraw funds despite the presence of the orders; in some instances, banks refused to refund these charges.

The ease of successfully stopping a payment also varies by channel. To execute a stop-payment order on a check, banks usually use the check number provided by the consumer. As ACH payments do not have a number equivalent to a check number for the bank to identify them, ACH payments are more difficult to stop. To block the payment, banks may need to search the ACH transaction description for information that identifies the lender. Determining an effective search term is difficult, given that there is no standardization of how originators of a payment—in this case, lenders—identify themselves in the ACH network. Lenders may use a parent company name or an abbreviated name, or may vary names based on factors like branch location. Other lenders use the name of their third-party payment processor. During the Bureau's outreach, some depository institutions indicated that certain payday lenders use multiple merchant ID codes and different names on their ACH transactions in an apparent attempt to reduce the risk of triggering scrutiny for their ACH presentments.

Moreover, remotely created checks (RCCs) and remotely created payment orders (RCPOs) are virtually impossible to stop because the consumer does not know the check number that the payee will generate, and the transaction information does not allow for payment identification in the same way that an ACH file does. RCCs and RCPOs have check numbers that are created by the lender or its payment processor, making it unlikely that consumers would have this information.[976] Industry stakeholders, including members of the Bureau's Credit Union Advisory Council, indicate that it is virtually impossible to stop payments on RCCs and RCPOs because the information needed to stop the payment—such as check number and payment amount—is generated by the lender or its payment processor. Consumers also may not realize that a payment will be processed as a RCC, so they may not even know to ask their bank to look for a payment processed as a check rather than as an ACH payment.

Some financial institutions impose additional procedural hurdles, for instance by requiring consumers to provide an exact payment amount for a stop-payment order and allowing payments that vary by a small amount to go through.[977] Others require consumers to provide the merchant identification code that the lender used in the ACH file.[978] Because there is no standardization of merchant names or centralized database of merchant identification codes in the ACH system, however, the only way for consumers to know the exact merchant identification code is if they observed a previous debit by that lender. Even if a consumer located a lender's identification code on a previous debit, which may or may not be practicable, lenders may vary this code when they are debiting the same consumer account again.[979] As mentioned previously, during the Bureau's outreach, some depository institutions indicated that payday

payday loans and withdraw fees without consent. The Bureau alleged that Hydra Group falsified loan documents to claim that the consumers had agreed to the phony online payday loans. The scam allegedly added up to more than $100 million worth of consumer harm. Hydra had been running its transactions through the ACH system. Complaint, *CFPB* v. *Moseley,* No. 4:14–CV–00789 (W.D. Mo. Sept. 8, 2014), ECF No. 3, *available at http://files.consumerfinance.gov/f/201409_cfpb_complaint_hydra-group.pdf. See also* Stipulated Order, *FTC* v. *Michael Bruce Moneymaker,* Civil Action No. 2:11–CV–00461 (D. Nev. Jan. 24, 2012), *available at https://www.ftc.gov/sites/default/files/documents/cases/2012/02/120201moneymaker order.pdf* (purported lead generator defendants used information from consumer payday loan applications to create RCCs to charge consumer accounts without authorization).

[972] *See, e.g.,* Great Plains Lending d/b/a Cash Advance Now, *Frequently Asked Questions (FAQs), https://www.cashadvancenow.com/FAQ.aspx* (last visited May 16, 2016) (''If we extend credit to a consumer, we will consider the bank account information provided by the consumer as eligible for us to process payments against. In addition, as part of our information collection process, we may detect additional bank accounts under the ownership of the consumer. We will consider these additional accounts to be part of the application process.'').

[973] This figure excludes debt collection payday loan complaints because consumers filing debt collection payday loan complaints have a different set of issues to choose from when completing the complaint form.

[974] This is the median stop-payment fee for an individual stop-payment order charged by the 50 largest financial institutions in 2015. Informa Research Services, Inc. (Aug. 7, 2015), Calabasas, CA. *www.informars.com.* Although information has been obtained from the various financial institutions, the accuracy cannot be guaranteed.

[975] *See, e.g.,* Complaint at 19, *Baptiste* v. *JP Morgan Chase Bank,* No. 1:12–CV–04889 (E.D.N.Y. Oct. 1, 2012) (alleging that during a two-month period, six payday lenders debited the plaintiff's bank account 55 times, triggering a total of approximately $1,523 in non-sufficient funds, overdraft, and service fees); *CFPB Online Payday Loan Payments.*

[976] *See* Letter to Ben Bernanke, Chairman, Board of Governors of the Federal Reserve System, from the National Consumer Law Center, Consumer Federation of America, Center for Responsible Lending, Consumer Action, Consumers Union, National Association of Consumer Advocates, National Consumers League, and U.S. PIRG, *Comments on Improving the U.S. Payment System,* at 8 (Dec. 13, 2013), *available at https://fedpaymentsimprovement.org/wp-content/uploads/2013/12/Response-Natl_Consumer_Law_Center_et_al-121313.pdf.*

[977] For example, Regions Bank instructs consumers that ''If you are attempting to stop payment on an ACH draft, you must provide the exact amount of the draft or the stop payment cannot be placed.'' *See* Regions Bank, *Frequently Asked Questions, http://www.regions.com/FAQ/lost_stolen.rf* (last visited May 17, 2016).

[978] *See* Wells Fargo, *Instructions for Stopping Payment, https://www.wellsfargo.com/help/faqs/order-checks/* (last visited May 17, 2016) (''ACH items—Please provide the Company Name, Account Number, ACH Merchant ID and/or Company ID (can be found by reviewing a previous transaction) and Amount of item.'').

[979] Through market outreach, the Bureau has learned that the ACH channel used to be allowed only for recurring authorizations. Future transactions could be stopped relatively easily because the bank could use the merchant identification information (in this case, the name that the lender or its payment processor puts in the ACH file) that was on prior preauthorized debits. However, now that the ACH network can also be used to initiate one-time payments, a bank may not know which merchant identifier to use. In addition, some merchants (including lenders) seem to be gaming the system by changing the merchant identifiers to work around stop payments.

lenders sometimes use multiple merchant ID codes and different names on their ACH transactions in an apparent attempt to reduce the risk of triggering scrutiny for their ACH presentments. Moreover, banks may require consumers to navigate fairly complex procedures in order to stop a payment, and these procedures may vary depending on whether the payment is presented through the ACH system or the check system. For example, one major depository institution allows consumers to use its online system to stop payment on a check, but requires notification over the phone to stop a payment on an ACH item.[980]

The Bureau also identified in the proposal some risk that bank personnel may misinform consumers about their rights. During outreach, the Bureau learned that the ACH operations personnel at some banks do not believe consumers have any right to stop payment or send back unauthorized transactions initiated by payday lenders. The Bureau has received consumer complaints to this effect.[981] Recent Federal court cases and information from legal aid organizations[982] also provide evidence that bank personnel may not correctly implement consumer payment rights in all cases.[983]

d. Private Network Protections Have Limited Impact

Finally, while the presentment practices of the payday industry are so severe that they have prompted recent actions by the private rulemaking body that governs the ACH network, the Bureau stated in the proposal that these efforts likely would be insufficient to solve the problems discussed above. The private NACHA Rules do provide some protections in addition to those currently provided by law. Specifically, the NACHA Rules now limit the re-presentment of any one single failed payment to two additional attempts and provide that any lender with a total return level of 15 percent or above may be subject to an inquiry process by NACHA. They also impose a ''company name rule'' mandating that originators of ACH transactions use names that consumers would recognize, and impose a fee on payment originators when payments are returned. NACHA has also undertaken various efforts to improve the enforcement of their rules in recent years, and to encourage more developed self-monitoring across all industries. As NACHA set forth in its comment responding to this rulemaking, it has engaged in a number of reforms more recently, including several reforms in 2014. However, the narrower scope of these rules, the limited private network monitoring and enforcement capabilities over them, and their applicability to only one payment method, taken together, mean that private network protections are not well positioned to completely solve problematic practices in the payday and payday installment industries.

Re-Initiation Cap

The Bureau observed in the proposal that the NACHA Rules have historically provided a re-initiation cap, which limits re-presentment of a failed payment to two additional attempts. Compliance with this requirement is difficult to monitor and enforce.[984] Although ACH files are supposed to distinguish between collection of a new payment and the re-initiation of a prior one, some originators do not comply with this requirement to label re-initiated transactions.[985] Because the ACH system does not record whether the payment is for a loan and accordingly cannot identify the terms of the loan, including whether it is a single-payment loan or an installment loan with a series of scheduled payments, there is limited ability to distinguish re-initiations (and potential NACHA rule violations) from the next installment payment. Unless a lender explicitly labels the attempt as a re-initiation, the ACH system cannot otherwise distinguish between, for example, the second attempt to collect a payment for January 1 and the first attempt to collect the next payment that is due on February 1.[986]

Even if the rule were not subject to ready evasion by originating entities, the cap also does not apply to future payments in an installment payment schedule. Accordingly, if a failed payment on a previously scheduled payment is followed by a payment attempt on the next scheduled payment, that second attempt is not considered a re-initiation and does not count toward the cap. For example, for a loan payment that does not go through, NACHA Rules allow that payment to be presented a total of three times, thereby generating three fees to the consumer, and the following payment due can still proceed despite any prior failures. Commenters suggested that the Bureau should distinguish between re-presentments and new payments on the payment schedule, and suggested that the Bureau should not have counted payments 14 days out as ''re-presentments'' in its studies. The Bureau did include them because payments in short succession would look quite similar to re-presentments from the consumer's perspective. And as the Bureau's study showed, even when counting presentments 14 days apart as ''re-presentments,'' the rates of rejection are quite high for second, third, fourth, and further presentments, especially when compared to the rejection rate for the first presentment.

[980] *See* Wells Fargo Instructions for Stopping Payment (''You can request a stop payment online (check only), by phone (check and ACH items) or by visiting your local store and speaking with a banker.''), *https://www.wellsfargo.com/help/faqs/order-checks/* (last visited May 17, 2016).

[981] The Bureau has received complaints from consumers alleging that banks told consumers that the bank could not do anything about unauthorized transactions from payday lenders and that the bank would not stop future debits.

[982] *See also,* New Economy Project Letter to Federal Banking Regulators, at 1–2 (September 2014), *available at http://www.neweconomynyc.org/wp-content/uploads/2014/11/letter.pdf* (''People have often found that their financial institution fails to honor requests to stop payment of recurring payments; has inadequate systems for implementing stop payment orders and preventing evasions of those orders; charges inappropriate or multiple fees; and refuses to permit consumers to close their accounts.'').

[983] See Jessica Silver-Greenberg, Major Banks Aid in Payday Loans Banned by States, NY Times (Feb. 23, 2013), *available at http://www.nytimes.com/2013/02/24/business/major-banks-aid-in-payday-loans-banned-by-states.html* (discussing allegations against JP Morgan Chase about consumer difficulties in revoking authorization and stopping payment on online payday loans); Complaint at 11, Baptiste, No. 1:12–CV–04889 (alleging that a bank employee told the plaintiff that the bank ''could not stop the debits from payday lenders, and that she should instead contact the payday lenders to tell them to stop debiting her account'').

[984] *See* FFIEC, *Bank Secrecy Act/Anti-Money Laundering Exam Manual,* at 238 (''Transactions should be monitored for patterns that may be indicative of attempts to evade NACHA limitations on returned entries. For example, resubmitting a transaction under a different name or for slightly modified dollar amounts can be an attempt to circumvent these limitations and are violations of the NACHA Rules.'').

[985] NACHA Request for Comment and Request for Information—ACH Network Risk and Enforcement Topics, Rule Proposal Description, at 6–7 (proposing amendments in response to lack of compliance with requirement to label reinitiated transactions) (''NACHA has reason to believe that some high-risk Originators may ignore or attempt to evade the requirements of the Reinitiation Rule, including by changing content in various fields to make an Entry appear to be a new Entry, rather than a reinitiationze . . . . For additional clarity, NACHA proposes to include in the Reinitiation Rule common examples that would be considered reinitiating an Entry to avoid arguments, for example, that adding a fee to an Entry creates a new Entry or that attempting to resubmit for a lesser amount takes the Entry outside of these limitations.'').

[986] NACHA explicitly excludes scheduled payments from its reinitiation rule. *See id.* at 7 (explaining that ''the proposal would clarify that a debit Entry in a series of preauthorized recurring debit Entries will not be treated as a reinitiated Entry, even if the subsequent debit Entry follows a returned debit Entry, as long as the subsequent Entry is not contingent upon whether an earlier debit Entry in the series has been returned.'').

There were a number of comments stating that NACHA has recently clarified its re-initiation cap in 2014, and that the Bureau should wait to see if that effort fixed the problems the Bureau had identified. In a similar vein, commenters suggested that the Bureau's study is stale because it was based on data from 2012, which was before these NACHA reforms were enacted. On this topic, NACHA wrote to the Bureau that its pre-existing re-initiation cap has acted to protect consumers against excessive debits to their accounts for many years, while providing a reasonable opportunity for duly authorized transactions to be paid when the account to be debited inadvertently has inadequate funds at the time of the original charge. NACHA also clarified that it took steps in 2014 to clarify the application of the re-initiation rule because of concerns regarding evasion and non-compliance with the rule. As discussed in the proposal, NACHA had concerns that originators were not labeling re-initiated transactions or were using scenarios where a payment had changed in some way—such as by adding a fee—to avoid considering it as a re-initiation under the cap. The Bureau notes that the cap is longstanding and existed during the 2011–2012 study period, and the Bureau's data shows that the problems identified above remained. NACHA clarified the application of the rule thereafter, and the Bureau agrees that this effort to focus more industry attention on the cap is likely to be helpful in addressing the problem. However, as noted in the NPRM, NACHA has limited to ability to monitor and enforce its reinitiation cap. Although it is possible that fewer industry participants violated the cap after the 2014 clarification, the fact that industry was evading the rule pre-2014 suggests that they may be still evading it today. NACHA claims that the overall NSF return rates for all ACH debits fell by 21 percent since 2012, and by 31 percent for online payments. Those are market-wide numbers, and it is unclear whether the payday industry made similar improvements. But even if it did, much of the problems that the Bureau's study identified would remain, though they may have been depressed somewhat. Furthermore, NACHA stated in its comment that the new NACHA Rules have resulted in a shift to other riskier payment methods, such as remotely created checks and debit network transactions that are not governed by the NACHA Rules. The Bureau believes that this final rule will be a beneficial supplement to the NACHA Rules in that this rule will apply across multiple payment methods (including those riskier methods that the NACHA Rules cannot reach). Additionally, the NACHA Rules cap re-presentments at two of the original entry, which allows one more re-presentment than does this rule (and, as discussed above, allows the reinitiation clock to re-start with the next scheduled payment). A substantial amount of the consumer harm found in the Bureau's study data occurred on the second re-presentment, and since the NACHA Rules did not affect that, the Bureau concludes that its data is not stale as to that issue. Lastly, as stated earlier in this section, while the NACHA reforms may impact the prevalence of re-presentment practices to some degree, they would not alter the type and extent of consumer harm that re-presentments cause when they do occur.

Total Return Rate Level

According to a NACHA rule that went into effect in September 2015, originators[987] with a total return rate of 15 percent or above are subject to an inquiry process by NACHA.[988] This return rate threshold includes returns for reasons such as non-sufficient funds, authorization that was revoked by the consumer, administrative issues (such as an invalid account number), and stop-payment orders. It does not include the returns of re-presented checks, which are ACH re-presentments of payments that were first attempted through the check-clearing network. Exceeding this threshold does not necessarily violate NACHA Rules, but rather simply allows NACHA to demand additional information from the lender's originating depository financial institution (ODFI) for the purpose of determining whether the ODFI should lose access to the ACH system.[989]

During this process, the ODFI may be able to justify a high return rate depending on the lender's business model and other factors.[990] NACHA set the threshold at 15 percent to allow flexibility for a variety of business models while identifying originators that were burdening the ACH system.[991] However, in the proposal the Bureau stated its concern that lenders can adopt problematic payment practices and remain below this inquiry level. This concern is borne out by the data, as the Bureau in fact has observed an overall lender NSF return rate of 10.1 percent in its analysis of ACH payments attempts by online payday and payday installment lenders.[992]

Monitoring and Enforcement of the New Total Return Rate Level

In the proposal, the Bureau preliminarily found that NACHA has a limited ability to monitor return rates. First, NACHA has no ability to monitor returns based on a particular lender. All of the return information it receives is sorted by the ODFIs that are processing the transactions, rather than at the level of the individual lenders that are

[987] The return rate level is calculated for individual entities like lenders and payment processors that direct an ODFI to debit a consumer's account on the entities' behalf. *See* NACHA Rule 2.17.2; NACHA Rule 8.6 (defining ''originator'').

[988] *See* NACHA Rule 2.17.2; NACHA, *ACH Network Risk and Enforcement Topics, https://www.nacha.org/rules/ach-network-risk-and-enforcement-topics* (last visited May 17, 2016) (''The Rule will establish an inquiry process that will provide NACHA with a preliminary evaluation point to research the facts behind an Originator's ACH activity. Preliminary research, as part of the inquiry process, begins when any Originator exceeds the established administrative return rate or overall return rate level. The review process involves eight steps, and includes an opportunity for NACHA and an industry review panel to review an Originator's ACH activity prior to any decision to require a reduction in a return rate. The inquiry process does not automatically trigger a Rules enforcement activity.'') (''The rule does not automatically require an ODFI to reduce an Originator's return rate below 15 percent; as such, it is meant to be flexible in accounting for differing needs of a variety of businesses. The rule would require an ODFI to reduce an Originator's return rate below 15 percent if directed to do so by the industry review panel.'').

[989] *See* NACHA Rule 2.17.2.

[990] See NACHA, *ACH Network Risk and Enforcement Topics: FAQs, available at https://www.nacha.org/rules/ach-network-risk-and-enforcement-topics* (last visited May 16, 2016).

The inquiry process is an opportunity for the ODFI to present, and for NACHA to consider, specific facts related to the Originator's or Third-Party Sender's ACH origination practices and activity. At the conclusion of the preliminary inquiry, NACHA may determine that no further action is required, or may recommend to an industry review panel that the ODFI be required to reduce the Originator's or Third-Party Sender's overall or administrative return rate below the Return Rate Level. . . . In reviewing the results of a preliminary inquiry, the industry review panel can consider a number of factors, such as: (1) The total volume of forward and returned debit Entries; (2) The return rate for unauthorized debit Entries; (3) Any evidence of Rules violations, including the rules on reinitiation; (4) Any legal investigations or regulatory actions; (5) The number and materiality of consumer complaints; (6) Any other relevant information submitted by the ODFI.

[991] *See* NACHA, *Request for Comment and Request for Information,* at 5 (''By setting the threshold at approximately 10 times the ACH Network average, NACHA believes that sufficient leeway will be permitted for businesses that attempt to service high risk communities without creating return rates that significantly increase costs on RDFIs and raise questions about the quality of the origination practices.'').

[992] This return rate does not include same-day presentments; with same-day presentments included, the overall return rate is 14.4%. The NACHA reinitiation cap was in effect during the Bureau's sample period of 2011–2012. The NACHA rule on overall return rate levels went into effect in September 2015.

accessing the ACH network. Because lenders sometimes use multiple ODFI relationships to process their payments,[993] the returns used in the NACHA threshold do not provide a full picture of those lenders' payment activity. In addition, NACHA has no ability to monitor or calculate return rates on an ongoing basis. Although it receives return volume reports from the ACH operators (the Federal Reserve and The Clearinghouse), these reports do not contain the successful payment volume information that is necessary to calculate a return rate. Rather, NACHA relies on financial institutions to bring suspect behavior to its attention, which even then only provides it with a basis to investigate further and request more detailed payment reports.

The Bureau also emphasized in the proposal that lenders often obtain access to multiple payment methods, such as check, ACH, and debit card. As private payment networks do not combine return activity, there is no monitoring of a lender's overall returns across all payment types. Payments that begin as checks and then are re-presented as ACH payments, a practice that is not uncommon among storefront payday lenders, are excluded from the NACHA return rate threshold. The Bureau is also aware that lenders sometimes alternate between payment networks to avoid triggering scrutiny or violation of particular payment network rules. Processor marketing materials, Bureau staff conversations with industry, and documents made public through litigation indicate that the NACHA unauthorized return and total return rate thresholds have already prompted migration to remotely created checks and debit network transactions, none of which is covered by the NACHA Rules.[994]

In light of the available evidence, including the comments received on the points discussed in this section of the proposed rule, the Bureau concludes that substantial risk to consumers remains. Although private network rules may improve lender practices in some respects, they have many gaps, impose limited consequences, and do not eliminate all consumer harm. There is no systematic way to monitor lender payment practices in the current ACH system, or more broadly for practices across all payment channels, leaving only weak enforcement mechanisms in place for applying the NACHA Rules. In addition, because these rules are private, the public has no guarantee or assurance of any kind that they will exist in the same form or an improved form in the future. And perhaps most importantly, the NACHA Rules only apply to the ACH system, and not all payment methods. For all of these reasons, the Bureau concludes that the private ACH network rules do not provide an adequate solution to the problematic payment practices in this market. The Bureau values NACHA's continued efforts to improve payment practices, both for this lending market and across the entirety of the ACH networks, and will continue to consider NACHA as a partner while the Bureau proceeds with its own work to address the harms it identifies to consumers.

Section 1041.7 Identification of Unfair and Abusive Practice—Payments

The Bureau's Approach in the Proposal

In the proposal, the Bureau stated its belief that the act or practice of obtaining a consumer's authorization in advance to initiate electronic fund transfers (EFTs) from the consumer's bank account often can be beneficial for creditors and consumers alike by providing a relatively speedy, predictable, and low-cost means of repayment. Nonetheless, for all of the reasons discussed in Markets Concerns—Payments of the proposed rule, the Bureau also stated its belief that lenders in the markets for payday and payday installment loans often use such payment authorizations in ways that may cause substantial harms to consumers who are especially vulnerable, particularly when lenders continue making payment withdrawal attempts after one or more attempts have failed due to non-sufficient funds.

Based on the available evidence and pursuant to its authority under section 1031 of the Dodd-Frank Act, the Bureau proposed in § 1041.13 [995] to identify it as both an unfair and an abusive act or practice for a lender to attempt to withdraw payment from a consumer's account in connection with a covered loan after the lender's second consecutive attempt has failed due to a lack of sufficient funds, unless the lender obtains the consumer's new and specific authorization to make further withdrawals from the account. In this context, an ''attempt to withdraw payment from a consumer's account'' was defined, in proposed § 1041.14, to mean a lender-initiated debit or withdrawal from the account for purposes of collecting any amount due or purported to be due in connection with a covered loan, regardless of the particular payment method used by the lender to initiate the debit or withdrawal. The proposed identification thus would apply to all common methods of withdrawing payment from consumers' accounts, including but not limited to the following methods: EFTs (including preauthorized EFTs), without regard to the particular type of payment device or instrument used; signature checks; remotely created checks; remotely created payment orders; and an account-holding institution's withdrawal of funds held at the same institution. The Bureau sought comment on the evidence it had presented on these issues, and on the preliminary findings and conclusions it had reached in the proposal.

General Comments Received

The Bureau received a number of general comments about the Bureau's use of its authority to prohibit unfair, deceptive, or abusive acts or practices. The Bureau addresses those more general comments immediately below; the specific comments on the prongs of unfairness or abusiveness are addressed further below.

Some commenters claimed the proposed intervention was not necessary because of the NACHA Rules described above or, alternatively, that the data the Bureau used was stale because of the new NACHA Rules. Other commenters suggested that the Bureau should simply enforce Regulation E, or use its UDAAP enforcement authority, to address the issue. Others argued that State law sufficiently addressed the issues identified by the Bureau, or that leveraged payment mechanisms were required by State law, and that this meant the rule was in conflict with those requirements.

Some commenters argued that it was improper or inappropriate to write a rule that only implicates a small subset of the total market's transactions, and that these issues should be addressed instead by supervisory oversight or enforcement activity.

Several commenters argued that the rule was overbroad, arguing that the Bureau's primary source of data was

[993] In order to access the ACH network, lenders must use an ODFI. A lender may not have a direct ODFI relationship if it is sending payments through a third-party payment processor. In that case, the processor would have an ODFI relationship. A lender may have multiple ODFI and processor relationships, such as different relationships for different loan products or regions.

[994] *See, e.g.,* FTC Final Amendments to Telemarketing Sales Rule, 80 FR 77520, 77532 (Dec. 14, 2015) (discussing marketing by payment processors).

[995] Because changes made to the proposal have led to omissions of certain sections, the sections on payment attempts, along with certain others, have been renumbered in the final rule. Thus, for example, § 1041.13 of the proposed rule has now become § 1041.7 of the final rule. The numbering of the sections in the final rule will be used here, unless specifically indicated otherwise.

from online payday lenders, and that the data were not applicable to depository institutions, traditional installment loans, or storefront lenders. Other commenters argued that the Bureau had not shown that there was any difference in payment presentment practices between covered industries and industries the rule would not cover—for example, longer-term installment lending with interest rates below 36 percent APR.

Still others argued that the Bureau had not identified, as an unfair or abusive practice, the failure to provide the consumer notice before initiating a transfer, and thus did not properly identify any UDAAP predicate to support the notice interventions in the proposed rule (proposed § 1041.15, final § 1041.9).

Lastly, commenters argued that this part of the rule was unnecessary because proposed §§ 1041.4 to 1041.6 would ensure that more borrowers have an ability to repay, and thus would be much more likely to have funds in their accounts when the first presentment is made (meaning there would be no need for multiple payment attempts).

Final Rule

The Bureau now concludes that the practice of making attempts to withdraw payment from consumers' accounts in connection with a covered loan after the lender's second consecutive attempts to withdraw payments from the accounts from which the prior attempts were made have failed due to a lack of sufficient funds, unless the lender obtains the consumers' new and specific authorization to make further withdrawals from the accounts, is unfair and abusive. The Bureau's analysis of why this practice meets the elements of unfairness and the elements of abusiveness, as well as its responses to the comments received on those topics, are provided below. But first the Bureau responds to the broader comments concerning the Bureau's general approach.

The Bureau addressed the comments regarding whether the Bureau's data are stale because of new NACHA Rules in the Market Concerns—Payments section above. This final rule would only allow one re-presentment, as opposed to the two re-presentments allowed by the NACHA Rules, and this marginal difference will have a significant impact on an identifiable set of consumers. Additionally, as noted above, this rule governs all payment methods, which is important because NACHA only addresses ACH payments and accordingly has seen many lenders shift towards other, non-ACH payment methods in response to NACHA's efforts to address the payment practices at issue in this rule. Further, the final rule clarifies that, as further explicated in the section-by-section analysis for § 1041.8, the payment presentment cap applies across multiple loans, contrary to the NACHA Rules. The Bureau values NACHA's efforts and looks forward to working in a partnership on these issues, but concludes that the provisions in the NACHA Rules do not eliminate the need for regulatory intervention here.

In addition, the Bureau concludes that merely continuing to enforce Regulation E would not be enough to remedy the harms from the identified practice. Regulation E does not impose a limit on multiple failed presentments. It does give consumers certain rights to stop payments and cancel authorizations, which may mitigate some of the harm caused by multiple failed presentments, if exercised successfully. However, as the Bureau highlighted in the Market Concerns—Payments section above, consumers often have difficulty exercising these rights, and many of the reasons for this difficulty result from conduct and other factors that may not violate Regulation E or even be subject to that regulation. Furthermore, even when entities are in compliance with Regulation E, consumers may not be aware of their rights under that regulation, and may not be able to exercise them quickly enough. Given these limitations, the Bureau believes that individual enforcement actions under Regulation E would not sufficiently address the problematic payment practices and resulting consumer harms in markets for payday and payday installment loans. As discussed below, the Bureau is now deciding to use its UDAAP authority to address these problems in a more fundamental and comprehensive manner, instead of on a case-by-case basis. To the extent there are State laws that could address the problems identified, the Bureau believes, based on the evidence of payments-related consumer harms in markets for payday and payday installment loans, that those laws have not succeeded in preventing the harms caused by the identified practice, and the Bureau has thus decided that a more fundamental and comprehensive approach is in order.

The Bureau has authority to bring UDAAP enforcement actions without issuing a rule. It could do so on a case-by-case basis, focusing only on those actors that engage in the most egregious payment practices. And it has already been doing so.[996] However, the Bureau believes that addressing only the most egregious payment practices on a case-by-case basis would not sufficiently address consum er harms that occur when lenders in markets for payday and payday installment loans make multiple failed attempts to withdraw payment from consumers' accounts. Accordingly, the Bureau has decided to address those harms more holistically with a rule.

Several industry commenters made the point that the Bureau was proposing to take action on the basis of a fairly small set of payment presentments, as compared to the total presentments in the industry (which are often successful on the first try). The Bureau acknowledges this point, but finds that it does not undermine the case for this portion of the rule. The Bureau finds that there is substantial injury to a significant population of consumers, even though those affected do not constitute a majority of all consumers. The Bureau finds that this practice meets the prongs of unfairness and abusiveness, as discussed below, and believes this finding suffices for a rule that is narrowly tailored to address the minority of transactions at issue.

The Bureau's primary study on this topic was a report based on online payday and high cost payday installment lenders only, which includes covered short-term loans and covered longer-term loans as defined in this rule. The report and other evidence showed, generally, what happens to consumers when lenders re-present after two previous and consecutive failed attempts. The Bureau's decision to apply the rule specifically to covered loans (short-term loans, high-cost longer-term loans, and long-term balloon payment loans), but not other lending markets, was based on the fact that consumers in the markets for covered loans have similar characteristics—as discussed in the proposal, Market Concerns—Underwriting, and Market Concerns—Payments—which make them vulnerable to harms that occur from the identified unfair and abusive practice. The Bureau also has evidence suggesting that lenders making covered loans are more likely to engage in the practice. Based on the higher return rates observed in the markets for covered loans, the payments report, the Bureau's enforcement experience, and consumer complaints, the Bureau believes the practice of continuing to make attempts to withdraw payment

[996] *See, e.g.,* Consent Order, In the Matter of *EZCORP,* Inc., CFPB No. 2015–CFPB–0031 (Dec. 16, 2015).

from a consumer's account after two consecutive attempts have failed is more likely to occur in the markets for covered loans, and that consumers of loans in those markets are therefore more likely to incur the observed harms that result from that practice. The Bureau has not observed similar evidence in other markets, and thus makes the reasonable determination to confine the rule to those markets where it has data, evidence, and experience. Additionally, the fact that leveraged payment mechanisms are generally a feature of loans covered by the rule suggests that these lenders are more likely to have the opportunity to engage in the practice than are lenders in credit markets that are not so dependent on leveraged payment mechanisms. Of course, if the Bureau were to receive evidence suggesting that participants in other markets are engaging in this practice in ways that similarly harm consumers, it would consider expanding the rule to those markets, or perhaps taking supervisory or enforcement action as appropriate.

With respect to the Bureau's determination to apply the final rule to covered longer-term loans with an APR of more than 36 percent but not to those with a lower APR, the Bureau has substantial evidence that the identified practice is occurring in the market for higher-cost installment loans, specifically as shown in the payments report and through enforcement actions.[997] The Bureau does not have similar evidence as to installment loans of all kinds, including traditional lower-cost credit, which makes up a much broader and more varied portion of the credit market, and is therefore limiting application of the rule so as to not reach all credit markets. If the Bureau were to obtain evidence that lenders in other installment loan markets are engaged in the identified practice or similarly harmful payment practices, it could initiate supervisory or enforcement actions, or expand the coverage of the rule, depending on the circumstances.[998] The Bureau chose the 36 percent threshold specifically because of the long history of States and Federal regulators that have exercised their judgment to rely on that particular rate as a point of distinction between high-cost loans and other loans, as described in more detail in the Background section.

Commenters are correct in asserting that the Bureau did not identify an unfair or abusive practice that would warrant the notice requirements in § 1041.15 of the proposed rule (§ 1041.9 of the final rule). But the Bureau did not attempt to do so. Instead, as discussed in the section-by-section analysis of § 1041.9, below, the notice requirements were proposed pursuant to the Bureau's disclosure authority under section 1032 of the Dodd-Frank Act.

Lastly, the Bureau acknowledges that covered lenders may have less opportunity to subject consumers to the practice identified in § 1041.7 after the underwriting provisions in §§ 1041.4 to 1041.6 are implemented. As a covered lender's customer base for covered short-term loans skews more towards borrowers with an ability to repay their loans, fewer initial payments will be returned, and thus lenders will have fewer opportunities to make multiple failed payment attempts. This will not be the case, however, for covered longer-term loans, which are not subject to § 1041.5. The Bureau also notes that covered short-term loans made under § 1041.6 will not be subject to rigorous underwriting requirements. Additionally, it is implausible that the underwriting requirements in §§ 1041.4 to 1041.6 will eliminate all failed payment attempts. No provisions in §§ 1041.4 to 1041.6 would stop a lender from engaging in the practice the Bureau identified in § 1041.7 if a borrower did not have enough funds in his account. In every credit market, even ones with substantial underwriting, consumers experience some rate of default.

For these reasons, and those set forth below, the Bureau finalizes the language in § 1041.7, identifying the specified practice of payment attempts on covered loans as unfair and abusive, in the same form as it was proposed in the comparable section of the proposed rule, with two exceptions. The Bureau has added official commentary, at comment 7–1, which clarifies that a lender who complies with § 1041.8 with regard to a covered loan has not committed the unfair and abusive practice under § 1041.7. This comment is added to clarify that § 1041.8 is intended to prevent the practice in § 1041.7. Thus, if a lender complies with § 1041.8, then it will not be in violation of § 1041.7.

Second, during inter-agency consultations, the Bureau received input from a Federal prudential regulator about the singular nature of the statement of the unfair and abusive act or practice. The regulator believed that supervisory or enforcement actions of this particular rule should be based on a pattern or practice of activity, rather than an isolated and inadvertent instance, which the regulator believed could deter responsible lenders from making covered loans. In the interest of inter-agency cooperation, the Bureau is adopting the suggestion to pluralize the statement of the unfair and abusive practice. Relatedly, the Bureau does not intend to bring supervisory or enforcement actions against a lender for a single isolated violation of § 1041.8.

a. Unfair Practice

Under section 1031(c)(1) of the Dodd-Frank Act, the Bureau has no authority to declare an act or practice unfair, unless it has a reasonable basis to conclude that it ''causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers,'' and such substantial, not reasonably avoidable injury ''is not outweighed by countervailing benefits to consumers or to competition.'' [999] In the proposal, the Bureau indicated that it could be an unfair act or practice to attempt to withdraw payment from a consumer's account in connection with a covered loan after the second consecutive attempt has failed due to a lack of sufficient funds, unless the lender obtained the consumer's new and specific authorization to make further withdrawals from the account. The Bureau received many comments from stakeholders on all sides of this issue, which are reviewed and addressed below.

In sum, after having reviewed the comments, the Bureau concludes that the practice preliminarily identified in the proposal is unfair. It causes substantial injury to consumers because borrowers subjected to the practice incur repeated fees. Based on the

[997] CFPB, Online Payday Loan Payments (April 2016), *available at http://files.consumerfinance.gov/f/201604_cfpb_online-payday-loan-payments.pdf;* Consent Order, *EZCORP*, CFPB No. 2015–CFPB–0031 (Dec. 16, 2015), *available at http://files.consumerfinance.gov/f/201512_cfpb_ezcorp-inc-consent-order.pdf.* Both involved high-cost installment or longer-term payday loans.

[998] In the Military Lending Act rule limiting the terms of consumer credit extended to servicemembers and their dependents, the Department of Defense noted its unwillingness to define the total cost of credit so as to exclude ''certain fees, or all non-periodic fees, [which] could be exploited by a creditor who would be allowed to preserve a high-cost, open-end credit product by offering a relatively lower periodic rate coupled with an application fee, participation fee, or other fee.'' 80 FR 43563. Under the cost of credit adopted here from Regulation Z to govern the applicability of subpart C to covered lenders, the Bureau would note that if a lender sought to structure its loans in such a manner as to shift the cost of credit from the periodic rate to unusual application fees, participation fees, or other fees that bore no relation to the actual cost of credit in order to avoid coverage under this rule, then supervisory or enforcement authority could be invoked and this structuring of the loans could be cited as evidence of attempted evasion of the rule.

[999] 12 U.S.C. 5531(c).

Bureau's study of online payday and payday installment lending, about two percent of borrowers in the market are subject to the practice, and of those subject to the practice, most previously incurred NSF or overdraft fees associated with the second failed attempt and more than 80 percent incurred additional NSF or overdraft fees as a result of the third, fourth, and further attempts, which are now prohibited. The practice is not reasonably avoidable because it is difficult to stop payments at the borrower's account-holding institution, and difficult to revoke payment authorizations. The injury is not outweighed by countervailing benefits to consumers or competition. Third and subsequent re-presentments have low expected values because of how often they fail, and consumers otherwise see very little benefit when lenders are allowed to re-present after two failed attempts without a new borrower authorization.

1. Causes or Is Likely To Cause Substantial Injury

Proposed Rule

As noted in part IV, the Bureau's interpretation of the various prongs of the unfairness test is informed by the FTC Act, the FTC Policy Statement on Unfairness, and FTC and other Federal agency rulemakings and related case law.[1000] Under these authorities, substantial injury may consist of a small amount of harm to a large number of individuals or a larger amount of harm to a smaller number of individuals.

As the Bureau discussed in the proposal, the lender act or practice of attempting to withdraw payment from a consumer's account in connection with a covered loan after the lender's second consecutive attempt has failed due to a lack of sufficient funds, unless the lender obtains the consumer's new and specific authorization to make further withdrawals from the account, appears to cause or to be likely to cause substantial injury to consumers. And each additional attempt by the lender is likely to trigger substantial additional fees for the consumer but is unlikely to result in successful collection for the lender. These additional attempts can cause serious injury to consumers who are already in substantial financial distress, including the cumulative fees that the consumers owe to both the lender and their account-holding institution.

Specifically, the Bureau conducted an analysis of online lenders' attempts to collect payments through the ACH system on loans with various payment structures, including payday loans with a single balloon payment and high-cost installment loans, typically with payments timed to coincide with the consumer's payday. The Bureau's analysis indicated that the failure rate after two consecutive unsuccessful attempts is 73 percent, even when re-presentments appear to be timed to coincide with the consumer's next payday or the date of the next scheduled payment, and further worsens on subsequent attempts.[1001] Return rates for resubmissions of returned signature checks, RCCs, and RCPOs through the check system are not as readily observable. Nonetheless, it is reasonable to assume that lenders' resubmissions of failed payment withdrawal attempts through the check-clearing system would yield high failure rates as well.[1002] Similarly, when a lender that is also the consumer's account-holding institution has already initiated two consecutive failed internal transfers to withdraw payment on a loan, despite having more information about the condition of the consumer's account than other lenders generally have, there is no reason to assume that the lender's next attempt to withdraw payment from the severely distressed account is any more likely to yield better results.[1003]

Consumers who are subject to the lender practice of attempting to withdraw payment from an account after two consecutive attempts have failed are likely to have incurred two NSF fees from their account-holding institution [1004] and, where permitted, two returned-payment fees from the lender by the time the third attempt is made. Accordingly, these consumers already may have incurred more than $100 in fees in connection with the first two failed attempts. As a result of lenders' attempts to withdraw payment from their accounts after the failure of a second consecutive attempt, most of these consumers will incur significant additional monetary and other harms. In the vast majority of cases, the third withdrawal attempt fails and thereby triggers additional NSF fees charged by the consumer's account-holding institution and may trigger additional returned-item fees charged by the lender. Indeed, the Bureau's evidence with respect to online payday and payday installment loans indicated that 73 percent of consumers who

[1000] Over the past several decades, the FTC and Federal banking regulators have promulgated a number of rules addressing acts or practices involving financial products or services that the agencies found to be unfair under the FTC Act (the 1994 amendments to which codified the FTC Policy Statement on Unfairness). For example, in the Credit Practices Rule that the FTC promulgated in 1984, the FTC determined that certain remedies that creditors frequently included in credit contracts for use when consumers defaulted on the loans were unfair, including confessions of judgments, irrevocable wage assignments, security interests in household goods, waivers of exemption, pyramiding of late charges, and cosigner liability. 49 FR 7740 (Mar. 1, 1984) (codified at 16 CFR part 444). The D.C. Circuit upheld the FTC rule as a permissible exercise of unfairness authority. *AFSA,* 767 F.2d at 957 (1985). The Federal Reserve Board adopted a parallel rule applicable to banks in 1985. (The Federal Reserve Board's parallel rule was codified in Regulation AA, 12 CFR part 227, subpart B. Regulation AA has been repealed as of March 21, 2016, following the Dodd-Frank Act's elimination of the Federal Reserve Board's rule-writing authority under the FTC Act. *See* 81 FR 8133 (Feb. 18, 2016)). In 2009, in the HPML Rule, the Federal Reserve Board found that disregarding a consumer's repayment ability when extending a higher-priced mortgage loan or HOEPA loan, or failing to verify the consumer's income, assets, and obligations used to determine repayment ability, is an unfair practice. *See* 73 FR 44522 (July 30, 2008). The Federal Reserve Board relied on a statutory basis for its exercise of unfairness authority pursuant to TILA section 129(l)(2), 15 U.S.C. 1639(l)(2) (renumbered to 15 U.S.C. 1639(p)(2), which incorporated the provisions of HOEPA. The Federal Reserve Board interpreted the HOEPA unfairness standard to be informed by the FTC Act unfairness standard. *See* 73 FR 44529 (July 30, 2008). That same year, the Federal Reserve Board, the OTS, and the NCUA issued the interagency Subprime Credit Card Practices Rule, where the agencies concluded that creditors were engaging in certain unfair practices in connection with consumer credit card accounts. *See* 74 FR 5498 (Jan. 29, 2009).

[1001] The analysis indicates that of the 20 percent of payment requests following a second failed payment request that occur between 14 and 15 days, 84 percent fail. CFPB Online Payday Loan Payments, at 16. In addition, the analysis indicates that while re-presentments at 30 days are rare, more than half of all that occur at 30 days fail. *Id.* at 17. In the Bureau's analysis, these data show that even if the re-presentment is on the consumer's next payday, which is likely to be the date of the consumer's next scheduled payment on an installment loan, it is also likely to fail. *Id.* at 17 fig. 3.

[1002] Indeed, as discussed in the proposal, information reported by storefront lenders suggests that when such lenders make payment withdrawal attempts using the consumer's check—typically in cases where the consumer does not come into the store to repay—the failure rates for such attempts are as high as or higher than those for presentments through the ACH system.

[1003] As discussed in the proposal, the Bureau is aware of some depository institutions that have charged overdraft and NSF fees for payments made within the institutions' internal systems, including a depository institution that charged overdraft and NSF fees on payments related to its small-dollar loan product. The Bureau has decided to exempt depository institutions from this rule when the depository institution is also the account-holding institution and when that depository institution does not charge fees for failed attempts or allow an internal transfer to cause an overdraft or account closure. That decision was made not because these presentments are more likely to succeed, but because in those instances, no fees are charged (either by the lender or by the account-holding institution, which are one and the same), and thus no injury occurs.

[1004] Although lenders do not directly charge these particular fees, their actions cause the fees to be charged by the account-holding institution. Furthermore, lenders know that consumers generally will incur fees from their account-holding institutions for failed payments.

experience a third withdrawal attempt after two prior failures incur at least one additional NSF fee (bringing their total to three and total cost in NSF fees to over $100), 36 percent end up with at least two additional fees, and 10 percent end up with at least three additional fees (meaning in most cases they will have been charged approximately $175 in fees by their account-holding institution). When returned-item fees are added, that can double these costs. These lender fees may be imposed even for returned or declined payment withdrawal attempts for which the account-holding institution may not charge a fee, such as attempts made by debit cards and certain prepaid cards. Moreover, in the relatively small number of cases in which such a withdrawal attempt does succeed, Bureau research suggests that roughly one-third of the time, the consumer is likely to have been charged an overdraft fee of approximately $34.[1005]

In addition to incurring these types of fees, in the proposal, the Bureau preliminarily found that consumers who experience two or more consecutive failed lender payment attempts appear to be at greater risk of having their accounts closed by their account-holding institution. Specifically, the Bureau's analysis of ACH payment withdrawal attempts made by online payday and payday installment lenders indicates that 43 percent of accounts with two consecutive failed lender payment withdrawal attempts were closed by the depository institution, as compared with only three percent of accounts generally.[1006]

Comments Received

The primary thrust of the comments that claimed the Bureau had not satisfied this element was that the Bureau either had insufficient evidence or had evidence that was inapplicable to certain sub-categories of products—such as longer-term installment loans, bank loans, or loans made by Tribal entities or, relatedly, that the Bureau's evidence was only applicable to online lending.

There were also various other discrete comments. Some commenters suggested that identification of the third payment attempt as injurious as opposed to, for example, the fifth attempt, was arbitrary. Others suggested that even the second payment attempt is injurious and should be constrained under the terms of the rule. Commenters claimed that the Bureau had not shown why submitting payments more than two times is a unique characteristic of covered lenders, and had not shown why it was not similarly injurious when other industries did so. Several commenters identified that the third presentment after two consecutive failed presentments was a small portion of the total number of presentments initiated by lenders of covered loans, thereby suggesting that the injury was not substantial.

Some commenters also noted that the Bureau had not provided evidence showing that covered lenders have knowledge of the fact that their actions will result in repeated fees at consumers' authorizing banks. Others claimed that the lenders covered by the proposed rule were not the cause of the injury, but rather it was the consumers' banks that caused the injury. A number of commenters objected to the Bureau's assertion that its evidence suggested that some account closures were caused by the identified practice. A few commenters argued that fees were not necessarily injury, and others suggested that some of the affected consumers were fraudsters or never intended to repay, and thus should not be considered injured parties.

Final Rule

After having reviewed the comments received, the Bureau concludes that the practice of attempting to withdraw payment from a consumer's account in connection with a covered loan after the lender's second consecutive attempt to withdraw has failed due to a lack of sufficient funds, unless the lender obtains the consumer's new and specific authorization for the withdrawal, causes or is likely to cause substantial injury.

It is true that the Bureau's proposal relied significantly on a study of re-presentments and ACH withdrawal attempts in the online payday and payday installment lending market. But the Bureau relied on other data as well. For example, as stated above, one very large depository institution presented its own statistical analysis demonstrating that storefront and online lenders shared a 25% overall return rate, as compared to the 1.36% return rate industry-wide. And the Bureau reviewed the financial records of lenders that provide covered loans other than online loans, and preliminarily found disclosures of high return rates and/or a practice of engaging in re-presentments.[1007]

But more generally, the Bureau agrees with commenters that injury would result when any vendor initiates a third withdrawal attempt after two failed attempts (absent a new and specific authorization). The Bureau decided to take action as to lenders of the loans covered by this rule because the Bureau has reason to find, based on evidence and data available to it, that lenders in these markets are or were engaged in the identified practice, per the discussion in Market Concerns—Payments above. Were the Bureau presented with evidence that other markets are also engaged in the practice, it would consider expanding this rule.

The Bureau does not agree that the evidence before it suggests that third and subsequent presentments (which, again, are second re-presentments) result in a small amount of injury. Of the borrowers who are subjected to a third presentment, the data showed that 73 percent incur an NSF fee and an additional 8 percent incur an overdraft fee. As the Bureau noted in the Market Concerns—Payments section, and as commenters correctly noted, the Bureau's study showed that around two percent of all initial presentments were followed by two more attempts. The average overdraft and NSF fee was around $34, which means 1.6 percent of all initial payment attempts involved an estimated $34 in injury from a third payment attempt. Given the size of the market, the injury caused just by third presentments alone is substantial, amounting to millions of dollars. The Bureau also analyzed the harms of the practice in a different manner—by looking at the total percentage of payment requests that this rule would prevent, and the average overdraft and NSF fees that the rule will prevent from being charged per impacted borrower.

[1005] Thus, even when the consumer does not incur NSF fees from her account-holding institution as a result of a lender payment withdrawal attempt made in connection with a covered loan after two consecutive attempts have failed, the consumer still has a roughly one-in-three chance of incurring an overdraft fee as a result of the subsequent lender attempt. Moreover, at the time lenders choose to make further attempts to withdraw payment from the account, the lenders should be on notice that the account is severely distressed (as evidenced by the prior two consecutive returns) and that additional attempts thus are likely to cause further injury to the consumer, be it from NSF fees, lender-charged returned-item fees or, as the Bureau's analysis indicates, overdraft fees charged by the consumer's account-holding institution.

[1006] CFPB Report on Supplemental Findings, at Chapter 6.

[1007] QC Holdings 2014 Annual Report (Form 10–K), at 7 (reporting a return rate of 78.5 percent); Advance America 2011 Annual Report (Form 10–K), at 27 (reporting return rates of 63 percent for checks and 64 percent for ACH attempts); First Cash Fin. Servs., 2014 Annual Report (Form 10–K), at 5 (Feb. 12, 2015) (explaining that provider of online and storefront loans subsequently collects a large percentage of returned ACH and check payments by redepositing the customers' checks, ACH collections, or receiving subsequent cash repayments by the customers); CashNet USA, ''Frequently Asked Questions,'' *https://www.cashnetusa.com/faq.html* (last visited Dec. 18, 2015) (''If the payment is returned for reason of insufficient funds, the lender can and will re-present the ACH Authorization to your bank'').

Based on the Bureau's study, around seven to ten percent of all presentments in the studied market consisted of a presentment after at least two consecutive failed attempts, while the average borrower subjected to the practice incurred an average of $64 to $87 in overdraft and NSF fees as a result of the practice.[1008]

Notably, these estimates do not take into consideration all the further risks and harms that occur to some consumers whose accounts are closed as a result of these situations. When adding to that the fee amounts charged cumulatively for further re-presentments, which occur in certain instances, plus the unquantifiable amounts for return fees charged by lenders themselves, the injury is even more substantial.

Additionally, this injury would be incurred by borrowers who are more likely to be unable to absorb small to midsized financial burdens. The impact is likely to be significant given that impacted borrowers will have already incurred fees after the first two failed payment attempts. Also, as noted in Market Concerns—Underwriting, consumers of covered loans are typically in financial distress, which is often the reason for seeking covered loans in the first place. For a borrower that is in financial distress, incurring an average of $64–$87 in bank fees, plus any lender return fees and the risk of account closure, after having already incurred approximately $70 in bank fees and additional lender fees due to the first two failed payment attempts, would be quite substantial. As for the decision to finalize a limit of two re-presentments, the Bureau recognizes that every re-presentment—whether the first, second, third, fourth, or any other ordinal—individually generates fees, and hence causes injury to consumers. In fact, looking individually at each presentment, the fee injury is likely identical for each instance (one NSF fee, overdraft fee, and perhaps return fee). But the Bureau does not view the injury and benefits of each additional presentment individually. Instead, it takes into account the cumulative impact of the string of presentments. The Bureau did not decide on a limit of two re-presentments because the first re-presentment does not cause injury. It did so because the injury after each failed attempt is cumulative, meaning the injury after two re-presentments is approximately double the injury after one, and the first re-presentment implicates certain additional countervailing benefits.[1009] Lenders may have simply tried the first presentment at the wrong time, and consumers may find it convenient to not have to reauthorize after one failed attempt.

The Bureau draws the line at two re-presentments in an abundance of caution, in an attempt to avoid regulating potentially more legitimate justifications for re-presentment. But this discussion should not be interpreted to minimize the harms that can occur even from a single re-presentment. Indeed, depending on the facts and circumstances, even payment practices involving a single re-presentment may be unfair, deceptive, or abusive. The Bureau also notes that this rule does not provide a safe harbor against misconduct that is not explicitly addressed by the rule, and the Bureau can and will continue to monitor these practices under its supervisory and enforcement authorities, and will take appropriate action as warranted by the circumstances.[1010]

The Bureau disagrees with commenters' assertions that the identified practice does not cause the injury, either because consumers' banks were the primary cause or because the Bureau did not prove that the lender knew fees would result. One commenter argued more specifically that lenders are not responsible for overdraft fees because borrowers opt in to overdraft fees with their banks. Another argued that fees are not necessarily an injury. As an initial matter, actual knowledge of the harm is not a requirement for an unfairness finding.[1011] Even if it were, the Bureau assumes that market participants understand the natural consequences of their actions. Additionally, the fact that consumers' banks are the actors that actually charge the fees does not suggest that the identified practice does not cause the substantial injury. The ''contribution of independent causal agents'' does not erase the role lenders play in causing the harm.[1012] The Bureau's proposal provided ample evidence that lenders are aware of high rejection rates, and any industry participant should know that a natural consequence of rejected transfers is that the consumer will incur fees. The Bureau study analyzed overdraft fees charged in connection with ACH transactions. Fees on such transactions are not subject to an opt-in requirement like overdraft fees on debit card transactions, meaning that while it is true borrowers may have opted into overdraft fees for some instances, that is not true for many instances in which overdraft fees are incurred. Further, it is a settled matter that fees which borrowers cannot reasonably avoid should be considered injury.[1013]

It may be true that some of the affected consumers may be fraudsters, or never intended to repay their loans. To the extent a person had used another individual's account number, any re-presentments would further victimize a victim of identity theft. But the Bureau agrees that there may be a small population of borrowers who took out a loan with no intention of trying to repay either the loan or any associated bank fees. This small population of borrowers does not change the Bureau's overall assessment of whether there was substantial injury, or whether that injury was outweighed by countervailing benefits.

Lastly, several commenters stated that the Bureau's evidence on high account-closure rates did not prove that the identified practice caused all of the closures. The Bureau acknowledged in the proposal that some accounts could be closed for other reasons. To the extent depository institutions do involuntarily close accounts as a result of repeated failed presentments, that result is injury. And one commenter provided a study in which 22 percent of the surveyed payday consumers did self-report that their account was closed because of payday loans.[1014] The Bureau does not know the full extent of how often borrowers' accounts are closed due to multiple presentments, but it can point to evidence showing that payday borrowers' accounts are closed involuntarily much more often

[1008] CFPB Report on Supplemental Findings, at Chapter 6.

[1009] Note that the Bureau's study, CFPB Online Payday Loan Payments, found that the second payment request had a 70 percent failure rate, while the third had a 73 percent failure rate. CFPB Online Payday Loan Payments at 13.

[1010] This discussion reflects the fact that rules identifying and preventing certain unfair or abusive practices as determined on a categorical basis—as is true, for example, of this rule—do not divest the Bureau of authority to address other unfair, deceptive, or abusive acts or practices that are identified in the particular facts or circumstances of a specific examination or enforcement investigation. For example, the Bureau has taken enforcement action in cases that involved payment practices which do not specifically track the unfair and abusive practice that is identified in § 1041.7. *See, e.g.,* Consent Order, In the Matter of EZCORP, Inc., No. 2015–CFPB–0031 (Dec. 16, 2015).

[1011] *FTC* v. *Neovi,* 604 F.3d 1150, 1156 (9th Cir. 2010).

[1012] *Neovi,* 604 F.3d at 1155 (9th Cir. 2010).

[1013] FTC Statement on Unfairness, Appended to International Harvester Co., 104 F.T.C. 949, 1070 (1984) (''In most cases a substantial injury involves monetary harm.'').

[1014] Pew Charitable Trusts, ''Payday Lending in America Fraud and Abuse Online: Harmful Practices in Internet Payday Lending, at 16 (Report 4, 2014), *available at http://www.pewtrusts.org/~/media/Assets/2014/10/Payday-Lending-Report/Fraud_and_Abuse_Online_Harmful_Practices_in_Internet_Payday_Lending.pdf.*

than other consumers. It is reasonable to assume that some portion of the closures result from the practice and some are a result of other circumstances. Either way, the Bureau neither thinks this injury is necessary to make the total injury ''substantial,'' nor that it tips the balance regarding whether the injury is outweighed by countervailing benefits.

2. Injury Not Reasonably Avoidable

Proposed Rule

As previously noted in part IV, under the FTC Act and Federal precedents that inform the Bureau's interpretation and application of the unfairness test, an injury is not reasonably avoidable where ''some form of seller behavior . . . unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision-making,'' or unless consumers have reason to anticipate the injury and the means to avoid it. In the proposal, the Bureau observed that in a significant proportion of cases, unless the lender obtains the consumer's new and specific authorization to make further payment withdrawals from the account, consumers may be unable to reasonably avoid the injuries that result from the lender practice of attempting to withdraw payment from a consumer's account in connection with a covered loan after two consecutive payment withdrawal attempts by the lender have failed.

The Bureau noted that consumers could avoid the above-described substantial injury by depositing into their accounts enough money to cover the lender's third payment withdrawal attempt and every attempt that the lender may make after that, but that for many consumers this is not a reasonable or even an available way of avoiding the substantial injury discussed above. Even if a consumer had sufficient funds to do so and knew the amount and timing of the lender's next attempt to withdraw payment, which are unlikely to be the case, any funds deposited into the consumer's account likely would be claimed first by the consumer's bank to repay the NSF fees charged for the prior two failed attempts. Thus, even a consumer who had some available cash could have difficulties in avoiding the injury resulting from the lender's third attempt to withdraw payment, as well as in avoiding the injury resulting from any attempts that the lender may make after the third one.[1015]

Moreover, as a practical matter, in the vast majority of cases in which two consecutive attempts to withdraw payment have failed, the consumer is in severe financial distress and thus does not have the money to cover the next payment withdrawal attempt.[1016] Although the Bureau's consumer testing indicates that consumers generally have a strong commitment to repaying their legal obligations,[1017] a consumer who has already experienced two consecutive failed payment attempts and incurred well over $100 in related fees may at that point consider, as the only other options to avoid further fee-related injury, either closing the account or attempting to stop payment or revoking authorization. Given that consumers use their accounts to conduct most of their household financial transactions, the Bureau did not believe that voluntarily closing down the account was a reasonable means for consumers to avoid injury.

Further, as discussed in the proposal, the option of attempting to stop payment or revoke authorization is not a reasonable means of avoiding the injuries either, for several reasons. First, as listed in the Market Concerns—Payments section above, consumers often face considerable challenges in issuing stop-payment orders or revoking authorization as a means to prevent lenders from continuing to attempt to make payment withdrawals from their accounts. Complexities in payment processing systems and the internal procedures of consumers' account-holding institutions, combined with lender practices, often make it difficult for consumers to stop payment or revoke authorization effectively. With respect to preauthorized EFTs authorized by the consumer, for example, even if the consumer successfully stops payment on one transfer, the consumer may experience difficulties in blocking all future transfers by the lender. In addition, payment withdrawal attempts made via RCC or RCPO can be especially challenging for the consumer's account-holding institution to identify and be able to stop payment on them.

Various lender practices exacerbate these challenges. Lenders often obtain several different types of authorizations from consumers—*e.g.,* authorizations to withdraw payment via both ACH transfers and RCCs—such that if the consumer successfully revokes one type of authorization, the lender has the ability to continue making payment collection attempts using another type of authorization. The procedures of consumers' account-holding institutions for stopping payment often vary depending on the type of authorization involved. Thus, when a lender has obtained two different types of authorizations from the consumer, the considerable challenges associated with stopping payment or revocation in connection with just one type of authorization are effectively doubled. Many consumers also may not understand that they must navigate two different sets of stop-payment or revocation procedures to prevent the lender from making additional withdrawal attempts.

In addition, the costs to the consumer for issuing a stop-payment order or revoking authorization are often as high as some of the fees that the consumer is trying to avoid, as depository institutions charge consumers a fee of approximately $32, on average, for placing a stop-payment order. The consumer incurs this fee regardless of whether the consumer is seeking to stop payment on a check, a single EFT, or all future EFTs authorized by the consumer. Moreover, issuing a stop-payment order at a cost of $32 does not guarantee success. Some depository institutions require the consumer to provide the exact payment amount or the lender's merchant ID code, and thus fail to block payments when the payment amount varies or the lender varies the merchant code. In addition, some depository institutions require consumers to renew stop-payment orders after a certain period of time. In such cases, consumers may incur more than one stop-payment fee in order to continue blocking future payment withdrawal attempts by the lender.

As a result of these stop-payment fees, the cost to the consumer of stopping payment with the consumer's account-holding institution is comparable to the NSF or overdraft fee that the institution would charge the consumer if the payment withdrawal attempt that the consumer is seeking to stop were made. Thus, even if the consumer successfully

[1015] In proposed § 1041.15, the Bureau proposed to require lenders to provide a notice to consumers in advance of each payment withdrawal attempt. The Bureau believed that the notices would help consumers make choices that may reduce potential harms from a payment withdrawal attempt—by reminding them, for example, to deposit money into their accounts prior to the attempt and thus avoid a late payment fee. The Bureau's treatment of these issues is discussed further below in the section-by-section analysis of § 1041.9 of the final rule.

[1016] The Bureau noted that even when consumers have agreed to make a series of payments on an installment loan, the substantial injuries discussed above are not reasonably avoidable, based on its analysis of ACH payment withdrawal attempts made by online payday and payday installment lenders, which indicates that after two failed presentments, even payment withdrawal attempts timed to the consumer's next payday, which is likely to be the date of the next scheduled payment on an installment loan, are likely to fail.

[1017] FMG Report, ''Qualitative Testing of Small Dollar Disclosures, Prepared for the Consumer Financial Protection Bureau,'' at 53 (Apr. 2016) *available at http://files.consumerfinance.gov/documents/Disclosure_Testing_Report.pdf.*

stops payment, they would not avoid this particular fee-related injury, but rather would be exchanging the cost of one comparable fee for another. In addition, some consumers may be charged a stop-payment fee by their account-holding institution even when, despite the stop-payment order, the lender's payment withdrawal attempt goes through. In such cases, the consumer may be charged both a fee for the stop-payment order and an NSF or overdraft fee triggered by the lender's payment withdrawal attempt.

In addition to the challenges consumers face when trying to stop payment or revoke authorization with their account-holding institutions, consumers often face lender-created barriers that prevent them from pursuing this option as an effective means of avoiding injury. Lenders may discourage consumers from pursuing this course of action by including language in loan agreements purportedly prohibiting the consumer from stopping payment or revoking authorization. In some cases, lenders may charge consumers a substantial fee in the event that they successfully stop payment with their account-holding institution. Lenders' procedures for revoking authorizations directly with the lender create additional barriers. As discussed in the proposal, lenders often require consumers to provide written revocation by mail several days in advance of the next scheduled payment withdrawal attempt. A consumer who took out the loan online, but now wishes to revoke authorization, may have difficulty even identifying the lender that holds the authorization, especially if the consumer was paired with the lender through a third-party lead generator. These lender-created barriers make it difficult for consumers to stop payment or revoke authorization.

Comments Received

Several industry commenters stated that the substantial injury identified by the Bureau could be reasonably avoided by consumers because consumers could choose not to borrow, and do not need to agree to a leveraged payment mechanism. Others claimed that borrowers have the ability to revoke authorizations and stop payments, and that these options make the injury reasonably avoidable. Some also claimed that the Bureau overestimated or had no evidence of the difficulty in obtaining a stop-payment order or revoking the authorization.

A number of industry commenters argued that borrowers should simply place sufficient funds in their account or pay the lender before the scheduled transfer date, and should generally be aware that fees would result from failed payment withdrawals. Still other commenters claimed that borrowers could avoid the injury by re-borrowing.

Final Rule

After reviewing the comments received, the Bureau concludes that the substantial injury identified above is not reasonably avoidable by consumers.

As an initial matter, the Bureau disagrees with comments that claimed that the Bureau did not have any convincing evidence of the difficulty of obtaining a stop-payment order or revoking an authorization. The proposed rule and the Market Concerns—Payments sections refer to significant evidence on this point.[1018] As described above, many lenders have obfuscated or interfered with consumers' ability to revoke authorization, and stop-payment orders can involve their own fees and are not always comprehensive. In particular, they are quite difficult to process for RCCs and RCPOs.

One lender noted that it cancels hundreds of payment authorizations each year, and argued that lenders cannot be held responsible if third-party financial institutions mishandle stop-payments or charge excessive fees. Again, lenders are causing harm that is not reasonably avoidable. That harm manifests itself, and is difficult to avoid, in part because of the actions of third-party financial institutions. Although it is fair to say that lenders do not necessarily bear all the responsibility for any problems that ensue, this does not change the fact that consumers are not able to withdraw their prior authorizations or stop payments in a reasonably effective manner. That one lender may process hundreds of canceled payment authorizations each year neither suggests that all of its borrowers who seek to cancel payment authorization are successful, nor suggests that many other lenders do the same thing.

The Bureau does not agree that simply repaying is a viable way to avoid the harm. Many borrowers will not have the funds (again, only approximately 20 percent of third presentments succeed without an overdraft fee). But, additionally, as laid out in the Market Concerns—Payments section, subsequent presentments can occur very quickly, often on the same day, making it difficult to ensure funds are in the right account before the re-presentment hits.[1019]

As in the section-by-section analysis for § 1041.4, the Bureau finds that simply replacing the injury with re-borrowing is not a satisfactory mechanism for reasonably avoiding the harm because it simply substitutes one injury for another. The Bureau has discussed, at length, the harms incurred by repeated re-borrowing in the section-by-section analysis of part B.

Moreover, under the traditional unfairness analysis established by prior precedents, the suggestion that a consumer can simply decide not to participate in the market is not considered to be a valid means of reasonably avoiding the injury.[1020] The Bureau addressed a similar line of comments in subpart B, and noted that if this view were adopted, no market practice could ever be determined to be unfair. That response is applicable here as well.

As stated in the proposal and above, lenders often take broad, ambiguous payment authorizations from consumers and vary how they use these authorizations, thereby increasing the risk that consumers will be surprised by the amount, timing, or channel of a particular payment. Borrowers do not have the ability to shop, at the time of origination, for covered loans without leveraged payment mechanisms, as that is a central feature of these loans. As some commenters noted, leveraged payment mechanisms are sometimes even required by State law.

3. Injury Not Outweighed by Countervailing Benefits to Consumers or Competition

Proposed Rule

As noted in part IV, the Bureau's interpretation of the various prongs of the unfairness test is informed by the FTC Act, the FTC Policy Statement on Unfairness, and FTC and other Federal agency rulemakings and related case law. Under those authorities, the countervailing benefits prong of the unfairness standard makes it appropriate to consider both the costs of imposing a remedy and any benefits that consumers enjoy as a result of the practice; yet this determination does not require a precise quantitative analysis of benefits and costs.

The Bureau preliminarily found that the lender practice of making additional

[1018] *See* specific Market Concerns—Payments sub-section entitled ''Consumers Have Difficulty Stopping Lenders' Ability to Access Their Accounts'' for that evidence.

[1019] In one demonstrative enforcement case, the Bureau found a payday and installment lender that regularly made three debit attempts on the same day. Consent Order, In the Matter of EZCORP, Inc., No. 2015–CFPB–0031 (Dec. 16, 2015).

[1020] *See, e.g.,* 49 FR 7740 (Mar. 1, 1984).

payment withdrawal attempts from a consumer's account in connection with a covered loan after two consecutive attempts have failed does not generate benefits to consumers or competition that outweigh the injuries caused by the practice. As discussed above, a substantial majority of additional attempts are likely to fail. Indeed, the Bureau's analysis in the proposal of ACH payment withdrawal attempts made by online payday and payday installment lenders preliminarily found that the failure rate on the third attempt is 73 percent, and it increases to 83 percent on the fourth attempt, and to 85 percent on the fifth attempt. Furthermore, of those attempts that succeed, 33 percent or more succeed only by overdrawing the consumer's account and generally incurring fees for the consumer.

When a third or subsequent attempt to withdraw payment does succeed, the consumer making the payment may experience some benefit in the form of avoiding further collection activity and consumer reporting, to the extent the lender is reporting the delinquency. According to the Bureau's study, it appears that third presentments succeed approximately 20 percent of the time without an overdraft fee, while an additional eight percent succeed with an overdraft fee. In any event, the Bureau preliminarily found that to the extent some consumers are able, after two consecutive failed attempts, to muster sufficient funds to make the next required payment or payments, these consumers would be able to arrange to make their payment or payments even if lenders were first required to get a new and specific authorization from the consumer before making additional payment attempts.

Turning to the potential benefits of the practice to competition, the Bureau recognizes that to the extent payment withdrawal attempts succeed when made after two consecutive failed attempts, lenders may collect larger payments or may collect payments at a lower cost by seeking payment from the consumer's account rather than being required to seek payment directly from the consumer. Given their high failure rates, however, these additional attempts generate relatively small amounts of revenue for lenders. For example, the Bureau's analysis of ACH payment withdrawal attempts made by online payday and payday installment lenders indicates that whereas the expected value of a first payment request is $152, the expected value of a third successive payment attempt is only $46, and that the expected value drops to $32 for the fourth attempt and to $21 for the fifth attempt.[1021]

Furthermore, the Bureau indicated that lenders could obtain much of this revenue without making multiple attempts to withdraw payment from demonstrably distressed accounts. For instance, lenders could seek payments in cash or ''push'' payments from the consumer or, in the alternative, could seek a new and specific authorization from the consumer to make further payment withdrawal attempts. Indeed, coordinating with the consumer to seek a new authorization may be more likely to result in successful payment withdrawal attempts than does the practice of repeatedly attempting to withdraw or transfer funds from an account in distress. Finally, in view of the pricing structures observed in the markets for loans that would be covered under the proposed rule, the Bureau preliminarily found that any incremental revenue benefit to lenders from subsequent attempts, including revenue from the fees charged for failed attempts, does not translate into more competitive pricing. In other words, the Bureau preliminarily found that prohibiting such attempts would not adversely affect pricing. In sum, the Bureau preliminarily determined in the proposal that consumers incur substantial injuries as a result of the identified practice that are not outweighed by the minimal benefits that this practice generates for consumers or competition.

Comments Received

Several industry commenters stated that the cost of credit would increase as a result of the remedy proposed by the Bureau, which the commenters interpreted to include the burden of sending payment reminders and of tracking unsuccessful debit attempts and new payment authorizations. Many commenters argued more generally that covered loans help borrowers, improve financial health, or are otherwise beneficial. Some commenters argued that recurring payment authorizations are a benefit to consumers because they are more convenient and enable consumers to designate their due date around the timing of when they will have available funds. Some commenters argued that consumers would feel frustrated and inconvenienced whenever a lender is required to request a new and specific authorization. Still others argued that barring withdrawals after the second attempt would limit payment options that are available to consumers. Finally, some argued that limiting payment attempts would harm consumers by causing them to default or slip further into delinquency.

Final Rule

After reviewing the comments received, the Bureau concludes that the substantial injury identified above is not outweighed by countervailing benefits to consumers or competition. A number of industry commenters presented arguments that would be inappropriate to consider in the weighing of countervailing benefits against consumer injury. First, several commenters argued that the costs of complying with the notices and disclosures that would be provided in proposed § 1041.15 constitute compliance costs that should be considered as the Bureau weighs countervailing benefits. Because that remedy is a result of exercising the Bureau's authority under section 1032 of the Dodd-Frank Act, and does not result from this finding of unfairness, the Bureau does not consider that remedy as part of its countervailing benefits analysis. Instead, it considers only the cost of those remedies that are being required to remediate the injury from the identified practice. It also did not identify the notices contained in proposed § 1041.15 as a remedy for the identified practice.

Second, commenters' claims that covered loans are generally beneficial, and that this should be accounted for in the weighing of benefits, cast too wide a net. The Bureau is not identifying the unfair practice as making covered loans, or even making covered loans with leveraged payment mechanisms. The Bureau is taking a much narrower approach here, by identifying the unfair practice as being limited to making a third payment request after two failed attempts, without first obtaining a new and specific payment authorization. The general benefits these commenters posit from the making of covered loans are not a result of that practice, and the Bureau has no reason to believe lenders will not make covered loans because they are unable to re-present after two attempts without obtaining a new authorization.

Third, because the Bureau is not prohibiting leveraged payment mechanisms, it does not consider the convenience of recurring payment authorizations, or scheduled payments, to be a benefit for purposes of this analysis. Lenders can still provide the benefits to consumers of convenience and scheduling after this rule is finalized. In other words, those benefits

[1021] Expected values are calculated by multiplying the average successful payment amount by the success rate.

are not a result of the identified practice, which is the initiation of additional payment requests after two failed attempts, absent a new and specific authorization.

Commenters have correctly identified the cost of tracking unsuccessful debits and of either securing new payment authorizations or obtaining payment through other means if two consecutive presentments fail as a cost of compliance applicable to this analysis. The effect that this cost will have on pricing is mitigated by other market forces including the fact that, as noted in the proposal, many loans in this market are priced at the maximum possible price permitted under State law. Nonetheless, these are costs the market must bear and some of those costs may be passed to consumers. Our analysis suggests that those costs likely will not be overly substantial because lenders already have processes in place to track payment attempts, and thus will only need to augment them slightly to accommodate the particular details for this rule (see Section 1022(b)(2) Analysis in part VII for more on this point). These costs are not sufficient to change the Bureau's overall conclusion that the substantial injury to consumers outweighs the countervailing benefits.

The Bureau does not agree that the consumer frustration caused by requests for new and specific payment authorizations would be significant. These requests would provide consumers with a choice about whether the lender can debit the consumer's bank account. Especially after two failed attempts, and the likely resulting fees, the Bureau judges that it is very likely that consumers will benefit from the opportunity to decide whether another attempt should occur. The Bureau's conclusion on this point is consistent with its statutory objective to ensure that ''consumers are provided with timely and understandable information to make responsible decisions about financial transactions.'' [1022]

Commenters argued that some borrowers could default or slip further into delinquency if the payment would have succeeded, but had not gone through because of the limitations created by the rule. As the Bureau stated in the proposal, however, borrowers will retain the ability to choose to pay their loans as they wish, including by reauthorizing automatic debits. Although there may be some borrowers for whom a third or subsequent presentment would succeed but who would not manage to repay the loan absent such presentments, the Bureau believes that this population is too small to affect the countervailing benefits analysis.

Lastly, the Bureau addressed the fact that the rule will limit consumers' payment options in the proposal. The rule covers all payment methods, and thus affects them evenly. To the extent that it limits payment options after two attempts, it limits them to any optional payment method at the specific initiation of the borrower. As consumers will have the choice of whether to re-authorize a payment authorization after two consecutive failed attempts—and they can always use any specifically initiated method for payment—the Bureau determines that the costs associated with limiting payment options (and thus the countervailing benefits of no limits) are quite minimal.

4. Consideration of Public Policy

Proposed Rule

Section 1031(c)(2) of the Dodd-Frank Act allows the Bureau to ''consider established public policies as evidence to be considered with all other evidence'' in determining whether a practice is unfair, as long as the public policy considerations are not the primary basis of the determination. This is an optional basis for justifying the rule, and in the proposal the Bureau did not make a preliminary determination to cite public policy as evidence to be considered in deciding that the identified payment practices are unfair. Yet some of the comments received invite further scrutiny of whether public policy should be viewed as a basis for either supporting or undermining the proposed rule. For that reason, the issue will be considered further here.

Comments Received

Some industry and other commenters suggested that the Bureau's purported role here is superfluous, since State law governs consumer credit. They argued that some States already cap presentments. They also suggested that the proposed rule may obstruct State efforts to craft regulatory approaches that appropriately protect consumers, because the Bureau's proposed intervention would interfere with policy experimentation by the States, and would shift the balance between consumer protection and access to credit in ways not intended by different State regulatory regimes. Rather than develop new provisions in a Federal rule to address these issues, these commenters argued that the Bureau instead should support changes in State law to address concerns about the misuse of payment instruments; or that it should increase its enforcement of existing Federal laws like the EFTA, Regulation E, and the Bureau's authority to enforce against unfair, deceptive, or abusive acts or practices.

Final Rule

The Bureau does not find that the public policy considerations raised by some of the commenters militate against the adoption of this final rule. Federal law has governed consumer credit, and specifically electronic payments, for 50 years, dating as far back as the Truth in Lending Act (TILA). The EFTA is the most applicable example, and a Federal rule in this area would be consistent with that history. Ultimately, the issue here is simply whether the Bureau has the legal authority to adopt rules to address the identified practice of making repeated withdrawal attempts after two consecutive failures by first determining that the identified practice is unfair and abusive. Under the Dodd-Frank Act, the Bureau is authorized to do so. That authority is not affected by other provisions of Federal and State law, most notably because those provisions preceded this authorization by Congress. Thus, the more recent statute opened the door to policy changes that would affect the application of those pre-existing legal requirements. Moreover, Congress placed it within the Bureau's discretion whether to address unfair, deceptive, or abusive acts or practices through enforcement, supervision, regulation, or some combination of these authorities.[1023] By expressly permitting the Bureau to adopt UDAAP rules, as it is doing here, Congress authorized this very endeavor as fully consistent with current notions of sound public policy and the established framework of Federal and State law.

b. Abusive Practice

Under section 1031(d)(2)(A) and (B) of the Dodd-Frank Act, the Bureau may declare an act or practice abusive if it takes unreasonable advantage of ''a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service,'' or of ''the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service.'' [1024] In the proposal, the Bureau preliminarily found that, with respect to covered loans, it is an abusive act or practice for a lender to attempt to withdraw payment from a consumer's account in connection with a covered loan after two consecutive

[1022] 12 U.S.C. 5511(b)(1).

[1023] *See* 12 U.S.C. 5531(c).

[1024] 12 U.S.C. 5531(d).

failed attempts, unless the lender obtains the consumer's new and specific authorization to make further withdrawals from the account.

After reviewing the comments received, as described and responded to below, the Bureau now concludes that the practice identified in the proposal is abusive. Borrowers do not understand the material risks, costs, or conditions that are posed by lenders engaging in repeated re-presentments. Similarly, borrowers are unable to protect their interests in using the product by revoking authorizations or enacting stop payments. Lenders take advantage of these conditions by re-presenting, and those re-presentments are unreasonable.

Before delving into the statutory prongs of abusiveness on which the Bureau relies for these conclusions, two broader comments can be addressed here. First, some commenters argued that the Bureau only has the authority to identify a practice as abusive if it ''materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service.'' This suggestion, that section 1031(d)(1) must be satisfied in order to make a finding of abusiveness, is a misreading of the statute. Section 1031(d) articulates four disjunctive categories of abusive practices—this one set forth in section 1031(d)(1), and three others that are set forth in section 1031(d)(2). Congress defined a practice to be ''abusive'' if it satisfies any of these four independent criteria. Congress clearly indicated as much with its use of the conjunction ''or'' throughout the text of section 1031(d).

Other commenters argued that Congress only intended abusiveness to cover conduct beyond what is prohibited as unfair or deceptive. The Bureau agrees that the abusiveness standard can reach practices that are not covered by the unfairness or deception standards if the prongs of abusiveness are met, but it does not agree that it can *only* reach practices that are not covered by the unfairness or deception standards. The Bureau is guided and limited by the definitional prongs of unfairness and abusiveness that are expressly articulated in the statute. A practice might meet these standards either alone or in combination (and, of course, lawful practices will meet none of the standards). There is little practical effect of any such overlap, as a practice is just as illegal if it violates one, two, or three of the standards. But as a matter of statutory interpretation, the Bureau has no textual basis to conclude that a practice meeting the statutory prongs of abusiveness cannot be considered abusive because it also meets the prongs of one of the other two standards.

1. Consumers Lack Understanding of Material Risks and Costs

Proposed Rule

In the proposal, the Bureau stated that when consumers grant lenders an authorization to withdraw payment from their account, they understand as a general matter that they may incur an NSF fee from their account-holding institution as well as a returned-item fee charged by the lender. However, the Bureau preliminarily found that such a generalized understanding does not suffice to establish that consumers understand the material costs and risks of a product or service. Rather, the Bureau determined that it is reasonable to interpret ''lack of understanding'' in this context to mean more than mere awareness that it is within the realm of possibility that a particular negative consequence may follow or a particular cost may be incurred as a result of using the product. For example, consumers may not understand that such a risk is very likely to happen or that—though relatively rare—the impact of a particular risk would be severe. In this instance, precisely because the practice of taking advance authorizations to withdraw payment is so widespread across markets for other credit products and non-credit products and services, the Bureau preliminarily concluded that consumers lack understanding of the risk they are exposing themselves to by granting authorizations to lenders that make covered loans. Rather, consumers are likely to expect these payment withdrawals to operate in a convenient and predictable manner, similar to the way such authorizations operate when they are granted to other types of lenders and in a wide variety of other markets. Consumers' general understanding that granting authorization can sometimes lead to fees does not prepare them for the substantial likelihood that, in the event their account becomes severely distressed, the lender will continue making payment withdrawal attempts even after the lender should be on notice (from two consecutive failed attempts) of the account's distressed condition. Nor does it prepare them for the result that thereby they will be exposed to substantially higher overall loan costs in the form of cumulative NSF or overdraft fees from their account-holding institution and returned-item fees from their lender, as well as the increased risk of account closure. Moreover, this general understanding does not prepare consumers for the array of significant challenges they will encounter if, upon discovering that their lender is still attempting to withdraw payment after their account has become severely distressed, they take steps to try to stop the lender from using their authorizations to make any additional attempts.

Comments Received

Industry commenters argued that the Bureau's findings on abusiveness rested on the unsubstantiated assumption that consumers did not understand the risks of covered loans, or the effects of leveraged payment mechanisms. These commenters questioned the Bureau's purported reliance on ''optimism bias.'' Others commented that consumers generally did understand the risks and benefits of covered loans before taking them out. They advanced that awareness of due dates and the fact that payment requests will be initiated, often provided by lenders in conjunction with TILA disclosures, suggest that borrowers understand the material costs and risks of covered loans. Some commenters provided data on borrower expectations about default and re-borrowing, but not about practices around how a lender would use a leveraged payment mechanism to initiate multiple payment requests. Consumer group commenters suggested that the industry acknowledges that covered borrowers do not understand the risks, costs, and conditions of these loans. To support this assertion, one commenter cited a 2016 law review article written by Jim Hawkins, stating that consumers ''are overly optimistic.''

One industry commenter stated that ''understanding'' did not mean anything more than a general sense that a negative consequence would follow. It asserted that consumers did not need to understand both the probability and depth of potential adverse consequences, and cited as support a dictionary definition of ''understanding,'' which is ''to know how (something) works or happens.'' It further argued that the level of understanding the Bureau required under the proposed rule was equivalent to expecting a borrower to become an expert on the lending industry.

Other commenters said that the Director of the Bureau had once publicly stated that whether a borrower has a lack of understanding is ''unavoidably situational'' and that abusiveness claims ''can differ from circumstance to circumstance.'' These commenters claimed that the statements confirmed that the Bureau could not address abusiveness in the market with

a general rule, and must exercise its abusiveness authority on a case-by-case basis instead.

Final Rule

The Bureau now concludes that consumers lack understanding of material risks, costs, or conditions of the product or service, specifically the practice of repeated re-presentments.

Evidence suggests that lenders in many non-covered markets take advanced authorizations to initiate electronic payments, yet do not appear to engage in the practice with any particular frequency. This means borrowers do not have experience with the practice, and thus, likely do not understand the specific risks at issue. The contrast in these markets again was shown by the analysis performed by a major financial institution of its consumer depository account data, which estimates ACH return rates for payday lenders, including both storefront and online companies, at 25 percent, with individual lender return rates ranging from five percent to almost 50 percent,[1025] whereas the average return rate for debit transactions in the ACH network across all industries was just 1.36 percent (with the next highest return rate of any other industry being cable television at 2.9 percent, auto and mortgage at 0.8 percent, utilities at 0.4 percent, and credit cards at 0.4 percent).[1026] It is reasonable to assume that many of that 25 percent consisted of rejected re-presentments, given that the Bureau's own data showed a failure rate for first presentments of only six percent for transactions initiated by online payday and payday installment lenders.[1027] Six percent is very close to the rejection rates of payday lenders with rejection rates at the low end in the financial institution's analysis (five percent), suggesting that lenders at the low end may not have been re-presenting. Lenders at the high end, with 50 percent total rejection rates, were likely re-presenting, bringing up the average. The failure rates for re-presentments in the Bureau's study (70 to 85 percent) were much higher than those for initial presentments.[1028] The comparatively much lower return rates in other markets do not similarly suggest high rates of re-presentment, and are more likely to simply constitute the typical rejection rate for initial presentments. This evidence suggests that the covered markets have much higher rates of re-presentment than consumers experience in other markets.

Additionally, the Bureau concludes that the complexity of payment presentment practices and their effects makes it likely that a significant number of borrowers lack a sufficient understanding of those practices and their effects. These presentment practices are material because they could result in significant risks and costs to the borrower, including NSF fees, overdraft fees, returned payment fees, and potentially account closures.

The Bureau does not rest its legal conclusion on the premise that borrowers are unaware that when they take out covered loans with leveraged payment mechanisms, a payment will be deducted on the due date. Nor does it rest on the premise that borrowers are unaware that when a payment is deducted, and the account lacks the funds to cover the payment, they are likely to incur a fee. Rather, the Bureau concludes that consumers are unaware of the severity of the risk they are exposing themselves to in the circumstances of the identified practice. In other words, the Bureau's analysis rests on the fact that borrowers are not aware of the risks and harms associated with engaging in the identified practice of *multiple* re-presentments. The risks, costs, or conditions of covered loans that borrowers do not understand are based on the fact that lenders will re-present *repeatedly* when borrowers default. Those risks, costs, or conditions are material because—as stated in the unfairness analysis above—borrowers incur substantial injury in the form of fees that are charged and other consequences of the identified practice when lenders repeatedly re-present payments. Data provided by commenters on borrower expectations about default and re-borrowing did not pertain to how lenders use leveraged payment mechanisms to initiate multiple payment requests and thus were not germane to the identified practice here.

Many of the commenters' arguments around whether consumers understand the risks, costs, or conditions of the covered loans focused on the fact that consumers knew a payment would be requested once, knew there would be fees, or knew about the likelihood of default. But those are not the risks, costs, or conditions at issue here, which, again, stem from multiple re-presentments. Similarly, commenters' assertions about the Bureau's reliance on ''optimism bias''—which rests on the assumption that borrowers are overly optimistic that they will be able to repay their loans—are misplaced here. The Bureau is not relying on the premise that borrowers underestimate the likelihood of default or re-borrowing for this part of the rule. Instead, the Bureau is merely concluding that borrowers underestimate the extent of fees resulting from default, because most of them have no basis to recognize that a lender will present multiple times in quick succession after the first payment request fails.

The Bureau also disagrees with the complaint that the proposal sets too high a standard for what borrowers are able to understand. The statute merely states that when risks, costs, or conditions are material and consumers lack understanding of them, lenders cannot take unreasonable advantage of that fact. The Bureau agrees with the industry commenters that it is unreasonable to expect borrowers to understand the lending, banking, and payments system well enough to fully understand all the details of how lenders will initiate repeated re-presentments if the borrower defaults. But if the identified practice constitutes a material risk of the product, as the Bureau concludes here, then lenders are not at liberty to take unreasonable advantage of their consumers' lack of understanding.

The Bureau also disagrees with the claim that it is using a definition of ''understanding'' that differs from ''to know how (something) works or happens.'' This suggestion is flawed because it obfuscates the material risks, costs, or conditions to which that definition should be applied. The Bureau has found that most consumers do not realize that the identified practice involving multiple failed re-presentments happens. This conclusion is consistent with the accepted dictionary definition of ''understanding.''

Lastly, the Bureau rejects the claim that it cannot base any rule on the abusiveness authority defined in the statute, and instead can only enforce against abusive practices on a case-by-case basis, even where the Bureau has evidence and data that would justify a more general rule. Congress granted the Bureau explicit authority under section 1031(b) of the Dodd-Frank Act to issue rules grounded on its abusiveness

[1025] Beth Anne Hastings, ''Monitoring for Abusive ACH Debit Practices,'' (Presentation by JP Morgan Chase at Spring 2014 NACHA Conference in Orlando, FL, Apr. 7, 2014). *See also* First Cash Fin. Servs., 2014 Annual Report (Form 10–K), at 5 (''Banks return a significant number of ACH transactions and customer checks deposited into the Independent Lender's account due to insufficient funds in the customers' accounts.'') (discussion later in the document indicates that the CSO section covers both online and storefront loans).

[1026] NACHA Q4 2014.

[1027] CFPB Online Payday Loan Payments, at 13.

[1028] CFPB Online Payday Loan Payments, at 13.

authority. The Bureau believes that by giving the Bureau rulemaking authority using its abusiveness authority, Congress expressed its clear intent to give the Bureau authority to make more general assessments where it has evidence and data regarding an identified practice that meets the statutory prongs for abusiveness. Based on the facts and evidence described in the proposed rule, this section, and Market Concerns—Payments, the Bureau is concluding that consumers generally lack an understanding of the material costs, risks, or conditions of lenders' repeated re-presentment practices, especially the extent of the risks and the severity of the costs. Accordingly, the Bureau is authorized to exercise its rulemaking authority in this area.

2. Consumers Are Unable To Protect Their Interests

Proposed Rule

The Bureau proposed that when a lender attempts to withdraw payment from a consumer's account in connection with a covered loan after the lender's second consecutive failed attempt, unless the lender obtains the consumer's new and specific authorization to make further withdrawals from the account, consumers are unable to protect their interests. By the time consumers discover that lenders are using their authorizations in this manner, it is often too late for them to take effective action. Although consumers could try to protect themselves from the harms of additional payment withdrawal attempts by closing down their accounts entirely, the Bureau did not interpret taking this action as being a practicable means for consumers to protect their interests, given that consumers use their accounts to conduct most of their household financial transactions. As discussed in the proposal, often the only option for most consumers to protect themselves (and their accounts) from the harms of lender attempts to withdraw payment after two consecutive attempts have failed is to stop payment or revoke authorization.[1029] However, as also explained in the proposal, consumers often face considerable challenges and barriers when trying to stop payment or revoke authorization, both with their lenders and with their account-holding institutions. These challenges and barriers thus also make this option an impracticable means for consumers to protect themselves from the harms of further payment withdrawal attempts.

As discussed in the proposal, lenders sometimes discourage consumers from stopping payment or revoking authorization by including language in loan agreements purporting to prohibit revocation. For instance, some lenders may charge consumers a substantial fee for stopping payment with their account-holding institutions. Others may have in place procedures for revoking authorizations directly with the lender that create additional barriers to stopping payment or revoking authorization effectively. For example, as discussed above, lenders often require consumers to provide written revocation by mail several days in advance of the next scheduled payment withdrawal attempt, among other requirements. Some consumers may even have difficulty identifying the lender that holds the authorization, particularly if the consumer took out the loan online and was paired with the lender through a third-party lead generator. These and similar lender-created barriers—while challenging for consumers in all cases—can make it particularly difficult for consumers to revoke authorizations for repayment by recurring transfers, given that a consumer's account-holding institution is permitted under Regulation E to confirm the consumer has informed the lender of the revocation (*e.g.,* by requiring a copy of the consumer's revocation as written confirmation to be provided within 14 days of an oral notification). Thus, if the institution does not receive the required written confirmation within this time frame, then it may continue to honor subsequent debits to the account.

In the proposal, the Bureau explained that consumers encounter additional challenges when trying to stop payment with their account-holding institutions. For example, due to complexities in payment processing systems and the internal procedures of consumers' account-holding institutions, consumers may be unable to stop payment on the next payment withdrawal attempt in a timely and effective manner. Even if the consumer successfully stops payment with her account-holding institution on the lender's next payment attempt, the consumer may experience difficulties blocking all future attempts by the lender, particularly when the consumer has authorized the lender to make withdrawals from her account via recurring EFTs. Some depository institutions require the consumer to provide the exact payment amount or the lender's merchant ID code, and thus fail to block payments when the payment amount varies or the lender varies the merchant code. Consumers are likely to experience even greater challenges in stopping payment on lender attempts made via RCCs or RCPOs, given the difficulty that account-holding institutions have identifying such payment attempts. Further, if the lender has obtained multiple types of authorizations from the consumer—such as authorizations to withdraw payment via both ACH transfers and RCCs—the consumer likely will have to navigate different sets of complicated stop-payment procedures for each type of authorization held by the lender, thereby making it even more challenging to stop the payment effectively.

As further laid out in the proposal, the fees charged by consumers' account-holding institutions for stopping a payment are often comparable to the NSF fees or overdraft fees from which the consumers are trying to protect themselves. Depending on the policies of their account-holding institutions, some consumers may be charged a second fee to renew a stop-payment order after a period of time. As a result of these costs, even if the consumer successfully stops payment on the next payment withdrawal attempt, the consumer will not have effectively protected herself from the fee-related injury that otherwise would have resulted from the attempt, but rather will have just exchanged the cost of one fee for another. Additionally, in some cases, consumers may be charged a stop-payment fee by their account-holding institution even when the stop-payment order fails to stop the lender's payment withdrawal attempt from occurring. As a result, such consumers may incur both a fee for the stop-payment order and an NSF or overdraft fee for the lender's withdrawal attempt.[1030]

Comments Received

One commenter suggested that the statutory phrase ''inability of the

[1029] As discussed in the proposal, even if consumers have enough money to deposit into their accounts prior to the next payment withdrawal attempt, those funds likely would be claimed first by the consumer's account-holding institution to repay the NSF fees charged for the prior two failed attempts. Thus, there is still a risk of additional consumer harm from a third attempt in such situations, as well as from any attempts the lender may make after the third one, unless the consumer carefully coordinates the timing and amounts of the attempts with the lender, which is generally not possible.

[1030] Even when consumers' account-holding institutions may not charge a fee for returned or declined payment withdrawal attempts made using a particular payment method, such as attempts made by debit cards and certain prepaid cards, consumers still incur lender-charged fees from which they cannot protect themselves. In addition, consumers sometimes incur lender-charged fees for successfully stopping payment or revoking authorization.

consumer to protect the interests of the consumer in selecting or using a consumer financial product or service'' is similar to section 4(c)(1) of the Uniform Consumer Sales Practices Act. That provision bans unconscionable contracts that take ''advantage of the inability of the consumer reasonably to protect his interests because of his physical infirmity, ignorance, illiteracy, [or] inability to understand the language of an agreement.'' This commenter suggested that the Bureau should thus deem this prong met only if the consumers in question are physically infirm, ignorant, illiterate, or unable to understand. Several commenters suggested again that borrowers typically are able to appreciate the general consequences of failing to pay, or contended that this prong of the definition of abusiveness is only met where it is literally impossible for consumers to protect their interests in selecting or using the product.

Many other comments pointed to the mechanisms that the Bureau identified in the proposal—authorization revocations, account closures, and stop payments—stating that these prove borrowers do have the ability to protect their interests. Some commenters argued more simply that borrowers can protect their interests by just making a payment when it is due, or by not taking out loans in the first place.

Consumer groups, by contrast, argued that it is difficult, if not impossible, for consumers to revoke account access or stop payment withdrawals when lenders initiate multiple attempts.

Final Rule

The Bureau now concludes, as discussed below, that consumers are unable to protect their interests—specifically the interest of preventing the harms identified—in selecting or using a consumer financial product or service.

The Bureau does not agree that the language in the Dodd-Frank Act should be interpreted as synonymous with the passage cited from the Uniform Consumer Sales Practices Act. In fact, there is no basis whatsoever for this suggestion. The statutory definition of abusiveness does not limit instances where a company can take advantage of an inability to protect one's own interests to a narrow set of instances where that inability is caused by infirmity, ignorance, illiteracy, or inability to understand the language of an agreement.

The Bureau also rejects the interpretation, presented by commenters, that the prong of ''inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service'' can be met only when it is literally impossible for consumers to take action to protect their interests.[1031] One dictionary defines ''inability'' to mean a ''lack of sufficient power, strength, resources, or capacity,''[1032] and the Bureau believes the clause ''inability of the consumer to protect'' is similarly reasonably interpreted to mean that consumers are unable to protect their interests when it is impracticable for them to do so in light of the circumstances.

As for comments that mechanisms are available to avoid undesirable outcomes, or that borrowers can protect their interests by just making a payment when it is due or by not taking out loans in the first place, these are arguments the Bureau already addressed in the ''reasonable avoidability'' part of the unfairness section above, and its responses to those points apply here.

As stated in the proposal and discussed further above in Market Concerns—Payments, evidence in the record supports the conclusion that consumers are, in fact, unable to protect their own interests in relation to payment re-presentments by initiating stop payments or revoking authorizations.[1033] Commenters' assertions that borrowers have a literal ability to protect their interests in some conceivable but impractical circumstances rest on a misunderstanding of the statutory test and the actual facts of these types of situations. On the basis of the evidence presented, the Bureau thus concludes that consumers are generally and practicably unable to use these methods to protect their interests.

3. Practice Takes Unreasonable Advantage of Consumer Vulnerabilities

Proposed Rule

Under section 1031 of the Dodd-Frank Act, an act or practice is abusive when it takes ''unreasonable advantage'' of consumers' lack of understanding of the material risks, costs, or conditions of selecting or using a consumer financial product or service or of their inability to protect their interests in selecting or using such a product or service. The Bureau proposed that, with respect to covered loans, the lender act or practice of attempting to withdraw payment from a consumer's account after two consecutive attempts have failed, unless the lender obtains the consumer's new and specific authorization to make further withdrawals, may take unreasonable advantage of consumers' lack of understanding and inability to protect their interests and is therefore abusive. In making this proposal, the Bureau was informed by the evidence discussed in the proposal and above in Markets Concerns—Payments.

In the proposal, the Bureau recognized that in any transaction involving a consumer financial product or service, there is likely to be some information asymmetry between the consumer and the financial institution. Often, the financial institution will have superior bargaining power as well. Section 1031(d) of the Dodd-Frank Act does not prohibit financial institutions from taking advantage of their superior knowledge or bargaining power to maximize their profit. Indeed, in a market economy, market participants with such advantages generally pursue their self-interests. However, section 1031 of the Dodd-Frank Act makes plain that at some point, a financial institution's conduct in leveraging consumers' lack of understanding or inability to protect their interests becomes unreasonable advantage-taking that is abusive.[1034]

The Dodd-Frank Act delegates to the Bureau the responsibility for determining when that line has been crossed. In the proposal, the Bureau stated that such determinations are best made with respect to any particular practice by taking into account all of the facts and circumstances that are relevant to assessing whether the practice takes unreasonable advantage of consumers' lack of understanding or inability to protect their interests. The Bureau recognized that taking a consumer's authorization to withdraw funds from her account without further action by the consumer is a common practice that frequently serves the interest of both lenders and consumers, and does not believe that this practice, standing alone, takes unreasonable advantage of consumers. However, at least with respect to covered loans, the Bureau proposed to conclude, based on the evidence discussed in the proposal and above in Markets Concerns—Payments, that when lenders use such

[1031] At least one court has rejected a similar interpretation. *See Consumer Financial Protection Bureau* v. *ITT Educational Services, Inc.,* 219 F. Supp. 3d 878, 919 (S.D. Ind. 2015).

[1032] ''Webster's Third New International Dictionary,'' (Merriam Webster Inc., 2002).

[1033] *See* specific Market Concerns—Payments subsection entitled ''Consumers Have Difficulty Stopping Lenders' Ability to Access Their Accounts'' for that evidence.

[1034] A covered person also may take unreasonable advantage of one or more of the three consumer vulnerabilities identified in section 1031(d) of the Dodd-Frank Act in circumstances in which the covered person lacks such superior knowledge or bargaining power.

authorizations to make another payment withdrawal attempt after two consecutive attempts have failed, lenders take unreasonable advantage of consumers' lack of understanding and inability to protect their interests, absent the consumer's new and specific authorization.

As discussed above, with respect to covered loans, the lender practice of continuing to make payment withdrawal attempts after a second consecutive failure generates relatively small amounts of revenues for lenders, particularly as compared with the significant harms that consumers incur as a result of the practice. Moreover, the cost to the lender of re-presenting a failed payment withdrawal attempt is nominal; for this reason, lenders often repeatedly re-present at little cost to themselves, and with little to no regard for the harms that consumers incur as a result of the re-presentments.

Specifically, the Bureau's analysis of ACH payment withdrawal attempts made by online payday and payday installment lenders, laid out in greater detail in the proposal, indicates that the expected value of a third successive payment withdrawal attempt is only $46 (as compared with $152 for a first attempt), and that the expected value drops to $32 for the fourth attempt and to $21 for the fifth attempt. And yet, despite these increasingly poor odds of succeeding, many lenders continue to re-present. This further suggests that at this stage, the consumers' payment authorizations have ceased to serve their primary purpose of convenience, but instead have become a means for the lenders to seek to extract small amounts of revenues from consumers any way they can. In addition, lenders often charge consumers a returned-item fee for each failed attempt.[1035] This provides lenders with an additional financial incentive to continue attempting to withdraw payment from consumers' accounts even after two consecutive attempts have failed. Although lenders may not be able to collect such fees immediately, the fees are added to the consumer's overall debt and thus can be pursued and perhaps collected later through the debt collection process. The Bureau preliminarily concluded that lenders could obtain much of this revenue without engaging in the practice of trying to withdraw payment from consumers' accounts after the accounts have exhibited clear signs of being in severe distress. For example, lenders could seek further payments in cash or ACH ''push'' payments from the consumer or, in the alternative, could seek a new and specific authorization from consumers to make further payment withdrawal attempts. Indeed, the Bureau determined that coordinating with the consumer to seek a new authorization may be more likely to result in successful payment withdrawal attempts than does the practice of repeatedly attempting to withdraw payments from an account that is known to be in distress.

Comments Received

Most of the comments relevant to this prong were already addressed in the two sections above. The Bureau also received comments suggesting that it provided no evidence that the practice takes unreasonable advantage of consumers. Commenters also argued that the Bureau should focus on how certain roadblocks imposed by financial institutions relating to stop-payment orders take unreasonable advantage of consumers rather than on the identified practice engaged in by lenders.

Final Rule

As described more fully above in Market Concerns—Payments, the Bureau does have ample evidence that the identified practice takes unreasonable advantage of consumers. Lenders take advantage by imposing financial harm on consumers when they make repeated efforts to extract funds from consumer accounts, and those actions are unreasonable in light of the low expected value of those re-presentments. Indeed, lenders should be well aware that borrowers will likely not have funds in their distressed accounts, as shown by the two prior failed presentments and the lenders' general experience of the low expected value of multiple re-presentments. They also should be well aware of the kinds of harms that consumers are likely to experience in these situations; nonetheless, they routinely make a conscious choice to engage in the identified practice by proceeding with their re-presentments.

It may be the case that financial institutions engage in practices that hinder borrowers' ability to stop payments. Whether this takes unreasonable advantage of consumers has no bearing on whether lenders also take unreasonable advantage of consumers by engaging in the identified practice.

The Bureau finalizes its conclusion that the practice of attempting to withdraw payment from a consumer's account in connection with a covered loan after the lender's second consecutive failed attempt to withdraw payment from the account, unless the lender obtains the consumer's new and specific authorization to make further withdrawals from the account, takes unreasonable advantage of consumers' lack of understanding of the material risks, costs, or conditions of the product or service, as well as their inability to protect their interests in selecting or using a consumer financial product or service.

Section 1041.8 Prohibited Payment Transfer Attempts

For the reasons discussed in the section-by-section analysis of § 1041.7, the Bureau has concluded that it is an unfair and abusive practice for a lender to attempt to withdraw payment from a consumer's account in connection with a covered loan after the lender's second consecutive attempt to withdraw payment from the account has failed due to a lack of sufficient funds, unless the lender obtains the consumer's new and specific authorization to make further withdrawals from the account. Thus, after a lender's second consecutive attempt to withdraw payment from a consumer's account has failed, the lender could avoid engaging in the unfair or abusive practice either by not making any further payment withdrawals or by obtaining from the consumer a new and specific authorization and making further payment withdrawals pursuant to that authorization.

Section 1031(b) of the Dodd-Frank Act provides that the Bureau may prescribe rules ''identifying as unlawful unfair, deceptive, or abusive acts or practices'' and may include requirements in such rules for the purpose of preventing unfair, deceptive, or abusive acts or practices. The Bureau is preventing the unfair and abusive practice described above by including in § 1041.8 specific requirements for determining when making a further payment withdrawal attempt constitutes an unfair or abusive act and for obtaining a consumer's new and specific authorization to make further payment withdrawals from the consumer's account. In addition to its authority under section 1031(b), the Bureau is issuing two other provisions—§ 1041.8(c)(3)(ii) and (c)(3)(iii)(C)—pursuant to its authority under section 1032(a) of the Dodd-Frank Act. Section 1032(a) authorizes the Bureau to prescribe rules to ensure that the

[1035] In addition, as discussed in the proposal, the Bureau is aware of some depository institutions that have charged NSF and overdraft fees for payment attempts made within the institutions' internal systems, including a depository institution that charged such fees in connection with collecting payments on its own small-dollar loan product.

features of consumer financial products and services, ''both initially and over the term of the product or service,'' are disclosed ''fully, accurately, and effectively . . . in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.'' [1036] Both of the proposed provisions relate to the requirements for obtaining the consumer's new and specific authorization after the prohibition on making further payment withdrawals has been triggered.

In addition to the provisions in § 1041.8, the Bureau is finalizing a complementary set of provisions in § 1041.9, pursuant to its authority under section 1032 of the Dodd-Frank Act, to require lenders to provide notice to a consumer prior to initiating a payment withdrawal from the consumer's account. These disclosures inform consumers in advance of the timing, amount, and channel of upcoming initial and unusual withdrawal attempts, in order to help consumers detect errors or problems with upcoming payments and contact their lenders or account-holding institutions to resolve them in a timely manner. The disclosures will also help consumers take steps to ensure that their accounts contain enough money to cover the payments, when taking such steps is feasible for consumers. In § 1041.9, the rule also provides for a notice that lenders are required to provide to consumers, alerting them to the fact that two consecutive payment withdrawal attempts to their accounts have failed—thus triggering operation of the requirements in § 1041.8(b)—so that consumers can better understand their repayment options and obligations in light of their accounts' severely distressed conditions. The two payments-related sections in the proposed rule thus complement and reinforce each other.

As described earlier, because the Bureau is not finalizing at this time the provisions relating to the underwriting of covered longer-term loans by assessing the borrower's ability to repay (other than for covered longer-term balloon-payment loans), various sections of the final rule have been renumbered differently than in the proposed rule. In particular, § 1041.14 of the proposed rule on prohibited payment transfer attempts, and § 1041.15 of the proposed rule on disclosure of payment transfer attempts, have now been renumbered, respectively, as §§ 1041.8 and 1041.9 of the final rule.

[1036] 12 U.S.C. 5532(a).

8(a) Definitions

Proposed § 1041.14(a) defined key terms to be used throughout proposed §§ 1041.14 and 1041.15. The central defined term in both proposed sections was ''payment transfer,'' which would apply broadly to any lender-initiated attempt to collect payment from a consumer's account, regardless of the type of authorization or instrument used. The Bureau also proposed to define ''single immediate payment transfer at the consumer's request,'' which is described below.

8(a)(1) Payment Transfer

Proposed Rule

Proposed § 1041.14(a)(1) defined a payment transfer as any lender-initiated debit or withdrawal of funds from a consumer's account for the purpose of collecting any amount due or purported to be due in connection with a covered loan. It also provided a non-exhaustive list of specific means of debiting or withdrawing funds from a consumer's account that would constitute payment transfers if the general definition's conditions are met. They included a debit or withdrawal initiated through: (1) An EFT, including a preauthorized EFT as defined in Regulation E, 12 CFR 1005.2(k); (2) a signature check, regardless of whether the transaction is processed through the check network or another network, such as the ACH network; (3) a remotely created check as defined in Regulation CC, 12 CFR 229.2(fff); (4) a remotely created payment order as defined in 16 CFR 310.2(cc); and (5) an account-holding institution's transfer of funds from a consumer's account that is held at the same institution.

The Bureau proposed a broad definition focused on the collection purpose of the debit or withdrawal rather than on the particular method by which the debit or withdrawal is made, to help ensure uniform application of the proposed rule's payment-related consumer protections. In the proposal the Bureau stated that in markets for loans that would be covered under the proposed rule, lenders use a variety of methods to collect payment from consumers' accounts. Some lenders take more than one form of payment authorization from consumers in connection with a single loan. Even lenders that take only a signature check often process the checks through the ACH system, particularly for purposes of re-submitting a returned check that was originally processed through the check system.

At the proposal stage the Bureau believed that, for a rule designed to apply across multiple payment methods and channels, a single defined term was necessary to avoid the considerable complexity that would result if the rule merely adopted existing terminology that may be unique to every specific method and channel. The Bureau believed that defining payment transfer in this way would enable the rule to provide for the required payment notices to be given to consumers regardless of the payment method or channel used to make a debit or withdrawal. Similarly, the Bureau believed that the proposed definition would ensure that the prohibition in proposed § 1041.14(b) on additional failed payment transfers would apply regardless of the payment method or channel used to make the triggering failed attempts and regardless of whether a lender moves back and forth between different payment methods or channels when attempting to withdraw payment from a consumer's account.

Proposed comment 14(a)(1)–1 explained that a transfer of funds meeting the general definition would be a payment transfer regardless of whether it is initiated by an instrument, order, or other means not specified in § 1041.14(a)(1). Proposed comment 14(a)(1)–2 explained that a lender-initiated debit or withdrawal includes a debit or withdrawal initiated by the lender's agent, such as a payment processor. Proposed comment 14(a)(1)–3 provided examples to illustrate how the proposed definition would apply to a debit or withdrawal for any amount due in connection with a covered loan. Specifically, proposed comments 14(a)(1)–3.i through (a)(1)–3.iv explained, respectively, that the definition would apply to a payment transfer for the amount of a scheduled payment, a transfer for an amount smaller than the amount of a scheduled payment, a transfer for the amount of the entire unpaid loan balance collected pursuant to an acceleration clause in a loan agreement for a covered loan, and a transfer for the amount of a late fee or other penalty assessed pursuant to a loan agreement for a covered loan.

Proposed comment 14(a)(1)–4 clarified that the proposed definition would apply even when the transfer is for an amount that the consumer disputes or does not legally owe. Proposed comment 14(a)(1)–5 provided three examples of covered loan payments that, while made with funds transferred or withdrawn from a consumer's account, would not be

covered by the proposed definition of a payment transfer. The first two examples, provided in proposed comments 14(a)(1)–5.i and (a)(1)–5.ii, were of transfers or withdrawals that are initiated by the consumer—specifically, when a consumer makes a payment in cash withdrawn by the consumer from the consumer's account and when a consumer makes a payment via an online or mobile bill payment service offered by the consumer's account-holding institution. The third example, provided in proposed comment 14(a)(1)–5.iii, clarified that the definition would not apply when a lender seeks repayment of a covered loan pursuant to a valid court order authorizing the lender to garnish a consumer's account.

Additionally, proposed comments relating to § 1041.14(a)(1)(i), (ii), and (v) clarified how the proposed payment transfer definition applies to particular payment methods. Specifically, proposed comment 14(a)(1)(i)–1 explained that the general definition of a payment transfer would apply to any EFT, including but not limited to an EFT initiated by a debit card or a prepaid card. Proposed comment 14(a)(1)(ii)–1 provided an illustration of how the definition of payment transfer would apply to a debit or withdrawal made by signature check, regardless of the payment network through which the transaction is processed. Lastly, proposed comment 14(a)(1)(v)–1 clarified, by providing an example, that an account-holding institution initiates a payment transfer when it initiates an internal transfer of funds from a consumer's account to collect payment on a deposit advance product.

Comments Received

NACHA agreed with the Bureau's decision to cover all payment methods with the rule, noting that their presentment cap is only applicable to payments processed on the ACH system and that since they clarified the cap on ACH presentments, they have seen vendors shift towards using other payment methods.

The Bureau received a number of comments arguing that the compliance burden of, among other things, tracking payment presentments across multiple payment methods would be significant.

Other commenters argued that payment withdrawal rules should be relaxed in cases where a depository institution is both the lender and the deposit account holder, provided that the depository institution does not charge a fee after attempting and failing to collect from the account. Similarly, a group representing community banks argued that the Bureau should not prohibit community banks from accessing consumer accounts held by the bank to pay for a loan made by the bank. This commenter claimed that the disclosures provided to borrowers before the authorization should suffice. More generally, commenters asked for further clarity on the rule's treatment of internal transfers at account-holding institutions.

Consumer group commenters were generally supportive of the proposed definition but argued that the Bureau should amend it in two ways. First, they argued that it should include both transactions initiated by the lender and transactions initiated by the lender's agent in the definition of payment transfer. Second, the commenters argued that the definition should not be tied to the term ''account'' because a nonbank might be able to evade this requirement by pulling funds from a source of funds other than an ''account.''

Commenters suggested that the Bureau use the term ''installment'' instead of ''payment'' in the definition so as to clarify that the rule covers each payment on an installment contract, which the commenters believed would expand the rule and be more consistent with State and local laws.

Several commenters, including State Attorneys General, argued that payments made using debit cards should be exempt because they generally do not engender NSF fees, and thus, the harm justifying the identified unfair and abusive act or practice is diminished for debit card payments.

Final Rule

The Bureau is generally finalizing the rule as proposed, with some technical changes, and the addition of an exclusion for lenders that are also acting as the borrower's account-holding institution when certain conditions are met. The Bureau concludes, in particular, that it is essential for the rule to cover all payment methods in order to prevent harm to consumers from the practice identified as unfair and abusive. Additionally, the Bureau maintains its view that a single definition is a simpler approach that is more administrable as a practical matter than using separate terminology for each type of payment method.

In adding the exclusion, the Bureau is reorganizing the numbering of § 1041.8(a)(1). The Bureau is also converting proposed comment 14(a)(1)–1 into the text of the regulation at § 1041.8(a)(1)(i). The initial examples of covered payment methods are now all listed there. The Bureau had proposed, as an example of a payment method included in the definition, ''[a]n account-holding institution's transfer of funds from a consumer's account that is held at the same institution.'' In light of the added conditional exclusion relating to account-holding institutions, the Bureau is adding at the end of that sentence ''other than such a transfer meeting the description in paragraph (a)(1)(ii) of this section.''

In response to the sound suggestion received from several commenters, the Bureau is adding paragraph (a)(1)(ii) to § 1041.8, which is a conditional exclusion for certain lenders that are also the borrower's account-holding institution. That exclusion only applies to instances where the lender has set forth in the original loan agreement or account agreement that it will not charge the consumer a fee for payment attempts when the account lacks sufficient funds to cover the payment, and that it will not close the account in response to a negative balance that results from a transfer of funds initiated in connection with the covered loan. If lenders do not charge NSF, overdraft, return payment fees, or similar fees, and do not close accounts because of failed payment attempts, the harms underpinning the unfair and abusive practice identified in § 1041.7 would not occur, and thus the Bureau concludes that the rule does not need to cover those instances.

The Bureau did not exclude transfers made by lenders that are also the borrower's account-holding institution where the harms would continue (*i.e.,* fees are charged or accounts are closed) because that would be inconsistent with the Bureau's efforts in the rule to prevent the harms associated with the unfair and abusive practice. Paragraph (a)(1)(ii) would allow late fees because the Bureau considers those charges to be distinct from, and not caused by, the practice identified in § 1041.7. It bears emphasis that, under the terms of the rule, the borrower's account or loan agreement must state, at the time the consumer takes out the first covered loan, that the account-holding institution does not charge such fees in connection with a failed payment attempt on a loan made by the institution or close the account in response to a negative balance resulting from the lender's collection of a payment on the covered loan. This is meant to prevent lenders from avoiding the presentment cap for failed payments involving fees by simply switching back and forth between charging fees and not charging fees, as well as to ensure that both conditions apply for the duration of the covered loan. The Bureau has not

finalized a similar exclusion for non-account-holding lenders where the account-holding institution otherwise does not charge fees or close accounts, because those lenders do not have control over whether those events occur, as do the lenders excluded by paragraph (a)(1)(ii).

In light of changes made to the text of the rule and the incorporation of proposed comment 14(a)(1)–1 into the text, the commentary to the rule has been renumbered accordingly. In addition, the Bureau has amended proposed comment 14(a)(1)(v)–1, now comment 8(a)(1)(i)(E)–1 of the final rule, to reflect the changes made to accommodate the conditional exclusion. In response to requests from commenters, the Bureau also has added comment 8(a)(1)(i)(E)–2, which to further clarifies the application of the payment transfer definition to internal transfers of funds within an account-holding institution. The Bureau notes that under the final rule, the payment transfer definition—and thus the cap on failed payment transfers—still applies to such lenders when the conditions for the exclusion from the definition are not met. The additional examples include: (1) Initiating an internal transfer from a consumer's account to collect a scheduled payment on a covered loan; (2) sweeping the consumer's account in response to a delinquency on a covered loan; and (3) exercising a right of offset to collect against an outstanding balance on a covered loan.

The Bureau also added some comments on the conditional exclusion. Comment 8(a)(1)(ii)(A)–1 clarifies that the loan or account agreement must contain a term to restrict the charging of fees that is in effect at the time the covered loan is made, which must remain in effect for the duration of the loan. Again, this comment is intended to ensure that lenders that are account-holding institutions do not avoid the rule's cap on failed payment attempts by switching back and forth between charging fees and not charging fees for failed attempts. Comment 8(a)(2)(ii)(A)–2 provides examples of the types of fees that must be restricted in order to qualify for the conditional exclusion. It clarifies that those fees include NSF fees, overdraft fees, and returned-item fees. It also explains that a lender may charge late fees if such fees are permitted under the terms of the loan agreement, and still qualify for the conditional exclusion if the conditions in § 1041.8(a)(1)(ii) are met.

Comment 8(a)(1)(ii)(B)–1 clarifies that in order to be eligible for the exclusion in § 1041.8(a)(1)(ii), the lender cannot close the borrower's account in response to a negative balance that results from a lender-initiated transfer of funds in connection with the covered loan, but that the lender is not restricted from closing the account in response to another event. Specifically, the comment provides that a lender is not restricted from closing the consumer's account in response to another event, even if the event occurs after a lender-initiated transfer of funds has brought the account to a negative balance. Further, the comment provides, as examples, that a lender may close the account at the consumer's request, for purposes of complying with other regulatory requirements, or to protect the account from suspected fraudulent use or unauthorized access, and still meet the condition in § 1041.8(a)(1)(ii)(B). The Bureau believes it is important to clarify that lenders collecting payments pursuant to the conditional exclusion in § 1041.8(a)(1) are not restricted from closing a consumer's account when circumstances unrelated to the covered loan payments dictate that they do so. Finally, comment 8(a)(1)(ii)(B)–2 clarifies that the loan or account agreement must contain a term providing that the lender will not close the consumer's account in the circumstances specified in the rule at the time the covered loan is made, and that the term must remain in effect for the duration of the loan.

The Bureau recognizes the industry commenters' concern that lenders will incur compliance burdens associated with keeping track of payment presentments across different payment methods. However, as stated in the proposal, the Bureau continues to maintain ongoing compliance costs associated with tracking presentments will likely be minimal following the initial investment. There may be additional compliance burdens associated with tracking presentments across payment methods, but the alternative of only tracking presentments on certain payment methods would undermine the purposes of the rule, and would not fully prevent the full scope of consumer harm identified above in Market Concerns—Payments, and further discussed in the section-by-section analysis of § 1041.7.

The Bureau also does not find it helpful to use the term ''installment'' to make clear that the rule applies to multiple payments initiated under an installment agreement. The definition of ''payment transfer'' is meant to cover any kind of payment attempt, including multiple attempts made to cover a single installment under a loan agreement. Replacing the term ''payment'' with ''installment'' may confuse that point.

In addition, the Bureau does not see the need for further clarification with regard to how the rule covers agents of lenders that initiate payment presentments on the lender's behalf. A lender's use of third-party processors or servicers does not provide a basis to circumvent the payment presentment cap. In fact, a lender using a third-party service provider is still liable under the rule, as the service provider also may be, depending on the facts and circumstances. Lastly, the Bureau is not aware of any methods by which a non-bank lender could circumvent the rule based on the definition of the term ''account.'' The definition is the same as in 12 CFR 1005.2, and therefore includes normal deposit accounts at financial institutions, payroll card accounts, and (by the time compliance with §§ 1041.2 through 1041.10, 1041.12, and 1041.13 is required) prepaid accounts. To the extent a lender is debiting something other than an ''account,'' that event may not involve the same kinds of fees associated with the identified practice. To provide greater clarity to industry, the Bureau finds it appropriate at this time to use a pre-existing definition. If in the future a lender or lenders cause repeated fees to consumers by attempting to take funds from something other than an ''account'' after multiple failed attempts, the Bureau would consider exercising its supervision, enforcement, or rulemaking authority to address the problem, as appropriate.

Lastly, the Bureau has decided not to exempt payments made using debit cards from the rule. First, while failed debt card transactions may not trigger NSF fees, some of them do trigger overdraft fees, even after two failed attempts, as our study showed. Second, lenders may still charge return fees for each presentment. And third, the Bureau does not believe an exclusion based on payment type would work to alleviate much compliance burden associated with § 1041.8 because the lender would need to develop processes and procedures for those payment types that are covered regardless. In fact, juggling multiple, disparate processes and procedures depending on payment type would involve its own compliance burdens.

8(a)(2) Single Immediate Payment Transfer at the Consumer's Request

Proposed Rule

Proposed § 1041.14(a)(2) would have defined a single immediate payment transfer at the consumer's request as,

generally, a payment transfer that is initiated by a one-time EFT or by processing a consumer's signature check within one business day after the lender obtains the consumer's authorization or check. Such payment transfers would be exempted from certain requirements in the proposed rule. The principal characteristic of a single immediate payment transfer at the consumer's request is that it is initiated at or near the time the consumer chooses to authorize it. During the SBREFA process, and in outreach with industry in developing the proposal, the Bureau received feedback that consumers often authorize or request lenders to make an immediate debit or withdrawal from their accounts for various reasons including, for example, to avoid a late payment fee. As discussed in the proposed rule, stakeholders expressed concerns primarily about the potential impracticability and undue burden of providing a notice of an upcoming withdrawal in advance of executing the consumer's payment instructions in these circumstances. More generally, the SERs and industry stakeholders suggested that a transfer made at the consumer's immediate request presents fewer consumer protection concerns than a debit or withdrawal authorized by the consumer several days or more in advance, presuming that the consumer makes the immediate request based on current and first-hand knowledge of their account balance.

In the proposal, the Bureau stated that applying fewer requirements to payment transfers initiated immediately after consumers request the debit or withdrawal was both warranted and consistent with the important policy goal of providing consumers with greater control over their payments on covered loans. Accordingly, the proposed definition would be used to apply certain exceptions to the proposed rule's payments-related requirements in two instances. First, a lender would not be required to provide the payment notice in proposed § 1041.15(b) when initiating a single immediate payment transfer at the consumer's request. Second, a lender would be permitted under proposed § 1041.14(d) to initiate a single immediate payment transfer at the consumer's request after the prohibition in proposed § 1041.14(b) on initiating further payment transfers has been triggered, subject to certain requirements and conditions.

Proposed § 1041.14(a)(2) provided that a payment transfer is a single immediate payment transfer at the consumer's request when it meets either one of two sets of conditions. The first of these prongs applied specifically to payment transfers initiated via a one-time EFT. Proposed § 1041.14(a)(2)(i) generally defined the term as a one-time EFT initiated within one business day after the consumer authorizes the transfer. The Bureau believed that a one-business-day time frame would allow lenders sufficient time to initiate the transfer, while providing assurance that the account would be debited in accordance with the consumer's timing expectations. Proposed comment 14(a)(2)(i)–1 explained that for purposes of the definition's timing condition, a one-time EFT is initiated at the time that the transfer is sent out of the lender's control and that the EFT thus is initiated at the time the lender or its agent sends the payment to be processed by a third party, such as the lender's bank.

The proposed comment further provided an illustrative example of this concept. The second prong of the definition, in proposed § 1041.14(a)(2)(ii), applied specifically to payment transfers initiated by processing a consumer's signature check. Under this prong, the term would apply when a consumer's signature check is processed through either the check system or the ACH system within one business day after the consumer provides the check to the lender. Proposed comments 14(a)(2)(ii)–1 and –2 explained how the definition's timing condition in proposed § 1041.14(a)(2)(ii) applies to the processing of a signature check. Similar to the concept explained in proposed comment 14(a)(2)(i)–1, proposed comment 14(a)(2)(ii)–1 explained that a signature check is sent out of the lender's control and that the check thus is processed at the time that the lender or its agent sends the check to be processed by a third party, such as the lender's bank. The proposed comment further cross-referenced proposed comment 14(a)(2)(i)–1 for an illustrative example of how this concept applies in the context of initiating a one-time EFT. Regarding the timing condition in proposed § 1041.14(a)(2)(ii), proposed comment 14(a)(2)(ii)–2 clarified that when a consumer mails a check to the lender, the check is deemed to be provided to the lender on the date it is received.

As with the similar timing condition for a one-time EFT in proposed § 1041.14(a)(2)(i), the Bureau believed that these timing conditions would help to ensure that the consumer has the ability to control the terms of the transfer and that the conditions would be practicable for lenders to meet. In addition, the Bureau noted that the timing conditions would effectively exclude from the definition the use of a consumer's post-dated check, and instead would limit the definition to situations in which a consumer provides a check with the intent to execute an immediate payment. The Bureau believed that this condition was necessary to ensure that the exceptions concerning single immediate payment transfers at the consumer's request apply only when it is clear that the consumer is affirmatively initiating the payment by dictating its timing and amount. Under the proposal, these criteria would not be met when the lender already holds the consumer's post-dated check.

Comments Received

The Bureau received some comments pertaining to the definition of a single immediate payment transfer at the consumer's request. Because the definition is closely related to the exception in § 1041.8(d), the Bureau addresses those comments below in the discussion of final § 1041.8(d).

Final Rule

The Bureau is finalizing this definition as proposed, except for renumbering proposed § 1041.14(a) as § 1041.8(a).

8(b) Prohibition on Initiating Payment Transfers From a Consumer's Account After Two Consecutive Failed Payment Transfers

Proposed Rule

Proposed § 1041.14(b) stated that a lender cannot attempt to withdraw payment from a consumer's account in connection with a covered loan when two consecutive attempts have been returned due to a lack of sufficient funds. This proposal was made pursuant to section 1031(b) of the Dodd-Frank Act, which provides that the Bureau may prescribe rules for the purpose of preventing unlawful unfair, deceptive, or abusive acts or practices.[1037] As discussed in the section-by-section analysis of proposed § 1041.13, it appeared that, in connection with a covered loan, it was an unfair and abusive practice for a lender to attempt to withdraw payment from a consumer's account after the lender's second consecutive attempt to withdraw payment from the account fails due to a lack of sufficient funds, unless the lender obtains the consumer's new and specific authorization to make further payment withdrawals. This proposed finding would have applied to any lender-

[1037] 12 U.S.C. 5531(b).

initiated debit or withdrawal from a consumer's account for purposes of collecting any amount due or purported to be due in connection with a covered loan, regardless of the particular payment method or channel used.

In accordance with this proposed finding, a lender would be generally prohibited under proposed § 1041.14(b) from making further attempts to withdraw payment from a consumer's account upon the second consecutive return for nonsufficient funds, unless and until the lender obtains the consumer's authorization for additional transfers under proposed § 1041.14(c), or obtains the consumer's authorization for a single immediate payment transfer in accordance with proposed § 1041.14(d). The prohibition under proposed § 1041.14(b) would apply to, and be triggered by, any lender-initiated attempts to withdraw payment from a consumer's checking, savings, or prepaid account. In addition, the prohibition under proposed § 1041.14(b) would apply to, and be triggered by, all lender-initiated withdrawal attempts regardless of the payment method used including, but not limited to, signature check, remotely created check, remotely created payment orders, authorizations for one-time or recurring EFTs, and an account-holding institution's withdrawal of funds from a consumer's account that is held at the same institution.

In developing the proposed approach to restricting lenders from making repeated failed attempts to debit or withdraw funds from consumers' accounts, the Bureau had considered a number of potential interventions. As detailed in Market Concerns—Payments of the proposal and final rule, for example, the Bureau is aware that some lenders split the amount of a payment into two or more separate transfers and then present all of the transfers through the ACH system on the same day. Some lenders make multiple attempts to debit accounts over the course of several days or a few weeks. Also, lenders that collect payment by signature check often alternate submissions between the check system and ACH system to maximize the number of times they can attempt to withdraw payment from a consumer's account using a single check. These and similarly aggressive payment practices potentially cause harms to consumers and may each constitute more specific unfair, deceptive, or abusive acts or practices, as well as fitting within the broader unfair and abusive practice identified in the proposal. However, the Bureau believed that tailoring requirements in this rulemaking for each discrete payment practice would add considerable complexity to the proposed rule and yet still could leave consumers vulnerable to harms from aggressive practices that may emerge in markets for covered loans in the future.

Accordingly, while the Bureau stated that it would continue to use its supervisory and enforcement authorities to address such aggressive payment practices in particular circumstances as appropriate, it proposed to address categorically the broader practice of making repeated failed attempts to collect payment on covered loans, which it preliminarily believed to be unfair and abusive. In addition, the Bureau proposed requirements to prevent that practice which would help protect consumers from a range of harmful payment practices in a considerably less complex fashion. For example, as applied to the practice of splitting payments into multiple same-day presentments, the proposed approach would effectively curtail a lender's access to the consumer's account when any two such presentments fail. As applied to checks, the proposed approach would permit a lender to resubmit a returned check no more than once, regardless of the channel used, before triggering the prohibition if the resubmission failed. The Bureau framed the proposed prohibition broadly so that it would apply to depository lenders that hold the consumer's asset account, such as providers of deposit advance products or other types of proposed covered loans that may be offered by such depository lenders. Because depository lenders that hold consumers' accounts have greater information about the status of those accounts than do third-party lenders, the Bureau believed that depository lenders should have little difficulty in avoiding failed attempts that would trigger the prohibition. Nevertheless, if such lenders elect to initiate payment transfers from consumers' accounts when—as the lenders know or should know—the accounts lack sufficient funds to cover the amount of the payment transfers, they could assess the consumers substantial fees permitted under the asset account agreement (including NSF and overdraft fees), as well as any late fees or similar penalty fees permitted under the loan agreement for the covered loan. Accordingly, the Bureau believed that applying the prohibition in this manner would help to protect consumers from harmful practices in which such depository lenders may sometimes engage. As discussed above in Market Concerns—Payments, for example, the Bureau notably found that a depository institution that offered loan products to consumers with accounts at the institution charged some of those consumers NSF fees and overdraft fees for payment withdrawals initiated within the institution's internal systems.

Proposed comment 14(b)–1 explained the general scope of the prohibition. Specifically, it provided that the prohibition would restrict a lender from initiating any further payment transfers from the consumer's account in connection with the covered loan, unless the requirements and conditions in either proposed § 1041.14(c) or (d) were satisfied. To clarify the ongoing application of the prohibition, proposed comment 14(b)–1 provided an example to show that a lender would be restricted from initiating transfers to collect payments that later fall due or to collect late fees or returned-item fees. The Bureau believed it was important to make clear that the proposed restriction on further transfers—in contrast to restrictions in existing laws and rules like the NACHA cap on re-presentments—would not merely limit the number of times a lender could attempt to collect a single failed payment. Lastly, proposed comment 14(b)–1 explained that the prohibition would apply regardless of whether the lender held an authorization or instrument from the consumer that was otherwise valid under applicable law, such as an authorization to collect payments via preauthorized EFTs under Regulation E or a post-dated check.

Proposed comment 14(b)–2 clarified that when the prohibition is triggered, the lender is not prohibited under the rule from initiating a payment transfer in connection with a bona fide, subsequent covered loan made to the consumer, provided that the lender had not attempted to initiate two consecutive failed payment transfers in connection with the bona fide subsequent covered loan. The Bureau believed that limiting the restriction in this manner was appropriate to ensure that a consumer who had benefitted from the restriction at one time would not be effectively foreclosed from borrowing a covered loan from the lender after their financial situation had improved.

Proposed 14(b)(1) General

Proposed § 1041.14(b)(1) provided specifically that a lender must not initiate a payment transfer from a consumer's account in connection with a covered loan after the lender has attempted to initiate two consecutive failed payment transfers from the consumer's account in connection with

that covered loan. It further proposed that a payment transfer would be deemed to have failed when it resulted in a return indicating that the account lacks sufficient funds or, for a lender that was the consumer's account-holding institution, if it resulted in the collection of less than the amount for which the payment transfer was initiated because the account lacked sufficient funds. The specific provision for an account-holding institution thus would apply when such a lender elected to initiate a payment transfer resulting in the collection of either no funds or a partial payment.

Proposed comments 14(b)(1)–1 to 14(b)(1)–4 provided clarification on when a payment transfer would be deemed to have failed. Specifically, proposed comment 14(b)(1)–1 explained that for purposes of the prohibition, a failed payment transfer included but was not limited to a debit or withdrawal that was returned unpaid or is declined due to nonsufficient funds in the consumer's account. This proposed comment clarified, among other things, that the prohibition applied to debit card transactions that were declined. Proposed comment 14(b)(1)–2 stated that the prohibition would apply as of the date on which the lender or its agent, such as a payment processor, received the return of the second consecutive failed transfer or, if the lender was the consumer's account-holding institution, the date on which the transfer was initiated. The Bureau believed that, in contrast to other lenders, a consumer's account-holding institution would or should have the ability to know that an account lacked sufficient funds before initiating a transfer (or immediately thereafter, at the latest). Proposed comment 14(b)(1)–3 clarified that a transfer that would result in a return for a reason other than a lack of sufficient funds was not a failed transfer for purposes of the prohibition, citing as an example a transfer that returned due to an incorrectly entered account number. Lastly, proposed comment 14(b)(1)–4 explained how the concept of a failed payment transfer would apply to a transfer initiated by a lender that was the consumer's account-holding institution. Specifically, the proposed comment provided that if the consumer's account-holding institution had initiated a payment transfer that resulted in the collection of less than the amount for which the payment transfer was initiated, because the account lacked sufficient funds, then the payment transfer would be a failed payment transfer for purposes of the prohibition. This would be the case regardless of whether the result was classified or coded as a return for nonsufficient funds in the lender's internal procedures, processes, or systems. The Bureau believed that, unlike other lenders, such a lender would or should have the ability to know the result of a payment transfer and the reason for that result, without having to rely on a ''return'' as classified in its internal procedures, processes, or systems, or on a commonly understood reason code. Proposed comment 14(b)(1)–4 further stated that a consumer's account-holding institution would not be deemed to have initiated a failed payment transfer if the lender had merely deferred or forgone the debit or withdrawal of a payment from a consumer account, based on having observed a lack of sufficient funds. For such lenders, the Bureau believed it was important to clarify that the concept of a failed payment transfer incorporates the central concept of the proposed definition of payment transfer that the lender must engage in the affirmative act of initiating a debit or withdrawal from the consumer's account in order for the term to apply.

During the SBREFA process and in outreach with industry in developing the proposal, some lenders recommended that the Bureau take a narrower approach in connection with payment attempts by debit cards. One such recommendation suggested that the prohibition against additional withdrawal attempts should not apply when neither the lender nor the consumer's account-holding institution charges an NSF fee in connection with a second failed payment attempt involving a debit card transaction that is declined. As explained in the proposal, the Bureau understood that depository institutions generally do not charge consumers NSF fees or declined authorization fees for such transactions, although it was aware that such fees are charged by some issuers of prepaid cards. It thus recognized that debit card transactions present somewhat less risk of harm to consumers.

For a number of reasons, however, the Bureau did not believe that this potential effect was sufficient to propose excluding such transactions from the rule. First, the recommended approach would not protect consumers from the risk of incurring an overdraft fee in connection with the lender's third withdrawal attempt. As discussed in Market Concerns—Payments, the Bureau's research focusing on online lenders' attempts to collect covered loan payments through the ACH system indicates that, in the small fraction of cases in which a lender's third attempt succeeds—*i.e.,* after the lender has sufficient information indicating that the account is severely distressed—up to one-third of the successful attempts are paid out of overdraft coverage. Second, the Bureau believed that the recommended approach would be impracticable to comply with and enforce, as the lender initiating a payment transfer would not necessarily know the receiving account-holding institution's practice with respect to charging fees on declined or returned transactions. Additionally, the Bureau was concerned that lenders might respond to such an approach by seeking to evade the rule by re-characterizing their fees in some other manner. It thus believed that it was not appropriate to propose that payment withdrawal attempts by debit cards or prepaid cards be carved out of the rule, in light of the narrow range of those situations, the administrative challenges, and the residual risk to consumers.

During the SBREFA process that preceded its issuance of the proposal, the Bureau received two other recommendations regarding the proposed restrictions on payment withdrawal attempts. One SER suggested that the Bureau delay imposing any restrictions until the full effects of NACHA's recent 15 percent return rate threshold rule could be observed. As discussed in Markets Background—Payments, the NACHA rule that went into effect in 2015 can trigger inquiry and review by NACHA if a merchant's overall return rate for debits made through the ACH network exceeds 15 percent. The Bureau considered the suggestion carefully but did not believe that a delay would be warranted. As noted, the NACHA rule applies only to returned debits through the ACH network. Thus, it places no restrictions on lenders' attempts to withdraw payment through other channels. In fact, as discussed in the proposal (and confirmed by NACHA's comment to the proposed rule), anecdotal evidence suggests that lenders are already shifting to use other channels to evade the NACHA rule. Further, exceeding the threshold merely triggers closer scrutiny by NACHA. To the extent that lenders making covered loans were to become subject to the review process, the Bureau believed that they might be able to justify their higher return rates by arguing that those higher rates are consistent with the rates for their market as a whole.

Another SER recommended before the proposal was issued that lenders should be permitted to make up to four payment collection attempts per month

when a loan is in default. The Bureau's evidence indicates that for the covered loans studied, after a second consecutive attempt to collect payment fails, the third and subsequent attempts are also very likely to fail. The Bureau therefore believed that two consecutive failed payment attempts, rather than four presentment attempts per month, was the appropriate point at which to trigger the rule's payment protections. In addition, the Bureau believed that in many cases where the proposed prohibition would apply, the consumer could technically be in default on the loan, considering that the lender's payment attempts would have been unsuccessful. Thus, the suggestion to permit a large number of payment withdrawal attempts when a loan is in default could have effectively circumvented the proposed rule.

Proposed 14(b)(2) Consecutive Failed Payment Transfers

Proposed § 1041.14(b)(2) would have defined a first failed payment transfer and a second consecutive failed payment transfer for purposes of determining when the prohibition in proposed § 1041.14(b) applies; the proposed commentary to this provision presented illustrative examples to explain and clarify the application of these terms. Proposed § 1041.14(b)(2)(i) provided that a failed transfer would be the first failed transfer if it met any of three conditions. First, proposed § 1041.14(b)(2)(i)(A) stated that a transfer would be the first failed payment transfer if the lender had initiated no other transfer from the consumer's account in connection with the covered loan. This would apply to the scenario in which a lender's very first attempt to collect payment on a covered loan had failed. Second, proposed § 1041.14(b)(2)(i)(B) provided that, generally, a failed payment transfer would be a first failed payment transfer if the immediately preceding payment transfer had been successful, regardless of whether the lender had previously initiated a first failed payment transfer. This proposed provision set forth the general principle that any failed payment transfer that followed a successful payment transfer would be the first failed payment transfer for the purposes of the prohibition in proposed § 1041.14(b). Lastly, proposed § 1041.14(b)(2)(i)(C) provided that a payment transfer would be a first failed payment transfer if it was the first failed attempt after the lender obtained the consumer's authorization for additional payment transfers pursuant to proposed § 1041.14(c). Proposed comment 14(b)(2)(i)–1 provided two illustrative examples of a first failed payment transfer.

Proposed § 1041.14(b)(2)(ii) provided that a failed payment transfer would be the second consecutive failed payment transfer if the previous payment transfer was a first failed transfer, and defined the concept of a previous payment transfer to include a payment transfer initiated at the same time or on the same day as the failed payment transfer. Proposed comment 14(b)(2)(ii)–1 provided an illustrative example of the general concept of a second consecutive failed payment transfer, while proposed comment 14(b)(2)(ii)–2 provided an illustrative example of a previous payment transfer initiated at the same time and on the same day. Given the high failure rates for same-day presentments, the Bureau believed it was important to clarify that the prohibition would be triggered when two payment transfers initiated on the same day fail, including instances where they had been initiated concurrently. Proposed comment 14(b)(2)(ii)–3 clarified that if a lender initiated a single immediate payment transfer at the consumer's request pursuant to the exception in § 1041.14(d), then the failed transfer count would remain at two, regardless of whether the transfer succeeded or failed. Thus, as the proposed comment further provided, the exception would be limited to the single transfer authorized by the consumer. Accordingly, if a payment transfer initiated pursuant to the exception failed, then the lender would not be permitted to reinitiate the transfer—*e.g.,* by re-presenting it through the ACH system—unless the lender had first obtained a new authorization from the consumer, pursuant to § 1041.14(c) or (d). The Bureau believed this limitation was necessary, as the authorization for an immediate transfer would be based on the consumer's understanding of their account's condition only at that specific moment in time, as opposed to its possible condition in the future.

Proposed § 1041.14(b)(2)(iii) would have provided the principle that alternating between payment channels does not reset the failed payment transfer count. Specifically, it proposed that a failed payment transfer meeting the conditions in proposed § 1041.14(b)(2)(ii) is the second consecutive failed transfer, regardless of whether the first failed transfer was initiated through a different payment channel. Proposed comment 14(b)(2)(iii)–1 provided an illustrative example of this concept.

Comments Received

Several industry representatives and lender commenters generally opposed the Bureau's proposal. These commenters stated that new industry guidelines issued by NACHA were sufficient to address the harms identified by the Bureau. Specifically, those new rules set return thresholds, including a 15 percent rate of total returns, a three percent rate of administrative returns, and a 0.5 percent rate of unauthorized transaction returns, and clarified the limits on payment splitting and re-presentments, as noted above. Conversely, other commenters argued against delaying or forgoing the proposed approach because, as the Bureau noted in the proposal, NACHA's new guidelines do not impact payment transfers initiated outside the ACH system.

Various stakeholders commented on the number of failed payment transfers that the proposed rule allowed. Some noted that NACHA operating rules and general industry standards allow three attempts to collect a single payment. Others expressed concerns that the proposed rule would in effect reduce the allowance to two attempts, which would require NACHA to amend its operating rules, and depository institutions and lenders to adjust their systems. Yet others argued that the Bureau should not measure all presentments against the presentment cap, but should instead measure presentments of the same payment, consistent with NACHA's approach. A few commenters objected to counting payment attempts towards the cap cross-payment method, and expressed concerns about the compliance costs associated with tracking payments across channels.

However, some industry participants agreed with the proposed two-attempt limit proposed, which they claimed to already have adopted. Other stakeholders argued that the rule should prohibit payment transfer attempts after one failed attempt. One such commenter claimed that gaining the ability to debit a borrower's account would reduce the lender's incentive to determine whether the borrower would have the ability to repay the loan and cover other obligations. It also argued that even one overdraft or NSF fee could generate additional debt and fees that would quickly snowball.

Some commenters argued that the Bureau should *only* declare the initiation of repeated presentments as unfair or abusive. In other words, this commenter believed that just finalizing this section, and not any of the ability-

to-repay requirements, would suffice to address the identified harms without imposing significant industry costs. One commenter also was concerned that, as written, the proposal could be interpreted to require depository institutions to: (1) Monitor lenders' use of the payment system; (2) determine when a lender may be in violation of proposed §§ 1041.14 and 1041.15; and (3) act as an enforcer of the regulation even where the consumer authorized the transaction. This commenter asked the Bureau to clarify that the responsibility of ensuring compliance with these provisions would be exclusively an obligation of the lender, and not an obligation of the lender's or the consumer's depository institution.

Other commenters stated that instead of prohibiting additional payment transfers after a number of previous failed attempts, the Bureau should require lenders to provide payment notices that include reminders that consumers have the ability to stop payments or revoke existing payment authorizations. These commenters shared the sentiment of commenters, discussed in the section-by-section analysis of § 1041.7 above, that borrowers should be able to avoid the harm by initiating stop payments or revoking payment authorizations with lenders, and argued that disclosure would help improve the efficacy of those mechanisms to a point where the harms would largely be eliminated.

One commenter asked the Bureau to additionally require reauthorization from the consumer after three failed attempts in a 12-month period, even when those attempts are not consecutive.

A number of comments from State Attorneys General and consumer groups also touted the benefits of the approach described in the proposed rule. These commenters noted that the limit on payment transfer attempts was essential because it would reduce fees and bolster the ability-to-repay determination.

Final Rule

The Bureau is finalizing the cap on payment presentments in § 1041.8(b), consistent with the conclusions reached above in the section-by-section analysis of § 1041.7 of the final rule. The Bureau is, however, making some changes to the proposed rule.

First, to clarify that the presentment cap will apply across all loans with the lender, the Bureau is replacing, in two places in § 1041.8(b)(1), the phrase ''in connection with a covered loan'' with ''in connection with any covered loan that the consumer has with the lender.'' Similarly, the Bureau is adding ''or any other covered loan that the consumer has with the lender'' at the end of § 1014.8(b)(2)(i)(A). A lender will need to seek a new authorization, or cease payment attempts, after two failed attempts on any loan the borrower has with the lender. Accordingly, if a borrower has two outstanding covered loans and a lender makes a failed payment attempt for each such loan in succession, then the cap is met. The proposed rule could have been interpreted to apply only to two failed attempts on one loan, and then two failed attempts on a different loan, and so forth. Yet the Bureau has adopted this change in order to ensure that the rule fully prevents the scope of harms intended to be covered under the rule in light of its understanding and description of the practice that it has identified as unfair and abusive. Regardless of whether the multiple presentments are for one loan, or spread across multiple loans, the borrower harm and expected value would be the same.[1038] To the extent lenders are not currently tracking payments across multiple loans, there may be some additional costs associated with this adjustment. However, the Bureau does not expect, once systems are updated, any additional compliance costs.

Comment 8(b)–1 is amended to incorporate this point, and a new comment 8(b)–3 is added for further clarity and to add an example as well. In addition, the comments related to § 1014.8(b) have been revised to clarify the prohibition's application to situations in which a consumer has more than one covered loan with a lender. The Bureau is also adding an example of a consumer with two covered loans who has a second failed payment transfer, in comment 8(b)(2)(ii)–1.ii.

The second modification of this provision is intended to clarify, in § 1041.8(b)(1) and elsewhere in the final rule, that the presentment cap applies on a per-consumer-account basis. That means if a lender attempts to withdraw payments from multiple accounts, the lender is limited to two consecutive failed attempts each. The Bureau makes this clarification because the presumption that funds are unlikely to be available for a third presentment does not follow when the presentment is made from a different account. Two consecutive failed attempts from one account tell the lender nothing about the condition of another account. However, the prohibition applies to the other account if the lender then initiates two consecutive failed payment transfers from that account. The Bureau is adding a new comment 8(b)–2 to clarify this point.

Third, the Bureau is making technical edits to the description, in § 1041.8(b)(1), of what constitutes a failed payment transfer when the lender is also the consumer's account-holding institution. That description, both in the proposal and in the final rule, provides that for such lenders, presentments resulting in non-sufficient funds, partial payments, or full payments paid out of overdraft all count toward the cap. The Bureau is making these edits for consistency with the new conditional exclusion in § 1041.8(a)(1). The Bureau also is making similar conforming edits to comment 8(b)(1)–4.

Lastly, the Bureau has made some other technical edits to § 1041.8(b)(2)(ii) for consistency with § 1041.8(b)(2)(i).

In Market Concerns—Payments and the section-by-section analysis of § 1041.7, the Bureau has already addressed the comments about whether this rule is necessary in light of NACHA's new guidelines. But to summarize again briefly, the Bureau believes that NACHA guidelines do not suffice to prevent all of the harms associated with the practice identified in § 1041.7. In particular, they would not prevent the second presentment or the third payment attempt. Commenters noted this difference and asserted that complying with the rule as proposed would require companies to change their systems. As explained in the section-by-section analysis of § 1041.7, the Bureau finds that there is a significant amount of injury in that third presentment: The Bureau's study showed that approximately 80 percent of such presentments caused an overdraft fee or failed (and likely caused an NSF fee and/or returned-item fee). Importantly, not only do the NACHA Rules apply only to payments made through the ACH network, but NACHA's own comment noted that it had already seen vendors shift to using other payment methods, likely in an effort to evade the NACHA Rules.

The Bureau has chosen to use a two-presentment cap to prevent consumer harms from the practice that it has identified as unfair and abusive. It did so not because the first re-presentment causes no injury, but rather because the injury after each failed attempt is cumulative and thus the injury becomes more significant over time. In addition, the first re-presentment implicates certain additional countervailing

[1038] The Bureau's Online Payday Loans Payments report on online payday and payday installment lending did not distinguish between multiple payments for individual loans and multiple payments for multiple loans. *CFPB Online Payday Loan Payments.*

benefits, as lenders may have simply tried the first presentment at the wrong time, and consumers may find it more convenient not to have to reauthorize after just one failed attempt. Additionally, if lenders only have one try, it may cause them to be overly circumspect about when to use it, which could undermine the benefits of ease and convenience for consumers. The Bureau therefore is drawing the line at two re-presentments in an abundance of caution, in an attempt to avoid regulating potentially more legitimate justifications for re-presentment. Nonetheless, the Bureau is aware of the harms that can occur even from a single re-presentment, and that the manner in which a lender engages in re-presentment activities more generally could be unfair, deceptive, or abusive. The rule does not provide a safe harbor against misconduct that it does not explicitly address, and the Bureau could in appropriate circumstances address problems through its supervisory and enforcement authority.[1039]

For purposes of determining whether the cap has been met, the Bureau has decided not to distinguish between re-presentments of the same payment and new presentments to cover new loan installments, as NACHA does. As the Bureau stated in the proposal, and now affirms, the tailoring of individualized requirements for each discrete payment practice would add considerable complexity to the rule and yet still could leave consumers vulnerable to harms from aggressive and evasive practices that may emerge in markets for covered loans in the future. Accordingly, the Bureau is addressing a somewhat broader practice that it has determined to be unfair and abusive by providing significant consumer protections from a range of harms in a considerably less complex fashion. Notably, the Bureau's study that showed very high rates of rejection and overdraft fees for third presentments did not distinguish between re-presentments of the same payment and new presentments for new installments. And the Bureau believes that after two failed attempts to the same account, even if two weeks or a month has passed, there is reason to believe a third would fail, and that obtaining a new authorization would be appropriate. The Bureau thus concludes that considerable injury is likely occurring from such new payment attempts and thus inclusion of those payments towards the cap is warranted.

As noted above, one commenter suggested finalizing this portion of the rule as a standalone, without the underwriting provisions requiring lenders to make a reasonable, ability-to-repay determination. The Bureau declines to follow this approach, as it continues to believe that § 1041.8 alone could not prevent all of the harms that flow from the practice identified in § 1041.7, including those stemming from the practice identified in § 1041.4. If lenders continue to make covered loans without assessing borrowers' ability to repay, consumers would still confront the harms associated with unaffordable loans—default, delinquency, re-borrowing, or other collateral injuries as described above in Market Concerns—Underwriting. The payment provisions of this rule address one of the potential collateral injuries from an unaffordable loan—which is itself an important source of harm—but they do not address the whole scope of harm that the Bureau seeks to address in part 1041. Therefore, the Bureau concludes that it would be quite insufficient to finalize subpart C of this rule by itself.

Furthermore, the Bureau concludes that disclosures alone would not suffice to prevent all of the harms caused by the unfair and abusive practice identified in § 1041.7 of the final rule. As explained above in Market Concerns—Payments and the section-by-section analysis of § 1041.7, the Bureau has observed significant difficulty when borrowers seek to stop payments or revoke authorizations. Disclosures may be effective in helping consumers know their rights, and understand what is occurring, but they would not help consumers stop the multiple attempts. Furthermore, while the Bureau believes its model disclosures will be effective in informing some consumers, the Bureau knows there are many others they will not reach or for whom they will not be as effective. As discussed below, one commenter described that it had tested the Bureau's ''notice of restrictions on future loans,'' which does not pertain to this particular part of the rule. The Bureau believes the methodology of that testing may have been flawed as noted in the section-by-section analysis of § 1041.6, but as we noted above, it is a reminder of the fact that disclosures in complicated areas, such as the payment attempt practices at issue here, are unlikely to be as effective as a substantive intervention shaped to respond more directly to the harms caused by the practice identified as unfair and abusive. That conclusion here is also consistent with the Bureau's conclusion about the effectiveness of disclosures as a possible alternative to the ability-to-repay requirements laid out above in Market Concerns—Underwriting and the section-by-section analysis of § 1041.4.

The principal obligation to comply with §§ 1041.8 and 1041.9 rests on the lender. Of course, if the lender uses a service provider to manage its payment withdrawals, that service provider may also be liable for any violation of the rule, as provided in the Dodd-Frank Act.[1040] The Bureau does not intend for this rule to have the effect of changing the obligations of non-lender depository institutions.

The Bureau also has decided not to require reauthorization after three failed attempts in a 12-month period. The effect of this change would be to establish a one-attempt cap where the lender had previously reached the two-attempt cap in the same 12-month period, or trigger the cap where, for example, every other payment fails. The Bureau has set the two-attempt cap to track the practice identified as unfair and abusive, and to avoid being overly restrictive by allowing the lender to make one more payment attempt after the first failed attempt following an authorization. The Bureau concludes that adding this requirement about the number of attempts in a 12-month period would add further complexity to the rule and would increase the burdens associated with tracking payment attempts.

8(c) Exception for Additional Payment Transfers Authorized by the Consumer

Proposed Rule

Whereas proposed § 1041.14(b) would have established the prohibition on further payment withdrawals, proposed § 1041.14(c) and (d) would have established requirements for obtaining the consumer's new and specific authorization to make further payment withdrawals. Proposed § 1041.14(c) was framed as an exception to the prohibition, even though payment withdrawals made pursuant to its requirements would not fall within the scope of the unfair and abusive practice preliminarily identified in proposed § 1041.13 (now § 1041.7 of the final rule).

Under the proposal, a new authorization obtained pursuant to

[1039] *See, e.g.,* Press Release, Bureau of Consumer Fin. Prot., ''CFPB Orders EZCORP to Pay $10 Million for Illegal Debt Collection Tactics,'' (Dec. 16, 2015), *available at http://www.consumerfinance.gov/newsroom/cfpb-orders-ezcorp-to-pay-10-million-for-illegal-debt-collection-tactics/;* Press Release, Bureau of Consumer Fin. Prot., ''CFPB Takes Action Against Online lender for Deceiving Borrowers,'' (Nov. 18, 2015), *available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-online-lender-for-deceiving-borrowers/.*

[1040] 12 U.S.C. 5531; 12 U.S.C. 5536(a).

proposed § 1041.14(c) would reset to zero the failed payment transfer count under proposed § 1041.14(b), whereas an authorization obtained pursuant to proposed § 1041.14(d) would not. Accordingly, a lender would be permitted under proposed § 1041.14(c) to initiate one or more additional payment transfers that are authorized by the consumer in accordance with certain requirements and conditions, and subject to the general prohibition on initiating a payment transfer after two consecutive failed attempts. The proposed authorization requirements and conditions in proposed § 1041.14(c) were designed to assure that, before a lender initiated another payment transfer (if any) after triggering the prohibition, the consumer did in fact want the lender to resume making payment transfers and that the consumer understands and had agreed to the specific date, amount, and payment channel for those succeeding payment transfers. The Bureau stated that requiring the key terms of each transfer to be clearly communicated to the consumer before the consumer decides whether to grant authorization would help assure that the consumer's decision is an informed one and that the consumer understands the consequences that may flow from granting a new authorization and help the consumer avoid future failed payment transfers. The Bureau believed that, when this assurance was provided, it no longer would be unfair or abusive for a lender to initiate payment transfers that accord with the new authorization, at least until such point that the lender initiated two consecutive failed payment transfers pursuant to the new authorization.

The Bureau recognized that, in some cases, lenders and consumers might want to use an authorization under this exception to resume payment withdrawals according to the same terms and schedule that the consumer had authorized prior to the two consecutive failed attempts. In other cases, lenders and consumers might want to establish a new authorization to accommodate a change in the payment schedule—as might be the case, for example, when the consumer entered into a workout agreement with the lender. Accordingly, the proposed exception was designed to be sufficiently flexible to accommodate both circumstances. In either circumstance, however, the lender would be permitted to initiate only those transfers authorized by the consumer under proposed § 1041.14(c).

Proposed § 1041.14(c)(1) would establish the general exception to the prohibition on additional payment transfer attempts under § 1041.14(b), while the remaining subparagraphs would specify particular requirements and conditions. First, proposed § 1041.14(c)(2) would establish the general requirement that for the exception to apply to an additional payment transfer, the transfer's specific date, amount, and payment channel must be authorized by the consumer. In addition, proposed § 1041.14(c)(2) would address the application of the specific date requirement to re-initiating a returned payment transfer and also address authorization of transfers to collect a late fee or returned item fee, if such fees are incurred in the future. Second, proposed § 1041.14(c)(3) would establish procedural and other requirements and conditions for requesting and obtaining the consumer's authorization. Lastly, proposed § 1041.14(c)(4) would address circumstances in which the new authorization becomes null and void. Each of these sets of requirements and conditions is discussed in detail below. Proposed comment 14(c)–1 summarized the exception's main provisions, and noted the availability of the exception in proposed § 1041.14(d).

Proposed § 1041.14(c)(1) provided that, notwithstanding the prohibition in proposed § 1041.14(b), a lender would be permitted to initiate additional payment transfers from a consumer's account after two consecutive transfers by the lender had failed if the transfers had been authorized by the consumer as required by proposed § 1041.14(c), or if the lender had executed a single immediate payment transfer at the consumer's request under proposed § 1041.14(d). Proposed comment 14(c)(1)–1 explained that the consumer's authorization required by proposed § 1041.14(c) would be in addition to, and not in lieu of, any underlying payment authorization or instrument required to be obtained from the consumer under applicable laws. The Bureau noted, for example, that an authorization obtained pursuant to proposed § 1041.14(c) would not take replace an authorization that a lender would be required to obtain under applicable laws to collect payments via RCCs, if the lender and consumer wished to resume payment transfers using that method. However, in cases where lenders and consumers wished to resume payment transfers via preauthorized EFTs, as that term is defined in Regulation E, the Bureau believed that—given the high degree of specificity required by proposed § 1041.14(c)—lenders could comply with the authorization requirements in Regulation E, 12 CFR 1005.10(b) and the requirements in proposed § 1041.14(c) within a single authorization process. Proposed § 1041.14(c)(2)(i) would establish the general requirement that for the exception in proposed § 1041.14(c) to apply to an additional payment transfer, the transfer's specific date, amount, and payment channel must be authorized by the consumer. The Bureau believed that requiring lenders to explain these key terms of each transfer to consumers when seeking authorization would help ensure that consumers could make an informed decision between granting authorization for additional payment transfers, and other convenient repayment options—*e.g.,* payments by cash or money order, "push" bill payment services, and single immediate payment transfers authorized pursuant to proposed § 1041.14(d)—which would help them avoid future failed payment transfers.

With respect to lenders that wished to obtain permission to initiate ongoing payment transfers from a consumer whose account has already been subject to two consecutive failed attempts, the Bureau believed it was important to require such lenders to obtain the consumer's agreement to the specific terms of each future transfer from the outset, rather than to provide for less specificity upfront and rely instead on the fact that under proposed § 1041.15(b), every consumer with a covered loan will receive notice containing the terms of each upcoming payment transfer. As discussed above, the Bureau believed that, in general, the proposed required notice for all payment transfers would help to reduce harms that may occur from payment transfers by alerting the consumers to the upcoming attempt in sufficient time for them to arrange to make a required payment when they could afford it, and to make choices that might minimize the attempt's impact on their accounts when the timing of a payment is not aligned with their finances. However, the Bureau believed that consumers whose accounts have already experienced two failed payment withdrawal attempts in succession would have demonstrated a degree of financial distress that would make it unlikely that a notice of another payment attempt would enable them to avoid further harm.

Proposed comment 14(c)(2)(i)–1 explained the general requirement that the terms of each additional payment transfer must be authorized by the consumer in order to qualify for the exception. It further clarified that for the

exception to apply to an additional payment transfer, these required terms had to be included in the signed authorization that the lender would be required to obtain from the consumer.

Proposed comment 14(c)(2)(i)–2 clarified that the requirement that the specific date of each additional transfer be expressly authorized would be satisfied if the consumer authorizes the month, day, and year of the transfer.

Proposed comment 14(c)(2)(i)–3 clarified that the exception would not apply if the lender initiated an additional payment transfer for an amount larger than the amount authorized by the consumer, unless it satisfied the requirements and conditions in proposed § 1041.14(c)(2)(iii)(B) for adding the amount of a late fee or returned item fee to an amount authorized by the consumer.

Proposed comment 14(c)(2)(i)–4 clarified that a payment transfer initiated pursuant to § 1041.14(c) would be initiated for the specific amount authorized by the consumer if its amount was equal to or smaller than the authorized amount. The Bureau recognized that in certain circumstances it might be necessary for the lender to initiate transfers for a smaller amount than specifically authorized including, for example, when the lender needed to exclude from the transfer the amount of a partial prepayment. In addition, the Bureau believed that this provision would provide useful flexibility in instances where the prohibition on further payment transfers is triggered at a time when the consumer has not yet fully drawn down on a line of credit. In such instances, lenders and consumers might want to structure the new authorization to accommodate payments on future draws by the consumer. With this provision for smaller amounts, the lender could seek authorization for additional payment transfers for the payment amount that would be due if the consumer had drawn the full amount of remaining credit, and then would be permitted under the exception to initiate the transfers for amounts smaller than the specific amount, if necessary.

Proposed § 1041.14(c)(2)(ii) would establish a narrow exception to the general requirement that an additional payment transfer be initiated on the date authorized by the consumer. Specifically, it would provide that when a payment transfer authorized by the consumer pursuant to the exception is returned for nonsufficient funds, the lender would be permitted to re-present the transfer on or after the date authorized by the consumer, provided that the returned transfer had not triggered the prohibition on further payment transfers in proposed § 1041.14(b). The Bureau believed that this narrow exception would accommodate practical considerations in payment processing and noted that the prohibition in proposed § 1041.14(b) would protect the consumer if the re-initiation had failed.

Proposed § 1041.14(c)(2)(iii) contained two separate provisions that would permit a lender to obtain the consumer's authorization for, and to initiate, additional payment transfers to collect a late fee or returned-item fee. Both of these provisions were intended to permit lenders to use a payment authorization obtained pursuant to proposed § 1041.14(c)(2)(iii) to collect a fee that was not anticipated when the authorization was obtained, without having to go through a second authorization process under proposed § 1041.14(c).

First, proposed § 1041.14(c)(2)(iii)(A) would permit a lender to initiate an additional payment transfer solely to collect a late fee or returned-item fee without obtaining a new consumer authorization for the specific date and amount of the transfer only if the lender, in the course of obtaining the consumer's authorization for additional payment transfers, had informed the consumer of the fact that individual payment transfers to collect a late fee or returned-item fee might be initiated, and had obtained the consumer's general authorization for such transfers in advance. Specifically, the lender could initiate such transfers only if the consumer's authorization obtained pursuant to proposed § 1041.14(c) included a statement, in terms that were clear and readily understandable to the consumer, that the lender might initiate a payment transfer solely to collect a late fee or returned-item fee. In addition, the lender would be required to specify in the statement the highest amount for such fees that may be charged, as well as the payment channel to be used. The Bureau believed this required statement might be appropriate to help ensure that the consumer is aware of key information about such transfers—particularly the highest possible amount—when the consumer would be deciding whether to grant an authorization.

Proposed comment 14(c)(2)(iii)(A)–1 clarified that the consumer's authorization for an additional payment transfer solely to collect a late fee or returned item fee needed not satisfy the general requirement that the consumer must authorize the specific date and amount of each additional payment transfer. Proposed comment 14(c)(2)(iii)(A)–2 provided, as an example, that the requirement to specify the highest possible amount that might be charged for a fee would be satisfied if the required statement specified the maximum amount permissible under the loan agreement. Proposed comment 14(c)(2)(iii)(A)–3 provided that if a fee might vary due to remaining loan balance or other factors, then the lender had to assume the factors that would result in the highest possible amount in calculating the specified amount.

The second provision, proposed § 1041.14(c)(2)(iii)(B), would have permitted a lender to add the amount of one late fee or one returned-item fee to the specific amounts authorized by the consumer as provided under proposed § 1041.14(c)(2) only if the lender had informed the consumer of the fact that such transfers for combined amounts might be initiated, and had obtained the consumer's general authorization for such transfers in advance. Specifically, under the proposal, the lender could initiate transfers for such combined amounts only if the consumer's authorization included a statement, in terms that were clear and readily understandable to the consumer, that the amount of one late fee or one returned-item fee might be added to any payment transfer authorized by the consumer. In addition, the lender would be required to specify in the statement the highest amount for such fees that may be charged, as well as the payment channel to be used. Proposed comment 14(c)(2)(iii)(B)–1 provided further clarification on that provision.

Proposed § 1041.14(c)(3) provided a three-step process for obtaining a consumer's authorization for additional payment transfers. First, proposed § 1041.14(c)(3)(ii) would contain provisions for requesting the consumer's authorization. The permissible methods for requesting authorization would allow lenders considerable flexibility. For example, lenders would be permitted to provide the transfer terms to the consumer in writing or (subject to certain requirements and conditions) electronically without regard to the consumer consent and other provisions of the E-Sign Act. In addition, lenders would be permitted to request authorization orally by telephone, subject to certain requirements and conditions. In the second step, proposed § 1041.14(c)(3)(iii) provided that, for an authorization to be valid under the exception, the lender had to obtain an authorization that is signed or otherwise agreed to by the consumer and that includes the required terms for each additional payment transfer. The lender

would be permitted to obtain the consumer's signature in writing or electronically, provided the E-Sign Act requirements for electronic records and signatures were met. This was intended to facilitate requesting and obtaining the consumer's signed authorization in the same communication. In the third and final step, proposed § 1041.14(c)(3)(iii) also would require the lender to provide to the consumer memorialization of the authorization no later than the date on which the first transfer authorized by the consumer is initiated. The comments to proposed § 1041.14(c)(3) specified and explained these points in greater detail. Under the proposal, the lender would be permitted to provide the memorialization in writing or electronically, without regard to the consumer consent and other provisions of the E-Sign Act, provided that it was in a retainable form.

In developing this three-step approach, the Bureau endeavored to ensure that the precise terms of the additional transfers for which a lender sought authorization were effectively communicated to the consumer during each step of the process, and that the consumer had the ability to decline authorizing any payment transfers with terms that the consumer believed would likely cause challenges in managing her account. In addition, the Bureau designed the approach to be compatible with lenders' existing systems and procedures for obtaining other types of payment authorizations, particularly authorizations for preauthorized, or ''recurring,'' EFTs under Regulation E. Accordingly, the proposed procedures generally were designed to mirror existing requirements in Regulation E, 12 CFR 1005.10(b). Regulation E requires that preauthorized EFTs from a consumer's account be authorized ''only by a writing signed or similarly authenticated by the consumer.'' [1041] Under EFTA and Regulation E, companies can obtain the required consumer authorizations for preauthorized EFTs in several ways. Consumer authorizations can be provided in paper form or electronically. The commentary to Regulation E explains that the rule ''permits signed, written authorizations to be provided electronically,'' and specifies that the ''writing and signature requirements . . . are satisfied by complying with the [E-Sign Act] which defines electronic records and electronic signatures.'' [1042] Regulation E does not prohibit companies from obtaining signed, written authorizations from consumers over the phone if the E-Sign Act requirements for electronic records and signatures are met.[1043] In addition, Regulation E requires persons that obtain authorizations for preauthorized EFTs to provide a copy of the terms of the authorization to the consumer.[1044] The copy of the terms of the authorization must be provided in paper form or electronically.[1045] The Bureau understands that this requirement in Regulation E, 12 CFR 1005.10(b), is not satisfied by providing the consumer with a recording of a telephone call.

During the SBREFA process, an SER recommended that the procedures for obtaining consumers' re-authorization after lenders trigger the proposed cap on failed presentments should be similar to existing procedures for obtaining consumers' authorizations to collect payment by preauthorized EFTs under Regulation E. The Bureau believed that harmonizing the two procedures would reduce costs and burdens on lenders by permitting them to incorporate the proposed procedures for obtaining authorizations into existing systems. Accordingly, as discussed above, the proposed approach was designed to achieve this goal.

Lastly, proposed § 1041.14(c)(4) would specify the circumstances in which an authorization for additional payment transfers obtained pursuant to proposed § 1041.14(c) expires or becomes inoperative. First, proposed § 1041.14(c)(4)(i) provided that a consumer's authorization would become null and void for purposes of the exception if the lender obtained a subsequent new authorization from the consumer pursuant to the exception. This provision was intended to ensure that, when necessary, lenders could obtain a consumer's new authorization to initiate transfers for different terms, or to continue collecting payments on the loan, and that such new authorization would supersede the prior authorization. Second, proposed § 1041.14(c)(4)(ii) provided that a consumer's authorization would become null and void for purposes of the exception if two consecutive payment transfers initiated pursuant to the consumer's authorization had failed, as specified in proposed § 1041.14(b). The Bureau proposed this provision for clarification purposes.

Comments Received

A number of commenters objected to the proposal that companies would have to obtain new authorizations after two failed attempts. More specifically, many of the commenters focused on how the rule would impact recurring debits or preauthorized EFTs. Under the proposal, if two recurring debits or EFTs failed, then the lender would have to receive a new authorization from the borrower under proposed § 1041.8(c) or (d) to continue processing payment transfers. Commenters argued that this could harm consumers because they might default or become delinquent on the loan if they believed the recurring transfers would continue, but the lender could not initiate further transfers because two previous transfers had been rejected. Commenters stated that a required notice informing borrowers of their right to revoke an authorization under Regulation E would be more appropriate for circumstances involving preauthorized EFTs.

Commenters also argued that the rule would deter lenders from using recurring transfers, a convenience to borrowers, if it meant that the loan would then be considered a covered longer-term loan subject to the requirements of the rule.

As stated previously, the Bureau also received a number of comments describing purported inconsistencies with the NACHA Rules. Specific to the proposed exception in § 1041.14(c), commenters noted that the NACHA Rules currently do not allow companies to add fees to an authorized amount, and instead only permit companies to initiate separate transfers for fees if the company had obtained the consumer's authorization for such transfers.

A consumer group asked the Bureau to clarify that the proposed ''failed payment clock'' would start again after reauthorization, meaning that if a lender reached the payment transfer limit, and then obtained reauthorization under proposed § 1041.14(c), then the borrower would need to get another new authorization if the lender again reaches the payment transfer limit.

Finally, the Bureau received comments generally supportive of the proposition that a lender should be

[1041] *See* 12 CFR 1005.10(b).

[1042] 12 CFR part 1005, Supp. I, comment 10(b)–5. The E-Sign Act establishes that electronic signatures and electronic records are valid and enforceable if they meet certain criteria. *See* 15 U.S.C. 7001(a)(1). An electronic signature is ''an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.'' 15 U.S.C. 7006(5). An electronic record is ''a contract or other record created, generated, sent, communicated, received, or stored by electronic means.'' 15 U.S.C. 7006(4).

[1043] In 2006, the Board explained that if certain types of tape-recorded authorizations constituted a written and signed (or similarly authenticated) authorization under the E-Sign Act, then the authorization would satisfy Regulation E requirements as well. 71 FR 1638, 1650 (Jan. 10, 2006).

[1044] *See* 12 CFR 1005.10(b).

[1045] *See* 12 CFR part 1005, Supp. I, comment 10(b)–5.

required to, and allowed to, obtain a new authorization after two consecutive attempts have failed.

Final Rule

The Bureau is now finalizing § 1041.8(c)—which is renumbered from § 1041.14(c) of the proposed rule—with a few revisions to the content of the regulation and corresponding commentary. Most notably, the Bureau is modifying proposed § 1041.8(c)(2)(iii), which permits lenders to collect late fees and returned-item fees pursuant to the exception in § 1041.8(c). Specifically, in light of comments noting inconsistencies with NACHA Rules, the Bureau is deleting proposed paragraph (c)(2)(iii)(B), which would have permitted lenders to add the amount of such a fee to the amount of any payment transfer initiated pursuant to the exception, provided that the consumer authorized the addition of the fee amount. Accordingly, the Bureau is finalizing the provisions in § 1041.8(c)(2)(iii) to permit lenders to initiate a payment transfer to collect a late fee or returned-time fee under the exception in § 1041.8(c) only as a stand-alone transfer for the amount of the fee itself, and only if authorized by the consumer in accordance with the rule's requirements. The Bureau notes that limiting such transfers in this way is consistent with existing practices of lenders that comply with NACHA Rules. Because the Bureau has deleted paragraph (c)(2)(iii)(B), paragraph (c)(2)(iii)(A) has been renumbered as paragraph (c)(2)(iii). The Bureau has also deleted the corresponding comment, and renumbered the remaining comments to reflect the change.

The Bureau clarified the remaining paragraph (c)(2)(iii) as well. As discussed immediately above, that paragraph allows lenders to initiate payment transfers for the collection of fees when a consumer has authorized such transfers. The Bureau replaced the word ''authorized'' with the phrase ''has authorized the lender to initiate such payment transfers in advance of the withdrawal attempt'' to indicate that the authorization cannot be obtained after-the-fact.

The Bureau is making no other substantive changes to paragraph (c) or its corresponding comments, and finalizes the section as otherwise proposed.

A number of the comment topics related to the prohibition on repeated failed payment attempts were already addressed above in Market Concerns—Payments or in the section-by-section analysis of § 1041.7, which identified this unfair and abusive practice. The Bureau recognizes that with recurring debits or preauthorized EFTs involving installment loans, if two scheduled payments fail, the recurring transfers would need to cease until after the lender has obtained a new authorization. It also recognizes that this could be an inconvenience, but nonetheless believes the interest of ceasing payment attempts when the consumer's account has demonstrated that it lacks the funds to cover ongoing payment attempts warrants the inclusion of preauthorized EFTs. As stated in § 1041.8(c), borrowers who wish to continue making payments out of that account can simply reauthorize, including by setting up a new authorization for preauthorized EFTs. They can also request a single immediate payment transfer under § 1041.8(d) at any time.

Concerns that the rule might deter lenders from offering recurring transfers on high-cost longer-term installment loans, because it would bring the loan under the requirements of the rule as proposed, are mitigated by the fact that the Bureau currently is not finalizing the ability-to-repay underwriting criteria as to high-cost longer-term installment loans. As a result, the only provisions of the rule that could be triggered by a leveraged payment mechanism are the requirements relating to payment attempts. It is, however, still possible that a lender that is making high-cost longer-term installment loans might choose not to take a leveraged payment mechanism, including by not offering preauthorized EFTs. Borrowers in these circumstances could set up recurring ''push'' payments with their account-holding institution, instead of giving lenders authorization to initiate a ''pull,'' thereby still obtaining the convenience of recurring automatic transfers. The Bureau notes that these borrowers would also avoid all of the harms identified in § 1041.7 because the lender would not be authorized to initiate payment requests themselves.

The Bureau does not find it necessary, contrary to some received comments, to clarify further that the ''failed payment clock'' under § 1041.8(b) restarts after a borrower provides a new authorization under § 1041.8(c). Section 1041.8(b)(2)(i)(C) makes clear that the clock does restart after a borrower reauthorizes under § 1041.8(c).

(d) Exception for Initiating a Single Immediate Payment Transfer at the Consumer's Request

Proposed Rule

Proposed § 1041.14(d) set forth a second exception to the prohibition on initiating further payment transfers from a consumer's account in proposed § 1041.14(b). In contrast to the exception available under proposed § 1041.14(c), which would allow lenders to initiate multiple recurring payment transfers authorized by the consumer in a single authorization, this exception would permit lenders to initiate a payment transfer only on a one-time basis immediately upon receipt of the consumer's authorization, while leaving the overall prohibition in place. This limited approach was designed to facilitate the collection of payments that would be proffered by the consumer for immediate processing, without requiring compliance with the multi-stage process in proposed § 1041.14(c), and to ensure that consumers would have the option to continue making payments—one payment at a time—after the prohibition in proposed § 1041.14(b) had been triggered, without having to provide lenders with broader ongoing access to their accounts.

In particular, subject to certain timing requirements, proposed § 1041.14(d) would permit lenders to initiate a payment transfer from a consumer's account after the prohibition had been triggered, without obtaining the consumer's authorization for additional payment transfers in accordance with proposed § 1041.14(c), if the consumer had authorized a one-time EFT or proffered a signature check for immediate processing. Under proposed § 1041.14(d)(1), a payment transfer initiated by either of these two payment methods would be required to meet the definition of a ''single immediate payment transfer at the consumer's request'' in proposed § 1041.14(a)(2). Thus, for the exception to apply, the lender must initiate the EFT or deposit the check within one business day after receipt.

Proposed § 1041.14(d)(2) provided that, for the exception to apply, the consumer had to authorize the underlying one-time EFT or provide the underlying signature check to the lender, as applicable, no earlier than the date on which the lender had provided to the consumer the consumer rights notice required by proposed § 1041.15(d) or on the date that the consumer affirmatively had contacted the lender to discuss repayment options, whichever date was earlier. The Bureau believed that many consumers who

would elect to authorize only a single transfer under this exception would do so in part because they had already received the notice, had been informed of their rights, and had chosen to explore their options with the lender. The Bureau also believed that in some cases, consumers might contact the lender after discovering that the lender had made two failed payment attempts (such as by reviewing their online bank statements) before the lender had provided the notice. Moreover, by definition, this exception would not require the consumer to decide whether to provide the lender an authorization to resume initiating payment transfer from their account on an ongoing basis. Accordingly, the Bureau believed it was unnecessary to propose requirements similar to those proposed for the broader exception in proposed § 1041.14(c) to ensure that consumers had received the notice informing them of their rights at the time of authorization.

Proposed comment 14(d)–1 cross-referenced proposed § 1041.14(b)(a)(2) and accompanying commentary for guidance on payment transfers that would meet the definition of a single immediate payment transfer at the consumer's request. Proposed comment 14(d)–2 clarified how the prohibition on further payment transfers in proposed § 1041.14(b) continued to apply when a lender initiates a payment transfer pursuant to the exception in proposed § 1041.14(d). Specifically, the proposed comment clarified that a lender would be permitted under the exception to initiate the single payment transfer requested by the consumer only once, and thus would be prohibited under proposed § 1041.14(b) from re-initiating the payment transfer if it failed, unless the lender subsequently obtained the consumer's authorization to re-initiate the payment transfer under proposed § 1041.14(c) or (d). The proposed comment further clarified that a lender would be permitted to initiate any number of payment transfers from a consumer's account pursuant to the exception in proposed § 1041.14(d), provided that the requirements and conditions were satisfied for each such transfer. Accordingly, the exception would be available as a payment option on a continuing basis after the prohibition in proposed § 1041.14(b) had been triggered, as long as each payment transfer was authorized and initiated in accordance with the proposed exception's timing and other requirements. In addition, the proposed comment cross-referenced proposed comment 14(b)(2)(ii)–3 for further guidance on how the prohibition in proposed § 1041.14(b) would apply to the exception in proposed § 1041.14(d).

Proposed comment 14(d)–3 explained, by providing an example, that a consumer affirmatively had contacted the lender when the consumer called the lender after noticing on their bank statement that the lender's last two payment withdrawal attempts had been returned for nonsufficient funds.

The Bureau believed that the requirements and conditions in proposed § 1041.14(d) would prevent the harms that otherwise would occur if the lender—absent obtaining the consumer's authorization for additional payment transfers under proposed § 1041.14(c)—were to initiate further transfers after two consecutive failed attempts. The Bureau believed that consumers who would authorize such transfers would do so based on their first-hand knowledge of their account balance at the time that the transfer, by definition, must be initiated. As a result of these two factors, the Bureau believed there was a significantly reduced risk that the transfer would fail.

Comments Received

Commenters argued that the proposed provisions in § 1041.14(d) that would not allow lenders to initiate single immediate payment transfers at the consumer's request unless the borrower had received the consumer rights notice or the borrower affirmatively contacted the lender were detrimental to consumers. For borrowers who did not consent to electronic communications, commenters argued that it would take days to mail the notices, meaning borrowers might remain in delinquency for longer than they otherwise would if a collector could simply call and ask for a single immediate payment transfer. Commenters also argued that the proposed rule would result in situations where a collector would call the consumer, ask if they wanted to reauthorize payments, and then ask the consumer to call back to ''affirmatively contact the lender,'' which the Bureau agrees would be an unfortunate unintended consequence.

One commenter argued that paragraph (d) would deter companies from reaching out to the consumer after a payment was rejected the first time to ask whether the consumer wanted to cover a required payment with a single immediate payment. It provided an example of a consumer authorizing a recurring ACH. If that recurring ACH was rejected, the commenter's current practice was to call the borrower to ask if they wanted to cover the payment over the phone using a different method (under an independent authorization). The commenter stated that if the consumer authorized a different payment that was then also rejected, then the notice-and-consent requirements would be triggered. This commenter argued that as it would be hard to track payments across all non-cash methods, the proposed rule might deter companies from reaching out to the consumer after the first ACH was rejected.

Final Rule

The Bureau is finalizing paragraph (d) as proposed, with only technical edits to reflect the renumbering of this section to § 1041.8.

The Bureau has decided not to eliminate the requirement that single immediate payment transfers only be processed after the consumer rights notice required under § 1041.9(c) is provided unless a borrower affirmatively reaches out to the lender to initiate the payment transfer. Commenters correctly noted that when combining the requirements in paragraphs (a), (b), (c), and (d), a lender will not be able to initiate any payment transfers after two failed payment transfers until after it they provide the notice under § 1041.9(c), unless the borrower affirmatively contact it to reauthorize. This means that for borrowers who do not accept electronic communications, there may be a period of several days before the notice under § 1041.9(c) is received, during which lenders cannot process payments unless the borrower affirmatively reaches out to the lender. Loans may continue to be delinquent during that period. And because lenders will be unable to process payments during this period on an outgoing collection call, they may be deterred from making collections calls during this brief window.

For a number of reasons, the Bureau believes that this scenario does not present significant concerns. First, the Bureau's study observed that only about 20 percent of third re-presentments succeed without an overdraft fee, suggesting that a minority of borrowers will wish to re-initiate payments so quickly after the second failed payment attempt. Second, while the time necessary to process a mail notice, and delivery times, may add a few days of delinquency, often a few days of delinquency will not be likely to cause a significant amount of harm if the borrower is able to cure the delinquency soon after the notice is received, and a collection call can be made. Third, borrowers retain the option to affirmatively initiate payments through

the lender, or avail themselves of a variety of payment options involving ''pushes'' from their account-holding institution, meaning that borrowers can still initiate payments, just not after being reminded to do so over an outgoing collection call. The Bureau does not believe the small fraction of consumers who may be harmed by this confluence of events is significant enough to outweigh the reasons for the restriction. Consumers would fall into this category only if they: (1) Have experienced a second payment attempt failure; (2) nonetheless immediately have funds available for a third payment; (3) are unaware that the second payment did not go through (and thus do not have the information necessary to choose whether to make a payment through an affirmative contact); (4) have not consented to electronic notifications; and (5) are in the rare circumstances in which a few additional days of delinquency would have a negative impact. In this situation, these consumers will benefit from knowing their rights and understanding what occurred with the prior failed payment attempts before reinitiating payments. The Bureau similarly is not concerned about payments made at the borrower's own affirmative initiation because, as stated in the proposal, such payments are more likely to be successful when the borrower knows what funds are available to process the payments.

As for suggestions that the rule will result in lenders calling consumers and telling them to return the call in order to initiate a single immediate payment transfer after an affirmative consumer contact, the Bureau believes that this scenario may violate the prohibition against evasion set forth in paragraph (e), depending on the underlying facts and circumstances.

The Bureau notes that if a lender reaches out after the first attempt fails in order to process a second attempt using a different payment method, then that second attempt would not be governed by paragraph (d) because it does not follow a second consecutive failed payment transfer. Instead, it simply would be an attempt to procure a payment after a first failed payment transfer. In other words, regardless of whether a lender reaches out to the borrower to arrange a new payment method after the first failed payment transfer, or simply re-presents under the original authorization, the cap and applicable notices would only trigger after the second failure. The Bureau expects that this may actually encourage lenders to reach out after the first failed payment transfer because a lender may be able to avoid the consequences of a second consecutive failed payment transfer by speaking with the consumer about the timing and amount of the transfer before initiating it.

Finally, the Bureau concludes that after an initial investment, lenders should be able to track the number of failed payment attempts on a borrower level (and not a loan or payment method level) with relatively low burden. The Bureau thus is not persuaded that lenders will be reluctant to call consumers to procure payment after the first failed attempt because they are unaware of whether the cap has yet been initiated.

8(e) Prohibition Against Evasion

The Bureau is finalizing § 1041.8 with a new paragraph (e). Paragraph (e) states that a lender must not take any action with the intent of evading the requirements of this section (referring to § 1041.8). Proposed § 1041.14 did not include its own statement on evasion. Rather, the proposal included a general statement on evasion in proposed § 1041.19, which provided that a lender must not take any action with the intent of evading the requirements of part 1041. To clarify and reinforce this point, the Bureau is adding anti-evasion paragraphs to certain individual sections of the rule for ease of reference, and to allow it to provide specific examples relating to each section in the commentary. To that end, the Bureau is adding comment 8(e)–1 to clarify that the standard in § 1041.8(e) is same as that in § 1041.13. It also is finalizing an illustrative example in comment 8(e)–2, which formerly was an example for proposed § 1041.19, to clarify that, depending on the facts and circumstances, lenders might violate the prohibition against evasion if they process very small payments with the intent of evading the prohibition against three consecutive failed payment attempts without obtaining a new consumer authorization.

Some commenters noted that the better way to address this issue would be to prohibit the initiation of additional transfers after any failed attempt. The Bureau addresses the feedback regarding whether the Bureau should impose a one re-presentment cap above. More general comments on the Bureau's evasion authority also are found in the section-by-section analysis of § 1041.13.

Section 1041.9 Disclosure of Payment Transfer Attempts

Overview of the Proposed Rule

As discussed in the proposal, consumers who use online payday and payday installment loans tend to be in economically precarious positions. They have low to moderate incomes, live paycheck to paycheck, and generally have no savings to fall back on. They are particularly susceptible to having cash shortfalls when payments are due and can ill afford additional fees on top of the high cost of these loans. At the same time, as discussed above in Market Concerns—Payments, many lenders in these markets may often obtain multiple authorizations to withdraw account funds through different channels, exercise those authorizations in ways that consumers do not expect, and repeatedly re-present returned payments in ways that can substantially increase costs to consumers and endanger their accounts.

In addition to proposing in § 1041.14 (now § 1041.8 of the final rule) to prohibit lenders from attempting to withdraw payment from a consumer's account after two consecutive payment attempts have failed, unless the lender obtains the consumer's new and specific authorization to make further withdrawals, the Bureau proposed in § 1041.15 (which is now being finalized as § 1041.9) to use its authority under section 1032(a) of the Dodd-Frank Act to require two new disclosures to help consumers better understand and mitigate the costs and risks relating to payment attempt practices in connection with covered loans. While the interventions in proposed § 1041.14 were designed to protect consumers already experiencing severe financial distress in connection with their loans and depository accounts, the primary intervention in proposed § 1041.15 was designed to give all borrowers of covered loans who grant authorizations for payment withdrawals the information they need to prepare for upcoming payments and to take proactive steps to manage any errors or disputes before funds are deducted from their accounts.

Specifically, proposed § 1041.15(b) would have required lenders to provide consumers with a payment notice before initiating each payment transfer on a covered loan. This notice was designed to alert consumers to the timing, amount, and channel of the forthcoming payment transfer and to provide consumers with certain other basic information about the payment transfer. The notice would specifically alert the consumer if the payment transfer would be for a different amount, at a different time, through a different payment channel than the consumer might have expected based upon past practice, or for the purpose of re-initiating a returned transfer. Where a lender had

obtained consumer consent to deliver the payment notice through electronic means, proposed § 1041.15(c) would provide content requirements for an electronic short notice, which would be a truncated version of the payment notice formatted for electronic delivery through email, text message, or mobile application with a requirement to include in the short notice a hyperlink that would enable the consumer to access an electronic version of the full notice.

In addition, proposed § 1041.15(d) would complement the intervention in proposed § 1041.14 by requiring lenders to provide a consumer rights notice after a lender triggered the limitations in that section. This consumer rights notice would inform consumers that a lender has triggered the provisions in proposed § 1041.14 and is no longer permitted to initiate payment from the consumer's account unless the consumer chooses to provide a new authorization. The Bureau believed informing consumers of the past failed payments and the lender's inability to initiate further withdrawals would help prevent consumer confusion or misinformation, and help consumers make an informed decision going forward on whether and how to grant a new authorization to permit further withdrawal attempts. For lenders to deliver the consumer rights notice required under proposed § 1041.15(d) through an electronic delivery method, proposed § 1041.15(e) would require the lenders to provide an electronic short notice that contains a link to the full consumer rights notice.

Under the proposal, lenders would be able to provide these notices by mail, in person or, with consumer consent, through electronic delivery methods such as email, text message, or mobile application. The Bureau sought to facilitate electronic delivery of the notices wherever practicable because it believed that such methods would make the disclosures timelier, more effective, and less expensive for all parties. Given that electronic delivery may be the most timely and convenient method of delivery for many consumers, the Bureau determined that facilitating electronic delivery was consistent with its authority under section 1032(a) of the Dodd-Frank Act to ensure that the features of any consumer financial product are ''fully, accurately, and effectively disclosed'' to consumers.[1046]

The Bureau proposed model clauses and forms in proposed § 1041.15(a)(7), which could be used at the option of covered persons for the provision of the notices that would be required under proposed § 1041.15. The proposed model clauses and forms were located in appendix A. Other than removing a line of APR information in one of the forms, the Bureau is finalizing them as proposed. These proposed model clauses and forms were validated through two rounds of consumer testing in the fall of 2015. The consumer testing results are provided in the FMG Report.[1047]

Legal Authority

The payment notice, consumer rights notice, and short electronic notices in § 1041.9 of the final rule were proposed and are finalized under section 1032(a) of the Dodd-Frank Act, which authorizes the Bureau to prescribe rules to ensure that the features of consumer financial products and services ''both initially and over the term of the product or service,'' are disclosed ''fully, accurately, and effectively'' in a way that ''permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.'' [1048] The authority granted to the Bureau in section 1032(a) is broad, and empowers the Bureau to prescribe rules regarding the disclosure of the ''features'' of consumer financial products and services generally. Accordingly, the Bureau may prescribe rules containing disclosure requirements even if other Federal consumer financial laws do not specifically require disclosure of such features.

Dodd-Frank Act section 1032(c) provides that, in prescribing rules pursuant to section 1032, the Bureau ''shall consider available evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services.'' [1049] Accordingly, in developing the rule under Dodd-Frank Act section 1032(a), the Bureau considered consumer complaints, industry disclosure practices, and other evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services. This included the evidence developed through the Bureau's own consumer testing as discussed in the proposal, as well as in Market Concerns—Payments and the FMG Report.

Section 1032(b)(1) also provides that ''any final rule prescribed by the Bureau under [section 1032] requiring disclosures may include a model form that may be used at the option of the covered person for provision of the required disclosures.'' Any model form issued pursuant to this authority shall contain a clear and conspicuous disclosure that, at a minimum, uses plain language that is comprehensible to consumers; contains a clear format and design such as an easily readable type font; and succinctly explains the information that must be communicated to the consumer.[1050] Section 1032(b)(2) provides that any model form that the Bureau issues pursuant to section 1032(b) shall be validated through consumer testing. The Bureau conducted two rounds of qualitative consumer testing in September and October of 2015. The testing results are provided in the FMG Report. Section 1032(d) provides that ''any covered person that uses a model form included with a rule issued under this [section 1032] shall be deemed to be in compliance with the disclosure requirements of this section with respect to such model form.''

The Bureau received a number of comments arguing that there was no UDAAP basis for the notices in proposed § 1041.15, or that the remedy the Bureau proposed for the identified unfair and abusive practice in proposed § 1041.13 (finalized as § 1041.7) was overbroad by requiring disclosures in addition to a prohibition on the identified practice. These commenters are correct in asserting that the Bureau did not identify an unfair or abusive practice that would warrant the notice requirements in proposed § 1041.15, but only because it did not attempt to do so. Instead, as described here, the Bureau proposed the section on notice requirements pursuant to its disclosure authority under section 1032 of the Dodd-Frank Act. Thus, the remedy in final § 1041.8 that is needed in order to prevent the practice identified in final § 1041.7 is not overbroad based on the existence of final § 1041.9, because § 1041.9 is intended for separate and additional reasons and finalized under separate authority.

9(a) General Form of Disclosures

Proposed Rule

Proposed § 1041.15(a), finalized as § 1041.9(a), set basic rules regarding the format and delivery for all notices

[1046] 12 U.S.C. 5532(a).

[1047] FMG Report, ''Qualitative Testing of Small Dollar Loan Disclosures, Prepared for the Consumer Financial Protection Bureau,'' (Apr. 2016) *available at http://files.consumerfinance.gov/f/documents/Disclosure_Testing_Report.pdf.*

[1048] 12 U.S.C. 5532(a).

[1049] 12 U.S.C. 5532(c).

[1050] Dodd-Frank Act section 1032(b)(2); 12 U.S.C. 5532(b)(2).

required under proposed § 1041.15 and set requirements for a two-step process for the delivery of electronic disclosures as further required under proposed § 1041.15(c) and (e). The format requirements generally paralleled the format requirements for other disclosures related to certain covered short-term loans as provided in proposed § 1041.7 (now final § 1041.6), but would also permit certain electronic disclosures by text message or mobile application. As proposed, a two-step electronic delivery process would involve delivery of short-form disclosures to consumers by text message, mobile application, or email that would contain a unique Web site address for the consumer to access the full notices proposed under § 1041.15

Because the disclosures in proposed § 1041.15 involved the initiation of one or more payment transfers in connection with existing loans, the Bureau believed that electronic disclosures generally would be more timely, more effective, and less expensive for consumers and lenders than paper notices, as discussed below. At the same time, it recognized that there were some technical and practical challenges with regard to electronic channels. The two-stage process was designed to balance such considerations, for instance by adapting the notices in light of format and length limitations on text message and by accommodating the preferences of consumers who are using mobile devices in the course of daily activities and would rather wait to access the full contents until a time and place of their choosing.

Proposed 15(a)(1) Clear and Conspicuous

Proposed § 1041.15(a)(1) provided that the disclosures required by proposed § 1041.15 must be clear and conspicuous, and could use commonly accepted or readily understandable abbreviations. Proposed comment 15(a)(1)–1 clarified that disclosures would be clear and conspicuous if they were readily understandable, and their location and type size were readily noticeable to consumers. This clear and conspicuous standard was based on the standard used in other Federal consumer financial laws and their implementing regulations, including Regulation E, subpart B, § 1005.31(a)(1). The Bureau believed that requiring the disclosures to be provided in a clear and conspicuous manner would help consumers understand the information in the disclosure about the costs, benefits, and risks of the transfer, consistent with the Bureau's authority under section 1032(a) of the Dodd-Frank Act.

Proposed 15(a)(2) In Writing or Electronic Delivery

Proposed § 1041.15(a)(2) required disclosures mandated by proposed § 1041.15 to be provided in writing or through electronic delivery. The disclosures could be provided through electronic delivery as long as the requirements of proposed § 1041.15(a)(4) were satisfied. The disclosures would have to be provided in a form that can be viewed on paper or a screen, as applicable. The requirement in proposed § 1041.15(a)(2) would not be satisfied orally or through a recorded message. Proposed comment 15(a)(2) explained that the disclosures that would be required by proposed § 1041.15 may be provided electronically as long as the requirements of proposed § 1041.15(a)(4) were satisfied, without regard to the E-Sign Act.[1051]

The Bureau proposed to allow electronic delivery because electronic communications are more convenient than paper communications for some lenders and consumers. Given that some requirements of the E-Sign Act might not be necessary in this context, but other features like a revocation regime might be useful given the ongoing nature of these disclosures, the Bureau proposed a tailored regime that it believed would encourage lenders and consumers to identify an appropriate method of electronic delivery where consumers have electronic access.

The Bureau understood that some lenders already contact their borrowers through electronic means such as text message and email.[1052] Lenders that currently provide electronic notices had informed the Bureau that they provide both email and text message as communication options to consumers. A major trade association for online lenders reported that many of its members automatically enroll consumers in an email notification system as part of the origination process but allow consumers to opt-in to receive text message notifications of upcoming payments. One member of this association asserted that approximately 95 percent of consumers opt in to text message notifications, so email effectively functions as a back-up delivery method. Similarly, during the Bureau's SBREFA process, a SER from an online-only lender reported that 80 percent of its customers opt in to text message notifications. According to a major payday, payday installment, and vehicle title lender that offers loans through storefronts and the Internet, 95 percent of its customers have access to the Internet and 70 percent have a home computer.[1053] Lenders may prefer contacting consumers through these methods given that they are typically less costly than mailing a paper notice. Given the convenience and timeliness of electronic notices, the Bureau believed the disclosure information would provide the most utility to consumers when it is provided through electronic methods.

The Bureau believed that providing consumers with disclosures that they can view and retain would allow them to more easily understand the information, detect errors, and determine whether the payment is consistent with their expectations. In light of the detailed nature of the information provided in the disclosures required by proposed § 1041.15, including payment amount, loan balance, failed payment amounts, consumer rights, and various dates, the Bureau also believed that oral disclosures would not provide consumers with a sufficient opportunity to understand and use the disclosure information.

Proposed 15(a)(3) Retainable

Proposed § 1041.15(a)(3) would require disclosures mandated by proposed § 1041.15 to be provided in a retainable form, except for the electronic short notices delivered through mobile application or text message. Electronic short notices provided by email would still be subject to the retain-ability requirement. Proposed comment 15(a)(3) explained that electronic notices would be considered retainable if they were in a format that is capable of being printed, saved, or emailed by the consumer. The Bureau believed that having the disclosures in a retainable format would enable consumers to refer to the disclosure at a later point in time, such as after a payment has posted to their account or if they contact the lender with a question, allowing the

[1051] 15 U.S.C. 7001 *et seq.*

[1052] During the SBREFA process, several SERs explained that they currently provide consumers with text message reminders of upcoming payments. Other public information indicates that lenders contact consumers through many of these methods. *See, e.g.,* ENOVA Int'l, Inc., 2014 Annual Report (Form 10–K), at 9 (''Call center employees contact customers following the first missed payment and periodically thereafter. Our primary methods of contacting past due customers are through phone calls, letters and emails.'').

[1053] Community Choice Fin. Inc., 2014 Annual Report (Form 10–K), at 4 (Mar. 30, 2015). At the time of the filing, most (about half) of Community Choice's revenue was from short-term loans. *Id.* at 6. Both short-term loans and long-term installment loans were being offered online. *Id.* at 6–7.

disclosures to more effectively disclose the features of the product to consumers. The Bureau did not propose to require that text messages and messages within mobile applications be permanently retainable because of concerns that technical limitations beyond the lender's control might make retention difficult. However, the Bureau anticipated that such messages would often be kept on a consumer's device for a considerable period of time and could therefore be accessed again. In addition, proposed § 1041.15 would require that such messages contain a link to a Web site containing a full notice that would be subject to the general rule under proposed § 1041.15(a)(3) regarding retain-ability. A lender would also be required to maintain policies, procedures, and records to ensure compliance with the notice requirement under proposed § 1041.18 (now final § 1041.12).

Proposed 15(a)(4) Electronic Delivery

Proposed § 1041.15(a)(4) laid out various requirements designed to facilitate delivery of the notices required under proposed § 1041.15 through electronic channels. The proposal would allow disclosures to be provided through electronic delivery if the consumer affirmatively consents in writing or electronically to the particular electronic delivery method. Lenders would be able to obtain this consent in writing or electronically. The proposed rule would require that lenders provide email as an electronic delivery option if they also offered options to deliver notices through text message or mobile application. Proposed § 1041.15(a)(4) would also set forth rules to govern situations where the consumer revokes consent for delivery through a particular electronic channel or is otherwise unable to receive notices through that channel. The consumer consent requirements for provision of the disclosures through electronic delivery were specified in the proposal. Proposed § 1041.15(a)(4)(i)(A) would require lenders to obtain a consumer's affirmative consent to receive the disclosures through a particular method of electronic delivery. These methods might include email, text message, or mobile application. The Bureau believed it was important for consumers to be able to choose a method of delivery to which they had access and that would best facilitate their use of the disclosures, and that viewable documentation would facilitate both informed consumer choice and supervision of lender compliance. The Bureau was concerned that consumers could receive disclosures through a method that they would not prefer or that would not be useful to them if they were automatically defaulted into an electronic delivery method. Similarly, the Bureau was concerned that a consumer might receive disclosures through a method that they would not expect if they had been provided with a broad electronic delivery option rather than an option specifying the method of electronic delivery.

Proposed § 1041.15(a)(4)(i)(B) stated that when obtaining consumer consent to electronic delivery, a lender had to provide the consumer with the option to select email as the method of electronic delivery, separate and apart from any other electronic delivery methods such as mobile application or text message. Proposed comment 15(a)(4)(i)(B) explained that the lender could choose to offer email as the only method of electronic delivery.

The Bureau believed that such an approach would facilitate consumers' choice of the electronic delivery channel that would be most beneficial to them, in light of differences in access, use, and cost structures between channels. For many consumers, delivery via text message or mobile application might be the most convenient and timely option. However, there would be some potential tradeoffs. For example, consumers might incur costs when receiving text messages and could have privacy concerns about finance-related text messages appearing on their mobile phones. During consumer testing, some of the participants had a negative reaction to receiving notices by text message, including privacy concerns about someone being able to see that they were receiving a notice related to a financial matter. The Bureau believed that mobile application messages might create similar privacy concerns, as such messages may generate alerts or banners on a consumer's mobile device.

Nonetheless, the Bureau believed that receiving notices by text message might be useful to some consumers. In general, most consumers have access to a mobile phone. According to a recent Federal Reserve study on mobile banking and financial services, approximately 90 percent of ''underbanked'' consumers—consumers who have bank accounts but use non-bank products like payday loans—have access to a mobile phone.[1054] Fewer underbanked consumer have a phone with Internet access, although the coverage is still significant at 73 percent. A few participants in the Bureau's consumer testing indicated a preference for receiving notices by text message. The Bureau believed that text message delivery should be allowed as long as consumers had the option to choose email delivery, which for some consumers might be a strongly preferred method of disclosure delivery. The Bureau also maintained that requiring an email option might help ensure that the disclosure information is effectively disclosed to consumers, consistent with the Bureau's authority under section 1032 of the Dodd-Frank Act.

Proposed § 1041.15(a)(4)(ii) would have prohibited a lender from providing the notices through a particular electronic delivery method if there was a subsequent loss of consent as provided in proposed § 1041.15(a)(4)(ii), either because the consumer had revoked consent pursuant to proposed § 1041.15(a)(4)(ii)(A), or the lender had received notification that the consumer was unable to receive disclosures through a particular method, as described in proposed § 1041.15(a)(4)(ii)(B). Proposed comment 15(a)(4)(ii)(B)–1 explained that the prohibition applied to each particular electronic delivery method. It further provided that a lender that had lost a consumer's consent to receive disclosures via text message but, for example, not the consent to receive disclosures via email, could continue to provide disclosures via email so long as all of the requirements in proposed § 1041.15(a)(4) were satisfied. Proposed comment 15(a)(4)(ii)(B)–2 clarified that the loss of consent would apply to all notices required under proposed § 1041.15. For example, if a consumer revoked consent in response to the electronic short notice text message delivered along with the payment notice under proposed § 1041.15(c), then that revocation also would apply to text message delivery of the electronic short notice that would be delivered with the consumer rights notice under proposed § 1041.15(e), or to delivery of the notice under proposed § 1041.15(d) if there were two consecutive failed withdrawal attempts that would trigger the protections of § 1041.14.

Proposed § 1041.15(a)(4)(ii)(A) would prohibit a lender from providing the notices through a particular electronic delivery method if the consumer had revoked consent to receive electronic disclosures through that method. Proposed comment 15(a)(4)(ii)(A)–1 clarified that a consumer could revoke consent for any reason and by any reasonable means of communication. The comment provided that examples of

[1054] Bd. of Governors of the Federal Reserve System, ''Consumers and Mobile Financial Services 2015,'' at 5 (Mar. 2015), *available at http://www.federalreserve.gov/econresdata/consumers-and-mobile-financial-services-report-201503.pdf.*

a reasonable means of communication included calling the lender and revoking consent orally, mailing a revocation to an address provided by the lender on its consumer correspondence, sending an email response or clicking on a revocation link provided in an email from the lender, and responding to a text message sent by the lender.

The Bureau was aware that burdensome revocation requirements could make it difficult for the consumer to revoke consent to receive electronic disclosures through a particular electronic delivery method. Accordingly, the Bureau believed it was appropriate to provide a simple revocation regime and require that lenders cannot provide the notices through a particular electronic delivery method if the consumer revokes consent through that method. Proposed § 1041.15(a)(4)(ii)(B) would prohibit a lender from providing the notices through a particular electronic delivery method if the lender had received notice that the consumer was unable to receive disclosures through that method. Such notice would be treated in the same manner as if the consumer had affirmatively notified the lender that the consumer was revoking authorization to provide notices through that means of delivery. Proposed comment 15(a)(4)(ii)(B)–1 provided examples of notice, including a returned email, returned text message, and statement from the consumer.

The Bureau believed this was an important safeguard to ensure that consumers have ongoing access to the notices required under proposed § 1041.15. It also believed this requirement to change delivery methods after consent has been lost would ensure that the disclosure information had been fully and effectively disclosed to consumers, consistent with the Bureau's authority under section 1032.

Proposed 15(a)(5) Segregation Requirements for Notices

All required notices under proposed § 1041.15 would have to be segregated from all other written materials and contain only the information required by the proposed rule, other than information necessary for product identification, branding, and navigation. Under the proposal, segregated additional content that was required by proposed § 1041.15 could not be displayed above, below, or around the required content. Proposed comment 15(a)(5)–1 clarified that additional, non-required content could be delivered through a separate form, such as a separate piece of paper or Web page. To increase the likelihood that consumers would notice and read the written and electronic disclosures required by proposed § 1041.15, the proposed notices had to be provided in a stand-alone format that is segregated from other lender communications. This requirement was intended to ensure that the disclosure contents would be effectively disclosed to consumers, consistent with the Bureau's authority under section 1032 of the Dodd-Frank Act. Lenders would not be allowed to add additional substantive content to the disclosure.

Proposed 15(a)(6) Machine Readable Text in Notices Provided Through Electronic Delivery

Under the proposal, a payment notice and consumer rights notice provided through electronic delivery also had to use machine readable text that is accessible via both Web browsers and screen readers. As the Bureau stated in the proposal, graphical representations of textual content cannot be accessed by assistive technology used by the blind and visually impaired. Providing the electronically-delivered disclosures with machine readable text rather than as a graphic image file, thus would allow consumers with a variety of electronic devices and consumers that utilize screen readers, such as consumers with disabilities, to access the disclosure information.

Proposed 15(a)(7) Model Forms

Proposed § 1041.15(a)(7) required all notices in proposed § 1041.15 to be substantially similar to the model forms and clauses proposed by the Bureau. Specifically, proposed § 1041.15(a)(7)(i) required the content, order, and format of the payment notice to be substantially similar to the Models Forms A–3 through A–5 in appendix A. Proposed § 1041.15(a)(7)(ii) required the consumer rights notice to be substantially similar to Model Form A–5 in appendix A. And similarly, proposed § 1041.15(a)(7)(iii) mandated the electronic short notices required under proposed § 1041.15(c) and (e) to be substantially similar to the Model Clauses A–6 through A–8 provided in appendix A. To explain the safe harbor provided by these model forms, proposed comment 15(a)(7)–1 provided that although the use of the actual model forms and clauses was not required, lenders using such model forms would be deemed to be in compliance with the disclosure requirement.

As stated in the proposal, the model forms developed through consumer testing might make the notice information comprehensible to consumers while minimizing the burden on lenders who otherwise would need to develop their own disclosures. Consistent with the Bureau's authority under section 1032(b)(1), the Bureau believed that its proposed model forms used plain language comprehensible to consumers, contained a clear format and design, such as an easily readable type font, and succinctly explained the information that must be communicated to the consumer. As described in the FMG Report and as discussed above, it further considered evidence developed through its testing of model forms pursuant to section 1032(b)(3). It also believed that providing these model forms would help ensure that the disclosures were effectively provided to consumers, while also allowing lenders to adapt the disclosures to their loan products and preferences.

Proposed 15(a)(8) Foreign Language Disclosures

The proposal also would allow lenders to provide the required disclosures in a language other than English, provided that the disclosures were made available in English upon the consumer's request.

Comments Received

Some industry commenters, many consumer groups, and many State Attorneys General supported the notice intervention. Several commenters raised concerns that consumers should have notice of upcoming transfers in order to minimize unexpected bank fees. A number of lenders stated that they already provide upcoming payment notices to their customers. One explained that it does not anticipate much additional compliance burden from the notices because it already provides payment reminders and does not use the payment practices described in the proposal, like re-presentments.

However, many industry commenters raised concerns about the burden of the intervention. One supported the intervention overall but raised burden concerns about the frequency and delivery of the notice. Some disputed the need for the intervention, arguing that the proposed notices were too burdensome and complex, that consumers knew when an ACH will be pulled, that the practices the notices sought to prevent violated existing laws that needed to be enforced, and that it would be burdensome to create a payment notice for past due consumers because lender wanted to debit when funds come in.

A number of stakeholders commented on the Bureau's consumer testing

process for the model forms. Some commenters believed that the Bureau's 28 consumer sample size was too small, noting that the Bureau and other agencies had used larger sample sizes for the qualitative testing of other disclosures (such as the TILA–RESPA integrated disclosure),[1055] and supplemented with quantitative testing. These commenters asked the Bureau to clarify that the notices do not need to conform to the model forms, such that lenders could conduct their own testing. Commenters claimed that the level of research rigor for the model disclosures was weak as compared to what would be considered a best practice in the industry. Another criticized both the sample size and the number of geographies represented, and recommended that the Bureau remove the model forms from the proposal. It also suggested that the Bureau's use of just qualitative testing without quantitative testing meant that the findings might not be projectable to the broader population. However, others supported the Bureau's use of a model form.

Stakeholders also commented on the consent requirements around receiving notices electronically. Commenters argued that the consent scheme imposed by the E-Sign Act should suffice, and that the Bureau had not explained why the E-Sign Act requirements were not sufficient in this context. In particular, one commenter argued that the prohibition against providing electronic notices that would apply after the lender receives notification that the consumer is unable to receive notices through a given electronic medium would create uncertainty around when a consumer will be deemed to have ''received notification.'' It noted that this requirement was more onerous than the E-Sign Act, which allows the lender to give electronic disclosures to consumers who have affirmatively consented, and have not withdrawn such consent. Others similarly suggested that allowing borrowers to consent to electronic delivery over the phone, something E-Sign allows, would be beneficial. These commenters said the Bureau should instead follow the E-Sign Act's requirements relating to consent.

More generally, the Bureau heard from a variety of industry participants about the compliance burden of the notice requirements. Although each had somewhat different perspective on the compliance costs, many considered them to be too high and argued that they could lead to higher prices for loan products. One commenter argued that the proposed notice requirements would pose a significant cost when borrowers do not opt in to electronic notifications, because mailings would pose significant costs. It provided the example of a borrower who takes out a $1,000 loan payable over 12 months, in semi-monthly installments. It estimated that the payment notices would cost about $0.40 per notice at high scale, and $1 at low scale. In the commenter's view, this meant that the notice requirement could cost more than two percent of the principal balance. In light of this significant cost, it asked that the Bureau allow borrowers to opt out of the notice requirement, or that it allow lenders to provide the notices through other methods, including pre-recorded phone calls. Other commenters asked the Bureau to similarly allow oral notices. Alternatively, a consumer group argued that lenders should be required to verify consent with a digital or print signature.

Another industry participant argued that the allowance for electronic notifications would not alleviate the costs associated with mailed notices because the costs of tracking consent and withdrawals across channel are too complex operationally and technologically, and thus too costly. This commenter argued that the Bureau should abandon the notice requirements because the costs would result in higher pricing.

Another entity commented that the proposal would impose high costs because a lender would have to invest in a system capable of recognizing that the consumer's inability to receive notices through certain methods or at a certain address.

Another commenter claimed that community banks would likely not attempt electronic notices, and thus would be left with the cost of providing paper notices.

However, a different industry participant stated that electronic notices, for which consent is taken over the phone, are in their experience 80 times cheaper than mail notices. The Bureau received several comments about methods of consenting to electronic delivery of the notices. One commenter argued that email notifications should only be allowed if the consumer explicitly consented to such notices, and that print text via mobile phone should be prohibited. Some commenters urged the Bureau to allow consent to electronic delivery to be received orally over the phone. One lender stated that 90 percent of customers had consented to receive electronic disclosures via verbal consent that would be either captured by a retail agent or by a call center agent on a recorded line (they appeared to be obtaining the consent while also closing the loan over the phone). A number of commenters also addressed the foreign language disclosures in proposed § 1041.15(a)(8). Several argued that the final rule should not require foreign language notices (which it did not propose but did seek comment on) because this would impose substantial costs and could involve wide-ranging consequences that deserve thoughtful consideration in a separate rulemaking. Other commenters argued that lenders should offer the model form in the language they use to communicate with consumers, in the language of the consumer's preference, or in the language that the lender uses to negotiate the transaction. One industry commenter suggested that the Bureau convene a Federal interagency and industry working group and address foreign language disclosures in a separate proceeding.

Final Rule

The Bureau is finalizing proposed § 1041.15(a) with no substantive changes except to renumber it as § 1041.9(a). It also made cosmetic or technical changes to § 1041.9(a)(2) and the commentary pertinent to § 1041.9(a) including, primarily, changes to section numbers in light of the reorganization of the rest of the regulatory text.

Based on its considerable experience with consumer testing, the Bureau has made the judgment that the qualitative user testing process for the model forms and notices is sufficient for purposes of this rule, especially because unlike the TILA–RESPA model disclosures, the model forms for this rule are relatively short and uncomplicated. Lenders remain free to conduct their own user-testing, including quantitative testing, and to improve upon the Bureau's model forms if their user-testing suggests further improvements are possible (and encourages lenders to share the results of that testing, and any specific improvements to the forms, which the Bureau may incorporate into the forms at a future date). The Bureau contracted with Fors March Group (FMG) to conduct qualitative user testing of the forms. While the sample size was indeed small—28 test subjects—each subject was given a one-on-one interview with an FMG staff member for about an hour. The interviews were conducted in two geographical locations, New Orleans and Kansas City. In addition, CFPB staff used the feedback after the round of testing in New Orleans to improve the model forms before the second round of

[1055] *See* 78 FR 79730 (Dec. 31, 2013).

testing in Kansas City. The Bureau did not conduct quantitative testing, though the Bureau agrees that quantitative testing could be advantageous. Regardless, it believes the testing it did suffices to show that the disclosures use plain language that is comprehensible to consumers, contains a clear format and design, and succinctly explains the information that must be communicated to the consumer.

There are a few differences between the regime for obtaining consent set forth in the proposal, and now the final rule, in comparison to the regime set forth in the E-Sign Act. That statute does not set forth the only electronic disclosure and consent requirements that an agency can prescribe, but rather presents general rules of the road where requirements are not otherwise specifically prescribed. It was not designed for this specific disclosure requirement, but rather, set forth default rules where others are not enacted specifically. Under the E-Sign Act, companies can only obtain consent after providing certain disclosures set forth in 15 U.S.C. 7001(c)(1)(B) and (c)(1)(C)(i). This rule does not require those disclosures—which would add marginal burden to the regime in this final rule—though companies may provide them if they wish. These disclosures require consumers to confirm through the particular electronic method that they can receive notices through that particular electronic method. Given the steps and potential delay that this requirement could impose on the origination process, the Bureau believes that the consumer consent regime being finalized will make it easier for consumers to provide (and lenders to obtain) consent to electronic delivery at origination. The E-Sign Act also requires certain actions when a company changes hardware or software requirements, which are not found in the rule (companies may provide these as well).[1056] The rule requires that the lender, when obtaining consent, must offer consumers the option to consent to the specific electronic method used (and not just general consent to electronic disclosures), and specifically requires that one method be provided—email. As the Bureau stated in the proposal, and now finds, consumers will benefit from being able to consent to specified electronic delivery methods—for example, a borrower may wish to consent to email but not mobile text messages (largely unavailable when the E-Sign Act was enacted).[1057] In certain circumstances, consent can also be provided by phone under E-Sign, which this rule would not allow. As stated in the proposal, the Bureau continues to believe that consumers would benefit from being able to see the specific delivery location—for example, the email address or phone number for text messaging. Of course, none of this means the lender *must* provide electronic notices; it is just an option.

The rule requires that lenders cease using an electronic method when a lender receives notification that the consumer is unable to receive disclosures through that method. Here, the Bureau contemplated a rejected email, text message, or other electronic communication, like an automated notification that a disclosure email or text was undeliverable. It does not agree with the commenters that this provision adds any particular level of uncertainty—when a lender receives any notice that the delivery method is no longer available, the lender cannot continue using that method. To the extent it is more burdensome than the E-Sign Act, it is for good reason—the Bureau does not wish to permit a lender to continue sending disclosures to an inactive email account or phone number, especially with regard to the unusual withdrawal notice where the disclosure is intended to warn consumers about an impending event.

The Bureau is not adding an option to allow oral consent to electronic delivery. It maintains that it would be helpful for consumers to see, and be able to retain, the type of delivery they are consenting to and which email address or phone number they are providing for this purpose. This requirement seems workable given lender practices. In the storefront, lenders could incorporate consent to electronic delivery into its in-person processes, and could have the consumer consent on paper or a computer screen. Online lenders could adjust their application process to have consumers consent to electronic delivery as part of the application process, even if they close the loan over the phone. They could even show the consent form electronically during application process or email it separately.

The bulk of the comments the Bureau received on § 1041.9(a) and (b) pertained to the burdens associated with the notice requirements. The Bureau has made changes to § 1041.9(b) that will substantially reduce the total aggregate burden of the disclosures, most notably that the notices no longer have to be sent before every payment attempt. Under the final rule, a payment notice must be sent before the first payment withdrawal (and can be provided during the origination process) and thereafter, notices only will have to be sent when there is an unusual withdrawal (defined as a payment that varies from a regular payment or minimum payment in the case of open-end credit, occurs on a date other than the regularly scheduled payment date, is processed through a different payment channel from the previous channel used, or is a re-presentment) or the payment attempt cap is met. Thus, taking the commenter's example of the borrower with a $1,000 loan payable over 12 months in semi-monthly installments, instead of providing 24 notices, the lender would only have to provide one (assuming there were no unusual payments, and the borrower never hit the payment attempt cap). Using the commenter's estimates, instead of costing more than two percent of the principal balance, it would cost 0.05 to 0.10 percent of principal. The lender would also able to provide that first and only payment notice during origination, thereby saving on postage as well. Given the changes discussed above, lenders may be able to avoid the need to send such paper notices at all if they avoid unusual withdrawals and hitting the cap, which should generally be rare events.

To the extent the costs of tracking consent to receive electronic notifications or to detect whether electronic communications are being rejected is too burdensome, lenders can always provide paper notices. But in the Bureau's experience, the technology to track borrower consent and detect rejected communications is readily available on the market today, and could be developed for this specific market, such that even small to mid-sized lenders would be able to procure that functionality from a vendor.

The Bureau concludes that providing notices through a pre-recorded call or a robo-call, or orally over the phone or in person, would not suffice to meet the purposes of the rule. The Bureau has determined that it is important for the notices to be retainable, such that a borrower can refer back to it at a later time—for example, to check that the right amount was debited. This is especially important now that lenders will not be providing notices before every payment withdrawal. Also, the burden of providing the notices is lower now that they are not required before every payment and, after origination,

[1056] 15 U.S.C. 7001(c)(1)(D).

[1057] The Bureau notes that lenders communicating by electronic means may be subject to additional requirements under the Telecommunications Consumer Protection Act (47 U.S.C. 227) or other authorities.

should only be necessary in rare circumstances.

The Bureau does not agree with consumer group commenters suggesting that it should not allow print text via mobile phones. In light of the constantly updating technology of the modern world—where some consumers may move frequently and may be more reliably communicated with through their phones—the Bureau believes this rule should allow communications to be made through the common communications means of the day. This means that for now, the Bureau will allow disclosures through mobile application or text message (provided that there is a link or PDF to the full disclosure); and that disclosures may be transmittable through other electronic means as they become available. As proposed, the Bureau is not requiring foreign language disclosures, and is instead finalizing the rule as proposed, which merely allows foreign language disclosures. Some of the Bureau's rules, like 12 CFR 1005.31(g), require disclosures in foreign languages in certain circumstances. The Bureau continues to believe that disclosures in languages other than English are a positive development in all markets for consumer financial products or services, where the customer base has become increasingly more diverse. It is not, however, prepared to make foreign language disclosures mandatory at this time with respect to these forms, largely because it recognizes that the current final rule will require lenders to engage in a significant amount of implementation work in order to begin complying with the rule, including the work to design and implement disclosures in English. In finalizing this rule, the Bureau is attempting to minimize compliance burden to the extent possible while maintaining the core protections of the rule. Although it has decided to allow but not mandate foreign language notices at this time, it may consider supplemental rulemakings or model forms in the future, when industry has fewer regulatory adjustments to manage and has developed more experience with the English-language forms.

9(b) Payment Notice

Proposed Rule

Proposed § 1041.15(b) required lenders to provide to consumers a payment notice before initiating a payment transfer from a consumer's account with respect to a covered loan. The Bureau notes here that under the final rule, this requirement has been scaled back to be required only in more limited payment transfer circumstances. As defined in proposed § 1041.14(a), a payment transfer would be any transfer of funds from a consumer's account that was initiated by a lender for the purpose of collecting any amount due or purported to be due in connection with a covered loan. The proposed notice contained timing requirements that would vary depending on the method of delivery, along with additional required information if the payment transfer was unusual in that it involved changes in amount, timing, or payment channel from what the consumer would otherwise be expecting. As discussed in the proposal and above in Market Concerns—Payments, when a lender initiates a payment transfer for which the consumer's account lacks sufficient funds, the consumer can suffer a number of adverse consequences. The consumer's bank will likely charge an overdraft or NSF fee. If the payment is returned, the lender may also charge a returned-item fee and/or a late fee. These fees can materially increase the overall amount that the consumer is required to pay. Moreover, the incidence of returned-item fees and other payments of these kinds appear to increase the likelihood that the consumer's account will be closed.

The Bureau believed that the payment notice could help consumers mitigate these various harms by providing a timely reminder that a payment transfer will occur, the amount and expected allocation of the payment as between principal and other costs, and other information that consumers may need to follow up with lenders or their depository institutions if they anticipate a problem with the upcoming withdrawal or in covering the payment transfer.

The Bureau believed that the notice could have value as a general financial management tool, but would be particularly valuable to consumers in situations in which lenders intend to initiate a withdrawal in a way that deviates from the loan agreement or prior course of conduct between the parties. As detailed above, the Bureau was aware that some lenders making covered loans sometimes initiate payments in an unpredictable manner, which may increase the likelihood that consumers will experience adverse consequences. Consumers have limited ability to control when or how lenders will initiate payment. Although paper checks specify a date and amount for payment, UCC sec. 4–401(c) allows merchants to present checks for payment on a date earlier than the date on the check. Lenders sometimes attempt to collect payment on a different day from the one stated on a payment schedule. The Bureau had received complaints from consumers who had incurred bank account fees after online payday and payday installment lenders attempted to collect payment on a different date from what was scheduled. It was also aware that lenders sometimes split payments into multiple pieces, make multiple attempts to collect in one day, add fees and charges to the payment amount, and change the payment method used to collect.

The Bureau was aware that these notices would impose some cost on lenders, particularly the payment notice under proposed § 1041.15(c), which would be sent before each payment transfer. It considered requiring the payment notice only when a payment transfer qualified as unusual, such as when there is a change in the amount, date, or payment channel. However, at the time of the proposal the Bureau believed that once lenders had built the infrastructure to send the unusual payment notices, the marginal costs of sending notices for all upcoming payments would likely to be relatively minimal. The Bureau noted that a number of lenders already had a similar infrastructure for sending payment reminders (*e.g.,* monthly bills). Indeed, a trade association representing online payday and payday installment lenders had expressed support for upcoming payment reminders.[1058] These lenders currently may choose to send out payment reminders before all payments initiated from a consumer's account. Others may be sending out notices for preauthorized EFTs that vary in amount in accordance with Regulation E § 1005.10(d), which requires payees to send a notice of date and amount ten days before a transfer that varies in amount from the previous transfer under the same authorization or from the preauthorized amount.

The Bureau describes each subparagraph of proposed § 1041.15(b) and (c) below, discusses the comments received on § 1041.15(b) and (c) together thereafter, and discusses the changes made to final § 1041.9(b).

[1058] "Bank account overdrafts are a lose-lose for online lenders and their customers. It is in the customers best interests as well as the lenders best interest for customers to not incur overdrafts. This is why we support payment reminders so that customers do not overdraft their accounts." Lisa McGreevy, "OLA Releases Statement in Response to CFPB Online Loan Payment Study," Online Lenders Alliance (Apr. 20, 2016), *available at http://onlinelendersalliance.org/ola-releases-statement-in-response-to-cfpb-online-loan-payment-study/.*

Proposed 15(b)(1) General

The proposal would have specifically required lenders to send a payment notice to a consumer prior to initiating a payment transfer from the consumer's account, subject to limited exceptions as specifically listed in proposed § 1041.15(b)(2) and the comments thereto.

Proposed 15(b)(2) Exceptions

Proposed § 1041.15(b)(2)(i) would except covered loans made pursuant to proposed § 1041.11 or proposed § 1041.12 from the payment notice requirement. The Bureau had limited evidence that lenders making payday alternative loans like those covered by proposed § 1041.11 take part in questionable payment practices. Given the cost restrictions placed by the NCUA on payday alternative loans and on the loans conditionally exempt under proposed § 1041.12, the Bureau believed it might have been particularly difficult to build the cost of providing the payment disclosure into the cost of the loan. It was concerned that lenders might be unable to continue offering payday alternative loans or the loans encompassed by proposed § 1041.12 if the disclosure requirement is applied.

Proposed § 1041.15(b) also provided a limited exception to the notice requirement for the first transfer from a consumer's account after the lender obtains the consumer's consent pursuant to proposed § 1041.14(c) (now final § 1041.8(c)), regardless of whether any of the conditions in proposed § 1041.15(b) apply. As discussed above, proposed § 1041.14 would have generally required a lender to obtain a consumer's consent before initiating another payment attempt on the consumer's account after two consecutive attempts have failed. Proposed § 1041.15(b) would allow lenders to forgo the payment notice for the first payment attempt made under the consumer's affirmative consent as the consent itself will function like a payment notice. Proposed comment 15(b)(2)(ii)–1 clarified that this exception would apply even if the transfer otherwise triggered the additional disclosure requirements for unusual attempts under proposed § 1041.15(b)(5). Proposed comment 15(b)(2)(ii)-2 explained that this exception would apply only to the first transfer when a consumer had affirmatively consented to multiple transfers in advance.

Proposed § 1041.15(b)(2) also provided an exception for an immediate single payment transfer initiated at the consumer's request as defined in proposed § 1041.14(a)(5). This exception would carve out situations where a lender is initiating a transfer within one business day of receiving the consumer's authorization.

During the SBREFA process and other external outreach, lenders raised concerns about how the Bureau's potential proposal would apply to one-time, immediate electronic payments made at the consumer's request. Industry commenters stated that, unless these payments were excepted from the requirement, lenders could be prohibited from deducting payments from consumers' accounts for several days in situations in which consumers had specifically directed the lender to deduct an extra payment or given approval to pay off their loans early. Similarly, if an advance notice were required before a one-time payment, consumers attempting to make a last-minute payment might incur additional late fees due to the waiting period required after the disclosure. The Bureau believed that these were valid policy concerns and accordingly proposed to except an immediate single payment transfer made at the consumer's request. It also believed that because this category of payments involved situations in which the consumer's affirmative request to initiate a transfer is processed within a business day of receiving the request, the consumer was unlikely to be surprised or unprepared for the subsequent withdrawal.

Proposed 15(b)(3) Timing

Proposed § 1041.15(b)(3) set forth timing requirements applicable to each of the three methods through which the payment notice can be delivered, which were mail, electronic, and in-person delivery. The minimum time to deliver the notice would range from six to three business days before the transfer, depending on the channel, as specified in the proposal. In proposing the timing requirements, the Bureau was attempting to balance several competing considerations about how timing may impact consumers and lenders. First, it believed that the payment notice information is more likely to be useful, actionable, and effective for consumers if it is provided shortly before the payment will be initiated. Consumers could use this information to assess whether there were sufficient funds in their account to cover the payment and whether they need to make arrangements for another bill or obligation that is due around the same time. However, consumers also might need some time to arrange their finances, to discuss alternative arrangements with the lender, or to resolve any errors. For example, if the payment were not authorized and the consumer wanted to provide a notice to stop payment to their account provider in a timely fashion under Regulation E § 1005.10(c)(1), the regulation would require the consumer to take action three business days before the scheduled date of the transfer.

The Bureau was also aware that the delay between sending and receiving the notice complicates timing considerations. For example, paper delivery via mail involves a lag time of a few days and is difficult to estimate precisely. Finally, as discussed above, the Bureau believed that electronic delivery might be the least costly and most reliable method of delivery for many consumers and lenders. However, some consumers would not have access to an electronic means of receiving notices, in which case a paper option would be their only option to receive the notices required under proposed § 1041.15(b). In light of these considerations, the Bureau believed that these timing requirements, which incorporate the delays inherent in various methods of delivery and the utility of the disclosure information for consumers, would help ensure that the content of the payment notice is effectively disclosed to consumers, consistent with the Bureau's authority under section 1032 of the Dodd-Frank Act.

Specifically, proposed § 1041.15(b)(3) would require the lender to mail the notice no earlier than 10 business days and no later than six business days prior to initiating the transfer. Proposed comment 15(b)(3)(i)–1 clarified that the six business days would begin when the lender placed the notice in the mail, rather than when the consumer received the notice. For a payment notice sent by mail, there might be a gap of a few days between when the lender sent the notice and when the consumer received it. The Bureau expected that in most cases this would result in the consumer receiving the notice between three and seven business days prior to the date on which the lender intended to initiate the transfer. This expectation was consistent with certain provisions of Regulation Z,[1059] which consider consumers to have received disclosures delivered by mail three business days after they are placed in the mail.

For a payment notice sent through electronic delivery along with the electronic short notice in proposed § 1041.15(c), consumers would be able to receive a notice immediately after it

[1059] 12 CFR part 1026.

is sent and without the lag inherent in paper mail. Proposed § 1041.15(b)(3)(ii)(A) would therefore adjust the time frames and require the lender to send the notice no earlier than seven business days and no later than three business days prior to initiating the transfer. Proposed comment 15(b)(3)(ii)(A)–1 clarified that the three business days would begin when the lender sends the notice, rather than when the consumer received or was deemed to have received the notice.

Proposed § 1041.15(b)(3) would require that if, after providing the payment notice through electronic delivery pursuant to the timing requirements in proposed § 1041.15(b)(3), the lender lost a consumer's consent to receive notices through a particular electronic delivery method, then the lender would have to provide the notice for any future payment attempt, if applicable, through alternate means. Proposed comment 15(b)(3)(ii)(B)–1 clarified that in circumstances when the lender received the consumer's loss of consent for a particular electronic delivery method after the notice has already been provided, the lender could initiate the payment transfer as scheduled. If the lender was scheduled to make any payment attempts following the one that was disclosed in the previously provided notice, then the lender would have to provide notice for that future payday attempt through alternate means, in accordance with the applicable timing requirements in proposed § 1041.15(b)(3). Proposed comment 15(b)(3)(ii)(B)–2 explained that alternate means could include a different electronic delivery method that the consumer has consented to in person or by mail. Proposed comment 15(b)(3)(ii)(B)–3 provided examples of actions that would satisfy the requirements in proposed § 1041.15(b)(3).

The Bureau was concerned that requiring lenders to delay the payment transfer past its scheduled date could cause consumers to incur late fees and finance charges. For example, if the lender attempts to deliver a notice through text message three days before the transfer date and the lender received a response indicating that the consumer's phone number was out of service, then the lender would not have sufficient time before the scheduled payment transfer date to deliver to payment notice by mail according to the timing requirements in proposed § 1041.15(b)(3). Although it would be preferable that consumers received the notice before any transfer in all circumstances, on balance the Bureau believed that the potential harms of causing payment delays outweighed the benefits of requiring delivery of the notice through another method. It was concerned that even if lenders were required to deliver the notice through another means, such as mail, alternative means also might not successfully deliver the notice to the consumer.

Under the proposal, if a lender provided the payment notice in person, then there would be no lag between providing the notice and the consumer's receipt. Similar to the timing provisions provided for the electronic short notice, proposed § 1041.15(b)(3) would provide that if the lender provided the notice in person, then the lender would have to provide the notice no earlier than seven business days and no later than three business days prior to initiating the transfer.

Proposed 15(b)(4) Content Requirements

Proposed § 1041.15(b)(4) specified the required contents of the payment notice, including an identifying statement, date and amount of the transfer, truncated information to identify the consumer account from which the withdrawal will be taken, loan number, payment channel, check number (if applicable), the annual percentage rate of the loan, a breakdown of how the payment is applied to principal and fees, and lender contact information. The proposed rule and comments thereto added more detail about these items. When the payment transfer had changed in a manner that makes the attempt unusual, the disclosure title would have to reflect that the attempt is unusual. The Bureau believed that this content would enable consumers to understand the costs and risks associated with each loan payment, consistent with its authority under section 1032 of the Dodd-Frank Act. The Bureau was aware that providing too much or overly complicated information on the notice may prevent consumers from reading and understanding it. To maximize the likelihood that consumers would read the notice and retain the most importance pieces of information about an upcoming payment, it believed that the content requirements should be minimal.

In particular, the Bureau considered adding information about other consumer rights, such as stop-payment rights for checks and EFTs, but had concerns that this information may be complicated and distracting. Consumer rights regarding payments are particularly complicated because they vary across payment methods, loan contracts, and whether the authorization is for a one-time or recurring payment. As discussed in Market Concerns—Payments, these rights are often burdensome and costly for consumers to utilize.

On the requirement to disclose APR, which is the one content requirement the Bureau is not finalizing as discussed below, it believed that providing information about the cost of the loan in the disclosure would remind consumers of the cost of the product over its term and assist consumers in their financial management, for instance in choosing how to allocate available funds among multiple credit obligations or in deciding whether to prepay an obligation. The Bureau recognized that consumers generally do not have a clear understanding of APR, as confirmed by the consumer testing of these model forms. It also stated at the proposal stage that APR nonetheless may have some value to consumers as a comparison tool across loan obligations even by consumers who are not deeply familiar with the underlying calculation.

Proposed 15(b)(5) Additional Content Requirements for Unusual Attempts

Under the proposal, if a payment transfer was unusual according to the circumstances described in the proposal, then the payment notice would have to include both the content provided in proposed § 1041.15(b)(4) (other than disclosure of the APR) and the content required by § 1041.15(b)(5), which would mandate the notice to state if the amount or the date or the payment channel differs from the amount of the regularly scheduled payment, and that the transfer would be for a larger or smaller amount than the regularly scheduled payment, as applicable. Proposed § 1041.15(b)(5) would require the notice to state, if the payment transfer date is not a date on which a regularly scheduled payment is due under the loan agreement, that the transfer will be initiated on a date other than the date of a regularly scheduled payment. For payment attempts using a payment channel different from the channel used for the previous transfer, proposed § 1041.15(b)(5) would require a statement to specify that the transfer would be initiated through a different payment channel, as well as the channel that the lender had used for the previous payment attempt. If the transfer was for the purpose of re-initiating a returned transfer, then proposed § 1041.15(b)(5) would require the notice to state that it was a re-initiation, along with a statement of the date and amount of the returned transfer and a statement of the reason for the return. Proposed comment 15(b)(5)–1 explained if the payment transfer was

unusual according to the circumstances described in proposed § 1041.15(b)(5), then the payment notice had to contain contents required by proposed § 1041.15(b)(4) (except for APR) and (b)(5). Proposed comment 15(b)(5)(i)–1 explained that the content requirement for varying amount applies when a transfer was for the purpose of collecting a payment that was not specified by amount on the payment schedule, or when the transfer was for the purpose of collecting a regularly scheduled payment for an amount different from the regularly scheduled payment amount according to the payment schedule. Proposed comment 15(b)(5)(ii)-1 explained that the content requirement for the date other than due date would apply when a transfer was for the purpose of collecting a payment that was not specified by date on the payment schedule, or when the transfer was for the purpose of collecting a regularly scheduled payment on a date that differed from regularly scheduled payment date according to the payment schedule.

The Bureau believed that all four of these circumstances—varying amount, date, payment channel and re-initiating a returned transfer—might be important to highlight for the consumer, so that the status of their loan is fully disclosed to them pursuant to section 1032(a) of the Dodd-Frank Act. If a lender initiated a payment that differed from the regularly scheduled payment amount authorized by the consumer, the payment was more likely to vary from consumer expectations and pose greater risk of triggering overdraft or NSF fees. The Bureau thus believed that these changes should be highlighted for consumers to understand the risks, attempt to plan for changed payments, and determine whether their authorization is being used appropriately. It also believed that changes in the date and channel of the payment could be important information for the consumer to prepare for the withdrawal and take steps as necessary. To effectively and fully understand their current loan status and alert consumers to a series of repeat attempts over a short period, the Bureau further found it important for the consumer to know if the past payment attempt failed and the lender is attempting to re-initiate a returned transfer.

Proposed 15(c)(1) General

The Bureau is combining the content from § 1041.15(c) into final § 1041.9(b) as well, and thus addresses these provisions here. Proposed § 1041.15(c) provided content requirements for an electronic short notice, essentially a truncated version of the payment notice formatted for electronic delivery through email, text message, or mobile application. This notice would be provided when the lender has obtained the consumer consent for an electronic delivery method and is proceeding to provide notice through such a delivery method. As described above, this electronic short notice would provide a web link to the complete payment notice that would be required by the proposed rule. The Bureau believed it was appropriate to tailor the notices in light of format limitations for electronic delivery channels that may be beyond the lender's control; as well as considerations about the ways consumers may access email, text messages, and mobile applications; privacy considerations; preferences for particular usage settings; and other issues. For all of these reasons, it found it appropriate for the electronic short notice to contain less information than the full payment notice, given that it links to the full notice. It was also persuaded that providing access to the full notice via the Web site link would appropriately balance related concerns to ensure that consumers could access the full set of notice information in a more secure, usable, and retainable manner. However, the Bureau asked for comment on this two-step structure in the proposal and, as discussed below, is finalizing additional ways to deliver the notices electronically, such as by providing the full text of the notice in the email and providing a PDF attachment of the full notice rather than a web link.

15(c)(2) Content

The proposed electronic short notice contained an abbreviated version of the proposed payment notice content, and would be an initial notice provided through a method of electronic delivery that the consumer has consented to, such as a text message or email, that would provide a link to a unique URL containing the full payment notice. It would include an identifying statement that describes the purpose of the notice and the sender of the notice; the date of the transfer, amount of the transfer, and consumer account information; and a unique Web site URL that the consumer may use to access the full payment notice.

15(c)(3) Additional Content Requirements

Under the proposal, if the electronic short notice was being provided under an unusual attempt scenario, then the notice would have to state what makes the payment attempt unusual by providing information about whether the amount, date, or payment channel has changed.

Comments Received

The Bureau received a number of comments about the payment notice requirements proposed in the rule. Some commenters noted that the notices were beneficial because they would provide information to consumers that might allow them to avoid unexpected bank fees. On the other hand, a commenter argued that the timing requirements of the payment notices could pose safety-and-soundness risks by creating a ''loophole'' for those seeking to avoid payment, and create barriers to borrowers repaying their contractual obligations. It appears this commenter suggested that because borrowers would be made aware of a pending payment, they might choose to stop that payment, which concerned the commenter because it would make it harder to collect.

Many industry commenters raised burden concerns about providing the notice. Several raised concerns about providing the paper notices through the mail. For example, one lender explained that compliance costs for mailed notices are between $10 and $24 for a $1,000 12-month loan and another stated that mailed written notices would be 80 times more expensive than electronic notices.

Additionally, as noted above when discussing § 1041.9(a) of the final rule, several commenters asserted that the payment notice requirements create compliance complexity. One commenter argued that because these notice requirements may preempt some and overlay other State law requirements, the requirement could cause both regulatory and consumer confusion. For example, the commenter claimed that if finalized, the rule could potentially require lenders to provide multiple notices with the same information in different formats (one required by this rule and the other required by State law). The commenter also suggested that lenders would incur substantial costs to try to navigate this dynamic.

Another commenter argued that a similar overlap dynamic could exist with TILA and Regulation Z, which imposes disclosure requirements for creditors at loan origination. The commenter claimed that companies which are lenders under this rule and ''creditors'' under TILA and Regulation Z would have potentially duplicative disclosure requirements that would be burdensome and perhaps confusing to consumers, thus recommending that the

Bureau issue a revised proposal to better align with the requirements in TILA and Regulation Z.

Several stakeholders commented on the proposed content of the payment notices, arguing that they merely would disclose information pertaining to an agreement into which the borrower had already entered, and thus would be unnecessary, or could frustrate or confuse consumers. A number of commenters asked the Bureau to provide a means for consumers to opt out of the notices, explaining that some consumers may not want to receive a stream of notices for normal payment activity. One commenter claimed that consumers might be disconcerted by receiving a comprehensive disclosure, and that it would be atypical to receive a disclosure that explains something to which a consumer already had agreed. This commenter claimed that consumers might not want the notices, or be frustrated by receiving them, and that their frustration would likely be aimed at the lenders. Many of these commenters focused their concerns on instances where a borrower agreed to regular automatic payments to make payments on installments.

One consumer advocate suggested using the term ''balance'' instead of ''principal.'' Others suggested providing all of the notice information in the body of the email, given concerns that a link may be at times difficult for consumers to access. The Bureau did not receive any comments about privacy concerns from including the full notice in the body of the email or from a web link notice.

Several commenters argued that instead of requiring lenders to obtain new payment authorizations after two failed attempts, the Bureau should include in these notices a disclosure requirement about consumers' rights to revoke existing authorizations. Other commenters had specific comments about the content of the notices. Some generally agreed with the prohibition against providing the full account number, agreeing with the Bureau that a full account number could leave consumers vulnerable to fraud. One commenter argued that the Bureau should require that the name of the Originating Depository Financial Institution (ODFI) be included in the notices. Another argued that the Bureau should not require inclusion of a check number, which they claim may interfere with lenders' ability to use remotely created checks and payment orders. A number of commenters expressed agreement with the requirement to include APR in the notices, including a suggestion to disclose an APR that includes credit insurance premiums. Others cited the Bureau's findings in the mortgage context that borrowers find APR confusing or unhelpful, arguing that it should not be included in the payment notices.

One commenter argued that credit union lenders, unlike other lenders, already provide most of the information in the proposed disclosures in monthly billing statements. Credit union commenters expressed concern that they would have to comply with the payment provisions, including by providing payment notices, when making loans under the NCUA's PAL program. These commenters argued that credit unions that already provide the information via billing statement should be exempted from having to provide this information again in a separate disclosure.

Finally, one commenter argued that depository institutions acting as service providers to lenders would have no way to know, under current technological means, whether transactions were related to covered loans, and would have no way to tell whether lenders had complied with notice requirements. For this reason, the commenter asked the Bureau to clarify under the final rule that the depository institutions holding the lender's or borrower's deposit account would not be held responsible for compliance with notice requirements.

Final Rule

The Bureau is now finalizing proposed § 1041.15(b) and (c), renumbered as § 1041.9(b), with significant deviations from the requirements proposed. In response to many comments about the burden of the notice, along with other concerns such as how consumers may be overwhelmed and desensitized by notices that are provided before every payment withdrawal, the Bureau is finalizing a scaled back payment notice requirement. Under the final rule, the notice will be required before (i) the first time a lender initiates a withdrawal and (ii) any unusual payment notices thereafter. There are also additional exceptions for open-end credit products, which already have periodic statement requirements under Regulation Z.

In particular, in deciding to modify the proposal in this manner, the Bureau found compelling the comments it received about over-disclosure and burdens associated with notices before every automatic payment withdrawal on installment loans. The upcoming payment notices may not be necessary for long term loans that are not experiencing unusual payment activity. However, due to concerns about payment transparency identified in the proposal, consumers would benefit from obtaining an upcoming payment notice for the first payment.

This revision would incentivize lenders to stick to the payment schedule and would only impose costs—which commenters pointed out may be more significant for paper notices—if they deviate from the consumer's authorization. This change would eliminate the need for a consumer opt-out regime, because after the first payment consumers would only receive notices if something unusual was happening. It also may make the unusual payment notices more salient for consumers, who otherwise could become desensitized to notices that are delivered before every payment. Accordingly, the Bureau decided that if a borrower is given a disclosure before the first withdrawal, and there are future withdrawals that are not unusual—meaning they do not vary in amount, are not on a date other than the date of regularly scheduled payment, are not processed through a different payment channel, and are not for purposes of re-initiating a previous failed transfer—then that first payment notice should suffice to give borrowers notice of payment characteristics. Also in response to burden concerns, the Bureau has adjusted the timing requirements so that the first payment withdrawal notice could be provided earlier, such as during origination. Of course, under this new notice regime, the requirement that the initial notice be retainable is even more important. To further limit burden and allow flexibility as consumer preferences and technologies change, the Bureau is finalizing additional ways to deliver the notices electronically, including by providing the full text of the notice in the email and providing a PDF attachment of the full notice rather than a web link.

To implement these revisions, the Bureau has restructured the regulatory text. At a high level, in the proposal the Bureau structured paragraph (b) as the requirement to provide notices before all withdrawals (including various requirements depending on whether the payments were unusual), and paragraph (c) set forth the ability to provide an electronic short notice instead. In the final rule, paragraph (c) has been built into paragraph (b), at paragraph (b)(4). Additionally, the Bureau has restructured paragraph (b) by splitting up the requirements for first payment withdrawal notices and unusual withdrawal notices—in paragraph (b)(2)

and (3) respectively—as separate paragraphs.

To clarify situations when the notices are required under this more limited frequency, definitions were added for the terms *first payment withdrawal* and *unusual withdrawal* under § 1041.9(b)(1)(i) and (ii), respectively. To ease readability, provisions are now repeated in paragraphs (b)(2) and (3) such that the requirements for each type of notice are self-contained in their respective paragraphs. The commentary has been revised to incorporate these changes as well. In finalized paragraph (b)(2)(i), the Bureau has changed how early a first payment withdrawal notice can be provided by mail, electronically, or in person. Specifically, lenders can now provide the notice as early as when the lender obtains payment authorization. This change was intended to further reduce burden to lenders, as now lenders, if they wish, may provide the first payment withdrawal notice at origination, when they are already interacting with the consumer and providing other loan materials. Although the information would not be as timely for consumers, consumers would receive the information in retainable form and there are transparency benefits to incentivizing lenders to commit to a particular payment date, channel, and amount at the time of origination.

The Bureau did not finalize proposed paragraph (b)(2)(i), which would have exempted payment transfers in connection with loans made under proposed § 1041.11 or § 1041.12 because the Bureau is not finalizing either of those sections here.

The Bureau is also not finalizing the requirement to disclose APR. Although the Bureau received some comments supporting its inclusion, it agrees with other commenters that APR disclosures may be duplicative of the disclosures provided under Regulation Z, especially with regard to the first payment withdrawal notice that might be provided at origination, which the Bureau believes will now make up the majority of the notices provided under this rule.

The Bureau is not changing the term ''principal'' to ''balance.'' Balance seems misleading in this context because the notice breaks out principal from interest and fees, and ''balance'' might lead consumers to believe that the interest and fees are not outstanding in addition to the principal amount.

The Bureau is finalizing the requirement that lenders only include a truncated account number in the notices. It is concerned that full account number is sensitive information given that a lender or fraudster could use it in conjunction with a bank routing number to initiate an ACH or RCC transfer. Truncated account number (such as the last four digits) would still allow consumers to identify the account. The Bureau continues to believe that the account information is important for consumers to track which account is being debited. However, despite disclosure of this information on the notice, the Bureau has concerns that lenders at times debit accounts that the consumer did not provide authorization for. It will continue to monitor these unauthorized transfer practices related to account switching, and maintains that requiring a lender to commit to a specific account number, via notice, may assist in that effort.

The Bureau is adding provisions to address overlap of the unusual withdrawal notices with disclosures required under Regulation Z for open-end credit plans. Under paragraph (b)(3)(i)(D), the unusual withdrawal notices may be provided in conjunction with the periodic statement required under Regulation Z, 12 CFR 1026.7(b). The Bureau added this provision to reduce burden on open-end lenders, which already must provide periodic statements under Regulation Z—which provides its own timing requirements—and may prefer to provide the notices at the same time; also, the Bureau believes that consumers of open-end credit would benefit, for comparison purposes, from receiving an unusual withdrawal notice in conjunction with or close in time to the periodic statement. It is further aware that minimum payments due for open-end credit plans may fluctuate depending on the outstanding balance. Under paragraph (b)(3)(ii)(C)(*1*)(*ii*), that unusual withdrawal notice need only include content about varying amount when the amount deviates from the scheduled minimum payment due as disclosed in that periodic statement required under Regulation Z.[1060] The Bureau believes consumers would benefit from receiving an unusual withdrawal notice when an open-end credit lender deviates from the scheduled payment amount due. As the first payment withdrawal notice contains information that is not on the periodic statement (*e.g.,* payment channel) and that it is a one-time notice that can be provided at origination, the Bureau believes that open-end credit consumers would benefit from receiving the first payment withdrawal notice.

The Bureau adjusted the electronic delivery provisions to allow for options beyond the two-step short notice plus link process. Under paragraph (b)(4)(i), there is an exception to the electronic short notice requirement if a lender is using email delivery as provided in paragraph (b)(4)(iii). Under paragraph (b)(4)(iii), when the consumer has consented to receive disclosures through electronic delivery, and the method of electronic delivery is email, the lender may either deliver the full notice required by paragraph (b)(1) in the body of the email or deliver the full notice as a linked URL Web page or PDF attachment along with the electronic short notice as provided in paragraph (b)(4)(ii). The revision is meant to address burden concerns raised by lenders and access concerns raised by consumer advocates.

The Bureau has made corresponding changes in the commentary, and added a number of comments providing additional clarification about the meaning of first payment withdrawal. Comment 9(b)(1)(i)–1 explains that the term encompasses the first payment initiated by the lender, so it is not necessarily the first payment on a covered loan; for example, a lender that obtains payment authorization after a few payments have been made by the consumer in cash would deliver the notice later in the loan term. Comment 9(b)(1)(i)–2 explains that when an open-end credit plan is not a covered loan at origination, but becomes one later, the first payment withdrawal after the loan becomes a covered loan would qualify as the first payment withdrawal. Comment 9(b)(2)(i)–1 specifies that the earliest point at which a lender may provide the first payment withdrawal notice is when the lender obtains the payment authorization. It also specifies that the notice can be provided simultaneously with receiving payment authorization, which could be at origination. The Bureau did not finalize comment (b)(3)(i)(B)–3 because it implicated regular payment notices that are now not contemplated in the final rule.

The Bureau added comments 9(b)(3)(ii)(C)–1 and –2 to provide further guidance on unusual withdrawal notices, with the latter providing an example of a payment that is unusual because the payment channel has changed. The Bureau added a paragraph to comment 9(b)(3)(ii)–3 describing how circumstances that trigger an unusual withdrawal for open-end credit plans are more limited according to § 1041.9(b)(3)(ii)(C)(*1*)(*ii*). It now says that since the outstanding balance on open-end credit plans may change over time, the minimum payment due on the scheduled payment date may also fluctuate. However, the minimum

[1060] 12 CFR 1026.7(b).

payment amount due for these open-end credit plans would be disclosed to the consumer according to the periodic statement requirement in Regulation Z. The payment transfer amount would not be considered unusual with respect to an open-end credit plan unless the amount deviates from the minimum payment due as disclosed in the periodic statement. Furthermore, the requirement for a first payment withdrawal notice under § 1041.9(b)(2) and the other circumstances that could trigger an unusual withdrawal notice under § 1041.9(b)(3)(ii)(C)(*2*) through (*4*), continue to apply.

Lastly, the Bureau added comment 9(b)(4)–1 to clarify that an electronic short notice must be used for electronic delivery other than email, but that the lender can choose whether to use the electronic short notice or the full text when using email.

The Bureau has determined that many of the extensive changes it made to the final rule largely incorporate and address the critical feedback received from commenters. While it does not share the fear that a borrower might choose not to pay if given a more informed choice, commenters' concerns about the notices making collections more difficult are largely addressed by the fact that consumers will no longer receive notices before every payment. The Bureau also made changes to address concerns about overlapping Regulation Z requirements by adding caveats for open-end credit and taking APR off the notices. And as stated above, the compliance burden associated with payment notices should be reduced significantly now that lenders will only need to provide notices on the first payment withdrawal, and before unusual withdrawals.

The Bureau does not agree that it needs to enact an opt-out provision for these notices. It has addressed concerns about consumers becoming desensitized to multiple identical notices by eliminating the need to send multiple identical notices. As lenders will only be sending notices upon infrequent events (the first payment, an unusual payment, or when the payment attempt cap is met), the risk of overloaded consumers is minimized; additionally, the Bureau wants to ensure that borrowers are aware of these rare events, and an opt-out regime might undermine that goal—including by allowing lenders to use the opt out feature to surreptitiously initiate payments that fall outside of consumers' expectations.

Credit union lenders making loans under the PAL program will not have to comply with any parts of this rule, including the payment notices. To the extent commenters believed that the Bureau's exclusion did not fully capture all PAL program loans, the Bureau has added a clarification in § 1041.3(e) to explicitly exclude all PAL program loans.

The Bureau does not see a basis for requiring lenders to identify the ODFI on the notices. Borrowers do not have a relationship with the ODFI, and would not need that information to understand any of the triggering events for which notices are required. Nor would borrowers need that information to enact a stop payment or revoke an authorization. The Bureau also knows from its experience in disclosures and consumer testing about the value of keeping the content of the notices limited so as not to crowd out or distract from the most important content.

The Bureau maintains its view that a check number should be on the first payment withdrawal notices. As described above in Market Concerns—Payments, borrowers may need that information to enact a stop payment. Contrary to one commenter's suggestion, the Bureau believes that this information will be useful to consumers.

The Bureau is not aware of any State laws that would directly conflict with the notice requirements set forth in the proposal or this final rule. It believes it is important that all consumers in all States receive these notices, and trusts that State officials will find an appropriate way to ensure that improved disclosures required by State laws are helpful to consumers in their State, in accordance with their independent judgment.

9(c) Consumer Rights Notice

The Bureau has decided to finalize proposed § 1041.15(d) and (e) as combined into § 1041.9(c) of the final rule. Other than adding some additional options for electronic delivery—which were also added to the notices in § 1041.9(b)—the Bureau is finalizing the consumer rights notice as proposed. Its reasons for doing so are set out below.

Proposed Rule

Proposed 15(d)(1) General

Proposed § 1041.15(d) required lenders to provide consumers with a consumer rights notice after a lender has initiated two consecutive or concurrent failed payment transfers and triggered the protections provided by the proposed rule. It also would provide timing and content requirements for this consumer rights notice, which would be triggered when the lender received information that its second consecutive payment attempt has failed. As described above, proposed § 1041.14 would have limited a lender's ability to initiate a payment transfer after two consecutive attempts have failed, allowing the lender to initiate another payment attempt from the consumer's account only if the lender had received the consumer's consent under proposed § 1041.14(c) or authorization to initiate an immediate one-time transfer at the consumer's request under proposed § 1041.14.

15(d)(2) Timing

The proposed rule would require a lender to send the consumer rights notice no later than three business days after the lender received information that the second consecutive attempt had failed, which proposed comment 15(d)(2) clarified would be triggered whenever the lender or its agent, such as a payment processor, received information that the second attempted payment transfer had failed. The Bureau believed that when a lender had initiated two consecutive failed payment transfers and triggered the protections provided by proposed § 1041.14(b), a consumer might not be aware that the lender was no longer permitted to initiate payment from the consumer's account. In the meantime, some loans might accrue interest or fees while the balance would remain unpaid. For these reasons, the Bureau stated that the consumer rights notice should be provided shortly after the second attempt fails. However, the Bureau was aware that, depending on the payment method, there may be a delay between the lender's initiation of the payment transfer and information that the payment transfer has failed. Accordingly, the Bureau proposed to require the lender to send the consumer rights notice within three business days after the lender received information that the payment transfer has failed.

15(d)(3) Content Requirements

The proposal would also specify the content requirements for the consumer rights notice. The Bureau believed that a consumer should know that a lender has triggered the provisions in proposed § 1041.14 and was no longer permitted to initiate payment from the consumer's account. It also considered it important to inform consumers that Federal law prohibits the lender from initiating further payment withdrawal attempts. Given that proposed § 1041.14 would prohibit the lender from initiating another payment attempt without a new consumer authorization, the Bureau proposed it would also be useful for the consumer to be aware that the lender may be contacting the consumer to

discuss payment choices. Consistent with the Bureau's authority under section 1032(a) of the Dodd-Frank Act, this content would inform consumers of the payment status on their covered loans. It also might help prevent consumer confusion or misinformation about why the lender cannot initiate another payment, by helping to ensure that this information about the situation is effectively, accurately, and fully disclosed to the consumer. The proposed rule specified that this content would include an identifying statement, a statement that the lender's last two attempts to withdraw payment had failed, information about the consumer account and loan identification information, a statement on the Federal law prohibiting the lender from initiating further transfers without the consumer's permission, a statement that the lender could contact the consumer to discuss payment choices going forward, the circumstances of why the lender could no longer withdraw payments from the consumer's account, and information about the Bureau.

15(e) Electronic Short Notice

For lenders to deliver the required consumer rights notice through an electronic delivery method, the proposed rule would require the lenders to provide an electronic short notice that contains a link to the full consumer rights notice; a truncated version of the content specified in the proposal; an email subject line, if applicable; and a unique Web site URL that links to the full consumer rights notice. For many of the same reasons discussed above in connection with proposed § 1041.15(c), the Bureau believed that the electronic short notice should contain limited content to maximize the utility of notices for consumers and minimize the burden on lenders. Consistent with the Bureau's authority under section 1032 of the Dodd-Frank Act, these proposed requirements would help ensure that consumer rights under proposed § 1041.14 are effectively disclosed to consumers.

Proposed § 1041.15(e)(2) specified that the electronic short notice must contain an identifying statement, a statement that the last two attempts were returned, consumer account identification information, and a statement of the prohibition under Federal law, using language substantially similar to the language set forth in the proposed model form. These terms were described for the full consumer rights notice in proposed § 1041.15(d)(3)(i), (ii), (iii), and (v). Proposed comment 15(e)(2)–1 clarified that when a lender provides the electronic short notice by email, the email had to contain this identifying statement in both the subject line and the body of the email. In order to provide consumers access to the full consumer rights notice, proposed § 1041.15(e)(2)(v) would also require the electronic short notice to contain the unique URL of a Web site that the consumer may use to access the consumer rights notice.

The Bureau understood that the unique Web site URL contains limited privacy risks because it would be unlikely that a third party will come across a unique URL. Even if a third party did discover this URL, the notice would not contain identifying information such as the consumer's name or full account number.

Comments Received

Many of the comments relating to the notices were aimed more generally at all of the notice requirements, and not specifically at the consumer rights notice. For example, some commenters repeated the concern that these provisions would create additional regulatory requirements for loans made under the NCUA's PAL program, which is not correct because those loans are not subject to the notice requirements. Others raised general concerns about the total compliance burden, which has been substantially lessened due to various changes in the final rule, including a significant scaling back of the frequency of the notices. Those comments are all addressed in the earlier discussions of comments above. Lastly, the Bureau did not receive any comments about the specific timing or content of the consumer rights notices.

Final Rule

The Bureau is now finalizing proposed § 1041.15(d) and (e) as § 1041.9(c) of the final rule. It has concluded that consumers should be informed when a lender has triggered the threshold of two consecutive failed payment withdrawal attempts so that they are made aware of the failed attempts and of the fact that, by operation of law, further attempts will cease even though they remain obligated to make continuing loan payments. The Bureau is also concerned that some lenders may pressure consumers to provide affirmative consent and could present the reasons behind the re-initiation limit in an incomplete manner. It has made the judgment that requiring disclosure of information about prior failed payments and consumer rights under § 1041.8 of the final rule would help ensure that the costs, benefits, and risks of the loan and associated payments are effectively disclosed to consumers, consistent with its authority under section 1032 of the Dodd-Frank Act. Due to these policy considerations, the Bureau has determined that a lender should be required to provide a standardized consumer rights notice after it has initiated two consecutive attempted payment withdrawals have failed.

The Bureau has made a few technical changes to reconcile the numbering changes, but otherwise is finalizing these paragraphs as proposed with only one substantive change to the rule and a corresponding change to the commentary. To ease burden and provide lenders with additional options—which may be beneficial to consumers giving changing preferences and privacy concerns in an evolving technological world—the Bureau is explicitly stating that when making electronic delivery of the consumer rights notices via email, lenders can, if they choose and the consumer has provide required consent, provide the full notice in the text of the email instead of the electronic short notice, or provide the full notice in a PDF attachment instead of through a linked URL Web page.

Lastly, the Bureau notes that the exclusions and exemptions listed in § 1041.3, including that for PAL loans, applies to all sections of part 1041, including this section.

Subpart D—Information Furnishing, Recordkeeping, Anti-Evasion, and Severability

Sections 1041.10 Information Furnishing Requirements and 1041.11 Registered Information Systems

Overview of the Proposal

As described earlier, the Bureau proposed that it is an unfair and abusive practice to make a covered short-term loan without reasonably determining that the consumer has the ability to repay the loan. The Bureau proposed to prevent this abusive and unfair practice by, among other things, including in the proposal requirements for how a lender could reasonably determine that a consumer has the ability to repay a loan.

The Bureau stated that, in order to achieve these consumer protections, a lender must have access to reasonably comprehensive information about a consumer's current and recent borrowing history, including covered loans made to the consumer by other lenders, on a real-time or close to real-time basis. As discussed above, online borrowers appear especially likely to move from lender to lender. This makes it particularly important for online

lenders to have access to information about covered loans made by other lenders in order to assess properly a consumer's eligibility for a loan under the proposal. The Bureau proposed § 1041.16 to require lenders to furnish certain information about most covered loans to each information system registered with the Bureau pursuant to proposed § 1041.17.[1061] This requirement was intended to be in addition to any furnishing requirements existing under other Federal or State law. The proposed registered information systems would be consumer reporting agencies within the meaning of sec. 603(f) of the Fair Credit Reporting Act (FCRA).[1062] Accordingly, lenders furnishing information to these systems under proposed § 1041.16 would be required to comply with the provisions of the FCRA and its implementing regulations applicable to furnishers of information to consumer reporting agencies.[1063] The furnishing requirement under proposed § 1041.16 would enable a registered information system to generate a consumer report containing relevant information about a consumer's borrowing history, regardless of which lender had made a covered loan to the consumer previously. A lender contemplating making most covered loans to a consumer would be required to obtain a consumer report from a registered information system and consider such a report in determining whether the loan could be made to the consumer, in furtherance of the consumer protections of proposed part 1041.[1064]

In developing the proposal, the Bureau considered an alternative approach to ensure that lenders could obtain reasonably comprehensive information about a consumer's borrowing history across lenders. Under this alternative approach, lenders would furnish information about covered loans to only one of the entities registered with the Bureau, but would be required to obtain a consumer report from each such entity.[1065] However, the Bureau preliminarily believed that this approach would be costlier for lenders than the proposed approach because lenders potentially would need to obtain several consumer reports for every application for a covered short-term loan made under proposed § 1041.5 or § 1041.7.[1066] The Bureau recognized the costs involved in furnishing to multiple entities but anticipated that those costs could be substantially reduced with appropriate coordination concerning data standards. The Bureau considered an alternative under which lenders would be required to furnish information to the Bureau or a contractor designated by the Bureau, and to obtain a report from the Bureau or its contractor. The Bureau believed that these functions would be better performed by the private sector and that the proposed approach would permit faster implementation of the rule. Further, it noted there may be legal or practical obstacles to this alternative approach.

The proposal would have required the Bureau to identify the particular consumer reporting agencies to which lenders were required to furnish information pursuant to proposed § 1041.16, and from which lenders would obtain consumer reports pursuant to proposed § 1041.5 and § 1041.7. Specifically, under proposed § 1041.17, the Bureau would have registered these consumer reporting agencies with the Bureau as information systems. Lastly, proposed § 1041.17 set forth processes for registering information systems before and after the effective dates of the furnishing obligations under proposed § 1041.16, and established the conditions that an entity had to satisfy to become a registered information system.

Legal Authority for Subpart D

A. Section 1031(b)

Section 1031(b) of the Dodd-Frank Act authorizes the Bureau to prescribe rules for the purpose of identifying unfair or abusive acts or practices, which rules may include requirements for the purpose of preventing such acts or practices.[1067] As discussed above, the Bureau determined that it is an unfair and abusive practice to make a covered loan without determining that the consumer has the ability to repay the loan. Accordingly, consistent with aspects of the proposed rule, this final rule requires lenders to determine the consumer's ability to repay a covered loan, including by reviewing the consumer's borrowing history and any current difficulty with repaying an outstanding loan.

The provisions of proposed §§ 1041.16 and 1041.17 were designed to ensure that lenders would have access to information to achieve the consumer protections of proposed §§ 1041.5 and 1041.7. The Bureau believed that to prevent the abusive or unfair practices identified in the proposed rule, it would be necessary or appropriate to require lenders to obtain and consider relevant information about a borrower's current and recent borrowing history, including covered loans made by all lenders. Requiring lenders to furnish relevant information concerning most covered loans pursuant to proposed § 1041.16 would ensure that lenders have access to a reliable and reasonably comprehensive record of a consumer's borrowing history when considering extending the consumer a loan. In turn, this would ensure that consumers receive the benefit of the protections imposed by proposed §§ 1041.5 and 1041.7.

B. Section 1024(b)

Section 1024(b)(7) of the Dodd-Frank Act provides that the Bureau may: (A) ''prescribe rules to facilitate supervision of persons described in subsection (a)(1) and assessment and detection of risks to consumers;'' (B) ''require a person described in subsection (a)(1), to generate, provide, or retain records for the purposes of facilitating supervision of such persons and assessing and detecting risks to consumers;'' and (C) ''prescribe rules regarding a person described in subsection (a)(1), to ensure that such persons are legitimate entities and are able to perform their obligations to consumers.'' [1068] The provisions in proposed § 1041.17—including the

[1061] The proposal required entities seeking to become registered information systems after the effective date of proposed § 1041.16 to first be provisionally registered for a period of time.

[1062] 15 U.S.C. 1681a(f).

[1063] These provisions include a number of requirements relating to the accuracy of information furnished, including the requirement to investigate consumer disputes and to correct and update information. *See, e.g.,* 15 U.S.C. 1681s–2(a) through (b); 12 CFR 1022.42 through 1022.43. Compliance with the FCRA may require that information in addition to that specified in the proposal is furnished to information systems registered with the Bureau. The proposed furnishing requirements aimed to ensure that lenders making most loans covered under the proposal would have access to information necessary to enable compliance with the provisions of the proposal, but would not supersede any requirements imposed upon furnishers by the FCRA.

[1064] The proposal explained that such lenders would be subject to the provisions of the FCRA and its implementing regulations applicable to users, including the requirement to provide a consumer a notice of taking an adverse action based in whole or in part on information contained in a consumer report. *See, e.g.,* 15 U.S.C. 1681m(a).

[1065] If lenders were required to furnish information to only one consumer reporting agency, the Bureau identified a substantial risk that, for many consumers, no consumer reporting agency would be able to provide a reasonably comprehensive report of the consumer's current and recent borrowing history with respect to covered loans across lenders.

[1066] Under the proposal, a lender would have had to review a consumer report in connection with loans made pursuant to proposed §§ 1041.5, 1041.6, 1041.7 and 1041.9. For ease of reference, this section-by-section analysis only refers to proposed § 1041.5 and/or § 1041.7 because the Bureau is adopting these proposed sections in the final rule (as §§ 1041.5 and 1041.6) and is not adopting proposed §§ 1041.6 and 1041.9.

[1067] 12 U.S.C. 5531(b).

[1068] 12 U.S.C. 5514(b)(7)(A)–(C).

criteria governing when the Bureau may register or provisionally register information systems, suspend or revoke such registration or provisional registration, or deny applications for registration or provisional registration—were proposed to facilitate supervision, enable the assessment and detection of risks to consumers, and ensure that registered information systems are legitimate entities able to perform their obligations to consumers.

Proposed § 1041.17 permits the Bureau to provisionally register or register an information system only if the Bureau determines, among other things, that the information system acknowledges that it is, or consents to being, subject to the Bureau's supervisory authority. Section 1024 of the Dodd-Frank Act grants the Bureau supervisory and enforcement authority over, among other non-bank persons, ''larger participant[s] of a market for other consumer financial products or services,'' as the Bureau defines by rule.[1069] In 2012, the Bureau promulgated a final rule defining larger participants of the market for consumer reporting.[1070] As noted in the proposal, the Bureau believes that entities that are registered information systems would be non-depository institutions that qualify as larger participants in the market for consumer reporting, and their acknowledgment would reflect that status. To the extent such an entity is not a larger participant, or if there is any ambiguity concerning that status, the proposal would require that an entity consent to the Bureau's supervisory authority to be eligible for registration as an information system.[1071]

C. Sections 1022(b), 1022(c), and 1021(c)(3)

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.'' [1072] The criteria defined in proposed § 1041.17 would ensure that registered information systems provide information to the Bureau about their activities and compliance systems or procedures. In addition to helping to achieve the purposes and objectives of the proposed rule, these provisions were proposed to ensure that ''consumers are protected from unfair, deceptive, or abusive acts and practices,'' and that ''markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.'' [1073] Section 1021(c)(3) of the Dodd-Frank Act provides that it is a function of the Bureau to ''publish[ ] information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets.'' [1074] Section 1022(c)(7) further authorizes the Bureau to ''prescribe rules regarding registration requirements applicable to a covered person, other than an insured depository institution, insured credit union, or related person.'' [1075]

Pursuant to the authorities described above, the Bureau is thus finalizing subpart D.[1076]

Effective and Compliance Dates

Although the effective and compliance dates of the various sections of the rule are discussed in part VI, it is necessary to address them here also, as the imposition of information furnishing requirements and the registration of information systems involve operational issues where timing is a significant factor.

Proposed Rule

As discussed in the proposal, the Bureau believed that building a reasonably comprehensive record of recent and current borrowing would take some time and raises a number of transition issues. For entities that wanted to become registered information systems before the furnishing requirements under proposed § 1041.16 take effect, the Bureau proposed a process that would generally work in the following sequence: Proposed § 1041.17 would take effect 60 days after publication of the final rule in the **Federal Register** so that the standards and process for registration would become operative. Interested entities would submit to the Bureau an application for preliminary approval for registration and, after receiving preliminary approval and obtaining certain written assessments from third parties concerning their compliance programs, a full application for registration. After an entity became a registered information system, the Bureau proposed to provide at least 120 days for lenders to onboard to the information system and prepare for furnishing before proposed § 1041.16 began to require furnishing. As detailed in the section-by-section analysis of proposed § 1041.17, the Bureau proposed a timeline for these steps that it believed would ensure that information systems would be registered, and lenders ready to furnish, on the date that the furnishing obligation in proposed § 1041.16 becomes effective.

Ultimately, the Bureau proposed allowing approximately 15 months after publication of the final rule in the **Federal Register** for information systems to complete the registration process described above, and for lenders to onboard to registered information systems and prepare to furnish. The Bureau also considered whether an additional period was needed between the date that furnishing to registered information systems would begin and the effective date of the requirements to obtain a consumer report from a registered information system under proposed §§ 1041.5 and 1041.7.

Comments Received

A number of industry commenters and trade associations objected to the Bureau's proposed timeline to implement §§ 1041.16 and 1041.17 as being too short. In particular, commenters argued that, given the proposal to require furnishing to each provisionally registered and registered information system (''furnish-to-all''), the sheer mechanics necessary to create furnishing relationships between all of the lenders making covered loans and all of the provisionally registered and registered information systems could not be accomplished in the allotted time frame. One commenter noted that in addition to common data standards, other standards would need to be established as well, which could take additional time. Pointing to the complexities of the proposal, one commenter urged the Bureau to delay the final rule's effective date, including proposed § 1041.17, which the Bureau proposed to become effective 60 days after publication of the final rule. The commenter recommended that the furnishing requirement in proposed

[1069] 12 U.S.C. 5514(a)(1)(B) and (a)(2).

[1070] 77 FR 42873 (July 20, 2012).

[1071] For example, 12 CFR 1091.110(a) provides that, ''[n]otwithstanding any other provision, pursuant to a consent agreement agreed to by the Bureau, a person may voluntarily consent to the Bureau's supervisory authority under 12 U.S.C. 5514, and such voluntary consent agreement shall not be subject to any right of judicial review.''

[1072] 12 U.S.C. 5512(b)(1).

[1073] 12 U.S.C. 5511(b)(2) and (b)(5).

[1074] 12 U.S.C. 5511(c)(3).

[1075] 12 U.S.C. 5511(c)(7).

[1076] *See also* 12 U.S.C. 5514(b)(1)(A) through (C) (authorizing, with respect to persons described in section 1024, the Bureau to ''require reports and conduct examinations . . . for purposes of—(A) assessing compliance with the requirements of Federal consumer financial law; (B) obtaining information about the activities and compliance systems or procedures of such person; and (C) detecting and assessing risks to consumers and to markets for consumer financial products and services'').

§ 1041.16 become effective sometime between 18 and 24 months after publication of the final rule. Two others suggested an implementation period of 24 months or longer. As precedent, one commenter cited the Bureau's TILA–RESPA Integrated Disclosure Rule, which became effective almost 24 months after the final rule was published. One commenter said delaying the effective date of the rule beyond the proposed 15 months would have two advantages. First, it would allow the Bureau to develop a contingency plan if no entity had applied or qualified for registration before the effective date. Second, if the Bureau experienced delays in registering information systems, the additional time would provide that lenders still had sufficient time to onboard. One industry commenter requested a 26-month implementation period and asserted that, in developing its timeline for implementation, the Bureau did not consider the time necessary for developing, testing, and deploying the infrastructure needed to comply with the proposal's onboarding and furnishing requirements.

Final Rule

The Bureau has considered the points made in the comments regarding the time frames related to provisionally registered and registered information systems in proposed §§ 1041.16 and 1041.17 and engaged in further analysis of the operational aspects of this process in light of those comments. As a result, the Bureau has decided to extend some of the proposed time frames in final §§ 1041.10 and 1041.11 (proposed §§ 1041.16 and 1041.17 as adopted and renumbered), including the time frame for submitting an application for preliminary approval for registration, the time frame for submitting an application to become a registered information system, the time frame for provisional registered information systems to automatically become fully registered information systems, and the time frame within which furnishing to a particular provisionally registered or registered information system must begin (the onboarding period). The Bureau is also extending the overall general implementation period for the final rule.

Nonetheless, the Bureau is adopting the proposed effective date for the registration provisions in § 1041.11. As noted above, the standards and processes for becoming registered information systems will become effective and operative 60 days after the final rule's publication. However, based on the comments it received, the Bureau is persuaded that other time frames should be extended. In particular, the Bureau concluded that potential registered information systems needed more time than originally proposed to submit applications for registration before August 19, 2019, the compliance date of the furnishing obligation. Final § 1041.11(c)(3)(i) extends the proposed time frame for entities to submit applications for preliminary approval for registration from 30 days to 90 days. In addition, final § 1041.11(c)(3)(ii) extends the proposed time frame from 90 days to 120 days for entities that have received preliminary approval to submit applications to become registered information systems.

The Bureau is also extending from 180 to 240 days the proposed time frame for entities provisionally registered on or after August 19, 2019 to automatically become registered information systems. Like the proposal, the process for registration on or after August 19, 2019 involves two steps: An entity will be required to apply to become a provisionally registered information system pursuant to § 1041.11(d)(1) and then, after it is provisionally registered for a period of time, it automatically will become a fully registered information system. Under the final rule, once an information system is provisionally registered for 180 days, lenders must furnish to it but cannot rely on reports from it to satisfy their obligations under the final rule until the system has become fully registered, 240 days after the date it was provisionally registered, pursuant to § 1041.11(d)(2). Like the proposal, the final rule provides 60 days for lenders to furnish to a provisionally registered information system before it becomes a fully registered information system.

The Bureau also extended the time frames associated with the registered information systems to which information must be furnished. The proposed rule would require lenders to furnish to each information system that, as of the date of consummation of the loan, had been registered with the Bureau pursuant to § 1041.17(c)(2) for 120 days or more, or had been provisionally registered with the Bureau pursuant to § 1041.17(d)(1) for 120 days or more, or subsequently had become registered with the Bureau pursuant to § 1041.17(d)(2). The Bureau is extending these 120-day time frames to 180 days under final § 1041.10(b)(1) in order to allow additional time for provisionally registered and registered information systems to ''onboard'' lenders.

Similarly, as noted above, the Bureau is extending the implementation period for §§ 1041.2 through 1041.10, 1041.12, and 1041.13 from 15 to 21 months. Therefore, compliance with the obligation to furnish information to registered information systems pursuant to § 1041.10 is not required until 21 months after publication in the **Federal Register**. This extension will allow for additional time to register information systems and additional time for lenders to onboard to registered information systems before the compliance date. The Bureau is extending the deadline to submit an application for preliminary approval for registration by 60 days in response to comments raising concerns about time needed to prepare such applications, but § 1041.11 will become effective and operative 60 days after publication of the final rule in the **Federal Register**, as proposed. The Bureau is not modifying the procedures for registration on or after the compliance date of the furnishing obligation. If no entity is registered as an information system under § 1041.11 sufficiently in advance of the compliance date of § 1041.10 so as to allow furnishing to begin as of that date, lenders will not be able to make a loan under § 1041.6 until such furnishing begins, as explained in comment 6(a)–2. Lenders will be able to make loans under § 1041.5 in the event that no entity is registered as an information system under § 1041.11 or registered sufficiently in advance of the compliance date of § 1041.10 so as to allow furnishing to begin as of that date.

10(a) Loans Subject to Furnishing Requirement

Proposed Rule

In proposed § 1041.16(a), the Bureau proposed to require lenders making most types of covered loans to furnish to each information system described in proposed § 1041.16(b) the information concerning the loans as described in proposed § 1041.16(c). As described in the proposal, the purpose of the furnishing requirement was to enable a registered information system to generate a consumer report containing relevant information about the consumer's borrowing history, regardless of which lender made a covered loan to the consumer previously. The Bureau believed that requiring lenders to furnish information about most covered loans would help achieve this result and, accordingly, help fulfill the consumer protections of proposed part 1041.

The Bureau also stated that the development of common data standards across registered information systems would benefit lenders and registered

information systems, and that the Bureau intended to foster the development of such common data standards where possible to minimize burdens on furnishers.

Comments Received

The Bureau received a wide range of comments about the furnishing requirements proposed under § 1041.16. Some comments supported the proposal to subject covered short-term loans and covered longer-term loans to the furnishing requirements. A consumer reporting agency stated that the proposal would allow the registered information systems to collect more comprehensive credit information on consumers who sought covered loans. Likewise, various commenters—including a consumer reporting agency, two consumer advocates, a credit union, and another industry commenter—approved of the proposed registered information systems and the requirement that lenders furnish information concerning consumers' borrowing histories. Consumer groups and others maintained that mandating the furnishing of information to registered information systems was critical to enabling compliance with the proposed regulation, including the restrictions on rollover transactions, back-to-back loans, and re-borrowing within a short period after paying off a prior loan. One industry commenter wrote that the furnishing requirements could potentially have a positive impact on consumers who make regular payments by helping them gain greater access to other types of credit. Another agreed with the Bureau's proposed furnishing requirements, but stated it would be difficult to implement in a timely manner the requirements for the registered information systems, which it considered burdensome.

Several commenters opposed either mandating the proposed furnishing requirements altogether, or suggested that the rule should only require certain kinds of lenders to furnish. Several commenters requested that the rule not require credit unions and other lenders to furnish to registered information systems at all, suggesting that their current furnishing to consumer reporting agencies is sufficient. Other commenters representing credit unions and auto lenders objected to the furnishing requirements on the basis that they do not generally furnish information to, or obtain information from, consumer reporting agencies. One consumer reporting agency contended that mandatory furnishing would stifle innovation among registered information systems, including among some specialty consumer reporting agencies, by diminishing their incentives to develop better risk-management products and services, which in turn would likely reduce the quality of products and services.

A trade association asserted that the furnishing provisions were overly prescriptive and disproportionate to any consumer benefit. One industry commenter asked the Bureau to consider restricting access to any registered information system to properly licensed lenders, citing State-licensed lenders as an example, to ensure that lenders were properly licensed in the State in which a consumer resided. Another group of commenters generally argued that the registered information requirements, including the furnishing provisions, would impose costs that would prevent lenders from providing small-dollar loans.

Commenters criticized the furnishing requirements for other reasons. One anticipated that lenders would not comply with the furnishing requirements, including what they understood to be the obligation to furnish information in real time, and warned of the compliance risk this would create for lenders. A trade association noted that the furnishing requirements could have a negative effect on Veritec's systems, which it thought are currently in use by most States that track payday loans. This commenter asserted that the proposal was silent on mechanisms to independently verify and secure the confidentiality of the data in the registered information systems.

Other commenters expressed concerns about the monetary, operational, and access-related burdens imposed by the furnishing requirements. One State government entity anticipated that the costs of creating the infrastructure related to the furnishing requirements would be passed on to consumers in the form of higher costs for obtaining small-dollar loans. A number of industry commenters stressed the impact that the requirements would have on lenders such as online lenders and other small-volume lenders, especially additional costs and burdens. Another argued that larger lending entities would be at a competitive advantage because the scale of their operations would allow them to spread the costs of integration more easily.

At least two of the industry commenters argued that the provisions related to the registered information systems would make it less profitable for banks and most credit unions to make small-dollar loans. One cited the high costs of investing in systems with furnishing capabilities and obtaining reports from registered information systems. Another claimed that obtaining consumer reports would increase the expense of making small-dollar loans for community banks, and that small-volume lenders would have to pay more for such reports than other lenders. One industry commenter stated that for lenders, the costs of hiring and training staff, along with the operational risks associated with data security and data integrity, would be significant.

An industry commenter and a Tribal-entity commenter identified as burdensome the requirement to report information at various stages in the life of a covered loan. One commenter observed that many lending entities with Tribal affiliation have limited access to consumer reporting agencies, and could be unable to comply with the rule if registered information systems refused to work with them, unless the Bureau took action to address the problem. The Tribal-entity commenter also asserted that satisfying the furnishing requirements would be more challenging for Tribes.

Some commenters recommended changes that they thought would facilitate the implementation of the furnishing requirements. One trade association proposed that lenders only be required to furnish information on a monthly basis. A trade association whose membership includes vehicle title lenders commented that the Bureau should permit such lenders to comply with a simplified alternative process in lieu of the proposed furnishing requirements.

Some commenters expressed concern about the impact of the furnishing requirements on the availability and cost of credit. One conveyed the importance of enabling consumers to build credit while they rely on covered short-term loans. This commenter suggested that the final rule should prohibit the use of furnished information to harm the score or profiles of less financially capable borrowers. One trade association speculated that the proposed rule could greatly restrict the availability of credit by discouraging community banks and other depository lenders from developing small-dollar lending programs and providing small-dollar loans as an accommodation to existing customers. This commenter asserted that restricted credit availability could fuel the growth of unlawful offshore lending from individuals and entities that are difficult to identify or regulate. An industry commenter stated that the registered

information system framework creates a unique category of non-prime consumer reporting agencies, which the commenter cautioned could prevent consumers from accruing the credit benefits that result when lenders furnish repayment information to mainstream consumer reporting agencies. One trade association stated that without an overhaul of the existing credit reporting structure, the proposal would dramatically increase the potential for errors and inaccuracies on consumer credit reports, and thereby decrease access to credit for consumers with negative or insufficient credit history.

Final Rule

As explained below, the Bureau is adopting § 1041.10(a) (as renumbered from proposed § 1041.16(a) for the reasons discussed earlier) with the following modifications. The proposal's coverage regarding the furnishing requirements included each covered loan, except covered loans made pursuant to proposed § 1041.11 or § 1041.12. Because proposed §§ 1041.11 and 1041.12 are not included in the final rule, as discussed above, the final rule no longer references loans made pursuant to those proposed provisions and thus, the Bureau has deleted the phrase ''other than a covered loan that is made under § 1041.11 or § 1041.12.'' Further, the final rule clarifies that a lender must furnish not for ''each covered loan'' as proposed but rather for ''each short-term and covered balloon-payment loan'' under the final rule. Thus the scope of the furnishing requirement is narrower than proposed and excludes a requirement that lenders furnish information regarding covered longer-term loans. The Bureau concluded that excluding such loans from the furnishing requirements would lessen the burden on lenders, especially in terms of the requirements to update loan information. Although this may create a gap in the information in the registered information systems to the extent an applicant has a prior or outstanding covered longer-term loan, lenders will still need to consider other sources of information concerning covered longer-term loans when performing the ability-to-repay analysis required by § 1041.5, as discussed in that section.

Proposed comment 16–1 is not adopted in the final rule because it pertained to proposed §§ 1041.11 and 1041.12 and the conditional exceptions to longer-term loans, which the Bureau is not adopting in the final rule. The Bureau is including in the final rule two new comments to § 1041.10(a). The first comment explains the application of the furnishing requirements to rollover loans. Comment 10(a)–1 was added to align with the treatment of rollovers in comments 5(d)–2, 6(b)(1)–3, 6(b)(1)–4 and 6(c)(2)–1, and provide greater clarity regarding their treatment in the context of the furnishing requirements in § 1041.10(a). In sum, it clarifies that if a State permits lenders to rollover (or renew) covered short-term loans or longer-term balloon payment loans, then the rollover or renewal loan must be treated as a new loan for the purposes of the furnishing requirements in § 1041.16(a). It further offers an example that illustrates that if a lender rolls over a covered short-term loan, as allowed by State law, after determining that the consumer has the ability to repay the loan, then the lender must report the original loan as no longer outstanding and report the rollover as a new covered loan.

Final comment 10(a)–2 pertains to lenders' furnishing through third parties. The Bureau added this comment in order to address concerns raised by commenters about the potential that, under the proposed rule, lenders may be required to furnish to multiple registered information systems with different interfaces and data standards. The comment clarifies that a lender may furnish information to a registered information system directly or through a third party acting on its behalf, including a registered information system. Accordingly, a lender could enter into an arrangement with one registered information system to allow that registered information system to furnish the lender's information to the other registered information systems on its behalf. Under such an arrangement, the lender would not have to furnish to multiple registered information systems—it would furnish to just one. The Bureau anticipates that some registered information systems will provide such services to lenders. Accordingly, it included comment 10(a)–2 in the final rule to clarify that direct furnishing to registered and provisionally registered information systems by lenders is not necessary, and to encourage registered information systems and service providers to provide services to reduce the potential challenges of a variety of different interfaces and data standards. As noted below, however, the Bureau anticipates that the market will create incentives for registered information systems to develop common data standards and interfaces.

The Bureau declines to eliminate the proposed mandatory furnishing obligation, as some commenters suggested. As many other commenters recognized, the proposed furnishing requirement is important to allow the underwriting and other provisions in the rule to function properly. The Bureau believes that lenders making covered loans will benefit significantly from comprehensive information about the consumer's recent borrowing history with respect to covered loans when making a reasonable assessment of a consumer's ability-to-repay. Generally, lenders either do not furnish information regarding loans that will be covered under this rule at all or furnish information about such loans to specialty consumer reporting agencies only. The registered information system provisions of the final rule are designed to allow lenders to access information regarding the consumer's borrowing history concerning short-term and covered longer-term balloon loans, beyond their own records and those of their affiliates. As described above, § 1041.5(d)(2) prohibits lenders from making the fourth loan in a loan sequence of covered short-term loans, covered longer-term balloon-payment loans, or a combination of those types of loans that are made under § 1041.5; and § 1041.5(d)(3) prohibits lenders from making a covered short-term or covered longer-term balloon loan under § 1041.5 concurrently or within a 30-day period following a loan made pursuant to the § 1041.6 conditional exception. To determine whether either prohibition applies to a contemplated loan, § 1041.5(d)(1) of the final rule requires a lender to obtain and review information about a consumer's borrowing history from its own records, its affiliates' records, and from a consumer report obtained from a registered information system, if available. These provisions require a cooling-off period of 30 days between the third and fourth loans in a § 1041.5 sequence, and before a consumer borrows a § 1041.5 loan following a § 1041.6 loan. These cooling-off periods are an integral component of the final rule's ability-to-repay intervention that the registered information system fosters. Namely, the existence of a registered information system allows the underwriting provisions in the rule to function properly by enabling a lender to see the borrower's previous and current use of covered short-term loans and covered longer-term balloon loans to determine the borrower's eligibility for a new covered short-term loan or covered longer-term balloon-payment loan subject to § 1041.5. Importantly, the registered information system will ensure that lenders are aware whether a potential borrower is subject to a

cooling-off period. That knowledge also may deter lenders from seeking to enter into referral arrangements to evade the cooling-off period requirements. Without a framework to ensure that information about a potential borrower's previous and current use of covered short-term loans and covered longer-term balloon loans is provided and collected in an organized and accessible manner, it would be much less likely that the goals of the lending limits, conditions, or restrictions contained in the rule would be achieved. Accordingly, the Bureau continues to believe that furnishing requirements play an important role in ensuring that lenders have the information they need to comply with the rule and achieve the consumer protections that are the goal of this part.

As discussed at great length above in Market Concerns—Underwriting, the market for covered short-term loans and covered longer-term balloon-payment loans is one where consumers who take out unaffordable loans confront considerable potential risks and harms. These risks and harms stem from default, delinquency, repeat re-borrowing, and the collateral consequences of having to make unaffordable payments, including forgoing basic living expenses or payments on major financial obligations. The underwriting requirement, that a lender must first make a reasonable assessment of the borrower's ability to repay the loan according to its terms, is being imposed in this rule to prevent the identified unfair and abusive practice of failing to engage in such underwriting for such loans. The furnishing requirement is an important component of the approach taken in the final rule to address these harms and protect consumers by preventing the identified unfair and abusive practices, pursuant to the Bureau's statutory authority to write such rules under section 1031(b) of the Dodd-Frank Act.

The furnishing requirements also allow lenders to make loans under final § 1041.6, which provides an exemption from the ability-to-repay determination requirements in final § 1041.5. The information furnished to a registered information system allows lenders to review a consumer's borrowing history, reflected in a consumer report from the registered information system, to determine the potential loan's compliance with the requirements of final § 1041.6 (b) and (c). If no entity is registered as an information system or a registered information system has not been registered for a period of at least 180 days on the compliance date of § 1041.6, the exemption under § 1041.6 will not be available. The Bureau anticipates that there will be at least one registered information system by the compliance date of § 1041.6.

The Bureau is not persuaded that requiring furnishing to registered information systems in this rule will exclude borrowers from nationwide consumer reporting agencies, as some commenters asserted. As noted in the proposal, for the most part, lenders currently making loans that would be covered under § 1041.10(a) do not currently furnish information concerning such loans to consumer reporting agencies consistently, if at all. Nothing in the final rule precludes lenders from furnishing to entities other than registered information systems, including nationwide consumer reporting agencies that do not seek to register as registered information systems.

As noted elsewhere, databases, such as Veritec, contract with various States that have statutory caps on short-term loans; these States impose requirements that lenders provide loan information to the databases and check the databases before approving borrowers for loans. Such databases are useful tools in policing State requirements. If any database, including Veritec, were to become a registered information system, it would have to make adjustments to the services it provides to facilitate lenders' compliance with part 1041's furnishing requirements. As discussed in the Section 1022(b)(2) Analysis in part VII below, lenders that already report information to databases to comply with State laws will likely face lower costs to come into compliance with the furnishing requirements in § 1041.10.

The Bureau expects that provisionally registered and registered information systems will find it in their competitive interests to develop common data standards and interfaces to facilitate accurate and timely reporting. Given the likelihood that standards for data will be established in this market, the Bureau is not persuaded that having more than one provisionally registered or registered information system will negatively impact the accuracy or quality of the data furnished to systems, as some commenters have suggested. As noted elsewhere, the FCRA and Regulation V will impose obligations with respect to data accuracy on lenders furnishing information to provisionally registered and registered information systems and on the information systems themselves.

One commenter expressed concern that a registered information system may not ''work with'' Tribal lenders. However, this commenter did not indicate what it believed the bases for such refusal might be. To be eligible for provisional registration or registration, § 1041.11(b)(3) requires that an entity must perform in a manner that facilitates compliance with and furthers the purposes of part 1041. This includes facilitating lender compliance with obligations to furnish information to provisionally registered and registered information systems and to obtain consumer reports from registered information systems. The Bureau notes that, as explained in proposed comment 17(b)(3)–1 (finalized as comment 11(b)(3)–1), this requirement does not supersede consumer protection obligations imposed upon a provisionally registered or registered information system by other Federal law or regulation. For example, if receiving data furnished by a particular lender pursuant to this rule, or providing a consumer report to a particular lender pursuant to this rule, would cause a provisionally registered or registered information system to violate a Federal law or regulation, then § 1041.11(b)(3) would not require the provisionally registered or registered information system to do so. However, absent such a circumstance, provisionally registered and registered information systems will be required to receive furnished data and provide consumer reports required under the rule, and to generally perform in a manner that facilitates compliance with and furthers the purposes of part 1041, in order to maintain their eligibility for provisional registration or registration. The Bureau notes that § 1041.11(h) will permit the Bureau to suspend or revoke the provisional registration or registration of an information system that has not satisfied, or no longer satisfies, the eligibility conditions set forth in § 1041.11(b). The Bureau believes that, together, these provisions will ensure that lenders are only denied service by registered information systems for reasons authorized under the rule.

The Bureau is not persuaded by the objection that commenters made to applying proposed § 1041.16 to vehicle title lenders. As explained in the proposal and above in Market Concerns—Underwriting, the Bureau has found a recurrence of high re-borrowing and high default rates among consumers who obtain short-term vehicle loans, which can result in severe harms to many consumers. Therefore, the Bureau remains convinced that it is in the public interest to require lenders that make such loans under § 1041.5 to

furnish information to registered information systems pursuant to §§ 1041.10 and 1041.11 of the final rule.

With respect to concerns about burdens on lenders associated with the furnishing requirements that some commenters have raised, the Bureau recognized in the proposal and further acknowledges that that the furnishing requirements will result in some added costs to lenders, especially those related to setting up furnishing arrangements with the registered information systems, but continues to believe that these costs are justified by the important benefits of the furnishing requirement. Commenters expressed concern about lenders having to furnish to and set up arrangements with multiple registered information systems. As discussed in greater detail in the Section 1022(b)(2) Analysis, furnishing information to registered information systems will require lenders to incur one-time and ongoing costs, including those associated with establishing a relationship with each registered information system, developing procedures for furnishing the loan data, and developing procedures for compliance with applicable laws. The Bureau also anticipates that lenders will face ongoing costs to furnish the data, although the Bureau estimates that the time costs for lending staff will be modest, particularly if one or more registered information systems or service providers offer a service of providing furnished information to some or all of the other registered information systems on behalf of lenders. The Bureau recognizes, however, that if multiple registered information systems exist and no such service is made available, then lenders will have to incur these costs multiple times. As noted in the proposal and in the Section 1022(b)(2) Analysis, the Bureau will encourage the development of common data standards for registered information systems in order to reduce the costs of providing data to multiple services where possible.

The Bureau recognizes that these additional costs may flow to consumers, though in some cases, lenders may not be able to pass all, or any, of the additional costs on by increasing product pricing, given that many covered short-term loans are already priced at their maximum allowable level under different State laws, as discussed above in part II. For the reasons stated in the proposal, in Market Concerns—Underwriting above, and described herein, the Bureau continues to maintain that the furnishing requirement and related costs are important components of the rule that will assist with effectively addressing the identified unfair and abusive practice of making unaffordable covered loans to consumers without reasonably assessing their ability to repay these loans. Moreover, as stated above, the Bureau expects that the registered information systems will find it in their interests to develop common data standards and interfaces to facilitate accurate and timely reporting. Specifically, if registered information systems take such steps and furnishing becomes more automated over time, it will make compliance with the rule easier and cheaper. In addition, because the rule, as described in the above discussion of comment 10(a)–2, allows a lender to rely on a third party to furnish on behalf of the lender, the Bureau anticipates that registered information systems and other providers will offer services that include furnishing to registered information systems, and will compete to offer such a service. The availability of such a service will mean that lenders can minimize any challenges of furnishing to all of the registered information systems and furnish to one who acts on its behalf to furnish data to the others. The Bureau anticipates that these arrangements will also result in cost-savings.

Nonetheless, the Bureau also notes that the final rule reflects two modifications that are likely to alleviate some of the burden stemming from complying with the furnishing requirement under § 1041.10. First, the Bureau has narrowed the scope of loans required to be furnished under final § 1041.10(a) to exclude covered longer-term loans (other than covered longer-term balloon-payment loans). As a result of this change, lenders will be required to furnish information about fewer loans than would have been required under the proposed rule. Second, as explained further below, the Bureau has also eliminated some of the information that it proposed to require lenders to furnish when a loan ceases to be an outstanding loan. Again, the Bureau anticipates that this modification will reduce burdens for lenders to satisfy their furnishing obligations under § 1041.10 of the final rule.

10(b) Information Systems to Which Information Must Be Furnished

10(b)(1)

Proposed Rule

Proposed § 1041.16(b)(1) stated that a lender had to furnish the information required in proposed § 1041.16(a) and (c) to each information system registered pursuant to proposed § 1041.17(c)(2) and (d)(2) or provisionally registered pursuant to proposed § 1041.17(d)(1). Proposed comment 16(b)–2 clarified that lenders were not, however, required to furnish information to entities that had received preliminary approval for registration pursuant to § 1041.17(c)(1) but were not registered pursuant to § 1041.17(c)(2). To allow lenders and provisionally registered and registered information systems time to prepare for furnishing to begin, the proposal delayed the furnishing obligation for newly registered and provisionally registered systems by requiring that lenders furnish information about a loan to such systems only if the system had been provisionally registered or registered for 120 days or more as of the date the loan was consummated. The Bureau believed that this 120-day period would allow lenders sufficient time to prepare for compliance with proposed § 1041.16, while giving provisionally registered or registered information systems sufficient time to onboard all of the lenders required to furnish to the information system.

Comments Received

Various consumer reporting agencies and consumer advocates approved of the proposal to require lenders to furnish information to each registered information system. An academic commenter stated that a more coordinated reporting of loans across lenders and States could matter in protecting consumers, many of whom had been harmed when they incurred large debts by borrowing from multiple lenders simultaneously. One consumer reporting agency asserted that proposed § 1041.16(b)(1) was a practical solution for the industry. Another claimed that the proposal to have lenders report to each registered information system would improve the industry's understanding of small-dollar loan usage among consumers and, combined with the data proposed to be furnished, this framework could lead to better and cheaper loan products.

A group of consumer advocates urged the Bureau to adopt the requirement that lenders must furnish to each of the registered information systems because, they argued, giving lenders the discretion to furnish to only one registered information system would incentivize the systems to be more responsive to lender concerns than to consumer concerns. These commenters also believed that permitting lenders to furnish to only one registered information system would be more cumbersome because it would be more difficult to guarantee access to a comprehensive borrowing history; doing

so either would require lenders to obtain reports from all registered information systems, or would necessitate all of the registered information systems to complete data-sharing agreements with each other. One industry commenter approved of the proposed rule generally, but recommended that lenders should also be required to register with the Bureau.

One consumer reporting agency believed that the proposed approach requiring furnishing to all of the registered information systems was realistic because in its view the industry norm for information furnishing already has creditors furnishing information to multiple nationwide consumer reporting agencies. It advocated for a single platform or gateway to accomplish the ''furnish to all'' approach, through which lenders would furnish information to each registered information system while being able to obtain the required consumer reports from this same single platform. At least two industry commenters supported the single-platform approach, one of which suggested that the single platform to which the lenders would furnish could coordinate furnishing and dispute resolution with the registered information systems.

One consumer reporting agency otherwise in support of the Bureau's proposal opposed the single-platform approach. This commenter argued that the mechanics of such an approach could not be accomplished on a reasonable timeline, and that such an approach would increase the infrastructure costs for registered information systems. It believed the single-platform approach was likely to be inadequate for other reasons also. This commenter argued that it would be difficult for the Bureau to select the single-platform provider and ascertain reasonable cost for the service. It further submitted that such an approach would reduce competition to improve the performance of the registered information systems, and any service interruption or disruption would affect the entire industry. This commenter suggested that, even with a single platform, lenders may still choose to obtain multiple reports to obtain a comprehensive understanding of a consumer's borrowing history, and establishing the contracting requirements for each registered information system would be a complex undertaking.

At least two commenters opposed the requirement to furnish to multiple registered information systems altogether. One trade association stated that for lenders, the costs of hiring and training staff, along with the operational risks associated with data security and data integrity, would be significant. One industry commenter echoed that the furnishing provisions were cumbersome, expensive, and presented the risk that inaccurate data would be furnished and that data would be disputed or handled improperly. Citing the potential high costs of compliance, one industry commenter criticized the Bureau's efforts for not sufficiently researching the impact of this approach on small businesses.

Several commenters responded to the Bureau's request in the proposal for ideas about alternatives to requiring lenders to furnish to each information registered system. One was concerned about the complexity of reporting to multiple systems with unique interfaces, credentialing, and the increased risks of errors. Two credit union commenters encouraged the Bureau to require lenders to furnish to the nationwide consumer reporting agencies only. An industry commenter recommended that, in lieu of the proposed registered information system approach, the Bureau require nationwide consumer reporting agencies to accept information furnished under the rule and share the information with other nationwide consumer reporting agencies. Some nationwide consumer reporting agencies advocated they are in the best position to act as registered information systems.

A mix of commenters recommended that the Bureau amend the proposal to allow lenders to furnish to one registered information system, and obtain from the system a merged report that would contain all the data furnished about the consumer. They noted that this ''furnish to one, pull a merged report'' approach was akin to the consumer reporting approach that typically is used in mortgage and certain other credit markets. A consumer reporting agency suggested that in order to enable the ''merge report'' concept to work, the Bureau would need to require each registered information system to agree to provide to other registered information systems, upon request, any furnished data concerning a loan applicant.

One trade association and another industry commenter favored a single, nationwide registered information system hosted by the Bureau or its contractor. A commenter with the capability to develop such a database asserted that this approach would create a unitary set of standards for data capture and electronic communication, while providing lenders with a single provider for assistance. This commenter stated that other advantages of a singular system included minimized costs and burdens for furnishing and maintaining information, increased compliance from lenders, improved regulatory oversight of lenders and the registered information system by the Bureau, more restricted access to the database and corresponding privacy protections for consumers, increased accuracy and consistency for both consumer and product data, reduced costs on the basis of scale, faster implementation, and improved ability to innovate and adapt to regulatory change.

A group of consumer advocates also supported a single registered information system on the condition that the Bureau consider housing the database either itself or with a contractor hired by the Bureau. These commenters believed this approach would improve protections for consumers while generating fewer data errors. One trade association listed as precedents for this approach the sanctions list hosted by the Department of Treasury's Office of Foreign Assets Control, and the list of active-duty servicemembers that the Department of Defense has developed to help implement the Servicemembers Civil Relief Act and the Military Lending Act.

Other commenters noted the experience of the 14 States that have State-mandated databases containing information about short-term, small-dollar loans. Commenters said that most of those regulatory regimes include a sole source contract with a single State-selected contractor that collects and discloses limited information about eligibility to lenders seeking to make loans. Some commenters noted that these systems lack market incentives to increase value and service while reducing costs and that the system as proposed by the Bureau will lead to better, less expensive products for lenders. Some commenters pointed to those State-mandated databases as success stories in terms of efficiencies and noted the experiences of two States that started out with multi-database reporting systems but, because of the challenges associated with such an approach, ultimately developed a single database reporting system.

One commenter noted that there were at least nine firms that would have the technical capability to act as registered information systems. Several noted that consistent data standards should be established, with many recommending the Metro 2 format but with others requesting that no standard be established.

As described above, the Bureau also received numerous comments about the amount of time provided under the proposed rule for lenders to onboard to registered information systems. Proposed § 1041.16(b)(2) provided that a lender must furnish information as required in paragraphs (a) and (c) to each information system that, as of the date the loan is consummated: Had been registered with the Bureau pursuant to § 1041.11(c)(2) for 120 days or more; or had been provisionally registered with the Bureau pursuant to § 1041.11(d)(1) for 120 days or more or subsequently had become registered with the Bureau pursuant to § 1041.11(d)(2). This would have provided lenders with 120 days to onboard to a provisionally registered information system and an information system registered before the effective date of § 1041.10 and prepare to furnish. At least two consumer reporting agencies suggested that they could onboard all covered lenders within this proposed time frame. Referring to the process of credentialing and onboarding potential furnishers, one consumer reporting agency estimated that it could onboard the lenders in a matter of months with the appropriate technical expertise and support. Another consumer reporting agency estimated that in its current capacity as a consumer reporting agency, credentialing and onboarding a new lender could take the commenter around four weeks. However, the commenter cautioned that if more extensive requirements than were proposed were included in the final rule, including additional or longer data fields, or a requirement to furnish using a data standard other than Metro 2, it could take longer to implement.

Several commenters argued that the 120-day period would be insufficient to permit onboarding of all lenders to all registered information systems. One industry commenter cautioned that the proposed timeline did not appear to contemplate the burdens lenders could face while working with the unique onboarding requirements of each registered information system. One commenter argued that the Bureau was underestimating the effort and time required to enroll and onboard lenders, and speculated that it would take years to implement the proposed furnishing provisions. It noted that the onboarding process at registered information systems could be unique because of variations in technology platforms, interfaces, and reporting formats. Additionally, this commenter explained that storefront lenders could face more difficulties than online lenders in integrating with consumer reporting agencies, which could delay such lenders' ability to onboard to a registered information system.

Final Rule

The Bureau has reviewed and analyzed the comments, and now adopts (renumbered) § 1041.10(b)(1) to require that a lender furnish the information as required in § 1041.10(a) and (c) to each information system registered pursuant to (renumbered) § 1041.11(c)(2) and (d)(2), and to provisionally registered information systems pursuant to § 1041.11(d)(1), as proposed. Of note, final §§ 1041.5 and 1041.6 require lenders to obtain a report from only one registered information system, also as proposed. The Bureau is responding to commenters that suggested extending the 120-day time period registered information systems need to be registered or provisionally registered before the furnishing requirements are applicable (onboarding period) by extending the onboarding period by 60 days. The final rule sets the onboarding period at 180 days. Other changes to the rule text reflect the renumbering from the proposal to the final rule. Likewise, comment 10(b)–1 is modified from the proposal to reflect the final rule's renumbering and adoption of the 180 day time frame described above. The illustrative example contained in the comment is also updated to reflect that lenders are not required to furnish to an information system that was provisionally registered 179 days before a loan was consummated. Comment 10(b)–2 is likewise altered to reflect the final rule's renumbering.

Commenters expressed concerns regarding the potential for inconsistencies in the furnished data and potential burdens on lenders they anticipated as a result of the proposal's requirement that lenders furnish to multiple registered information systems. Some commenters suggested that the Bureau register only one information system under proposed § 1041.17 while others suggested that the Bureau contract with a single provider or house the system within the Bureau. The Bureau recognizes that a single registered information system approach—whether administered by the Bureau, its contractor, or another entity—may provide benefits in terms of the uniformity and consistency of data and the expenditure of fewer lender resources initially, as lenders would not have to furnish to multiple systems. However, there are also risks to a single registered information system approach. With respect to the suggestion that the Bureau house information concerning covered loans itself or through the use of a contractor, it continues to believe that the private sector is better equipped to implement the requirements for registered information systems in a timely manner. The Bureau also continues to believe that there may be legal or significant practical obstacles to the Bureau contracting with or maintaining the single system. Further, the Bureau is concerned that, if it registered only one information system where more than one entity has applied to be a registered information system and satisfies the eligibility requirements, the single registered information system would likely lack the market incentives to increase value and service while reducing costs on lenders. The Bureau is thus convinced that registering a single information system where others are available would stifle innovation and, as some commenters noted, competition to improve the performance of the registered information system. The Bureau is confident that the market will adequately respond to challenges that may arise in connection with the final rule's furnish to all approach, and has determined that this approach is better than the single registered information system approach some commenters have suggested.

Some commenters suggested that the Bureau establish common data standards or require the use of an existing credit reporting standard. The Bureau decided not to create or require a particular data standard. As described above, the Bureau concluded that the market will provide incentives for the development of appropriate data standards. The Bureau is concerned that requiring the use of a specific data standard would stifle innovation. The Bureau believes that registered information systems will be incentivized to work together to develop common data standards and create efficiencies, especially in light of the ability of registered information systems or service providers, clarified under the final rule, to furnish information on behalf of lenders. As noted in the proposal, the Bureau intends to help foster the development of such coordinated data standards.

Some commenters advocated for an alternative that would require lenders only to furnish to one of the registered information systems and to obtain a ''merged'' report from only one registered information system. In order to facilitate that approach, commenters recommended that the Bureau require each registered information system to agree to provide information in its system concerning a specific loan

applicant to each other registered information system in response to a request for such information and that each agree to charge no more than a reasonable fee for doing so. The Bureau chose not to pursue that alternative for a variety of reasons. The Bureau is particularly concerned that if lenders only furnished to one of the registered information systems, the unique data that rest at a particular registered information system would be unavailable to other lenders if the registered information system experienced a problem, such as temporary system outage, or had its registration revoked. However, if lenders are obligated to furnish to all registered information systems, then an outage or revocation at one registered information system would not impact the comprehensiveness of the consumer report provided to a lender by any other registered information system pursuant to the rule. In addition, an approach that relied on registered information systems sharing unique information to produce a merged report could create incentives for individual registered information systems to leverage their (perhaps limited) data to extract a high price from other registered information systems for access. Although the imposition of a limitation on what a registered information system may charge another registered information system for data could ameliorate that concern, the Bureau ultimately concluded that it did not want to engage in the policing of pricing practices of registered information systems related to the sale of data and, overall, the furnish to all requirement reflected in the final rule is the better approach.

Other commenters suggested another approach as an alternative that would involve reporting to all systems, but would also entail a centralized gateway or platform through which lenders could furnish. Some noted that some specialty consumer reporting agencies currently provide such a service. The Bureau believes that there is no need to mandate the creation of such a platform or gateway. If there is a demand for such a service, the Bureau believes the registered information systems or other market actors will respond to the demand.

Commenters encouraged the Bureau to require lenders to furnish to the nationwide consumer reporting agencies and to require such consumer reporting agencies to accept the information furnished under the rule. Based on its market outreach and experience, as well as the comments it received, the Bureau believes that there are firms capable of taking on the task of acting as a registered information system under the final rule. Accordingly, the Bureau has concluded that it is more appropriate to grant players in the market who satisfy the eligibility criteria set forth in § 1041.11 the choice of whether to become a registered information system. Nothing precludes nationwide consumer reporting agencies from seeking to become registered information systems, and the Bureau would welcome their participation in this area.

Many commenters expressed concern about the length of time allotted in the proposal for registered information systems to onboard lenders. Under the proposal, lenders would be required to furnish to registered information systems that had been registered with the Bureau pursuant to § 1041.17(c)(2) for 120 days or more, or had been provisionally registered with the Bureau pursuant to § 1041.17(d)(1) for 120 days or more or subsequently had become registered with the Bureau pursuant to § 1041.17(d)(2). Commenters noted that the amount of time it would take for registered information systems to onboard lenders could be significant. One suggested that from its experience, it could even take years to onboard all of the lenders that would be required to furnish under the proposal. Others anticipated that the process would only take several months. The Bureau attempted to balance these concerns against the need for the systems to be operational as soon as possible so as to permit timely implementation of the rule. Accordingly, in the final rule, the Bureau is extending the onboarding period by 60 days, such that a lender now has 180 days to onboard to a provisionally registered information system and an information system registered pursuant to § 1041.11(c)(2). However, depending on how far in advance of the compliance date of the furnishing obligations information systems are registered, the onboarding period for information systems registered pursuant to § 1041.11(c)(2) could exceed 180 days. For example, if an information system is registered 210 days before the compliance date, then lenders will have 210 days to onboard to that registered information system before they are required to furnish to it. No lender would be obligated to start furnishing before the compliance date of § 1041.10. The Bureau concludes that the revised time frame provides sufficient time for lenders to onboard and prepare to furnish, and for registered or provisionally registered information system to prepare to receive, information pursuant to §§ 1041.10 and 1041.11 of the final rule.

10(b)(2)

Proposed Rule

Proposed § 1041.16(b)(2) would require the Bureau to publish on its Web site and in the **Federal Register** notice of the provisional registration of an information system pursuant to proposed § 1041.17(d)(1), registration of an information system pursuant to proposed § 1041.17(c)(2) or (d)(2), and suspension or revocation of the provisional registration or registration of an information system pursuant to proposed § 1041.17(g). Proposed § 1041.16(b)(2) provided that, for purposes of proposed § 1041.16(b)(1), an information system was provisionally registered or registered, and its provisional registration or registration suspended or revoked, on the date that the Bureau published notice of such provisional registration, registration, suspension, or revocation on its Web site. Proposed § 1041.16(b)(2) further required the Bureau to maintain on its Web site a current list of information systems provisionally registered pursuant to § 1041.17(d)(1) and registered pursuant to § 1041.17(c)(2) and (d)(2).

Under the proposal, the date that a particular information system becomes provisionally registered pursuant to proposed § 1041.17(d)(1) or registered pursuant to proposed § 1041.17(c)(2) is the date that would trigger the 120-day period at the end of which lenders would be obligated to furnish information to that particular registered information system pursuant to proposed § 1041.16. The general furnishing requirement would commence at the effective date of proposed § 1041.16, namely, 15 months from publication of the final rule in the **Federal Register**. An information system's automatic change from being provisionally registered pursuant to proposed § 1041.17(d)(1) to being registered pursuant to proposed § 1041.17(d)(2) would not have triggered an additional obligation on the part of a lender; rather the significance of the full registration of a provisionally registered system was that lenders could, once fully registered, rely on a consumer report from the system to comply with their obligations under proposed §§ 1041.5 and 1041.7.[1077] Under the proposal, suspension or

[1077] The proposal required lenders to furnish to such a system beginning 120 days from the date of the system's provisional registration and to continue to do so after the system becomes registered.

revocation of an entity's provisional registration or registration pursuant to proposed § 1041.16(g) would relieve lenders of their obligation to furnish information to the information system pursuant to proposed § 1041.16 and lenders would no longer be permitted to rely on a consumer report generated by the entity to comply with their obligations under proposed §§ 1041.5 and 1041.7.

The Bureau believed that publication of a notice on its Web site would be the most effective way to ensure that lenders received notice of an information system's provisional registration or registration, or of a suspension or revocation of its provisional registration or registration. Accordingly, for purposes of proposed § 1041.16(b)(1),[1078] the Bureau proposed to tie the dates of provisional registration, registration, and suspension or revocation of provisional registration or registration, as applicable, to publication of a notice on its Web site. The proposal also would have required the Bureau to maintain on its Web site a current list of information systems that were registered pursuant to § 1041.17(c)(2) and (d)(2) and provisionally registered pursuant to § 1041.17(d)(1).

Final Rule

The Bureau did not receive any comments addressing this provision. The Bureau has added language to clarify that, if it suspends the provisional registration or registration of an information system, it will provide instructions to lenders concerning the scope and terms of such suspension. For example, depending on the facts and circumstances of a particular determination that suspension is appropriate, the Bureau may suspend registration of a provisionally registered information system or registered information system for purposes of final §§ 1041.5 and 1041.6 but still require lenders to furnish to the suspended system pursuant to § 1041.10. The Bureau may also determine that suspension is only appropriate for a certain period of time. Other than those clarifications, the Bureau is finalizing this provision substantially as proposed except that it is renumbering it as § 1041.10(b)(2).

[1078] For purposes of proposed §§ 1041.5 and 1041.7, which would require a lender to obtain a consumer report from a registered information system, the Bureau proposed that a suspension or revocation of registration would be effective five days after the Bureau published notice of the suspension or revocation on its Web site.

10(c) Information To Be Furnished

Proposed Rule

Proposed § 1041.16(c) would have identified the information a lender had to furnish concerning each covered loan as required by proposed § 1041.16(a) and (b). This provision would require lenders to furnish information when the loan was consummated and again when it ceased to be an outstanding loan. If there was any update to information previously furnished pursuant to proposed § 1041.16 while the loan was outstanding, then proposed § 1041.16(c)(2) required lenders to furnish the update within a reasonable period of the event that caused the information previously furnished to be out of date. However, the proposal did not require a lender to furnish an update to reflect that a payment was made unless the payment caused the loan to cease to be outstanding. A lender was only required to furnish an update if such payment caused information previously furnished to be out of date. Proposed § 1041.16(c)(1) and (3) required lenders to furnish information no later than the date of consummation, or the date the loan ceased to be outstanding, as applicable, or as close in time as feasible to the applicable date. Proposed comment 16(c)–1 clarified that under proposed § 1041.16(c)(1) and (3), if it was feasible to report on the applicable date, then the applicable date was the date by which the information had to be furnished. Under the proposal, the Bureau would have encouraged lenders to furnish information concerning covered loans on a real-time basis, but permitted lenders to furnish the required information on a daily basis or as close in time to consummation as feasible.

Proposed § 1041.16(c) also stated that a lender had to furnish the required information in a format acceptable to each information system to which it was required to furnish information. This requirement was complemented by proposed § 1041.17(b)(1), discussed further below, which conditioned an entity's eligibility for provisional registration or registration as an information system on its capability to use reasonable data standards that would facilitate the timely and accurate transmission and processing of information in a manner that would not impose unreasonable costs or burdens on lenders.[1079]

[1079] Among other things, these standards had to facilitate lender and registered information system compliance with the provisions of the FCRA and its implementing regulations concerning the accuracy of information furnished.

Final Rule

The introductory paragraph of § 1041.10(c) of the final rule is being finalized as proposed (aside from being renumbered), and comments directed at the substance of this provision are addressed in the analysis for § 1041.10(c)(1) through (3) below. The introductory paragraph summarizes the main thrust of § 1041.10(c), which addresses what information must be furnished with respect to covered loans as required in § 1041.10(a) and (b), and when it must be furnished. It also specifies that a lender must furnish the information in a format acceptable to each information system to which it must furnish information.

10(c)(1) Information To Be Furnished at Loan Consummation

Proposed Rule

Proposed § 1041.16(c)(1) would have required that at the time a loan was made, or as close in time as feasible to that date, lenders must furnish eight pieces of information about the loan to each registered and provisionally registered information system. The specified pieces of information would be as follows:

Proposed § 1041.16(c)(1)(i) would have required information that is necessary to uniquely identify the covered loan. This would likely be the loan number assigned to the loan by the lender, but the proposal deferred to lenders and provisionally registered and registered information systems to determine what information is necessary or appropriate for this purpose.

Proposed § 1041.16(c)(1)(ii) would have required information necessary to identify the specific consumer(s) responsible for the loan. The proposal deferred to each provisionally registered and registered information system the determination of the specific items of identifying information necessary for this purpose.

Proposed § 1041.16(c)(1)(iii) would have required information stating whether the loan was a covered short-term loan, a covered longer-term loan, or a covered longer-term balloon-payment loan, as those terms were defined in proposed § 1041.2. Proposed comment 16(c)(1)–1 would clarify that compliance with proposed § 1041.16(c)(1)(iii) required a lender to identify the covered loan as one of these types of loans, and provided an example.

Proposed § 1041.16(c)(1)(iv) would have required information concerning whether the loan was made under proposed § 1041.5 or § 1041.7, as

applicable. Proposed comment 16(c)(1)–2 would clarify that compliance with proposed § 1041.16(c)(1)(iv) required a lender to identify the covered loan as made under one of these sections, and provided an example.

Proposed § 1041.16(c)(1)(v) would require the furnishing of information about the loan consummation date for a covered short-term loan.

Proposed § 1041.16(c)(1)(vi) would require the furnishing of information about the principal amount borrowed for a loan made under proposed § 1041.7.

Proposed § 1041.16(c)(1)(vii) would require the furnishing of the following information about a loan that is closed-end credit: (a) The fact that the loan is closed-end credit, (b) the date that each payment on the loan is due, and (c) the amount due on each payment date. This information was intended to reflect the amount and timing of payments due under the terms of the loan as of the loan's consummation. Proposed comment 16(c)(2)–1 explained that, for example, if a consumer made a payment on a closed-end loan as agreed and the loan was not modified to change the dates or amounts of future payments on the loan, then the lender was not required to furnish an update to information previously furnished. If, however, the lender extended the term of the loan, then the lender would be required to furnish an update to the date that each payment on the loan was due and the amount due on each payment date, to reflect the updated payment dates and amounts.

Finally, proposed § 1041.16(c)(1)(viii) would require the furnishing of the following information for a loan that is open-end credit: (a) The fact that the loan is open-end credit, (b) the credit limit on the loan, (c) the date that each payment on the loan is due, and (d) the minimum amount due on each payment date. As discussed further below, lenders would be required to furnish an update to information previously furnished within a reasonable period after the event that caused the prior information to be out of date.

Comments Received

As noted above, the proposal required lenders to furnish the information no later than the date on which the loan was consummated or as close as feasible to the date the loan was consummated. Several commenters opposed what they deemed the ''real-time'' furnishing requirement of proposed § 1041.16(c). Other commenters recognized that the Bureau was not requiring real-time furnishing and advocated that the Bureau adopt such a requirement as a reasonable means of ensuring compliance. One trade association suggested that some lenders would not comply with the furnishing requirements on a real-time basis, if at all. Several commenters said this requirement would add costs and operational complexity that would hinder lenders from providing small-dollar credit.

One consumer reporting agency expressed concern that without a system to facilitate the sharing of the updated account information between the registered information systems, correcting a consumer report across all registered information systems would involve substantial burden and expense. A commenter also asserted that potential lags in the timing of furnishing to a registered information system could result in a ''window of invisibility'' with respect to a consumer report produced by the registered information system. For example, if a consumer secured a loan from a lender but the lender did not furnish information about the loan to a registered information system until later that day, then the loan would not be reflected in a consumer report obtained from that registered information system by another lender immediately after the loan was made, and therefore would be invisible to the second lender unless the loan was made by an affiliate of that lender. This commenter also appeared to suggest that if a loan was furnished to registered information systems after the disbursement of funds, then the potential window of invisibility would be shorter for storefront lenders as these lenders disburse funds immediately, and longer for online lenders as these lenders may have a lag period between the loan's approval and the disbursement of funds. The commenter expressed concern that a consumer could obtain multiple loan approvals during this window of invisibility. Relatedly, several commenters requested a safe harbor from liability to account for circumstances in which a lender checks a registered information system and finds no outstanding loan, but later discovers that a borrower did have another covered loan outstanding. The Bureau has addressed these concerns in comments 5(c)(2)(ii)(B)–3 and 6(a)–3, as discussed in more detail below.

A set of consumer advocates generally supported the elements of proposed § 1041.16(c) but urged the Bureau also to require lenders to report more information, such as the all-in APR at consummation and a summary of collection efforts. They also suggested that whether a loan is short-term or long-term should be supported by the underlying information, such as the loan's date of consummation, due date, and amount and timing of payment, rather than by merely checking a box. Several commenters criticized the Bureau's inclusion in proposed § 1041.16(c)(1) of the phrase ''as close in time as feasible to the date the loan is consummated.'' Consumer advocates urged the Bureau to remove the above phrase to ensure the timelier furnishing of data, which would improve the determinations made by lenders considering consumer reports from registered information systems when making a covered loan. An industry commenter stated that this standard would thwart the provisions of the proposed rule that were intended to prevent repeat borrowing.

Focusing on proposed § 1041.16(c)(1)(i), an industry commenter suggested that the unique loan identifier should be consistent across all lenders and registered information systems. This commenter contended that the lack of a unique loan identifier would create substantial issues related to preserving data integrity with respect to data furnished under proposed § 1041.16.

With respect to proposed § 1041.16(c)(1)(ii), a group of consumer advocates urged the Bureau to require lenders to furnish the borrower's full name, address, phone number, date of birth, and all nine digits of the borrower's Social Security number. They further requested that the Bureau mandate a set of strict matching criteria to be used to properly match borrowers to the correct file at a registered information system. The commenters suggested this was essential to protect consumers against the risk of ''mixed files'' (*i.e.,* the inclusion, in a consumer report concerning one consumer, of information concerning another consumer). One industry commenter noted that proposed § 1041.16(c)(1)(ii) would create a Federal mandate for State-licensed providers to furnish personally identifying information that is otherwise protected under several State laws. It also stated that the Bureau should combine proposed § 1041.16(c)(1)(iii) and (iv) together in the final rule.

Regarding proposed § 1041.16(c)(1)(v), a group of consumer advocates suggested that the Bureau require the loan consummation date for all loans required to be furnished, not just for covered short-term loans. They also urged the Bureau to modify proposed § 1041.16(c)(1)(vi) to require that the principal amount borrowed for all loans be furnished, not just for loans made

under proposed § 1041.7. Similarly, an industry commenter suggested that this requirement should be extended to all loans made under proposed §§ 1041.5 and 1041.7.

A group of consumer advocates supported proposed § 1041.16(c)(1)(vii) and (viii), but urged the Bureau to require lenders to report at the time these loans are consummated the loan consummation date, the total number of payments required, and the loan due date. They also noted that lenders should be required to report loans outstanding on the effective date of the furnishing requirements. They believed this addition was critical to limiting a borrower's days of indebtedness in a 12-month period.

An industry commenter stated that lenders should be required to furnish to registered information systems the following additional information to enable compliance. First, the lender should provide information to uniquely identify itself and the store location that issued the loan. The commenter stated that the identifier should be verified to ensure that the lender was actively licensed to conduct business with the borrower in the borrower's State, but did not specify whether the party responsible for conducting the verification should be the furnisher or the registered information system, and what a registered information system or lender using a consumer report containing such information would do with the information. The same commenter also suggested that lenders should report whether the loan was provided at the physical location of the entity that issued the loan or elsewhere, including electronically.

Three consumer reporting agencies commented on the format of the data to be furnished pursuant to proposed § 1041.16. One stated that a robust set of registration requirements—including mandating a standardized format for furnishing the data required under the rule—would minimize variation and inconsistencies in the consumer reports provided to lenders across different registered information systems. This commenter acknowledged that in the short run, some entities could face challenges in implementing any standardized data format, but argued that this approach would reduce the burden on furnishers and be more efficient in the long run. It argued that requiring use of the Metro 2 format would standardize the small-dollar lending market and ensure greater data integrity and consistency, which it said would benefit both lenders and consumers. Another consumer reporting agency likewise encouraged the Bureau to require uniformity across furnishing formats in order to ensure that lenders are able to furnish accurate, complete, and timely information.

Conversely, one consumer reporting agency urged the Bureau to give registered information systems flexibility rather than mandating data furnishing standards in the rule. However, this commenter agreed that a single standard would support consistency. It also said that though developing a uniform data standard would be costly for registered information systems, software companies could help new furnishers comply with Metro 2 standards, which would allow for faster onboarding. It cited Metro 2 as an example of a best practice and stated that this format was a good model for enabling entities to furnish to registered information systems. This commenter said it did not believe lenders pay dues to use Metro 2. Relatedly, this commenter asked the Bureau to stress to lenders the importance of adequate staffing and of designing their furnishing systems with the appropriate speed and quality. It also asked the Bureau to clarify to lenders that registered information systems would not be responsible for deficiencies in the lenders' furnishing capabilities.

One consumer reporting agency stated that common standards to ensure equal access to data were in the interest of every registered information system, and emphasized the utility of a standardized electronic data reporting format akin to Metro 2, which the commenter believed would decrease operational burdens for lenders. This commenter speculated that, to the extent the industry could leverage the existing Metro 2 infrastructure to develop a standard appropriate for furnishing data required under the rule, the onboarding process would be relatively quick and simple, whereas a registered information system based on a brand-new data furnishing standard would delay the prospective timeline.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1041.10(c)(1) as proposed, with two revisions and as renumbered in light of other structural changes made in the rule. First, the Bureau has removed from § 1041.10(c)(1)(iii) the phrase ''a covered longer-term loan,'' and from § 1041.10(c)(1)(iv) the corresponding reference to proposed § 1041.9, to reflect that the final rule does not require furnishing of information about covered longer-term loans (other than covered longer-term balloon-payment loans). Second, § 1041.10(c)(1)(v) of the final rule now requires lenders to provide the loan consummation date for covered longer-term balloon-payment loans in addition to covered short-term loans. As discussed in the section-by-section analysis to the proposal, this information will enable a registered information system to generate a consumer report that will allow a lender to determine whether a contemplated loan is part of a loan sequence and the chronology of prior loans within a sequence, which will enable the lender to meet its obligations under final §§ 1041.5 and 1041.6. Because the definition of loan sequence in the final rule includes covered longer-term balloon-payment loans, the Bureau is requiring lenders to furnish loan consummation date for all covered loans required to be furnished. Accordingly, the Bureau has deleted the phrase ''For a covered short-term loan'' from proposed § 1041.16(c)(1)(v). The Bureau is making adjustments to comments 10(c)(1)–1 and 10(c)(1)–2, in order to reflect that § 1041.10(c)(1)(iii) and (iv) relate only to covered short-term loans and covered longer-term balloon loans.

As finalized, § 1041.10(c)(1) requires lenders to furnish the specified information no later than the date on which the loan is consummated or as close in time as feasible after that date. The Bureau recognized in the proposal, and acknowledges here, that some installment lenders currently furnish loan information to consumer reporting agencies in batches on a periodic basis. However, the Bureau is not persuaded that batch reporting less frequently than daily would provide information sufficiently timely to serve the purposes of this rule. On the contrary, the Bureau maintains that the proposed timing requirement is needed to further the consumer protections envisioned for part 1041. With respect to the concern some commenters stated—that there would be no way to ensure that data furnished and updated by lenders is consistent across all registered information systems because of the possible delays in the availability of loan data from each individual registered information system—the Bureau is aware of the potential for gaps in information. It further agrees that there exists the potential for a window of invisibility for some loans, as the rule does not require true ''real-time'' furnishing. Instead, it requires that information must be furnished no later than the date on which the loan is consummated, or as close in time as feasible to the date the loan is consummated. The Bureau has weighed

the risk of potential gaps in the available information against the burden on lenders of imposing a real-time furnishing requirement. Ultimately, the Bureau concluded that the incremental benefit of a real-time furnishing requirement would not justify the burden that would result from such a requirement. In the event that lenders exploit timing delays with the intent to evade the requirements of the rule, the Bureau may address the behavior by relying on its anti-evasion authority, as outlined in final § 1041.13.

A commenter expressed concerns about consumer disputes not being adequately conveyed to all registered information systems because of concerns about the systems' ability to communicate with each other. The Bureau notes that the FCRA and Regulation V impose obligations on furnishers to convey corrections to data previously furnished identified by a consumer dispute. The Bureau expects that lenders will comply with their obligations under the FCRA and Regulation V with respect to updating information at each registered information system to which it previously furnished information about a loan.

The Bureau recognizes the concern that commenters have expressed about a lender incurring liability for making a covered short-term loan or covered longer-term balloon-payment loan based on an incomplete or inaccurate consumer report obtained from a nationwide consumer reporting agency or registered information system. The Bureau has added commentary to both §§ 1041.5 and 1041.6 to allay such concerns.[1080]

Relatedly, the Bureau expects that lenders will furnish the specified information no later than the date on which the loan is consummated. It includes the phrase ''or as close in time as feasible to the date the loan is consummated'' not to undercut this expectation or to create, as some commenters fear, a loophole. The Bureau includes this phrase because it recognizes that there may be certain circumstances under which it may not be feasible to furnish information on the date the loan is consummated, such as the temporary unavailability of a furnishing system. Final comment 10(c)–1, unchanged from the proposal except for numbering changes, clarifies that ''if it is feasible to report on a specified date (such as the consummation date), the specified date is the date by which the information must be furnished.'' The Bureau concludes that the expectation under the rule regarding the timing of furnishing information regarding consummation is reasonable and clear and thus it declines to remove from proposed § 1041.16(c) the phrase ''as close in time as feasible to the date the loan is consummated'' and thus adopts § 1041.10(c)(1) as described above.

Final rule § 1041.10(c)(1)(i) through (vii) also sets out the types of information that lenders must furnish at loan consummation. After carefully evaluating the comments it received regarding increasing the number of data points lenders should be required to furnish, the Bureau has decided to adopt § 1041.10(c)(1) as proposed.

Regarding proposed § 1041.16(c)(1)(ii), the Bureau weighed the utility of requiring furnishing of more extensive identifying information (*e.g.,* identifying specific consumers responsible for the loan), as suggested by a group of consumer advocates, against the potential burdens on furnishers associated with such a requirement and the potential privacy and data security concerns associated with the collection and furnishing of more identifying information than is necessary, and concluded that the proposed approach strikes the right balance. Under this approach, rather than prescribing specific identifying information that could, in practice, prove to be under-inclusive, over-inclusive, or both, the Bureau instead concludes that it is preferable for individual provisionally registered and registered information systems to identify the identifying information needed to avoid errors. This approach will also ensure that lenders and provisionally registered and registered information systems collect no more identifying information from applicants and borrowers than is necessary, consistent with best data security practices. Thus, the Bureau defers to each provisionally registered and registered information system concerning the specific items of identifying information they deem necessary to identify the particular consumer responsible for the loan.

The Bureau also decided not to modify proposed § 1041.16(c)(1)(vi) to require lenders to furnish the principal amount borrowed for all loans required to be furnished. The proposal required lenders to furnish the principal amount borrowed only for loans made under proposed § 1041.7(b)(1). The express purpose of this requirement was to allow lenders to determine whether a contemplated loan satisfied the limitations on principal amount set in proposed § 1041.7(b)(1). Under the corresponding provision in the final rule (now renumbered as § 1041.6), the lender must first obtain and consider a consumer report from a registered information system to make covered loans under that framework. However, lenders are permitted to make loans pursuant to proposed § 1041.5 without first obtaining a consumer report from a registered information system if such consumer reports are not available because there are no registered information systems, or none have been registered for the required length of time. While a record of the principal amount is crucial to a lender's review for a loan made under final § 1041.6, it is not essential for registered information systems to collect and provide this information for loans made pursuant to § 1041.5. After carefully considering the potential burdens that the suggested approach would pose on lenders that furnish to registered information systems, the Bureau declines to adopt the additional data points that some commenters recommend requiring from furnishers in § 1041.10(c) of the final rule. The Bureau finds instead that § 1041.10(c) will provide sufficient information for lenders to make ability-to-repay determinations that can achieve the consumer protections intended in part 1041.

The Bureau is also finalizing § 1041.10(c)(1)(vii) and (viii) as proposed, except for numbering adjustments for internal consistency. These provisions outline the specific information required to be furnished depending on whether the loan is closed or open credit. The Bureau continues to believe these data points will assist with ability-to-repay determinations under the final rule.

10(c)(2) Information To Be Furnished While Loan Is an Outstanding Loan

Proposed Rule

Proposed § 1041.16(c)(2) would have required lenders to furnish, while a loan is an outstanding loan, any update to information previously furnished pursuant to proposed § 1041.16 within a reasonable period of the event that caused the information previously furnished to be out of date. Proposed comment 16(c)(2)–1 provided examples of scenarios under which proposed § 1041.16(c)(2) required a lender to furnish an update to information previously furnished. Proposed comment 16(c)(2)–2 clarified that the update requirement extended to information furnished pursuant to proposed § 1041.16(c)(2).

[1080] *See* Comments 5(c)(2)(ii)(B)–3 and 6(a)–3.

The Bureau believed that each item of information that the proposal required lenders to furnish under § 1041.16(c)(1) strengthened the consumer protections of proposed part 1041. Updates to these items of information could affect a consumer's eligibility for covered loans under the proposal and, thus, the achievement of those protections. The Bureau concluded that such updates should be reflected in a timely manner on a consumer report that a lender obtains from a registered information system. However, the Bureau also believed that, to the extent furnishing updates would impose burden on lenders, a more flexible timing requirement was appropriate for furnishing an update. The Bureau thus proposed that when a covered loan was outstanding, lenders had to furnish updates pursuant to proposed § 1041.16(c)(2) within a reasonable period after the event that caused this type of information previously furnished to be out of date.

Comments Received

One group of commenters supported the proposed requirement that a lender be required to furnish updates regarding any changes to a loan's due date, payments, and payment amount. However, they urged the Bureau to require furnishing of more information about a loan while it was outstanding, including information about the payments made, principal and charges owed after each payment, the number of days that a borrower was delinquent on a payment, and whether the loan was refinanced or renewed. These commenters stated that if the loan was refinanced or renewed, then the lender should have to report the amount of principal paid down on the original loan at the time of renewal, the amount of principal owed after renewal, and lastly, all the other requirements for a loan at consummation. They believed the proposed additional information would be important to a lender's ability-to-repay calculation, and would improve compliance with the proposed provisions addressing repeat re-borrowing of longer-term loans. Other commenters recommended that furnishing updates include any changes to balance amount, credit limit, high credit, minimum payment due, actual payment made, past due amount, delinquency status, and all dates associated with those updates.

One industry commenter submitted that the lack of a consistent means for loan identification across lenders and registered information systems could create disparities in the application of updates to borrower loan records. Some commenters expressed concerns about the required frequency of the furnishing updates and that lenders may need to furnish updates more often than once a month because of the short billing cycle for small-dollar loans. In addition, a group of consumer advocates opposed a timing requirement that would be any more flexible than that contained in proposed § 1041.16(c)(1) and (3), and asked the Bureau to require lenders to furnish updates to information previously furnished no later than the date on which the changes to the terms of the outstanding loan are made. Another industry commenter likewise urged a real-time furnishing requirement.

Final Rule

The Bureau is adopting § 1041.16(c)(2) as proposed, other than renumbering it as § 1041.10(c)(2). It declines to expand this furnishing requirement as proposed by some commenters. Ultimately, the Bureau has concluded that the information lenders must provide pursuant to § 1041.10(c)(2) strikes the right balance between permitting lenders to conduct a precise assessment for purposes of the proposed rule, and limiting the furnishing burdens that the rule imposes on lenders. These requirements, and the resulting balance struck between demanding either more or less information, are in service of the core principle of the underwriting provisions, which require lenders that contemplate making a covered short-term loan or a covered longer-term balloon-payment loan to make a reasonable assessment of the borrower's ability to repay the loan according to its terms. Thus, they generally further the consumer protections advanced by part 1041.

The Bureau does not agree with the commenter that suggested that a loan identifier that is unique across all lenders and registered information systems would be needed to ensure that updates are properly applied to the correct loan. Even if two lenders assigned the same loan number to a loan that each furnished, since each lender will be updating its own loan, a registered information system will be able to distinguish the loans. Further, the Bureau does not believe that such a requirement is feasible in the context of this rule, which would require thousands of unaffiliated lenders to develop and use a system to generate a unique number at the consummation of every covered short-term and longer-term balloon payment loan for use when furnishing information to each registered information system.

The Bureau disagrees that the proposed requirement to update information previously furnished did not adequately describe the loans for which updates would be required or the timing of the required reporting. As described above, final § 1041.10(c)(2) requires lenders to furnish—for all outstanding covered short-term loans and covered longer-term balloon-payment loans—updates within a reasonable period after the event that causes the information that was previously furnished to be out of date. For the reasons described in the proposal, the Bureau also maintains that granting lenders a more flexible timing requirement for furnishing updates is an appropriate component in drawing the balance between the burdens and the benefits of this provision.

The Bureau adopts the commentary related to § 1041.10(c)(2) as proposed, other than to make updates regarding numbering. Final comment 10(c)(2)–1 sets out an example of the types of updates lenders must furnish while loans are outstanding.

10(c)(3) Information To Be Furnished When Loan Ceases To Be an Outstanding Loan

Proposed Rule

Proposed § 1041.16(c)(3) would have required lenders to furnish specified information no later than the date the loan ceased to be an outstanding loan, or as close in time as feasible to the date that the loan ceased to be an outstanding loan. The Bureau believed that a real-time or close-to-real-time furnishing requirement for when a loan ceased to be an outstanding loan was appropriate to achieve the consumer protections of proposed part 1041. The proposed requirement sought to give lenders that use consumer reports from a registered information system timely information about most covered loans made by other lenders to a consumer. Although the Bureau would have encouraged lenders to furnish information about covered loans on a real-time or close-to-real-time basis, the proposal permitted lenders to furnish the required information on a daily basis or as close in time to the date the loan ceased to be outstanding as would be feasible.

Proposed § 1041.16(c)(3)(i) would have required lenders to furnish the date as of which the loan ceased to be an outstanding loan. Proposed § 1041.16(c)(3)(ii) would require lenders to furnish for a covered short-term loan that had ceased to be an outstanding loan whether all amounts owed in connection with the loan were paid in

full including the amount financed, charges included in the total cost of credit, and charges excluded from the total cost of credit. If all amounts owed in connection with the loan were paid in full, then this provision would further require lenders to specify the amount paid on the loan, including the amount financed and the charges comprised in the total cost of credit, but excluding any charges excluded from the total cost of credit.

Comments Received

Very few commenters specifically addressed the requirements listed under proposed § 1041.16(c)(3). A group of consumer advocates asserted that the Bureau's furnishing requirements when a loan ceases to be outstanding were lacking, and made recommendations intended to strengthen the requirements applicable to both covered short-term loans and covered longer-term loans. They contended that the Bureau should require lenders to furnish charges excluded from the total cost of credit even if a loan was paid in full, and to furnish the amount financed and charges included and excluded from the total cost of credit separately from one another. They also urged the Bureau to clarify that charges not included in the total cost of credit include any fees associated with late payment on the loan, including both late fees and returned item fees.

These commenters advised the Bureau to require lenders to furnish any date on which the borrower became delinquent, or the lender determined the loan to be in default, or the lender charged off the loan. They also urged the Bureau to require furnishing of information related to collection activity, including the date that the collection activity began, and records of any failed payment transfer such as transfers that trigger a prohibition on further payment transfer attempts and the reauthorization requirement. They considered this information to be relevant to a consumer's borrowing history and a subsequent lender's ability-to repay determination, and stated that the availability of such information in a consumer report provided by a registered information system would help protect consumers against unaffordable longer-term refinancings. An industry commenter urged that the Bureau adopt a real-time furnishing requirement.

Final Rule

The Bureau is finalizing § 1041.10(c)(3) as proposed and renumbered with two substantive modifications and a minor technical edit.

First, final rule § 1041.10(c)(3)(ii) now requires the information described in proposed § 1041.16(c)(3)(ii)(A) to be furnished for all loans for which information is required to be furnished under the rule, not only covered short-term loans. The information that must be furnished under this section is whether the borrower paid in full all amounts owed in connection with the loan, including the amount financed, charges included in the cost of credit, and charges excluded from the cost of credit. Under the proposal, this information was necessary to establish whether an exception to the presumption against a consumer's ability to repay in proposed § 1041.6 applied. Because of the narrowing of the scope of the rule, this information is no longer necessary for that purpose. However, the Bureau believes that this information will be useful to lenders' underwriting of subsequent loans. Although this change will slightly increase furnishing burden, the Bureau believes the increased burdens are outweighed by the insights this information would provide about actual prior loan performance. The Bureau is not finalizing proposed § 1041.16(c)(3)(ii)(B), which would have required furnishers to furnish the actual amounts paid in instances where borrower successfully paid in full all amounts connected with loans. This also was proposed to allow lenders to establish whether an exception to the presumption against a consumer's ability to repay in proposed § 1041.6 applied. Because the Bureau is not adopting proposed § 1041.6, this information is no longer needed. Additionally, this section now references ''cost of credit,'' rather than ''total cost of credit,'' consistent with the Bureau's adoption of the former term.

Commenters had suggested the inclusion of several other data points in the furnishing requirements applicable to loans that are no longer outstanding, as they suggested that this information would be helpful for lenders in evaluating the borrowers' ability to repay loans or refinanced loans. Although the additional information indeed might be helpful to lenders in their ability-to-repay evaluations, the Bureau finds that this benefit is outweighed by the burden on lenders that would result from requiring the additional information. Likewise, for reasons described above, the Bureau chose not to require real-time furnishing.

Section 1041.11 Registered Information Systems

As discussed in more detail in the overview of proposed §§ 1041.16 and 1041.17, the Bureau sought to ensure that lenders making most covered loans would have access to timely and reasonably comprehensive information about a consumer's current and recent borrowing history with other lenders. Proposed § 1041.16 would require lenders to furnish information about most covered loans to each information system that was either provisionally registered or registered with the Bureau pursuant to proposed § 1041.17. This requirement would allow a registered information system to generate a consumer report containing relevant information about a consumer's borrowing history, regardless of which lender or lenders had made a covered loan to the consumer previously. A lender that was contemplating making most covered loans would obtain a consumer report from a registered information system and consider such a report in determining whether the loan could be made, in furtherance of the consumer protections of proposed part 1041.

The proposal also would have required the Bureau to identify the particular consumer reporting agencies to which lenders had to furnish information pursuant to proposed § 1041.16, and from which lenders could obtain the consumer reports needed to satisfy their obligations under proposed §§ 1041.5 and 1041.7. Proposed § 1041.17 would require the Bureau to identify these consumer reporting agencies by registering them with the Bureau as ''information systems.'' As described in more detail below, proposed § 1041.17 set forth proposed processes for registering information systems before and after the furnishing obligations under proposed § 1041.16 take effect and it stated the proposed conditions that an entity would have to satisfy in order to become a registered information system.

11(a) Definitions

11(a)(1) Consumer Report

Proposed Rule

Proposed § 1041.17(a)(1) would have defined consumer report by reference to the definition of consumer report in the FCRA.[1081] The Bureau explained that this definition accurately reflected how the FCRA would apply to provisionally registered and registered information systems, to lenders that furnish information about covered loans to

[1081] 15 U.S.C. 1681a(d).

provisionally registered and registered information systems pursuant to proposed § 1041.16, and to lenders that use consumer reports obtained from registered information systems. The proposal would require a lender that contemplated making most covered loans to obtain a consumer report about the consumer from a registered information system, which would enable the lender to determine the consumer's eligibility for most covered loans. The proposal clarified that registered information systems providing consumer reports to such lenders would be consumer reporting agencies within the meaning of the FCRA [1082] and would be subject to its applicable provisions and implementing regulations. Moreover, lenders that obtained consumer reports from registered information systems and those required to provide information to provisionally registered and registered information systems under proposed § 1041.16 also would be required to comply with the provisions of the FCRA applicable to users of consumer reports and to furnishers of information to consumer reporting agencies.

Comments Received

One consumer reporting agency expressed general support for the proposed definition of consumer report and agreed that the FCRA is applicable. A few commenters disagreed with the definition of consumer report proposed in § 1041.17(a)(1). One industry commenter stated that the definition was not consistent with the purposes of a registered information system and a consumer report issued under the proposed rule. The commenter posited that information communicated is only a consumer report within the definition in the FCRA if the information is used by a lender to answer the question of whether a lender should make a loan to a borrower. The commenter suggested that consumer reports under the rule would not qualify as consumer reports under the FCRA because the purpose of the reports under the rule would be to determine if a lender could lend to a consumer in compliance with the regulation, not whether they should lend to the consumer. The commenter asserted that a consumer report obtained from a registered information system is not sufficient, and not intended to determine whether a lender should make a loan to the borrower. The commenter indicated that consumer reports provided by nationwide consumer reporting agencies were more appropriate to this purpose than consumer reports provided by a registered information system. One consumer reporting agency stated that the proposed registered information systems would be in conflict with the FCRA's definitions and requirements for consumer reporting agencies, but did not elaborate further.

Final Rule

The Bureau is finalizing proposed § 1041.17(a)(1), renumbered as § 1041.11(a)(1) of the final rule, without any modifications. The Bureau remains persuaded that it is appropriate to define consumer report by reference to the FCRA's definition of consumer report. The FCRA defines consumer report to mean ''any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for,'' among other permissible purposes, credit.[1083] Under the final rule, information contained in a consumer report obtained from a registered information system will bear on the aspects listed in section 603(d)(1) of the FCRA, and will be used in whole or in part to serve as a factor in establishing the consumer's eligibility for a covered short-term or covered longer-term balloon loan. The Bureau does not agree with the comment suggesting that, because the information in a consumer report from a registered information system will be used to determine whether a loan would comply with this regulation, such information will not be used in whole or in part as a factor in establishing the consumer's eligibility for credit.

11(a)(2) Federal Consumer Financial Law

Proposed Rule

Proposed § 1041.17(a)(2) would have defined Federal consumer financial law by reference to the definition of Federal consumer financial law in the Dodd-Frank Act, 12 U.S.C. 5481(14). This term is defined in the Dodd-Frank Act to include several laws that would apply to registered information systems, including the FCRA.

Comments Received

A set of comments generally addressed the applicability of the FCRA or other Federal laws such as the FTC's Standards for Safeguarding Customer Information,[1084] 16 CFR part 314, to provisionally registered and registered information systems and covered lenders and the scope of the applicability of those laws. One consumer reporting agency agreed that registered information systems and furnishers are subject to the FCRA. A group of consumer advocates believed it was important and only fair that the FCRA applies to information that is furnished to registered information systems. The commenters said that the FCRA requirements were basic, fundamental principles of fair information use.

Conversely, some commenters argued that registered information systems would not fit well within the scope of the FCRA and the FACT Act. One of them added that the rule's provisions would be subject to misinterpretation, litigation, and unpredictable regulatory examination and oversight. Another commenter stated that requiring credit unions to comply with the FCRA, when such entities do not typically furnish loan information to specialty consumer reporting agencies, would greatly increase operational costs for such lenders.

Some commenters requested clarification about the scope of the FCRA's applicability to the proposed rule. One asked the Bureau to clarify whether lenders would be required to provide a notice of adverse action. Another asked the Bureau to formalize certain best practices with respect to consumer report disputes as requirements in the final rule, saying that it was essential for the registered information systems to have the capacity to coordinate with lenders in real time in order to handle consumer disputes effectively while complying

[1082] *See* 15 U.S.C. 1681a(f).

[1083] Section 603(d) of the Fair Credit Reporting Act, 15 U.S.C. 1681(d).

[1084] Generally known as the Safeguards Rule, part 314 sets forth standards for developing, implementing, and maintaining safeguards to protect the security, confidentiality, and integrity of customer information. The Safeguards Rule was promulgated and is enforced by the FTC pursuant to the Gramm-Leach-Bliley Act (GLBA), 15 U.S.C. 6801 through 6809. The data security provisions of the GLBA direct the prudential regulators, the SEC, and the FTC to establish and enforce appropriate standards for covered entities relating to administrative, technical and physical safeguards necessary to protect the privacy, security, and confidentiality of customer information. Congress did not provide the Bureau with rulemaking, enforcement, or supervisory authority with respect to the GLBA's data security provisions. 15 U.S.C. 6801(b), 6804(a)(1)(A), and 6805(b). The portion of the GLBA concerning data security is not a Federal consumer financial law under the Dodd-Frank Act. However, data security practices that violate those GLBA provisions and their implementing regulations may also constitute unfair, deceptive, or abusive acts or practices under the Dodd-Frank Act.

with FCRA requirements and deadlines. One commenter noted that the FCRA imposes duties on furnishers to provide accurate information and investigate disputes, and encouraged the Bureau to state in the final rule whether the registered information systems would be expected to monitor furnishers and take corrective action.

At least two commenters sought clarification about the extent to which consumers would have access to the consumer protections available to them under the FCRA. One stated that consumers should have the right to review the information pertaining to them in a provisionally registered or registered information system, and to dispute those records. This commenter explained that the FCRA entitles consumers to receive information about adverse credit determinations, and stated that such a consumer right would be useful in instances where some borrowers are denied credit. One commenter encouraged the Bureau to evaluate and clearly state any requirement permitting a consumer to freeze, block, or place a fraud alert on their registered information system consumer report. It also asked the Bureau to clarify any requirement that a registered information system place an address discrepancy notation on a consumer's file with a registered information system. Lastly, this commenter also noted that it was possible that some registered information systems subject to the final rule would not be nationwide consumer reporting agencies within the FCRA's definition.

Numerous commenters were concerned about the possibility of provisionally registered and registered information systems using the furnished data for purposes other than in furtherance of part 1041. One industry commenter encouraged the Bureau to consider further restricting access to furnished information in order to protect borrower information in a manner that is consistent with applicable State law. It argued that registered information systems that supplied reports containing information furnished under the rule would not be subject to the Bureau's supervisory authority. It further argued that permitted uses of furnished information were more permissive under the FCRA than under State requirements, and contended that the FCRA would enable registered information systems to exploit the private information of consumers in ways detrimental to borrowers, including for the purposes of generating marketing leads and advertising.

Likewise, one consumer advocate opposed allowing provisionally registered and registered information systems to generate lead lists based on information furnished under the proposed rule. The commenter believed that the history of the payday lending industry showed that new supplies of debt competition would not reduce prices and pointed out that it was a standard practice of the payday industry to set interest rates at the maximum level allowed by law. It suggested that consumers would be unlikely to benefit if lenders had the ability to purchase prescreened lists from a provisionally registered or registered information system and then make pre-screened offers of credit, and submitted that the FCRA grants consumers the right to control where and how their personal information is disseminated. Consumer advocates urged the Bureau to limit the use of information furnished pursuant to part 1041 to credit purposes. Specifically, they requested that the Bureau prohibit use of the furnished information for prescreening and non-credit permissible purposes like determinations related to employment or insurance. One commenter stated that permitting use of the data for other purposes would expose consumers to negative consequences that could resulting from employers or other creditors learning that they had applied for a payday loan.

One commenter stated that the FCRA and FTC Safeguards Rule would protect the security, confidentiality, and integrity of the consumer information, but cautioned that to better protect consumer privacy, the Bureau should impose additional limitations on the information collected, and should further restrict access to and use of consumer information held by registered information systems.

Some consumer reporting agencies disagreed with recommendations to restrict additional uses of information furnished to provisionally registered and registered information systems pursuant to proposed §§ 1041.16 and 1041.17. One asserted that prescreening consumers for firm offers of credit would help them transition into traditional credit products by giving them targeted information on credit alternatives for which they qualify, expanding their options. It stated that consumer unawareness of these products could limit people's access to lower cost loans.

One consumer reporting agency argued that in certain contexts—including during the underwriting process—underbanked consumers, unbanked consumers, and consumers with little to no traditional credit history could benefit from the alternative use of their furnished data. It said that registered information systems would be obligated to comply with the FCRA, including the provisions that restrict access to credit reports for permissible purposes. It also noted that the Bureau, pursuant to its supervisory and enforcement authority over registered information systems, could monitor compliance with the FCRA and bring enforcement actions against registered information systems as applicable.

Final Rule

The Bureau has carefully considered the comments on proposed § 1041.17(a)(2). For the reasons discussed in the proposal and further below, the Bureau is finalizing this section as proposed, except for renumbering it as § 1041.11(a)(2) of the final rule, along with conforming internal references to other renumbered sections of the final rule.

Registered information systems performing as required under the rule will be consumer reporting agencies within the meaning of the FCRA. Regarding the comments seeking clarification about applicability of various sections of the FCRA, the Bureau concludes that it is beyond the scope of this rulemaking to clarify the scope of other rules or statutes. Specifically, it declines to provide in this rulemaking guidance concerning how registered information systems and lenders comply with the FCRA.

It should be noted that the Bureau included in § 1041.11(b)(4) and (5) eligibility requirements for becoming a registered or provisionally registered information system that include specific requirements for an applicant to have a Federal consumer financial law compliance program and for it to provide the Bureau with an independent assessment of its compliance program as part of its application for provisional registration or registration. Accordingly, it is the Bureau's expectation that registered information systems will determine their rights and obligations under the applicable Federal consumer financial laws.

The Bureau declines to impose restrictions on the use of information furnished to registered information systems pursuant to this rule beyond the restrictions contained in the FCRA. The Bureau recognizes that a provisionally registered or registered information system's provision of prescreened lists based on information furnished pursuant to this rule may create a risk

that an unscrupulous provider of risky credit products could use such a list to target potentially vulnerable consumers. At the same time, however, the Bureau believes that prescreening could prove useful to certain consumers to the extent they needed credit and received firm offers of affordable credit.

Commenters also sought clarity regarding the applicability of the Safeguards Rule; again, the Bureau concludes that it is beyond the scope of this rulemaking to clarify the scope of other rules or statutes. The Bureau also notes that, as explained above, it does not have authorities with respect to the Safeguards Rule. The Bureau notes it is including in § 1041.11(b)(6) and (7) eligibility requirements for becoming a registered or provisionally registered information system that include specific requirements for an applicant to have developed, implemented, and maintain a comprehensive information security program that complies with the Safeguards Rule and for it to provide the Bureau with an independent assessment of its information security program as part of its application for provisional registration or registration and on at least a biennial basis thereafter.

11(b) Eligibility Criteria for Information Systems

Proposed Rule

The subparts of proposed § 1041.17(b) set forth the conditions the Bureau would consider in determining whether an entity is eligible to become a registered or provisionally registered information system pursuant to proposed § 1041.17(c) or (d). As with other portions of the proposed rule that are being renumbered in light of changes made to their provisions, proposed § 1041.17(b) is ultimately being renumbered as § 1041.11(b) of the final rule.

Proposed § 1041.17(b)(1) would have required the Bureau to determine that an entity possesses the technical capability to immediately receive information furnished pursuant to proposed § 1041.16, and that the entity uses reasonable data standards that facilitate the timely and accurate transmission and processing of information in a manner that does not impose unreasonable cost or burden on lenders.[1085] Proposed § 1041.17(b)(2) would require the Bureau to determine that the entity possessed the technical capability to generate a consumer report containing, as applicable for each unique consumer, all information described in proposed § 1041.16 substantially simultaneous to receiving the information from a lender. Proposed § 1041.17(b)(3) would require the Bureau to determine that the entity would perform in a manner that facilitates compliance with, and furthers the purposes of, proposed part 1041.

Proposed § 1041.17(b)(4) would require the Bureau to determine that the entity had developed, implemented, and maintains a program reasonably designed to ensure compliance with all applicable Federal consumer financial laws. This compliance program would have to include written policies and procedures, comprehensive training, and monitoring to detect and promptly correct compliance weaknesses, as described in more detail in the proposed commentary. Proposed § 1041.17(b)(5) required the entity to provide to the Bureau in its application for registration or provisional registration a written assessment of the Federal consumer financial law compliance program just described. The assessment would have to set forth a detailed summary of the Federal consumer financial law compliance program that the entity had implemented and maintained, and explain how that compliance program was appropriate for the entity's size and complexity, the nature and scope of its activities, and risks to consumers presented by such activities. The assessment also would have to certify that, in the opinion of the independent assessor, the Federal consumer financial law compliance program was operating with sufficient effectiveness to provide reasonable assurance that the entity was fulfilling its obligations under all Federal consumer financial laws. In addition, the assessment would have to certify that it had been conducted by a qualified, objective, independent third-party individual or entity that used procedures and standards generally accepted in the profession, adhered to professional and business ethics, performed all duties objectively, and was free from any conflicts of interest that might have compromised the assessor's independent judgment in performing the assessment.

The written assessment of an entity's Federal consumer financial law compliance program required under proposed § 1041.17(b)(5) would have to be included in the entity's application for registration pursuant to proposed § 1041.17(c)(2) or for provisional registration pursuant to proposed § 1041.17(d)(1). However, this written assessment would not be required in an entity's application for preliminary approval for registration pursuant to proposed § 1041.17(c)(1), and would not have to be provided to the Bureau when a provisionally registered information system became registered pursuant to proposed § 1041.17(d)(2). With respect to entities seeking to become registered prior to the effective date of proposed § 1041.16, the proposal would have provided an entity 90 days from the date that preliminary approval was granted to prepare its application for registration, including obtaining the written assessment required under proposed § 1041.17(b)(5).

Proposed § 1041.17(b)(6) would have required the Bureau to determine that an applicant had developed, implemented, and maintained a comprehensive information security program that complied with the Safeguards Rule. Proposed § 1041.17(b)(7)(i) would require the entity to provide to the Bureau in its application for provisional registration or registration, and on at least a biennial basis thereafter, a written assessment of the information security program described in proposed § 1041.17(b)(6). Each assessment had to set forth the administrative, technical, and physical safeguards that the entity had implemented and maintained; explain how such safeguards were appropriate to the entity's size and complexity, the nature and scope of its activities, and the sensitivity of the customer information at issue; explain how the safeguards that were implemented met or exceeded the protections required by the Safeguards Rule; and certify that, in the opinion of the assessor, the information security program was operating with sufficient effectiveness to provide reasonable assurance that the entity was fulfilling its obligations under the Safeguards Rule. The assessment also had to certify that it had been conducted by a qualified, objective, independent third-party individual or entity that used procedures and standards generally accepted in the profession, adhered to professional and business ethics, performed all duties objectively, and was free from any conflicts of interest that might have compromised the assessor's independent judgment in performing assessments. The proposed commentary clarified the timing of the assessments, provided examples of individuals and entities qualified to conduct the assessment, and addressed matters of format and style.

With respect to entities seeking to become registered prior to the effective date of proposed § 1041.16, the Bureau proposed to allow 90 days from the date that a preliminary approval for

[1085] Among other things, these standards must facilitate lender and registered information system compliance with the provisions of the FCRA and its implementing regulations concerning the accuracy of information furnished.

registration was granted for the entity to prepare its application for registration, including obtaining the written assessment required pursuant to proposed § 1041.17(b)(7). Proposed § 1041.17(b)(7)(ii) required each written assessment produced pursuant to proposed § 1041.17(b)(7)(i) to be completed and provided to the Bureau within 60 days after the end of the period to which the assessment applies. Proposed § 1041.17(b)(8) required that to become a registered information system, the entity had to have acknowledged that it was, or consented to being, subject to the Bureau's supervisory authority.

Comments Received

The Bureau received a broad range of comments about the adequacy of the eligibility requirements applicable to entities seeking to become registered information system pursuant to proposed § 1041.17(b). One set of commenters was generally apprehensive about the potential lack of interest from eligible entities in serving as registered information systems. One trade association questioned the Bureau's support for establishing the measures, and stated that it doubted any entities would register as information systems. This commenter predicted that consumer access to the covered loan products would turn more on registration compliance than lender compliance. Another commenter speculated that there would be little interest from entities to become registered information systems because it viewed the proposed independent assessment of the information security program as exceeding the scope of the Safeguards Rule. It criticized the Bureau for lacking a contingency plan to ensure continuity in the market in the event that no entities chose to become registered information systems.

Some comments addressed proposed § 1041.17(b)(1), concerning the requirement that a registered information system be able to use reasonable data standards in a manner that does not impose unreasonable costs or burdens on lenders. One Tribal entity urged the Bureau to prevent registered information systems from engaging in price-gouging practices, particularly when transacting with parties that wholly depend on the ability to access the services to be provided by these systems. A consumer reporting agency argued that the heterogeneity of specialty consumer reporting agencies with respect to technology, data collected, business model, and business practices, would make it challenging for the Bureau to assess whether any costs meet the reasonableness standard of proposed § 1041.17(b)(1). Furthermore, this commenter cautioned that some entities applying for registration could be regulatory monopolists and could charge high costs for access to their data. This commenter believed that registered information systems should agree to data interchange standards in order to keep prices down. In addition, it recommended that any fee charged to lenders should be conditioned on the provision of actual data, such that a result of no data would not incur a fee. The commenter believed this approach would prevent a registered information system from being compensated simply for inquiries that generate no hits. On the other hand, one industry commenter stated that the Bureau should consider several factors before restricting fees and charges in connection with the proposed furnishing requirements. It argued that fees and charges should permit a registered information system to maintain financially sound business operations while enabling lenders to use these compliance services at a reasonable business-friendly cost.

With respect to an entity's general capability to receive information, one consumer reporting agency stated that a registered information system would need access to data about outstanding loans as of the effective date of the furnishing requirement, along with historical data on loans originated and closed in the six months leading up to the requirement to furnish data. Another commenter agreed with this suggestion, stating that it was necessary for lenders to upload historical loan data by the effective date of the furnishing requirement. Other commenters encouraged requiring registered information systems to be able to receive information furnished in the Metro 2 format, explaining that, in their view, Metro 2 fully complies with Federal requirements, is publicly available and time-tested, and would ensure proper classification of loans and loan statuses. Others agreed that standardizing how data is furnished is important but requested that the Bureau not designate a specific standard.

Proposed § 1041.17(b)(2) requires entities to have the capability to generate a consumer report substantially simultaneous to receiving information from a lender. One trade association doubted that entities seeking to act as registered information systems would be able to generate reports substantially simultaneous to their receipt of the information. Commenters who urged requiring provisionally registered and registered information systems to be able to receive information furnished in the Metro 2 format also requested that registered information systems have the capability to generate a consumer report containing information furnished in the Metro 2 format. Others asked the Bureau to clarify provisionally registered and registered information systems' responsibility to perform quality assurance assessments on furnished information received pursuant to proposed §§ 1041.16 and 1041.17. As an example of what such potential responsibilities might entail, the commenter described the process that it follows to analyze its portfolio of records for data quality and consistency, and to monitor the frequency of updates to its records. Some commenters raised concerns about the feasibility of developing within the proposed time frames the standards necessary to meet the requirement that registered information systems generate reports ''substantially simultaneous'' to receipt of the information from the lender. Other commenters indicated that some consumer reporting agencies have that capability now.

The Bureau received several comments on proposed § 1041.17(b)(3), which requires an entity to be able perform its obligations as a registered information system in furtherance of the purposes of part 1041. A number of consumer groups noted their support for proposed comment 17(b)(3)–1, which clarifies that part 1041 does not supersede the consumer protection obligations imposed under other Federal law or regulation and provides a specific example concerning an obligation under the FCRA. One commenter regarded it as a fundamental condition of eligibility for registered information systems.

One consumer reporting agency urged the Bureau to condition an entity's eligibility to become a registered information system on certain financial stability requirements, to subject the systems to oversight, and to apply standards of ownership and management that would exclude inexperience or criminal backgrounds. It also urged the Bureau to require entities to demonstrate a proven record of core competencies, compliant market-place behavior, and an effective dispute-handling system. Another commenter agreed that an entity should be required to show a proven history of successfully implementing and maintaining a compliance management system. A trade association suggested that the Bureau mandate the lender's submission of net worth requirements, a bond for performance, background checks on the owners, and anti-sale provisions of the company without notice or approval

elements. Another commenter recommended that the Bureau require entities to provide evidence of their relationships with lenders that would furnish data to the entities pursuant to proposed § 1041.16. It believed that the existence and nature of such relationships could help maximize the effectiveness of efforts to preserve and produce high-integrity data.

One industry commenter argued that, generally, consumer reporting agencies were not well-suited to satisfy the proposed conditions to become registered information systems because they were not designed for real-time data capture and reporting, and in the past had not been required to perform in the manner required by proposed § 1041.17 to meet requirements under the FCRA. This commenter asserted that consumer reporting agencies had a poor track record in maintaining the accuracy of furnished information, among other obligations.

Very few commenters disagreed with the substance of proposed § 1041.17(b)(4). One industry commenter argued the proposal is vague, and does not provide enough information to adequately determine the applicability of the referenced Federal consumer financial laws. A consumer reporting agency suggested that entities should have to demonstrate their capability to reasonably reinvestigate a consumer dispute, based on the circumstances. It urged the Bureau to retain exclusive jurisdiction over the enforcement and oversight of the registered information systems. It speculated that fear of private litigation could constrain new registered information systems. It also raised the possibility that State actions and plaintiff litigation would risk the development of inconsistent or conflicting law, which could restrain future rulemaking relating to registered information systems.

The Bureau received several comments on the requirement in proposed § 1041.17(b)(6) that an entity would have to develop an information security program that is compliant with the Safeguards Rule and submit it to the Bureau. One commenter praised the Bureau for acknowledging that registered information systems must comply with the Safeguards Rule. Another stated that registered information systems should be required to monitor data furnishing and generally take an active role in working with lenders to reduce compliance burdens and streamline reporting systems. Yet another commenter said that the required independent assessment of the information security program exceeded the scope of the Safeguards Rule, which would increase the costs of obtaining reports and eventually shut down small businesses and hinder innovation.

One commenter requested that the Bureau explicitly restrict the access to information furnished to registered information systems to authorized users exclusively and on an as-needed basis only.[1086] A trade association argued that the proposal did not address mechanisms to independently verify the data in the registered information systems and to secure the data's confidentiality. This commenter generally asked the Bureau for more details about the registered information systems. A consumer reporting agency asked the Bureau how consumer disputes were to be accurately communicated to all registered information systems to ensure that each had identical data.

With respect to the requirements under proposed § 1041.17(b)(5) and (7), a consumer reporting agency expressed concern that requiring all registered information systems to conduct independent assessments would substantially increase the costs of compliance, which would then pass through to consumers in the form of higher-cost credit. It suggested that a sufficiently independent internal audit process could provide the appropriate balance and oversight. Lastly, the Bureau did not receive any comments about proposed § 1041.17(b)(8).

Final Rule

After carefully considering the comments received, the Bureau is finalizing § 1041.11(b) of the final rule—including paragraphs (b)(1) through (8)—in substantially the same form as proposed § 1041.17(b), aside from renumbering the paragraphs and conforming the internal references from the proposal, and it is also adding to the commentary relating to § 1041.11(b)(3) as described below.

In general, the Bureau disagrees with the prediction that no entity would be interested in registering as an information system under the rule. During its market outreach, several firms have expressed interest in serving as registered information systems pursuant to the rule.

Several commenters emphasized the importance of moderating any costs to furnish information pursuant to § 1041.10 of the final rule. Section 1041.11(b)(1) requires that registered information systems use reasonable standards with respect to furnishing that, among other things, do not impose unreasonable costs or burdens on lenders. The Bureau considered the comments regarding moderating costs associated with furnishing and the related concern that registered information systems are able to cover their costs (and earn a return) in satisfying their obligations pursuant to § 1041.11 of the final rule. It agrees with commenters who suggest that fees and charges should permit a registered information system to maintain financially sound business operations while enabling lender to use these compliance services at a reasonable business-friendly cost. However, in finalizing final § 1041.11(b)(1), the Bureau concludes that in connection with furnishing, lenders must not impose unreasonable costs or burdens on lenders.

Several commenters suggested that lenders should be able to access historical data on loans made prior to the effective date of the rule when contemplating making a covered loan under the rule. As described elsewhere, the final rule does not require any furnishing until the compliance date of § 1041.10, which will be 21 months after publication of the rule in the **Federal Register**. Because compliance with §§ 1041.5 and 1041.6 will be required at the same time as § 1041.10, there will be some period of time during which reports obtained from information systems registered before the compliance date will have little or no information. The Bureau weighed the risk of having little or no information in these registered information systems against the burdens related to requiring lenders to furnish information about loans made prior to the compliance date of §§ 1041.2 through 1041.10, 1041.12, and 1041.13. The Bureau has determined that such a requirement would impose significant burden on lenders and that such burden would not be justified by the benefits. For example, under such a requirement, lenders would have to determine whether loans made prior to the compliance date would qualify as ''covered short-term loans'' or ''covered longer-term balloon payment loans'' if they had been made after that date. Further, lenders would not be able to furnish some of the required fields, reducing the utility of the data to further the purposes of the rule. Finally, requiring the furnishing of historical loan data would require additional time for onboarding lenders to registered information systems, delaying the implementation of the rule.

The Bureau also considered whether, in order to increase the amount of data

[1086] It should be noted that the FCRA limits access to consumer reports to those with a permissible purpose.

held by registered information systems when lenders begin obtaining consumer reports as required under the rule, it should stagger the compliance dates of the furnishing obligation under § 1041.10 and the obligations to obtain a consumer report from a registered information system under §§ 1041.5 and 1041.6. Staggering compliance dates may increase to some degree the utility of the consumer reports that lenders would be required to obtain at first, but may add complexity to implementation of the rule and would involve other tradeoffs, as discussed in the proposal. The Bureau has determined that not staggering the compliance dates of §§ 1041.10, 1041.5 and 1041.6, and requiring furnishing on a going forward basis, is the better approach.

The Bureau agrees with commenters who suggest that requiring provisionally registered and registered information systems to agree to use a common data standard would have the potential to keep costs incurred by lenders in connection with furnishing down. However, it declines to require that provisionally registered and registered information systems agree to use a common data standard. The Bureau is not convinced that requiring such agreement as a condition of eligibility for registration is necessary. The Bureau has concluded that it will be in the interest of the registered information systems to use a common data standard.

The Bureau also declines to require that provisionally registered and registered information systems use a particular data standard, such as Metro 2, for purposes of receiving furnished information from lenders. As explained elsewhere, the Bureau believes that the development of common data standards across provisionally registered and registered information systems would benefit lenders and the information systems and intends to foster the development of such common data standards where possible. However, the Bureau believes that development of these standards by market participants would likely be more efficient and offer greater flexibility and room for innovation than if the Bureau prescribed particular standards in this rule. With respect to Metro 2 in particular, the Bureau notes that it believes the standard would need to be modified in order to allow furnishing as required under this rule. Though Metro 2 may be useful as a starting point for development of a common data standard, especially to the extent that the entities that become provisionally registered or registered information systems already use Metro 2 to receive data, the Bureau declines to condition an entity's eligibility to become a registered information system on its use of Metro 2.

With respect to the requirement that registered information systems generate a consumer report substantially simultaneous to receiving the information from a lender, the Bureau is finalizing proposed § 1041.17(b)(2) as § 1041.11(b)(2). Comment 11(b)(2)–1 clarifies that technological limitations may cause some slight delay in the appearance of a consumer report of information furnished pursuant to § 1041.10, but that any delay must be reasonable. The Bureau concludes that this expectation is reasonable.

Under final § 1041.11(b)(3), as proposed, an entity seeking to become a provisionally registered or registered information system must be able to perform in a manner that facilitates compliance with and furthers the purposes of this part. The Bureau disagrees with the comment recommending that it seek to override other existing Federal consumer financial laws that would, example, permit States to bring enforcement actions pursuant to the Dodd-Frank Act, or private individuals to bring an action pursuant to a private cause of action created by the FCRA. The Bureau maintains the position that the consumer protections conferred by part 1041 will best be furthered if the final rule does not supersede the obligations imposed by other Federal laws or regulations. Accordingly, it is finalizing comment 11(b)(3)–1, as proposed, which clarifies that the requirement that to be eligible for provisional registration or registration as an information system, an entity must perform in a manner that facilitates compliance with the purposes of the final rule, does not supersede consumer protection obligations imposed on the entity by other Federal law or regulation.

Several commenters expressed concern that the Bureau would consider registering entities with no demonstrated experience with compliance management systems, FCRA compliance, or with the types of lenders that will be furnishing data under the rule. In response, the Bureau has added comment 11(b)(3)–2 to clarify that in evaluating whether an applicant is reasonably likely to satisfy or does satisfy the requirement set forth in § 1041.11(b)(3) of the final rule, the Bureau will consider any experience the applicant has in functioning as a consumer reporting agency.

In addition, the Bureau declines to prescribe in this rule a provisionally registered or registered information system's responsibility to perform quality assurance assessments on furnished information received pursuant to § 1041.10 of the final rule. As described in the proposal, the Bureau's general approach is to seek to preserve more latitude for market participants that are interested in becoming registered information systems, with the understanding that other regulations and laws already apply or will apply to them, such as the FCRA and the Safeguards Rule, providing additional consumer protections. The final rule confers on provisionally registered and registered information systems the discretion to develop and refine their policies and procedures to satisfy the requirements of §§ 1041.10 and 1041.11. The Bureau has concluded that it is more efficient and effective to allow a market entity to determine its individual approach to complying with § 1041.11(b)(1), (4) and (6) and other regulatory requirements, including potentially designing a quality assessment process in a manner that accounts for features that may be unique to that entity, such as its technology, infrastructure, or business model. As noted in comment 11(b)(3)–1, the FCRA would obligate any registered information system preparing a consumer report to ''follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.'' [1087]

The central point in § 1041.11(b)(4) of the final rule is to ensure that provisionally registered and registered information systems have appropriate Federal consumer financial law compliance programs in place, including written policies and procedures, comprehensive training, and monitoring to detect and to promptly correct compliance weaknesses. As described in the proposal and in the discussion below, the commentary to this section provides examples of the policies and procedures, training, and monitoring that are required here. The proposal explained that these examples were modeled after the Compliance Management Review examination procedures contained in the Bureau's Supervision and Examination Manual. Moreover, the final rule refers to the Dodd-Frank Act's definition of Federal consumer financial law which includes several laws that the Bureau sees as applicable to registered information systems, including the FCRA, as discussed in greater detail in the proposal.

[1087] 15 U.S.C. 1681e(b).

The required Federal consumer financial law compliance program in § 1041.11(b)(4) of the final rule is reinforced by the provision requiring an independent assessment of that compliance program in § 1041.11(b)(5) of the final rule. To summarize, as noted in the proposal, an entity's application for registration pursuant to § 1041.11(c)(2) or provisional registration pursuant to § 1041.11(d)(1) is required to contain this written assessment, which includes a detailed summary of the entity's compliance program, an explanation of how the program is appropriate to the entity's size and activities, certification by an assessor that the program is effective in assuring that the entity is fulfilling its legal duties, and certification of the assessor's qualifications, objectivity, and independence. The Bureau received comments suggesting that § 1041.11(b)(5) would add costs to the preparation of an application to be a registered information system, which the Bureau agrees is likely. However, with respect to entities seeking to become registered information systems before August 19, 2019, the Bureau has purposefully staggered the requirement for submitting such an assessment to the Bureau until after the entity receives preliminary approval to become a registered information system. The applicants will incur such costs only after they receive preliminary approval. The costs of having an actual compliance management program are ones that responsible companies already budget for and are not imposed by this requirement. It should also be noted that effective programs often tend to reduce costs by minimizing legal, regulatory, and reputational risk for the entity. The Bureau is including the requirement in § 1041.11(b)(5) so that the Bureau can be reasonably assured that the entity has developed, implemented, and maintains a program reasonably designed to ensure compliance with all applicable Federal consumer financial laws until such time as the Bureau itself can evaluate the entity's compliance program under its supervisory authority. Thus, the Bureau is finalizing § 1041.11(b)(4) and (5) as proposed and renumbered. The Bureau is also finalizing the related commentary related to those provisions, as proposed.

The Bureau also adopts § 1041.11(b)(6) as proposed and renumbered. The Bureau acknowledges that, as one commenter stated, the rule does not prescribe how provisionally registered and registered information systems comply with the Safeguards Rule. As mentioned above, the Bureau declines to provide in this rulemaking guidance concerning how provisionally registered and registered information systems comply with other applicable laws. The Bureau concludes that it is beyond the scope of this rulemaking to do so.

And for essentially the same reasons that were discussed above with respect to § 1041.11(b)(4) and (5), the Bureau adopts § 1041.11(b)(7) as proposed. The information security program required under § 1041.11(b)(6) is reinforced by the provision requiring an independent assessment of the program in § 1041.11(b)(7) of the final rule. Here too, commenters stated that the independent assessment requirement would add cost to the preparation of an application to be a registered information system, which the Bureau agrees is likely. However, with respect to entities seeking to become registered information systems before August 19, 2019, the Bureau has purposefully staggered the requirement for submitting such an assessment to the Bureau until after the entity receives preliminary approval to become a registered information system. The Bureau is finalizing § 1041.11(b)(7) and its related commentary, as proposed and renumbered.

Several commenters sought to condition the Bureau's approval of an entity as a provisionally registered or registered information system upon it meeting certain additional criteria, including, among other things, financial stability criteria, background checks, net worth thresholds, criminal background checks, and performance bonds. The Bureau declines to add additional eligibility requirements. The Bureau takes the view that its expertise and experience with this market, together with its consumer protection obligations under the Dodd-Frank Act, this final rule, and other applicable Federal consumer financial laws and regulations, provide sufficient sources to guide it in evaluating an applicant's eligibility to become a registered information system. It should be noted that several of the additional criteria suggested by commenters are already addressed by the eligibility requirements in final § 1041.11(b). For example, one commenter suggested that the Bureau condition eligibility on a company having an established compliance management system designed to ensure adherence with Federal consumer financial laws. Final § 1041.11(b)(4) requires that registered information systems have developed, implemented, and maintain a program reasonably designed to ensure compliance with all applicable Federal consumer financial law. Such a program is a key component of an adequate compliance management system; other components of such a system include Board and management oversight, consumer complaint response monitoring, compliance audit, and service provider oversight. The Bureau expects that all supervised entities (which under § 1041.11(b)(8) will include all provisionally registered and registered information systems) will have adequate compliance management systems.

Proposed § 1041.16(b)(8) would have required that an entity seeking to become a provisionally registered or registered information system must acknowledge it is or consents to be subject to the Bureau's supervisory authority. This provision received no comments and thus the Bureau is finalizing § 1041.11(b)(8) as proposed and renumbered.

11(c) Registration of Information Systems Prior to August 19, 2019

Proposed Rule

Proposed § 1041.17(c) described the process that the Bureau proposed for the registration of information systems before the effective date of proposed § 1041.16. Once proposed § 1041.16 was in effect, lenders would have to furnish information to an information system that was registered pursuant to proposed § 1041.17(c)(2) for 120 days or more. The Bureau proposed a two-stage process to become registered prior to the effective date of proposed § 1041.16. First, interested entities would submit to the Bureau an initial application for preliminary approval for registration. Second, the entities would submit a full application for registration after receiving preliminary approval and obtaining certain written assessments from third parties concerning their compliance programs.

11(c)(1) Preliminary Approval

Proposed § 1041.17(c)(1) provided that, prior to the effective date of proposed § 1041.16, the Bureau could preliminarily approve an entity for registration only if the entity submitted an application for preliminary approval to the Bureau by the deadline set forth in proposed § 1041.17(c)(3)(i). The application had to contain information sufficient for the Bureau to determine that the entity was reasonably likely to satisfy the conditions set forth in proposed § 1041.17(b) by the deadline set in proposed § 1041.17(c)(3)(ii). The proposed rule and comments outlined further details about the process, including that the entity's application

would need to describe the steps the entity plans to take to satisfy the conditions and the entity's timeline for such steps and that the entity's plan would need to be reasonable.

11(c)(2) Registration

Proposed § 1041.17(c)(2) allowed the Bureau to approve the application of an entity seeking to become a registered information system prior to the effective date of proposed § 1041.16 only if the entity had received preliminary approval pursuant to proposed § 1041.17(c)(1), and applied to be a registered information system by the deadline proposed in § 1041.17(c)(3)(ii) by submitting information sufficient for the Bureau to determine that the conditions set forth in proposed § 1041.17(b) were satisfied. Proposed § 1041.17(c)(2) further provided that the Bureau could require additional information and documentation to facilitate this determination or otherwise to assess whether registration of the entity would pose an unreasonable risk to consumers. Its related commentary clarifies that the entity seeking to become a registered information system would have to submit the application by the deadlines, and that the application would need to contain information and documentation adequate for the Bureau to determine the required conditions are satisfied, and succinctly and accurately convey the required information, including the required written assessments.

11(c)(3) Deadlines

Proposed § 1041.17(c)(3)(i) and (ii) provided that the deadline to submit an application for preliminary approval for registration pursuant to proposed § 1041.17(c)(1) would be 30 days from the effective date of proposed § 1041.17, and the deadline to submit a registration application pursuant to proposed § 1041.17(c)(2) would be 90 days from the date that preliminary approval for registration is granted. Proposed § 1041.17(c)(3)(iii) would permit the Bureau to waive these deadlines.

Comments Received

Few commenters objected to the time frames that were proposed in § 1041.17(c). One commenter interested in registering as an information system under proposed § 1041.17 stated that its existing infrastructure could allow it to implement the requirements within four months to a year. The commenter stated that the factors that could delay implementation toward the longer side of that range were the historical data component, the complexity of products, the number of products, and interfaces and rules as yet unknown. One consumer reporting agency stated that if the Bureau did not announce the eligibility criteria for registration until it published the final rule, the proposed 30-day period after § 1041.17's effective date to apply for preliminary approval would be insufficient to allow applicants to conduct a business analysis and the technical planning necessary to prepare their applications for preliminary approval. This commenter urged the Bureau to signal its views on configuration issues far ahead of the formal application period for registration. Alternatively, it proposed that the Bureau extend the period to prepare an application for preliminary approval to at least six months. Another industry commenter argued that the deadlines under proposed § 1041.17(c)(3) did not allow adequate time for a preliminary approval application, technical development, operational development, incorporation of common data standards, and completion of written assessments. That commenter asked the Bureau to reconsider the timeline required to meet eligibility criteria and foster common data standards, and for prospective applicants to integrate these standards with their service offerings. It urged the Bureau to initiate the common data standards process prior to publication of the rule, if possible, to facilitate completion of the registered information system's environment prior to the effective date of the final rule.

Final Rule

The Bureau is finalizing proposed § 1041.17(c) as § 1041.11(c) of the final rule in accordance with the renumbering of sections within the rule described earlier. As described above, the Bureau is doing so with one minor modification to the proposed rule, along with substantive changes to the proposed deadlines and technical revisions. The Bureau is finalizing § 1041.11(c)(1) as proposed, except that the provision now permits the Bureau to require additional information and documentation to facilitate its determination of whether to grant an applicant preliminary approval. The Bureau has determined that this modification will facilitate its engagement with entities seeking registration before August 19, 2019 at an earlier stage in the registration process, while granting entities additional opportunities to supplement their applications and ensuring the Bureau has received all the information necessary to make a well-informed determination.

The Bureau is also finalizing proposed § 1041.17(c)(2) as § 1041.11(c)(2). As described above, the section allows the Bureau to approve the application of an entity seeking to become a registered information system prior to August 19, 2019 only if the entity received preliminary approval pursuant to § 1041.11(c)(1), and applied to be a registered information system by the deadline in § 1041.11(c)(3)(ii) by submitting information sufficient for the Bureau to determine that the conditions set forth in § 1041.11(b) are satisfied. Section 1041.11(c)(2) further provides that the Bureau can require additional information and documentation to facilitate this determination or otherwise to assess whether registration of the entity would pose an unreasonable risk to consumers. In addition, the Bureau is finalizing the commentary related to § 1041.11(c)(1) and (2).

In response to concerns that commenters raised about the proposed deadlines, the Bureau is finalizing § 1041.11(c)(3)(i) as proposed, except that it is extending the deadline to submit an application for preliminary approval by 60 days—which now establishes a deadline of April 16, 2018. The Bureau is adopting § 1041.11(c)(3)(ii) as proposed, except that it is extending the deadline to submit an application for registration by 30 days—which now establishes a deadline of 120 days from the date that preliminary approval for registration is granted. The Bureau has concluded that the revised deadlines will provide interested entities with adequate time to prepare their applications, and will provide the Bureau with adequate time to review applications, while still allowing entities to register sufficiently in advance of the compliance date of § 1041.10 so that furnishing may begin upon that date. The proposed deadlines complement the final rule, which extends the implementation period for §§ 1041.2 through 1041.10, 1041.12, and 1041.13 by six more months—moving it from 15 months to 21 months, as described above—and which provides for a 180-day period (rather than the 120-day period that was proposed) before lenders are obligated to begin furnishing to an information system registered prior to August 19, 2019.

The Bureau is not requiring that registered information systems use a common data standard for receiving information from lenders. The Bureau will welcome suggestions regarding how it can foster the development of such standards with applications for preliminary approval as registered information systems.

11(d) Registration of Information Systems On or After August 19, 2019

Proposed Rule

Proposed § 1041.17(d) set forth the process that the Bureau proposed to be used for the registration of information systems on or after the effective date of proposed § 1041.16. The process involved two steps: First, an entity had to apply to become a provisionally registered information system; second, after it had been provisionally registered for a period of time, the entity automatically would become a fully registered information system. Under the proposal, lenders had to furnish information to a system that had been provisionally registered pursuant to proposed § 1041.17(d)(1) for 120 days or more, or that subsequently had become registered pursuant to proposed § 1041.17(d)(2). However, lenders could not rely on consumer reports from a provisionally registered system to satisfy their obligations under proposed §§ 1041.5 and 1041.7 until the system was fully registered pursuant to proposed § 1041.17(d)(2). The proposed period between provisional registration and full registration would be 180 days, to provide 120 days for onboarding and 60 days of furnishing before lenders could rely on consumer reports from the registered information system for purposes of the rule.

11(d)(1) Provisional Registration

Proposed § 1041.17(d)(1) would have provided that, on or after the effective date of proposed § 1041.16, the Bureau could only approve an entity's application to be a provisionally registered information system if the entity's application contained information sufficient for the Bureau to determine that the entity satisfied the conditions set forth in proposed § 1041.17(b). Proposed § 1041.17(d)(1) added that the Bureau could require more information and documentation to facilitate this determination or otherwise assess whether provisional registration of the entity would pose an unreasonable risk to consumers.

11(d)(2) Registration

Proposed § 1041.17(d)(2) stated that an information system which is provisionally registered pursuant to proposed § 1041.17(d)(1) would automatically become a registered information system pursuant to proposed § 1041.17(d)(2) upon the expiration of the 180-day period commencing on the date the information system was provisionally registered. Once a system was registered pursuant to proposed § 1041.17(d)(2), lenders were permitted to rely on a consumer report generated by the system to satisfy their obligations under proposed §§ 1041.5 and 1041.7. Proposed § 1041.17(d)(2) would provide that, for purposes of proposed § 1041.17(d), an information system was provisionally registered on the date that the Bureau published notice of such provisional registration on the Bureau's Web site.

Final Rule

The Bureau did not receive comments on proposed § 1041.17(d). In the proposal, the Bureau explained that it anticipated that, in order to permit lenders time to adjust to furnishing to information systems that are registered before the effective date of the furnishing obligation, proposed § 1041.16, it would not provisionally register any information systems during the first year that proposed § 1041.16 would be in effect. One consumer reporting agency expressed support for this proposed pause, which it believed would provide entities registered as information systems before the effective date with time to collaborate on data exchange standards. The Bureau now confirms that it plans to not provisionally register any information systems during the first year compliance with §§ 1041.2 through 1041.10, 1041.12, and 1041.13 is required. The Bureau concludes that such a pause in registrations of information systems will allow lenders time to adjust to the furnishing to registered information systems that are registered pursuant to § 1041.11(c)(2). The Bureau adopts § 1041.17(d) as proposed, which is now renumbered as § 1041.11(d) of the final rule, with one modification. Under final § 1041.11(d)(2), as explained above, a provisionally registered information system under § 1041.11(d)(1) automatically becomes a fully registered information system upon the expiration of 240 days, not 180 days as proposed. This change is to preserve the 60-day ''furnishing-only'' stage proposed for entities provisionally registered on or after August 19, 2019. Under the final rule, once an information system is provisionally registered for 180 days, lenders must furnish to the system under § 1041.10. Lenders cannot rely on reports from the system to satisfy its obligations under §§ 1041.5 and 1041.6 until the system becomes a fully registered information system, which will happen automatically 240 days after the system was provisionally registered. Thus, these registered information systems will receive furnished information for 60 days before lenders can rely on their reports to satisfy their obligations under the rule. This will ensure that at the point at which an information system becomes registered on or after August 19, 2019 and lenders can rely on its reports, such reports would include reasonably comprehensive information about consumers' recent borrowing histories.

The Bureau adopts comment 11(d)(1)–1 as proposed, as well, which clarifies that the entity seeking to become a provisionally registered information system must submit an application to the Bureau containing information and documentation adequate for the Bureau to assess that § 1041.11(b) are satisfied.

11(e) Applications

In § 1041.11 of the final rule, the Bureau has added a new provision, § 1041.11(e), for the purpose of ensuring more specifically that it receives from applicants the information necessary to evaluate applications pursuant to § 1041.11(c) and (d) of the final rule. The provision requires entities to submit their applications for preliminary registration, registration, and provisional registration in the form required by the Bureau. Applications must include the name of the entity, its business and mailing address as applicable, and the name and contact information of the person who is authorized to communicate with the Bureau on the applicant's behalf concerning the application. The Bureau expects that applicants will be able to provide this information in their application to the Bureau without incurring unreasonable costs or burdens.

11(f) Denial of Application

Proposed Rule

Proposed § 1041.17(e) would have provided that the Bureau deny the application of an entity seeking preliminary approval for registration pursuant to proposed § 1041.17(c)(1), registration pursuant to proposed § 1041.17(c)(2), or provisional registration pursuant to proposed § 1041.17(d)(1) if the Bureau made any of three determinations. First, if the Bureau determines that the entity did not satisfy the conditions set forth in proposed § 1041.17(b), or, in the case of an entity seeking preliminary approval for registration, was not reasonably likely to satisfy the conditions as of the deadline set forth in proposed § 1041.17(c)(3)(ii). Second, if the Bureau determines that the entity's application was untimely or materially inaccurate or incomplete. Third, if the Bureau determines that preliminary approval, provisional registration, or registration

would pose an unreasonable risk to consumers.

Final Rule

The Bureau did not receive comments on proposed § 1041.17(e). Therefore, the Bureau adopts § 1041.17(e) as proposed except that, as described above, the Bureau has renumbered this provision as § 1041.11(f) of the final rule.

11(g) Notice of Material Change

Proposed Rule

Proposed § 1041.17(f) would have required a provisionally registered or registered information system to provide to the Bureau a written description of any material change to information contained in its application for registration submitted pursuant to proposed § 1041.17(c)(2) or provisional registration submitted pursuant to proposed § 1041.17(d)(1), or to information previously provided to the Bureau pursuant to proposed § 1041.17(f), within 14 days of any such change.

Final Rule

The Bureau did not receive comments on proposed § 1041.17(f). Therefore, the Bureau adopts § 1041.17(f) as proposed except that, as described above, the Bureau has renumbered this provision as § 1041.11(g) of the final rule.

11(h) Revocation

Proposed Rule

Proposed § 1041.17(g)(1) would have provided that the Bureau would suspend or revoke an entity's preliminary approval for registration, provisional registration, or registration, if it determined either that the entity had not satisfied or no longer satisfied the conditions described in proposed § 1041.17(b); or that it had not complied with the requirement described in proposed § 1041.17(f); or that preliminary approval for registration, provisional registration, or registration of the entity posed an unreasonable risk to consumers.

Proposed § 1041.17(g)(2) would allow the Bureau to require additional information and documentation from an entity if it had reason to believe suspension or revocation under proposed § 1041.17(g)(1) may be warranted. Proposed § 1041.17(g)(3) stated that, except in cases of willfulness or those in which the public interest required otherwise, prior to suspension or revocation under proposed § 1041.17(g)(1), the Bureau would issue written notice of the facts or conduct that could warrant the suspension or revocation and grant an opportunity for the entity to demonstrate or achieve compliance with proposed § 1041.17 or otherwise address the Bureau's concerns. Proposed § 1041.17(g)(4) would allow the Bureau to revoke an entity's preliminary approval for registration, registration, or provisional registration if the entity submitted a written request to the Bureau that its preliminary approval for registration, registration, or provisional registration be revoked.

Proposed § 1041.17(g)(5) provided that for the purposes of §§ 1041.5 and 1041.7—which would require a lender making most covered loans to obtain and consider a consumer report from a registered information system—suspension or revocation of an information system's registration would become effective five days after the date that the Bureau published notice of the suspension or revocation on its Web site. It also provided that, for purposes of proposed § 1041.16(b)(1), suspension or revocation of an information system's provisional registration or registration would be effective on the date that the Bureau published notice of the revocation on its Web site. Finally, proposed § 1041.17(g)(5) provided that the Bureau would also publish notice of a suspension or revocation in the **Federal Register**.

Final Rule

The Bureau did not receive comments on proposed § 1041.17(g). However, the Bureau is finalizing it as § 1041.11(h) with one change. The Bureau has added § 1041.11(h)(6) to clarify that, if it suspends the provisional registration or registration of an information system, it will provide instructions to lenders concerning the scope and terms of such suspension. For example, depending on the facts and circumstances of a particular determination that suspension is appropriate, the Bureau may suspend registration of a provisionally registered information system or registered information system for purposes of §§ 1041.5 and 1041.6 only; lenders may still be required to furnish to the provisionally registered information system or registered information system pursuant to § 1041.10. The Bureau may also determine that suspension is only appropriate for a certain period of time.

11(i) Administrative Appeals

The Bureau added § 1041.11(i), which provides a process for entities to submit to the Bureau an administrative appeal in certain circumstances. According to § 1041.11(i) of the final rule, an entity may appeal: A denial of its application for preliminary approval for registration pursuant to § 1041.11(c)(1), registration under § 1041.11(c)(2) or (d)(2), or provisional registration under § 1041.11(d)(1); and a suspension or revocation of its preliminary approval for registration pursuant to § 1041.11(c)(1), registration under § 1041.11(c)(2) or (d)(2), or provisional registration under § 1041.11(d)(1).

The subparagraphs of § 1041.11(i) of the final rule address other matters pertinent to administrative appeals. Section 1041.11(i)(1) sets out the grounds for administrative appeal while under § 1041.11(i)(2), an entity has 30 business days to submit an appeal from the date of the determination, although the Bureau may extend this time for good cause. Section 1041.11(i)(3) sets forth the form and content of the administrative appeal, which shall be submitted by electronic means as set forth on the Bureau's Web site. Section § 1041.11(i)(4) establishes the appeals process and that the filing and pendency of an appeal does not by itself suspend the determination that is the subject of the appeal during the appeals process, but grants the Bureau discretion to suspend the determination that is the subject of the appeal during the appeals process. Lastly, § 1041.11(i)(5) specifies that the Bureau has the power to decide whether to affirm or reverse the determination in whole or in part, and requires the Bureau to notify the appellant of this decision in writing.

The Bureau concluded that modifying the proposal to add § 1041.11(i) is consistent with the tenets of due process and administrative law and affords entities under its supervisory authority, including registered information systems, more clarity and transparency about their rights in the event that they receive an adverse determination from the Bureau pursuant to any of the provisions of § 1041.11.

Section 1041.12 Compliance Program and Record Retention

Overview of the Proposal

The Bureau proposed § 1041.18 to require a lender that makes a covered loan to develop and follow written policies and procedures that are reasonably designed to ensure compliance with part 1041 and that are appropriate to the size and complexity of the lender and its affiliates and the nature and scope of their covered loan activities. The Bureau also proposed to require a lender to retain evidence of compliance with the requirements in part 1041 for 36 months after the date a covered loan ceases to be an outstanding loan. Specifically, the

Bureau proposed to require a lender to retain several types of documentation and loan-level records. It proposed both requirements pursuant to its authority to prevent unfair or abusive acts or practices under section 1031 of the Dodd-Frank Act and for the reasons discussed below.

The Bureau stated that the proposed requirement to develop and follow written policies and procedures would help foster compliance with proposed part 1041,[1088] which would have prescribed detailed ability-to-repay and payment collection requirements that were generally more comprehensive than the requirements in States that permit lenders to make covered loans.[1089] To make covered loans that comply with part 1041 when they are originated and when they are outstanding, proposed § 1041.18 would have required lenders to develop written policies and procedures to reasonably ensure that their staff understands the proposed requirements and conducts covered loan activities in accordance with the proposed requirements. In facilitating lender compliance with these requirements, the proposed compliance program requirements would have helped to prevent the identified unfair and abusive practices addressed in part 1041.

As discussed above in part III, the Bureau has extensive experience to date in using its supervisory authority to examine the operations of certain payday lenders and its enforcement authority to investigate the acts or practices of payday lenders. Based on that experience, as well as through its general market outreach, the Bureau believed that it may be useful to provide greater specificity as to the record retention requirement than is typical in many other Federal consumer financial regulations, which are usually phrased in more general terms.[1090] In the Bureau's experience, current record retention practices vary widely across the industry, depending on lender business practices, technology systems, State regulatory requirements, and other factors, but often have proved to be problematic.[1091] Particularly given that ability-to-repay determinations would likely involve different levels of automation and analysis from lender to lender, the Bureau believed that providing an itemized framework listing the nature and format of records that must be retained would help reduce regulatory uncertainty and facilitate supervision by the Bureau and other regulators. The Bureau also noted that the level of detail in the proposed record retention requirements was similar to the level of detail in the recordkeeping obligations in the small-dollar lending statutes and regulations of some States.[1092]

Given that part 1041 would have imposed requirements tied to, among other things, checking the records of the lenders and its affiliates regarding a consumer's borrowing history and verifying a consumer's income and major financial obligations, the Bureau believed that the record retention requirements proposed in § 1041.18(b) would assist a lender in complying with the requirements in part 1041. By providing a non-exhaustive list of records that would need to be retained in proposed § 1041.18(b)(1) through (5), proposed § 1041.18(b) would help covered persons determine whether a contemplated covered loan would comply with the requirements in part 1041 and aid covered persons in complying with the record retention requirements. Furthermore, the proposed record retention requirements would support the external supervision of lenders for compliance with part 1041. In facilitating lender compliance and helping the Bureau and other regulators assess compliance with the requirements in part 1041, the proposed record retention requirements would help prevent and deter the identified unfair and abusive practices addressed in part 1041.

Comments Received

A number of industry commenters disagreed with the Bureau's general approach in the proposal, describing the recordkeeping provisions as overly stringent, unnecessarily prescriptive, and disproportionate to any benefit for consumers. They also suggested that the Bureau should pursue less burdensome alternatives than requiring borrower information to be maintained electronically.

By contrast, consumer groups recommended expanded record retention provisions, partly to ensure that lenders report to the Bureau sufficient information about loans and borrowers. They suggested twenty additional, non-exhaustive data points for the Bureau to analyze under an expanded requirement to retain more records. They also suggested that lenders should report aggregate data to the Bureau at least annually, that the Bureau should create a searchable public database of such information, and that the Bureau should publish an annual report—based on both retained and aggregate data—to demonstrate whether the rule is proving to be effective in achieving its purposes. Another commenter requested that the Bureau create a review process of lender practices for lender portfolios of covered loans that perform unusually poorly over time. This commenter also supported making more of the retained information available to the public for scrutiny.

Several commenters urged that classes of lenders, such as State-regulated entities, should be exempted from compliance with the proposed rule, including its compliance program and record retention requirements. Trade associations, including those for credit unions, advocated for more sweeping exemptions of entire categories of lenders from coverage under the rule. A group of chief legal officers from certain States also supported exempting those lenders that are already covered by such State and local regulatory systems from coverage under the proposal, citing Alabama and Idaho as particular examples of State regulatory systems that they viewed as operating effectively.

Some industry commenters were critical of the Bureau for not exempting small businesses and other small entities from coverage under the proposed rule's compliance program and record retention requirements. One commenter acknowledged, but disagreed with, the Bureau's stated rationale that small lenders are not engaged in meaningfully different practices from other lenders that offer the same types of loans. Others noted that the costs and burdens of meeting any new and additional requirements tended to fall disproportionately heavily on small entities.

[1088] A written policies and procedures requirement is a requirement in other Bureau rules. *See, e.g.,* Regulation E, 12 CFR 1005.33(g)(1).

[1089] *See* discussion of the current regulatory environment by product type in part II above.

[1090] The Bureau believed that record retention was necessary to prove compliance with a rule and was a common requirement across many of the Bureau's rules. *See, e.g.,* Regulation B, 12 CFR 1002.12; Regulation Z, 12 CFR 1026.25. In this context, the Bureau noted that it had found it necessary to levy a civil penalty of $5 million against a large payday lending company for engaging in the destruction of records around one of the Bureau's initial supervisory examinations in this market, which had included continuing to shred documents for weeks, even after Bureau examiners told employees to halt such activities. *See* Consent Order, In re Cash America Int'l, Inc., No. 2013–CFPB–0008 (Nov. 20, 2013).

[1091] Bureau of Consumer Fin. Prot., ''Supervisory Highlights,'' at 16 (Spring 2014), *available at http://files.consumerfinance.gov/201405_cfpb_supervisory-highlights-spring-2014.pdf* (''At multiple lenders, policies and procedures for record retention either did not exist or were not followed, leading to incomplete record destruction logs and improperly destroyed records.'').

[1092] *See, e.g.,* Colo. Code Regs. sec. 902–1–10; Wash. Admin. Code sec. 208–630–610.

Commenters with experience in documenting loans in accordance with existing laws asserted that the recordkeeping requirements were not specific enough for lenders to determine accurately the associated costs, and advanced that to make such determinations, more information was needed about format, content, retention, among other factors. A few commenters noted that some of the recordkeeping requirements contained in the proposal could be satisfied if regulators could access the consistent, real-time information that lenders would furnish to registered information systems, which then could reduce costs and burdens to both lenders and regulators while being more conducive to review and analysis. They also noted that the proposal would cause the regulatory authorities themselves to incur substantial costs to compile, review, and analyze the records they receive from lenders, especially if they are maintained in different formats or contain different content.

Several industry commenters noted that the practical effect of conditional exemptions from certain provisions of the rule was likely to be limited if compliance and records retention requirements still had to be met, as they believed would be the case. Some industry commenters cautioned that the record retention requirements could expose consumers and lenders to significant operational risks to the security of their data.

Final Rule

In § 1041.12 of the final rule, renumbered from proposed § 1041.18, the Bureau has decided to maintain the same general approach to the compliance and record retention requirements as was framed in the proposal. In particular, the final rule requires lenders that make covered loans to develop and follow written policies and procedures that are reasonably designed to ensure compliance with the rule's requirements. Such policies and procedures must be appropriate to the size and complexity of the lender and its affiliates and the nature and scope of its covered loan activities. The final rule requires lenders to retain evidence of compliance and includes a non-exhaustive list of the types of loan-level records and documentation that lenders are required to retain. However, because the scope of coverage has changed from the proposed rule to the final rule to omit the underwriting requirements for covered longer-term loans other than covered longer-term balloon-payment loans, the compliance program and record retention requirements of the final rule are narrower as well. In addition, the final rule exempts from the compliance program and record retention requirements alternative loans pursuant to § 1041.3(e), and accommodation loans pursuant to § 1041.3(f), regardless of the type of lender. The Bureau notes, however, that lenders making alternative loans must maintain and comply with policies and procedures documenting proof of recurring income, as specified as a condition of the exemption in the final rule. The commentary to the final rule contains changes that conform to the modifications made in the final rule.

Several commenters raised issues about the potential burden on lenders and the level of detail required by the proposal, yet the Bureau has determined that the record retention and compliance program requirements will foster compliance with the final rule and as such will benefit consumers. Although the record retention requirements are the same regardless of the size of the lender's operation, the compliance program requirements are calibrated to the size and complexity of the lender and its affiliates, and the nature and scope of the covered lending activities of the lender and its affiliates. Lenders' written policies and procedures must be reasonably designed to ensure compliance with the final rule but the Bureau's regulatory expectation is for lenders to develop compliance programs that are commensurate with their size and complexity and the scope of their offered products. Accordingly, although the compliance program and record retention requirements may increase lenders' regulatory responsibilities, the Bureau concludes that the requirements of the final rule will not be overly burdensome for such lenders. In the final rule, the Bureau has opted to continue to include detailed record retention requirements in order to reduce regulatory uncertainty and facilitate supervision by the Bureau and other regulators. It concludes that this level of detail is necessary because part 1041 is establishing a new regulatory regime, which includes flexible underwriting requirements and limitations on payment attempts. It is important that lenders are aware of what records they need to maintain to demonstrate compliance. In addition, it is important that the Bureau and other regulators are able to use those records to evaluate whether lenders are complying with the rule's requirements.

Some commenters noted that the record retention requirements may increase the costs incurred by regulatory authorities to compile, review, and analyze any records they receive from lenders, especially if the records are maintained in different formats or contain different content. The Bureau finds that the format and content differences in the materials retained by lenders will not impact the overall benefit of the compliance program and record retention requirements. The Bureau would prefer to bear the costs of reviewing such records in different formats rather than pass those costs on to lenders by imposing more specific format requirements.

Several commenters suggested that whole categories of lenders should be exempted from compliance with the final rule's compliance or record retention requirements because they are already subject to State or Federal regulation, such as credit unions or banks, or because they are small businesses. The Bureau's approach to the final rule remains primarily focused on the kinds of loans lenders provide and how they impact consumers, not on the type or size of lenders. As noted above, the Bureau has concluded that it will exclude several categories of loans from coverage of the rule, in part, because they do not present the same kinds of consumer risks and harms as the covered loans addressed by part 1041. Providers of those excluded loans who do not also offer covered loans will not be subject to the compliance program and reporting requirements in § 1041.12 of the final rule. For providers of covered loans, the compliance program and record retention required by the final rule will assist them in complying with the substantive requirements of the rule, benefit supervisory and monitoring efforts, and thus help deter unfair and abusive practices. The Bureau thus has concluded that based on these benefits, the record retention and compliance program requirements in the final rule should apply to all lenders of covered loans, and that it should not exempt any particular class of lenders. The Bureau continues to observe that most small lenders are not engaged in meaningfully different practices from other lenders that offer the same types of loans. Accordingly, the Bureau has decided not to carve out any exceptions for small businesses from the compliance program and record retention requirements of the final rule.

Several commenters recommended that the Bureau require lenders to retain additional specific information and that lenders periodically report to the Bureau about their loan data and lending practices. The Bureau is not requiring additional reporting requirements in the final rule at this

time, based in part on the comments it received raising concerns about the perceived regulatory burden related to the existing components of the proposed compliance program and record retention requirements. In addition, the Bureau concludes that it is premature to establish a blanket reporting requirement for all lenders, given that regulators may want different information for different supervisory or monitoring purposes. In the same vein, the Bureau is not adopting the recommendation by some commenters to make the reported information available to the public.

Likewise, the Bureau is not increasing lenders' requirements to report to the registered information systems as a means of having real-time data available for review for compliance and monitoring purposes, as some commenters suggested. Although real-time access to such data might serve the supervisory purposes of the Bureau and other regulators, it would be contrary to the Bureau's decision to ease some of the burdens of the reporting requirement to the registered information systems in the final rule, as discussed earlier. Many commenters discussed the increased costs associated with the proposed compliance program and record retention requirements, and several cautioned that the record retention requirements could expose consumers and lenders to significant operational risks for the security of their data. The Bureau has considered all of these concerns about the increase in costs to lenders and the industry as a whole and has concluded that the benefits to consumers and the marketplace outweigh concerns about the costs to industry, but those costs should not be exacerbated by adding further burdens at this time of initiating a new Federal regulatory framework. Finally, the Bureau disagrees that the compliance program and record retention requirements increase risks for the security of the consumer data. Providers of covered loans are already subject to legal obligations to secure the data of their consumers under the Safeguards Rule[1093] and the final rule does not change those obligations. If lenders are meeting those obligations in their everyday operations, then the additional information that the rule requires them to retain should not affect the security of consumer data.

12(a) Compliance Program

Proposed Rule

In proposed § 1041.18(a), the Bureau would have required a lender making a covered loan to develop and follow written policies and procedures that are reasonably designed to ensure compliance with part 1041 and that are appropriate to the size and complexity of the lender and its affiliates and the nature and scope of their covered loan activities. Proposed comments 18(a)–1 and 18(a)–2 explained and provided examples of the proposed requirements.

Comments Received

One trade association noted that the proposal would require lenders to develop corresponding policies, which may then grow in complexity if multiple vendors provide the underlying hardware and software infrastructure for origination systems. A number of industry commenters stated that the compliance requirements would substantially increase the costs for providing covered loans, which will either restrict the availability of such credit or make it more costly as these higher compliance costs are passed on to consumers. Several commenters noted that this is particularly a problem for small entities, where the costs of compliance can feel especially heavy and disproportionate to their business operations that lack much scale.

Final Rule

After considering the many comments made on the proposal, the Bureau has decided to finalize § 1041.12(a) as it was proposed (and now renumbered from proposed § 1041.18(a)). The provision states that a lender making a covered loan must develop and follow written policies and procedures that are reasonably designed to ensure compliance with the final rule's requirements. The written policies and procedures must be appropriate to the size and complexity of the lender and its affiliates, and the nature and scope of the covered loan activities.

The commentary to § 1041.12(a) of the final rule differs from the proposed commentary because of technical changes to update the relevant references to the final rule, rather than to the proposed rule. Moreover, throughout, it deletes references to provisions in the proposed rule that would have covered the underwriting of all covered longer-term loans but were omitted from the final rule. By modifying the scope of the final rule from the proposed rule, the Bureau thereby has altered the compliance program requirements in the final rule. Comment 12(a)–2 of the final rule modifies the reference to ''covered short-term loan'' by replacing it with ''covered loan'' to align it more accurately with the terms of the final rule, which also applies the ability-to-repay underwriting requirements to covered longer-term balloon-payment loans. It also specifies that lenders who make such loans under § 1041.5 of the final rule have to develop and follow written policies and procedures to ensure compliance with the ability-to-repay requirements set out in modified form in § 1041.5 of the final rule. For instance, the example in the commentary no longer includes a discussion of the need for lenders to develop and follow policies and procedures regarding estimating housing expenses because under final § 1041.5(c)(2)(iii), lenders can rely on borrower's statements of rental expenses, rather than follow the proposal's requirement that the lender estimate those expenses. And, as discussed above, the commentary to § 1041.12(a) of the final rule has been modified based on changes to the scope of the final rule declining to apply the ability-to-repay underwriting criteria to all covered longer-term loans.

Commenters raised concerns about the complexity of the required policies and procedures, given the underlying complexity of the proposed rule's requirements. They also expressed concern about the cost of developing compliance systems, especially for smaller lenders, and predicted that such costs are likely to be passed on to consumers. These general concerns have already been considered and addressed in the discussion above, yet they also militate in favor of maintaining a certain amount of flexibility. In this regard, it bears emphasis that this provision requires lenders to develop and follow policies and procedures that are reasonably designed to ensure compliance with the requirements of the final rule. The written policies and procedures must be appropriate to the size and complexity of the lender and its affiliates, and to the nature and scope of the covered loan activities. In short,

[1093] Standards for Safeguarding Customer Information, 16 CFR part 314. This regulation was promulgated and is enforced by the FTC pursuant to its specific authority under the Gramm-Leach-Bliley Act, 15 U.S.C. 6801–6809. See earlier discussion regarding the requirements of the Safeguards Rule in the discussion of final rule section 11. In particular, Congress did not provide the Bureau with rulemaking, enforcement, or supervisory authority with respect to the GLBA's data security provisions. 15 U.S.C. 6801(b), 6804(a)(1)(A), and 6805(b). The portion of the GLBA concerning data security is not a Federal consumer financial law under the Dodd-Frank Act; the Bureau does not have authority with respect to the GLBA data security provisions. However, data security practices that violate those GLBA provisions and their implementing regulations may also constitute unfair, deceptive, or abusive acts or practices under the Dodd-Frank Act.

the final rule is not a one-size-fits-all approach. And because of changes made in the scope of coverage under the final rule, the compliance costs highlighted by commenters that were reacting to the proposed rule will be less than they anticipated. The Bureau thus has determined at this time that the final rule appropriately takes into account the size and complexity of lenders' operations and will not create unreasonable compliance costs or burdens on lenders.

12(b) Record Retention

Proposed Rule

Proposed § 1041.18(b) would have required a lender to retain evidence of compliance with part 1041 for 36 months after the date a covered loan ceases to be an outstanding loan. The Bureau believed, in general, that the proposed period would be appropriate for purposes of record retention, and it would give the Bureau and other Federal and State enforcement agencies time to examine and conduct enforcement investigations in the highly fragmented small-dollar lending market that could help address and prevent the unfair and abusive practices that the Bureau had identified as a preliminary matter. The Bureau believed that the proposed requirement to retain records for 36 months after a covered loan ceases to be an outstanding loan also would not impose an undue burden on a lender. The Bureau believed that the proposed record retention requirements would have promoted effective and efficient supervision and enforcement of part 1041, thereby further preventing and deterring the unfair and abusive acts the Bureau proposed to identify.

The Bureau also proposed to specify requirements as to the format in which certain records would have to be retained. In particular, the proposed approach would have provided flexibility as to how lenders could retain the loan agreement and documentation obtained in connection with a covered loan from the consumer or third parties, while requiring that the lender retain various other records that it generates in the course of making and servicing loans in an electronic tabular format such as a spreadsheet or database, so as to facilitate analysis both by the lender and by its external supervisors.

Specifically, proposed § 1041.18(b)(1) would have required a lender of a covered loan either to retain the original version of the loan agreement or to be able to reproduce an image of it and certain documentation obtained from the consumer or third parties in connection with a covered loan. That additional documentation would include, as applicable, the following items: A consumer report obtained from a registered information system; verification evidence; any written statement obtained from the consumer; authorization of an additional payment transfer; and an underlying one-time electronic transfer authorization or underlying signature check. These matters were further described and clarified in the proposed commentary.

Proposed § 1041.18(b)(2) would have required a lender to retain electronic records in tabular format of certain calculations and determinations that it would have been required to make in the process of making a covered loan. A lender would, at a minimum, have been required to retain the records listed in proposed § 1041.18(b)(2), as explained further in the proposed commentary.

Proposed § 1041.18(b)(3) would have required a lender to retain electronic records in tabular format for a consumer who qualifies for an exception to or overcomes a presumption of unaffordability for a covered loan in proposed § 1041.6, § 1041.12(a), or § 1041.10. A lender would, at a minimum, have been required to retain the records listed in proposed § 1041.18(b)(3), as explained further in the proposed commentary.

Proposed § 1041.18(b)(4) would have required a lender to retain electronic records in tabular format on a covered loan's type and terms. A lender would, at a minimum, have been required to retain the records listed in proposed § 1041.18(b)(4), and as explained further in the proposed commentary.

Proposed § 1041.18(b)(5) would have required a lender to retain electronic records in tabular format on payment history and loan performance for a covered loan. A lender would, at a minimum, have been required to retain the records listed in proposed § 1041.18(b)(5), and as explained in the proposed commentary.

Comments Received

Industry commenters asserted that the length of the proposed record retention period was excessive, unjustified, and not in line with existing Federal law, and several advocated for a shorter period. Many relied on the 25-month record retention requirements of the Equal Credit Opportunity Act as the basis for recommending a shorter period. Another commenter supported the proposed record retention period as an appropriate length of time, joined by others that pointed to the furnisher requirements under the FCRA to retain substantiation for 36 months. Some commenters contended that the 36-month period would not impose an undue burden on lenders.

Consumer groups believed that an even longer retention period is justified in light of the requirements already imposed on lenders who typically must substantiate any information they report to consumer reporting agencies for 36 months or more. If the period is not lengthened, they urged the Bureau to specify that this rule does not affect any record retention requirement imposed under any other Federal or State law, including those for substantiating information furnished to a consumer reporting agency and Federal standards for safeguarding consumer information.

Industry commenters also viewed the proposed formatting requirements and mandatory data points as too complex and onerous. They said the electronic tabular format as framed in the proposal was too specific and the data points were too detailed, and that compliance with these requirements would force lenders to develop new systems at substantial cost. Some of this discussion of cost was directed at covered longer-term loans made by traditional installment lenders, but much of it was directed at covered short-term loans. Many commenters claimed that the record retention provisions, including the electronic tabular format, would likely impose large operating costs that would either cause lenders to exit the market or be passed on to consumers. They suggested that the Bureau should pursue less burdensome alternatives than requiring borrower information to be maintained electronically. Commenters noted that that lenders maintain many of the records required under the proposal, but they often do not have one system of record and predicted that the required information would have to be manually entered into an electronic tabular format.

Several industry commenters expressed concerns that the recordkeeping burden was the same for lenders who offered loans under the conditional exemption (proposed § 1041.7) as for those who offered loans subject to the underwriting requirements. Credit unions noted that PAL loans would also be subject to the record retention requirements and expressed concern about the attendant added costs.

Industry commenters, including credit unions and banks, contended that they already follow certain recordkeeping requirements pursuant to existing regulatory oversight by other Federal and State authorities. They asserted that they can provide such information when requested and thus the electronic tabular format described

in the proposal is unnecessary. They regarded the proposal's requirements as more stringent than parallel rules applicable to lenders of other types of credit.

One commenter supported the electronic tabular format as a reasonable approach to the kind of recordkeeping needed to monitor compliance with the proposed rule, and stated that lenders will save on costs by accepting and storing records electronically.

Final Rule

The Bureau is finalizing the opening paragraph of § 1041.12(b) unchanged from proposed § 1041.18(b), other than being renumbered to reflect other modifications made in the rule as discussed earlier. This provision requires a lender to retain evidence of compliance with the final rule for 36 months after the date on which a covered loan ceases to be an outstanding loan.

In particular, the Bureau has concluded that the 36-month record retention period contained in the proposal is appropriate here for several reasons. First, it would provide the Bureau and other Federal and State enforcement agencies with an appropriate and practical amount of time to examine and conduct enforcement investigations in order to prevent and deter the unfair and abusive practices identified in the final rule. Record retention provisions are common in Federal consumer financial law to facilitate effective supervisory examinations, which depend critically on having access to the information necessary to assess operations, activities, practices, and legal compliance.[1094] If the record retention period were reduced, it could be considerably more difficult to ensure that the necessary information and records would remain routinely available for proper oversight of the industry. The Bureau is in a position to evaluate such issues from its experience and perspective of exercising supervision and enforcement authority over this industry, as it has done now for the past several years, as described above in part III. That experience has led the Bureau to perceive that there are some special challenges of oversight in this industry, including around the topic of record retention.[1095]

Second, the 36-month time frame fits relatively comfortably within the other recordkeeping requirements provided under other consumer financial laws, paralleling the FCRA in particular. And though some statutes and regulations provide for shorter periods, the highly fragmented small-dollar lending market argues for a somewhat longer record retention period in order to facilitate the Bureau and other regulators in covering more of the industry while maintaining reasonably spaced examination cycles.

Third, given that some record retention period is virtually inevitable in this market for all the reasons stated, the 36-month retention period would be unlikely to impose an undue burden on lenders, as some commenters noted, when viewed in light of the marginal difference in cost or burden between, say, a 24-month period or a 36-month period. That is especially so given that it is increasingly common even for smaller entities to maintain their lending records on computers.

The commentary to § 1041.12(b) of the final rule was modified to consolidate references previously found in the proposed commentary for the individual subparagraphs. New comment 12(b)–1 now clarifies that items listed in final § 1041.12(b)—documentation and information in connection with the underwriting and performance of covered short-term loans and covered longer-term balloon-payment loans, as well as payment practices in connection with covered loans, generally—are non-exhaustive as to the records that may need to be retained as evidence of compliance with part 1041.

The Bureau has finalized § 1041.12(b)(1) in a slightly reorganized form. Other than its organizational structure, it is in substantially the same form as proposed, except for changes that clarify that the loan agreement and documentation that lenders must retain relates to that which lenders obtained in connection with originating a covered short-term or covered longer-term balloon payment loan, not a ''covered loan'' as described in the proposal. Other changes are technical in nature to make references to the final rule accurate. In particular, the list of required documentation in final § 1041.12(b)(1)(i) through (iii) no longer references proposed § 1041.9(c)(3), which pertained to the ability-to-repay requirements for the covered longer term loans that were included in the proposal but have not been retained in the final rule. It continues to require retention of consumer reports from registered information systems (i), as well as verification evidence (ii) and written statements (iii) under § 1041.5. It clarifies that the consumer reports must be from an information system that has been registered for 180 days or more pursuant to final § 1041.11(c)(2) or is registered with the Bureau pursuant to § 1041.11(d)(2). However, the requirements in proposed paragraphs (b)(1)(iv) and (v) that relate the requirements relating to proposed § 1041.14 (renumbered as final § 1041.8) are now found in a new § 1041.12(b)(4) regarding retention of certain records pertaining to payment practices for covered loans.

To reflect the addition of comment 12(b)–1, the proposed comment 18(b)(1)–1 was deleted. New comment 12(b)(1)–1 is substantially the same as 18(b)(1)–2 in the proposal. It reflects technical changes, including those to clarify that the provision relates to covered short-term or covered longer-term balloon-payment loans and describes the methods of retaining loan agreement and documentation for short-term or covered longer-term balloon payment loans, including in original form or being able to reproduce an image of the loan agreement and documentation. In addition, the commentary to proposed § 1041.18(b)(1)(ii) was deleted, as it referred to estimates of housing expenses.

In light of other substantive changes to the final rule, § 1041.12(b)(2) is more streamlined than the proposed rule. As in the proposal, it requires lenders of covered loans to retain electronic records in tabular format that include specific underwriting information for covered loans under § 1041.5 of the final rule. The final rule clarifies that lenders must retain electronic records in tabular format regarding origination calculations and determinations for covered short-term or covered longer-term balloon-payment loans under § 1041.5. The list of required information is reduced somewhat from the proposal because it no longer includes references to the timing of net income or of major financial obligations, and it no longer requires the retention of information about the underwriting of covered longer-term loans (other than covered longer-term balloon-payment loans). These changes to the record retention provisions thus mirror the corresponding changes made to the

[1094] As noted earlier, record retention is necessary to prove compliance with a rule and is a common requirement across many of the Bureau's rules. *See, e.g.,* Regulation B, 12 CFR 1002.12; Regulation Z, 12 CFR 1026.25.

[1095] *See, e.g.,* Bureau of Consumer Fin. Prot., *Supervisory Highlights,* at 16 (Spring 2014) (''At multiple lenders, policies and procedures for record retention either did not exist or were not followed, leading to incomplete record destruction logs and improperly destroyed records.''); Consent Order, *In re Cash America Int'l, Inc.,* File No. 2013–CFPB–0008 (Nov. 20, 2013) (levying civil penalty for ongoing destruction of records that were needed to conduct an examination), *available at http://files.consumerfinance.gov/f/201311_cfpb_cashamerica_consent-order.pdf.*

substantive underwriting requirements in § 1041.5 of the final rule. The information that lenders must retain under § 1041.12(b)(2)(i) through (iv) includes: the projection made by the lender of the amount of a consumer's income; the projections made by the lender of the amounts of the consumer's major financial obligations; calculated residual income or debt-to-income ratio; and, the estimated basic living expenses for the consumer. The Bureau also added new § 1041.12(b)(2)(v), which requires the retention of other information considered in making the ability-to-repay determinations to clarify that the enumerated list, as stated in the commentary, is non-exhaustive. The commentary to this provision is substantially similar to the proposal but reflects those other substantive and technical changes that were made to the final rule. Proposed comment 18(b)(2)–1 was not finalized because its content is addressed in final comment 12(b)–1, as discussed above. The Bureau finalized former comment 18(b)(2)–2, as comment 12(b)(2)–1. It discusses the requirement that lenders retain records in an electronic tabular format and clarifies, as was proposed, that a lender would not have to retain records under this section in a single, combined spreadsheet or database with the other records required by the provisions of § 1041.12(b). It notes, however, that § 1041.12(b)(2) requires a lender to be able to associate the records for a particular covered short-term or covered longer-term balloon-payment loan with a unique loan and consumer identifiers in § 1041.12(b)(3).

In § 1041.12(b)(3) of the final rule, the Bureau did not finalize the requirement to retain electronic records in a tabular format for a consumer that qualifies for an exception to or overcomes a presumption of unaffordability for a covered loan. It thus has eliminated this provision and renumbered the subsequent subparagraphs. The Bureau did not include this provision in the final rule because the presumptions of unaffordability in proposed § 1041.6 have been eliminated from the rule. The commentary reflects these same changes.

The Bureau has finalized in § 1041.12(b)(3) provisions proposed in § 1041.18(b)(4) with changes from the proposal that reflect some reorganization of provisions formerly found in paragraph (b)(5) and technical changes to address the modification of references from the proposal to the final rule. In particular, this renumbered provision requires lenders to retain electronic records in tabular format regarding loan type, terms, and performance of covered short-term or covered longer-term balloon-payment loans. The final rule now includes the requirement that lenders of such loans retain: the applicable information listed in § 1041.10(c)(1) and (2) of the final rule; whether the lender obtained vehicle security from the consumer; the loan number in a sequence of covered short-term loan, covered longer-term balloon-payment loans, or a combination thereof; information regarding loans not paid in full by the due date; for a loan with vehicle security, whether repossession of the vehicle was initiated; the date of last or final payment received; and, the information listed in § 1041.10(c)(3). The Bureau also deleted language from the proposal that would have covered matters that are now treated elsewhere in the final rule.

The related commentary reflects similar changes, including the reorganization of several subparagraphs. Proposed comment 18(b)(3)–1 was not finalized. Former comment 18(b)(3)–2, now renumbered as 12(b)(3)–1 explains the requirement for lenders to retain records regarding loan type, terms, and performance of covered longer-term balloon payment loans in an electronic tabular format and notes that the records are not required to be in a single, combined spreadsheet or database with the other records required by the provisions of § 1041.12(b); however, it states that § 1041.12(b)(3) requires that the lender be able to associate a particular covered short-term or covered longer-term balloon-payment loan with unique loan and consumer identifiers in § 1041.12(b)(3).

Of note, the requirements formerly outlined in proposed § 1041.18(b)(5)(iii) regarding retaining information about past due loans has been altered in final § 1041.12(b)(3)(iv). The proposal required that a lender retain information on the maximum number of days, up to 180, any full payment, as defined, was past due in relation to the payment schedule. The final rule § 1041.12(b)(3)(iv) instead requires that lenders retain information ''for any full payment on the loan that was not received or transferred by the contractual due date, the number of days such payment was past due, up to a maximum of 180 days.'' Final comment 12(b)(3)(iv)–1 explains that under § 1041.12(b)(3)(iv), a lender that makes a covered loan must retain information regarding the number of days any full payment is past due beyond the payment schedule established in the loan agreement, up to 180 days. The comment defines ''full payment'' as principal, interest, and any charges and explains that if a consumer makes a partial payment on a contractual due date and the remainder of the payment 10 days later, the lender must record the full payment as being 10 days past due. If a consumer fails to make a full payment more than 180 days after the due date, the lender must only record the full payment as being 180 days past due.

With the adjustments to other paragraphs of § 1041.12(b), the Bureau is finalizing § 1041.12(b)(4) to focus on the retention of documents regarding payment practices generally, as they relate to all covered loans. It contains many of the provisions originally in proposed § 1041.18(b)(4) with some adjustments. It requires lenders to retain certain payment-related records for covered loans. Like final § 1041.12(b)(1), a lender must retain or be able to reproduce an image of the required records. Lenders do not need to retain these documents in an electronic tabular format, which for many of the required documents reflects a change from the proposal. The records include leverage payment mechanisms with respect to covered longer-term loans, authorizations of additional payment transfers, and underlying one-time electronic transfer authorizations. It reflects technical changes in the references and content of the final rule. The final commentary outlines methods of retaining documentation. In particular, as an example, comment 12(b)(4)–1 clarifies that a lender must either retain a paper copy of a leveraged payment mechanism obtained in connection with a covered longer-term loan or be able to reproduce an image of the mechanism.

The Bureau is finalizing § 1041.12(b)(5) to require that lenders retain certain other records relating to payment practices for covered short-term or longer-term balloon-payment loans. However, unlike the records retained under § 1041.12(b)(4), these records must be retained in an electronic tabular format. The list of documents is the same as that proposed with one exception. Proposed § 1041.18(b)(5)(iii) has been rephrased and renumbered as § 1041.12(b)(3)(iv). The commentary related to the proposed section was moved to reflect this reorganization and any renumbering of provisions in the rule. The commentary explains that the lender does not have to retain the records required under § 1041.12(b)(3) in a single, combined spreadsheet or database with other records required by the provisions of § 1041.12(b); however, it noted that § 1041.12(b)(5) requires a lender to be able to associate the records for a

particular covered-short-term, or covered longer-term balloon-payment loan with a unique loan and consumer identifiers in § 1041.12(b)(3).

With respect to § 1041.12(b) as a general matter, many commenters had objected to the scope of the information that lenders must retain under the proposal as complex, onerous, stringent, and burdensome. As noted above, the most major change in this regard is the change in the scope of coverage of the rule, which eliminated underwriting requirements for covered longer-term loans (other than covered longer-term balloon loans). Yet in light of the comments received, the Bureau has also lessened the record retention requirements in other respects. For example, the Bureau changed the method of retention required for some of the required records. In particular, it no longer is requiring lenders to retain certain records relating to payment practices in an electronic tabular format.

Some commenters had expressed concern that even if loans were exempted from the ability-to-repay requirements, the lenders were still subject to the compliance program and record retention requirements. To address those concerns, the Bureau has exempted certain types of loans from coverage entirely—namely, alternative loans (§ 1041.3(e)), and accommodation loans (§ 1041.3(f))—including from the compliance program and record retention requirements. As a result, lenders that exclusively provide such loans will not be subject to the compliance program or record retention requirements. For lenders of covered loans, including loans that are conditionally exempted from § 1041.5 under § 1041.6, the Bureau concluded that retention of the documents and information enumerated in final § 1041.12(b)(1) through (4) will suffice to facilitate lender compliance with the rule and the ability to examine for such compliance. As such, the retention of such documents will help prevent unfair and abusive practices.

Some commenters objected to the application of the retention requirements to loans made pursuant to § 1041.6 of the final rule, arguing that the record retention requirements may deter lenders from making such loans. The Bureau believes that the record retention requirements are necessary to ensure that lenders are complying with the specific requirements of § 1041.6 which are designed to protect consumers in the absence of underwriting requirements. In addition, it notes that lenders of loans under § 1041.6 would not have to retain all of the information that relates to origination decisions for loans made under § 1041.5.

The Bureau disagrees with the commenters that asserted records retention provisions are unnecessary because they already retain documents in accordance with other Federal consumer financial laws and can produce them when requested. The obverse of this argument is that it shows the supposed burdens of imposing these provisions are not significant for these entities. As outlined in the proposal, the Bureau's experience is that current record retention practices vary widely across the industry, depending on lender business practices, technology systems, State regulatory requirements, and other factors. In addition, as mentioned above, the Bureau itself, in the context of its supervision and enforcement activities, has encountered difficulties at times with the industry's handling of records. Accordingly, the Bureau has concluded that listing the specific nature and format of records to be retained will help reduce regulatory uncertainty and facilitate supervision by the Bureau and other regulators. That some lenders can easily produce these types of documents upon request does not undercut the Bureau's conclusion that, based on its supervisory and enforcement experience, many lenders of covered loans do not have robust compliance management systems and would benefit from more guidance regarding compliance expectations. Indeed, as noted above, what it actually shows is that records retention is a functionality that can be managed successfully by these entities, especially as it is computerized and automated.

The other principal objection that commenters made here concerned the requirement that much of the specified information is to be maintained in an electronic tabular format, which they claimed is complex, onerous, burdensome, and unnecessary. Other commenters, however, found this requirement to be a reasonable approach, and as outlined in the proposal, the Bureau sought to strike a balance that would allow lenders substantial flexibility to retain records in a way that would reduce potential operational burdens while also facilitating access and use by the lender itself and by the Bureau and other regulators. The Bureau has carefully considered the comments that it received and concludes that this requirement to retain records in an electronic tabular format should be relatively simple for lenders to carry out. That is especially so because lenders can create multiple spreadsheets or databases to capture the related sets of information, as long as they could cross-link materials through unique loan and consumer identifiers. As at least one commenter noted, these are documents that many lenders are already generating right now. That fact, coupled with the 21-month implementation period leading up to the compliance date of §§ 1041.2 through 1041.10, 1041.12, and 1041.13, indicates that the industry is relatively well positioned to comply with this component.

The other complaint raised by some commenters was that the proposed compliance program and record retention requirements would increase lender costs in providing such loans and may result in some lenders leaving the small-dollar loan market. Other commenters noted that lenders would actually save on costs by accepting and storing records electronically, as is increasingly common with businesses of all kinds. The Bureau has concluded that any increased costs associated with developing a record retention system that is compliant with the final rule are likely to be offset by benefits that will flow to lenders, consumers, and the marketplace from lenders having systems in place that enable them more easily to track and monitor their compliance with the final rule. For example, lenders will be better able to review their loan performance metrics and identify the root causes of systemic problems while preventing violations of the final rule. The Bureau has also concluded that the record retention requirements would promote effective and efficient enforcement and supervision of the final rule, thereby deterring and preventing unfair and abusive practices that create risks and harms for consumers.

Section 1041.13 Prohibition Against Evasion

Proposed Rule

Proposed § 1041.19 would have provided that a lender must not take any action with the intent of evading the requirements of part 1041. It would have complemented the specific, substantive requirements of the proposed rule by prohibiting any lender from undertaking actions with the intent to evade those requirements. The Bureau proposed § 1041.19 based on its express statutory authority under section 1022(b)(1) of the Dodd-Frank Act to prevent evasions of ''the purposes and objectives of the Federal consumer financial laws.'' [1096]

[1096] 12 U.S.C. 5512(b)(1).

The proposed commentary would clarify the meaning of this general provision by indicating when a lender action is taken with the intent of evading the requirements of the Federal consumer financial laws, including this rule. Specifically, the commentary noted that the form, characterization, label, structure, or written documentation in connection with the lender's action shall not be dispositive, but rather the actual substance of the lender's actions, as well as other relevant facts and circumstances will determine whether the lender took action with the intent of evading the requirements of part 1041. It also clarified that if the lender's action is taken solely for legitimate business purposes, then it is not taken with the intent of evading the requirements of part 1041, and that, by contrast, if a consideration of all relevant facts and circumstances reveals the presence of a purpose that is not a legitimate business purpose, the lender's action may have been taken with the intent of evading the requirements of part 1041.[1097] The commentary also clarified that action taken by a lender with the intent of evading the requirements of part 1041 may be knowing or reckless. Furthermore, it clarified that fraud, deceit, or other unlawful or illegitimate activity may be one fact or circumstance that is relevant to the determination of whether a lender's action was taken with the intent of evading the requirements of the proposed rule, but fraud, deceit, or other unlawful or illegitimate activity is not a prerequisite to such a finding. The proposed comments also provided some illustrative examples of lender actions that, depending on the facts and circumstances, may have been taken with the intent of evading the requirements of the proposed rule and thus may be violations of the proposed rule, as well as one counter-example.

The Bureau proposed § 1041.19 for two primary reasons. First, the provision would address future lender conduct that is taken with the intent of evading the requirements of the rule but which the Bureau may not, or could not, have fully anticipated in developing the rule. The proposed rule contained certain requirements that are specifically targeted at potential lender evasion and which rely on the Bureau's authority to prevent evasion under section 1022(b)(1) of the Dodd-Frank Act.[1098] However, the Bureau cannot anticipate every possible way in which lenders could evade the requirements of the proposed rule.[1099] The Bureau was also concerned about the further complexity that would result from attempting to craft additional rule provisions designed to prevent other conduct taken with the intent of evading the proposed rule. Proposed § 1041.19 would provide flexibility to address future lender conduct that is taken with the intent of evading the proposed rule. By limiting avenues for potential evasion, proposed § 1041.19 would enhance the effectiveness of the proposed rule's specific, substantive requirements, and thereby preserve the consumer protections of the proposed rule.

Second, the Bureau believed that proposed § 1041.19 was appropriate to include in the proposed rule given the historical background of the markets for covered loans. As discussed in the proposal, over the past two decades many lenders making loans that would be treated as covered loans under the proposed rule have taken actions to avoid regulatory restrictions at both the State and Federal levels. For example, as discussed above in part II, some lenders have reacted to State restrictions on payday loans by obtaining State mortgage lending licenses and continuing to make short-term, small-dollar loans. In Delaware, a State court of chancery recently held that a loan agreement was unconscionable because, among other factors, the court found that the ''purpose and effect'' of the loan agreement was to evade the State's payday lending law, which includes a cap on the total number of payday loans in a 12-month period and an anti-evasion provision.[1100] States also have faced challenges in applying their laws to certain online lenders, including lenders claiming Tribal affiliation and offshore lenders. Furthermore, at the Federal level, lenders have been making loans that were narrowly structured to deliberately circumvent the scope of regulations to implement the Military Lending Act (MLA), which Congress enacted in 2006. For example, in response to the MLA's implementing regulations that prohibited certain closed-end payday loans of 91 days or less in duration and vehicle title loans of 181 days or less in duration, lenders began offering payday loans greater than 91 days in duration and vehicle title loans greater than 181 days in duration, along with open-end products. The Department of Defense, which was responsible for drafting the MLA regulations, as well as numerous members of Congress, concluded that such practices were undermining the MLA's consumer protections for service members and their families.[1101] Given this historical background of a decade of widespread evasion of the protections supposedly conferred by the MLA, the Bureau determined that the anti-evasion provision in § 1041.19 was appropriate to include in the proposed rule.

In proposing § 1041.19 and its accompanying commentary, the Bureau relied on anti-evasion authority under section 1022(b)(1) of the Dodd-Frank Act, which provides that the Bureau's director may 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.'' [1102]

[1097] The proposal noted that even if a lender's action can be shown to have been taken solely for legitimate business purposes—and thus was not taken with the intent of evading the requirements of the proposed rule—the lender's action is not *per se* in compliance with the proposed rule because, depending on the facts and circumstances, the lender's action may have violated specific, substantive requirements of the proposed rule.

[1098] For example, proposed § 1041.7(d) was designed to prevent evasion of the requirements of proposed § 1041.7 through the making of a non-covered bridge loan when a section 7 loan is outstanding and for 30 days thereafter.

[1099] As the Commodity Futures Trading Commission (CFTC) noted in a proposed rulemaking implementing an anti-evasion provision under title VII of the Dodd-Frank Act, ''Structuring transactions and entities to evade the requirements of the Dodd-Frank Act could take any number of forms. As with the law of manipulation, the 'methods and techniques' of evasion are 'limited only by the ingenuity of man.''' 76 FR 29818, 29866 (May 23, 2011) (quoting *Cargill* v. *Hardin,* 452 F.2d 1154, 1163 (8th Cir. 1971)). The Bureau's approach to the anti-evasion clause in proposed § 1041.19 has been informed by this CFTC rulemaking, as discussed below.

[1100] *See James* v. *National Financial, LLC,* 132 A.3d 799, 834 (Del. Ch. 2016). The lender structured a $200 loan as a 12-month installment loan with interest-only payments followed by a final balloon payment, with an APR of 838.45 percent. *Id.* at 803. The court also found a violation of TILA with regard to the disclosure of the APR in the loan contract. *Id.* at 838–39. This case and the Delaware payday law at issue are also discussed above in part II.

[1101] The Department of Defense amended the MLA regulations in 2015 and the compliance date for the amendments is later this year. *See* 80 FR 43560 (Jul. 22, 2015) (final rule containing amendments). The preamble to the amendments included discussion of comments to the proposed rule from 40 U.S. Senators who wrote that the amendments were ''essential to preventing future evasions'' of the MLA regulations. *Id.* at 43561 (quoting letter from Jack Reed, *et al.,* Nov. 25, 2014).

[1102] The Bureau noted that Dodd-Frank Act section 1036(a) separately provides that it shall be unlawful for ''any person to knowingly or recklessly provide substantial assistance to a covered person or service provider in violation of the provisions of section 1031, or any rule or order issued thereunder, and notwithstanding any provision of this title, the provider of such substantial assistance shall be deemed to be in violation of that section to the same extent as the person to whom such assistance is provided.'' 12 U.S.C. 5536(a)(3). The Bureau did not rely on this authority for proposed § 1041.19, but noted that this statutory provision

Continued

Anti-evasion provisions are a feature of many Federal consumer financial laws and regulations.[1103] In addition, anti-evasion provisions were included in a final rule issued in 2012 by the CFTC under title VII of the Dodd-Frank Act (the CFTC Anti-Evasion Rules).[1104] One of the CFTC Anti-Evasion Rules provides that it is ''unlawful to conduct activities outside the United States, including entering into agreements, contracts, and transactions and structuring entities, to willfully evade or attempt to evade any provision of'' the Dodd-Frank Act title VII provisions or implementing CFTC regulations [1105] and that the ''[f]orm, label, and written documentation of an agreement, contract, or transaction, or an entity, shall not be dispositive in determining whether the agreement, contract, or transaction, or entity, has been entered into or structured to willfully evade.'' [1106] Moreover, in the preamble for the final CFTC Anti-Evasion Rules, the CFTC provided interpretive guidance about the circumstances that may constitute evasion of the requirements of title VII of the Dodd-Frank Act. The CFTC differentiated between an action taken by a party *solely* for legitimate business purposes, which the CFTC stated would not constitute evasion, and an action taken by a party that based on a ''consideration of all relevant facts and circumstances reveals the presence of a purpose that is not a legitimate business purpose,'' which the CFTC stated could constitute evasion depending on the facts and circumstances.[1107] The CFTC adopted a principles based approach because it found that adopting an alternative approach that provides a bright-line test of non-evasive conduct may provide potential wrong-doers with a roadmap for structuring evasive transactions. The Bureau believes that the CFTC Anti-Evasion Rules are an informative source of regulatory text and interpretative guidance on agency use of anti-evasion authority granted under the Dodd-Frank Act.[1108]

Comments Received

Several industry participants and trade associations raised questions about the Bureau's reliance on the Dodd-Frank Act's grant of authority to the CFPB's director to promulgate rules to ''prevent evasions'' as the basis for its legal authority for the proposed rule's anti-evasion provision. In particular, one commenter asserted that this legal authority should be construed narrowly to authorize only recordkeeping, reporting, and compliance requirements or to prohibit products and services where no reasonable expectation exists that consumers will use them in a lawful manner.

Some commenters objected that exercising this authority would allow the Bureau to circumvent the constraints of the Administrative Procedure Act and impose restrictions without sufficient notice or specificity. Other industry commenters urged that the proposed anti-evasion clause should not be utilized because its purported breadth and ambiguity would lead to overreach that could adversely affect lenders that are responsible and committed to regulatory compliance. They noted that lenders are already obliged to comply with various State laws and with the Military Lending Act, and they contended that the anti-evasion clause is unnecessary in light of the Bureau's existing authority to target and investigate unfair, deceptive, or abusive acts or practices. Many industry commenters urged that the rule either be made more specific—without an anti-evasion clause—or that it be replaced instead with clear guidance to ensure compliance. They noted that the substantive and definitional provisions of the rule could be amended over time to address any loopholes that are found to harm consumers without including open-ended authority that they contend may create a trap for unwary lenders who believe, in good faith, that they are complying with the provisions of the rule. A group of chief legal officers echoed this advice by urging the Bureau to develop specific criteria to determine whether to bring enforcement actions because it would provide clear standards to lenders. Another industry commenter urged the Bureau to let the courts determine violations of law based on fact-specific circumstances and statutory interpretations rather than applying a broad anti-evasion clause.

In contrast, consumer groups judged the anti-evasion clause to be an essential means of addressing evasive practices that would breach the intent of the rule while seeming to conform to its terms. They mentioned specific loopholes that exist under various State laws and described how those provisions are used to circumvent regulatory oversight in ways that are prevalent across the lending industry. One State Attorney General expressed support for a broad and flexible anti-evasion clause as necessary to prevent lenders from evading coverage by various means and to enable law enforcement to effectuate the purposes of the rule. Another commenter supported the clause but suggested supplementing it with additional bright-line rules to restrict certain fees and the bundling of covered loans with the sale of other goods and services.

could be used in an enforcement action to address evasive conduct if a lender's actions were taken with the substantial assistance of a non-covered person.

[1103] *See, e.g.,* Fair Credit Reporting Act, 15 U.S.C. 1681s(e)(1) (''The Bureau may prescribe regulations as may be necessary or appropriate to administer and carry out the purposes and objectives of this subchapter, and to prevent evasions thereof or to facilitate compliance therewith.'').

[1104] *See* 77 FR 48208, 48297–48303 (Dec. 13, 2012) (Final Rule); 76 FR 29818, 29865–68 (May 23, 2011) (Proposed Rule). Section 721(c) of the Dodd-Frank Act required the CFTC to further define the terms ''swap,'' ''swap dealer,'' ''major swap participant,'' and ''eligible contract participant'' in order ''[t]o include transactions and entities that have been structured to evade'' subtitle A of title VII of the Dodd-Frank Act, and several other provisions of Dodd-Frank Act title VII reference the promulgation of anti-evasion rules. *See* 77 FR 48208, 48297 (Dec. 13, 2012). The CFTC Anti-Evasion Rules were promulgated as part of a larger rulemaking issued jointly by the CFTC and the Securities and Exchange Commission (SEC) under title VII of the Dodd-Frank Act, which established a comprehensive new regulatory framework for swaps and security-based swaps. Although the larger rule was issued jointly by the CFTC and the SEC, the anti-evasion provisions were adopted only by the CFTC. *Id.* at 48297–48302. The SEC declined to adopt any anti-evasion provisions under its Dodd-Frank Act discretionary anti-evasion authority. *Id.* at 48303.

[1105] 17 CFR 1.6(a).

[1106] 17 CFR 1.6(b). A separate anti-evasion provision deemed as a swap any agreement, contract, or transaction ''that is willfully structured to evade any provision of'' subtitle A of title VII. This provision contained similar language as 17 CFR 1.6(b) regarding the ''form, label, and written documentation'' of the transaction not being dispositive as to the determination of evasion. *See* 17 CFR 1.3(xxx)(6)(i), (iv). The CFTC defined willful conduct to include intentional acts or those taken with reckless disregard.

[1107] *See* 77 FR at 48301–02; 76 FR at 29867. Among other sources for this distinction, the CFTC described Internal Revenue Service (IRS) guidance on the line between permissible tax avoidance and impermissible tax evasion. *See* 77 FR 48208, 48301–02; 76 FR 29818, 29867. The CFTC also addressed, in response to comments, whether avoidance of regulatory burdens is a legitimate business purpose. The CFTC wrote that the agency ''fully expects that a person acting for legitimate business purposes within its respective industry will naturally weigh a multitude of costs and benefits associated with different types of financial transactions, entities, or instruments, including the applicable regulatory obligations.'' 77 FR 48208, 48301. The CFTC further clarified that ''a person's specific consideration of regulatory burdens, including the avoidance thereof, is not dispositive that the person is acting without a legitimate business purpose in a particular case. The CFTC will view legitimate business purpose considerations on a case-by-case basis in conjunction with all other relevant facts and circumstances.'' *Id.*

[1108] The Bureau emphasized that although the anti-evasion clause in proposed § 1041.19 and the accompanying commentary has been informed by the CFTC Anti-Evasion Rules, the Bureau was not formally adopting as the Bureau's own position the interpretations drawn by the CFTC in the CFTC Anti-Evasion Rules' preamble, nor did the Bureau endorse the reasoning and citations provided by the CFTC in the CFTC Anti-Evasion Rules' preamble.

Many industry commenters and trade associations objected to the anti-evasion clause because of its alleged vagueness. They contended that, as a result, unfair effects could flow to lenders, including potential chilling effects on participation and innovation in the marketplace. In particular, they asserted that the proposed anti-evasion provision's knowing or reckless standard for intent is too vague, open-ended, and indefinite and it exposes lenders to liability for non-compliance based on the Bureau's own undefined notions of the spirit of the law, even where the lender is in technical compliance with the provisions of the rule. In addition, many industry commenters, while supportive of including an intent standard, thought it should be more specifically defined. They also objected to setting the threshold for intent at a ''knowing or reckless'' level because they thought it was too loose a standard for invoking such authority. They further contended that ''intended evasions'' should fall outside the scope of the rule, and an action should have to constitute an actual evasion to trigger a violation under the statute.

A number of consumer and legal aid groups opposed the proposed ''intent'' provision, which they thought risked undermining the entire provision, as it would be potentially difficult for the Bureau to prove the lender's state of mind. Others agreed and thought that the clause would set up time-consuming and costly legal battles that would actually facilitate evasions of the rule. They countered that the anti-evasion clause should be reworded simply to cover *de facto* evasions, without any importing of an intent standard into the clause.

Several commenters further urged the Bureau not to prohibit acts or practices without lenders knowing what acts or practices were being proscribed. This objection was couched as a matter of elementary fairness and the legal requirement to provide sufficient notice before imposing liability. Commenters said that the anti-evasion clause is broad enough to permit the Bureau to label as a violation any action it perceives as politically distasteful, regardless of the specific provisions in the final rule. Some commenters focused on the Bureau's second rationale for the proposal—that lenders of covered loans have a history of avoiding regulatory restrictions. They asserted that these examples of avoidance are really just evidence of lenders' efforts to comply with those laws and regulations. One commenter objected that the anti-evasion clause would be likely to sow confusion in the complex system of modern interstate banking.

Some industry commenters also were concerned that the breadth of the proposed anti-evasion clause would create a ''chilling effect'' that would disincentivize lenders from making loans, and could therefore cause some lenders to exit the market. By creating the potential to over-deter desirable conduct and punish undeserving actors, commenters warned that the clause was more likely to lead to significant litigation than to bolster regulatory effectiveness. At the same time, they contended that the open-ended nature of the clause would chill innovation and prevent market entry by lenders that would otherwise be willing to offer new products. The risks thus posed would tend to scare off investors and creditors, thereby increasing the cost of capital and discouraging more lending.

Industry commenters also took issue with use of the phrase ''solely for legitimate business purposes'' in the commentary to the proposed rule. Specifically, the commentary stated that if the lender's action is taken solely for legitimate business purposes, the lender's action is not taken with the intent of evading the requirements. The commenters contended that the phrase was vague and not sufficiently defined in the proposal. One commenter asserted that this wording would allow the Bureau to reach as evasion any acts with a secondary purpose and instead the Bureau should be limited to reaching only acts that constitute a ''disguised primary purpose,'' as grounded in an evidentiary showing as a factual matter. Another commenter suggested exempting from the clause any change in practices that produces an economic benefit to the consumer.

Consumer groups stated that an evasion should not be limited to a change in a lender's practices, in order to capture new entrants to the markets with practices that would evade the rule. They also argued that the relevant time frame for gauging a pertinent shift in a lender's practices should extend back to the issuance of the SBREFA framework of proposals, rather than the issuance of the final rule, which they deemed to be more consistent with an ''all facts and circumstances'' approach. One industry commenter asked the Bureau to clarify that compliance with the rule is itself a legitimate business reason to modify products and processes.

Industry participants and trade associations objected to the Bureau's statement in the proposal that anti-evasion provisions are a feature of many Federal consumer financial laws and regulations, which they claim is unfounded. They sought to distinguish on a variety of grounds the FCRA, the treatment in Regulation Z derived from the Home Ownership Equity and Protection Act (HOEPA), and the anti-evasion clause contained in the Dodd-Frank Act as administered by the CFTC. For example, one commenter noted that the FCRA has a *statutory* anti-evasion provision, while only Regulation Z contains limited anti-evasion clauses in its high-cost mortgage provision, which was derived from HOEPA. Other commenters distinguished the CFTC's anti-evasion clause from the proposal's provision because it applies only to ''willful'' behavior; the parties to the regulated activity are generally more sophisticated than the consumer borrowers at issue here; and a person's consideration of the regulatory burdens, including avoidance thereof, is not dispositive that the person is acting without a legitimate purpose.

Several industry commenters concluded that the proposal's anti-evasion provision was arbitrary and capricious, citing several of the issues identified above, including, among other things: The perceived lack of distinction in the proposal between proper and improper behavior; the Bureau's reliance on the CFTC's anti-evasion rule; the necessity of the provision in light of the Bureau's other authority; and the perceived potential for a chilling of the markets.

Many commenters also provided input into different aspects of the commentary set out in the proposal and how well it does or does not succeed in bolstering the proposed rule. In particular, some commenters criticized the commentary as exacerbating the concerns about vagueness with its list of ''non-exhaustive'' examples. One industry commenter noted that the limited examples do not guarantee that other regulators will take the same view, or that what is currently viewed as permissible under the proposed rule would remain so in the future, both of which raise liability concerns. On the other side, consumer groups also recommended revising and adding a number of examples to further their goal of strengthening the anti-evasion clause. A number of commenters also expressed differing views about the appropriate relationship or intersection between covered and non-covered loans for purposes of some of these provisions.

Among other conduct, the first example in the proposal would pertain to a lender that routinely obtains a leveraged payment mechanism but does so more than 72 hours after origination. One attorney general observed that it

was illustrative of the need for an anti-evasion clause. Several commenters noted, however, that this example should be strengthened to protect borrowers by removing the time limit altogether or covering loans any time a lender obtains a leveraged payment mechanism, regardless of when that occurs. An industry commenter stated that this example was too vague, because it did not specify how many borrowers were needed to meet the ''routinely'' standard. Another commented that an examiner at a later date should not be able to add further restrictions beyond the 72-hour period. One Tribal lender expressed its concern that the language used seemed like a warning that the Bureau will regularly find that the Tribal operations do not constitute legitimate business practices.

Among other conduct, the second proposed example would pertain to a lender not conducting an ability-to-repay analysis and regularly charging a recurring late fee to borrowers to be paid biweekly while the loan is outstanding. Consumer groups offered suggestions about the second example in the proposal. They contended that the assumption that delinquency fees and re-borrowing fees are the same should be eliminated, and suggested that the Bureau should emphasize that the scenario could lack elements from the fact pattern and still constitute evasion. They further commented that the example did not provide very robust guidance about what constitutes evasion. They recommended modifying the definition of a loan sequence or covered loan to address the concerns underlying this example in a more effective manner.

Consumer groups contended that the third proposed example which would involve, among other conduct, the lender charging a high penalty interest rate, was overly broad and advocated the use of a lower penalty rate to emphasize that not all of the elements in the example had to be present to constitute evasion. They also suggested that the rule should specify that the total cost of credit must include the penalty rate if the lender reasonably expects that a significant number of borrowers will trigger the penalty rate. Consumer groups also suggested that the reference point in the example for lenders' past and current practices should be the SBREFA date.

Regarding the fourth proposed example, which would include, among other conduct, the lender changing its practice such that its second presentment for a delinquent loan was for only $1, consumer groups recommended prohibiting the initiation of additional payment transfers after any failed attempt.

The fifth proposed example would pertain to, among other conduct, a lender restructuring its loan product prior to the effective date of the final rule such that it is a covered loan subject to one of the conditional exceptions. The commentary suggests that the scenario offered is not indicative of evidence of a violation of the anti-evasion provision. An industry commenter stated that the fifth example suggests it might be an evasion to structure the loan product to be non-covered, but the example does not clarify how to avoid having such a loan product trigger the anti-evasion clause.

Consumer groups also stated that the Bureau should adopt other examples for greater clarity about what constitutes an evasion. They suggested that if certain lenders unilaterally change the terms of an account after 72 hours to add a wage assignment, automatic transfers, or other leveraged payment mechanism, that should constitute an evasion. They also suggested that another example of evasion would be where the lender continues to use a leveraged payment mechanism without complying with the requirements of the payment provisions of the rule. Further, they suggested a list of more than a dozen ways lenders could evade the rule or certain of its requirements, which should be addressed to improve the proposal. One commenter, by contrast, asked the Bureau to adopt more examples of actions undertaken without intent to evade the rule, including the use of consumer notices, one-time ACH authorizations, and other mechanisms. A credit union trade association offered several ideas for how the anti-evasion clause could be clarified further, and asked the Bureau to clarify that the clause would not be used to create liability for credit unions that changed their lending programs to fall outside the scope of the rule. One set of academic commenters expressed concern that the definition of ''annual percentage rate'' could allow lenders to exclude late fees from the modified total cost of credit and structure rolled-over short-term loans to pass as long-term loans.

Some commenters raised other miscellaneous suggestions. A trade association requested that if the Bureau keeps an anti-evasion clause, then it should extend a safe harbor for at least the first year after the effective date of the final rule. Another commenter urged that the Bureau should regularly examine records for data omissions and this provision should include specific language to address the consequences of any such data omissions. That commenter also sought language barring the practice of breaking up a payment request into smaller requests to avoid the reauthorization requirement. Consumer groups urged the Bureau to make clear that it will pay special attention to situations where lenders indicate they will attempt to expand or migrate to other industries and shift their unaffordable lending practices to those products.

Finally, a trade association encouraged the Bureau to consult with prudential regulators about whether exempting depository institutions would incentivize certain entities in the payday lending market to convert to a bank status, which the commenter found to be implausible. And a set of chief legal officers urged the Bureau to consult with or defer to the States and incorporate some of their suggestions in the final rule, because the States have had more experience with these kinds of consumer loans.

Final Rule

Proposed § 1041.19 would have required that a lender must not take any action with the intent of evading the requirements of this part 1041. After considering the comments received, the Bureau concludes that the general anti-evasion provision as proposed is appropriate in the final rule to complement the specific, substantive requirements of the final rule by prohibiting a lender from taking action with the intent to evade those requirements. The only change from the proposed § 1041.19 to the final rule is technical in nature; its reference in the final rule is § 1041.13.

In finalizing this provision, the Bureau is relying on its anti-evasion authority under section 1022(b)(1) of the Dodd-Frank Act, which provides that the Bureau's director may 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.'' The Bureau is finalizing § 1041.13 for two primary reasons. First, the provision will address future lender conduct that is taken with the intent of evading the requirements of the rule but which the Bureau may not, or could not, have fully anticipated in developing the rule. The rule contains certain requirements that are specifically targeted at potential lender evasion and which rely on the Bureau's authority to prevent evasion under section 1022(b)(1) of the Dodd-Frank Act. However, the Bureau cannot anticipate every possible way in which lenders

could evade the requirements of the proposed rule. The Bureau concludes final § 1041.13 will provide flexibility to address future lender conduct that is taken with the intent of evading the proposed rule. By limiting avenues for potential evasion, § 1041.13 will enhance the effectiveness of the final rule's specific, substantive requirements, and thereby preserve the consumer protections of the final rule. Second, the Bureau's judgment is informed, in particular, by the history of evasive actions in this industry to circumvent restrictions in State laws and the coverage of the Military Lending Act, outlined above.

In the commentary to the final rule, the Bureau modified the proposal's commentary regarding the anti-evasion provision by removing the illustrative examples of lender actions that may have been taken with the intent of evading requirements of the rule outlined in proposed comment 19–2. Two illustrative examples can now be found in the commentary sections related to §§ 1041.5 and 1041.8 of the final rule. Specifically, the second example from proposed comment 19–2 is now found in the commentary for § 1041.5(e) of the final rule and the fourth example from proposed comment 19–2 is now found in the commentary for § 1041.8 of the final rule. Any modifications to those examples in the final rule are discussed above in the section-by-section analysis of those provisions. In particular, the Bureau added to the final rule specific anti-evasion provisions about the ability-to-repay requirements and prohibited payment transfer attempts, and moved the illustrative examples from proposed § 1041.19 to those sections in the final rule to provide additional context for a violation of those specific anti-evasion provisions.

Because of coverage changes and other considerations, including the comments it received, the Bureau deleted from the commentary for § 1041.13 of the final rule the remaining illustrative examples that were proposed in comment 19–2. In particular, the first example pertained to, among other conduct, a lender obtaining a leveraged payment mechanism 72 hours after the borrower received the loan proceeds. The proposed rule limited coverage of the ability-to-repay requirements for covered longer-term loans to loans for which the leveraged payment mechanism was taken within 72 hours of origination. However, under the final rule covered longer-term loans are subject only to the payment provisions, but not to the ability-to-repay underwriting provisions. Accordingly, in the final rule, the Bureau deleted the reference to the first example in the proposed rule's commentary to avoid confusion. The Bureau deleted the third illustrative example in proposed comment 19–2 because it addressed evading the ability to repay requirements for longer-term loans, and in light of the changes to the coverage of the rule, it is of limited relevance. Likewise, the Bureau deleted the fifth illustrative example, in part, because of concerns raised about whether the counter-example of evidence not constituting a violation succeeded in providing adequate guidance.

The comments the Bureau received about the inclusion of the illustrative examples were mixed, with some commenters seeking more examples to address certain situations and others finding the examples unhelpful and not sufficiently detailed. By relocating some of the examples and deleting others, the Bureau has attempted to balance the stated desire by commenters for clearer guidance about what conduct constitutes evasion and their suggestions that the anti-evasion provision should remain flexible. The Bureau has concluded that the specific anti-evasion provisions in the final rule and the related illustrative examples in the commentary will provide concrete guidance on specific types of evasions, while the general anti-evasion provision is necessary to allow the Bureau to prevent intentional evasions of the specific, substantive requirements of the final rule that it cannot yet anticipate at this time. In addition to deleting some of the proposal's illustrative examples, the Bureau decided not to include any additional illustrative examples of evasion in the final rule, although many commenters suggested particular factual situations as possible examples and counter-examples of evasion. The Bureau reached this decision because of the comments it received highlighting concerns that undue weight may be placed on the specifics in any particular examples provided and hence they may be misconstrued as an exhaustive list of possible means of evasion that would be viewed as narrowing the concept that Congress explicitly incorporated into the Dodd-Frank Act. The Bureau thus disagrees with commenters that suggested a general anti-evasion provision is contrary to the statutory authority granted in section 1022(b)(1), which itself is expressly a general anti-evasion provision. Nothing in the Act suggests in any way that the Bureau's authority to prevent evasions is limited, as some commenters have suggested. Nor does the Bureau agree that the Administrative Procedure Act is implicated if the Bureau exercises this direct statutory authority. In sum, the Bureau has decided to finalize, as it was proposed (and now renumbered), the general anti-evasion provision contained in § 1041.13 of the final rule.

Although some commenters had questioned the Bureau's references to anti-evasion features in other Federal consumer financial laws and regulations, the Bureau did not rely on those provisions in deciding upon its own authority to act in accordance with the express terms of the statute. Rather, the Bureau included references to other Federal consumer financial laws in the proposal merely because it found them to be informative. Because the CFTC's source of authority for its Anti-Evasion Rules was the Dodd-Frank Act, the Bureau believed that provision to be of special interest regarding agency use of anti-evasion authority granted under the very same statute. The Bureau continues to find the CFTC Anti-Evasion Rules and other Federal consumer financial laws to be informative about the scope and nature of the Bureau's anti-evasion provision, yet the Bureau does not formally adopt the CFTC's interpretations as its own.

As for the claim that an anti-evasion provision is unnecessary because of the Bureau's UDAAP authority and lenders' responsibilities to comply with other State and Federal laws, the Bureau does not find the claim persuasive. Instead, the Bureau concludes that an anti-evasion provision is necessary to ensure compliance with the substantive provisions of the final rule. Congress granted the Bureau to authority to promulgate rules to prevent evasions and thus, it is authorized to exercise its authority by finalizing a general anti-evasion provision. If Congress had intended that every evasion of the Bureau's rules must also be an independent UDAAP, it would set out those requirements in the Dodd-Frank Act; however, it did not. In fact, it is well-established that violations of public policy—such as rules or other violations—do not in and of themselves constitute independent UDAAPs, in particular in the context of unfair acts or practices. Accordingly, the Bureau disagrees that its UDAAP authority negates the need for the anti-evasion provision because the Bureau may not be able to readily reach conduct that constitutes evasion using its existing UDAAP authority. In particular, the evasive conduct may be actionable without having to meet the stringent standards for UDAAP violations or with less expenditure of resources.

Moreover, as described above, the historical background in this market indicates that lenders of covered loans have taken actions to circumvent and avoid compliance with various State and Federal regulatory restrictions designed to protect consumers, including the Military Lending Act. The Bureau places great weight on this recent historical experience and perceives it as considerable justification for being vigilant about similar conduct that may be engaged in to circumvent the provisions of this rule.

The Bureau is not persuaded by the concerns raised about the purported breadth, ambiguity, and vagueness of a general anti-evasion provision. In particular, many commenters thought it would be important to identify much more specific conduct that would constitute evasion. Instead, the Bureau found compelling the arguments from commenters who urged that the anti-evasion provision should be maintained as a broad and flexible support for administering and enforcing the provisions of the rule. Almost by definition, the anti-evasion clause must be kept on a more general plane; if all the particulars could be specified in advance, they would all be written into the substantive provisions of the rule, even though that could prove cumbersome and add a good deal of complexity. As the CFTC noted in its anti-evasion rulemaking, providing bright-line tests of non-evasive conduct may provide potential wrong-doers with a roadmap for structuring evasive transactions. By contrast, however, the *only* real purpose to be served by an anti-evasion clause is to provide authority to address *other* situations that may arise but are not directly addressed by the specific provisions of the rule. Thus, the Bureau concludes that the anti-evasion clause is an important feature of this rule and that it must remain sufficiently flexible to prevent lenders from engaging in conduct designed to circumvent the rule in ways that could pose harms for consumers.

Another point of contention is the intent requirement in the anti-evasion provision. Some commenters argued that it poses too low a standard and others argued that it is set too high. The Bureau has made the judgment that the requirement that a lender either knowingly or recklessly intends to evade the final rule is an important limitation on the Bureau's exercise of its evasion authority. The intent requirement prevents the very outcome that some commenters fear—violations by unwary lenders acting in good faith. By its very terms, the intent requirement eliminates that possibility. The Bureau is thus finalizing § 1041.13 as proposed (and now renumbered), including its formulation of the intent standard as further explained in the related commentary.

As the commentary, now finalized, sets out, a lender must act with knowing or reckless intent to evade the final rule in order to be liable under the anti-evasion provision. Intent is the state of mind accompanying an act. Ordinarily, state of mind cannot be directly proved but, instead must be inferred from the surrounding circumstances, as explained in the final rule commentary. As noted in the proposal, the intent standard in the final rule is consistent with the scienter standard in section 1036(a) of the Dodd-Frank Act for establishing that persons knowingly or recklessly provided substantial assistance to a covered person or service provider in violation of section 1031.[1109] In the civil liability sphere, recklessness includes actions entailing an unjustifiably high risk of harm that is known or either so obvious it should be known.[1110] Some commenters expressed concern that the intent standard would be a challenging threshold to meet. Yet the existence of such a standard is crucial to establishing that the lender has in fact engaged in the type of conduct that was intended to evade this rule, as opposed to being found liable for unintentional conduct. Because standards grounded in the intentions of the parties are well-established in the common law and are being developed in CFPB cases,[1111] the Bureau is not persuaded that lenders would be confused or at a loss to know how to proceed or that the Bureau's use of this authority would be unfettered and arbitrary. Accordingly, the Bureau has adopted this provision without altering the intent standard as originally proposed.

Comment 13–1 of the final rule, which illustrates lender action taken with the intent of evading the requirements of the rule, is adopted in a form that remains unchanged from the proposal. Although several commenters raised concerns about this piece of the commentary, they appear to have misinterpreted it. In particular, it provides that ''if the lender's action is taken solely for legitimate business purposes, the lender's action *is not* taken with the intent of evading the requirements.'' [1112] It further provides that ''if a consideration of all relevant facts and circumstances reveals the presence of a purpose that is not a legitimate business purpose, the lender's action *may* have been taken with the intent of evading the requirements of'' the final rule.[1113] Both sentences must be read in conjunction. The existence of a non-legitimate business purpose does not mean that the lender necessarily intended to evade the rule's requirements; it simply means that it may have done so. And commenters' interpretation of the first sentence regarding ''solely for legitimate business purposes'' is misguided. As the commentary itself states, ''the actual substance of the lender's action as well as other relevant facts and circumstances will determine whether the lender's action was taken with the intent of evading the requirements'' of the rule. By its express terms, lenders who act solely from legitimate business purposes will not be subject to enforcement of this provision. Accordingly, a lender that modifies its practices to comply with the requirements of the final rule will not violate the anti-evasion provision unless it meets the threshold of acting with knowing or reckless intent to evade the requirements.

Some commenters warned that this provision could create a ''chilling effect'' that would cause lenders not to make loans and to leave the market. To be sure, some lenders will likely change their practices in light of the final rule, including performing ability-to-repay underwriting of covered loans for the first time. However, it seems highly unlikely that the anti-evasion provision itself would be the cause of lenders changing their practices or exiting the market. In fact, the Bureau concludes that the intent requirement is a key element that undercuts arguments that the anti-evasion provision is unfair to lenders or will over-deter desirable conduct and punish undeserving actors.

In terms of evaluating a lender's practices under the anti-evasion provision, commenters made conflicting arguments that tend to underscore the need to maintain flexibility if this provision is to fulfill its intended purpose. Various limiting principles were suggested—such as that any changes in lender practices that produce an economic benefit for consumers should never be deemed to be evasions, or that conduct during one defined period or another should be established

[1109] The CFTC's Anti-Evasion Rule's scienter standard is willfulness which the CFTC interprets as including intentional or reckless acts. See *Safeco Ins. Co. of America* v. *Burn, 551 US 47 (2007).*

[1110] See *Safeco Ins. Co. of America* v. *Burn, 551 US 47 (2007).*

[1111] See *CFPB* v. *Universal Debt and Payment Solutions,* Civil Action No. 1:115–CF–00859 (D. Ga. September 2015).

[1112] Comment 13–1 (emphasis added).

[1113] *Id.* (emphasis added).

as a firm baseline—but none of them appears to be consistent with the general terms that Congress used to articulate and confer this authority. Nor was any sound justification offered for the suggestion that the Bureau should extend a safe harbor against its use of the anti-evasion provision for at least the first year after the effective date of the final rule. As stated in the commentary, the pertinent analysis instead is and should be the ''actual substance of the lender's action as well as other relevant facts and circumstances'' and thus the Bureau made no changes to the commentary in this regard.

Finally, in light of this discussion, the Bureau concludes that the final anti-evasion provision is not arbitrary and capricious. Lenders are on notice about the substantive provisions of the final rule and they are on notice that if they act with knowing or reckless intent to evade those provisions, they may be subject to the anti-evasion provision. Congress expressly authorized the Bureau to enact such a provision pursuant to the Dodd-Frank Act, and through this rulemaking process the Bureau has considered the relevant factors, including numerous public comments and its own analysis, to adopt this anti-evasion provision in § 1041.13 of the final rule.

Section 1041.14 Severability

Proposal

Proposed § 1041.20 would have made the provisions of this rule separate and severable from one another.

Comments Received

Several commenters argued that the proposed rule should not include a severance provision because the various provisions of the proposal are interconnected and the proposal would create a whole new comprehensive regulatory framework. As such, if one provision is deemed invalid, they argued, the entire system should be deemed invalid. Commenters noted their impression that the proposal repeatedly emphasized that the provisions were designed to work in tandem, noting specifically the relationship between proposed §§ 1041.5 and 1041.7.

Final Rule

The Bureau is finalizing proposed § 1041.20 as final § 1041.14, such that it now reads: ''The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect.'' The final rule removes the phrase ''it is the Bureau's intention that'' from the provision to clarify that the provision is not dependent on the Bureau's intention.

This is a standard severability clause of the kind that is included in most regulations and much legislation to clearly express agency intent about the course that is preferred if such events were to occur.

The Bureau disagrees with commenters that the provisions are so interconnected that if one provision should fail, the others should, as well. The Bureau specifically designed the framework of the rule so that the fundamental protections will continue regardless of whether one or another provision is not effectuated. The rule anticipates certain contingencies. For example, lenders can still enter into loans made pursuant to final § 1041.5, regardless of whether there is a registered information system pursuant to § 1041.11. Lenders may not be able to do so under § 1041.6. In the absence of such protections, then under the terms of the rule itself, such lending is not available, and that framework should thus continue.

Further, § 1041.6 is an exemption from § 1041.5, and thus, § 1041.5 alone should be more than sufficient to prevent the unfair and abusive practice identified in § 1041.4 if § 1041.6 should be overturned. Additionally, part B (§§ 1041.4 through 1041.6) and part C (§§ 1041.7 through 1041.9) are entirely separate, based on separate identified unfair and abusive practices, and thus, if either should fall, the other should remain intact and continue to operate.

These examples are merely illustrative, and do not constitute a complete list of sections which are severable from each other, nor of reasons that sections can operate independently from each other. The Bureau designed *each* individual provision to operate independently and, thus the Bureau is finalizing the severability clause, as proposed.

VI. Effective Date

Proposed Rule

The Bureau proposed that, in general, the final rule would take effect 15 months after publication in the **Federal Register**. The Bureau believed that 15 months struck the appropriate balance between providing consumers with necessary protections while giving covered persons adequate time to comply with all aspects of the final rule. In particular, the Bureau gave thought to the time necessary to implement the consumer reporting components of the proposal, in addition to the time that lenders would need to adjust their underwriting practices and prepare to provide new consumer disclosures. The Bureau proposed that proposed § 1041.17 (now final § 1041.11) would take effect 60 days after publication in the **Federal Register** with regard to registered information systems. The Bureau believed that this earlier effective date for § 1041.17 was appropriate to allow the standards and process for registration to be in place, which would be necessary for the information systems to be operational by the effective date of the other provisions of the final rule.

Comments Received

The Bureau received several comments suggesting that it should extend the effective date as to the general rule, with particular focus on 24 months after publication in the **Federal Register** as a proposed alternative. Commenters argued that 2 years would be necessary because they believed the rule would substantially change the core structure of the industry. One commenter cited the experience with the TILA–RESPA Integrated Disclosure Rule as evidence that complicated regulations require significant implementation time. That rule was initially published in the **Federal Register** on December 31, 2013, with an effective date of August 1, 2015,[1114] but the effective date was extended to October 3, 2015, roughly 21 months after the initial rule was published.[1115] Other commenters, more generally, suggested it would take more than 15 months, or ''years,'' to revise underwriting standards, develop new loan origination processes, train staff, upgrade systems to meet the new underwriting, disclosure, and recordkeeping requirements, and integrate their systems with the registered information systems.

Commenters also asked the Bureau more specifically to delay the date after which lenders will need to obtain a consumer report from a registered information system, citing concerns that lenders would be unable to make loans under the exemption in § 1041.6 if an information system is not registered sufficiently in advance of that data to allow lenders to rely on a consumer report from a registered information system as required under § 1041.6.

Final Rule

In light of comments received, and extended deadlines elsewhere in the rule, the Bureau is extending by six

[1114] 78 FR 79730 (Dec. 31, 2013).

[1115] 80 FR 43911 (July 24, 2015).

months the compliance date for §§ 1041.2 through 141.10, 1041.12, and 1041.13. The final rule will have an effective date of January 16, 2018, 60 days after publication in the **Federal Register**, and a compliance date for §§ 1041.2 through 1041.10, 1041.12, and 1041.13 of August 19, 2019, 21 months after publication in the **Federal Register**. The deadline to submit an application for preliminary approval for registration pursuant to § 1041.11(c)(1) is April 16, 2018, 150 days after publication in the **Federal Register**. Accordingly, the standards and processes for registration as registered information systems will become operative 60 days after the final rule's publication. However, it was persuaded that other time frames, based on the comments it received, should be extended. See the section-by-section analysis for §§ 1041.10 and 1041.11 for more details.

The Bureau has extended deadlines for applying to be a registered information system found in § 1041.11(c)(3). It has also extended the amount of time an information system must be registered before a lender must furnish to it under § 1041.10(b). The combined amount of time extended for registration and preparation to furnish is 5 months. It is the Bureau's intent to have information systems registered at least 180 days prior to the compliance date of §§ 1041.2 through 1041.10, 1041.12, and 1041.13 such that lenders can furnish to and obtain reports from a registered information system, and make loans under § 1041.6, immediately upon that effective date. To help ensure that occurs, the Bureau needed to extend the compliance date of §§ 1041.2 through 1041.10, 1041.12, and 1041.13, in light of the extended deadlines in §§ 1041.10 and 1041.11, by at least 5 months.

The timeline for implementation of the rule is as follows. The rule goes into effect 60 days after publication of the rule in the **Federal Register**. The deadline to submit an application for preliminary approval to become a registered information system before August 19, 2019 is 90 days from the effective date of § 1041.11 (it was 30 days in the proposal). That means the deadline for applicants seeking preliminary approval is 150 days after publication in the **Federal Register.** Once the Bureau grants preliminary approval, the applicant will have an additional 120 days to submit an application to become a registered information system (it was 90 days in the proposal). Under § 1041.10(b), lenders will be required to furnish to a registered information system that has been registered for 180 days or more (it was 120 days or more in the proposal), or upon the compliance date of § 1041.10, whichever is later. This will allow a period of at least 180 days for lenders to onboard to the registered information system and prepare to furnish. The Bureau believes a compliance date for §§ 1041.2 through 1041.10, 1041.12, and 1041.13 of 21 months after publication of the final rule in the **Federal Register** will accommodate these new periods and give the Bureau enough time to review applications.

The Bureau also agrees that the industry may need additional time to implement the requirements of this rule. The Bureau seeks to balance giving enough time for an orderly implementation period against the interest of enacting protections for consumers as soon as possible. The Bureau believes that by providing an additional 6 months for compliance with §§ 1041.2 through 1041.10, 1041.12, and 1041.13, lenders should be able to reasonably adjust their practices to come into compliance with the rule. Of course, the Bureau will monitor the implementation period and make adjustments as appropriate.

VII. 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 requested comments 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 with the prudential regulators and the Federal Trade Commission, including consultation regarding consistency with any prudential, market, or systemic objectives administered by such agencies.

The Bureau specifically invited comment on all aspects of the data that it used to analyze the potential benefits, costs, and impacts of the proposed provisions. While some commenters provided additional empirical analyses and data, the Bureau notes that in some instances, the requisite data are not available or are quite limited. As a result, portions of this analysis rely, at least in part, on general economic principles, the Bureau's experience and expertise in consumer financial markets, and qualitative evidence provided by commenters, while other portions rely on the data that the Bureau has collected and analyzed about millions of these loans. Many of the benefits, costs, and impacts of the final rule are presented in ranges, rather than as point estimates.

The Bureau also discussed and requested comment on several potential alternatives, 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 part VII.J and the Final Regulatory Flexibility Analysis (FRFA) in part VIII below.

B. Major Provisions and Coverage

In this analysis, the Bureau focuses on the benefits, costs, and impacts of the four major elements of the final rule: (1) The requirement to reasonably determine borrowers' ability to repay covered short-term and longer-term balloon-payment loans according to their terms (along with the exemption allowing for a principal step-down approach to issuing a limited number of short-term loans); (2) certain limitations on attempts to initiate payment for covered loans; (3) the recordkeeping requirements associated with (1) and (2); and (4) the rule's requirements concerning registered information systems.

The discussion of impacts that follows is organized into these four main categories. Within each, the discussion is organized to facilitate a clear and complete consideration of the benefits, costs, and impacts of the major provisions of the rule. Impacts on depository institutions with $10 billion or less in total assets and on rural consumers are discussed separately below.

There are two major classes of short-term lenders the Bureau expects to be affected by the ability-to-repay provisions of the rule: Payday/unsecured short-term lenders, both storefront and online, and short-term vehicle title lenders. The Bureau also believes there is at least one bank that makes deposit advance product loans that are likely to be covered by these

provisions. The Bureau recognizes that some community banks and credit unions occasionally make short-term secured or unsecured loans, but the Bureau believes that those loans will generally fall within the exemption for alternative loans or the exemption for accommodation loans under § 1041.3(e) and (f). Similarly, the Bureau recognizes that some firms in the financial technology (fin tech) space are seeking to offer products designed to enable consumers to better cope with liquidity shortfalls, but the Bureau believes that those products, to a significant extent, will fall within the exclusion for wage advance programs under § 1041.3(d)(7) or the exclusion for no-cost advances under § 1041.3(d)(8).[1116]

In addition to short-term lenders, lenders making longer-term balloon-payment loans (either vehicle title or unsecured) are also covered by the ATR requirements and the rule's requirements concerning registered information systems. The Bureau believes there are many fewer such lenders, but notes that the following discussion applies to these lenders as well.

The provisions relating to payment practices and related notices apply to any lender making a covered loan, either covered short-term loans, covered longer-term balloon-payment loans, or covered longer-term loans. However, payment withdrawals by lenders who also hold the consumer's deposit account are exempt if they meet certain conditions. The payment provisions affect certain online lenders, who make loans with an APR above 36 percent and normally receive payments via ACH or other electronic means. In addition, storefront payday or payday installment lenders that receive payment via ACH or post-dated check, either for regular payments or when a borrower has failed to come to the store and make a cash payment in person, will be affected, as will some traditional finance companies if they make loans that meet the criteria for a covered longer-term loan. Lenders making vehicle title loans often do not obtain the same forms of account access, but those that do will also be affected.

The provisions relating to recordkeeping requirements apply to any lender making covered loans, with additional requirements for lenders making covered short-term and longer-term balloon-payment loans. The provisions relating to the application process for entities seeking to become registered information systems govern any and all entities that apply to become such information systems.[1117] The provisions relating to the requirements to operate as a provisionally registered or registered information system apply to any entity that becomes a provisionally registered or registered information system.

The Bureau received many comments that seemed to mistakenly interpret the rule as a ban on payday and/or vehicle title loans. It should be noted that none of the above provisions, either on their own or in combination, constitutes a ban on covered lending. As such, the rule does not explicitly ban payday, vehicle title, longer-term balloon, or any other covered loans. While the Bureau estimates that there will be a substantial reduction in the volume of covered short-term payday loans made in response to the rule prior to any reforms that may occur in the market, the Bureau believes such loans will remain available to the vast majority of consumers facing a truly short-term need for credit (where permitted by State law). In fact, as described in greater detail below, the Bureau's simulations suggest that the rule will only restrict roughly 6 percent of borrowers from initiating a payday borrowing sequence they would have initiated absent the rule. In the case of short-term vehicle title loans, the Bureau acknowledges that a more substantial portion of lending will be curtailed.[1118]

C. Baseline for Consideration of Benefits, Costs, and Impacts

In considering the potential benefits, costs, and impacts of the rule, the Bureau takes as the baseline for the analysis the regulatory regime that currently exists for the covered products and covered persons.[1119] Given that the Bureau takes the status quo as the baseline, the analysis below focuses on providers that currently offer short-term loans and longer-term loans with balloon features, the potential entrants into the market for registered information systems required under this rule (although their participation is voluntary), and, to a lesser extent, providers of covered longer-term loans that face limits on their activities only through the intervention affecting payment practices.

The baseline considers economic attributes of the relevant markets and the existing legal and regulatory structures applicable to providers. Most notably, the baseline recognizes the wide variation in State-level restrictions that currently exist. As described in greater detail in part II above, there are now 35 States that either have created a carve-out from their general usury cap for payday loans or have no usury caps on consumer loans.[1120] The remaining 15 States and the District of Columbia either ban payday loans or have fee or interest rate caps that payday lenders apparently find too low to sustain their business models. Further variation exists within States that allow payday loans, as States vary in their payday loan size limits and their rules related to rollovers (*e.g.,* when rollovers are permitted and whether they are subject to certain limitations such as a numerical cap or requirements that the borrower must amortize the rollover by repaying part of the original loan

[1116] The Bureau also believes many of the current "fintech" offerings fall outside of at least the ability-to-repay requirements of the rule, as they often focus on longer-term lending without balloon payments.

[1117] In this section the Bureau's references to registered information systems will generally include both provisionally registered information systems and registered information systems, as lenders will be required to report to both types of systems, and incur similar costs to do so.

[1118] In this section the Bureau focuses most of its analysis on payday and vehicle title loans, rather than the longer-term balloon-payment loans that face similar coverage. The Bureau has observed that longer-term balloon-payment loans are currently less common, and have arisen mostly in response to regulatory regimes restricting or banning payday loans. As such, the Bureau has substantially less evidence about these loans. The Bureau does possess data for a single lender that made longer-term vehicle title loans with both balloon and amortizing payment schedules. These data show that loans with balloon payments defaulted at a substantially higher rate (see "CFPB Report on Supplemental Findings," at 30), but do not provide much insight into the broader market for these loans. Still, the Bureau has concluded that they generally lead to similar harms due to their payment structures, and will experience similar effects from this rule.

[1119] 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.

[1120] *See* Pew Charitable Trusts, "State Payday Loan Regulation and Usage Rates," (Jan. 14, 2014), *available at http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/state-payday-loan-regulation-and-usage-rates* (for a list of States). Other reports reach slightly different totals of payday authorizing States depending on their categorization methodology. *See, e.g.,* Susanna Montezemolo, "The State of Lending in America & Its Impact on U.S. Households: Payday Lending Abuses and Predatory Practices," at 32–33 (Ctr. for Responsible Lending 2013), *available at http://www.responsiblelending.org/sites/default/files/uploads/10-payday-loans.pdf;* Consumer Fed'n of Am., "Legal Status of Payday Loans by State," *available at http://www.paydayloaninfo.org/state-information* (last visited Apr. 6, 2016) (lists 32 States as having authorized or allowed payday lending). Since publication of these reports, South Dakota enacted a 36 percent usury cap for consumer loans. Press Release, S.D. Dep't of Labor and Reg., "Initiated Measure 21 Approved" (Nov. 10, 2016), *available at http://dlr.sd.gov/news/releases16/nr111016_initiated_measure_21.pdf.* Legislation in New Mexico prohibiting short-term payday and vehicle title loans will go into effect on January 1, 2018. Regulatory Alert, N.M. Reg. and Licensing Dep't, "Small Loan Reforms," *available at http://www.rld.state.nm.us/uploads/files/HB%20347%20Alert%20Final.pdf.*

amount with each payment made). Numerous cities and counties within these States have also passed local ordinances restricting the location, number, or product features of payday lenders.[1121] Restrictions on vehicle title lending similarly vary across and within States, in a manner that often (but not always) overlaps with payday lending restrictions. Overall, these restrictions leave fewer than half of States having vehicle title lenders.[1122]

Another notable feature of the baseline is the restriction in the Military Lending Act (MLA) to address concerns that servicemembers and their families were becoming over-indebted in high-cost forms of credit.[1123] The MLA, as implemented by the Department of Defense's regulation, requires, among other provisions, that the creditor may not impose a military annual percentage rate (MAPR) greater than 36 percent in connection with an extension of consumer credit to a covered borrower. In 2007, the Department of Defense issued its initial regulation under the MLA, limiting the Act's application to closed-end loans with a term of 91 days or less in which the amount financed did not exceed $2,000; closed-end vehicle title loans with a term of 181 days or less; and closed-end tax refund anticipation loans.[1124] This covered most short-term and longer-term payday loans and vehicle title loans as well.[1125]

In considering the benefits, costs and impacts of the rule, the Bureau recognizes this baseline. More specifically, the Bureau notes that the rule will not have impacts, with some limited exceptions, for consumers in States that currently do not allow such lending. It is possible that consumers in these States do access such loans online, by crossing State lines, or through other means, and to the extent the rule limits such lending, they may be impacted. Similarly, in States with more binding limits on payday lending, the rule will have fewer impacts on consumers and covered persons as the State laws may already be restricting lending. The overall effects of these more restrictive State laws were described earlier in part II. In the remaining States, which are those that allow lending covered by the rule without any binding limitations, the rule will have its most substantial impacts.

Notably, the quantitative simulations discussed below reflect these variations in the baseline across States and across consumers with one exception. The data used inherently capture the nature of shocks to consumers' income and payments that drive demand for covered loans. To the extent that these have not changed since the time periods covered by the data, they are captured in the simulations. The analysis also captures the statutory and regulatory environment at the time of the data. The implication is that to the extent that the environment has changed since 2011–2012, those changes are not reflected in the simulations. More specifically, the simulations will overstate the effect of the rule in those areas where regulatory changes since that time have limited lending, and will underestimate the effect of the rule in any areas where regulatory changes since that time have relaxed restrictions on lending. In general, the Bureau believes that the States have become more restrictive over the past five years so that the simulations here are more likely to overstate the effects of the rule. That said, the simulation results are generally consistent with the additional estimates, using other data and time periods, provided to the Bureau in comments.

D. Description of the Market Failure

The primary concern in this market, as described in Market Concerns—Underwriting and the section-by-section analysis of § 1041.4, is that many borrowers experience long and unanticipated durations of indebtedness. That is, the failures in the market do not necessarily impact the average borrower experience, but instead impact those borrowers who experience longer sequences of loans. If the likelihood of re-borrowing, and in particular re-borrowing that results in longer sequences is underestimated by customers when they take their initial loans, the existence of these sequences implies imperfect or incomplete information. This lack of information constitutes a potentially harmful market failure.[1126]

That the likelihood of these long sequences is underestimated or unanticipated is supported by empirical findings in the academic literature. The Bureau believes that Mann (2013) provides the most relevant data describing borrowers' expected durations of indebtedness with payday loan products.[1127] Many comments received in response to the proposal, including one from Professor Mann himself, suggest this is a widely held view. However, the Bureau's consideration of the facts provided in Mann (2013) differs from the main points highlighted in the study, and reiterated in Professor Mann's comment letter. This was discussed at length in Market Concerns—Underwriting and is addressed more completely, along with a discussion of the broader literature on the accuracy of borrowers' expectations, in part VII.F.2.

In summary, Mann asserts that borrowers are generally accurate in their predictions (citing the fact that 57 percent predict their time in debt within a 14-day window),[1128] that many anticipate re-borrowing (40 percent anticipated they would ''continue their borrowing after its original due date''),[1129] and that borrowers were about as likely to overestimate their times in debt as they were to underestimate them. The Bureau did not contradict these findings in the

[1121] For a sample list of local payday ordinances and resolutions, see Consumer Fed'n of Am., ''Controlling the Growth of Payday Lending Through Local Ordinances and Resolutions,'' (Oct. 2012), *available at www.consumerfed.org/pdfs/Resources.PDL.LocalOrdinanceManual11.13.12.pdf.*

[1122] For a discussion of State vehicle title lending restrictions, see Consumer Fed'n of Am., Car Title Loan Regulation (Nov. 16, 2016), *available at http://consumerfed.org/wp-content/uploads/2017/01/11-16-16-Car-Title-Loan-Regulation_Chart.pdf.*

[1123] The Military Lending Act, part of the John Warner National Defense Authorization Act for Fiscal Year 2007, was signed into law in October 2006. The interest rate cap took effect October 1, 2007. *See* 10 U.S.C. 987.

[1124] 72 FR 50580 (Aug. 31, 2007).

[1125] As noted earlier, effective October 2015 the Department of Defense expanded its definition of covered credit to include open-end credit and longer-term loans so that the MLA protections generally apply to all credit subject to the requirements of Regulation Z of the Truth in Lending Act, other than certain products excluded by statute. *See* 80 FR 43560 (July 22, 2015) (codified at 32 CFR part 232).

[1126] Note that the characterization of market failure here does not hinge only on the outcome of long sequences, but the unanticipated nature of that outcome. Also note that the *typical* customer anticipating his or her sequence length, or customers as a whole properly anticipating the *average* duration of indebtedness, is not a credible counterargument to this market failure. If few (or none) of the individuals who experience long sequences properly anticipated the likelihood that a sequence of this length might occur, that in and of itself would constitute a market failure. In assessing the costs and benefits of the rule, this section remains agnostic about the source of the information deficiency; however § 1041.4 describes the Bureau's view about the nature and source of consumers' inaccurate expectations.

[1127] Ronald Mann, ''Assessing the Optimism of Payday Loan Borrowers,'' 21 Supreme Court Econ. Rev. 105, at 132 (2013). Also note that, while Mann's approach is the most relevant for this rule, there are other studies that explore the accuracy of borrowers' expectations about continued use of short-term loans. These studies are discussed in part VII.F.2 below.

[1128] Ronald Mann, ''Assessing the Optimism of Payday Loan Borrowers,'' 21 Supreme Court Econ. Rev. 105, at 123 (2013). Note that the reported value of 57 percent is out of respondents who answered the relevant question (approximately 80 percent of all survey respondents), meaning that only 46 percent of all survey respondents made predictions with this accuracy.

[1129] *See* Ronald Mann, ''Assessing the Optimism of Payday Loan Borrowers,'' 21 Supreme Court Econ. Rev. 105, at 120 (2013).

proposal, nor does it attempt to do so now.

However, the Bureau believes these data also provide strong evidence that those borrowers who experience long periods of indebtedness did not anticipate those experiences. For example, of the borrowers who remained in debt at least 140 days (10 biweekly loans), it appears that all (100 percent) underestimated their times in debt, with the average borrower in this group spending 119 more days in debt than anticipated (equivalent to 8.5 unanticipated rollovers). Of those borrowers who spent 90 or more days in debt (*i.e.,* those most directly affected by the rule's limits on re-borrowing under § 1041.6), it appears that more than 95 percent underestimated their time in debt, spending an average of 92 more days in debt than anticipated (equivalent to 6.5 unanticipated rollovers).[1130]

There is also evidence that even short-term borrowers do not fully expect the outcomes they realize. For example, only 40 percent of borrowers anticipated re-borrowing, but it appears that more than 70 percent of the customers Mann surveyed did in fact re-borrow. As such, even those borrowers who accurately predict their durations of indebtedness within a 14-day window are likely to have experienced unanticipated re-borrowing. Across all borrowers in the data, a line of ''best fit'' provided by Professor Mann describing the relationship between a borrower's expected time in debt and the actual time in debt experienced by that borrower shows effectively zero slope (indicating no correlation between a borrower's expectations and outcomes).[1131] This shows that, regardless of whether borrowers experienced short or long durations of indebtedness, they did not systematically predict their outcomes with any sort of accuracy or precision. While many individuals appear to have anticipated short durations of use with reasonable accuracy (highlighted by Mann's interpretation), borrowers' individual predictions did not appear to be correlated with their actual outcomes, and virtually none accurately predicted long durations (which is the market failure described here).[1132]

E. Major Impacts of the Rule

The primary impact of this rule, prior to any reforms it may prompt in market practices, will be a substantial reduction in the volume of short-term payday and vehicle title loans (measured in both number and total dollar value), and a corresponding decrease in the revenues that lenders realize from these loans. Simulations based on the Bureau's data indicate that payday loan volumes will decrease by 62 percent to 68 percent, with a corresponding decrease in revenue.[1133] Simulations of the impact on short-term vehicle title lending predict a decrease in loan volumes of 89 percent to 93 percent, with an approximately equivalent reduction in revenues. The specific details, assumptions, and structure of these simulations are described in detail below.

The Bureau expects these declines will result in a sizable decrease in the number of storefronts, as was observed in States that experienced similar declines after adopting regulations of loan volumes (*e.g.,* Washington). This decline may limit some physical access to credit for consumers, and this limit may be felt more acutely by consumers in rural areas. Additionally, the decrease in storefronts is likely to impact small lenders and lenders in rural areas more than larger lenders and those in areas of greater population density. However, borrowers in rural areas are expected to retain much of their access to these loans. In States with regulatory changes that led to decreases in storefronts, over 90 percent of borrowers had to travel an additional five miles or less in order to obtain such a loan. Additionally, the Bureau expects that online options will be available to the vast majority of current borrowers, including those in rural areas.[1134] Consumers may also substitute non-restricted borrowing options (*e.g.,* longer-term loans not covered by the originations portion of the rule, credit cards, informal borrowing from family or friends, or other alternatives).

As discussed further below, the welfare impacts of the decline in lending are expected to be positive for consumers, and negative for lenders. Decreased revenues (more precisely, decreased profits) in an industry with low concentration are expected to lead to exit by many current providers. Additionally, many of the restrictions imposed by the rule could have been voluntarily adopted by lenders absent the rule; that they were not implies the changes are likely to be at least weakly welfare-decreasing for lenders. As for the welfare impact on consumers, in an efficient market (one that is competitive, fully informed, and in which agents are rational and possess perfect foresight) a decrease in access to credit should decrease consumer welfare (though consumers would save an amount equal to the revenue lost by lenders). However, as discussed in Market Concerns—Underwriting, the section-by-section analysis for § 1041.4, and throughout this analysis, the payday and vehicle title lending markets exhibit characteristics consistent with a market failure. If some of the demand for these loans results from departures from rational expectations (or any other violation of neoclassical economic theory), reducing access may improve consumer welfare. To weigh these possible outcomes, the Bureau conducted a broad assessment of the literature pertaining to the welfare effects of short-term payday and vehicle title loans. A summary of this assessment is presented in part VII.F.2.c.

The Bureau believes that the evidence on the impacts of the availability of

[1130] Theoretically, these findings can be reconciled with a rational expectations model, but only under very specific conditions. Specifically, one has to assume that borrowers have no or very little information on which to base their predictions of their length of indebtedness. In that case, the extreme outcomes are simply very rare realizations from some distribution of outcomes. To the extent that borrowers have information about their own financial circumstances (*e.g.,* repeat borrowers know their past experience with payday loans), the above assumption cannot be plausibly maintained. And in fact, past experience is predictive of the future length of indebtedness: In a hazard model, the length of past loan sequences has an economically and statistically significant negative impact on the hazard of subsequent loan sequences ending, which implies that individuals with long sequences tend to have longer subsequent loan sequences.

[1131] Again, technically these findings can be reconciled with a rational expectations model if one assumes that borrowers have no information on which to base their predictions of their length of indebtedness, but as argued in the preceding footnote, this assumption cannot be plausibly maintained.

[1132] It should be noted that Professor Mann did not provide his data to the Bureau, either prior to the proposal, or in his comment in response to the proposal. In place of these data, the Bureau is relying on the charts and graphs he provided in his correspondence with and presentation to the Bureau. Among other things, these graphs depict the distribution of borrowers' expectations and outcomes, but as they are scatterplots, counting the number of observations in areas of heavy mass (*e.g.,* expecting no rollovers) is difficult. However, the scatterplot depicts only sequences up to approximately 170 days in length, while subsequent histograms of sequence length show a large portion of borrowers experiencing sequences of 200 or more days (approximately 13 percent). It appears these borrowers are not depicted on the scatterplots. As such, the analysis provided here may be somewhat imprecise.

[1133] The Bureau ran a number of simulations based on different market structures that may result after the rule. The estimates cited here come from the specifications where lenders make loans under both the ATR and principal step-down approaches. See part VII.F.1.c for descriptions of all the simulations conducted by the Bureau, and their results.

[1134] This geographic impact on borrowers is discussed in the section on Reduced Geographic Availability of Covered Short-Term Loans in part VII.F.2.b.v below.

payday loans on consumer welfare indeed varies. In general, the evidence to date suggests that access to payday loans appears to benefit consumers in circumstances where they use these loans for short periods to address an unforeseen and discrete need, such as when they experience a transitory and unexpected shock to their incomes or expenses. However, in more general circumstances, access to and intensive use of these loans appears to make consumers worse off. A more succinct summary is: Access to payday loans may well be beneficial for those borrowers with discrete, short-term needs, but only if they are able to successfully avoid long sequences of loans.

Short-term vehicle title borrowers are more likely to find that they are unable to obtain an initial loan because the principal step-down approach does not provide for vehicle title loans. Many of these consumers may choose to pursue a payday loan instead and seek to avail themselves of the principal step-down approach. However, as noted later, State restrictions and the financial condition of these borrowers may limit these options.

As this rule will allow for continued access to the credit that appears most beneficial—that which assists consumers with discrete, short-term needs—the Bureau believes that much of the welfare benefit estimated in the literature will be preserved, despite the substantial reduction in availability of re-borrowing. Additionally, the rule limits the harm that may be realized by borrowers who experience long durations of indebtedness where the literature, albeit more limited, and the Bureau's own analysis and study suggest the welfare impacts of prolonged re-borrowing are negative. Given this, the Bureau has concluded that the overall impacts of the decreased loan volumes resulting from the rule for consumers will be positive.[1135]

Relative to the considerations above, the remaining costs and benefits of this rule are much smaller. Most of these impacts manifest as administrative, compliance, or time costs; or as benefits from reductions in fraud or increased transparency. The Bureau expects most of these impacts to be fairly small on a per loan/customer/lender basis. These impacts include, inter alia, those applicable to the registered information systems envisioned by the rule's requirements; those associated with furnishing requirements on lenders and consumers (*e.g.,* cost to establish connection with registered information systems, benefit from reduced fraud); those associated with conducting an ATR assessment for loans that require such an assessment (*e.g.,* cost to obtain a consumer report, benefit of decreased defaults); those associated with the increased requirements for record retention; those associated with disclosures regarding principal step-down loans; those associated with the prescribed payment interventions (*e.g.,* cost from additional disclosures, benefits from reduced NSF or overdraft fees); and the additional benefits associated with reduced loan volumes (*e.g.,* changes in defaults or account closures). Each of these costs and benefits, broken down by market participant (lender, registered information system, consumer) is discussed in detail below.

In addition, the Bureau has conducted a Final Regulatory Flexibility Analysis (FRFA), which describes the impact of the rule on small entities, responds to the significant issues raised by the public comments and the Chief Counsel for Advocacy of the Small Business Administration regarding the proposal's Initial Regulatory Flexibility Analysis, and describes changes made to the proposed rule in the final rule in response to these comments. The FRFA also provides an estimate of the number of small entities to which the final rule will apply; descriptions of the projected reporting, recordkeeping, and other compliance requirements of the rule; and a description of the steps the Bureau has taken to minimize the significant economic impact on small entities and a statement of the reasons for selecting the final rule over the other significant alternatives considered.

The Bureau has also conducted a Paperwork Reduction Act (PRA) analysis to estimate the cost in burden hours and the dollar costs of the information collection requirements to the entities subject to the rule. The PRA separates these cost estimates into one-time and annual ongoing categories for total burden cost, labor burden hour cost, and labor burden dollar cost. Cost estimates are included for the requirements of the rule relating to disclosure, obtaining and furnishing consumer information, obtaining a consumer report, underwriting, registered information systems, prohibited payment transfers, and obtaining authorization for both small and large entities.

F. Benefits and Costs of the Rule to Covered Persons and Consumers—Underwriting

This section discusses the impacts of the provisions of the loan origination portions of the rule. Those provisions specifically relate to covered short-term loans and covered longer-term balloon-payment loans. The benefits and costs of these provisions may be affected by a shift to products not covered by the origination portions of the rule. For example, the potential for consumer substitution to longer-term installment and other loans may have implications for the effects of these provisions on those non-covered markets. The Bureau also acknowledges that some new products may develop in response to this rule, to cater to displaced demand for short-term liquidity. In fact, many of the rule's exclusions and exemptions are intended to encourage innovation in this market space. However, the potential evolution of substitutes in the market that may arise in response to this rule is beyond the scope of this analysis. Potential interactions with existing products are discussed as appropriate.

The provisions discussed here include the requirements under § 1041.5 that lenders determine that applicants for short-term loans and longer-term balloon payment loans have the ability to repay the loan while still meeting their major financial obligations and paying for basic living expenses, as well as the alternative set of requirements for originating short-term loans discussed in § 1041.6. In this analysis, the practice of making loans after determining that the borrower has the ability to repay the loan will be referred to as the ''ATR approach,'' while the practice of making loans by complying with the alternative requirements under § 1041.6 will be referred to as the ''principal step-down approach.''

The procedural requirements for originations, and the associated restrictions on re-borrowing, are likely to have a substantial impact on the markets for these products. In order to present a clear analysis of the benefits and costs of the rule, this section first describes the benefits and costs of the rule to covered persons and then discusses the implications of the rule for the overall markets for these products. The benefits and costs to consumers are then described.

1. Benefits and Costs to Covered Persons

The rule imposes a number of procedural requirements on lenders making covered short-term and longer-

[1135] Note that the Bureau has observed that longer-term balloon-payment loans are uncommon in the current market. As such, while the rule's relative impact on these loans is expected to be similar to the impact on payday and vehicle title loans, the absolute magnitude of the impact on these loans is expected to be small. This is because the Bureau takes the current market as its baseline, and longer-term balloon-payment loans represent a small share of covered loans in this baseline.

term balloon-payment loans, as well as imposing restrictions on the number of these loans that can be made. This section first discusses the benefits and costs of the procedural requirements for lenders using the ATR approach with regard to originating loans and furnishing certain related information to registered information systems over the life of the loan. This is followed by a discussion of the benefits and costs of the procedural requirements for lenders using the principal step-down approach. The final section discusses the potential impacts on loan volume and revenues of the underwriting and re-borrowing restrictions under both the ATR and the principal step-down approach.

Most if not all of the provisions are activities that lenders could choose to engage in absent the rule. The benefits to lenders of those provisions are discussed here, but to the extent that lenders do not voluntarily choose to engage in the activities, it is likely the case that the benefits to lenders, in the lenders' view, do not currently outweigh the costs to lenders.[1136]

The Bureau received many comments discussing the analysis of costs and benefits provided in the proposal. These comments came from industry, trade groups, consumer groups, customers, academic and other researchers, and others. Many of these comments offered general critiques of the assumptions made by the Bureau (*e.g.,* with respect to time to process applications or cost to implement compliance systems), and others pointed out perceived deficiencies in the costs and benefits considered (*e.g.,* should bolster discussion of the benefits from avoiding unaffordable payments, or should provide deeper consideration of the cost of reduced access to credit). Relatively few comments offered data, evidence, or specific values for the costs or benefits likely to arise from the rule. Those comments that offered information of direct relevance to the analysis of costs and benefits have been considered—and where applicable, have been incorporated into—the analysis that follows.

a. Procedural Requirements—ATR Approach

Lenders making loans using the ATR approach need to comply with several procedural requirements when originating loans. Lenders need to consult their own records and the records of their affiliates to determine whether the borrower had taken out any prior short-term loans or longer-term balloon-payment loans that were still outstanding or were repaid within the prior 30 days. Lenders must obtain a consumer report from a registered information system (if available) in order to obtain information about the consumer's borrowing history across lenders, and are required to furnish information regarding covered loans they originate to all registered information systems.[1137] Lenders are also required to obtain and verify information about the amount of an applicant's income (unless not reasonably available) and major financial obligations. Specifically, lenders must obtain a statement from applicants of their income and payments on major financial obligations, verification evidence where reasonably available regarding income, and a consumer report from a nationwide consumer reporting agency to verify major financial obligations. Lenders must assess that information and apply an estimate of the borrower's basic living expenses in order to determine whether a consumer has the ability to repay the loan.

Each of the procedural requirements entails costs that are likely to be incurred for loan applications, and not just for loans that are originated. Lenders will likely avoid incurring the full set of costs for each application by establishing procedures to reject applicants who fail a screen based on a review of partial information. For example, lenders are unlikely to collect any further information if their records show that a borrower is ineligible for a loan given the borrower's prior borrowing history. The Bureau expects that lenders will organize their underwriting process so that the more costly steps of the process are only taken for borrowers who satisfy other requirements. Many lenders currently use other screens when making loans, such as screens meant to identify potentially fraudulent applications. If lenders employ these screens prior to collecting all of the required information from borrowers, that will eliminate the cost of collecting additional information on borrowers who fail those screens. But in most cases lenders will incur some of these costs evaluating loan applications that do not result in an originated loan, and in some cases lenders will incur all of these costs in evaluating loan applications that are eventually declined.

Finally, lenders are required to develop procedures to comply with each of these requirements and train their staff in those procedures. The Bureau believes that many lenders use automated systems when originating loans and will modify those systems, or purchase upgrades to those systems, to incorporate many of the procedural requirements of the ATR approach. The costs of modifying or upgrading such a system and training staff are discussed below, in the discussion of the costs of developing procedures, upgrading systems, and training staff.

i. Consulting Lender's Own Records

In order to consult its own records and those of any affiliates, a lender will need a system for recording loans that can be identified as being made to a particular consumer and a method of reliably accessing those records. The Bureau believes that lenders will most likely comply with this requirement by using computerized recordkeeping. A lender operating a single storefront will need a system of recording the loans made from that storefront and accessing those loans by consumer. A lender operating multiple storefronts or multiple affiliates will need a centralized set of records or a way of accessing the records of all of the storefronts or affiliates. A lender operating solely online will presumably maintain a single set of records; if it maintains multiple sets of records it will need a way to access each set of records.

The Bureau believes that lenders must track their loans in order to service them. In addition, lenders need to track the borrowing and repayment behavior of individual consumers to reduce their credit risk, such as by avoiding lending to a consumer who has defaulted on a prior loan. And most States that allow payday lending have requirements that implicitly require lenders to have the ability to check their records for prior loans to a loan applicant, including limitations on renewals or rollovers, or cooling-off periods between loans. As such, existing business needs for recordkeeping ensure that most lenders already have the ability to comply with this provision, with the possible exception of lenders with affiliates that are run as separate operations. Still, there may be a small minority of lenders that currently do not have the capacity to comply with this requirement.

[1136] It is possible that coordination problems limit the development of market improvements. This would be the case if such improvements are in the interest of each lender individually, but only if such improvements are undertaken by all lenders in the market.

[1137] The Bureau received comments from a number of specialty consumer reporting agencies that indicated they believed themselves to be eligible to become registered information systems. Additionally, at least three of these companies have publically expressed interest in becoming registered information systems. As such, the Bureau believes there will be at least one registered information system when the market reaches steady-state.

Developing this capacity will enable these lenders to better service the loans they originate and to better manage their lending risk, such as by tracking the loan performance of their borrowers. Lenders that do not already have a records system in place will need to incur a one-time cost of developing such a system, which may require investment in information technology hardware and/or software. The Bureau estimates that purchasing necessary hardware and software will cost approximately $2,000, plus $1,000 for each additional storefront. The Bureau estimates that firms that already have standard personal computer hardware, but no electronic recordkeeping system, will need to incur a cost of approximately $500 per storefront. Lenders may instead contract with a vendor to supply part or all of the systems and training needs. For lenders that choose to access their records manually, rather than through an automated loan origination system, the Bureau estimates that doing so will take an average of nine minutes of an employee's time.

The Bureau received no comments from industry or trade groups asserting that a substantial number of lenders currently lack the ability to check their records for prior loans, or that implementing such a system would constitute an undue cost or burden. The Bureau believes this supports the benefit-cost framework laid out here. The Bureau did receive some comments noting that it had underestimated the costs associated with developing a system capable of allowing lender personnel to check the lender's records, including by not accounting for training, maintenance, or furnishing costs. It was suggested by some commenters that these costs would be especially burdensome for small lenders. The Bureau addresses systems and training costs, and explicitly discusses the impacts on smaller lenders, in part VIII. The Bureau believes most lenders already have systems in place for which training must occur, and acknowledges that training for any new systems developed based on this rule would largely replace or be added to that training.

ii. Obtaining a Consumer Report From a Registered Information System

The Bureau believes that many lenders already obtain from third parties some of the information that will be included in the registered information system data. For example, in many States a private third party operates a database containing loan information on behalf of the State regulator, and many lenders utilize similar third parties for their own risk management purposes (*e.g.,* fraud detection). However, the Bureau recognizes that there also is a sizable segment of lenders making short-term loans or longer-term balloon-payment loans that operate only in States without a State-mandated loan database, and who choose to make lending decisions without obtaining any data from a specialty consumer reporting agency.

Lenders will receive benefits from being able to obtain timely information about an applicant's borrowing history from a registered information system. This information will include reasonably comprehensive information about an applicant's current outstanding covered loans, as well as his or her borrowing history with respect to such loans. Lenders that do not currently obtain consumer reports from specialty consumer reporting systems will benefit from reports from a registered information system through reduced risks of fraud and default. Additionally, the rule requires furnishing to registered information systems of all covered short-term and longer-term balloon-payment loans, meaning that even lenders that already receive reports from specialty consumer reporting agencies will benefit by receiving more comprehensive and complete information.

As noted above, the Bureau believes that many lenders use automated loan origination systems and will modify those systems or purchase upgrades to those systems such that they will automatically order a report from a registered information system during the lending process. For lenders that order reports manually, the Bureau estimates that it will take approximately nine minutes on average for a lender to request a report from a registered information system. For all lenders, the Bureau expects that access to a registered information system will be priced on a ''per-hit'' basis, where a hit is a report successfully returned in response to a request for information about a particular consumer at a particular point in time. The Bureau estimates that the cost per hit will be $0.50, based on pricing in existing relevant consumer reporting markets.

The Bureau received comments from trade groups and lenders discussing the estimated ''per hit'' costs of the registered information system reports. The comments were approximately evenly split as to whether the estimated costs were substantially too low, slightly too low, or approximately accurate. A trade group representing mostly large depository institutions argued the cost is substantially too low, and cited its members' average costs of $10.97 to purchase a credit report. Given the drastic difference between this cost and those stated by other commenters, the Bureau believes the credit reports referred to (*e.g.,* tri-bureau credit reports) are not the type that would be purchased for this type of loan. This comparison did not seem relevant to the cost to obtain a report from a registered information system. A trade group representing small-dollar lenders also asserted the estimated cost was too low, citing its members' average cost of $1 to obtain a credit report from a nationwide consumer reporting agency. Finally, a large small-dollar lender asserted the $0.50 estimate ''appears to be right.'' Given that registered information systems are likely to collect much less data than are collected by consumer reporting agencies operating in the market today, it follows that the cost of a report from a registered information system should be lower. Given that the comments received directly from lenders regarding the expected costs of a registered information system report argued the estimate is generally accurate, the Bureau continues to believe the cost per hit estimate of $0.50 is reasonable. Additionally, lenders will only need to pull a report from one registered information system. In the event that more than one registered information system enters the market, the Bureau believes that competition is likely to put downward pressure on the price of a report.[1138]

iii. Furnishing Information to Registered Information Systems

Lenders making covered short-term and longer-term balloon-payment loans are required to furnish information about those loans to all information systems that have been registered with the Bureau for 180 days or more, have been provisionally registered with the Bureau for 180 days or more, or have subsequently become registered after being provisionally registered (generally referred to here as registered information systems). At loan consummation, the information furnished must include identifying information about the borrower, the type of loan, the loan consummation date, the principal amount borrowed or credit limit (for certain loans), and the payment due dates and amounts. While a loan is outstanding, lenders must furnish information about any update to

[1138] As noted previously in this part, at least three specialty consumer reporting agencies have publicly expressed interest in becoming registered information systems. As such, the Bureau believes there will be at least one—and potentially multiple—registered information systems.

information previously furnished pursuant to the rule within a reasonable period of time following the event prompting the update. And when a loan ceases to be an outstanding loan, lenders must furnish the date as of which the loan ceased to be outstanding and whether all amounts owed in connection with the loan were paid in full, including the amount financed, charges included in the cost of credit, and charges excluded from the cost of credit.

Furnishing data to registered information systems will benefit all lenders by improving the coverage and quality of information available to lenders relative to the baseline. This will allow lenders to better identify borrowers who pose relatively high default risk, and the richer information and more complete market coverage will make fraud detection more effective relative to the baseline.

Furnishing information to registered information systems also requires lenders to incur one-time and ongoing costs. One-time costs include those associated with establishing a relationship with each registered information system, and developing policies and procedures for furnishing the loan data and procedures for compliance with applicable laws.[1139] Lenders using automated loan origination systems will likely modify those systems, or purchase upgrades to those systems, to incorporate the ability to furnish the required information to registered information systems.[1140] The Bureau believes that large lenders rely on proprietary loan origination systems, and estimates the one-time programming cost for large respondents to update their systems to carry out the various functions to be 1,000 hours per entity.[1141] The Bureau believes small lenders that use automated loan origination systems rely on licensed software. Depending on the nature of the software license agreement, the Bureau estimates that the one-time cost to upgrade this software will be $10,000 for lenders licensing the software at the entity-level and $100 per ''seat'' (or user) for lenders licensing the software using a seat-license contract. These systems are for furnishing information to, and receiving information from, registered information systems, obtaining consumer reports, and assessing ability to repay. Given the price differential between the entity-level licenses and the seat-license contracts, the Bureau believes that only small lenders with a significant number of stores will rely on the entity-level licenses.

The ongoing costs will be the costs of accurately furnishing the data.[1142] Lenders with automated loan origination and servicing systems with the capacity of furnishing the required data will have very low ongoing costs.[1143] Lenders that report information manually will likely do so through a web-based form, which the Bureau estimates will take three minutes to fill out for each loan at the time of consummation, when information is updated (as applicable), and when the loan ceases to be an outstanding loan. If multiple registered information systems exist and they do not share data, it may be necessary to incur this cost multiple times, unless there are services that report to all registered information systems on behalf of a lender.[1144] The Bureau notes that in States where a private third-party operates a database on behalf of a State regulator, some lenders are already required to provide information similar to that required under the rule, albeit to a single entity; such lenders thus have experience complying with this type of requirement. Where possible, the Bureau will also encourage the development of common data standards for registered information systems in order to reduce the costs of providing data to multiple information systems.

iv. Obtaining Information and Verification Evidence About Income and Major Financial Obligations

Lenders making loans under the ATR approach are required to collect information about the amount of income and major financial obligations from the consumer, make certain efforts to verify that information, and use that information to make an ability-to-repay determination. The impact on lenders with respect to applicants who a lender does not determine have the ability to repay, and are thus denied loans, is discussed separately.

The Bureau believes that many lenders that make covered short-term and longer-term balloon-payment loans, such as storefront lenders making payday loans, already obtain some information on consumers' income. Many of these lenders, however, only obtain income verification evidence the first time they make a loan to a consumer, or for the first loan following a substantial break in borrowing. Other lenders, such as some vehicle title lenders or some lenders operating online, may not currently obtain any income information, let alone income verification evidence, before issuing loans. In addition, many consumers likely have multiple income sources that are not all currently documented in the ordinary course of short-term lending. Under the rule, consumers and lenders might have incentives to provide and gather more income information than they do currently in order to establish the borrower's ability

[1139] In the event that multiple registered information systems enter the market, the Bureau anticipates that some will choose to furnish information to the other registered information systems on behalf of the lender, as a way to compete for that lender's business. Other third parties may also provide this service.

[1140] Some software vendors that serve lenders that make payday and other loans have developed enhancements to enable these lenders to report loan information automatically to existing State reporting systems.

[1141] In the PRA analysis prepared by the Bureau, the burden hours estimated to modify loan origination systems is 500. This is because only some of the system modifications are for functions related to information collections covered by the PRA. *See* Bureau of Consumer Fin. Prot., Paperwork Reduction Act Information Collection Request, Supporting Statement Part A, Payday, Vehicle Title and Certain High-Cost Installment Loans (12 CFR part 1041) (posted Jul. 22), *available at https://www.regulations.gov/document?D=CFPB-2016-0025-0002.* The Bureau notes that these costs include the anticipated costs to establish connections to furnish to, and pull from, registered information systems. If more than one registered information system exists (as noted previously, multiple companies have publically expressed interest in becoming registered information systems), the programming costs may increase. The Bureau estimates this increase to be approximately 250 additional hours of programming per registered information system.

[1142] The Bureau also received comments noting that lenders will have to incur additional costs associated with dispute resolution. One commenter specifically noted that consumers would dispute negative data contained on their reports which would require investigation along with company responses. The commenter cited a figure of $50,000 per year to handle these disputes and other costs of furnishing. The Bureau acknowledges there may be ancillary costs associated with such disputes, but believes that furnishing accurate data and compliance with the records management requirements should mitigate the costs associated with dispute resolutions (*e.g.* confirming the existence of the loan and any payments made). Additionally, many of the costs associated are expected to be borne by registered information systems, as the FCRA allows consumers to dispute information directly with the consumer reporting agency. As such, the $50,000 figure cited by the commenter seems inflated. Instead, the Bureau believes the costs associated with these activities are included in the ongoing costs associated with furnishing to registered information systems.

[1143] The Bureau notes there could be modest per-loan furnishing costs (*e.g.,* comparable to the costs of pulling from a registered information system). This will largely depend on the business model(s) adopted by registered information systems, and must be consistent with § 1041.11(b)(1), which requires registered information systems to facilitate the timely and accurate transmission and processing of information in a manner that does not impose unreasonable costs or burdens on lenders.

[1144] Should there be multiple registered information systems, the Bureau believes that one or more registered information systems or other third parties will offer to furnish information to all registered information systems on behalf of the lender.

to repay a given loan. The Bureau believes that most lenders that originate short-term and longer-term balloon-payment loans do not currently collect information on applicants' major financial obligations, let alone attempt to verify such obligations, or determine consumers' ability to repay a loan, as is required under the rule.

As noted above, many lenders already use automated systems when originating loans. These lenders will likely modify those systems or purchase upgrades to those systems to automate many of the tasks that are required by the rule.

Lenders are required to obtain a consumer report from a nationwide consumer reporting agency to verify applicants' required payments under debt obligations unless, within the preceding 90 days, that lender has obtained a report that the lender retained and the consumer has not triggered a cooling-off period. *See* § 1041.5(c)(2)(ii)(D). As such, these consumer reports will usually be necessary to obtain only for the first loan in a new sequence of borrowing that begins more than 90 days since the last consumer report was obtained. This is in addition to the cost of obtaining a report from a registered information system, though the Bureau expects some registered information systems will provide consolidated reports.[1145] Verification evidence for housing costs may be included on an applicant's nationwide consumer report, if the applicant has a mortgage; otherwise the lender may reasonably rely on the consumer's written statement as to housing expense. Based on industry outreach, the Bureau believes these reports will cost approximately $2.00 for small lenders and $0.55 for larger lenders. At least one trade group suggested this to be an accurate estimate, by noting its members pay around $1 per hit for such reports.[1146] As with the ordering of reports from registered information systems, the Bureau believes that many lenders will modify or upgrade their loan origination system to allow the system to automatically order a national consumer report during the lending process at a stage in the process where the information is relevant, or to purchase combined reports from registered information systems that may offer them. For lenders that order reports manually, the Bureau estimates that it will take approximately nine minutes on average for a lender to request a report and incorporate it into the ATR determination.

Lenders that do not currently collect income or verification evidence for income will need to do so. The Bureau estimates it will take roughly three to five minutes per application for lenders that use a manual process to gather and review information, for consumers who have straightforward documentation (*e.g.,* pay stubs or bank statements). Some industry commenters suggested this value was too low in the proposal, often citing cases where consumers may not have regular income from sources that provide documentation. The Bureau notes that many lenders already require such information prior to initiating loans. Additionally, the rule allows stated income to be used in appropriate cases where verification evidence is not reasonably available, reducing the average time cost associated with verification efforts. However, lenders will need to obtain a brief statement from consumers about their incomes and expenses prior to verification. As such, the Bureau believes the time estimates provided here to be reasonable.

Some consumers may visit a lender's storefront without the required income documentation and may have income for which verification evidence cannot be obtained. Lenders making loans online may face particular challenges obtaining verification evidence, especially for income. It may be feasible for online lenders to obtain scanned or photographed documents as attachments to an electronic submission; the Bureau understands that some online lenders are doing this today. And services that use other sources of information, such as checking account or payroll records, may mitigate the need for lenders to obtain verification evidence directly from consumers. Such services may be especially appealing to online lenders, to whom it might be more difficult to provide copies of physical pay stubs, bank statements, or other documentation of income. Additionally, for consumers with cash income that is not deposited into a deposit account, lenders will be allowed to rely on stated information, § 1041.5(c)(2)(ii), lowering the lenders' costs relative to the proposal and the chance that a consumer is unable to complete an application.

v. Making the Ability-To-Repay Determination

Once information and verification evidence on income and major financial obligations has been obtained, the lender must use that information and evidence to make a reasonable determination that the consumer will have the ability to repay the contemplated loan. In addition to considering the information collected about income and major financial obligations, lenders must reasonably estimate an amount that the borrower needs for basic living expenses. They may do this in a number of ways, including, for example, collecting information directly from borrowers, using available estimates published by third parties, or basing estimates on their experience with similarly situated consumers. *See* comment 5(b)–2.i.C.

The initial costs of developing methods and procedures for gathering information about major financial obligations and income, and estimating basic living expenses, are discussed further below. As noted above, the Bureau believes that many lenders use automated loan origination systems, and will modify these systems or purchase upgrades to these systems to make the ability-to-repay calculations.

vi. Total Procedural Costs of the ATR Approach

In total, the Bureau estimates that obtaining a statement from the consumer, taking reasonable steps to verify income, obtaining a report from a nationwide consumer reporting agency and a report from a registered information system, projecting the consumer's residual income or debt-to-income ratio, estimating the consumer's basic living expenses, and arriving at a reasonable ATR determination will take essentially no additional time for a fully automated electronic system and between 15 and 45 minutes for a fully manual system.[1147] Numerous industry commenters suggested the estimate provided by the Bureau in the proposal (15 to 20 minutes) was too low. In response to these comments, the Bureau has increased its estimated time to manually underwrite these loans, but also notes that all major financial obligations should be obtainable either from a consumer report or consumer statement (in the example of rental expense).

[1145] The Bureau notes that, as discussed in the section-by-section analysis for § 1041.5(c)(2), lenders may order their information requests in a way that would minimize unnecessary impacts on consumers' credit scores. Even with the consolidated reports envisioned here, lenders and the providers for the registered information systems could stagger the delivery of such reports so as to minimize the negative scoring impacts on consumers.

[1146] Others suggested it would cost as high as $12 per hit, but the Bureau believes these estimates were unreasonably high.

[1147] Note that times are increases above the baseline. That is, they represent additional time beyond that which is already taken to originate such loans, such as the time spent on income verification for payday loans.

Further, total costs will depend on the existing utilization rates of, and wages paid to, staff that will spend time carrying out this work. To the extent that existing staff has excess capacity (that is, that a lender's employees have time that is not fully utilized), the extra time to process applications for loans made via the ATR approach should not result in higher wage bills for the lender. Further, as the Bureau expects the majority of loans to be made via the principal step-down approach, the expected increase in staff hours necessary to comply with the new procedural requirements should be modest.[1148] Still, to the extent that lenders must increase staff and/or hours to comply with the procedural requirements, they may experience increased costs from hiring, training, wages, and benefits.

Dollar costs will include a consumer report from a nationwide consumer reporting agency costing between $0.55 and $2.00 and a report from a registered information system costing $0.50. Lenders relying on third-party services to gather verification information about income may face an additional small cost.

vii. Developing Procedures, Upgrading Systems, and Training Staff

Lenders need to develop policies and procedures to comply with the requirements of the ATR approach and train their staff in those procedures. Many of these requirements do not appear qualitatively different from many practices that most lenders already engage in, such as gathering information and documents from borrowers and ordering various types of consumer reports.

Developing procedures to make a reasonable determination that a borrower has an ability to repay a loan without re-borrowing and while paying for major financial obligations and basic living expenses is likely to be a challenge for many lenders. The Bureau expects that vendors, law firms, and trade associations are likely to offer both products and guidance to lenders, potentially lowering the cost of developing procedures as service providers can realize economies of scale. Lenders must also develop a process for estimating borrowers' basic living expenses if they choose not to make an individual determination for each customer. Some lenders may rely on vendors that provide services to determine ability to repay that include estimates of basic living expenses. Some methods for conducting an analysis to determine estimates of basic living expenses could be quite costly. There are a number of government data sources and online services, however, that lenders may be able to use to obtain living expense estimates. Additionally, lenders may rely on their experiences with similarly situated consumers in making this estimate, reducing the need to rely on individual measures or third parties.

As noted above, the Bureau believes that many lenders use automated systems when originating loans and will incorporate many of the procedural requirements of the ATR approach into those systems. This will likely include an automated system to make the ability-to-repay determination; subtracting the component expense elements from income itself, or comparing the component expenses to income to develop a ratio, is quite straightforward and should not require substantial development costs. The costs of these systems are discussed above.

One trade group commented that they believe the Bureau's estimated systems costs to be too low, citing a survey of their members. However, the trade group's members are not predominately involved in making loans that will be covered under the rule, so it is unclear how their estimates relate to the systems contemplated here. Additionally, the vast majority of the comments from more directly-related trade groups and lenders remained silent on these estimates, despite the invitation to provide feedback. As such, the Bureau has not changed these values from those put forth in the proposal.

The Bureau estimates that lender personnel engaging in making loans will require approximately 5 hours per employee of initial training in carrying out the tasks described in this section and 2.5 hours per employee per year of periodic ongoing training.[1149]

b. Procedural Requirements—Principal Step-Down Approach

The procedural requirements of the principal step-down approach will generally have less impact on lenders than the requirements of the ATR approach. Specifically, the rule does not mandate that lenders obtain information or verification evidence about income or major financial obligations, estimate basic living expenses, or complete an ability-to-repay determination prior to making loans that meet the requirements of the principal step-down approach.[1150]

Instead, lenders making loans under § 1041.6 must consult their internal records and those of affiliates, obtain reports from a registered information system, furnish information to all registered information systems, and make an assessment that certain loan requirements (such as principal limitations and restrictions on certain re-borrowing activity) are met. The requisite disclosures are discussed below. The requirement to consult the lender's own records is slightly different than under the ATR approach, as the lender must check the records for the prior 12 months. This is unlikely to have different impacts on lenders, however, as any system that allows the lender to comply with the requirement to check its own records under the ATR approach should be sufficient for the principal step-down approach, and vice-versa. A lender will also have to develop procedures and train staff.

i. Disclosure Requirement

Lenders making short-term loans under the principal step-down approach are required to provide borrowers with disclosures, described in the section-by-section analysis of § 1041.6(e), with information about their loans and about the restrictions on future loans taken out using the principal step-down approach. One disclosure is required at the time of origination of a first principal step-down approach loan, where a borrower had not had a principal step-down approach loan within the prior 30 days. The other disclosure is required when originating a third principal step-down approach loan in a sequence, because the borrower would therefore be unable to take out another principal step-down approach loan within 30 days of repaying the loan being originated. The disclosures will need to be customized to reflect the specifics of the individual loan.

By informing borrowers that they are not permitted to take out another covered loan for the full amount of their current loan within 30 days of repaying the current loan, the first disclosure may help lenders reduce defaults by borrowers who are unable to repay the loan, even in part, without re-

[1148] In the Bureau's simulations, the ratio of loans made via the principal step-down approach to those made via the ATR approach is approximately 14:1.

[1149] These training costs represent the total costs to comply with the rule, including training to conduct an underwriting assessment, pull a credit report, assess borrower history, and comply with disclosure requirements. The specific breakdown of these times can be found in part VIII.

[1150] As discussed above, the Bureau believes that, in certain circumstances, lenders may choose to strengthen their internal screening processes in order to increase the probability that loans would be paid in full over a sequence of three principal step-down approach loans, since the rule would restrict further re-borrowing.

borrowing. Lenders may have incentives to inform borrowers of this restriction to reduce their own risk, although it is unclear if they would choose to do so absent the requirement, if they believed that the restrictions on principal and re-borrowing were likely to discourage many borrowers who could repay from taking out loans made under the principal step-down approach.

The Bureau believes that most, if not all, lenders have some disclosure system in place to comply with existing disclosure requirements. Lenders may enter data directly into the disclosure system, or the system may automatically collect data from the lenders' loan origination system. For disclosures provided via mail, email, or text message, some disclosure systems forward the information necessary to prepare the disclosures to a vendor in electronic form, and the vendor then prepares and delivers the disclosures. For disclosures provided in person, disclosure systems produce a disclosure which the lender then provides to the borrower. Respondents will incur a one-time cost to upgrade their disclosure systems to comply with new disclosure requirements.

The Bureau believes that large lenders rely on proprietary disclosure systems, and estimates the one-time programming cost for large respondents to update these systems to be 1,000 hours per lender. The Bureau believes small depositories and non-depositories rely on licensed disclosure system software. Depending on the nature of the software license agreement, the Bureau estimates that the cost to upgrade this software will be $10,000 for lenders licensing the software at the entity-level and $100 per seat for lenders licensing the software using a seat-license contract. Given the price differential between the entity-level licenses and the seat-license contracts, the Bureau believes that only small lenders with a significant number of stores will rely on entity-level licenses.

In addition to the upgrades to the disclosure systems, the Bureau estimates that small storefront lenders will pay $200 to a vendor for a standard electronic origination disclosure form template.

The Bureau estimates that providing disclosures in stores will take a store employee two minutes and cost $0.10.

c. Effect on Loan Volumes and Revenue From Underwriting Requirements and Re-Borrowing Limits

The underwriting requirements under the ATR approach and the restrictions on certain re-borrowing under both the ATR approach and principal step-down approach will impact lenders' loan volume in a way that the Bureau believes will likely be more substantial than the increase in compliance costs from implementing the requirements discussed above. The following section discusses these impacts by lender type since storefront and online payday lenders will have the option of using both the ATR approach and principal step-down approach, while vehicle title lenders are required to use the ATR approach. Any impacts on longer-term balloon-payment loans should be similar although, as noted, such loans are currently less common and the Bureau has substantially less data about these loans. The subsequent section discusses overall combined impacts on these markets from the reduction in lender revenue and the increased procedural costs.

In order to simulate the effects of the rule, it is necessary to impose an analytic structure and make certain assumptions about the impacts of the rule, and apply these to the data. The Bureau conducted three simulations of the potential impacts of this rule on payday loan volumes. The first assumes all loans are issued using the ATR approach, and simulates the impacts from both the underwriting restriction (using assumed parameters informed by both Bureau and outside research) and the restrictions on re-borrowing. The second simulation assumes all loans are issued using the principal step-down approach. This approach simulates the impacts from the sequence limits and annual caps associated with these loans, and implicitly assumes no borrowers pass ATR after exhausting the loans made under the principal step-down approach. The final simulation assumes loans are issued via both the ATR and principal step-down approaches. For loans issued via the ATR approach, the Bureau simulates the effects of both the underwriting requirement and the restrictions on re-borrowing. Generally, this is the Bureau's preferred simulation, as it most closely mirrors the market structure the Bureau expects in response to the rule.[1151]

In addition, the Bureau performed a single vehicle title simulation. As vehicle title loans are not eligible for the principal step-down approach, the simulation measures the impacts of the ATR approach. As with payday, the Bureau simulates the impacts from both the underwriting restriction and the restrictions on re-borrowing.

[1151] The Bureau also conducted a number of additional simulations as robustness checks. While not described here, their general results were consistent with those reported in this analysis.

The structure, assumptions, and data used by the Bureau are described below.

i. Description of the Simulations of the Rule's Impacts on Loan Volumes

In general, the Bureau uses its data, described in part VII.F.1.c.ii, as the basis for the simulations. The simulations filter or constrain the observed data according to constraints imposed by the rule. In simulations where principal step-down approach loans are available, the Bureau always assumes principal step-down approach loans will be made to each consumer prior to any ATR approach loans as the Bureau believes that lenders will strictly favor issuing loans under the principal step-down approach over the ATR approach. Loans made under the principal step-down approach require substantially less underwriting (in effect just verifying the customer is eligible to borrow given his/her previous indebtedness). They are, therefore, faster and less costly to originate.

Perhaps more importantly, the number and duration of ATR loans restrict lenders' abilities to make subsequent loans to a consumer under the principal step-down approach. But there are no explicit caps on the number of loans or time in debt restricting the issuance of loans made under the ATR approach, beyond the sequence-level re-borrowing restriction. As such, lenders seeking to maximize loan volume, and borrowers seeking to maintain future borrowing options, would likely favor the principal step-down approach when available, even when customers are able to demonstrate the ability to repay.[1152]

For loans issued under the ATR approach, the Bureau assumes the loan amount will be unchanged from the amount observed in the data. This holds for both initial loans in a sequence and for all subsequent loans in that sequence. For loans issued under the principal step-down approach, the Bureau assumes that the amount borrowed in initial loans in a sequence will be the minimum of the observed loan amount in the data, or the maximum amount allowed by the rule (*i.e.,* $500). Subsequent loans in a sequence will be the minimum of the observed loan amount in the data, or the maximum amount allowed by the rule for subsequent loans (*i.e.,* two-thirds of

[1152] The Bureau does note that principal step-down approach loans do have potentially binding restrictions that may make them less desirable to a small subset of consumers (*e.g.,* lower limits, forced principal step-down), and potentially a small set of lenders (those concerned with loan amount, rather than number of loans). However, the Bureau believes the speed and cost advantage of the principal step-down approach will largely outweigh these considerations.

the amount of the initial loan for a second loan and one-third of the amount of an initial loan for a third loan).

With respect to the underwriting of loans, in those simulations where loans made via the principal step-down approach are available in the market, the Bureau assumes that all initial loans observed in the data are originated.[1153] In contrast, simulations for payday loans under the ATR approach assume that only a fraction of consumers will qualify. To assess the impact of this reduction on loans and loan volumes, the fraction of borrowers assumed to qualify for ATR is applied to weight observations in the data that show revealed demand for ATR loans.[1154] The Bureau's analysis in the proposal attempted to calculate this fraction and comments received in response to the proposal provided additional information. Many of these comments note that modeling the ability to repay of borrowers is difficult without detailed information, though some comments attempt to provide evidence for the share of borrowers likely to pass an ATR determination. The Bureau has reviewed these comments and, as appropriate, used their content to inform its assumptions. However, the Bureau continues to believe that determining the share of borrowers and particular loans likely to be impacted by an ATR assessment is necessarily imprecise. The details of the calculations are included below.

The Bureau applies this underwriting filter to both payday and vehicle title loans. While the Bureau believes that the data and comments relating to the share of payday borrowers that could reasonably pass ATR are more informative than those relating to vehicle title borrowers, (*e.g.,* no supporting evidence was provided to the Bureau in response to comments), the Bureau believes it is important to include an underwriting filter in its simulations of each market, and that the value of this filter may be similar across the affected products.

In its ATR simulations, the Bureau assumes that each subsequent ATR loan would be subject to the same filter. That is, the probability of originating each subsequent loan is weighted by the value of the underwriting filter. It is true that any borrower who passes an ATR assessment on his or her initial loan will likely have the same residual income or DTI on each subsequent loan within a sequence (as the lender is not required to pull a new national consumer report if, within the preceding 90 days, that lender has obtained a report that the lender retained and the consumer has not triggered a cooling-off period, and a customer's assessed ability to repay would only change if the information obtained about income or from a registered information system changed). However, the Bureau expects that the instances of re-borrowing should be less frequent for customers who pass an ATR assessment compared to customers who fail to satisfy an ATR determination. This is due to the fact that customers who are able to repay their loans according to the terms at origination are less likely to need to re-borrow compared to those customers who are expected to struggle to repay, and require a subsequent loan to repay the previous one. Additionally, lenders may reasonably interpret the borrower's immediate return as an indicator that the borrower may lack the ability to repay the loan according to its terms, and decide not to extend an additional loan.

The Bureau cannot identify from its data those specific customers who will demonstrate an ability to repay (and applies a weighting filter to account for the attrition induced by underwriting), let alone those near the margin of demonstrating an ability to repay (who are most likely to be voluntarily cut off by lenders). As such, assuming consistent attrition in subsequent loans is a way to account for the combined effects of ATR borrowers' lower propensities to re-borrow, coupled with lenders' likely reassessments of those borrowers' abilities to repay. Therefore, the Bureau assumes a constant decay of re-borrowing amongst those customers who originate an ATR loan. That is, for each new would-be ATR loan present in the data, the simulation accounts for the decline in loan volumes by weighting each loan by a value that represents the combined likelihood that a customer applies and is approved for that loan.

Finally, with respect to re-borrowing restrictions, as stated previously, in simulations where loans made under the principal step-down approach are available, the Bureau assumes that all initial loans are taken out under the rule. Each subsequent loan observed in the data within 30 days of a prior loan (*i.e.,* within a sequence) is also taken out, up to the limit imposed by the rule (*e.g.,* three). For borrowers with sequences in excess of the limit and who have not reached any of the caps on loans under the principal step-down approach, the Bureau adopts one of two assumptions in each of its simulations: Either the borrower returns immediately after the triggered cooling-off period (assumes need persists), or the borrower does not return after the cooling-off period (assumes need is obviated).[1155] To the extent that long sequences reflect the difficulty that borrowers have paying off large single-payment loans, rather than borrowers repeatedly experiencing new income or expense shocks that lead to additional borrowing, it is more likely that borrowers will tend not to return to borrow once a loan sequence has ended and a 30-day period has expired. Regardless, the initial loan in each new distinct sequence for a borrower as observed in the data is always assumed to be initiated, until that borrower has reached his or her limit under the rule.

When a borrower shows revealed demand for an ATR loan in the simulations (*e.g.,* in simulations with only ATR loans or with both ATR and principal step-down approach loans where the borrower has exhausted his/her principal step-down approach loans), the Bureau applies an underwriting filter to the chance that the borrower takes the loan, as discussed above. As was the case under the principal step-down approach, for ATR borrowers with sequences in excess of the limit (and who pass the underwriting screen for each of the loans [1156]), the Bureau adopts one of two

[1153] The Bureau notes that the re-borrowing restrictions imposed by the rule may provide incentives for lenders to impose additional screens on borrowers. Under certain conditions, the limit to the revenue that can be realized via re-borrowing may drive lenders to attempt to screen out borrowers who are no longer profitable to lend to. The Bureau lacks evidence on if, how, and how frequently lenders would do this, and therefore the simulations do not attempt to model this possibility. But any such voluntary underwriting would further reduce the provision of credit. This implies that the simulation results may somewhat underestimate the overall reductions in loans and revenue if the price of and demand for these loans remains constant.

[1154] As the specific loans that would pass ATR are unknown, the Bureau weights all potential loans by the ATR filter rate. If the loans that would pass an ATR assessment systematically vary in amount, propensity to re-borrow, or other such factors from the typical loans observed in the data, the simulations may overestimate or underestimate the impact of the ATR restriction (*e.g.,* if a loan that would pass ATR is actually larger in amount, and rolled over more often than the typical loan, the estimated decreases in revenue by the simulations would be overstated).

[1155] Note that monthly borrowers are unlikely to be able to borrow loans via the principal step-down approach after the third loan in a 12-month period, as they will likely have reached the 90-day limit on indebtedness.

[1156] Note again that the underwriting screens are taken to be independent. While it is likely that a borrower who is able to demonstrate ATR for an initial loan in a sequence will present with similar data for subsequent loans, the Bureau believes borrowers with a demonstrated ATR would be less likely to return to re-borrow. Additionally, lenders may take a borrower's return as an indication they initially lacked the ability to repay, and may not

Continued

assumptions in each of its simulations: Either the borrower returns immediately after the triggered cooling-off period (assumes need persists), or the borrower does not return after the cooling-off period (assumes need is obviated). As each new loan must pass the ATR screen, there is a great deal of decay in the likelihood that a new sequence of ATR loans is initiated.[1157]

(a). Example: Payday Simulation

In the simulation the Bureau estimates as most closely resembling anticipated market impacts, the Bureau assumes loans will be available under both ATR and principal step-down approaches. Consistent with the description above, the Bureau assumes all borrowers with revealed demand for six or more loans in a 12-month period will successfully take out loans under the principal step-down approach until the cap imposed by the rule, or until they reach a forced cooling-off period (after which, by assumption, they may or may not return). The Bureau also imposed an underwriting filter on the demand for and availability of all ATR loans (*i.e.,* all loans in excess of the limit imposed by the principal step-down approach). Consumers are allowed to continue borrowing as permitted by the re-borrowing restriction and the underwriting filter. In practical terms, the re-borrowing rate for sequences of loans made via the ATR approach declines rapidly, as the underwriting filter compounds for each subsequent loan. The Bureau conducts this simulation under the assumption that borrowers with interrupted sequences return to attempt to borrow immediately after their cooling-off periods, and under the assumption that such borrowers do not attempt to borrow again until their next distinct sequence observed in the data. This provides upper and lower bounds for the estimated impacts under this simulation, though the range between these bounds is narrow, due to the low probability of both returning to re-borrow and being approved for a subsequent loan.

(b). Example: Vehicle Title Simulation

Vehicle title loans are only available under the ATR approach because principal step-down loans cannot include vehicle security under § 1041.6(b)(3), limiting the assumptions required for simulations of this market. In the Bureau's simulation for vehicle title loans, the Bureau imposes the same underwriting filter applied to payday loans. This means every loan observed in the data must pass the underwriting screen (and second loans must have passed the first screen, third loans must have passed the first and second screens, and so on). Consumers are allowed to continue borrowing as permitted by the re-borrowing restriction and underwriting filter, and trigger a 30-day cooling-off period if they reach a third loan. The Bureau conducts this simulation under the two different assumptions about borrowers that experience interrupted sequences: That borrowers with interrupted sequences return to attempt to borrow immediately after their cooling-off periods, and that such borrowers do not attempt to borrow again until their next distinct sequence observed in the data. This provides upper and lower bounds for the estimated impacts under this simulation.

ii. Storefront Payday Lending: Impacts on Loan Volumes, Revenues, and Stores

The Bureau has simulated the impacts of the lending restrictions on loan volumes assuming that lenders only make loans using the principal step-down approach relative to lending volumes today. The simulations measure the direct effect of the restrictions by starting with data on actual lending and then eliminating those loans that would not have been permitted if the regulation had been in effect. Possible responses by lenders or borrowers are not considered in the simulations, aside from the effect discussed above on borrowers who have loan sequences interrupted by the re-borrowing restrictions. Depending on the extent to which borrowers who have loan sequences cut off by the three-loan limit will return to borrow again after the 30-day period following the third loan, the estimated impact of the lending restrictions shows a decrease in the number of loans of 55 to 62 percent, and the estimated impact on total loan volume is a decrease of 71 to 76 percent. The simulated impact on revenue is greater than the impact on loan volume because of the loan-size restrictions of the principal step-down approach, with the ''step down'' in the allowable loan amounts for the second and third loans in a sequence having a greater impact than the $500 limit on initial loan size.

The Bureau has also simulated the effects of imposing the ATR approach only (*i.e.,* a market with no principal step-down approach loans). Under the ATR approach a new covered short-term loan cannot be made during the term of and for 30 days following a prior covered short-term loan made under the principal step-down approach. Additionally, new ATR loans can only be originated within 30 days of a previous ATR loan if such a loan would not constitute a fourth loan in a sequence. Using data and analysis provided in the proposal, and information received in comments responding to the proposal, the Bureau has estimated the share of borrowers who would be able to satisfy this requirement to be 33 percent of the would-be borrowers. The Bureau also uses this same value, 33 percent, for subsequent ATR loans to capture the dynamics explained above (*i.e.,* the probability a borrower applies for, and is approved for, a subsequent loan). The Bureau views this, in the absence of specific evidence, as a very conservative assumption in that it generates a larger reduction in loans than would similarly justifiable assumptions (*e.g.,* assuming a larger share of borrowers are able to pass the new, more streamlined ATR assessment; applying a single underwriting reduction at the sequence-level rather than the loan-level; etc.). However, the Bureau notes that the results are not particularly sensitive to using any similar fraction.

Using the simulation approach described above and allowing only the ATR approach produces estimates of the reduction of loan volume and lender revenue of approximately 92 to 93 percent, relative to lending volume today. Again, these estimates vary depending on what is assumed about the behavior of borrowers after the end of the 30-day period following a loan, though these differences are small, as few borrowers will pass four ATR assessments in the simulations.

The Bureau received some comments citing a study that criticizes the Bureau's simulations, arguing they underestimate the reduction in loan volumes.[1158] The study in question estimates that, under the principal step-

originate subsequent loans barring a documented improvement in the borrower's finances. As such, the underwriting filter can be viewed as a ''combined probability of successfully re-borrowing'' filter for second and third loans in a sequence.

[1157] In practice, this represents a small share of potential loans. For an ATR borrower to take a fourth loan, he or she would have had to pass four of the combined re-borrowing and ATR screens, making the probability of being eligible for such a loan p^4, where p is the probability of passing the screen.

[1158] For more details see nonPrime101 ''Report 9—Evaluating CFPB Simulations of the Impact of Proposed Rules on Storefront Payday Lending,'' *available at https://www.nonprime101.com/report-9-evaluating-cfpb-simulations-of-the-impact-of-proposed-rules-on-storefront-payday-lending/*; ''Update to Report 9—'Being Precise About the Impact of 'Principal Reduction','' *available at https://www.nonprime101.com/update-report-9/*.

down approach only, payday loan volumes would decrease by 79.6 percent, and under the ATR approach only payday loan volumes would decrease by 90.5 to 92.7 percent. The Bureau notes these differences are fairly small (less than four percentage points for the principal step-down approach only, and within two percentage points for the ATR approach only), and considers them broadly consistent with the Bureau's findings. Further, the Bureau believes these differences are largely attributable to methodological differences in the identification of the loan sequences likely to be affected by the rule.[1159]

The Bureau received comments citing two additional and similar studies, which estimated the effects of the principal step-down approach (with no ATR approach loans) using data covering loans made by small lenders and loans made by large lenders. These studies estimate total revenue reductions of 82% and 83% respectively.[1160] The Bureau again notes that these findings are broadly consistent with the Bureau's findings, and that there are subtle but important methodological differences which may largely account for the differences in effect sizes.[1161]

The Bureau feels the methodology used in its simulations should generate the most accurate estimates of the steady-state effect on loans volumes in these markets. In the simulation the Bureau believes most closely mirrors the market likely to evolve in response to this rule, borrowers are assumed to be able to take out loans under the principal step-down approach, then continue re-borrowing subject to passing an ATR determination should they still have demand for such loans (again with a 33 percent chance of applying for and passing an ATR assessment for each new ATR sequence). This is the third simulation described above. This simulation produces estimates of the reduction of loan volume and lender revenue of approximately 51 to 52 percent, relative to lending volume in the data, with corresponding revenue decreases of 67 to 68 percent. Of note in this simulation is that approximately 40 percent of the reduction in revenue is the result of limits on loan sizes (*i.e.,* $500 max for principal step-down approach, and forced step-downs), with the remaining reduction attributable to re-borrowing restrictions.

Estimating the share of payday loan borrowers for whom a lender could reasonably determine ability to repay the loan requires data on borrowers' income, details about the prospective loans (especially the payments), and data on borrowers' major financial obligations and estimated basic living expenses. In addition, lenders may satisfy the ATR requirements in a variety of ways (*e.g.,* verification of income via pay stubs or bank statements vs. relying on stated income, or a residual income determination vs. a DTI assessment). It is also challenging to estimate the frequency with which borrowers will seek to initiate new loans sequences after a 30-day cooling-off period. All this necessarily complicates the estimation of the effects of the requirement. As already discussed, the Bureau has assumed 33 percent of would-be ATR borrowers will pass an initial ATR determination and that for each subsequent loan 33 percent of those borrowers would apply for and pass another ATR test. To the extent more applicants will apply for a loan and pass an ATR assessment, the ATR simulation estimates above will overstate the actual decline in lending; to the extent fewer applicants will apply for a loan and pass an ATR assessment, this simulation will understate the actual decline in lending.

Given the importance of the assumption, the Bureau repeats here the analysis and discussion from the proposal of the share of borrowers who would be able to demonstrate an ability to repay a payday loan. Additional analyses using proprietary data were submitted to the Bureau in comments and these analyses are discussed immediately following.[1162] The Bureau notes that the estimates provided by these analyses are all broadly consistent with one another.

The data the Bureau uses include information on the income and loan amounts of payday borrowers. Data on major financial obligations and basic living expenses are only available at the household level, and only for certain obligations and expenses. In addition, only some of the obligation and expense data are available specifically for payday borrowers, and in no case is the obligation or expense data tied to specific loans. Given the limited information on major financial obligations and basic living expenses it is likely the case that estimates made using the available data will overstate the share of borrowers who would demonstrate an ability to repay a payday loan. In addition, lenders may adopt approaches to estimating basic living expenses that lead to fewer borrowers satisfying the lenders' ATR evaluations. Also note that the data and discussion to follow focus on an assessment of residual income for determining ability to repay. While a debt to income (DTI) assessment is also permitted under § 1041.5(b), it is the Bureau's expectation that the DTI approach will not lead to substantial differences compared to the residual income approach when assessing customers' abilities to repay. Rather, the Bureau's inclusion of DTI is intended to give lenders more flexibility in determining how to assess ATR.

Data on payday loans and their associated individual borrower incomes were obtained under the Bureau's supervisory authority.[1163] These data cover a large number of payday loans originated by several lenders in over 30 States.[1164] To ensure the sequences observed in the Bureau's data are not

[1159] Specifically, the nonPrime101 reports do not appear to account for the left-censoring of their data. Under the rule, these individuals would likely not be observed at this stage in their borrowing. The Bureau's approach can be interpreted as the reduction in ''steady-state'' loan volumes (*i.e.,* the level of reduced loans and revenues once the market has adjusted to the rule). The Bureau has previously described its approach to dealing with the left-censoring (*see, e.g.,* CFPB Data Point: Payday Lending, at 10), and does so again below.

[1160] Arthur Baines et al., ''Economic Impact on Small Lenders of the Payday Lending Rules Under Consideration by the CFPB,'' Charles River Associates, (2015), *available at http://www.crai.com/publication/economic-impact-small-lenders-payday-lending-rules-under-consideration-cfpb*; Arthur Baines et al., ''Economic Impact on Storefront Lenders of the Payday Lending Rules Proposed by the CFPB,'' Charles River Associates (2016), *available at http://www.crai.com/publication/economic-impact-storefront-lenders-payday-lending-rules-proposed-cfpb.*

[1161] In particular, a number of loans in their evaluation period are excluded for exceeding loan caps based on the number of loans taken in a pre-policy assessment period. However, the rule's restrictions on allowed number of loans in a 12-month period will not encompass loans made in any period prior to the compliance date of §§ 1041.2 through 1041.10, 1041.12, and 1041.13.

[1162] The Bureau notes that the intent of these studies was to argue that an ability-to-repay assessment is not an effective means by which to reduce default. This Section 1022(b)(2) Analysis does not evaluate these claims or the analyses on which they are based, instead, it acknowledges the usefulness of their underlying data, and uses these data to inform assumptions about the share of borrowers who are likely to pass an ATR assessment. A discussion of the main conclusions of these studies is offered in the section-by-section for § 1041.5.

[1163] These data have been used in prior Bureau publications including: CFPB Payday Loans and Deposit Advance Products White Paper; CFPB Data Point: Payday Lending; and CFPB Report on Supplemental Findings, and are discussed in more detail in those publications.

[1164] Note that the Bureau's data were collected from large payday lenders, and thus may not be representative of small lenders. However, the two Charles River Associates studies cited by commenters and discussed above estimated declines in loan volumes by lender size and found similar revenue impacts on small and large entities. See the Final Regulatory Flexibility Analysis for further discussion of these studies and the anticipated impacts on small lenders.

impacted by left-censoring, the Bureau looks at borrowers who take their first loans in the second month of a lender's data. The Bureau restricts the analysis to these sequences so that it can ensure it is able to observe the first loan in a sequence and thus accurately measure sequence duration.[1165] In effect, this allows the Bureau to estimate the impact on lending volumes in the steady-state, as many of the loans observed in the first month's data are deep into a sequence, and would not have been observed under the rule.

Data on household expenditures comes from the 2010 BLS Consumer Expenditure Survey (CEX). These data contain information on some of the expenditures that make up major financial obligations, including housing obligations (rent or mortgage payments) and vehicle loan payments. The CEX also contains information on various categories of basic living expenses, including utilities, food, and transportation. These expense categories would need to be considered by lenders estimating basic living expenses. An important limitation of the data is that they do not contain information for all major financial obligations; in particular the data exclude such obligations as credit card payments, student loan payments, and payments on other small-dollar loans.

As noted above, the CEX collects expenditure data at the household, rather than individual, level. Lenders are required to make the ATR determination for an individual borrower, which may include reasonable considerations of income from other persons to which the borrower can show access, contributions of other persons to major financial obligations and in certain cases to basic living expenses, *see* comments 5(a)(5)–3, 5(c)(1)–2, 5(b)–2.i.C.*2*. Given the lack of available information on individual expenditures, household level income and expenditures information is presented here, though the Bureau notes these may not be directly applicable to individual-level determinations of ATR. Because the data on payday loans collected under the Bureau's supervisory authority contain information on borrowers' individual incomes, the Bureau used a third source of data to map individual incomes to household incomes, with particular attention on this population.

Data on both individual and household incomes come from the four waves of the FDIC National Survey of Unbanked and Underbanked Households that have been conducted as a special supplement to the Current Population Survey (CPS). This provides information on the distribution of household income for individuals with individual income in a certain range. The share of the population that takes one of these types of loans is fairly small, so income data on both payday and vehicle title borrowers is used to provide more robust information on the relationship between individual and household income for this population. The CPS collects information from 60,000 nationally representative respondents in each wave, of whom roughly two percent reported having taken out a payday and over one percent reported having taken out a vehicle title loan in the past 12 months in the most recent wave of the survey.[1166] These data are the most extensive source of information on both individual and household income of such borrowers that the Bureau has been able to identify.

Relative to the proposal, the Bureau has continued using data on household spending and income from the 2010 CEX, while including the latest wave of the 2015 FDIC Survey data. Compared to more recent CEX data, the data should better correspond to the borrower characteristics considered by lenders in the baseline loan origination data which are from 2011 and 2012. As noted below, the Bureau also continues to use the 2010 Survey of Consumer Finances for the same reason. Incorporating the additional wave of the FDIC survey data increases the small sample of observed payday and vehicle title borrowers, improving the estimated relationship between individual and household incomes. The differences in time periods should not introduce any bias as the four waves are centered roughly over the time periods of the loan and expense data, and the Bureau is only using the CPS data for the crosswalk between individual and household income.

Table 1 shows the distribution of payday loan borrowers by their reported individual monthly income based on the loan data discussed above. As the table shows, roughly half of payday loans in the data were taken out by borrowers with monthly individual incomes below $2,000.

[1163] These data have been used in prior Bureau publications including: CFPB Payday Loans and Deposit Advance Products White Paper; CFPB Data Point: Payday Lending; and CFPB Report on Supplemental Findings, and are discussed in more detail in those publications.

[1164] Note that the Bureau's data were collected from large payday lenders, and thus may not be representative of small lenders. However, the two Charles River Associates studies cited by commenters and discussed above estimated declines in loan volumes by lender size and found similar revenue impacts on small and large entities. See the Final Regulatory Flexibility Analysis for further discussion of these studies and the anticipated impacts on small lenders.

TABLE 1.

Distribution of Individual Monthly Income of Payday Borrowers	
Individual Monthly Income	Share of Borrowers
$0 - $499	2.3 %
$500 - $999	14.4 %
$1000 - $1499	17.5 %
$1500 - $1999	17.3 %
$2000 - $2499	14.0 %
$2500 - $2999	10.9 %
$3000 - $3499	7.5 %
$3500 - $3999	4.8 %
$4000 - $4999	5.7 %
$5000 - $5999	2.7 %
$6000 - $6999	1.3 %
$7000 - $7999	1.4 %
Source: CFPB analysis of loan-level payday data	

Table 2 provides the distribution of household monthly income among payday and vehicle title borrowers by their individual level of monthly income.[1167] For instance, referring back to Table 1, 14 percent of payday loans in the loan data analyzed went to borrowers with individual incomes between $2,000 to $2,499 dollars per month (or $24,000 to $29,999 per year). As Table 2 shows, the median household income for a payday or vehicle title borrower with an individual monthly income in this range is $2,417 per month, with the mean household income slightly higher at $2,811 per month.

TABLE 2.

Distribution of Household Monthly Income by Individual Monthly Income*				
Individual Monthly Income	Mean	10th Pct.	Median	90th Pct.
$0 - $499	$803	$0	$389	$2,087
$500 - $999	$1,258	$635	$878	$2,535
$1000 - $1499	$1,738	$1,085	$1,424	$2,989
$1500 - $1999	$2,178	$1,588	$1,838	$3,294
$2000 - $2499	$2,811	$2,077	$2,417	$4,078
$2500 - $2999	$3,667	$2,608	$2,971	$5,458
$3000 - $3499	$4,212	$3,116	$3,495	$6,063
$3500 - $3999	$5,059	$3,582	$4,445	$7,397
$4000 - $4999	$5,920	$4,151	$4,916	$8,561
$5000 - $5999	$7,169	$5,163	$7,104	$9,383
$6000 - $6999	$8,087	$6,644	$7,504	$10,661
$7000 - $7999	$11,059	$7,298	$8,965	$17,131
$8000 - $8999	$10,219	$8,301	$8,566	$12,987
$9000 - $9999	$9,509	$9,262	$9,415	$10,375
$10,000+	$14,572	$10,980	$13,548	$18,454
Source: 2009, 2011, 2013, 2015 FDIC National Survey of Unbanked and Underbanked Households				
*Reported data includes only borrowers who reported taking out a payday or auto-title loan in the last 12 months.				

Table 3 shows the distribution of certain household expenditures by household monthly incomes. For instance, households with an income between $2,000 and $2,499 per month spend on average $756 on obligations which would fall within the category of major financial obligations, including rent or mortgage payments and vehicle loan payments. The same households spend an average of $763 on food, utilities, and transportation, which all are basic living expenses. As shown in the table, that leaves $689 to cover any other financial obligations, including payments on other forms of debt, other basic living expenses and payments on a new loan.

[1165] *See* CFPB Data Point: Payday Lending, at 10 (for more details).

TABLE 3.

Distribution of Household Expenditures and Average Remaining Income by Household Monthly Income[a]							
Household Monthly Income	Total Household Expenditures[a]				Recurring Obligations[b]	Basic Living Expenses[c]	Remaining Income
	Mean	10th Pct.	Median	90th Pct.	Mean	Mean	Mean
$0 - $499	$1,096	$432	$982	$1,888	$555	$541	$-884
$500 - $999	$971	$428	$879	$1,641	$451	$520	$-190
$1000 - $1499	$1,196	$595	$1,094	$1,958	$589	$607	$36
$1500 - $1999	$1,383	$732	$1,280	$2,156	$673	$710	$350
$2000 - $2499	$1,519	$888	$1,450	$2,281	$756	$763	$689
$2500 - $2999	$1,674	$1,002	$1,557	$2,461	$870	$804	$1,062
$3000 - $3499	$1,743	$1,066	$1,667	$2,617	$901	$843	$1,459
$3500 - $3999	$1,854	$1,157	$1,743	$2,736	$975	$880	$1,864
$4000 - $4999	$2,011	$1,218	$1,900	$2,981	$1,052	$959	$2,436
$5000 - $5999	$2,186	$1,342	$2,087	$3,152	$1,189	$997	$3,260
$6000 - $6999	$2,325	$1,471	$2,227	$3,359	$1,283	$1,042	$4,112
$7000 - $7999	$2,580	$1,650	$2,500	$3,735	$1,453	$1,128	$4,841
$8000 - $8999	$2,760	$1,709	$2,656	$4,017	$1,551	$1,209	$5,668
$9000 - $9999	$2,855	$1,801	$2,824	$4,188	$1,576	$1,279	$6,547
$10,000+	$3,182	$2,014	$3,108	$4,652	$1,819	$1,363	$9,562

Source: 2010 BLS Consumer Expenditure Survey

[a] Household expenditures include housing obligations (rent or mortgage payments), vehicle loan payments, expenditure on transportation (gas and public transit), payments on utilities, and expenditure on food.

[b] Recurring obligations include housing obligations (rent or mortgage payments) and vehicle loan payments.

[c] Other basic living expenses include expenditure on transportation (gas and public transit), payments on utilities, and expenditure on food.

Based on these data, it appears that payday borrowers need at least $1,500 in monthly household income to possibly have enough residual income to be able to repay a typical payday loan of $300–$400. However, this requires that the household have no other major financial obligations beyond housing and an auto loan, and does not factor into account all of the categories for basic living expenses defined in the rule.

Table 4 provides more information about other typical major financial obligations of households that use payday loans. It shows the amount of outstanding debts and monthly payments for several categories of credit for households that used payday loans over a period of twelve months, as well as the share of those households that had each category of debt. This information comes from the 2010 Survey of Consumer Finances (SCF),[1168] which has details on respondents' assets, debts, and income, but the number of payday borrowers in the data is not large enough to allow estimating debts for borrowers in different income ranges.[1169]

[1168] Relative to the proposal, the Bureau has continued to use the 2010 SCF data, as these better reflect contemporaneous debt obligations for borrowers observed in the baseline loan origination data.

[1169] These estimates show a substantially lower share of borrowers with credit cards than was found in a study that matched payday loan data with credit report information. That study found that 59 percent of payday borrowers had an outstanding balance on at least one credit card, with an average outstanding balance of $2,900.

TABLE 4.

Distribution of Debt Obligation Conditional Balances and Monthly Payments Among Payday Borrowers[a]					
Debt Obligations	Mean	10th Pct.	Median	90th Pct.	Fraction of Borrowers with Outstanding Debt Obligation
Outstanding Balances					
Credit Cards	$3,287	$230	$1,300	$7,130	34%
Revolving Charge Accounts[b]	$3,351	$300	$750	$6,000	9%
Monthly Payments					
Housing Payments[c]	$755	$300	$660	$1,300	96%
Lines of Credit[d]	$196	$20	$135	$405	4%
Car Loans[e]	$421	$200	$360	$770	35%
Student Loans	$174	$50	$105	$370	14%
Other Consumer Loans	$266	$30	$150	$672	20%
Total Balances and Payments					
All Credit Card and Charge Accounts	$3,561	$230	$1,200	$8,000	40%
All Monthly Payments[f]	$977	$370	$809	$1,710	98%
All Monthly Payments Minus Housing and Car Loan Payments	$263	$50	$160	$640	33%

Source: 2010 Federal Reserve Board Survey of Consumer Finances

[a] Households are identified as payday borrowers if a household member took out a payday loan during the past year.

[b] Revolving charge accounts at stores other than store accounts where a household has credit.

[c] Includes mortgage payments, rental payments, land contract payments, payments on home equity loans, and payments on home improvement loans.

[d] Payments on lines of credit (including home equity lines of credit).

[e] Includes personally owned cars, trucks, vans, and sport utility vehicles.

[f] Includes payments on housing, lines of credit, car loans, student loans, and other consumer loans.

Table 4 shows that 34 percent of households with payday loans have outstanding credit card debt, with an average balance of nearly $3,300. An average credit card balance of approximately $3,300 requires a minimum monthly payment of around $100.[1170] The table also shows that one-third of payday households have additional debts not associated with housing or vehicles, with average monthly payments of $263. Given these other major financial obligations, and the need to account for other basic living expenses, it seems likely that a household will need monthly income substantially higher than $1,500 to be able to demonstrate an ability to repay a typical payday loan. For example, households with at least $3,000 in monthly income seem to demonstrate an ability to repay a typical payday loan. Individuals in such households typically have roughly $2,500 in monthly income. And in the data the Bureau has analyzed, roughly one-third of payday borrowers have individual income above $2,500 per month.

There is an additional caveat to this analysis: The CEX expenditure data are for all households in a given income range, not households of payday borrowers. If payday borrowers have unusually high expenses relative to their incomes, they will be less likely than the data suggest to be able to demonstrate an ability to repay a payday loan. Conversely, if payday borrowers have unusually low expenses relative to their incomes, they will be more likely to be able to borrower under the ATR approach. Given these borrowers' needs for liquidity, it seems more likely that they have greater expenses relative to their income compared with households generally. This may be particularly true around the time that borrowers take out a payday loan, as this may be a time of unusually high expenses or low income.

As noted earlier, comments received in response to the proposal provided the Bureau with additional data that speak to payday borrowers' residual incomes and the likely outcomes of an ability to repay assessment. The first of these data, shown in Table 5, were provided in a comment letter to the Bureau by an alternative credit bureau. Table 5 presents the percentages of current payday loans by the residual income level of the borrower. The residual incomes were calculated for a randomly sampled 1.65 million loan applicants in 2014. The calculation subtracted the following elements from a consumers' stated monthly income: ''Covered Loan'' monthly debt obligation, traditional monthly debt obligation sourced from a national credit bureau, any applicable child or family support sourced from a national credit bureau, requested loan payment amount, monthly geo-aggregated estimate of housing costs (from Census data), and monthly estimate of utility and phone payments (from BLS data).[1171] At least the basic living expenses comprised by this estimate of residual income are, as the commenter noted, incomplete, and thus the residual incomes in Table 5 are potentially higher than those that would result from an ability-to-repay assessment consistent with § 1041.5.

[1170] This assumes a 24 percent annual interest rate on the balance, with a minimum monthly payment calculated as all interest due plus one percent of the principal.

[1171] *See* FactorTrust Inc. Comment Letter to the CFPB, dated October 6, 2016. The commenter did not provide more detail on the nature of the sample, which may include loans that are not covered under the rule (but were covered under the proposal). Also, the subtractions listed include ''Covered Loan monthly debt obligation'' and ''requested loan payment amount.'' The Bureau believes these refer to the same item.

TABLE 5.

Distribution of Loan Volumes by Residual Income		
Monthly Residual Income	Percent of Current Payday Loans	Percent of First-Time Applicants
<-$2500	5.0%	7.8%
-$2500 to-$1501	7.9%	8.5%
-$1500 to -$1001	8.2%	7.7%
-$1000 to -$501	14.0%	14.1%
-$500 to $0	18.7%	17.1%
$1 to $500	12.3%	12.1%
$501 - $1000	9.6%	9.1%
$1001 to $1500	6.9%	6.5%
$1501 - $2500	8.3%	7.8%
> $2500	9.2%	9.3%
Source: FactorTrust Inc. Comment Letter to the CFPB dated October 6,2016, pp. 19-21.		

As shown in Table 5, these data indicate that fewer than 50 percent of current payday loans are made to individuals with positive residual incomes, with slightly fewer first-time applicants having positive residual incomes (46.2 percent vs. 44.8 percent).[1172] Setting aside the fact that as previously noted at least the subtractions for basic living expenses are incomplete, this still implies that the majority of payday loans would not pass an ability to repay determination. This finding is consistent with other studies that show that fewer than four in ten payday loan bookings passed a residual-income test.[1173]

Another report, submitted by the research arm of an alternative credit bureau, provided similar data.[1174] Table 6 shows the percentage of storefront payday loan borrowers who would have had positive residual incomes after making a loan payment, and the percentage of all loans made to such borrowers. These percentages come from a sample of 90,000 storefront payday loans made in 2013, matched to debt obligations and two income measures (one each for the median observed income, and the most recently observed income). The residual-income measure subtracted from the borrower's income debt service obligations and basic living expenses including shelter, food, transportation, communication, medical care, and dependent childcare (using BLS data to proxy where necessary).

TABLE 6.

Share of Borrowers and Loans to Borrowers with Positive Residual Income After Loan Payment			
Income Measure	Pay Frequency	Percentage of Borrowers with Positive Residual Income After Loan Payment	Percent of Loans Made to Borrowers With Positive Residual Income After Loan Payment
Median Income	Weekly	23.2%	23.0%
	Bi-Weekly	37.3%	38.7%
	Monthly	34.1%	33.9%
	Total	**33.1%**	**34.0%**
"Last Seen" Income	Weekly	23.1%	25.2%
	Bi-Weekly	35.6%	38.6%
	Monthly	21.8%	22.9%
	Total	**28.5%**	**31.1%**
Source: Rick Hackett, "Report 10: Is Consumer 'Ability to Repay' Predictive of Actual Repayment of Storefront Payday Loans?" nonPrime101 at appendix tbl. 1.			

[1172] In this analysis, residual income refers to money left over after subtracting loan payments, financial obligations and some living expenses. Residual income in the rule is slightly different and refers to income minus major financial obligations and loan payments. Thus, whereas $0 residual income could indicate a borrower has ability to repay using the factor trust calculation, it would not under the rule's calculation because funds would be needed to cover basic living expenses.

[1173] FactorTrust ''Underwriting Benchmarks: How Does Your Performance Stack Up?,'' presentation to the 2017 CFSA Conference & Expo, at slide 20.

[1174] nonPrime101, ''Report 10: Is Consumer 'Ability to Repay' Predictive of Actual Repayment of Storefront Payday Loans?,'' (2017), *available at https://www.nonprime101.com/report-10-ability-to-pay/.*

The results in Table 6 show that between 28.5 and 33 percent of borrowers would have passed a residual-income test in these data. This appears somewhat lower than reported in Table 5, where 34 percent of borrowers had at least $500 in positive residual income (more than enough to cover the debt service on a payday loan). This difference could be due to the study's sampling methodology, which may overstate loans in long sequences. Such loans may be suggestive of an inability to repay (see discussion of censoring above). As such, the Bureau considers these figures to be ''conservative'' (in that they may underestimate the share of borrowers who would pass an ATR assessment).[1175]

It is not known whether the applications that would fail to pass an ATR determination are more likely to be for one of a customer's first six loans (which would not be subject to an ATR assessment if issued under the principal step-down approach). While first-time applicants do appear slightly more likely to have negative residual incomes, the residual income levels of applicants for a seventh (or greater) loan in a 12-month period may be higher or lower on average compared to the overall population of applications. As such, there is no strong evidence that customers seeking their first loan under the ATR approach (which, as discussed previously, is likely to be their seventh loan in a 12-month period) would be more or less likely to pass an ATR assessment. As such, the evidence suggests that relatively few applicants would pass an ATR determination in order to continue borrowing beyond the limits imposed by the principal step-down approach.

Based on these findings, the Bureau assumes for the purposes of its simulation that 33 percent of would-be borrowers can pass ATR. This number is near the lower end of the ranges identified by the Bureau's analysis and in the first of the two comments described above and within the range of the second comment that independently attempted to measure the share of borrowers likely to pass an ATR assessment. While the 33 percent figure used here is a restrictive assumption (*i.e.,* will result in a larger estimated decline in lending), the actual share of borrowers who will pass the ATR assessment in practice may differ from the value used here. To the extent that the value used in the Bureau's simulations is too high (*i.e.,* fewer borrowers would pass an ATR determination), the real decreases in loan volumes and revenues would be greater. To the extent that the value used in the Bureau's simulations is, as suggested above, too low (*i.e.,* more borrowers would pass an ATR determination), the real decreases in loan volumes and revenues would be smaller. However, given the magnitude of the decline in the ATR-only simulations, it appears that there is unlikely to be a substantial change to the estimates based on any reasonable assumption about the share of borrowers qualifying for ATR loans.

The simulations of the re-borrowing restrictions and the ATR analysis presented thus far relate only to storefront loans. Online payday loans and vehicle title loans are considered next.

iii. Online Payday Lending: Impacts

The impact of the rule on the online payday market is more difficult to predict. There is no indication that online payday lenders will be more successful under the ATR approach than storefront lenders; in fact, it may be somewhat more difficult for them to satisfy the procedural requirements of that approach. The available information does not allow for reliably tracking sequences of online payday loans, as borrowers appear to change lenders much more often online and there is no comprehensive source of data on all online lenders. If very long sequences of loans are less common for online loans, however, the re-borrowing restrictions of both the ATR and principal step-down approaches will have a smaller impact on online lenders.

There are additional relevant considerations for the impacts of the rule on online lenders relative to storefront lending. Unfortunately the direction and magnitudes of the impacts are not entirely clear. The decrease in online lending may be less relative to storefronts if the geographical contraction of storefronts leads more borrowers to seek loans from online lenders. Additionally, online lenders may have lower overhead costs and be able to better amortize one-time and per-location costs over broader potential borrowing populations. However, there could be negative selection into online lending (*e.g.,* borrowers who are less likely to pass ATR assessments or are more likely to default) if storefront closings happen to displace less qualified customers. As such, the effects on online lenders are likely to be similar to those on storefront lenders, though the Bureau notes this actual impact on online lenders is much more difficult to predict.

iv. Vehicle Title Lending: Impacts

Vehicle title loans are not eligible for the principal step-down approach, and therefore lenders making only vehicle title loans will only be able to make such loans to borrowers who the lender is able to determine have the ability to repay the loan. Table 7 shows the distribution of individual incomes of single-payment vehicle title borrowers.

[1175] The differences also may reflect differences in the categories of expenses included as basic living expenses in the two analyses. The Bureau also received comments referencing other studies or analyses that provided less data, analytic rigor, or transparency; the Bureau placed less weight on the findings from such studies. For example, some commenters cited an analysis in an undated presentation by four industry representatives, including one of the specialty credit bureaus whose more detailed comment is noted above. This analysis claims that individuals earning less than $40,000 per year are ''unlikely to qualify'' for a $500 payday loan. However, this analysis is flawed. First, the presentation ignores the option for loans made under the principal step-down approach, which the Bureau expects to remain widely available. Second, the study's sources for assumptions about the typical expenses faced by these households are not cited, and appear inflated relative to the levels shown in the available data (*i.e.,* they assume $2,495 in ''typical'' monthly expenses, while Table 2 shows the median expense for individuals with this level of income is only $1,667). Third, this study applies a five percent ''ATR buffer'' that reduces the individual's available income. This buffer was not part of the proposal (though it is similar to the considerations proposed by some consumer groups), and without this buffer, the individual in the presentation's example actually would qualify for a $500 payday loan according to their calculations. In general, the Bureau considered carefully those analyses that provided or carefully cited reliable data, and discounted those that were less empirically grounded or had flaws similar to those noted here.

TABLE 7.

Distribution of Individual Monthly Income of Single-Payment Vehicle Title Borrowers	
Individual Monthly Income	Share of Borrowers
$0 - $499	2.9 %
$500 - $999	13.2 %
$1000 - $1499	19.9 %
$1500 - $1999	20.1 %
$2000 - $2499	13.0 %
$2500 - $2999	8.9 %
$3000 - $3499	7.5 %
$3500 - $3999	3.3 %
$4000 - $4999	4.7 %
$5000 - $5999	2.4 %
$6000 - $6999	1.6 %
$7000 - $7999	0.7 %
$8000 - $8999	0.5 %
$9000 - $9999	0.2 %
$10,000+	1.2 %
Source: CFPB analysis of loan-level single-payment vehicle title loan data.	

Table 7 shows that the incomes of vehicle title loan borrowers are slightly lower than those of payday loan borrowers. Vehicle title loans, however, are substantially larger than payday loans, with a median loan amount of nearly $700, twice that of payday loans.[1176] Based on Tables 3 and 4, it appears that very few households with monthly income below $3,000 will be able to demonstrate an ability to repay a loan with a payment of $700, and even $3,000 will likely be insufficient. Based on the imputation of household numbers to individual borrowers, it appears that some individuals with monthly income between $1,500 and $2,000 will live in households with sufficient residual income to make a $700 payment, but that it is more likely that monthly individual income of $2,500 or more will be needed to have sufficient residual income to make such a payment. Table 7 shows that less than one third of vehicle title borrowers have monthly individual income above $2,500.

Putting aside the difficulty of developing precise estimates of the share of borrowers who will be able to demonstrate an ability to repay a loan, it is likely that the share will be smaller for vehicle title borrowers than payday borrowers simply because vehicle title borrowers have slightly lower average incomes, and the average single-payment vehicle title loan is substantially larger than the average payday loan. However, the Bureau applied the same assumption as with payday loans about the share of borrowers who will pass an ATR assessment in the vehicle title simulations. Specifically, 33 percent of borrowers are assumed to pass the ATR screen. While it is likely that relatively fewer borrowers will pass an ATR determination for title loans, the 33 percent number was near the low end of the predicted ranges for borrowers passing ATR for payday. Additionally, the Bureau did not receive any comments with detailed analysis of the share of borrowers likely to pass ATR for title loans. As such, while the Bureau has determined the 33 percent figure to be a reasonable assumption for the share of borrowers passing ATR assessments for both payday and title loans, it acknowledges that the figure is less precise for title loans.

Vehicle title lenders also face the limitations of the ATR approach on making loans to borrowers during the term of, and for 30 days following, a prior covered short-term loan.

The Bureau has run simulations of the share of single-payment vehicle title loans that are currently made that could still be made under the rule.[1177] The simulations apply the same 33 percent ATR filter as was described for payday, and likewise assume that borrowers cannot take out a loan within 30 days of repaying a prior loan. Depending on whether borrowers who currently take out long sequences of loans will return to borrow again after a 30-day period following repayment of a loan, the Bureau estimates that the restrictions on short-term vehicle title lending will prevent between 89 and 93 percent of short-term vehicle title loans that are currently made, with an equivalent reduction in loan volume and revenue.

Depending on the extent to which the underwriting restrictions on these lenders eliminate more loans (*i.e.,* fewer than 33 percent of borrowers demonstrate ATR), the overall reduction in loans and revenue could be even greater. However, if more than 33 percent of borrowers can demonstrate ATR for each loan, the reduction in loans may be reduced.

v. Overall Impacts on These Markets

For the reasons discussed above, the Bureau believes that the rule will have a substantial impact on the markets for payday loans and single-payment vehicle title loans. The costs of the procedural requirements may have some impact on these markets, but the larger effects will come from the limitations on lending.

Most of the costs associated with the procedural requirements of the rule are per-loan (or per-application) costs, what economists refer to as ''marginal costs.'' Standard economic theory predicts that marginal costs will be passed through to consumers, at least in part, in the form of higher prices. As discussed above in part II, however, many covered loans are being made at prices equal to caps that are set by State law or State regulation; lenders operating in States with binding price caps will not be able to recoup

[1176] CFPB Payday Loans and Deposit Advance Products White Paper, at 15; CFPB Vehicle Title Report, at 6.

[1177] These are similar to the simulations described in CFPB Report on Supplemental Findings, at Chapter 6, though the results of the simulations presented there take account only of the re-borrowing restriction, while the results presented here add the underwriting filter.

those costs through higher prices. The new procedural costs to lenders making loans using the principal step-down approach, however, will be quite small, primarily the costs of obtaining data from a registered information system and providing data to registered information systems. Lenders making vehicle title loans, which cannot be made under the principal step-down approach, will be required to incur the costs of using the ATR approach. If lenders make smaller loans to comply with the ATR requirements, however, the relative importance of procedural costs could increase.

As described above, the limitations on lending included in the rule will have a substantial impact on the loan revenue of storefront payday and vehicle title lenders; the impact on online payday lenders is less clear, but is likely to be substantial as well. However, it is important to emphasize that these revenue projections do not account for lenders making changes to the terms of their loans to better fit the regulatory structure or offering other products, for instance by offering a longer-term vehicle title loan with a series of smaller periodic payments instead of offering a short-term vehicle title loan. The Bureau is not able to model these effects.

A pattern of contractions in storefronts has played out in States that have imposed new laws or regulations that have had a similar impact on lending revenue, where revenue-per-store has generally remained fairly constant and the number of stores has declined in proportion to the decline in revenue.[1178] To the extent that lenders cannot replace reductions in revenue by adapting their products and practices, Bureau research suggests that the ultimate net reduction in revenue will likely lead to contractions of storefronts of a similar magnitude, at least for stores that do not have substantial revenue from other lines of business, such as check cashing and selling money orders.

With regard to evolution in product offerings, it is quite likely that lenders may respond to the requirements and restrictions in the rule by adjusting the costs and features of particular loans. They may also change the range of products that they offer. If lenders are able to make these changes, it will mitigate their revenue losses. On individual loans, a loan applicant may not demonstrate an ability to repay a loan of a certain size with a certain payment schedule. The lender may choose to offer the borrower a smaller loan or, if allowed in the State where the lender operates, a payment schedule with a comparable APR but a longer repayment period yielding smaller payments. Lenders may also make broader changes to the range of products that they offer, shifting to longer-term, lower-payment installment loans, where these loans can be originated profitably within the limits permitted by State law.[1179]

Making changes to individual loans and to overall product offerings will impose costs on lenders even as it may serve to replace at least some lost revenues. Smaller individual loans generate less revenue for lenders. Shifting product offerings will likely have very little direct cost for lenders that already offer those products. These lenders will likely suffer some reduced profits, however, assuming that they found the previous mix of products to generate the greatest profits. Lenders who do not currently offer longer-term products but decide to expand their product range will incur a number of costs. These might include learning about or developing those products; developing the policies, procedures, and systems required to originate and to service the loans; training staff about the new products; and communicating the new product offerings to existing payday and single-payment vehicle title borrowers.

2. Benefits and Costs to Consumers

a. Benefits to Consumers

The rule will benefit consumers by reducing the harm they suffer from the costs of extended sequences of payday loans and single-payment auto-title loans, from the costs of delinquency and default on these loans, from the costs of defaulting on other major financial obligations, and/or from being unable to cover basic living expenses in order to pay off covered short-term and longer-term balloon-payment loans.[1180] Borrowers will also benefit from lenders adjusting their loan terms or their product mix, so that future loans are more predictable and ultimate repayment is more likely.

i. Eliminating Extended Loan Sequences

As discussed in detail above in Market Concerns—Underwriting, there is strong evidence that borrowers who take out storefront payday loans and single-payment vehicle title loans often end up taking out many loans in a row. This evidence comes from the Bureau's own work, as well as analysis by independent researchers and analysts commissioned by industry. Each subsequent single-payment loan carries the same cost as the initial loan that the borrower took out, and there is evidence that many borrowers do not anticipate these long sequences of loans. Borrowers who do not intend or expect to have to roll over or re-borrow their loans, or expect only a short period of re-borrowing, incur borrowing costs that are several times higher than what they expected to pay. The limitations on making loans to borrowers who have recently had relevant covered loans will eliminate these long sequences of loans.

The Bureau received many comments from industry, trade associations, and others arguing about consumers' abilities to anticipate their borrowing patterns. The Bureau has addressed these comments previously in Market Concerns—Underwriting, the section-by-section analysis for § 1041.4 and part VII.D, and does so again here.

There are several key findings that are raised by multiple sources, including analyses by the Bureau; by academic, industry, and other researchers; by State government agencies; in a report submitted by several of the SERs as part of the SBREFA process; and raised in comments. First, only a minority of new payday and single-payment vehicle title loans are repaid without re-borrowing. With slight variation depending on the particular analysis, from approximately one-in-three to one-in-four payday loans and approximately one-in-eight single-payment vehicle title loans is repaid without re-borrowing. In contrast, about half of loans lead to sequences at least four loans long, for both types of

[1178] CFPB Report on Supplemental Findings, at chapter 3; *Wash. State Dep't. of Fin. Insts.,* ''2015 Payday Lending Report,'', at 5 *(2015), available at http://www.dfi.wa.gov/sites/default/files/reports/2015-payday-lending-report.pdf*; Adm'r of the Colo. Consumer Credit Unit, ''Colorado Payday Lending—July Demographic and Statistical Information: July 2000 through December 2012,''; Adm'r of the Colo. Consumer Credit Unit, ''Colorado Uniform Consumer Credit Code: Annual Report Composites,'' *available at https://coag.gov/uccc/info/ar.*

[1179] An analysis by researchers affiliated with a specialty consumer reporting agency estimated that roughly half of storefront payday borrowers could demonstrate ability to repay a longer-term loan with similar size and APR to their payday loan, but noted that these loans would not be permitted in a number of States because of State lending laws and usury caps. nonPrime 101, ''Report 8, *Can Storefront Payday Borrowers Become Installment Loan Borrowers? Can Storefront Payday Lenders Become Installment Lenders*?,'' at 3 (Dec. 2, 2015) *available at https://www.nonprime101.com/wp-content/uploads/2015/12/Report-8-Can-Storefront-Payday-Borrowers-Become-Installment-Loan-Borrowers-Web-61.pdf.*

[1180] As mentioned previously, the effects associated with longer-term balloon-payment loans are likely to be small relative to the effects associated with payday and vehicle title loans. This is because longer-term balloon-payment loans are uncommon in the baseline against which benefits are measured.

loans.[1181] A significant percentage of borrowers have even longer sequences; about a third of either type of loan leads to sequences seven loans long, and about a quarter lead to sequences 10 loans long or longer. And, a small number of borrowers have extremely long sequences that go on for years. An analysis by an industry research group found that 30 percent of payday borrowers who took out a loan in a particular month also took out a loan in the same month four years later. For this group, the median time in debt over that period was over two years, and nine percent of the group had a loan *in every pay period across the four years.*[1182]

The Bureau believes the available empirical evidence demonstrates that borrowers who take out long sequences of payday loans and vehicle title loans do not anticipate those long sequences.[1183] Aside from the Mann (2013) study, which is discussed further below, two academic studies have asked payday and vehicle title borrowers about their expectations regarding how long it takes to repay payday loans, and not re-borrow shortly thereafter, and compared their responses with actual repayment behavior of the overall borrower population.[1184] These studies did not compare borrowers' predictions with their own borrowing experiences, but did show that borrowers appear, on average, somewhat optimistic about re-borrowing. Still, the average borrower experience may not be directly relevant to the impacts of this rule. Rather, as described in part VII.D, the more pertinent question in assessing the impacts of this rule's restrictions is whether those borrowers who experience long sequences of re-borrowing properly anticipated these experiences.

Two nearly identical surveys of payday borrowers commissioned by an industry trade group were conducted in 2013 and 2016, and asked borrowers who had recently repaid a loan and not re-borrowed if it had taken as long as the borrower had initially expected to repay the loan.[1185] They found that the overwhelming majority of borrowers stated that it had not taken longer than they expected. This approach, however, may suffer from numerous problems, including recall bias (as borrowers were asked about what they expected in the past and whether their expectations were accurate) and ''reverse'' survivor bias (as only borrowers who successfully closed a sequence of loans are surveyed, and these borrowers are much less likely to have been in long borrowing sequences). It is also not clear from the wording of the survey if borrowers are likely to have understood the question to refer to the actual loan they had recently repaid, or to the original loan they had taken out that led to the loan sequence.

As discussed in the overview, Mann (2013) did ask borrowers about their expectations for re-borrowing and compared those with their actual borrowing experience, yielding insights more directly relevant for this rule.[1186] As described in the proposal, the study found that borrowers who wound up with very long sequences of loans had rarely expected those long sequences; that only 40 percent of respondents expected to re-borrow at all (while more than 70 percent actually did re-borrow); and, that borrowers did not appear to become better at predicting their own borrowing, as those who had borrowed most heavily in the past were most likely to underestimate their future re-borrowing.

This study was one of the most heavily cited by commenters, and the author himself provided a comment as well. Industry commenters and the author offered criticisms of the Bureau's characterization of the study's findings. However, the Bureau continues to believe the evidence suggests many borrowers did not anticipate their outcomes. Given the prevalence and intensity with which commenters cite this study, the Bureau offers a more detailed response here.

Mann (2013) presents evidence that 51 percent of borrowers predict their outcomes within 7 days, 57 percent within 14 days, and 63 percent within 21 days,[1187] and that borrower's errors were fairly symmetric around zero [1188] (*i.e.,* there was not evidence of systematic optimism or pessimism).[1189] The Bureau appreciates Mann's evidence and places significant weight on his findings, but does dispute his interpretation of those findings.

The pertinent question for this rule, which limits long durations (but not discrete and short-term access), is: Do the specific borrowers who will experience very long sequences anticipate these outcomes at the time they borrow? The answer to this question appears to be no. Mann did not include his data with his comment, which makes deeper exploration of his findings difficult.[1190] However, using the paper and documents provided by the author to the Bureau, some useful findings can be discerned.[1191] These

[1181] *See* CFPB Data Point: Payday Lending, at 10–11; CFPB Vehicle Title Report, at 10–11; CFPB Report on Supplemental Findings, at Chapter 5; Arthur Baines et al., ''Economic Impact on Small Lenders of the Payday Lending Rules Under Consideration by the CFPB,'' Charles River Associates, (2015), *available at http://www.crai.com/publication/economic-impact-small-lenders-payday-lending-rules-under-consideration-cfpb;* Letter from Greg Gonzales, Comm'r, Tennessee Dep't of Fin. Insts., to Hon. Bill Haslam, Governor and Hon. Members of the 109th General Assembly, at 8 (Apr. 12, 2016) (Report on the Title Pledge Industry), *available at http://www.tennessee.gov/assets/entities/tdfi/attachments/Title_Pledge_Report_2016_Final_Draft_Apr_6_2016.pdf.*

[1182] nonPrime 101, ''Report 7–C, A Balanced View of Storefront Payday Borrowing Patterns: Results from a Longitudinal Random Sample over 4.5 Years,'' at tbl. A–7 (2016), *available at https://www.nonprime101.com/data-findings/.*

[1183] The evidence described in this section is also discussed in Market Concerns—Underwriting.

[1184] Kathryn Fritzdixon et al., ''Dude, Where's My Car Title?: The Law Behavior and Economics of Title Lending Markets,'' 2014 U. IL L. Rev. 1013 (2014); Marianne Bertrand and Adair Morse, ''Information Disclosure, Cognitive Biases and Payday Borrowing,'' 66 Journal of Fin. 1865 (2011).

[1185] Tarrance Group et al., ''Borrower and Voter Views of Payday Loans,'' Cmty. Fin. Servs. Ass'n of America (2016), *available at http://www.tarrance.com/docs/CFSA-BorrowerandVoterSurvey-AnalysisF03.03.16.pdf*; Harris Interactive, ''Payday Loans and the Borrower Experience,'' Cmty. Fin. Servs. Ass'n of America (2013), *available at http://cfsaa.com/Portals/0/Harris_Interactive/CFSA_HarrisPoll_SurveyResults.pdf.*

[1186] Ronald Mann, ''Assessing the Optimism of Payday Loan Borrowers,'' 21 Supreme Court Econ. Rev. 105 (2013), and correspondence between Prof. Mann and Bureau staff described in Market Concerns—Underwriting.

[1187] Note that in performing these calculations, the paper ignores the 20 percent of respondents who did not respond to the questions (potentially because they were unable to offer a prediction of their time in debt). In terms of the share of all surveyed borrowers successfully predicting within a given window, these percentages in the paper translate to 41 percent within seven days, 46 percent within 14 days, and 51 percent within 21 days.

[1188] Note that the paper does not offer the mean error, stating only that it is ''close to zero.'' It does divulge that the median error is three days, which is 10 percent of the predicted loan duration and over 20 percent of the initial loan term. This implies that even ''average'' borrowers may not be as precise in their predictions as the author implies.

[1189] The Bureau notes this second point, but further notes that consumers who underestimate their ability to repay do not achieve additional benefit from the payday loan borrowing experience, though they do achieve better-than-expected outcomes. Consumers who overestimate their ability to repay may suffer considerably over a long period of subsequent indebtedness. This asymmetry is what is addressed by the proposed rule, not the asymmetry in expected durations.

[1190] As stated above in part VII.D, it should be noted that Professor Mann did not provide his data to the Bureau, either prior to the proposal, nor in his comment in response to the proposal. In place of these data, the Bureau is relying on the charts and graphs he provided in his correspondence with and presentation to the Bureau. As such the analysis provided here may be somewhat imprecise.

[1191] Many of these findings were derived by analyzing the scatterplots depicting borrowers' re-borrowing expectations and outcomes, provided in Attachment to Email from Ronald Mann, Professor, Columbia Law School, to Jialan Wang & Jesse Leary, Bureau of Consumer Fin. Prot. (Sept. 24, 2013, 1:32 EDT). The Bureau measured the distances of each discernable point on the plot to assess its

include, inter alia: Among borrowers taking 150+ days to clear a sequence, none (0 percent) predicted they would be in debt for even 100, and the average borrower spent 121 unanticipated days in debt (equivalent to more than 8.5 rollovers); among borrowers taking 90 or more days to clear their loans at least 95 percent believed they would be in debt for shorter durations than they actually experienced, with the average borrower spending 92 unanticipated days in debt (equivalent to more than 6.5 rollovers); and among those borrowers taking 42 or more days to clear their loans (equivalent to the three loan sequence permitted under the rule) more than 90 percent underestimated their time in debt, with the average borrower experiencing 48 unanticipated days in debt (equivalent to more than three rollovers).[1192]

Additionally, a graph depicting the relationship between predicted and actual days in debt shows a regression line with no discernable slope. The Bureau believes this to be the clearest statistical evidence that there is no significant relationship between predicted and actual days in debt. If borrowers could have predicted precisely what would happen to them, the slope of the line would be equal to one. If borrowers' predictions were generally (and positively) correlated with their actual outcomes, the slope of the line would be positive and non-trivial. If borrowers' predictions were completely uncorrelated with their outcomes, the slope of the line would be zero. In the correspondence provided by the author, the slope of the line appears to be almost completely flat, and statistically indistinguishable from zero.[1193] In other words: Borrowers predictions had no discernable correlation with their outcomes, regardless of whether they experienced long periods of indebtedness.

This finding of no discernable correlation between predictions and outcomes may seem inconsistent with the finding that many borrowers did accurately predict their durations within a 14-day window. Since so many borrowers expect short durations, and many borrowers experience these durations, it appears that they accurately predict their outcomes when, in fact, they are just as likely to have experienced longer durations. For example, in the Bureau's data on payday loans, if all consumers predicted they would have no renewals, their actual sequence length would be within 14 days of the prediction 44 percent of the time. This is very similar to the 46 percent of borrowers in Mann's data that are accurate in their predictions to within a 14-day window (once those borrowers not reporting a prediction are included).

Lastly, the paper itself presents direct evidence that a substantial minority of borrowers are unable to even offer a prediction of their outcomes. For example, approximately 20 percent of borrowers were unable to answer the question ''. . . How long do you think it will be before you have saved enough money to go an entire pay period without borrowing from this lender? If you aren't sure, please give your best estimate.''[1194] In response to other questions in the survey, amongst borrowers who indicated they expected to roll the loan over, more than one-third did not (or could not) offer a prediction of how long they would continue borrowing.[1195] Accounting for these non-responses means that the 57 percent of borrowers who Mann asserts predict their durations within a 14-day window actually represent less than half (46 percent) of all surveyed borrowers. Put another way, the paper's findings are potentially instructive only for those borrowers who have enough confidence to make a prediction, and say little about the substantial fraction of borrowers who implicitly suggest or explicitly state they cannot predict their expected duration of indebtedness.

In summary, the Bureau believes there are multiple implications of Mann's findings. Specifically, it may be true that many borrowers accurately anticipate their debt durations, as Mann asserts in both his paper and comment. However, it is certainly true that most of those borrowers with long duration sequences did not accurately anticipate this outcome. Additionally, a large share of borrowers who anticipated no re-borrowing remain in debt for multiple loans, and many are unable to even offer a guess as to the duration of their indebtedness, let alone a precise prediction. Finally, there appears to be no discernable relationship between borrowers' individual expectations, and their ultimate outcomes.

Given the tenor of the comments received by the Bureau, the Bureau feels compelled to note that this rule does not ban payday or vehicle title lending. In fact, the Bureau expects the vast majority of borrowers to be permitted three-loan sequences under the principal step-down approach. It warrants mentioning that Mann (2013) shows that borrowers expect to be in debt an average of 36 days, and that more than 80 percent of borrowers expect clearance in 50 days or less, both of which fall within the approximate amount of time of indebtedness permitted under each sequence of loans under the rule.[1196] As such, the evidence from Mann (2013) implies that the rule would not place a binding limit on the anticipated re-borrowing for the vast majority of his sample.

As mentioned, the Bureau received many comments suggesting that the cumulative available evidence shows borrowers anticipate their payday borrowing experiences. The Bureau believes the more thorough treatment of this literature offered here provides much in the way of support for the premise that those payday loan borrowers who experience long durations of debt failed to anticipate that this would occur. As such, the Bureau continues to believe the evidence strongly suggests there is a significant minority of borrowers who experience long durations of indebtedness that did not anticipate these outcomes, let alone the costly impacts thereof.

It is less clear how large the benefits from the limitations on repeat borrowing will be for borrowers who take out online payday loans. As described above, available information does not allow for reliably tracking sequences of online payday loans, as borrowers appear to change lenders much more often online and there is no comprehensive source of data on all

coordinates. Because of the presence of line of best fit on the figure, some points near 28 days of expected indebtedness are obscured. This should not substantially impact the findings presented here, and would only serve to bias the results away from finding that borrowers with long sequences underestimate their durations of indebtedness. As previously noted, borrowers with exceptionally long sequences (including those displayed in subsequent slides of the author's presentation) appear to be missing from this scatterplot.

[1192] Attachment to Email from Ronald Mann, Professor, Columbia Law School, to Jialan Wang & Jesse Leary, Bureau of Consumer Fin. Prot. (Sept. 24, 2013, 1:32 EDT).

[1193] The Bureau estimates the actual slope of the line to be approximately 0.011, based on the Stata-generated graph provided to the Bureau by the author. *See* Attachment to Email from Ronald Mann, Professor, Columbia Law School, to Jialan Wang & Jesse Leary, Bureau of Consumer Fin. Prot. (Sept. 24, 2013, 1:32 EDT). And, again, the relationship is statistically insignificant.

[1194] Ronald Mann ''Assessing the Optimism of Payday Loan Borrowers,'' 21 Supreme Court Econ. Rev. 105, 121 (2013).

[1195] Ronald Mann ''Assessing the Optimism of Payday Loan Borrowers,'' 21 Supreme Court Econ. Rev. 105, 121 (2013).

[1196] *See* Ronald Mann, ''Assessing the Optimism of Payday Loan Borrowers,'' 21 Supreme Court Econ. Rev. 105, at at tbl. 3ii (2013). Note that a sequence of three biweekly loans covers approximately 42 days, which appears to be assigned to the same category as 50 days in the paper's histogram.

online lenders. If very long sequences of loans are less common for online loans, the costs of those sequences will be less and the benefits to consumers of preventing long sequences will be smaller.

ii. Reduced Defaults and Delinquencies

The Bureau estimates that borrowers taking out covered short-term and longer-term balloon-payment loans will experience substantially fewer defaults under the rule. As discussed in Market Concerns—Underwriting, the Bureau believes the consequences of defaults are harmful to consumers, and therefore reducing defaults provides a benefit to consumers. Consumers who default can become subject to harmful debt collection efforts. While delinquent, they may also seek to avoid default in ways that lead to a loss of control over budgeting for their other needs and expenses. In addition, 20 percent of single-payment vehicle title loan sequences end with borrowers losing their cars or trucks to repossession. Even borrowers who have not yet defaulted may incur penalty fees, late fees, or overdraft fees along the way and may find themselves struggling to pay other bills or meet their basic living expenses.

There are at least three reasons generally to expect fewer defaults under the rule. First, borrowers who take out loans from lenders that use the ATR approach will go through a meaningful evaluation of their ability to make the payment or payments on the loan. The borrowers whom lenders determine have sufficient residual income or a low enough DTI ratio to cover each loan payment, make payments for major financial obligations, and meet basic living expenses over the term of the loan, and 30 days thereafter, will likely be better able to pay off their loans relative to the population of borrowers who currently take out these loans.

Second, the reducing balances on loans made pursuant to the principal step-down approach should limit payment shocks to consumers. This step-down approach should lower the risk to lenders and borrowers of borrowers defaulting when a lender is unable to continue to lend to them (though some borrowers who would have re-borrowed the full amount of the initial loan may now default, if they are unable to successfully make the step-down payment).

Third, lenders' ability to make long sequences of loans to borrowers will be greatly curtailed, whether lenders use the ATR or principal step-down approach. Currently, borrowers who have difficulty repaying a loan in full usually have the option of paying just the finance charge and rolling the loan over, or repaying the loan and then quickly re-borrowing. The option to re-borrow may make borrowers willing to make a finance charge payment on a loan they know they cannot afford while still meeting their other obligations or expenditure needs. The option for continued re-borrowing allows borrowers to put off defaulting in the hopes they may ultimately be able to successfully repay the loan. If continued re-borrowing does not allow them to ultimately repay the loan, the lender will still have received multiple finance charges before the borrower defaults. To this point, Bureau research shows that nearly half of the consumers who experienced a default or a 30-day delinquency had fees over $60 in the month before their first default or 30-day delinquency.[1197]

Borrowers who are more likely to default are also more likely to have late payments; thus, reducing the rate of defaults will likely reduce the rate of late payments and the harm associated with those late payments. Late payments on payday loans, defined as a payment that is sufficiently late that the lender deposits the borrower's check or attempts to collect using the ACH authorization, appear to range from seven [1198] to over 10 percent.[1199] At the borrower level, two different sources show that 39 to 50 percent of borrowers have a check deposited that bounces in their first year of payday borrowing.[1200] These late payments are costly for borrowers. If a lender deposits a check or submits a payment request and it is returned for insufficient funds, the borrower's bank or credit union will likely charge the borrower an NSF fee of approximately $35, and the lender may charge a returned-item fee. In addition, analysis the Bureau has conducted of payment requests from online lenders shows that a substantial number of payments that are made are overdrafts.[1201] Fees for overdrafts are generally equal to NSF fees at the same institution. Consumers will also benefit from mitigation of the harm from NSF and overdraft transactions by the limitations on payment practices and related notices described in the section-by-section analysis of §§ 1041.8 and 1041.9, and discussed later in this section.

Default rates on individual payday loans are fairly low, 2 percent in the data the Bureau has analyzed.[1202] But, as noted above, a substantial majority of borrowers takes out more than one loan in sequence before repaying the debt or defaulting. A more meaningful measure of default is therefore the share of loan sequences that end in default. The Bureau's data show that, using a 30-day sequence definition, 20 percent of loan sequences end in default. Other researchers have found similar high levels of default at the borrower level. A study of payday borrowers in Texas found that 4.7 percent of loans were charged off but 30 percent of borrowers had a loan charged off in their first year of borrowing.[1203]

Less information is available on the delinquency and default rates for online payday loans. The available information is discussed in part II above, where the Bureau notes that one lender reports online single-payment loans have a charge-off rate substantially higher than that for storefront payday loans. In a 2014 analysis of its consumer account data, a major depository institution found that small-dollar lenders, which include lenders making a range of products including payday loans, had an overall return rate of 25 percent for ACH payments. The Bureau's report on online payday loan payments practices presents rates of failed payments for online lenders exclusively.[1204] It shows a lower rate of payment failure; six

[1197] Calculations using the Bureau's payday loan dataset described above.

[1198] "For the years ended December 31, 2011 and 2010, we deposited customer checks or presented an Automated Clearing House ("ACH") authorization for approximately 6.7 percent and 6.5 percent, respectively, of all the customer checks and ACHs we received and we were unable to collect approximately 63 percent and 64 percent, respectively, of these deposited customer checks or presented ACHs. Total charge-offs, net of recoveries, for the years ended December 31, 2011 and 2010 were approximately $106.8 million and $108 million, respectively." Advance America, 2011 Annual Report (Form 10–K).

[1199] Paige Marta Skiba and Jeremy Tobacman, "Payday Loans, Uncertainty, and Discounting: Explaining Patterns of Borrowing, Repayment, and Default," (Vand. L. and Econ., Research Paper No. 08–33, 2008).

[1200] Paige Marta Skiba and Jeremy Tobacman, "Payday Loans, Uncertainty, and Discounting: Explaining Patterns of Borrowing, Repayment, and Default," (Vand. L. and Econ., Research Paper No. 08–33, 2008); Susanna Montezemollo and Sarah Wolff, "Payday Mayday: Visible and Invisible Payday Lending Defaults," at 5 (Ctr for Responsible Lending 2015).

[1201] The Bureau's analysis shows that 6 percent of payment requests that were not preceded by a payment request that was returned for insufficient funds are returned for insufficient funds and 6 percent are paid as overdrafts. CFPB Online Payday Loan Payments.

[1202] Default here is defined as a loan not being repaid as of the end of the period covered by the data or 30 days after the maturity date of the loan, whichever was later.

[1203] Paige Marta Skiba and Jeremy Tobacman, "Payday Loans, Uncertainty, and Discounting: Explaining Patterns of Borrowing, Repayment, and Default," at tbl. 2 (Vand. L. and Econ., Research Paper No. 08–33, 2008).

[1204] CFPB Online Payday Loan Payments.

percent of payment attempts that were not preceded by a failed payment attempt themselves failed.[1205] Default rates are more difficult to determine, but 42 percent of checking accounts with failed online loan payments are subsequently closed.[1206] This provides a rough measure of default on these loans.

Default rates on single-payment vehicle title loans are higher than those on payday loans. In the data analyzed by the Bureau, the default rate on all loans is nine percent, and the sequence-level default rate is 31 percent.[1207] In the data the Bureau has analyzed, five percent of all single-payment vehicle title loans lead to repossession, and 18 percent of sequences of loans end with repossession. So, at the loan level and at the sequence level, slightly more than half of all defaults lead to repossession of the borrower's vehicle.

The range of potential impacts on a borrower of losing a vehicle to repossession depends on the transportation needs of the borrower's household and the available transportation alternatives. According to two surveys of vehicle title loan borrowers, 15 percent of all borrowers report that they would have no way to get to work or school if they lost their vehicle to repossession.[1208] Fully 35 percent of borrowers pledge the title to the only working vehicle in the household.[1209] Even those with a second vehicle or the ability to get rides from friends or take public transportation would presumably experience significant inconvenience or even hardship from the loss of a vehicle.

iii. Avoiding Harms From Making Unaffordable Payments

Consumers will also benefit from a reduction in the other financial hardships that may arise because borrowers, having taken out a loan with unaffordable payments, feel compelled to take painful measures to avoid defaulting on the covered short-term and longer-term balloon-payment loans. If a lender has taken a security interest in the borrower's vehicle, the borrower may decide not to pay other bills or forgo crucial expenditures because of the leverage that the threat of repossession gives to the lender. The repayment mechanisms for some covered short-term loans and longer-term loans with balloon payments can also cause borrowers to lose control over their own finances. If a lender has the ability to withdraw payment directly from a borrower's checking account, especially when the lender is able to time the withdrawal to the borrower's payday, the borrower may lose control over the order in which payments are made and may be unable to choose to make essential expenditures before repaying the loan.

iv. Changes to Loan Structure

Consumers may benefit if lenders respond to the rule by modifying the terms of individual loans or if lenders adjust the range of products they offer. Borrowers offered smaller loans may benefit if this enables them to repay the loan, when they would otherwise be unable to repay. This will mitigate a borrower's exposure to the costs associated with re-borrowing, default, or the costs of being unable to pay for other financial obligations or living expenses. If lenders shift from payday loans or single-payment vehicle title loans to longer-term loans, consumers may benefit from lower payments that make it more feasible for the borrowers to repay. Given the high rate of unanticipated re-borrowing of short-term loans, the financing costs of longer-term loans, provided they disclose their terms clearly and do not utilize balloon or leveraged payments, may be easier for borrowers to predict, and therefore borrowers may be less likely to end up in a loan that is substantially more expensive than they anticipated.

b. Costs to Consumers and Access to Credit

The procedural requirements of the rule will make the process of obtaining a loan more time consuming and complex for some borrowers. The restrictions on lending included in the rule will reduce the availability of storefront payday loans, online payday loans, single-payment vehicle title loans, longer-term balloon-payment loans, and other loans covered by the rule. Borrowers may experience reduced access to new loans (*i.e.,* loans that are not part of an existing loan sequence). Some borrowers will also be prevented from rolling loans over or re-borrowing shortly after repaying a prior loan. And, some borrowers may still be able to borrow, but for smaller amounts or with different loan structures, and find this less preferable than the terms they would have received absent the rule.

The Bureau received many comments suggesting that the consideration of costs to consumers was incomplete. Notably, comments suggested that the speed of obtaining funds would be reduced, leading to consumer harm; that the welfare implications of reducing the access to covered loans needed to be more adequately considered; that the Bureau should more explicitly consider the costs of moving to ''inferior'' alternatives due to the reduction in covered loans; and that the Bureau declined to provide monetary estimates of harm. The Bureau attempts to address each of these (as well as additional comments) in the subsections below.

However, one general response is that the estimated restriction on consumer access to credit is not as severe as implied by these comments. The rule does not impose a ban on payday lending, and the Bureau expects the vast majority of consumers will experience minimal, if any, reduction in access to credit. The Bureau's simulations (discussed above) show that the restrictions on re-borrowing and underwriting imply that only 5.9 to 6.2 percent of borrowers will be prohibited from initiating a sequence of loans they would have initiated absent the rule.[1210] That is, since most consumers take out six or fewer loans each year, and are not engaged in long sequences of borrowing, most will not find their preferred borrowing patterns interrupted by the rule's requirements and prohibitions. As will be discussed below, if borrowers derive greater benefits from their initial loans compared to subsequent loans, the impacts of these restrictions will have

[1205] CFPB Online Payday Loan Payments, at 13 tbl. 1. This analysis includes both online and storefront lenders. Storefront lenders normally collect payment in cash and only deposit checks or submit ACH requests for payment when a borrower has failed to pay in person. These check presentments and ACH payment requests, where the borrower has already failed to make the agreed-upon payment, have a higher rate of insufficient funds.

[1206] CFPB Online Payday Loan Payments, at 24 tbl. 5.

[1207] There is also evidence that the default rates on longer-term balloon-payment title loans are high. The Bureau has data for a single lender that made longer-term vehicle title loans with both balloon and amortizing payment schedules. Those loans with balloon payments defaulted at a substantially higher rate. *See* CFPB Report on Supplemental Findings, at 30.

[1208] Kathryn Fritzdixon et al., ''Dude, Where's My Car Title?: The Law Behavior and Economics of Title Lending Markets,'' 2014 U. IL L. Rev. 1013 (2014); Pew Charitable Trusts, ''Auto Title Loans, Market Practices and Borrower Experiences,'' at 1038 (2015), *available at http://www.pewtrusts.org/~/media/assets/2015/03/autotitleloansreport.pdf.*

[1209] Kathryn Fritzdixon et al., ''Dude, Where's My Car Title?: The Law Behavior and Economics of Title Lending Markets,'' 2014 U. IL L. Rev. 1013 (2014); Pew Charitable Trusts, ''Auto Title Loans, Market Practices and Borrower Experiences,'' at 1038 (2015), *available at http://www.pewtrusts.org/~/media/assets/2015/03/autotitleloansreport.pdf.*

[1210] As previously mentioned, the Bureau does not attempt to predict the impact of any voluntary underwriting activities that would be undertaken by lenders providing loans under the principal step-down approach (*e.g.,* to screen out likely defaulters who would have been profitable under a regime with unlimited rollovers). Any reduction in lending that might result from such a strategic response to this rule would further reduce the provision of credit compared to the estimates provided here.

limited (and potentially positive) impacts on consumer welfare.

i. Impacts of Procedural Requirements

The procedural requirements for lenders will make the process of obtaining a loan more time consuming for some borrowers. This will depend on whether lenders use the ATR approach or the principal step-down approach, and the extent to which lenders automate their lending processes. In particular, borrowers taking out payday loans originated under the principal step-down approach from lenders that automate the process of checking their records and obtaining a report from a registered information system will see little, if any, increase in the time to obtain a loan. Notably, this should not substantially reduce the speed at which customers can take out a first loan (or a first loan after 30 or more days without a covered short-term loan or longer-term loan with a balloon payment). As such, those consumers who experience discrete, unanticipated, and infrequent shocks are unlikely to be negatively impacted by the rule's procedural requirements.[1211]

Borrowers taking out loans from lenders using the ATR approach are more likely to experience additional complexity. Online payday borrowers and vehicle title borrowers are required to provide documentation of the amount of their income, which currently is often not required. Both storefront and online borrowers will be asked to fill out a form listing the amount of their income and payments on major financial obligations. Even when additional documentation is not required and a customer statement of income or expenses is sufficient, the process by which a lender may obtain these values is likely to take additional time, and lead to additional scrutiny, than was the case prior to the rule. As such, customers seeking loans under the ATR approach will likely experience reductions in the speed they receive funds and/or access to credit.

While the Bureau expects many lenders to automate much of the ATR determination, there may still be lenders that rely, partially or completely, on manual underwriting processes.[1212] Estimates of the time required to manually process an application for a loan made via the ATR approach vary substantially. In the proposal, the Bureau assumed manual calculations of ATR would take less than 20 minutes. A large lender noted in its comment that manually processing applications in the U.K. takes one to four hours, and a trade group representing mostly large depository institutions suggested that three hours was a viable estimate. Comments received from a trade group representing covered title lenders and based on information provided by Small Entity Representatives shows that the increased time to process a manual ATR determination is 15–45 minutes. The last of these seems to be based on the most applicable information (*e.g.,* covered lenders in the U.S.), and thus informs the Bureau's estimates. Thus, if a lender orders consumer reports manually and performs the calculations by hand necessary to determine that the borrower has the ability to repay the loan, the Bureau estimates this could add 15–45 minutes to the borrowing process. And if a borrower is unaware that it is necessary to provide certain documentation required by the lender, this may require a second trip to the lender, increasing the costs borne by the borrower. Finally, borrowers taking out loans online may need to upload verification evidence, such as by taking a photograph of a pay stub, or facilitate lender access to other information sources.

ii. Reduced Access to Initial Loans

Initial covered short-term loans—*i.e.,* those taken out by borrowers who have not recently had a covered short-term loan—are presumably taken out because of a need for credit that is not the result of prior borrowing of covered short-term loans. Borrowers may be unable to take out new loans (those originated more than 30 days after their last loan) for at least two reasons: they may only have access to loans made under the ATR approach and be unable to demonstrate an ability to repay the loan under the rule, or they may be unable to satisfy any underwriting requirements adopted by lenders.

Payday borrowers are not likely to be required to satisfy the ATR requirement unless and until they have exhausted the limits on loans available to them under the principal step-down approach, or unless the borrower is seeking a loan in excess of $500. However, to obtain loans under the principal step-down approach, borrowers may be required to satisfy more exacting underwriting requirements than are applied today. Moreover, after exhausting the limits on principal step-down approach loans, borrowers are required to satisfy the ATR requirement in order to obtain a new loan.

The direct effects of the principal step-down approach on borrowers' ability to take out loans will be quite limited, provided the borrowers did not have an active loan within the past 30 days. The Bureau estimates that only about five percent of initial payday loans (those that are not part of an existing sequence) will be prevented by the annual limits, and roughly six percent of borrowers will be prohibited from initiating a new sequence of loans they would have started absent the rule. That is, only about five percent of the loans that are most likely to reflect a new need for credit will be affected by these annual limits on borrowing. These affected borrowers will then have to satisfy the ATR test in order to obtain a new loan.

Vehicle title borrowers are more likely to find that they are unable to obtain an initial loan because the principal step-down approach does not provide for vehicle title loans and thus these borrowers must satisfy the ATR requirement. Many of these consumers could choose to pursue a payday loan instead and seek to avail themselves of the principal step-down approach. However, there are two States that permit vehicle title loans but not payday loans, and 15 percent of vehicle title borrowers do not have a checking account, and thus may not be eligible for a payday loan under the lender's own rules (as borrowers without a checking account are allowed to obtain a loan under this rule).[1213] In addition, many States limit the size of payday loans but not the size of vehicle title loans, so some borrowers may prefer a vehicle title loan. For all of these borrowers, their ability to obtain an initial loan will depend upon their ability to demonstrate an ability to repay and satisfy any other underwriting requirements the lender may impose.

Consumers who are unable to obtain a new loan because they cannot satisfy

[1211] Some commenters suggested that the procedural requirements would reduce both speed and access to short-term credit, leading to consumer harm for those consumers who experience unanticipated shocks to their finances (*e.g.,* car repair or hospital bill). As the principal step-down approach is likely to be the primary means through which customers get infrequent loans to deal with shocks of this nature, the procedural requirements are unlikely to bind on customers dealing with these events.

[1212] It is likely that those stores able to determine ATR more rapidly and at a lower cost (*e.g.,* via an automated process) will have a competitive advantage. Given the reduction in stores anticipated in this section, in steady-state the Bureau has concluded that relatively few lenders will employ a manual process, and those that do will be the ones who are able to streamline their assessments.

[1213] The 2015 FDIC National Survey of Unbanked and Underbanked Households finds that 12.4 percent of consumers reporting having used an auto title loan in the prior 12 months are unbanked.

the ATR requirement and have exhausted or cannot qualify for a loan under the principal step-down approach will bear some costs from reduced access to credit. They may be forced to forgo certain purchases,[1214] incur high costs from delayed payment of existing obligations, incur high costs and other negative impacts by simply defaulting on bills, or they may choose to borrow from sources that are more expensive or otherwise less desirable. Some borrowers may overdraft their checking account; depending on the amount borrowed, an overdraft on a checking account may be more expensive than taking out a payday or single-payment vehicle title loan. Similarly, ''borrowing'' by paying a bill late may lead to late fees or other negative consequences like the loss of utility service. Other consumers may turn to friends or family when they would rather borrow from a lender. Still others may seek other types of credit, like longer-term loans not covered by the origination portions of this rule, credit cards, or other alternatives. And, some consumers may take out online loans from lenders that do not comply with this regulation.[1215]

Survey evidence provides some information about what borrowers are likely to do if they do not have access to these loans. Using the data from the CPS Unbanked/Underbanked supplement, researchers found that the share of households using pawn loans increased in States that banned payday loans, to a level that suggested a large share of households that would otherwise have taken out payday loans took out pawn loans, instead.[1216] A 2012 survey of payday loan borrowers found that a majority indicated that if payday loans were unavailable they would reduce expenses, delay bill payment, borrow from family or friends, and pawn personal items. Some did indicate, however, that they would get a bank or credit union loan or use a credit card to cover expenses.[1217] Finally, data collected by the Bureau from banks that ceased offering deposit advance products (''DAP loans''), showed that there was no evidence that reduced access to these products led to greater rates of overdraft or account closure.[1218]

In many comments received by the Bureau it was suggested that more consideration be given to the alternatives that displaced borrowers may turn to absent available payday or title loans. Overdraft fees, ''illegal loan sharks,'' and pawn loans were specifically mentioned as inferior forms of credit that borrowers denied a payday or title loan may utilize. The Bureau agrees that these are indeed valid potential costs, and considered them in the proposal. The Bureau notes that its summary and analysis of the related literature and empirical evidence suggests that intensive payday borrowers experienced increase welfare from reduced use of these loans. This outcome reflects the net effects of any substitution patterns or reductions in borrowing.

iii. Limits on Loan Size

Lenders making loans using the principal step-down approach could not make loans larger than $500. This will limit the availability of credit to borrowers who would otherwise seek a larger loan, and either do not have access to loans under the ATR approach or cannot demonstrate their ability to repay the larger loan. In the data analyzed by the Bureau, however, the median payday loan is only $350, and some States impose a $500 maximum loan size, so most existing payday loans would fall at or below the $500 maximum.[1219] Any borrowers that would have preferred a vehicle title loan but instead obtain a payday loan originated under the principal step-down approach because of the rule may be more affected by the loan size limit, as the median single-payment vehicle title loans is for nearly $700.[1220]

There are additional restrictions on loan sizes made via the principal step-down approach that apply to the second and third loans in a sequence. That is, each subsequent loan in a sequence made using the principal step-down approach must decrease by at least one-third the amount of the original loan. For example, a $450 initial loan would mean borrowers are restricted to no more than $300 for a second loan, and no more than $150 for a third loan.

In the Bureau's preferred simulation, described in part VII.F.1.c, around 40 percent of the reduction in loan revenues were the result of $500 cap on initial loans and the principal step-down, with the remaining reduction attributable to re-borrowing restrictions. Put another way, the reduction in revenues (which correspond to total amounts borrowed) predicted by the Bureau's simulations are partially, though not primarily, attributed to changes in maximum loans amounts.[1221]

iv. Limits on Re-Borrowing

For storefront payday borrowers, most of the reduction in the availability of credit will likely be due to borrowers who have recently taken out loans being unable to roll their loans over or borrow again within a short period of time. As discussed above, the Bureau believes that most storefront payday lenders will employ the principal step-down approach to making loans. If lenders only make loans under the principal step-down approach, each successive loan in a sequence will have to reduce the amount borrowed by one-third of the original principal amount, with a maximum of three loans per sequence, and borrowers will only be able to take out six covered short-term loans in a 12-month period or be in debt on such loans for at most 90 days over the course of any 12-month period.[1222] This restriction could limit borrowers paid monthly to as few as three loans per year, depending on when they take out their loans relative to when they are

[1214] Specifically, consumers may react to reduced access to short-term loans by decreasing their short-run consumption. However, to the extent they avoid long sequences of loans, and the fees associated with them, their longer-term consumption may increase. One study of consumption responses to payday loan access shows that overall consumption increases as payday loan use declines. *See* Brian Baugh, ''What Happens When Payday Borrowers Are Cut Off from Payday Lending? A Natural Experiment,'' Fisher College of Bus., Ohio State U. 2015).

[1215] It has been suggested that some borrowers might turn to in-person illegal lenders, or ''loan sharks.'' The Bureau is unaware of any data on the current prevalence of illegal lending in the United States by individuals. Nor is the Bureau aware of any data suggesting that such illegal lending is more prevalent in States in which payday lending is not permitted than in States which permit payday lending or of any evidence that the amount of such lending has increased in States which adopted a prohibition on payday lending.

[1216] Neil Bhutta et al., ''Consumer Borrowing after Payday Loan Bans.'' 59 J. of L. and Econ. 225 (2016).

[1217] Pew Charitable Trusts, ''Payday Lending in America: Who Borrows, Where They Borrow, and Why,'' at 16 (Report 1, 2012), *available at http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf* (reporting $375 as the average).

[1218] CFPB Report on Supplemental Findings, at 35–39. The Bureau notes, however, that if demand for short-term liquidity is inelastic and outside options are limited, a decrease in access to one option will necessarily increase the demand for its substitutes.

[1219] CFPB Payday Loans and Deposit Advance Products White Paper, at 15.

[1220] CFPB Vehicle Title Report, at 7 tbl. 1.

[1221] Note that the Bureau's simulations do not consider the possible strategic responses to the amortization features of loans made via the principal step-down approach. For example, some lenders may encourage borrowers to take out larger initial loans to ensure increased access to credit on the second and third loans in a sequence. To the extent this increases initial loan sizes, the Bureau's estimates may overstate the expected decreases in lender revenues and borrowers' access to credit.

[1222] Prior loans made using the ATR approach would count towards the maximum number of loans and maximum time-in-debt limits of the principal step-down approach.

paid. If lenders make both ATR and principal step-down approach loans, borrowers who can demonstrate an ability to repay a loan will be able to take out ATR approach loans after they have reached the cap on loans issued via the principal step-down approach.

As described above, consumers will benefit from not having long sequences of loans and the associated higher than anticipated borrowing costs. Some borrowers, however, may experience costs from not being able to continue to re-borrow. For example, consider a borrower who has a loan due and is unable to repay one-third of the original principal amount (plus finance charges and fees), but who anticipates an upcoming influx of income. This borrower may experience additional costs if unable to re-borrow the full amount due because of the restrictions imposed by the rule. These costs could include the costs of being delinquent on the loan and having a check deposited or ACH payment request submitted, either of which may lead to an NSF fee. Borrowers in this situation may reasonably expect to eventually repay the loan, given the upcoming influx, but may simply default if they are not permitted to re-borrow.

The Bureau does not believe, however, that the restrictions on lending will necessarily lead to increases in borrowers defaulting on payday loans, in part because the step-down provisions of the principal step-down approach are designed to help consumers reduce their debt over subsequent loans. This step-down approach should reduce the risk of payment shock and lower the risk to lenders and borrowers of borrowers defaulting when a lender is unable to continue to lend to them (though some borrowers who would have re-borrowed the full amount of the initial loan may now default, if they are unable to successfully make the step-down payment). Additionally, the Bureau's simulations indicate that the majority of reduced access to credit will result from the re-borrowing restrictions, rather than initial loan size cap and forced step-down features of loans made via the principal step-down approach. It is also possible that some borrowers or lenders will strategically respond to the step-down provisions by taking out larger initial loans to ensure that subsequent loans in a sequence are sufficient to cover anticipated expenses. Finally, borrowers anticipating an influx of more than three pay periods in the future may find it more appropriate to pursue a longer-term loan (where permitted), meaning they should be less prevalent in the market for short-term loans.

Borrowers taking out single-payment vehicle title loans will also be much less likely to be able to roll their loans over or borrow again within a short period than they are today. They will potentially suffer the same costs as by payday borrowers taking out loans under the ATR approach who would prefer to roll over or re-borrow rather than repay their loan without re-borrowing.

v. Reduced Geographic Availability of Covered Short-Term Loans

Consumers will also have somewhat reduced physical access to payday storefront locations. Bureau research on States that have enacted laws or regulations that substantially impacted the revenue from storefront lending indicates that the number of stores has declined roughly in proportion to the decline in revenue.[1223] Because of the way payday stores locate, however, this has had much less impact on the geographic availability of payday loans. Nationwide, the median distance between a payday store and the next closest payday store is only 0.3 miles. When a payday store closes in response to laws that reduce revenue, there is usually a store nearby that remains open. For example, across several States with regulatory changes, between 93 and 95 percent of payday borrowers had to travel less than five additional miles to find a store that remained open. This is roughly equivalent to the median travel distance for payday borrowers nationwide. Using the loan volume impacts previously calculated above for storefront lenders exclusively using the principal step-down approach (which were about 71–76 percent without accounting for additional ATR lending or for changes in product terms or mixes[1224]) the Bureau forecasts that a large number of storefronts will close under the rule, but that consumers' geographic access to stores will not be substantially affected in most areas.

c. Evidence on the Benefits and Costs to Consumers of Access to Payday and Other Covered Loans

Most studies of the effects of payday loans on consumer welfare have relied on State-level variation in laws governing payday lending.[1225] Most of these studies rely on an ''intent to treat'' identification strategy, where access to payday loans is used as a proxy for actual use. While certainly instructive, the Bureau believes findings from such studies are generally less compelling than those based on individual-level data that are able to identify actual payday borrowers and use. A third class of studies addressing questions around payday focuses on experiments, either in the field or in laboratory settings. Within this literature, most studies have examined storefront payday loans; the literature studying online loans and vehicle title lending is much smaller; and there is even less direct evidence on longer-term balloon-payment loans.

The Bureau notes that all of the studies vary in their empirical rigor and the connection of their causal inference to their documented findings. As such, the Bureau, based on its experience and expertise, finds some studies to be more compelling than others. The Bureau discussed many of these studies in the proposal; additional studies are discussed here in light of comments received on the proposal.

As noted above, the rule does not ban payday or other covered short-term loans or longer-term balloon-payment loans. In fact, the Bureau believes that covered short-terms loans will still be

[1223] CFPB Report on Supplemental Findings, at Chapter 3. This is consistent with theoretical research showing that State price caps should lead to fewer stores and more borrowers per store. *See* Mark Flannery & Katherine Samolyk, ''Payday Lending: Do the Costs Justify the Price?,'' (FDIC Ctr. for Fin. Res., Working Paper No. 2005–09, 2005), *available at https://www.fdic.gov/bank/analytical/cfr/2005/wp2005/cfrwp_2005–09_flannery_samolyk.pdf*; Mark Flannery & Katherine Samolyk, ''Scale Economies at Payday Loan Stores,'' at 233–259 (Proceedings of the Federal Reserve Bank of Chicago's 43rd Annual Conference on Bank Structure and Competition 2007). It is also consistent with empirical analysis showing a correlation between State price caps and the number of stores per State resident. Pew Charitable Trusts, Fact Sheet, ''How State Rate Limits Affect Payday Loan Prices'' (Apr. 2014), *available at http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs/content-level_pages/fact_sheets/stateratelimitsfactsheet.pdf*.

[1224] It is important to note that the estimates for the reduction in lending above may underestimate impacts in some ways and overestimate them in others. For example, store closures may cause total lending to fall further. A small share of potential borrowers will lose easy access to stores. In addition, the reduced physical presence and therefore visibility of stores, even in areas where as store is fairly close by, may lead to some consumers not taking out loans, or borrowing less, because they are not reminded as frequently of the availability of payday loans. Some lenders, however, may successfully adapt to the regulation by, for example, broadening the range of products they offer. The ability to do this will vary across States and across individual lenders.

[1225] This section focuses on the benefits and costs to consumers from payday lending. The literature on consumers' understanding and expectations regarding payday lending, notably Mann (2013), is discussed earlier in this section and above in Market Concerns—Underwriting. Other strands of the literature related to payday and small-dollar lending (*e.g.,* those addressing the populations of borrowers, endogenous market entry by lenders, changes in behavior or outcomes not related to regulatory changes, and academic studies of the business models or market structure) were also reviewed by the Bureau, but are not discussed here.

available to consumers facing a truly short-term need for credit in States that allow them. In contrast, most research has focused almost exclusively on the question of what happens when all access to a given form of credit is eliminated, as opposed to restricted. This is often referred to as the extensive margin (access), rather than the intensive margin (use, once accessed). As noted above, the available evidence from States that have imposed strong restrictions on lending, but not outright or de facto bans, suggests that, even after large contractions in this industry, loans remain widely available, and access to physical locations is not unduly limited.

To the extent that ability to repay and/or shorter loan sequences are associated with beneficial borrowing, this should not unduly restrict the positive welfare for consumers associated with borrowing to cover discrete needs. That said, if the benefits from borrowing are realized from later loans in a 12-month period, and are concentrated predominately in the segment of borrowers who would not pass an ATR assessment, the rule will more substantially reduce the benefits realized by borrowers. As noted at the end of this section however, the Bureau believes that the literature implies the greatest benefits consumers receive from access to credit are realized early in a borrowing sequence.

i. Intent-To-Treat Studies

As mentioned previously, intent-to-treat studies focus on the availability of credit to larger populations of individuals, rather than focusing on the actual usage of that credit. Many of these studies focus on the changes resulting after States institute bans on payday lending. For example, Morgan and Strain (2008) study a number of State law changes over a ten-year period, and find that payday bans were associated with higher rates of bounced checks.[1226] They also found that bans were associated with higher rates of complaints about debt collectors to the FTC, but lower rates of Chapter 13 bankruptcy filings. In an update to that paper, Morgan et al. (2012) expand the time frame, analyze more State-level payday bans, and consider the impacts of enabling payday lending as well.[1227] They again find evidence that bounced checks and complaints about debt collectors to the FTC increase, and Chapter 13 bankruptcy filings decrease in response to limits on payday lending. They also find that the service fees received on deposit accounts by banks operating in a single State tend to increase with limits on payday lending, and interpret this as an indication that payday loans help to avoid overdraft fees.

In contrast, Campbell, et al. (2008) found that Georgia's payday ban appeared to improve consumer's outcomes, as consumers living in counties further from bordering States that allowed payday lending had lower rates of involuntary checking account closures.[1228] Bhutta et al. (2016), using data from the Current Population Survey, show some evidence of increased use of alternative forms of high-interest credit (*e.g.,* pawn loans) when access to payday loans was restricted.[1229] Additionally, they present weak evidence of an increase in involuntary account closings after the imposition of State bans of payday loans, but this effect did not persist. In data collected by the Bureau from banks that ceased offering deposit advance products (''DAP loans''), there was no evidence that reduced access to these products led to greater rates of overdraft or account closure.[1230]

Melzer (2011) measured access to payday loans of people in States that do not allow payday lending using distance to the border of States that permit payday lending.[1231] He measured the effects of access on the payment of mortgages, rent and utilities, and found that greater access causes greater difficulty in paying these basic expenses, as well as delays in needed medical care. In a follow-up study, Melzer (2016), found higher Supplemental Nutritional Assistance Program (food stamp) usage and lower child-support payments with greater payday availability.[1232]

Two additional studies exploit State-level variation in access to estimate the impacts of payday loans by looking at similarly situated counties. Desai & Elliehausen (2017) compare counties in States that ban payday lending (Georgia, North Carolina, and Oregon) with adjacent States that allow such lending.[1233] While the authors cannot observe whether or to what extent payday borrowing is actually occurring in these counties, it appears that legislation in the States curbing payday lending had very small, mostly positive, effects on delinquencies. Edminson (2011) uses a similar identification approach (county-level analysis with varying payday restrictions), but does not limit the analysis to counties in adjacent States.[1234] This study concludes that restrictive payday regimes are associated with lower average credit scores, even when income is accounted for.

Zinman (2010) conducted a survey of payday loan users in Oregon and Washington both before and after a new law took effect in Oregon that limited the size of payday loans and reduced overall availability of these loans.[1235] He showed that the law appeared to increase consumer hardship, measured by unemployment and qualitative self-assessments of current and expected future financial conditions, over the subsequent five months.

An alternative to the State-level variation in extensive access to payday loans is to look at the intensive concentration of lenders in a geographical area as a proxy for payday loan availability. For example, Morse (2011) looked at zip code-level data to assess the impact of the availability of payday loans in particular circumstances, natural disasters.[1236] Using information about the concentration of payday lenders by zip code and linking it to data on natural disasters, she found that greater access to payday lending in times of disaster—which may generalize to unexpected personal emergencies—reduces home foreclosures and small property crime. Dobridge (2014) found that, in normal times, access to payday loans reduced consumer well-being, as measured by purchases of consumer durable

[1226] Donald P. Morgan and Michael R. Strain, ''Payday Holiday: How Households Fare after Payday Credit Bans'' (Fed. Reserve of N.Y. Staff Reports No. 309, 2008).

[1227] Donald P. Morgan and Ihab Seblani, ''How Payday Credit Access Affects Overdrafts and Other Outcomes,'' 44 J. of Money, Credit, and Banking 519 (2012).

[1228] Dennis, F. Campbell et al., ''Bouncing Out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures,'' 36 J. of Banking and Fin. 1224 (2012).

[1229] Neil Bhutta et al., ''Consumer Borrowing after Payday Loan Bans.'' 59 J. of L. and Econ. 225 (2016).

[1230] CFPB Report on Supplemental Findings, at 39.

[1231] Brian T. Melzer, ''The Real Costs of Credit Access: Evidence from the Payday Lending Market,'' 126 Quarterly J. of Econ. 517 (2011).

[1232] Brian T. Melzer, ''Spillovers from Costly Credit.'' Review of Fin. Studies (forthcoming NW Univ., Kellogg Sch. of Management, Dep't of Finance, 2013).

[1233] Chintal A. Desai and Gregory Elliehausen, ''The Effect of State Bans of Payday Lending on Consumer Credit Delinquencies,'' 64 Quarterly Review of Econ. and Fin. 94 (2017).

[1234] Kelly D. Edminston, ''Could Restrictions on Payday Lending Hurt Consumers?'' at 37–38 (Fed. Reserve Bank of K.C. Econ. Review 31, 2011).

[1235] Jonathan Zinman, ''Restricting Consumer Credit Access: Household Survey Evidence on Effects Around the Oregon Rate Cap,'' 34 J. of Banking and Fin. 546 (2010).

[1236] Adair Morse, ''Payday Lenders: Heroes or Villains?,'' 102 J. of Fin. Econ. 28 (2011).

goods.[1237] But, similar to Morse (2011), Dobridge found that in times of severe weather, access to payday loans allowed consumers to smooth consumption and avoid declines in food spending or missed mortgage payments. Carrell and Zinman (2014) also developed a measure of payday loan access similar to that used by Morse (2011) and linked it to the job performance of Air Force personnel, showing that greater access to payday lending leads to worse job performance to such an extent that fewer are eligible for reenlistment.[1238]

Carter and Skimmyhorn (2016) used an alternative identification strategy, utilizing the differential access to payday loans associated with the implementation of the Military Lending Act (MLA). The MLA effectively banned payday loans to military personnel, allowing the authors to measure the impact of payday loans on financial well-being and labor market outcomes of soldiers in the Army.[1239] Unlike Carrell and Zinman who also focused on military personnel, Carter and Skimmyhorn found no effects. They speculated that some of the difference in the outcomes of the two preceding studies could reflect the fact that re-enlisting in the Army was easier than re-enlisting in the Air Force during the periods covered by the respective studies.

Another study also used the implementation of the MLA to measure the effects of payday loans on the ability of consumers to smooth their consumption between paydays, and found that access to payday loans did appear to make purchasing patterns less concentrated around paydays (Zaki, 2013).[1240] This study also found some evidence that access to payday loans increased what the author referred to as ''temptation purchases,'' specifically alcohol and consumer electronics.

Among these intent-to-treat studies, industry comments most often cited Morgan and Strain (2008), Zinman (2010), Morse (2011), and Morgan et al. (2012), along with a related study that is no longer available.[1241] Many of these commenters argued that these studies suggest strong, positive welfare impacts of access to payday lending. However, Morgan and Strain (2008) relies on a methodology that severely undermines their conclusions. Specifically, Morgan and Strain's (2008) assertion that checks are returned more frequently from the non-authorizing payday States of Georgia and North Carolina relies on data that intermingles those States' data with that of numerous authorizing States (*e.g.,* Louisiana, Alabama, and Tennessee).[1242] Additionally, the complaints data they cite are limited by the fact that the FTC is unlikely to receive complaints about payday lending (at the time, State regulators were more likely to receive such complaints). As such, the complaints measure the authors employ may not indicate the actual rate of credit-related complaints, let alone overall consumer satisfaction.

While Morgan et al. (2012) expands on the previous studies by including more States (contributing to the policy variation needed for identification), and additional outcome measures (*e.g.,* bank fee income), they fail to adequately address the shortcomings of their previous studies. For example, this study once again employs the measure of complaints received by the FTC. It also relies on data sources that comingle returned checks from States with payday bans with those from States that permit payday, which their difference-in-difference identification approach may not adequately address. For example, the Atlanta check processing center (CPC) is coded as ''banned'' even after States that allow payday (*e.g.,* Alabama and Louisiana) are absorbed; the Oregon payday ban is never coded into their data since the CPC for Oregon is in Seattle (and Washington allows payday); etc.[1243] The biggest addition to the paper relative to Morgan and Strain (2008) is that Morgan et al. (2012) analyze a new outcome to support the notion that payday limits are associated with an increase in overdrafts by looking at bank revenues realized through fees. However, their proxy for overdraft fees includes all service fees on deposit accounts at a time when the prevalence of overdraft was changing, and they limit their sample of banks to only those operating in a single State, limiting both the accuracy and generalizability of their finding.

Finally, most of the findings in Morgan et al. (2012) are not robust but rather highly sensitive to the choice of specification. For example, the point estimates and significance levels change a great deal in response to the inclusion or exclusion of State-specific time trends; the service fee findings are dependent on using a log fees per capita measure, rather than the more natural fees per capita or log fees; and their findings for the impacts of State-level bans on returned checks become insignificant when questionable demographic variables are excluded from the regressions.[1244]

Zinman (2010) was also frequently cited by industry comments. Those comments point to the qualitative findings that survey respondents indicate greater levels of ''financial hardships'' after a payday ban. However, the quantitative findings show indications that the welfare effects of the ban may have been positive (*e.g.,* lower rates of phone disconnections, greater rates of on time bill

[1237] Christine L. Dobridge, ''Heterogeneous Effects of Household Credit: The Payday Lending Case'' (Wharton Sch., Univ. of Penn., Working Paper, 2014). Note that this paper relies on a State-level approach (similar to Melzer, 2011), as opposed to the more intensive measures used by Morse (2011).

[1238] Scott E. Carrell and Jonathan Zinman, ''In Harm's Way? Payday Loan Access and Military Personnel Performance,'' 27 Rev. of Fin. Studies 2805 (2014).

[1239] Susan Payne Carter and William Skimmyhorn ''Much Ado About Nothing? New Evidence on the Effects of Payday Lending on Military Members,'' (*forthcoming* Rev. of Econ. and Stats, 2016).

[1240] Mary Zaki, ''Access to Short-term Credit and Consumption Smoothing within the Paycycle'' (FEEM. Working Paper No. 007.2016, 2016), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2741001.*

[1241] Donald P. Morgan, ''Defining and Detecting Predatory Lending'' (Fed. Reserve Bank of N.Y. Staff Report No. 273, 2007). FRBNY Web page indicates report was ''removed at the request of the author.''

[1242] Donald P. Morgan and Michael R. Strain, ''Payday Holiday: How Households Fare after Payday Credit Bans,'' (Fed. Reserve of N.Y. Staff Report No. 309, 2008), *available at https://www.newyorkfed.org/research/staff_reports/sr309.html* (similarly mischaracterizes authorizing and non-authorizing States, *e.g.,* asserting North Carolina to be a non-authorizing State despite having 500+ payday lenders during the period analyzed.).

[1243] These findings were obtained from a brief analysis of the data used by Morgan et al. (2012), *see* Donald P. Morgan and Ihab Seblani, ''How Payday Credit Access Affects Overdrafts and Other Outcomes,'' 44 J. of Money, Credit, and Banking 519 (2012).

[1244] The authors note their coefficients of interest ''were insignificant in regressions using (unlogged) levels of fee income and income per capita.'' Donald P. Morgan and Ihab Seblani, ''How Payday Credit Access Affects Overdrafts and Other Outcomes,'' 44 J. of Money, Credit, and Banking 519, at n.16 (2012). The findings about the sensitivity of the returned checks estimates were achieved by analyzing the Morgan et al. (2012) data available at *id.* It should also be noted that the Bureau finds other weaknesses in the analytic approach employed in this study. Specifically, the difference-in-difference approach for returned checks relies on observations at the check processing center (CPC) level, yet a single CPC may process checks from many States, some of which ban payday, some of which allow it, and some of which have no explicit allowance or ban. The authors attempt to control for this using a very large number of dummy variables to capture CPC mergers, but this results in estimates that are highly sensitive to specification assumptions. Additionally, the study appears to code in ''sharp'' policies where the policy is actually ''fuzzy,'' which would cause identification problems (*e.g.,* they code a payday ban for P.A. in 2007, when the last payday lender exited the market, even though there had been a longer decline since 2006 when the legislation was passed). There are additional econometric issues with this study's approach, but the Bureau believes those cited here are sufficient to cast doubt on the strength of the reported findings.

payment).[1245] Additionally, the findings rely on a small survey conducted across only two States where idiosyncratic effects may drive many of the results. As such, the Bureau believes the actual welfare implications from this study are hard to generalize.

Priestly (2014), another paper frequently mentioned in industry comments, is more clear on the welfare implications of payday, and specifically re-borrowing. The author's results indicate, for example, that each rollover in 2008–2009 was associated with a .109-point increase in a customer's VantageScore (a credit score similar to FICO). The Bureau believes these benefits are quite small, as Priestly's findings suggest that the average consumer in her sample would need to roll a payday loan over more than nine times (at a cost of approximately $135 per $100 borrowed) in order to increase his or her VantageScore by one point. For the average customer in Priestly's sample, this would represent an increase from 587 to 588, deep enough into the subprime range that such a change would be unlikely to have any practical value.

The Morse (2011) study differs from the other intent-to-treat studies most cited by commenters, as it focuses on a source of variation more relevant to this rule (endogenous concentrations of lenders, rather than restrictions on locations), and its welfare implications are more nuanced. Specifically, Morse finds that borrowers appear ''better off'' in the face of unexpected shocks (*i.e.,* those that lead to discrete needs) with access to payday loans. While the outcome measures used in the study (*e.g.,* home foreclosures) limit the generalizability of the findings (as homeowners may not be representative of the typical payday borrower), the Bureau believes this study is methodologically sound and the findings are large and significant enough to warrant deep consideration. However, the Bureau has found little in this study to imply that a limit on continued use of payday loans (rather than a limit on the availability of short-term credit for discrete needs) would necessarily decrease borrowers' welfare.

ii. Individual-Level Studies

Other studies, rather than using differences across States in the availability of payday loans, have used data on the actual borrowers who apply for loans and are either offered loans or are rejected. These individual-level studies offer more direct insight into the effects of payday loans, rather than the effect of access measured by the intent-to-treat studies. Skiba and Tobacman (2009) used this approach to find that taking out a payday loan increases the likelihood that the borrower will file for Chapter 13 bankruptcy.[1246] They found that initial approval for a payday loan essentially doubled the bankruptcy rate of borrowers. Bhutta, et al., (2015) used a similar approach to measure the causal effects of storefront borrowing on borrowers' credit scores.[1247] They found that obtaining a loan had no impact on how the consumers' credit scores evolved over the following months. The authors noted, however, that applicants generally had very poor credit scores both prior to and after borrowing (or being rejected for) a payday loan. In each of these studies, the authors were unable to determine whether borrowers that were rejected by the lender from which they had data were able to take out a loan from another lender.

Two other studies have used data on payday borrowing and repayment behavior to compare changes over time in credit scores for different groups of borrowers. Priestley (2014), discussed above, measured changes over time in credit scores for borrowers who re-borrowed different numbers of times, and found that in some cases it appeared that borrowers who re-borrowed more times had slightly more positive changes in their credit scores.[1248] These differences were not economically meaningful, however, implying borrowers would need to rollover a loan more than nine times (at an average total cost of $135 per $100 borrowed) to see a one-point increase in their VantageScores.[1249] Mann (2014) compared the changes in credit scores of borrowers who defaulted on their loans with borrowers who did not, and also found no difference.[1250] Similar to the Bhutta, et al. (2015) study, neither the Priestly nor Mann studies found a meaningful effect of payday loan borrowing behavior on credit scores. Unlike Bhutta, et al. (2015), however, if either had measured an effect it would have simply been a finding of correlation, as neither had a way of identifying an effect as causal.

Gathergood, et al. (2016),[1251] used an approach similar to that used by Skiba and Tobacman (2014) and Bhutta, et al., (2015) to study the effects of taking out payday loans on United Kingdom borrowers' future overdrafting, rates of delinquency on other loan products, subjective well-being, and feelings of regret about borrowing. The products studied are similar to payday loans in the United States, primarily single-payment loans due in roughly 30 days. While the UK market includes storefront lenders, it is dominated by online lenders. The authors found that online payday loans led to higher rates of bank overdraft and delinquencies on other loans. While it had no effect on subjective measures of well-being, borrowers did report regretting the decision to take out the payday loan.

Baugh (2015) used the closure of dozens of online payday lenders, which cut off borrowers' access to such loans and other high-cost online credit, to measure the effects of these loans on consumers' consumption, measured via expenditures on debit and credit cards, and on overdrafts and insufficient funds transactions.[1252] He found that losing access to these loans, especially for consumers who had been heavy users of these loans, led to increased consumption and fewer overdrafts or NSF transactions.

iii. Experimental Studies

There have also been at least three studies of the impacts of payday loans that rely on experimental approaches. Bertrand and Morse (2011) run an experiment providing three types of information disclosures about the costs and re-borrowing rates of payday loans at the time borrowers receive their loans

[1245] Phone disconnections were explored in greater detail in the working paper version. *See* Jonathan Zinman, ''Restricting Consumer Credit Access: Household Survey Evidence on Effects Around the Oregon Rate Cap,'' (Dartmouth College, 2008), *available at http://www.dartmouth.edu/~jzinman/Papers/Zinman_RestrictingAccess_oct08.pdf*.

[1246] Paige Marta Skiba and Jeremy Tobacman. ''Do Payday Loans Cause Bankruptcy?,'' (Vand. U. Sch. of L., L. and Econ., Working Paper No. 11–13, 2011), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266215*.

[1247] Neil Bhutta et al., ''Payday Loan Choices and Consequences,'' 47 J. of Money, Credit and Banking 223 (2015).

[1248] Jennifer Priestly, ''Payday Loan Rollovers and Consumer Welfare'' (Kennesaw State U., Dep't of Stats. and Analytical Sciences 2014).

[1249] The Priestley study also compared changes over time in credit scores of payday borrowers in different States, and attributed those differences to differences in the States' payday regulations. This ignores differences in who chooses to take out payday loans in different States, and ignores the different changes over time in the broader economic conditions in different States.

[1250] Ronald Mann, ''Do Defaults on Payday Loans Matter?,'' (Colum. L. and Econ., Working Paper No. 509, 2015), *available at https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2560005*.

[1251] John Gathergood et al., ''Comments on: How do Payday Loans Affect Consumers?'' (NBER Summer Institute–L. and Econ. 2015).

[1252] Brian Baugh, ''What Happens When Payday Borrowers Are Cut Off From Payday Lending? A Natural Experiment,) (Ph.D. dissertation, Ohio State Univ., 2015), *available at http://fisher.osu.edu/supplements/10/16174/Baugh.pdf*.

from a storefront payday lender.[1253] The disclosures are found to reduce the incidence of re-borrowing by 6–11 percent and the average amount borrowed by 12–23 percent relative to the control group, with stronger results for borrowers self-reporting higher degrees of self-control.

Fusaro and Cirillo (2011) conduct an experiment in which some borrowers are given no-fee loans and their re-borrowing rates are compared to borrowers who are given loans with normal fees.[1254] They find that re-borrowing rates are not different between the two groups. This could lead to at least two possible and compatible conclusions: That the cost does not drive a cycle of debt, and/or that the single-payment structure is a key factor that drives unaffordability, not merely the fee.

Commenters also referenced a third experimental study, Wilson et al. (2010).[1255] In this study the authors conducted a laboratory experiment designed to test whether access to payday loans improves or worsens the likelihood of ''financial survival'' or financial health in the face of expense shocks. The authors found that the students engaged in the game were more likely to successfully manage financial shocks if they had access to payday loans. However, when they explore the intensity of usage, they find that participants who utilize 10 or more loans over the 30 experimental months find themselves at greater risk than they would under a regime that bans payday loans.

iv. Discussion of Literature

The Bureau received numerous comments selectively citing the studies listed above, and making reference to particular results of interest to the commenters. Generally, industry and trade group commenters favored studies that imply access improves consumer outcomes (*e.g.,* Priestly (2014), Zinman (2010)); consumer groups favored studies that imply access harms consumers (*e.g.,* Skiba and Tobacman (2015), Baugh (2015)); and academic researchers referenced numerous studies highlighting the ambiguity or uncertainty illustrated by the literature. The Bureau has considered the comments carefully and gives weight to the studies in proportion to their applicability to the rule, generalizability, and methodological soundness.[1256] Additionally, and as much as possible, the Bureau has endeavored to rely on the descriptive (positive) findings of the studies, and not the authors' interpretations (often normative) of those findings.

In reviewing the existing literature, the Bureau notes that the evidence on the impacts of the availability of payday loans on consumer welfare indeed varies. In general, the evidence to date suggests that access to payday loans appears to benefit consumers in circumstances where they use these loans for short periods to address an unforeseen and discrete need, such as when they experience a transitory and unexpected shock to their incomes or expenses. However, in more general circumstances, access to and intensive use of these loans appears to make consumers worse off. A more succinct summary is: Access to payday loans may well be beneficial for those borrowers with discrete, short-term needs, but only if they can succeed in avoiding long sequences of loans.

There is also some limited evidence about the welfare effects of ''intensive'' users of payday. It should be noted, however, that there are no studies the Bureau is aware of that directly evaluate the welfare impacts of the seventh and later loans taken by a borrower in a 12-month span.[1257] There are also no studies on the welfare effects of payday loans made specifically to borrowers who would have failed an ATR assessment. Since the rule's restrictions should only bind for individuals who demand a seventh loan in a 12-month period and cannot demonstrate an ability to repay, there are no studies that speak directly to the likely impacts of the regulation.

As this rule will allow for continued access to the credit that appears to benefit consumers with discrete needs, the Bureau believes that the rule limits the potential harm other borrowers may experience while maintaining much of the welfare gains consumers realize from access to these loans.

G. Benefits and Costs of the Rule to Covered Persons and Consumers—Payments and Notices

The rule limits how lenders initiate payments on a covered loan from a borrower's account and imposes two notice requirements relating to such payments. Specifically, if two consecutive prior attempts to withdraw payment through any channel from a borrower's account have failed due to insufficient funds, lenders are prohibited from continuing to attempt to withdraw payment from a borrower's account, unless the lender obtains a new and specific authorization to make further withdrawals from the consumer's account. The rule also requires lenders of covered loans to provide a notice to a borrower before the initial withdrawal attempt and before initiating an unusual withdrawal attempt. A special notice is also required to be sent to the borrower if the lender can no longer continue to initiate payment directly from a borrower's account because two consecutive prior attempts had failed due to insufficient funds. The impacts of these proposals are discussed here for all covered loans.

Note that the Bureau expects that unsuccessful payment withdrawal attempts will be less frequent under the rule. This is because of the notice of irregular withdrawals; and it is also true because the ability-to-repay provisions or the requirements of the conditional exemption loans will reduce the frequency with which borrowers receive loans that they do not have the ability to repay. This should in turn lessen the impacts of the limitation on payment withdrawal attempts and the number of instances where a lender is required to notify consumers that the lender is no longer permitted to attempt to withdraw payments from a borrower's account.

Most if not all of the requirements in this portion of the rule are activities that lenders could have chosen to engage in absent the rule. As such, the Bureau

[1253] Marianne Bertrand, and Adair Morse, ''Information, Disclosure, Cognitive Bias, and Payday Borrowing,'' 66 J. of Fin. and Econ. 1865 (2011).

[1254] Marc A. Fusaro & Patricia J. Cirillo, ''Do Payday Loans Trap Consumers in a Cycle of Debt?,'' (2011), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1960776.*

[1255] Bart J. Wilson et al., ''An Experimental Analysis of the Demand for Payday Loans,'' 10 B.E. J. of Econ. Analysis & Policy (2010).

[1256] The Bureau received numerous comments calling into question the objectivity of some studies funded by industry. These issues have also been noted in the press. *See, e.g.,* Ben Walsh and Ryan Grim, ''Emails Show Pro-Payday Loan Study Was Edited by the Payday Loan Industry,'' Huffington Post, Nov. 2, 2015, *available at http://www.huffingtonpost.com/entry/payday-loan-study_us_5633d933e4b00aa54a4e4273*; Christopher Werth, ''Tracking the Payday-Loan Industry's Ties to Academic Research,'' Freakonomics, Apr. 6, 2014, *available at http://freakonomics.com/podcast/industry_ties_to_academic_research/.* At least one of these studies appears to have given editorial and content control to an industry lobbyist. Others failed to reference the financial and other support received from the group in any of their acknowledgements, as is the best practice in such research. Still others mention the support received, but assert the group had no influence on the study or its findings (a similar assertion was made in the study where influence was documented). Such comments are to be expected in any contentious policy debate. Overall, the Bureau attempted to judge each study on its merits. As such, findings from these industry studies are generally weighted by their methodological soundness (in terms of data collection and analysis).

[1257] Bart J. Wilson et al., ''An experimental analysis of the demand for payday loans,'' 10 B.E. J. of Econ. Analysis & Policy (2010) (This analysis does show that once a participant takes 10 or more loans in a 30-month span, the loans appear to be more harmful than helpful to financial survival.)

believes that, while there are potential benefits to lenders, the restrictions are expected to impose some costs on these covered persons.[1258] That said, the Bureau is aware that many lenders have practices of not continuing to attempt to withdraw payments from a borrower's account after one or more failed attempts, and that some depository institutions do not assess additional fees to customers when continued attempts to withdraw from their accounts are made. In addition, some lenders provide upcoming-payment notices to borrowers in some form.

1. Limitation on Payment Withdrawal Attempts

The rule prevents lenders from attempting to withdraw payment from a consumer's account if two consecutive prior payment attempts made through any channel are returned for nonsufficient funds. The lender can resume initiating payment if the lender obtains from the consumer a new and specific authorization to collect payment from the consumer's account.

a. Benefits and Costs to Covered Persons

The rule will impose costs on lenders by limiting their use of payment methods that allow them to withdraw funds directly from borrowers' accounts, and by imposing the cost of obtaining a renewed authorization from the consumer or using some other method of collecting payment. There may be some benefits to lenders of reduced attempts to withdraw funds following repeated failures, as other methods of collecting may be more successful.

The impact of this restriction depends on how often a lender previously attempted to collect from a consumers' account after more than two consecutive failed transactions, and how often the lender was successful in doing so. Based on industry outreach, the Bureau understands that some lenders had already established a practice of not continuing to attempt to collect using these means after one or two failed attempts. These lenders would not incur costs from the restriction. Additionally, some depository institutions have disallowed repeated attempts to collect using these means; lenders attempting to collect from such depositories would also not incur costs from this restriction.

The Bureau has analyzed the ACH payment request behavior of lenders making payday or payday installment loans online. The Bureau found that about half the time that an ACH payment request fails, the lender makes at least two additional ACH payment requests.[1259] The likelihood of a successful payment request after a request that was returned for insufficient funds is quite low. Only 30 percent of requests that follow a failed request succeed, only 27 percent of third requests succeed, and after that the success rate is below 20 percent.[1260] The Bureau found that only 7 to 10 percent of the payments attempted through the ACH system came after two failed payments requests, equivalent to $55 to $219 per borrower from whom a payment was collected after the two failed attempts.[1261] These payments would have been prevented if the rule had been in place at the time. The Bureau notes that under the restriction, lenders can still seek payment from borrowers by engaging in other lawful collection practices. As such, the preceding are high-end estimates of the impact this restriction would have had on the collection efforts of these lenders. These other forms of lawful collection practices, however, may be more costly for lenders than attempting to collect directly from a borrower's account.

After the limitation is triggered by two consecutive failed attempts, lenders are required to send a notice to consumers. To seek a new and specific authorization to collect payment from a consumer's account, the lender can send a request with the notice and may need to initiate additional follow-up contact with the consumer. The Bureau believes that this will most often be done in conjunction with general collections efforts and will impose little additional cost on lenders, other than the costs associated with the disclosures, discussed below.

To the extent that lenders assess returned item fees when an attempt to collect a payment fails and are subsequently able to collect on those fees, this rule may reduce lenders' revenues.

Lenders will also need the capability of identifying when two consecutive payment requests have failed. The Bureau believes that the systems lenders use to identify when a payment is due, when a payment has succeeded or failed, and whether to request another payment will have the capacity to identify when two consecutive payments have failed, and therefore this requirement will not impose a significant new cost.

b. Benefits and Costs to Consumers

Consumers will benefit from the restriction because it will reduce the fees they are charged by the lender and the fees they are charged by their depository institution. Many lenders charge a returned item fee when a payment is returned for insufficient funds. Borrowers will benefit if the reduced number of failed ACH payment requests also results in reductions in the number of these fees, to the extent that they are eventually paid. Borrowers may also benefit from a reduction in the frequency of checking account closure, to be discussed below.

Each time an ACH transaction is returned for insufficient funds, the borrower is likely to be charged an NSF fee by her financial institution. In addition, each time a payment is paid by the borrower's financial institution when the borrower does not have sufficient funds in the account to cover the full amount of the payment, the borrower is likely to be charged an overdraft fee. Overdraft and NSF fees each average $34 per transaction.[1262] As noted above, most re-presentments[1263] of failed payment requests themselves fail, leading to additional NSF fees. In addition, about a third of all re-presentments that succeed only succeed because the borrower's financial institution paid it as an overdraft, likely leading to an overdraft fee. The Bureau's analysis of online lender payment practices shows that borrowers who have two payment withdrawal attempts fail are charged additional fees on subsequent payment attempts of $64 to

[1258] This is simply a revealed preference argument that to the extent that lenders did not voluntarily choose to engage in the activities, it is likely the case that the benefits to lenders do not outweigh the costs to lenders (at least in the lenders' views).

[1259] CFPB Online Payday Loan Payments, at 14 tbl. 2. Lenders make at least one additional request after a failed payment request 74 percent of the time. Two-thirds of these are followed by a third request, if the second also fails. These calculations exclude multiple requests made on the same day, as those requests are unlikely to be intentional re-presentments of failed attempts because the lender is unlikely to know that a payment failed on the same day it was submitted and be able to re-present the request on the same day. The data used in the Bureau's analysis were for 18 months in 2011 and 2012. Changes to the rules governing the ACH system in the fall of 2015 may have reduced the frequency with which lenders continue to make payment requests after one or more payment attempts have failed.

[1260] CFPB Online Payday Loan Payments, at 13 tbl. 1.

[1261] CFPB Report on Supplemental Findings, at 150. These impacts may be lower now than they were at the time covered by the data analyzed by the Bureau, due to changes in industry practices and to changes in the rules governing the ACH system referred to in note CFPB Online Payday Loan Payments, at 14 tbl. 2.

[1262] CFPB Online Payday Loan Payments, at 2.

[1263] For the purposes of its analysis, the Bureau referred to any payment request following a failed payment request as a ''re-presentment.'' The only exception was when multiple payment requests were submitted on the same day; if two or more failed, only the first failed payment request was considered a re-presentment.

$87. These costs would be prevented by the rule.[1264]

The restriction on repeated attempts to withdraw payments from a borrower's checking account may also reduce the rate of account closure, as account closures appear to be associated with failed withdrawal attempts. This benefits borrowers by allowing them to maintain their existing account so as to better manage their overall finances. It also allows them to avoid the possibility of a negative record in the specialty consumer reporting agencies that track involuntary account closures, which can make it difficult to open a new account and effectively cut the consumer off from access to the banking system and its associated benefits. In the data studied by the Bureau, account holders who took out online payday loans were more likely to have their accounts closed by their financial institution than were other account holders, and this difference was substantially higher for borrowers who had NSF online loan transactions.[1265] Borrowers with two consecutive failures by the same lender are significantly more likely to experience an involuntary account closure by the end of the sample period than accountholders generally (43 percent versus 3 percent, respectively).[1266] While there is the potential for a number of confounding factors, transactions that were NSFs could contribute to account closure in at least two ways. First, the fees from repeated payment attempts add to the negative balance on the deposit account, making it more difficult for a borrower to bring the account balance positive and maintain a positive balance. And, if a lender is repeatedly attempting to extract money from an account, the borrower may feel that the only way to regain control of her finances is to cease depositing money into the account and effectively abandon it.

The reduced ability to collect by repeatedly attempting to withdraw payments from a borrower's account may increase lenders' credit losses, which may, in turn reduce the availability or raise the cost of credit. As discussed in the consideration of the costs to lenders, this reduction in collections is likely to be quite small. And, as noted above in the discussion of the impacts of the ATR requirements, many lenders already charge the maximum price allowed by State law.

[1264] The Bureau notes that at least one depository institution limits the fees charged to consumers from multiple attempts to drawn on an account by payday lenders. To the extent that this type of policy is being voluntarily adopted, the net benefits of this limitation might decrease (due to an increase in the benefits present in the baseline).

[1265] CFPB Online Payday Loan Payments, at 24.

[1266] CFPB Report on Supplemental Findings, at 151 n. 177.

2. Required Notice Prior To Attempt To Collect Directly From a Borrower's Account

The rule also requires lenders to provide consumers with a notice prior to the first lender-initiated attempt to withdraw payment from consumers' accounts, including ACH entries, post-dated signature checks, remotely created checks, remotely created payment orders, and payments run through the debit networks. The notice is required to include the date the lender will initiate the payment request; the payment channel; the amount of the payment; the breakdown of that amount to principal, interest, and fees; the loan balance remaining if the payment succeeds; the check number if the payment request is a signature check or RCC; and contact information for the consumer to reach the lender. There are also separate notices required prior to unusual payments.

a. Benefits and Costs to Covered Persons

These notices may reduce delinquencies and related collections activities if consumers take steps to ensure that they have funds available to cover loan payments, such as delaying or forgoing other expenditures, making deposits into their accounts, or contacting the lender to make alternative arrangements.

Costs to lenders of providing these notices will depend heavily on when the lender provides the notice and, should they provide a notice after origination, whether they are able to provide the notice via email, text messages, or on paper at origination or have to send notices through paper mail. In practice, the Bureau expects most lenders to provide the notice of initial payment withdrawal at origination, minimizing the transmission costs. This can either be done via a written disclosure (at a storefront), or as a PDF attachment, or Web page sent along with an electronic short notice sent via an email or text (for either storefront or online lenders). The variation in costs of notices provided after origination (either regular notices, or notices in advance of unusual payments) is due in part to differences in transmission costs between different channels. Most borrowers are likely to have Internet access and/or a mobile phone capable of receiving text messages, and during the SBREFA process multiple SERS reported that most borrowers, when given the opportunity, opt in to receiving notifications via text message. The Bureau has intentionally structured the rule to encourage transmission by email or text message because it believes those channels are the most effective for consumers, as well as less burdensome for lenders. However, should the lender choose to send paper notifications via regular mail, they would incur higher costs of transmission, as well as administrative costs associated with providing the notification early enough to ensure sufficient time for it to be received by the consumer.

The Bureau believes that all lenders affected by the new disclosure requirements have some system in place to comply with existing disclosure requirements, such as those imposed under Regulation Z, 12 CFR part 1026, and Regulation E, 12 CFR part 1005. Lenders enter data directly into the disclosure system, or the system automatically collects data from the lenders' loan origination system. For disclosures provided via mail, email, text message, or immediately at the time of origination, the disclosure system often forwards the information necessary to prepare the disclosures to a vendor in electronic form, and the vendor then prepares and delivers the disclosures. Lenders will incur a one-time burden to upgrade their disclosure systems to comply with new disclosure requirements.

Lenders will need to update their disclosure systems to compile the necessary loan information to send to the vendors that will produce and deliver the disclosures relating to payments. The Bureau believes that large lenders rely on proprietary disclosure systems, and estimates the one-time programming cost for large respondents to update these systems to be 1,000 labor hours per entity. The Bureau believes small lenders rely on licensed disclosure system software. Depending on the nature of the software license agreement, the Bureau estimates that the cost to upgrade this software will be $10,000 for lenders licensing the software at the entity-level and $100 per seat for lenders licensing the software using a seat-license contract. For lenders using seat license software, the Bureau estimates that each location for small lenders has on average three seats licensed. Given the price differential between the entity-level licenses and the seat-license contracts, the Bureau believes that only small lenders with a significant number of stores will rely on the entity-level licenses.

Lenders with disclosure systems that do not automatically pull information from the lenders' loan origination or servicing system will need to enter

payment information into the disclosure system manually, so that the disclosure system can generate payment disclosures. The Bureau estimates that this will require two minutes per loan in addition to the two minutes to provide the disclosures. Lenders would need to update this information if the scheduled payments were to change.

For disclosures delivered through the mail, the Bureau estimates that vendors will charge two different rates, one for high volume mailings and another for low volume mailings. For the high volume mailings, the Bureau estimates vendors will charge $0.53 per disclosure. However, the Bureau expects high volume mailings to be infrequent, as follow-up disclosures are only necessary for unusual payments and reauthorizations. For the low-volume mailings, the Bureau estimates vendors will charge $1.00 per disclosure. For disclosures delivered through email, the Bureau estimates vendors will charge $0.01 to create and deliver each email such that it complies with the requirements of the rule. For disclosures delivered through text message, the Bureau estimates vendors will charge $0.08 to create and deliver each text message such that it complies with the requirements of the rule. The vendor will also need to provide either a PDF attachment of the full disclosure or a Web page where the full disclosure linked to in the text message is provided. The cost of providing this PDF attachment or web disclosure is included in the cost estimate of providing the text message. Finally, for disclosures delivered on paper at origination, the Bureau estimates costs will be $0.10 per disclosures.

Again, the Bureau believes that virtually all notifications will be provided at the time of origination (for regular notices), or electronically via text or email (for notifications of unusual payments). As such, the mailing costs discussed here are expected to be almost completely avoided.

In addition to the costs associated with providing notices, this requirement may impact the frequency with which lenders initiate withdrawal attempts and lenders' revenue. On timing, lenders are likely to disclose all regular payment schedules at origination, and must provide notices on unusual payments in advance of their initiation. This lag time could affect lenders' decisions as to the timing and frequency of withdrawal attempts. With regard to revenue, the impacts are uncertain: Payment revenue will be reduced if the notices lead to consumers taking steps to avoid having payments debited from their accounts, including placing stop-payment orders or paying other expenses or obligations prior to the posting of the payment request. Alternatively, if the notices help borrowers to ensure that funds are available to cover the payment request, this will reduce lenders' losses from non-payment, although it will also lower lenders' returned-item fee revenue.

b. Benefits and Costs to Consumers

Receiving notices prior to an upcoming unusual payment will benefit consumers by allowing them to take those payments into account when managing the funds in their accounts. This will allow them to reduce the likelihood that they will run short of funds to cover either the upcoming payment or other obligations. The notice will also help borrowers who have written a post-dated check or authorized an ACH withdrawal, or remotely created check or remotely created payment order, to avoid incurring NSF fees. These fees can impose a significant cost on consumers. In data the Bureau has analyzed, for example, borrowers who took out loans from certain online lenders paid an average of $92 over an 18 month period in overdraft or NSF fees on the payments to, or payment requests from, those lenders.[1267]

The information in the notices may also benefit borrowers who need to address errors or unauthorized payments, by making it easier for the borrower to resolve errors with the lender or obtain assistance through their financial institution prior to the payment withdrawal being initiated.

Some consumers may incur costs for notices sent by text. Consumers can avoid these costs by choosing email;[1268] the Bureau requires that lenders must provide an email delivery option whenever they are providing a text or other electronic delivery option.

As some commenters noted, costs associated with the disclosures might be passed on the consumers. However, the Bureau believes the costs associated with the disclosures will be limited, as noted above. Specifically the costs will be much lower than under the proposed rule, which would have required a disclosure before each payment withdrawal attempt. Ultimately, the Bureau believes these costs to consumers will be small in relation to the overall cost of the loan.

[1267] CFPB Online Payday Payments, at 3.

[1268] It is possible that some consumers may only have access to email via data-limited plans (*e.g.,* smartphones), and thus receiving emails could impose costs as well. However, there are numerous ways to avoid the cost of accessing email (*e.g.,* public libraries or facilities that offer free WiFi). As such, the Bureau considers the cost of receiving an email to be negligible.

3. Required Notice When Lender Can No Longer Collect Directly From a Borrower's Account

The rule requires a lender to provide a borrower with a notice of consumer rights within three days of a second consecutive unsuccessful attempt to collect payment from a borrower's account. This notice will identify the loan, explain that the lender is no longer able to attempt to collect payment directly from the borrower's account, and provide the consumer a record of the two failed attempts to collect funds.

a. Benefits and Costs to Covered Persons

This provision may benefit lenders if it leads to consumers contacting the lender to provide a new authorization to withdraw payments from the borrower's account or make other payment arrangements. However, lenders would likely have attempted to make contact with borrowers to obtain payment even in the absence of this requirement.

The requirement will impose on lenders the cost of providing the notice. Lenders already need to track whether they can still attempt to collect payments directly from a borrower's account, so identifying which borrowers should receive the notice should not impose any additional cost on lenders. The Bureau also expects that lenders normally attempt to contact borrowers in these circumstances in an attempt to identify other means of obtaining payment. If they are contacting the consumer via mail, the lender will be able to include the required notice in that mailing.

The Bureau expects that lenders will incorporate the ability to provide this notice into their payment notification process. The Bureau estimates that vendors will charge $0.53 per notice sent via paper mail for lenders that send a large number of mailings and $1.00 per notice for lenders that send a small volume of mailing. For disclosures delivered through email, the Bureau estimates vendors will charge $0.01 to create and deliver each email such that it complies with the requirements of the rule. For disclosures delivered through text message, the Bureau estimates vendors will charge $0.08 to create and deliver each text message. The vendor will also need to provide either a PDF attachment of the full disclosure or a Web page where the full disclosure linked to in the text message would be provided. The cost of providing this PDF attachment or web disclosure is

included in the cost estimate of providing the text message.

b. Benefits and Costs to Consumers

Consumers will benefit from the notice because it will inform them that the lender cannot continue to collect payment directly from their account without their express permission. Absent this notice, borrowers may believe that they are obligated to re-authorize a lender to begin collecting directly from their account, when in many cases the borrower has the option to repay the loan through some other means that carries less risk of fees and provides the borrower with greater control over the timing and prioritization of their expenditures. Conversely, absent some communication from the lender, the borrower may not realize that payment can no longer be withdrawn and, as a result, fail to make payments on a loan.

Some consumers may incur costs for notices sent by text. Consumers can avoid these costs by choosing email or paper delivery of the notices. The Bureau does not believe the required disclosures will impose any other costs on consumers.

H. Benefits and Costs of the Rule to Covered Persons and Consumers—Recordkeeping

The rule requires lenders to maintain sufficient records to demonstrate compliance with the rule. This includes, among other records, loan records; materials collected during the process of originating loans, including the information used to determine whether a borrower had the ability to repay the loan, if applicable; records of reporting loan information to a registered information system, as required; and, records of attempts to withdraw payments from borrowers accounts, and the outcomes of those attempts.

1. Benefits and Costs to Covered Persons

The Bureau believes that some of the records that lenders are required to maintain would have already been maintained in the ordinary course of business. Given the very low cost of electronic storage, however, the Bureau did not believe that these new requirements would impose a meaningful new burden on lenders. However, a number of trade groups provided comments suggesting there are indeed costs associated with retaining these records. These comments note that lenders may incur some costs in developing a document retention policy, obtaining additional computer storage space to maintain the documents, programming the computer system to keep the documents for 36 months, training employees to comply with the recordkeeping requirements, and monitoring the implementation of these new procedures modify systems.

The Bureau acknowledges these costs but believes them to be small. The development of retention policy should be straightforward, as the requirements are not opaque. Computer storage is inexpensive and even the largest lenders should not require more than one terabyte of additional storage to manage the retention of their files enterprise-wide (and that assumes their computer systems are already storage-constrained). As such, the Bureau estimates this cost to be less than $50 per lender if they wish to purchase additional storage themselves (*e.g.,* a portable hard drive), or $10 per month if they wish to lease storage (*e.g.,* from one of the many online cloud storage vendors). There may be a need to develop procedures and train staff to retain materials that they would not normally retain in the ordinary course of business, as well as design systems to generate and retain required records; those costs are included in earlier estimates of the costs of developing procedures, upgrading systems, and training staff. The Bureau also finds that maintaining the records will facilitate lenders' ability to comply, and document their compliance, with other aspects of the rule.

2. Benefits and Costs to Consumers

Consumers will benefit from the requirement to maintain records sufficient to demonstrate compliance because this will make compliance by lenders more likely, and facilitates enforcement of the rule, ensuring that consumers receive the benefits of the rule.

I. Benefits and Costs of the Rule to Covered Persons and Consumers—Registered Information Systems

As discussed above, the rule will generally require lenders to report covered loans to registered information systems in close to real time. Entities wishing to become registered information systems must apply to the Bureau to become registered. The process for becoming a registered information system prior to August 19, 2019 requires an entity to submit an application for preliminary approval with information sufficient to determine that the entity would be reasonably likely to satisfy the conditions to become a registered information system. These conditions include, among other things, that the entity possesses the technical capabilities to carry out the functions of a registered information system; that the entity has developed, implemented, and maintains a program reasonably designed to ensure compliance with all applicable Federal consumer financial laws; and that the entity has developed, implemented, and maintains a comprehensive information security program. If an entity obtains preliminary approval to become a registered information system from the Bureau, it will need to submit an application to be a registered information system that includes certain written third-party assessments contemplated by the rule. The rule also permits the Bureau to require an entity to submit to the Bureau additional information and documentation to facilitate determination of whether the entity satisfies the eligibility criteria to become a registered information system, or otherwise to assess whether registration of the entity will pose an unreasonable risk to consumers.

On or after August 19, 2019, the rule contemplates a slightly different two-stage process. Specifically, an entity can become provisionally registered by submitting an application that contains information and documentation sufficient to determine that the entity satisfies the conditions to become a registered information system, including the written third-party assessments contemplated by the rule. Lenders will be required to furnish information to a provisionally registered system, but a consumer report from such a system will not satisfy the lenders' obligations under the rule to check borrowing history until a 240-day period from the date of provisional registration has expired, after which time the system will be deemed a fully registered information system.

Once an entity is a registered information system under either process, the rule requires the entity to submit biennial assessments of its information security program.

The Bureau expects that applicants to become registered information systems will be primarily, or exclusively, existing consumer reporting agencies. These entities have the technical capacity to receive data on consumer loans from a large number of entities and, in turn, deliver that data to a large number of entities. Depending on their current operations, some firms that wish to apply to become registered information systems may need to develop additional capabilities to satisfy the requirements of the rule. These requirements include that an entity possess the technical capability to receive specific information from lenders immediately upon furnishing,

using reasonable data standards that facilitate the timely and accurate transmission and processing of information in a manner that does not impose unreasonable costs or burdens on lenders, as well as the technical capability to generate a consumer report containing all required information substantially simultaneous to receiving the information from a lender. Because firms currently operating as consumer reporting agencies must comply with applicable existing laws and regulations, including Federal consumer financial laws and the Standards for Safeguarding Customer Information, the Bureau also expects that they should already have programs in place to ensure such compliance.

1. Benefits and Costs to Covered Persons

The rule will benefit firms that apply to become registered information systems by requiring lenders to furnish information regarding most covered loans to all registered information systems and to obtain a consumer report from a registered information system before originating most covered loans. The requirement to furnish information will provide registered information systems with data on borrowing of covered short-term and longer-term balloon payment loans. The requirement to obtain a consumer report before originating covered short-term and longer-term balloon-payment loans will ensure that there will be a market for these reports, which will provide a source of revenue for registered information systems. Registered systems will also be well-positioned to offer lenders supplemental services, for instance in providing assistance with determining consumers' ability to repay.

Any firm wishing to become a registered information system will need to incur the costs of applying to the Bureau. For some firms these costs may consist solely of compiling information about the firms' practices, capabilities, and policies and procedures, all of which should be readily available, and obtaining the required third-party written assessments. Some firms may choose to invest in additional technological or compliance capabilities so as to be able to satisfy the requirements for registered information systems. Firms currently operating as consumer reporting agencies must comply with applicable existing laws and regulations, including Federal consumer financial laws and the Standards for Safeguarding Customer Information. As such, it is the Bureau's expectation that these firms have programs in place to ensure such compliance. However, the independent assessments of these programs outlined in the rule may impose additional costs for some firms.

Once approved, a registered information system will be required to submit biennial assessments of its information security program. Firms that already obtain independent assessments of their information security programs at least biennially, similar to those contemplated in the rule, will incur very limited additional costs. Firms that do not obtain biennial independent assessments similar to those contemplated in the rule will need to incur the cost of doing so, which may be substantial.

2. Benefits and Costs to Consumers

The requirement that registered information systems have certain technical capabilities will ensure that the consumer reports that lenders obtain from these systems are sufficiently timely and accurate to achieve the consumer protections that are the goal of this part. This will benefit borrowers by facilitating compliance with the rule's ability to repay requirements and the conditional exemption in § 1041.6 to the ability to repay requirements.

J. Alternatives Considered

In preparing the rule, the Bureau has considered a number of alternatives to the provisions. The alternatives discussed here are:

- Limits on re-borrowing covered short-term loans without an ability-to-repay requirement;
- An ability-to-repay requirement for short-term loans with no principal step-down approach;
- Disclosures as an alternative to the ability-to-repay requirement; and
- Limitations on withdrawing payments from borrowers' accounts without such disclosures.

In this section, the major alternatives are briefly described and their potential impacts relative to each provision are discussed.

1. Limits on Re-Borrowing of Covered Short-Term Loans Without an Ability-To-Repay Requirement

The Bureau considered not imposing a requirement that lenders making covered short-term and longer-term balloon-payment loans determine the ability of borrowers to repay the loans, and instead proposing solely to limit the number of times that a lender could make a covered short-term loan to a borrower. Such a restriction could take the form of either a limit on the number of loans that could be made in sequence or a limit on the number of loans that could be made in a certain period of time.

The impacts of such an approach would depend on the specific limitation adopted. One approach the Bureau considered would have been to prevent a lender from making a covered short-term loan to a borrower if that loan would be the fourth covered short-term loan to the borrower in a sequence. A loan would be considered part of the same sequence as a prior loan if it were taken out within 30 days of when the prior loan were repaid or otherwise ceased to be outstanding.

A limit on repeated lending of this type would have procedural costs similar to the principal step-down approach, and therefore lower than the ATR approach to making short-term loans. The Bureau simulated the effects of a ''principal step-down approach only'' policy. More specifically, the simulation assumed one possible implementation of this type of policy: A three-loan sequence cap, a six-loan annual cap, and a principal step-down requirement within each sequence. In this simulation, loan volumes and revenues decreased by 71–76 percent.

Without an annual cap on loans, the impacts of this alternative on payday or vehicle title lender revenue would likely be less than the current rule. The ATR approach and the repeated lending limit both place a three-loan cap on loan sequences, but the ATR approach imposes the requirement that a lender not make a first loan without determining the borrower has the ability to repay the loan.

The repeated lending limit without an annual cap on loans would likely also have less impact on payday lender revenue than would the principal step-down approach. The principal step-down approach limits loan sequences to no more than three loans, but, in addition, imposes loan size limitations and limits borrowers to no more than six loans in a year and no more than 90 days in debt per year on a covered short-term loan. While payday lenders could make loans using the ATR approach to borrowers who had reached the annual limits for loans issued via the principal step-down approach, the ATR approach will likely limit the total loans available to many consumers.

The Bureau believes that limiting repeated lending should create stronger incentives to underwrite borrowers for ability to repay than exist in the current market. This is due to the reduction in expected revenue from loan sequences that would be cut off after the threshold is reached, rather than being able to continue for as long as the consumer is able to sustain rollover payments.

However, a rule that relied solely on limiting repeat lending would increase the risk that borrowers take out loans that they would not have the ability to repay relative to the rule. This alternative would also lack the protections of the principal step-down approach, which include mandatory reductions in loan size across a sequence of loans. The Bureau believes that this step-down system will make it more likely that borrowers will successfully repay a loan or short loan sequence than would a limit on repeated lending, which might produce more defaults at the point that further re-borrowing would be prohibited. And, without the principal step-down approach's limits on the number of loans per year and the limit on the time in debt, some borrowers might effectively continue their cycle of re-borrowing by returning as soon the 30-day period has ended.

2. An Ability-To-Repay Requirement for Short-Term Loans With No Principal Step-Down Approach

The Bureau also considered the ATR approach without the principal step-down approach for covered short-term loans. Many consumer groups suggested this alternative. Without the principal step-down approach, lenders would be required to incur the expenses of the ATR approach for all payday loans. This effect, together with the impact of the ATR requirements, would have a larger impact on the total volume of payday loans that could be originated than would the rule. The Bureau simulated the effects of an ''ATR approach only'' policy, applying the same assumption that 33 percent of borrowers would qualify for an initial ATR loan (*see* part VII.F.1.c for more details on the Bureau's simulations); and, as described in part VII.F.1.c, using various assumptions about how borrowers behave when the loan sequences are cut off. In this simulation, loan volumes and revenues decreased by 92 to 93 percent. Borrowers who could not demonstrate an ability to repay the loan would be unable to take out a payday loan.

3. Disclosures as an Alternative to the Ability-To-Repay Requirement

The Bureau considered whether to require disclosures to borrowers warning of the risk of re-borrowing or default, rather than the ATR approach and the principal step-down approach, and the Bureau received a number of comments asserting that this approach would be sufficient or more advantageous, as discussed in the section-by-section analysis above.

The Bureau believes that a disclosure-only approach would have lower procedural costs for lenders than would the ATR approach or the principal step-down approach. Requiring lenders to prepare disclosures that were customized to a particular loan would impose some additional cost over current practices. If lenders could simply provide standardized disclosures, that would impose almost no additional cost on lenders.

A disclosure-only approach would also have substantially less impact on the volume of covered short-term lending. Evidence from a field trial of several disclosures designed specifically to warn of the risks of re-borrowing and the costs of re-borrowing showed that these disclosures had a marginal effect on the total volume of payday borrowing.[1269] Analysis by the Bureau of similar disclosures implemented by the State of Texas showed a reduction in loan volume of 13 percent, consistent with the limited magnitude of the impacts from the field trial.[1270]

The Bureau believes that a disclosure-only approach would also have substantially less impact on the harms consumers experience from long sequences of payday and single-payment vehicle title loans. Given that loans in very long sequences make up well over half of all payday and single-payment vehicle title loans, a reduction of 13 percent in total lending has only a marginal impact on those harms. In addition, analysis by the Bureau of the impacts of the disclosures in Texas shows that the probability of re-borrowing on a payday loan declined by approximately 2 percent once the disclosure was put in place, indicating that high levels of re-borrowing and long sequences of payday loans remain a significant source of consumer harm. A disclosure-only approach would also not change the lender's incentives to encourage borrowers to take out long sequences of covered short-term loans.

Given the evidence of unanticipated re-borrowing discussed above in Market Concerns—Underwriting, borrowers are likely to dismiss warnings of possible negative outcomes as not applying to them, and to not focus on disclosures of the possible harms associated with a negative outcome that they do not anticipate experiencing. To the extent the borrowers have thought about the likelihood that they themselves will default on a loan, a general warning about how often people default is unlikely to cause them to revise their own expectations about the chances they themselves will default. Additionally, there is evidence that borrowers are generally aware of the average durations of sequences, but in spite of this are not good at predicting whether or not they themselves will experience a long duration.[1271] As such, warnings about the potential for long durations are also unlikely to elicit changes in these borrowers' behaviors.

The Bureau received comments suggesting that the potential for disclosures to impact behavior in this market was not fully considered. They pointed to the research of Bertrand and Morse (cited above), to the Texas disclosure law (described and analyzed above), and for the finding that disclosures alerting borrowers to the availability of payment plans in certain States increase participation in said payment plans. While the Bureau believes disclosures can be effective in certain applications—especially when there is a market failure resulting in a lack of information about a more immediate and certain outcome—the available evidence suggests that a disclosure-only intervention in this market would yield substantially lower benefits to consumers than the ATR with principal step-down approach in the rule. The Bureau discusses this topic in the section-by-section analysis in part V as well.

4. Limitations on Withdrawing Payments From Borrowers' Accounts Without Disclosures

The Bureau considered including the limitation on lenders continuing to attempt to withdraw payment from borrowers' accounts after two sequential failed attempts to do so, but not including the required initial disclosure of usual payments or the additional disclosure in the event of unusual payments, or the notice that would be sent when a lender could no longer continue to attempt to collect payments from a borrower account. The impacts of excluding the upcoming payment notices would simply be to not cause lenders and borrowers to experience the benefits and costs that are described in the discussion of the impacts of those provisions. With regard to the notice that a lender could no longer attempt to withdraw payment from a borrower's account, the primary effect would be analogous, and the benefits and costs are described in the discussion of the

[1269] Marianne Bertrand and Adair Morse, ''Information Disclosure, Cognitive Biases and Payday Borrowing,'' 66 J. of Fin. 1865 (2011).

[1270] *See* CFPB Supplemental Findings, section 3.

[1271] See the discussion in Market Concerns—Underwriting and above in this section of Ronald Mann, ''Assessing the Optimism of Payday Loan Borrowers,'' 21 Sup. Ct. Econ. Rev. 105 (2013).

impacts of the provision that would require that notice. However, there may also have been a particular interaction if lenders had been prevented from continuing to attempt to withdraw payment from a borrower's account, but the borrower did not receive a notice explaining that. Absent some communication from the lender, the borrower may not realize that payment would no longer be withdrawn and, as a result, fail to make payments on a loan. Lenders would presumably reach out to borrowers to avoid this eventuality. In addition, absent the notice, borrowers may have been more likely to believe that they are required to provide lenders with a new authorization to continue to withdraw payments directly from their accounts, when they may have been better off using some alternative method of payment.

K. Potential Impact on Depository Creditors With $10 Billion or Less in Total Assets

The Bureau believes that depository institutions and credit unions with less than 10 billion dollars in assets rarely originate loans that are covered by this rule. To the extent depository institutions do make loans in this market, many of those loans would be exempted under § 1041.3(e) or (f) as alternative or accommodation loans.

L. Impact on Consumers in Rural Areas

Consumers in rural areas will have a greater reduction in the availability of covered short-term and longer-term balloon-payment loans originated through storefronts relative to consumers living in non-rural areas. As described in part VII.F.1.c, the Bureau estimates that the restrictions on making these loans will likely lead to a substantial contraction in the markets for storefront payday loans and storefront single-payment vehicle title loans.[1272] The Bureau has analyzed how State laws in Colorado, Virginia, and Washington that led to significant contraction in the number of payday stores in those States affected the geographic availability of storefront payday loans in those States.[1273] In those States, nearly all borrowers living in non-rural areas (defined as Metropolitan Statistical Areas or ''MSA'') still had physical access to a payday store.[1274] A substantial minority of borrowers living outside of MSAs, however, no longer had a payday store readily available following the contraction in the industry. In Colorado, Virginia, and Washington, 37 percent, 13 percent, and 30 percent of borrowers, respectively, would need to travel at least five additional miles to reach a store that remained open.[1275] In Virginia, almost all borrowers had a store that remained open within 20 miles of their previous store.[1276] And, in Washington 9 percent of borrowers would have to travel at least 20 additional miles.[1277] While many borrowers who live outside of MSAs do travel that far to take out a payday loan, many do not,[1278] and the additional travel distance resulting from closures of rural storefronts will impose a cost on these borrowers and may make borrowing from storefront lenders impractical or otherwise cause them to choose not to borrow from such lenders. Rural borrowers for whom visiting a storefront payday lender becomes impracticable retain the option to seek covered loans from online lenders, subject to the restrictions of State and local law.

The Bureau has not been able to study a similar contraction in the single-payment vehicle title market, but expects that the relative impacts on rural and non-rural consumers will be similar to what has occurred in the payday market. That is, rural consumers are likely to experience a greater reduction in the physical availability of single-payment vehicle title loans made through storefronts than borrowers living in non-rural areas.

The Bureau received numerous comments suggesting that the proposal's consideration of rural borrowers was incomplete. However, the specific shortcoming cited was almost universally that rural borrowers displaced by the contraction in storefront lenders may not retain access via online lenders if they do not have access to the Internet. In assessing this, the Bureau notes that rural populations are less likely to have access to high-speed broadband compared to the overall population (39 percent vs 10 percent).[1279] However, the bandwidth and speed required to access an online payday lender is minimal; even if high-speed access is currently beneficial to seeking an online loan, lenders can scale down the bandwidth requirements if the latent demand for loans amongst rural borrowers is sufficient to justify doing so. Additionally, the Bureau believes most potential borrowers in rural communities will likely be able to access the Internet by some means (*e.g.,* dial up, or access at the public library or school). While the ease of access and quality of experience for bandwidth-limited rural customers may be lower than for non-rural customers, the Bureau believes that there will still be reasonable access for rural customers in need of loans. Additionally, mobile broadband access is growing rapidly in rural areas, with 67 percent of adults in these areas reporting they own a smartphone.[1280]

Additional commenters noted that some online payday lenders operate in rural areas, and that some comprise large shares of their local economies. If these lenders are amongst the number the Bureau expects to contract, this could impose a cost on these rural communities that would be avoided by more densely populated areas experiencing similar labor market shocks. However, if the cost advantages realized by lenders in rural areas (*e.g.,* lower overhead, lower wages afforded by lower costs of living) give them a competitive advantage over online lenders in more densely populated areas, they may be less likely to contract. However, the Bureau acknowledges that at least some rural lenders will be substantially impacted by the rule.

Given the available evidence, the Bureau believes that, other than the greater reduction in the physical availability of covered short-term loans made through storefronts, a potentially small relative reduction in access to any covered short-term loans, and the risk of negative labor market shocks to some rural areas in which online lenders comprise a significant share of employment, consumers living in rural areas will not experience substantially different effects of the regulation than other consumers. OMB designates this rule as major under 5 U.S.C. 804(2).

VIII. 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

[1272] The Bureau reiterates that, given their limited prevalence, data on longer-term balloon-payment loans is scant. The effects on these types of loans are extrapolations from the empirical findings on short-term loans.

[1273] CFPB Supplemental Findings.

[1274] CFPB Supplemental Findings at 95 tbl. 17.

[1275] CFPB Supplemental Findings.

[1276] CFPB Supplemental Findings.

[1277] CFPB Supplemental Findings.

[1278] CFPB Supplemental Findings at 93 tbl. 15.

[1279] Darrell M. West and Jack Karsten, ''Rural and Urban America Divided by Broadband Access,'' Brookings Institution, Techtank, July 18, 2016, *available at https://www.brookings.edu/blog/techtank/2016/07/18/rural-and-urban-america-divided-by-broadband-access/.*

[1280] Pew Research Center, ''*Digital gap between rural and nonrural America persists.*'' May 19, 2017.

rulemaking requirements.[1281] These analyses must ''describe the impact of the proposed rule on small entities.'' [1282] 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.[1283] 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 the IRFA is required.[1284]

A. Overview of the Bureau's Approach

In the proposal the Bureau did not certify that the proposal would not have a significant 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 the Small Business Regulatory Enforcement Fairness Act (SBREFA) to consider the impact of the rule 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 proposal on those entities, drawing on the proposal's Section 1022(b)(2) Analysis. The Bureau also solicited comments on any costs, recordkeeping requirements, compliance requirements, or changes in operating procedures arising from the application of the proposal to small businesses; comments regarding any Federal rules that would duplicate, overlap, or conflict with the proposal; and comments 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 Section 1022(b)(2) Analysis 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.

Section 604(a) of the RFA sets forth the required elements of the FRFA. Section 604(a)(1) requires the FRFA to contain a statement of the need for, and objectives of, the rule.[1285] Section 604(a)(2) requires a statement of the significant issues raised by the public comments in response to the IRFA, a statement of the assessment of the Bureau of such issues, and a statement of any changes made in the proposed rules as a result of such comments.[1286] Section 604(a)(3) requires the response of the Bureau to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments.[1287] The FRFA further must contain a description of and, where feasible, provide an estimate of the number of small entities to which the final rule will apply.[1288]

Section 604(a)(5) requires a description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for the preparation of the report or record.[1289] Finally, section 604(a)(6) requires a description of the steps the Bureau has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected; and a description of the steps the agency has taken to minimize any additional cost of credit for small entities.[1290]

B. Rationale and Objectives of the Final Rule

As discussed in Market Concerns—Underwriting and Market Concerns—Payments above, the Bureau is concerned that practices in the market for payday, vehicle title, longer-term balloon-payment loans, and certain other longer-term loans utilizing leveraged payment mechanisms pose significant risk of harm to consumers. In particular, the Bureau is concerned about the harmful impacts on consumers of the practice of making these loans without making a reasonable determination that the consumer has the ability to repay the loan while paying for major financial obligations and basic living expenses. In addition, the Bureau is concerned that lenders in this market are using their ability to initiate payment withdrawals from consumers' accounts in ways that harm consumers.

To address these concerns, the Bureau is issuing the final rule pursuant to its authority under the Dodd-Frank Act in order to identify certain unfair and abusive acts or practices in connection with certain consumer credit transactions, to set forth requirements for preventing such acts or practices, to exempt loans meeting certain conditions from those requirements, to prescribe requirements to ensure that the features of those consumer credit transactions are fully, accurately, and effectively disclosed to consumers, and to prescribe processes and criteria for registration of information systems. The legal basis for the rule is discussed in detail in the legal authority analysis in part IV and in the section-by-section analysis in part V.

1. Public Comments on the IRFA and the Bureau's Views and Treatment of Those Comments

In accordance with section 603(a) of the RFA, the Bureau prepared an IRFA. In the IRFA, the Bureau estimated the possible costs for small entities with respect to the reporting, recordkeeping, and compliance requirements of the proposed rule against a pre-statute baseline. The Bureau requested comment on the IRFA.

A number of comments specifically addressed the IRFA or raised concerns regarding the burden of compliance with the rule for small entities. These comments are discussed first. Those comments that repeated the same issues raised by the Office of Advocacy of the U.S. Small Business Administration are addressed in the next section of the FRFA, below. While many additional comments referred to economic impacts affecting all entities, this FRFA discussion focuses on comments addressing impacts that are particular to or differential for small entities, supplementing the discussion in the section-by-section analysis in part V, and the consideration of the broader impacts in the Section 1022(b)(2) Analysis in part VII.

The significant comments addressing the IRFA or compliance burdens for small entities raised specific concerns falling into one of the following general categories: Anticipated direct costs to small entities unaccounted for or unquantified in the IRFA; direct costs to small entities accounted for but

[1281] 5 U.S.C. 601, *et seq.*

[1282] 5 U.S.C. 603(a).

[1283] 5 U.S.C. 605(b).

[1284] 5 U.S.C. 609.

[1285] 5 U.S.C. 604(a)(1).

[1286] 5 U.S.C. 604(a)(2).

[1287] 5 U.S.C. 604(a)(3).

[1288] 5 U.S.C. 604(a)(4).

[1289] 5 U.S.C. 604(a)(5).

[1290] 5 U.S.C. 604(a)(6).

underestimated; the lack of estimates for revenue losses specific to small entities; indirect effects on costs or prices faced by small entities not addressed; alternatives to the proposed rule which were not addressed or not appropriately considered; conflicts with existing laws and regulations not addressed; and categories of small entities not included in the analysis.

a. Comments Asserting Anticipated Direct Costs to Small Entities Not Accounted for in the IRFA

Commenters raised concerns about costs arising from several requirements of the rule which, they asserted, were unaccounted for or unquantified in the IRFA. First, commenters raised concerns that although the IRFA states that small entities may contract with attorneys, consultants, and vendors for assistance in complying with the ability-to-repay, disclosure, and reporting requirements of the rule, these costs were not made explicit. Related comments expressed concern that the need for small entities to contract with attorneys and vendors was in conflict with the Bureau's statement that professional skills beyond those of existing employees would be required in only rare circumstances.

The Bureau acknowledges that the need to contract with attorneys, consultants, and vendors may entail new costs for some small entities. For those small lenders which already maintain compliance processes for existing rules or regulations, the Bureau believes that the marginal added cost will be limited. In addition, some changes to the final rule which simplify the ability-to-repay verification and calculation requirements may lessen the need for these services. For those small entities that do not have relationships with these types of service providers under their current business process, the one-time costs may be larger.

Second, commenters expressed concern that the costs associated with the 36 month recordkeeping requirement of the rule would be more substantial than the discussion in the IRFA implied. In the case of recordkeeping, Regulation Z, implementing TILA, has a general record retention rule that lenders ''shall retain evidence of compliance'' for ''two years after the date disclosures are required to be made or action is required to be taken.'' [1291] In addition, as discussed in greater detail in the Background section, a number of States (including Colorado, Texas, Virginia, and Washington) have record retention requirements specific to payday loans, and numerous others have payday lending requirements which implicitly require some form of recordkeeping for compliance. Thus, the Bureau believes the 36 month recordkeeping requirement constitutes only an adjustment or extension of existing processes, with limited costs.

Still, commenters noted that lenders may incur some costs in developing a document retention policy, obtaining additional computer storage space to maintain the documents, programming the computer system to keep the documents for 36 months (and then delete them), training employees to comply with the recordkeeping requirements, and monitoring the implementation of these new procedures. The Bureau acknowledges these costs but believes them to be small. The development of retention policies should be straightforward, as the requirements are not opaque. Computer storage is inexpensive and even the largest lenders should not require more than one terabyte of additional storage to manage the retention of their files enterprise-wide (and that assumes their computer systems are already storage-constrained). As such, the Bureau estimates this cost to be less than $50 per lender if they wish to purchase additional storage themselves (*e.g.,* a portable hard drive) with any associated operations and maintenance costs, or $10 per month if they wish to lease storage (*e.g.,* from one of the many online cloud storage vendors).

There may be a need to develop procedures and train staff to retain materials that they would not normally retain in the ordinary course of business, as well as design systems to generate and retain the required records; those costs are included in earlier estimates of the costs of developing procedures, upgrading systems, and training staff. The Bureau also believes that maintaining the records will facilitate lenders' ability to comply with, and to document their compliance with, other aspects of the rule.

Third, commenters stated that tracking failed payment withdrawals would require new systems and procedures to be developed, at a cost not specified in the IRFA. While the Bureau acknowledges that some entities may face costs in modifying existing systems to comply with the recordkeeping and payment processing requirements of the rule, these requirements largely build on processes required by existing laws or necessitated by standard business practice.

b. Comments Asserting That Direct Costs to Small Entities Were Underestimated

Commenters raised concerns that, among the costs to small entities quantified in the IRFA, some of the Bureau's estimates of required time and financial costs were too low. Comments stated that compliance with the ability-to-repay requirements would be more costly and take employees longer than the Bureau had estimated. In particular, comments from industry trade associations and others asserted that the complexity of the proposed rule meant that verification and documentation of evidence for the ability-to-repay calculations would take longer than the Bureau's estimate of three to five minutes. Similarly, the commenters raised concerns that making the ability-to-repay determination would take longer than 15 to 20 minutes for manual decisions, and that the Bureau's statement that automated decisions would take essentially no time neglected to account for the time required for employees to monitor and maintain the automated decision-making system. Based on a survey of community banks, one industry trade association stated that respondents anticipate three hours of processing time on average to complete ability-to-repay verification and determination. As discussed in the section-by-section analysis for § 1041.5, part VII, and part VIII.C, in response to these concerns the Bureau has lessened the documentation requirements and simplified the calculations for the ability-to-repay determination in the following respects.

First, if verification evidence for income is not reasonably available, lenders may reasonably rely on stated amounts for income. Second, if the verification evidence for major financial obligations (*e.g.,* the borrower's credit report) does not include a particular obligation, lenders reasonably may rely on the stated amount of such obligation. Third, lenders will not be required to perform a credit check if they have already done so in the past 90 days and the consumer has not recently triggered a cooling-off period following a three-loan sequence. Fourth, lenders can use either a residual income or debt-to-income ratio when making the ability-to-repay determination, and the income and expenses can be based on a snapshot of the relevant calendar month rather than a time period which depends on the length of the loan. Fifth, lenders are not required to track the timing of income receipts or payments on major financial obligations. Finally, the Bureau has eliminated the

[1291] Regulation Z, 12 CFR 1026.25(a).

presumptions of unaffordability attached to the second and third loan in a sequence made under the ability-to-repay requirements, likely reducing the underwriting costs for these loans and increasing the number of consumers determined to have the ability to repay such a loan.

While these changes should reduce small entities' time costs for compliance with the ability-to-repay requirements, the Bureau has increased its estimate of the total time to conduct a manual ability-to-repay determination to 15–45 minutes. This estimate is consistent with comments received from a trade group representing covered lenders and information provided by Small Entity Representatives.

Commenters also raised concerns that the Bureau's time estimates for initial and periodic ongoing training estimates were too low. The Bureau has reviewed its assessment, and the broader set of comments, and has concluded that the training estimates laid out were reasonable. The Bureau has clarified that the training estimates are per employee engaged in the relevant business process.

Across a number of business processes, commenters raised concerns that the Bureau's estimates for the one-time costs to update policies, systems, and materials were underestimated. Regarding the disclosure requirements of the proposed rule, commenters stated that the time and costs to develop and ensure disclosures are accurate was underestimated. Similarly, commenters also stated that the estimated one-time costs to update credit reporting systems were too low. Finally, commenters stated that the Bureau's estimates of the costs to upgrade general computer systems—separate from licensed underwriting, credit reporting, and disclosure systems—were underestimated.

The Bureau appreciates these comments, but believes its estimates, and the cost framework used throughout the rule, are accurate. Throughout the rule, the Bureau has updated its estimates when appropriate, as in the case of possible setup costs for furnishing to multiple registered information systems, and believes these changes and the corresponding discussions in part VII where the Section 1022(b)(2) Analysis address these concerns.

c. Comments Asserting That the IRFA Did Not Estimate Lost Revenue for Smaller Entities

In the proposed rule, the Bureau estimated the loss of revenue from the proposal (see for example the section in the proposed Section 1022(b)(2) Analysis on ''Effect on Loan Volumes and Revenue From Underwriting Requirements and Restrictions on Certain Re-borrowing''). These costs, while not specifically estimated for small entities, were also referenced in the IRFA. Even assuming uniform compliance with the rule across large and small entities, the Bureau believes that the revenue impacts could differ between large and small entities. As noted below in more detail in the next section of this FRFA, the Bureau does not have data, and commenters provided only minimal evidence, that allow for the separate estimation of revenue impacts for small lenders. This issue is also discussed in part VII.F.1.c.

d. Comments Asserting Additional Indirect Effects on Costs and Prices

Commenters raised concerns regarding indirect costs and impacts on small entities resulting from the responses of lenders or other market participants to the rule. Several commenters stated that lenders themselves may face higher costs of obtaining credit due to the rule's impact on their profitability. Commenters also noted that lenders would face adjustment costs if they were to shift their portfolio of products away from covered loans. Related comments stated that if lenders were to forgo leveraged payment mechanisms on new originations in response to the rule, loan defaults were likely to increase. One commenter raised the concern that a reduction in the total size of the market could require vendors and consultants for small entities to raise prices charged for services provided. Commenters raised concern over possible increased litigation risk for lenders.

The Bureau appreciates these comments, and acknowledges that small lenders may face higher costs of credit, and that business practice adjustments would likely impact both the costs and revenues of these firms. Litigation risks and the pricing of vendor or consulting services could also change in response to the rule. While the exact form of these indirect costs is uncertain and the Bureau does not have the data available to estimate them, small lenders may face a relatively higher burden than larger lenders, given their smaller scale over which to spread fixed investments, and their potentially more limited access to financing options. These impacts are likely to be larger for small lenders that are highly specialized in short-term loans, or longer-term balloon-payment loans, or vehicle title loans not eligible for the exemption in § 1041.6, and smaller for those with more diversified product portfolios.

e. Comments Asserting That Certain Alternatives Were Not Addressed or Appropriately Considered

Regarding the IRFA, commenters expressed concern that the Bureau failed to provide a meaningful explanation for why it declined to pursue significant alternatives to the proposed rule. The IRFA included discussions of four significant alternatives to the proposed rule, which referred to more detailed analyses in the section-by-section discussions and the Section 1022(b)(2) Analysis. The Bureau believes its discussion of the alternatives provided in the IRFA, along with the alternatives considered in the proposal's Section 1022(b)(2) Analysis, provided sufficient explanation for the choice of regulatory approach. However, in order to provide improved detail and clarity, part VIII.D below includes additional discussion in response to comments.

The Bureau received a number of comments requesting exemptions for small entities. The Bureau is finalizing an exemption for accommodation loans, which are loans made by lenders that make fewer than 2,500 covered short-term loans and covered longer-term balloon-payment loans a year, and for which covered short-term loans and covered longer-term balloon-payment loans make up less than 10 percent of annual receipts. Additionally, the Bureau has adjusted its exemption for alternative loans to ensure that all PAL loans, and loans made by non-Federal credit unions which match the characteristic of a PAL loan, are exempt. This exemption should significantly reduce burden for smaller credit unions and other companies. Further, in response to comments the Bureau has substantially adjusted the rule in order to lessen the burdens of compliance, and also to reduce the degree to which the rule will impact total loan volumes, as noted above and in the section-by-section analysis for §§ 1041.5 and 1041.8. Even with these changes, there will still be a significant impact on small entities. The Bureau declines to completely exempt small entities because it believes many smaller entities, especially payday and vehicle title lenders, are engaging in the unfair and abusive practices identified in §§ 1041.4 and 1041.7. These practices cause substantial harm to consumers, and an exemption for small entities that would allow the practices to continue, albeit only at smaller companies, would substantially undermine the goals of

this rule and permit a significant amount of consumer harm to continue.

f. Comments Asserting That Conflicts With Existing Law Were Not Considered

The IRFA requires identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule. Several trade association commenters raised concerns that the Bureau had not identified E–SIGN and ECOA/Regulation B as duplicate or overlapping rules.

One comment stated that the proposed rule conflicts with E–SIGN and Regulation E because it adopts a different and new definition for consumer consent to receive electronic disclosures. The Bureau believes there is no conflict with E–SIGN because E–SIGN is not implicated by the consent process laid out in the rule. The Bureau decided not to use the E-Sign framework because of concerns raised in the SBREFA process about the burden of E–SIGN and the policy consideration of using an electronic disclosure consent process that is tailored to the small-dollar origination process and the situation the consumer is providing consent for. The Bureau also believes that the framework for obtaining consent for electronic notifications is more appropriate for the specific purposes of the notices in this rule. Another comment raised concerns about conflicts with EFTA, Regulation E, and Regulation CC. EFTA and Regulation E were discussed in the Market Concerns—Payments and section-by-section analysis for §§ 1041.7 and 1041.8. There are no provisions in EFTA, Regulation E, and Regulation CC that require or limit re-presentments of payments; those regulations do not conflict, duplicate or overlap with the limit on re-presentments. There are longstanding private network rules regarding repeat presentments that similarly do not raise conflicts.

One comment stated that the proposed rule conflicts with ECOA because it does not permit lenders to consider household income or expenses in making an ability-to-repay determination. Similarly, another comment expressed concern that considerations in ECOA and Regulation B for co-habitation arrangements, including ''spouses, cosigners, roommates, parents and adult children residing together, adult-children and elderly parents residing together,'' do not fit neatly into the proposal's documentation requirements for income, obligations, and living expenses. It also noted that ''the consumer reporting and registered information systems do not address how such information is reported under those varying arrangements.'' In the section-by-section analysis of § 1041.5, the Bureau discusses changes made to the ability-to-repay requirements of the final rule which now permits lenders to consider third party income to which a consumer has a reasonable expectation of access, to consider whether other persons are contributing towards the consumer's payment of major financial obligations, and to consider whether other persons are contributing towards the consumer's payment of basic living expenses when a lender chooses to itemize basic living expenses. As noted in the section-by-section analysis of § 1041.5 above, the Bureau believes that the requirements of the rule do not conflict with ECOA or Regulation B.[1292]

The Bureau also received comments suggesting that it had failed to consider the overlap between the proposal's provisions relating to registered information systems and to lenders' obligation to furnish to registered information systems, on the one hand, and the Fair Credit Reporting Act, Regulation V, the Gramm Leach Bliley Act, Regulation P or the Privacy Rule, and the Safeguards Rule, on the other hand. The commenter claimed that the Bureau had opened the door to numerous Regulation V issues relating to proper compliance with the duties of users and furnishers of information in registered information systems, and that the Bureau had not considered legal issues around the privacy and data security of said data. Yet these laws do not conflict with the rule in any way. To the contrary they would all have the same effect as they are applicable, and they would operate to address the issues raised by the commenter here in the same manner that they do in other areas of the economy.

g. Comments Asserting That Categories of Entities Were Not Included

A small number of commenters raised concerns regarding the impacts of the proposed rule on Indian tribes, which the IRFA did not separately address. The Bureau did not specifically analyze effects on Indian tribes, as it does not consider them to be small entities under the RFA, consistent with the interpretation provided by the Small Business Administration's comment. However, as many Tribal lenders may be small lenders, and many exist in rural areas, there is the potential for a more acute impact of the rule on Tribal lenders. This coincides with the impact on small and rural entities, and is therefore considered within the discussion of the impacts on those lenders.

2. Response to the Small Business Administration Chief Counsel for Advocacy

The SBA Office of Advocacy (Advocacy) provided a formal comment letter to the Bureau in response to the proposed rule. Among other things, this letter expressed concern about the following issues: The burden of complying with the ability-to-repay requirements; the lack of estimates for the impact of the ability-to-repay requirements on lender revenues; the length of the cooling-off period; the lack of an exception for loans to address an emergency; the interaction of the rule with State laws; the impact of the rule on credit unions, small communities, and Indian tribes; the lack of clarity of the business loan exemption; the effect of the rule on lender's own cost of credit; and the implementation date of the final rule.

Advocacy expressed concern that the ability-to-repay requirements in the proposed rule would be burdensome. The proposed rule would have required lenders to verify a consumer's net income, debt obligations, and housing expenses; project basic living expenses, net income, and obligations for a time period based on the term of the loan; and use this information to calculate the consumer's ability to repay the loan. Advocacy expressed concern that these requirements were complicated and extensive, turning an uncomplicated product into a complex product. Advocacy also expressed concern that many customers may not qualify for loans under the ability to repay requirements, particularly in small rural communities where lenders contend that lending is relationship based. Advocacy encouraged the Bureau to eliminate some of the ability-to-repay requirements, and suggested eliminating the credit check requirement as one possibility.

In response to comments from Advocacy and the public, the Bureau has made changes to the ability-to-repay requirements to reduce compliance costs for small entities of both obtaining evidence and making the ability-to-repay determination. For example, if verification evidence for income is not reasonably available, lenders may reasonably rely on stated amounts for

[1292] Under the RFA, rules are duplicative or overlapping if they are based on the same or similar reasons for the regulation, the same or similar regulatory goals, and if they regulate the same classes of industry. Rules are conflicting when they impose two conflicting regulatory requirements on the same classes of industry. The Bureau does not believe these standards are met in this case.

income. Additionally, verification evidence is no longer required for rental housing expenses. The Bureau estimates that these changes will reduce the time and expense of obtaining the information required to make an ability to repay determination, particularly for lenders serving customers with income or expenses that are difficult to document. And while the Bureau believes that the credit check requirement is necessary to properly project a consumer's debt obligations, lenders will not be required to perform a credit check if they have already done so in the past 90 days and the consumer has not recently triggered a cooling-off period following a three-loan sequence. This change maintains the integrity of the ability to repay requirements, while eliminating some marginal costs that both Advocacy and the Bureau suggest are higher for small lenders compared to larger lenders.

Additional changes were made to final rule to reduce the burden of making the ability-to-repay determination. Lenders can use either residual income or debt-to-income ratio when making the ability-to-repay determination, and the income and expenses can be based on a snapshot of the relevant calendar month rather than a time period which depends on the length of the loan. The Bureau expects these changes to ease implementation of the ability-to-repay requirement, particularly for smaller lenders who have less scale over which to recoup their fixed investment in compliance requirements. Finally, the Bureau has eliminated the presumptions of unaffordability attached to the second and third loan in a sequence made under the ability-to-repay requirements, likely reducing the underwriting costs for these loans and increasing the number of consumers determined to have the ability to repay such a loan.

In addition to compliance burdens, Advocacy expressed concern that the IRFA did not provide separate estimates of the impact of the ability-to-repay requirements, or the proposed rule as a whole, on revenue for small entities.

The Bureau does not have data that allow for the separate estimation of revenue impacts for small lenders. However, even assuming uniform compliance with the rule across large and small entities, the Bureau believes that the revenue impacts could differ between large and small entities. This possibility is discussed in part VII.F.1.c. However, that discussion is based on economic theory and reasoning, as the Bureau lacks the data required to differentiate the potential impacts on small and large lenders.

In contrast, two studies of loan-level data cited by commenters suggest the impacts on revenue may be similar for small and large entities.[1293] The studies separately simulated the effects of the proposed rule on a dataset of loans made by small lenders and on a dataset of loans made by large lenders, estimating total revenue reductions of 82% and 83% respectively. As described earlier, the Bureau's updated estimates in the Section 1022(b)(2) Analysis in part VII.F.1.c indicate smaller reductions in revenue from the final rule relative to the proposed rule; however, the Bureau is not able to differentiate the impacts for smaller entities. As a result, the Bureau has no evidence to suggest the revenue impacts on small entities will exceed those on larger entities, but remains sympathetic to that possibility. While not directly addressing revenue impacts, data on market concentration before and after payday lending laws were implemented in Colorado suggest that overall impacts were larger for small lenders. Colorado implemented its payday lending laws in 2010, and the share of storefront locations operated by the ten largest companies increased from 64% to 78% between 2009 and 2011.[1294] Note that the provisions and market context of the Colorado law differ from those in this rule.

Beyond the ability-to-repay requirements, Advocacy stated that the 30-day cooling-off period for re-borrowing will harm small businesses. As a result of the SBREFA panel, the Bureau reduced the cooling-off period from 60 to 30 days, for which Advocacy expressed appreciation. However, Advocacy asserted that the size of the revenue reductions estimated by the Bureau may be detrimental to small entities, and encouraged the Bureau to consider a shorter cooling-off period. Additionally, Advocacy noted that consumers may have bills due more frequently than monthly, in which case the 30-day cooling-off period may prevent the consumer from obtaining funds to meet these needs.

While the Bureau considered a range of cooling-off periods in the rulemaking process, the 30-day period was chosen, consistent with the re-borrowing period described in the section-by-section analysis above, so that borrowers must go a full billing cycle across all their liabilities before being permitted to take out another loan. This aligns the rule with the idea that short-term loans are intended to cover unexpected and temporary financial shocks, rather than persistent income deficits relative to expenses. See the section-by-section analysis for §§ 1041.4 and 1041.5 for more details.

Advocacy encouraged the Bureau to provide an exemption for consumers who have experienced and unexpected emergency, and to provide clear guidance on what qualifies as an emergency.

The Bureau has not created an exception for consumers who have experienced an emergency, as defining an emergency in such a way that does not allow broader evasion of the rule's requirements was not feasible. The Bureau believes that the alternatives to the ability-to-repay requirements present in the rule will make credit available to these consumers enduring unusual and nonrecurring expenses or drops in income. Specifically, the Bureau expects a consumer will be able to obtain no less than six loans in a 12-month period, without needing to satisfy any ability to repay requirements. The Bureau further expects this will be sufficient to address the vast majority of discrete events, such as emergencies and/or unexpected shocks to a consumer's income or expenses. This issue was discussed in greater depth above in Market Concerns—Underwriting.

Advocacy noted that many States have addressed the issue of payday loans through their own lawmaking. Small entities in States with existing payday lending laws have already made changes to their practices to comply with these laws. Advocacy encouraged the Bureau to recognize the States' ability to make the appropriate choices for their citizens and exempt from the rule small businesses that operate in States that currently have payday lending laws.

The Bureau has considered how this rule will interact with the existing State payday lending laws, which are

[1293] Arthur Baines et al., ''Economic Impact on Small Lenders of the Payday Lending Rules Under Consideration by the CFPB,'' Charles River Associates (2015), *available at http://www.crai.com/publication/economic-impact-small-lenders-payday-lending-rules-under-consideration-cfpb*; Arthur Baines et al., ''Economic Impact on Storefront Lenders of the Payday Lending Rules Proposed by the CFPB,'' Charles River Associates (2016), *available at http://www.crai.com/publication/economic-impact-storefront-lenders-payday-lending-rules-proposed-cfpb.* Note that these estimates assume lenders use the principal step-down approach, rather than ability-to-repay, due to data limitations.

[1294] *See* Adm'r of the Colo. Consumer Credit Unit, ''Colorado Payday Lending—July Demographic and Statistical Information: July 2000 through December 2009,''; Adm'r of the Colo. Consumer Credit Unit, ''Colorado Payday Lending—July Demographic and Statistical Information: July 2000 through December 2011,''; Adm'r of the Colo. Consumer Credit Unit, ''Colorado Uniform Consumer Credit Code: Annual Report Composites,'' *available at https://coag.gov/uccc/info/ar.*

discussed in greater detail in part II and part VII.C. Given the varying stringency of State payday lending laws, the Bureau has found evidence of harm to consumers even in States with these laws, as discussed earlier. As such, the Bureau believes that State exemptions would be inconsistent with the objectives of the rule. As noted earlier, for those lenders in States with stricter limits on lending, lenders will experience relatively low compliance costs and smaller impacts from the rule, as the rule will be relatively less binding on them.

Advocacy raised concerns that the Bureau had underestimated the rule's impact on small credit unions. In particular, Advocacy expressed concerns over the minimum length required for loans made by credit unions, under the PAL program administered by the NCUA. The proposed rule required loans made under the alternative PAL approach to be at least 46 days in length, while NCUA requires a minimum length of only 30 days. Advocacy also raised concerns that the all-in APR calculation required by the proposal may require credit unions to perform additional calculations to populate new forms, disclosures, compliance training, and other resources. Advocacy encouraged the Bureau to recognize the NCUA's expertise in the area of credit unions and exempt small credit unions from the proposed rule.

While the Bureau believes that exempting small credit unions entirely would be inconsistent with the objectives of the rule, several changes have been made to the final rule to address the concerns and burden for small credit unions. First, the Bureau has lowered the minimum length of a loan made under the PAL Approach to 30 days, bringing the requirements into alignment with those of NCUA. In addition, the Bureau has added a safe harbor to any loans made by Federal credit unions in compliance with the PAL program as set forth by NCUA. Finally, the Bureau has added an exemption for entities offering loans on an accommodation basis that would otherwise be covered loans, as evidenced by the volume of such loans that an entity makes in absolute terms and relative to its overall business. The Bureau believes that most small credit unions will fall within this exemption. Thus the compliance costs of the rule will be significantly reduced for small credit unions, as well as other small entities, which make loans that follow the PAL Approach.

Advocacy expressed concern about the impact of the rule on small rural communities and Tribal businesses and communities. Consumers in rural communities may have fewer options for accessing credit than consumers in more populated areas. Advocacy also stated that consolidation of lenders will be more difficult in these areas, and the resulting long distances between lenders may further reduce credit access. Advocacy relayed the concerns of Tribal representatives regarding the impact of the rule on their communities, many of which are economically disadvantaged. Advocacy encouraged the Bureau to consider the detrimental effects that the proposed rule may have on small rural communities, and to work with federally recognized Indian tribes to resolve the issue of Tribal consultation and Tribal sovereignty.

The Bureau acknowledges that the effects of the rule may be felt differentially in communities depending on their population density, density of lenders, income, and wealth. Specifically, the Bureau considered the impact of consolidation by estimating the additional distance a rural customer may have to travel after this rule in part VII.F.2.b.v and part VII.L. Regarding the specific effects on small lenders, the Bureau believes that the changes made in the final rule described above will mitigate some of the burden associated with compliance in rural or Tribal areas.

Advocacy thanked the Bureau for clarifying that the proposed rule would not apply to business loans, and encouraged the Bureau to provide clear guidance on what qualifies as a small business loan. Advocacy stated that some small businesses do use payday loan products to finance their businesses, and this source of financing is important to their operations. Advocacy raised concerns that even with clear guidance, sources of credit for small businesses may be reduced if a large percentage of payday lenders cease operating due to the rule. In addition, Advocacy noted that if the rule affects the revenue stream of payday lenders, those lenders themselves may face higher costs of credit. Advocacy encouraged the Bureau to perform a full analysis of the impact that this rulemaking may have on the cost of credit for small entities as required by the RFA.

The Bureau's rule is not intended to effect business loans, and the definitions of covered loans reflect this fact. Only loans extended to a consumer primarily for personal, family, or household purposes are covered by the rule. The Bureau appreciates the concern for a possible reduction in business loan availability due to lender exit, and acknowledges that those business relying on products offered by payday lenders may have to travel further to obtain credit, or seek credit from alternative sources. (*e.g.,* online lenders). Regarding the potentially higher cost of credit to payday lenders themselves, Advocacy's point is well taken. The Bureau's analysis has focused on estimating the direct effects of the rule, as the indirect effects rely heavily on lender's responses to the rule, and the Bureau does not have data which could be used to quantify these effects.

Finally, Advocacy encouraged the Bureau to allow at least 24 months for small entities to comply with the rule, in part because small entities have undergone a number of other regulatory changes, including due to the implementation of State lending laws and the Military Lending Act.

The Bureau appreciates the concern regarding the required adjustments to small entities operations, and has increased the compliance date of §§ 1041.2 through 1041.10, 1041.12, and 1041.13 to 21 months after publication of the rule in the **Federal Register**. The Bureau believes this is a sufficient period for compliance with the final rule.

C. Effect of the Rule on Small Entities

1. Description and Estimate of the Number of Small Entities to Which the Final Rule Will Apply

As discussed in the Small Business Review Panel Report, for purposes of assessing the impacts of the rule on small entities, ''small entities'' is defined in the RFA to include small businesses, small nonprofit organizations, and small government jurisdictions.[1295] A ''small business'' is determined by application of SBA regulations and reference to the North American Industry Classification System (NAICS) classifications and size standards.[1296] Under such standards, banks and other depository institutions are considered ''small'' if they have $550 million or less in assets, and for most other financial businesses, the threshold is average annual receipts (*i.e.,* annual revenues) that do not exceed $38.5 million.[1297]

During the SBREFA process, the Bureau identified four categories of small entities that may be subject to the proposed rule for purposes of the RFA. The categories and the SBA small entity

[1295] 5 U.S.C. 601(6).

[1296] 5 U.S.C. 601(3). The current SBA size standards are found on SBA's Web site at *http://www.sba.gov/content/table-small-business-size-standards.*

[1297] 5 U.S.C. 601(3).

thresholds for those categories are: (1) Commercial banks, savings associations, and credit unions with up to $550 million in assets; (2) nondepository institutions engaged in consumer lending or credit intermediation activities with up to $38.5 million in annual revenue; (3) nondepository institutions engaged in other activities related to credit intermediation activities with up to $20.5 million in annual revenue; and (4) mortgage and non-mortgage loan brokers with up to $7.5 million in annual revenue.

The following Table 1 provides the Bureau's revised estimates of the number and types of entities that may be affected by the rule: [1298]

BILLING CODE 4810–AM–P

Table 1: Estimated Number and Types of Affected Entities and Small Entities by NAICS Code

NAICS Industry	NAICS Code	Small Entity Threshold	Estimated Number of Total Entities	Estimated Number of Small Entities
Commercial Banks, Savings Institutions, and Credit Unions[a]	522110; 522120; 522130	$550 million in assets	12,256	10,447
Nondepository Institutions Engaged in Consumer Lending or Credit Intermediation Activities[b]	522298	$38.5 million in annual revenues	5,523	5,403
Nondepository Institutions Engaged in Other Activities Related to Credit Intermediation Activities[b]	522390	$20.5 million in annual revenues	4,701	4,549
Mortgage and Non- Mortgage Loan Brokers[b]	522310	$7.5 million in annual revenues	7,007	6,817
Consumer Lending[b]	522291	$38.5 million in annual revenues	3,206	3,130

[a] Total number of entities and small entities was estimated based on the 2017 Call Report.

[b] Total number of entities and small entities was estimated based on the Census Bureau's Statistics of U.S. Businesses for 2012.

As discussed in the Small Business Review Panel Report, the NAICS categories are likely to include firms that do not extend credit that will be covered by the rule. In addition, some of these firms may qualify for exemptions under the rule. The following Table 2 provides the Bureau's estimates, not accounting for exemptions, of the numbers and types of small entities within particular segments of primary industries that may be affected by the rule:

[1298] In the Small Business Review Panel Report at Chapter 9.1, a preliminary estimate of affected entities and small entities was included in a similar format (a chart with clarifying notes). *See* Small Business Review Panel Report, at 26 tbl. 9.1.1, 27 tbl. 9.1.2.

Table 2: Estimated Number and Types of Affected Small Entities by Industry Category

NAICS Industry	NAICS Code	Small Entity Threshold	Estimated Number of Small Entities
Storefront Payday Lenders[a]	522390	$20.5 million in annual revenue	2,218
Storefront Payday Lenders Operating Primarily as Brokers[a]	522310	$7.5 million in annual revenue	229
Storefront Installment Lenders[b]	522291	$38.5 million in annual revenue	1,577
Storefront Vehicle Title Lenders[c]	522298	$38.5 million in annual revenue	812
Online Lenders[d]	522298; 522390	$20.5 million or 38.5 million in annual revenue	124
Credit Unions[e]	522130	$550 million in assets	5,603
Banks and Thrifts[e]	522110; 522120	$550 million in assets	4,844

[a] The number of small storefront payday lenders is estimated using licensee information from State financial regulators, firm revenue information from public filings and non-public sources, and, for a small number of States, industry market research relying on telephone directory listings. State reports supplemented by location information prepared by Steven Graves and Christopher Peterson, available at *http://www.csun.edu/~sg4002/research/data/US_pdl_addr.xls*. Based on these sources, there are approximately 2,256 storefront payday lenders in the United States. Based on the publicly-available revenue information, at least 38 of the firms have revenue above the small entity threshold. Most of the remaining firms operate a very small number of storefronts. Therefore, while some of the firms without publicly available information may have revenue above the small entity threshold, in the interest of being inclusive all are assumed to be small entities.

[b] The number of storefront installment lenders is estimated from industry estimates of the overall number of installment loan storefront locations and information on the locations of the largest storefront installment lenders. John Hecht, "Alternative Financial Services: Innovating to Meet Customer Needs in an Evolving Regulatory Framework," (2014) (Stephens, Inc., slide presentation) (on file). A recent industry report estimated 8,000 to 10,000 storefront installment lender locations. Based on publicly-available information, approximately 58 of the largest firms have revenue above the small entity threshold. They operate approximately 5,718 storefronts, leaving, on the high end, up to 4,300 storefronts operated by small entities. The number of small entities likely is on the high end of potential estimates of the number of entities that would be affected by the rule, as not all small storefront installment lenders originate covered loans.

[c] The number of small storefront vehicle title lenders is estimated using licensee information from State financial regulators and revenue information from public filings and from non-public sources. State reports supplemented with estimates from Susanna Montezemolo, "Payday Lending Abuses and Predatory Practices: The State of Lending in America & Its Impact on U.S. Households," (Ctr. for Responsible Lending, 2013), *available at http://www.responsiblelending.org/sites/default/files/uploads/10-payday-loans.pdf*. Based on these sources, there are approximately 842 storefront vehicle title lenders in the United States. Based on the revenue information, at least 30 of the firms have revenue above the small entity threshold. Most of the remaining firms operate a very small number of storefronts. Therefore, while some of the firms without publicly available information may have revenue above the small entity threshold, in the interest of being inclusive they are all assumed to be small entities.

d The number of small online lenders is estimated based on Bureau outreach and on estimates from nonPrime101, Report 1: Profiling Internet Small-Dollar Lending – Basic Demographics and Loan Characteristics, at 3 (2014), https://www.nonprime101.com/wp- content/uploads/2015/02/Profiling-Internet-Small-Dollar-Lending-Final.pdf.

[e] These numbers of small entities were estimated based on 2017 Call Report data. The estimates for banks and credit unions are on the high end of small entities subject to the rule, as some do not originate covered loans, though the Bureau's information on this point is incomplete.

BILLING CODE 4810–AM–C

2. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule

The rule imposes new reporting, recordkeeping, and compliance requirements on certain small entities. These requirements and the costs associated with them are discussed below.

a. Reporting Requirements and Their Costs for Small Entities

The rule imposes new reporting requirements to ensure that lenders making covered short-term and longer-term balloon-payment loans under the rule have access to timely and reasonably comprehensive information about a consumer's current and recent borrowing history with other lenders, as discussed in the section-by-section analysis for § 1041.10. This section discusses these reporting requirements and their associated costs on small entities.

Lenders making covered short-term or longer-term balloon-payment loans are required to furnish information about those loans to all information systems that have been registered with the Bureau for 180 days or more, have been provisionally registered with the Bureau for 180 days or more, or have subsequently become registered after being provisionally registered (generally referred to here as registered information systems). At loan consummation, the information furnished needs to include identifying information about the borrower, the type of loan, the loan consummation date, the principal amount borrowed or credit limit (for certain loans), and the payment due dates and amounts. While a loan is outstanding, lenders need to furnish any update to information previously furnished pursuant to the rule within a reasonable period of time following the event prompting the update. And when a loan ceases to be an outstanding loan, lenders must furnish the date as of which the loan ceased to be outstanding and whether all amounts owed in connection with the loan were paid in full, including the amount financed, charges included in the cost of credit, and charges excluded from the cost of credit.

Furnishing information to registered information systems will require small entities to incur one-time and ongoing costs. One-time costs include those associated with establishing a relationship with each registered information system and developing policies and procedures for furnishing the loan data.[1299] Lenders using automated loan origination systems will likely modify those systems, or purchase upgrades to those systems, to incorporate the ability to furnish the required information to registered information systems.[1300]

The ongoing costs will be those of accurately furnishing the data.[1301]

[1299] If multiple registered information systems exist, lenders may be able to contract with a third party to furnish to all registered information systems on their behalf. This third party may be one of the registered information systems, as they may provide this service to make them a more attractive option to lenders.

[1300] Some software vendors that serve lenders that make payday and other loans have developed enhancements to enable these lenders to report loan information automatically to existing State reporting systems.

[1301] The Bureau also received comments noting that lenders will have to incur additional costs associated with dispute resolution. One commenter specifically noted that consumers would dispute negative data contained on their reports which would require investigation along with company responses. The commenter cited a figure of $50,000 per year to handle these disputes and other costs of furnishing. The Bureau acknowledges there may be ancillary costs associated with such disputes, but believes that furnishing accurate data and compliance with the records management requirements should mitigate the costs associated with dispute resolutions (*e.g.* confirming the existence of the loan and any payments made). Additionally, many of the costs associated are expected to be borne by registered information systems, as the FCRA allows consumers to dispute

Lenders with automated loan origination and servicing systems with the capacity to furnish the required data will have very low ongoing costs. Lenders that furnish information manually will likely do so through a web-based form, which the Bureau estimates will take three minutes to fill out for each loan at the time of consummation, when information is updated (as applicable), and when the loan ceases to be an outstanding loan. If multiple registered information systems exist, it may be necessary to incur this cost multiple times, unless there are services that furnish to all registered information systems on behalf of a lender.[1302]

The Bureau notes that some lenders in States where a private third-party operates a database on behalf of State regulators are already required to provide information similar to that required under the rule, albeit to a single entity; such lenders thus have experience complying with this type of requirement. Where possible, the Bureau will also encourage the development of common data standards for registered information systems in order to reduce the costs of providing data to multiple information systems.

In addition to the costs of developing procedures for furnishing the specified information to registered information systems, lenders will also need to train their staff in those procedures. The Bureau estimates that lender personnel engaging in furnishing information will require approximately half an hour of initial training in carrying out the tasks described in this section and 15 minutes of periodic ongoing training per year.

b. Recordkeeping Requirements and Their Costs for Small Entities

The rule imposes new data retention requirements for the requirements to assess borrowers' ability to repay and alternatives to the requirement to assess borrowers' ability to repay for both short-term and longer-term balloon-payment loans by requiring lenders to maintain evidence of compliance in electronic tabular format for certain records. The retention period is 36 months, as discussed above in the section-by-section analysis for § 1041.12.

The data retention requirement in the rule may result in costs to small entities. The Bureau believes that not all small lenders currently maintain data in an electronic tabular format. To comply with the record retention provisions, therefore, lenders originating short-term or longer-term balloon-payment loans may be required to reconfigure existing document production and retention systems. For small entities that maintain their own compliance systems and software, the Bureau does not believe that adding the capacity to maintain data in an electronic tabular format will impose a substantial burden. The Bureau believes that the primary cost will be one-time systems changes that could be accomplished at the same time that systems changes are carried out to comply with the provisions of §§ 1041.5 and 1041.6 of the rule. Similarly, small entities that rely on vendors will likely rely on vendor software and systems to comply in part with the data retention requirements.

In addition to the costs described above, lenders will also need to train their staff in record retention procedures. The Bureau estimates that lender personnel engaging in recordkeeping will require approximately half an hour of initial training in carrying out the tasks described in this section and 15 minutes of periodic ongoing training per year.

c. Compliance Requirements and Their Costs for Small Entities

The analysis below discusses the costs of compliance for small entities of the following major provisions: (i) Ability-to-repay requirements for covered short-term and longer-term balloon-payment loans, including the requirement to obtain a consumer report from a registered information system; and a conditional exemption providing an alternative to those specific underwriting criteria for short-term loans, including notices to consumers taking out loans originated under this alternative; and (ii) provisions relating to payment practices that limit continuing attempts to withdraw money from borrowers' accounts after two consecutive failed attempts; and payment notice requirements.

The discussions of the impacts are organized into the two main categories of provisions listed above—those relating to underwriting and those related to payments. Within each category, the discussion is organized to facilitate a clear and complete consideration of the impacts of these major provisions of the rule on small entities.

In considering the potential impacts of the rule, the Bureau takes as the baseline for the analysis the regulatory regime that currently exists for the covered products and covered persons.[1303] These include State laws and regulations; Federal laws, such as the MLA, FCRA, FDCPA, TILA, EFTA, ECOA, E–SIGN, and the regulations promulgated under those laws; and, with regard to depository institutions that make covered loans, the guidance and policy statements of those institutions' prudential regulators.[1304]

The rule includes several exemptions, and in places it is useful to discuss their benefits, costs, and impacts relative to those of the core provisions of the proposed regulation. The baseline for evaluating the full potential benefits, costs, and impacts of the proposal, however, is the current regulatory regime as of the issuance of the proposal.

The discussion here is confined to the direct costs to small entities of complying with the requirements of the rule. Other impacts, such as the impacts of limitations on loans that could be made under the rule, are discussed at length above. The Bureau believes that, except where otherwise noted, the impacts discussed there would apply to small entities.

i. Underwriting for Covered Short-Term and Longer-Term Balloon-Payment Loans

(a). Requirement To Assess Borrowers' Ability To Repay

The rule will require that lenders determine that applicants for short-term and longer-term balloon-payment loans have the ability to repay the loan while still meeting their major financial obligations and paying basic living expenses. For purposes of this discussion, the practice of making loans after determining that the borrower has the ability to repay the loan will be referred to as the ''ATR approach.'' Lenders making loans using the ATR approach will need to comply with several procedural requirements when

information directly with the consumer reporting agency. As such, the $50,000 figure cited by the commenter seems inflated. Instead, the Bureau believes the costs associated with these activities are included in the ongoing costs associated with furnishing to registered information systems.

[1302] Should there be multiple registered information systems, the Bureau expects that one or more registered information systems or other third parties will offer to furnish information to all registered information systems on behalf of the lender.

[1303] 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.

[1304] *See, e.g.,* FDIC, Fin. Institution Letter FIL–14–2005, ''Payday Lending Programs: Revised Examination Guidance,'' (Revisd 2015), *available at https://www.fdic.gov/news/news/financial/2005/fil1405.pdf*; OCC, Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Product, 78 FR 70624 (Nov. 26, 2013); Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 78 FR 70552 (Nov. 26, 2013).

originating loans. The Bureau's assessment of the benefits, costs, and other relevant impacts on small entities of these procedural requirements are discussed below.

The Bureau believes that many lenders use automated systems when underwriting loans and will modify those systems, or purchase upgrades to those systems, to incorporate many of the procedural requirements of the ATR approach. The costs of modifying such a system or purchasing an upgrade are discussed below, in the discussion of the costs of developing procedures, upgrading systems, and training staff.

(1). Consulting Lender's Own Records and Costs to Small Entities

Under the rule, lenders will need to consult their own records and the records of their affiliates to determine whether the borrower had taken out any prior short-term loans or longer-term balloon-payment loans that were still outstanding or were repaid within the prior 30 days. To do so, a lender will need a system for recording loans that can be identified as being made to a particular consumer and a method of reliably accessing those records. The Bureau has concluded that lenders will most likely comply with this requirement by using computerized recordkeeping. A lender operating a single storefront will need a system of recording the loans made from that storefront and accessing those loans by consumer. A lender operating multiple storefronts or multiple affiliates will need a centralized set of records or a way of accessing the records of all of the storefronts or affiliates. A lender operating solely online will presumably maintain a single set of records; if it maintained multiple sets of records, it will need a way to access each set of records.

The Bureau believes that most small entities already have the ability to comply with this provision, with the possible exception of those with affiliates that are run as separate operations. Lenders' own business needs likely lead them to have this capacity. Lenders need to be able to track loans in order to service the loans. In addition, lenders need to track the borrowing and repayment behavior of individual consumers to reduce their credit risk, such as by avoiding lending to a consumer who has defaulted on a prior loan. And most States that allow payday lending have requirements that implicitly require lenders to have the ability to check their records for prior loans to a loan applicant, including limitations on renewals or rollovers or cooling-off periods between loans. Despite these various considerations, however, there may be some lenders that currently do not have the capacity to comply with this requirement.

Small entities that do not already have a records system in place will need to incur a one-time cost of developing such a system, which may require investment in information technology hardware and/or software. Lenders may instead contract with a vendor to supply part or all of the systems and training needs.

As noted above, the Bureau believes that many lenders use automated loan origination systems and will modify those systems or purchase upgrades to those systems such that they would automatically access the lender's own records. For lenders that access their records manually, rather than through an automated origination system, the Bureau estimates that accessing and utilizing these records in the ATR determination will take an average of nine minutes of an employee's time.

The Bureau received no comments from industry or trade groups asserting that a substantial number of lenders currently lack the ability to check their record for prior loans, or that implementing such a system would constitute an undue cost or burden. The Bureau believes this supports the cost framework laid out here.

(2). Obtaining a Consumer Report From a Registered Information System; Costs to Small Entities

Under the rule, small entities will have to obtain a consumer report from a registered information system containing timely information about an applicant's borrowing history, if one or more such systems were available. The Bureau believes that many lenders likely already obtain from third parties some of the information that will be included in the registered information system data, such as in States where a private third-party operates a database containing loan information on behalf of the State regulator or for their own risk management purposes, such as fraud detection. However, the Bureau recognizes that there also is a sizable segment of lenders making short-term loans that operate only in States without a State-mandated loan database and that make lending decisions without obtaining any data from a specialty consumer reporting agency.

As noted above, the Bureau believes that many small entities use automated loan origination systems and will modify those systems or purchase upgrades to those systems such that they will automatically order a report from a registered information system during the lending process. For lenders that order reports manually, the Bureau estimates that it will take approximately nine minutes on average for a lender to request a report from a registered information system and utilize the report in the ATR determination. For all lenders, the Bureau expects that access to a registered information system will be priced on a ''per-hit'' basis, where a hit is a report successfully returned in response to a request for information about a particular consumer at a particular point in time. Based on industry outreach, the Bureau estimates that the cost to small entities would be $0.50 per hit, based on pricing in existing relevant consumer reporting markets.

The Bureau received comments from trade groups and lenders discussing the estimated ''per hit'' costs of the registered information system reports. The comments were approximately evenly split as to whether the estimated costs were substantially too low, slightly too low, or approximately accurate. A trade group representing mostly large depository institutions argued the cost is substantially too low, and cited its members' average costs of $10.97 to purchase a credit report. Given the drastic difference between this cost and those stated by other commenters, the Bureau believes the credit reports referred to (*e.g.,* tri-bureau credit reports) are not the type that would be purchased for this type of loan. This comparison did not seem relevant to the cost to obtain a report from a registered information system. A trade group representing small-dollar lenders also asserted the estimated cost was too low, citing its members' average cost of $1 to obtain a consumer report from a nationwide consumer reporting reporting agency. Finally, a large small-dollar lender asserted the $0.50 estimate ''appears to be right.'' Given that registered information systems are likely to collect much less data than are collected by consumer reporting agencies operating in the market today, it follows that the cost of a report from a registered information system should be lower. Given that the comments received directly from lenders regarding the expected costs of a registered information system report argued the estimate is generally accurate, the Bureau continues to believe the cost per hit estimate of $0.50 is reasonable.

(3). Assessing Ability To Repay Based on Information and Verification Evidence About Income and Major Financial Obligations; Costs to Small Entities

Lenders making loans under the ATR approach are required to collect information about the amount of income and major financial obligations, make reasonable efforts to verify that information, and use that information to make an ability-to-repay determination.

The Bureau believes that many small entities that make short-term loans, such as small storefront lenders making payday loans, already obtain some information on consumers' income. Many of these lenders, however, only obtain income verification evidence the first time they make a loan to a consumer or for the first loan following a substantial break in borrowing. Other lenders, such as some vehicle title lenders or some lenders operating online, may not currently obtain income information at all, let alone verification evidence for that information, before issuing loans. In addition, many consumers likely have multiple income sources that are not all currently documented in the ordinary course of short-term lending. Under the rule, consumers and lenders might have incentives to provide and gather more income information than they do currently in order to establish the borrower's ability to repay a given loan. The Bureau believes that most lenders that originate short-term loans and longer-term loans with balloon payments do not currently collect information on applicants' major financial obligations, let alone attempt to verify obligations, nor do they determine consumers' ability to repay a loan, as will be required under the rule.

There are two types of costs entailed in making an ATR determination: The cost of obtaining and verifying evidence where possible and the cost of making an ATR determination consistent with that evidence.

As noted above, many lenders already use automated systems when originating loans. These lenders will likely modify those systems or purchase upgrades to those systems to automate many of the tasks that would be required by the rule.

Under the rule, small lenders will be required to obtain a consumer report from a nationwide consumer reporting agency to verify the amount of payments for debt obligations, unless that lender has obtained a report in the preceding 90 days or the consumer has triggered a cooling-off period at the end of a three-loan sequence. As such, these consumer reports will typically only be necessary to obtain for the first loan in a new sequence of borrowing that begins more than 90 days since the last consumer reports was obtained. This will be in addition to the cost of obtaining a report from a registered information system, though the Bureau expects some registered information systems will provide consolidated reports. Based on industry outreach, the Bureau believes these reports will cost approximately $2.00 for small entities. As with the ordering of reports from registered information systems, the Bureau believes that many small entities will modify their loan origination system or purchase an upgrade to that system to allow the system to automatically order a consumer report from a nationwide consumer reporting agency during the lending process at a stage in the process where the information is relevant. For lenders that order reports manually, the Bureau estimates that it would take approximately nine minutes on average for a lender to request a report and utilize it in the ATR determination.

Small entities that do not currently collect income or verification evidence for income will need to do so. The Bureau estimates it will take roughly three to five minutes per application for lenders that use a manual process to gather and review information a for consumers who have straightforward documentation (*e.g.,* pay stubs), and incorporate the information into the ATR determination. Some industry commenters suggested this value was too low in the proposal, often citing cases where consumers may not have regular income from sources that provide documentation. The Bureau notes that many lenders already require such information prior to initiating loans. Additionally, the rule now allows stated income to be used in appropriate cases, mitigating the time costs associated with more rigorous verification efforts. As such, the Bureau believes the time estimates provided here to be reasonable.

Some consumers may visit a lender's storefront without the required documentation and may have income for which verification evidence cannot be obtained electronically.

Small entities making loans online may face particular challenges obtaining verification evidence, especially for income. It may be feasible for online lenders to obtain scanned or photographed documents as attachments to an electronic submission; the Bureau understands that some online lenders are doing this today with success. And services that use other sources of information, such as checking account or payroll records, may mitigate the need for lenders to obtain verification evidence directly from consumers. Additionally, for consumers with cash income that is not deposited into a depository account, lenders will be allowed to rely on stated information, minimizing the lenders' costs and the chance that a consumer is unable to complete an application.

Once information and verification evidence on income and major financial obligations has been obtained, the lender must use that information and evidence to make a reasonable determination that the consumer will have the ability to repay the contemplated loan. In the process of considering the information collected about income and major financial obligations, lenders will need to estimate an amount that the borrower needs for basic living expenses. They may do this in a number of ways, including, for example, collecting information directly from borrowers, using available estimates published by third parties, or basing it on their experience with similarly situated consumers.

In total, the Bureau estimates that obtaining a statement from the consumer and taking reasonable steps to verify income and required payments for major financial obligations, projecting the consumer's residual income, estimating the consumer's basic living expenses, and arriving at a reasonable ATR determination will take essentially no additional time for a fully automated electronic system and between 15 and 45 minutes for a fully manual system. Numerous industry commenters suggested the estimate provided by the Bureau in the proposal (15 to 2010 minutes) was too low. In response to these comments, the Bureau has increased its estimated time to manually underwrite these loans, but also notes that all major financial obligations should be obtainable either from a consumer report or consumer statement (in the example of rental expense).

Further total costs will depend on the existing utilization rates of and wages paid to staff that will spend time carrying out this work. To the extent that existing staff has excess capacity (that is, that a lender's employees have time that is not fully utilized), the extra time to process applications for loans made via the ATR approach should not result in higher wage bills for the lender. Further, as the Bureau expects the majority of loans to be made via the principal step-down approach, the expected increase in staff hours necessary to comply with the new

procedural requirements should be modest. Still, to the extent that lenders must increase staff and/or hours to comply with the procedural requirements, they may experience increased costs from hiring, training, wages, and benefits.

Dollar costs include a report from a registered information system costing $.50 and a consumer report from a nationwide consumer reporting agency containing housing costs estimates costing $2.00. Lenders relying on electronic services to gather verification information about income would face an additional small cost.

(4). Developing Procedures, Upgrading Systems, and Training Staff; Costs to Small Entities

Small entities will need to develop procedures to comply with the requirements of the ATR approach and train their staff in those procedures. Many of these requirements do not appear qualitatively different from many practices that most lenders already engage in, such as gathering information and documents from borrowers and ordering various types of consumer reports.

Developing procedures to make a reasonable determination that a borrower has an ability to repay a loan without re-borrowing and while paying for major financial obligations and living expenses is likely to be a challenge for many small entities. The Bureau expects that vendors, law firms, and trade associations are likely to offer both products and guidance to lenders, potentially lowering the cost of developing procedures as service providers can realize economies of scale. Lenders must also develop a process for estimating borrowers' basic living expenses if they choose not to make an individual determination for each customer. Some lenders may rely on vendors that provide services to determine ability to repay that include estimates of basic living expenses. Some methods of conducting an analysis to determine estimates of basic living expenses could be quite costly. There are a number of government data sources and online services, however, that lenders may be able to use to obtain living expense estimates. Additionally, lenders may rely on their experiences with similarly situated consumers in making this estimate, reducing the need to rely on individual measures or third parties.

As noted above, the Bureau believes that many lenders use automated systems when originating loans and would incorporate many of the procedural requirements of the ATR approach into those systems. This will likely include an automated system to make the ability-to-repay determination; subtracting the component expense elements from income itself is quite straightforward and should not require substantial development costs. The Bureau believes small lenders that use automated loan origination systems rely on licensed software. Depending on the nature of the software license agreement, the Bureau estimates that the one-time cost to upgrade this software will be $10,000 for lenders licensing the software at the entity-level and $100 per seat for lenders licensing the software using a seat-license contract. Given the price differential between the entity-level licenses and the seat-license contracts, the Bureau believes that only small entities with a significant number of stores will rely on the entity-level licenses. One trade group commented that they believe this to be too low an estimate of the associated costs, citing a survey of their members. However, the trade group's members are not predominately involved in making loans that will be covered under the rule, so it is unclear how their estimates relate to the systems contemplated here. Additionally, the vast majority of the comments from more directly-related trade groups, lenders, etc. remained silent on these estimates, despite the invitation to provide feedback. As such, the Bureau has not changed these values from those put forth in the proposal.

The Bureau estimates that lender personnel engaging in making loans would require approximately 4 hours per employee of initial training in carrying out the tasks described in this section and 2 hours per employee of periodic ongoing training per year.[1305]

(b). Principal Step-Down Approach as an Alternative to the Underwriting Criteria Used To Assess the Borrower's Ability To Repay; Costs to Small Entities

The rule includes an alternative approach, as opposed to using the underwriting criteria specified in § 1041.5, for originating certain short-term loans as in § 1041.6. In this section, the practice of making loans by complying with the alternative requirements under § 1041.6 will be referred to as the ''principal step-down approach.''

The procedural requirements of the principal step-down approach will generally have less impact on small lenders than the requirements of the ATR approach. Lenders that make short-term loans under the principal step-down approach will not have to obtain information or verification evidence about income or major financial obligations, estimate basic living expenses, or complete an ability-to-repay determination prior to making loans.

The rule will instead require only that lenders making loans under § 1041.6 consult their internal records and those of affiliates, access reports from a registered information system, furnish information to all registered information systems, and make an assessment as part of the origination process that certain loan requirements (such as principal limitations and restrictions on certain re-borrowing activity) are met. The requirement to consult the lender's own records is slightly different than under the ATR Approach, as the lender must check the records for the prior 12 months. This is unlikely to have different impacts on small lenders, however, as any system that allows the lender to comply with the requirement to check its own records under the ATR approach should be sufficient for the principal step-down approach and vice-versa. A lender will also have to develop procedures and train staff.

Small entities making short-term loans under the principal step-down approach will be required to provide borrowers with a disclosure, described in the section-by-section analysis of § 1041.6(e), with information about their loans and about the restrictions on future loans taken out using the principal step-down approach. One disclosure will be required at the time of origination of a first principal step-down approach loan, where a borrower had not had a principal step-down approach loan within the prior 30 days. The other disclosure will be required when originating a third principal step-down approach loan in a sequence because the borrower will therefore be unable to take out another principal step-down approach loan within 30 days of repaying the loan being originated. The disclosures will need to be customized to reflect the specifics of the individual loan.

The Bureau believes that all small entities have some disclosure system in place to comply with existing disclosure requirements. Lenders may enter data directly into the disclosure system, or the system may automatically collect data from the lenders' loan origination system. For disclosures provided via mail, email, or text message, some disclosure systems forward the information necessary to prepare the

[1305] Note that the Bureau expects that this training would be in addition to the training relating to furnishing loan information as discussed in part VIII.C.2.a and recordkeeping as discussed in part VIII.C.2b.

disclosures to a vendor in electronic form, and the vendor then prepares and delivers the disclosures. For disclosures provided in person, disclosure systems produce a disclosure that the lender then provides to the borrower.

Respondents will incur a one-time cost to upgrade their disclosure systems to comply with new disclosure requirements.

The Bureau believes that small lenders generally rely on licensed disclosure system software. Depending on the nature of the software license agreement, the Bureau estimates that the cost to upgrade this software will be $10,000 for lenders licensing the software at the entity-level and $100 per seat for lenders licensing the software using a seat- license contract. Given the price differential between the entity-level licenses and the seat- license contracts, the Bureau believes that only small lenders with a significant number of stores will rely on entity-level licenses.

In addition to the upgrades to the disclosure systems, the Bureau estimates that small storefront lenders will pay $200 to a vendor for a standard electronic origination disclosure form template.

The Bureau estimates that providing disclosures in stores will take a store employee two minutes and cost $0.10.

ii. Payment Practices and Related Notices for Certain Covered Loans; Costs to Small Entities

The rule limits how lenders initiate payments on a covered loan from a borrower's account and imposes two notice requirements relating to such payments. The impacts of these provisions are discussed here for all covered loans.

Note that the Bureau believes that the requirement to assess ATR before making a short-term or longer-term balloon-payment loan, or to comply with one of the conditional exemptions, will reduce the frequency with which borrowers receive loans that they do not have the ability to repay. This should make unsuccessful payment withdrawal attempts less frequent, and lessen the impacts of the limitation on payment withdrawal attempts and the requirement to notify consumers when a lender is no longer permitted to attempt to withdraw payments from a borrower's account.

(a). Limitation on Payment Withdrawal Attempts; Costs to Small Entities

The rule prevents lenders from attempting to withdraw payment from a consumer's account if two consecutive prior attempts to withdraw payment made through any channel are returned for nonsufficient funds. The lender can resume initiating payment if the lender obtains from the consumer a new and specific authorization to collect payment from the consumer's account.

The impact of this restriction depends on how often the lender attempts to collect from a consumers' account after more than two consecutive failed transactions and how often they succeed in doing so. Based on industry outreach, the Bureau understands that some small entities already have a practice of not continuing to attempt to collect using these means after one or two failed attempts. These lenders will not incur costs from the restriction. Additionally, some depository institutions disallowed repeated attempts to collect using these means; lenders attempting to collect from such depositories would also not incur costs from this restriction.

While not specific to small lenders, the Section 1022(b)(2) Analysis discusses the Bureau's analysis of ACH payment request behavior of online lenders making payday or payday installment loans. The Bureau found that only 7 to 10 percent of the payments attempted through the ACH system came after two failed payments requests.[1306] Under the restriction, lenders can still seek payment from their borrowers by engaging in other lawful collection practices. As such, the preceding are high-end estimates of the impact of this restriction on the collection efforts of these lenders. These other forms of lawful collection practices, however, may be more costly for lenders than attempting to collect directly from a borrower's account. After the limitation is triggered by two consecutive failed attempts, lenders are required to send a notice to consumers. To seek a new and specific authorization to collect payment from a consumer's account, the lender can send a request with the notice and may need to initiate additional follow-up contact with the consumer. The Bureau believes that this will most often be done in conjunction with general collections efforts and will impose little additional cost on lenders.

To the extent that lenders assess returned item fees when an attempt to collect a payment fails and lenders are subsequently able to collect on those fees, this rule may reduce lenders' revenues.

Small entities will also need the capability of identifying when two consecutive payment requests have failed. The Bureau believes that the systems small entities use to identify when a payment is due, when a payment has succeeded or failed, and whether to request another payment will have the capacity to identify when two consecutive payments have failed, and therefore this requirement will not impose a significant new cost.

The Bureau received comments stating that tracking failed payment withdrawals would require new systems and procedures to be developed, at a cost not specified in the IRFA. While the Bureau acknowledges that some small entities may face costs in modifying existing systems to comply with the recordkeeping and payment processing requirements of the rule, these requirements largely build on processes required by existing laws or necessitated by standard business practice.

(b). Required Notice To Collect Directly From a Borrower's Account; Costs to Small Entities

The rule will require lenders to provide consumers with a notice prior to the first lender-initiated attempt to withdraw payment from consumers' accounts, including ACH entries, post-dated signature checks, remotely created checks, remotely created payment orders, and payments run through the debit networks. The notice will be required to include the date the lender will initiate the payment request, the payment channel, the amount of the payment, the breakdown of that amount to principal, interest, and fees, the loan balance remaining if the payment succeeds, the check number if the payment request is a signature check or RCC, and contact information for the consumer to reach the lender. There are separate notices required prior to unusual payments.

This provision will not apply to small lenders making loans under the PAL approach or making accommodation loans.

The costs to small entities of providing these notices will depend heavily on whether they are able to provide the notice via email, text messages, or on paper at origination or will have to send notices through regular mail. In practice, the Bureau expects most small lenders to provide the notice of initial payment withdrawal at origination, minimizing the transmission costs. This can either be done via a written disclosure (at a storefront), or as a PDF attachment or Web page sent via an email or text (for either storefront or online lenders). The variation in costs of notices provided

[1306] CFPB Report on Supplemental Findings, at 150 tbl. 32. These impacts may be lower now than they were at the time covered by the data analyzed by the Bureau, due to changes in industry practices and to changes in the rules governing the ACH system.

after origination (either regular notices, or notices in advance of unusual payments) is due in part to differences in transmission costs between different channels. Most borrowers are likely to have Internet access or a mobile phone capable of receiving text messages, and during the SBREFA process multiple SERs reported that most borrowers, when given the opportunity, opt in to receiving notifications via text message. The Bureau has intentionally structured the rule to encourage transmission by email or text message because it believes those channels are the most effective for consumers, as well as less burdensome for lenders. However, should the lender choose to send paper notifications via regular mail, they would incur higher costs of transmission, as well as administrative costs associated with providing the notification early enough to ensure sufficient time for it to be received by the consumer.

The Bureau believes that small entities that will be affected by the new disclosure requirements have some disclosure system in place to comply with existing disclosure requirements, such as those imposed under Regulation Z, 12 CFR part 1026, and Regulation E, 12 CFR part 1005. Lenders enter data directly into the disclosure system or the system automatically collects data from the lenders' loan origination system. For disclosures provided via mail, email, text message, or immediately at the time of origination, the disclosure system often forwards to a vendor, in electronic form, the information necessary to prepare the disclosures, and the vendor then prepares and delivers the disclosures. Lenders will incur a one-time burden to upgrade their disclosure systems to comply with new disclosure requirements.

Small lenders will need to update their disclosure systems to compile necessary loan information to send to the vendors that would produce and deliver the disclosures relating to payments. The Bureau believes small lenders rely on licensed disclosure system software. Depending on the nature of the software license agreement, the Bureau estimates that the cost to upgrade this software would be $10,000 for lenders licensing the software at the entity-level and $100 per seat for lenders licensing the software using a seat-license contract. For lenders using seat license software, the Bureau estimates that each location for small lenders has on average three seats licensed. Given the price differential between the entity-level licenses and the seat-license contracts, the Bureau believes that only small entities with a significant number of stores will rely on the entity-level licenses.

Small entities with disclosure systems that do not automatically pull information from the lenders' loan origination or servicing system will need to enter payment information into the disclosure system manually so that the disclosure system can generate payment disclosures. The Bureau estimates that this will require two minutes per loan in addition to the two minutes to provide the disclosures. Lenders will need to update this information if the scheduled payments were to change.

For disclosures delivered through the mail, the Bureau estimates that vendors would charge two different rates, one for high volume mailings and another for low volume mailings. The Bureau understands that small entities will likely generate a low volume of mailings and estimates vendors will charge such lenders $1.00 per disclosure. For disclosures delivered through email, the Bureau estimates vendors will charge $0.01 to create and deliver each email such that it complies with the requirements of the rule. For disclosures delivered through text message, the Bureau estimates vendors will charge $0.08 to create and deliver each text message such that it complies with the requirements of the rule. The vendor would also need to provide either a PDF attachment of the full disclosure or a Web page where the full disclosure linked to in the text message is provided. The cost of providing this PDF attachment or web disclosure is included in the cost estimate of providing the text message. Finally, for disclosures delivered on paper at origination, the Bureau estimates costs will be $0.10 per disclosures.

Again, the Bureau believes that virtually all notifications will be provided at the time of origination (for regular notices), or electronically via text or email (for notifications of unusual payments). As such, the mailing costs discussed here are expected to be almost completely avoided.

(c). Required Notice When Lender Can No Longer Collect Directly From a Borrower's Account; Costs to Small Entities

The rule will require a lender that has made two consecutive unsuccessful attempts to collect payment through any channel from a borrower's account to provide a borrower, within three business days of learning of the second unsuccessful attempt, with a consumer rights notice explaining that the lender is no longer able to attempt to collect payment directly from the borrower's account, along with information identifying the loan and a record of the two failed attempts to collect funds.

The requirement will impose on small entities the cost of providing the notice. Lenders already need to track whether they can still attempt to collect payments directly from a borrower's account, so identifying which borrowers should receive the notice should not impose any additional cost on lenders. The Bureau also expects that lenders normally attempt to contact borrowers in these circumstances to identify other means of obtaining payment. If they are contacting the consumer via mail, the lender will be able to include the required notice in that mailing.

The Bureau expects that small entities will incorporate the ability to provide this notice into their payment notification process. The Bureau estimates that vendors will charge $1.00 per notice for small entities that send a small volume of mailing. For disclosures delivered through email, the Bureau estimates vendors will charge $0.01 to create and deliver each email such that it complies with the requirements of the proposed rule. For disclosures delivered through text message, the Bureau estimates vendors will charge $0.08 to create and deliver each text message. The vendor would also need to provide either a PDF attachment of the full disclosure or a Web page where the full disclosure linked to in the text message would be provided. The cost of providing this PDF attachment or web disclosure is included in the cost estimate of providing the text message.

(d). Estimate of Small Entities Subject to the Rule and Costs for Preparing Reports and Records

Section 604(a)(5) of the RFA also requires an estimate of the type of professional skills necessary for the preparation of the reports or records. The Bureau does not anticipate that, except in certain rare circumstances, any professional skills will be required for recordkeeping and other compliance requirements of this rule that are not otherwise required in the ordinary course of business of the small entities affected by the proposed rule. Parts VIII.C.2.b and VIII.C.2.c summarize the recordkeeping and compliance requirements of the rule that will affect small entities.

As discussed above, the Bureau believes that vendors will update their software and provide small creditors with the ability to retain the required data. The one situation in which a small entity would require professional skills

that are not otherwise required in the ordinary course of business will be if a small creditor does not use computerized systems to store information relating to originated loans and therefore will either need to hire staff with the ability to implement a machine-readable data retention system or contract with one of the vendors that provides this service. The Bureau believes that the small entities will otherwise have the professional skills necessary to comply with the proposed rule.

The Bureau believes efforts to train small entity staff on the updated software and compliance systems will be reinforcing existing professional skills sets above those needed in the ordinary course of business. In addition, although the Bureau acknowledges the possibility that certain small entities may have to hire additional staff as a result of certain aspects of the rule, the Bureau has no evidence that such additional staff will have to possess a qualitatively different set of professional skills than small entity staff employed currently. The Bureau presumes that additional staff that small entities may need to hire will generally be of the same professional skill set as current staff.

Several commenters raised concerns that the initial implementation of the rule's requirements may require legal or consulting skills beyond those of employees at typical small lenders. The Bureau acknowledges this concern, and believes these costs are accounted for in earlier estimates of the one-time costs of developing procedures, upgrading systems, and training staff.

D. The Bureau's Efforts To Minimize the Economic Impact on Small Entities

Section 604(a)(6) of the RFA requires the Bureau to describe in the FRFA the steps taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes. The Bureau has taken numerous steps to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statues. These include simplification of the ability-to-repay requirements, expanded exclusions from the rule, expanded exemptions for alternative loans and accommodation loans, increased flexibility and reduced number of required payment disclosures, and a later compliance date of §§ 1041.2 through 1041.10, 1041.12, and 1041.13, as described in the Bureau's responses to public comments and the SBA Office for Advocacy.

1. Consideration of Alternatives to the Final Rule and Their Impact on Small Entities

In the IRFA, four significant alternatives to the proposed rule were considered, but the Bureau decided that none of them would accomplish the stated objectives of Title X of the Dodd-Frank Act while minimizing the impact of the rule on small entities.[1307] In this section, the Bureau presents its considerations in that regard. Four significant alternatives are briefly described and their impacts on small entities relative to the adopted provisions are discussed below. The discussion of each alternative includes a statement of the factual, policy, and legal reasons for selecting the adopted provisions and rejecting the significant alternatives. The alternatives discussed here are:

- Limits on re-borrowing of short-term loans without an ability-to-repay requirement;
- An ATR requirement for short-term loans with no principal step-down approach;
- Disclosures as an alternative to the ability-to-repay requirement; and
- Limitations on withdrawing payments from borrowers' accounts without disclosures.

In addition to the significant alternatives outlined above, the Bureau has considered comments on alternatives to specific provisions of the rule, discussed in the section-by-section analysis of each corresponding section.

a. Limits on Re-Borrowing Short-Term Loans Without an Ability-To-Repay Requirement

As an alternative to the ability-to-repay requirements in § 1041.5 for short-term loans, the Bureau considered a limitation on the overall number of short-term loans that a consumer could take in a loan sequence or within a short period of time. This alternative would limit consumer injury from extended periods of re-borrowing on short-term loans. However, as discussed further in part VII.J.1, the Bureau has concluded that a limitation on re-borrowing without a requirement to determine the consumer's ability to repay the loan will not provide sufficient protection against consumer injury from making a short-term loan without reasonably determining that the consumer will have the ability to repay the loan. Accordingly, the Bureau finds that a limitation on repeat borrowing alone will not be consistent with the stated objectives of Title X to identify and prevent unfair, deceptive, or abusive acts or practices. However, the Bureau has made changes to the ability-to-pay requirements to reduce the burden of compliance for small entities, as described in the Bureau's responses to the SBA Office for Advocacy.

[1307] 5 U.S.C. 603(c).

b. An ATR Requirement for Short-Term Loans With No Principal Step-Down Approach

The Bureau considered adopting the ability-to-repay requirements in § 1041.5 for short-term loans without adopting the alternative approach for originating certain short-term loans as described in § 1041.6. In the absence of the principal step-down approach, lenders would be required to make a reasonable determination that a consumer has the ability to repay a loan and to therefore incur the costs associated with the ability-to-repay requirements for every short-term application that they process. However, the Bureau has determined that the principal step-down approach will provide sufficient structural consumer protections while reducing the compliance burdens associated with the ATR approach on lenders and permitting access to less risky credit for borrowers for whom it may be difficult for lenders to make a reasonable determination that the borrower has the ability to repay a loan, but who may nonetheless have sufficient income to repay the loan and also meet other financial obligations and basic living expenses. Comments from small entities expressed particular concern that the ability-to-repay requirements would be burdensome given their smaller scale over which to spread fixed cost investments.

In addition, comments suggested that because small lenders base some lending decisions on their personal relationship with customers, the full ability-to-repay assessment was not necessary for all loan originations. Accordingly, the Bureau has concluded that providing the principal step-down approach as described in § 1041.6 will help minimize the economic impact of the proposed rule on small entities without undermining consumer protections in accordance with the stated objectives of Title X to identify and prevent unfair, deceptive, or abusive acts or practices.

c. Disclosures as an Alternative To the Ability-To-Repay Requirement

As an alternative to substantive regulation of the consumer credit transactions that will be covered by the rule, the Bureau considered whether enhanced disclosure requirements would prevent the consumer injury that is the focus of the rule and minimize the impact of the proposal on small entities.

In particular, the Bureau considered whether the disclosures required by some States would accomplish the stated objectives of Title X of the Dodd-Frank Act. The Bureau is adopting, in §§ 1041.6 and 1041.9 requirements that lenders make specific disclosures in connection with certain aspects of a transaction.

Analysis by the Bureau indicates that a disclosure-only approach would have substantially less impact on the volume of short-term lending, but also would have substantially less impact on the harms consumers experience from long sequences of payday and single-payment vehicle title loans, as discussed further in part VII.J.3. Because the Bureau has concluded that disclosures alone would be ineffective in warning borrowers of those risks and preventing the harms that the Bureau seeks to address with the proposal, the Bureau is not adopting disclosure as an alternative to the ability-to-repay and other requirements of the rule.

d. Limitations on Withdrawing Payments From Borrowers' Accounts Without Disclosures

The Bureau considered including the prohibition on lenders attempting to collect payment from a consumer's accounts when two consecutive attempts have been returned due to a lack of sufficient funds in § 1041.8 unless the lender obtains a new and specific authorization, but not including the required disclosures of upcoming payment withdrawals (both the first and unusual payments) or the notice by lenders to consumers alerting them to the fact that two consecutive withdrawal attempts to their account have failed and the lender can therefore no longer continue to attempt to collect payments from a borrower account. This alternative would reduce lenders' one-time costs of upgrading their disclosure systems as well as the incremental burden of providing each disclosure. The Bureau finds, however, that in the absence of the disclosures, consumers face an increased risk of injury in situations in which lenders intend to initiate a withdrawal in a way that deviates from the loan agreement or prior course of conduct between the parties. In addition, consumers would face an increased risk of believing that they are required to provide lenders with a new authorization to continue to withdraw payments directly from their accounts when they may be better off using some alternative method of payment.

To reduce the burden for small entities and other lenders, after the first payment, any payment withdrawals for usual payments do not require a disclosure under the final rule. Relative to the proposed rule, this change will decrease compliance costs for small entities while still accomplishing the stated objectives of the rule.

Some commenters expressed concern that the Bureau's position on disclosures—that they are an insufficient alternative to the ability-to-repay requirements but beneficial for payment withdrawals, is inconsistent. Yet the mandated disclosures in these situations address different harms. The primary harm from re-borrowing is unlikely to be resolved by disclosures that long sequences may occur, as borrowers seem to understand the average duration of sequences,[1308] but cannot accurately predict their own durations.[1309] For re-borrowing, providing evidence about the average would therefore not address the market failure. However, disclosures about payments are different, as they are more immediate and inform the borrower of more certain events. Therefore, the Bureau has determined that they are an appropriate intervention here.

2. The Bureau's Efforts To Minimize Any Additional Cost of Credit for Small Entities

Section 603(d) of the RFA requires the Bureau to consult with small entities about the potential impact of the proposed rule on the cost of credit for small entities and related matters. In the FRFA, the Bureau is required to provide a description of the steps taken to minimize any additional cost of credit for small entities.[1310] To satisfy these statutory requirements, the Bureau provided notification to the Chief Counsel that the Bureau would collect the advice and recommendations of the same small entity representatives identified in consultation with the Chief Counsel through the SBREFA process concerning any projected impact of the proposed rule on the cost of credit for small entities.[1311] The Bureau sought to collect the advice and recommendations of the small entity representatives during the Small Business Review Panel Outreach Meeting regarding the potential impact on the cost of business credit because, as small financial service providers, the SERs could provide valuable input on any such impact related to the proposed rule.[1312]

At the Small Business Review Panel Outreach Meeting, the Bureau asked the SERs a series of questions regarding issues about the cost of business credit.[1313] The questions were focused on two areas. First, the SERs were asked whether, and how often, they extend to their customers covered loans to be used primarily for personal, family, or household purposes but that are used secondarily to finance a small business, and whether the proposals then under consideration would result in an increase in their customers' cost of credit. Second, the Bureau inquired as to whether the proposals under consideration would increase the SERs' cost of credit.

In general, some of the SERs expressed concern that the proposals under consideration would have a substantial impact on the cost of business credit, both by reducing access to credit for their customers that are using loans to fund small business operations and by making their businesses less creditworthy. As discussed in the Small Business Review Panel Report, the Panel recommended that the Bureau cover only loans extended primarily for personal, family, or household purposes.[1314] The Bureau agreed with that recommendation, and so in § 1041.3(b), the rule does in fact specify that it will apply only to loans that are extended to consumers primarily for personal, family, or household purposes. Loans that are made primarily for a business, commercial, or agricultural purpose will not be subject to this part. Nonetheless, the Bureau recognizes that some covered loans may nonetheless be used in part or in whole to finance small businesses, both with or without the knowledge of the lender.

The Bureau also recognizes that the rules will impact the ability of some small entities to access business credit themselves. As discussed more fully part VII.J and just above in this section, in developing the rule, the Bureau has considered a number of alternative approaches, yet for the reasons stated it has concluded that none of them would achieve the statutory objectives while minimizing the cost of credit for small entities.

[1308] *See, e.g.,* Marianne Bertrand and Adair Morse, "Information Disclosure, Cognitive Biases and Payday Borrowing," 66 J. of Fin. 1865 (2011).

[1309] Ronald Mann, "Assessing the Optimism of Payday Loan Borrowers," 21 Sup. Ct. Econ. Rev. 105 (2013).

[1310] 5 U.S.C. 604(a)(6).

[1311] *See* 5 U.S.C. 603(d)(2)(A). The Bureau provided this notification as part of the notification and other information provided to the Chief Counsel with respect to the SBREFA process pursuant to section 609(b)(1) of the RFA.

[1312] *See* 5 U.S.C. 603(d)(2)(B).

[1313] *See* Small Business Review Panel Report, at 25.

[1314] *See id.* at 33.

IX. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA),[1315] Federal agencies are generally required to seek approval from the Office of Management and Budget (OMB) 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 the following aspects of the rule would be information collection requirements under the PRA: (1) Development, implementation, and continued use of notices for covered short-term loans made under § 1041.6, upcoming payment notices (including unusual payment notices), and consumer rights notices; (2) obtaining a consumer report from a registered information system; (3) furnishing information about consumers' borrowing behavior to each registered information system; (4) retrieval of borrowers' national consumer report information; (5) collection of consumers' income and major financial obligations during the underwriting process; (6) obtaining a new and specific authorization to withdraw payment from a borrower's deposit account after two consecutive failed payment transfer attempts; (7) application to be a registered information system; (8) biennial assessment of the information security programs for registered information systems; (9) retention of loan agreement and documentation obtained when making a covered loan, and electronic records of origination calculations and determination, records for a consumer who qualifies for an exception to or overcomes a presumption of unaffordability, loan type and term, and payment history and loan performance.

The Bureau received a fairly significant number of comments pertaining to the expected burden of the proposal, including burdens accounted for in the PRA. Some of those comments specifically noted the PRA, and argued that the proposed collections of information did not fill a legitimate regulatory purpose. Specifically, they claimed that the paperwork burden, in particular the collection and verification of income and debt information, did not serve a legitimate purpose and would not advance the goal of ensuring that loans would be made based on a reasonable assessment of the borrower's ability to repay.

As explained in detail in the section-by-section analysis, especially the section-by-section analysis for § 1041.5, as well as the Section 1022(b)(2) Analysis in part VII, the Bureau has significantly reduced the burden associated with the rule's requirements in response to comments it received which stated concerns that the proposed requirements would be too onerous. As finalized, and as described above, the Bureau is confident that each of the collections of information is worth the burden and serves an important purpose. Specific to the verification of income and debt requirements, the Bureau believes that these requirements are not overly burdensome. In many cases, covered lenders already verify income. Verification of debt will be achievable through obtaining consumer reports, an approach that would not burden consumers, and is consistent with industry practices in most other credit markets. These requirements advance the stated goal of assessing ability to repay because they ensure that lenders verify essential variables for a reasonable ability-to-repay determination, and they combat significant risks associated with lenders' potential evasion of the rule.

Pursuant to 44 U.S.C. 3507, the Bureau will publish a separate notice in the **Federal Register** announcing the submission of these information collection requirements to OMB as well as OMB's action on 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.*

Title of Collection: Payday, Vehicle Title, and Certain High-Cost Installment Loans.

OMB Control Number: 3170–0064.

Type of Review: New collection (Request for a new OMB control number).

Affected Public: Private Sector.

Estimated Number of Respondents: 9,900.

Estimated Total Annual Burden Hours: 8,199,815.

List of Subjects in 12 CFR Part 1041

Banks, Banking, Consumer protection, Credit, Credit Unions, National banks, Registration, Reporting and recordkeeping requirements, Savings associations, Trade practices.

Authority and Issuance

■ For the reasons set forth above, the Bureau adds 12 CFR part 1041 to read as follows:

PART 1041—PAYDAY, VEHICLE TITLE, AND CERTAIN HIGH–COST INSTALLMENT LOANS

Subpart A—General

Sec.
1041.1 Authority and purpose.
1041.2 Definitions.
1041.3 Scope of coverage; exclusions; exemptions.

Subpart B—Underwriting

1041.4 Identification of unfair and abusive practice.
1041.5 Ability-to-repay determination required.
1041.6 Conditional exemption for certain covered short-term loans.

Subpart C—Payments

1041.7 Identification of unfair and abusive practice.
1041.8 Prohibited payment transfer attempts.
1041.9 Disclosure of payment transfer attempts.

Subpart D—Information Furnishing, Recordkeeping, Anti-Evasion, and Severability

1041.10 Information furnishing requirements.
1041.11 Registered information systems.
1041.12 Compliance program and record retention.
1041.13 Prohibition against evasion.
1041.14 Severability.
Appendix A to Part 1041—Model Forms
Supplement I to Part 1041—Official Interpretations

Authority: 12 U.S.C. 5511, 5512, 5514(b), 5531(b), (c), and (d), 5532.

[1315] 44 U.S.C. 3501 *et seq.*

Subpart A—General

§ 1041.1 Authority and purpose.

(a) *Authority.* The regulation in this part is issued by the Bureau of Consumer Financial Protection (Bureau) pursuant to Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5481, *et seq.*).

(b) *Purpose.* The purpose of this part is to identify certain unfair and abusive acts or practices in connection with certain consumer credit transactions and to set forth requirements for preventing such acts or practices. This part also prescribes requirements to ensure that the features of those consumer credit transactions are fully, accurately, and effectively disclosed to consumers. This part also prescribes processes and criteria for registration of information systems.

§ 1041.2 Definitions.

(a) *Definitions.* For the purposes of this part, the following definitions apply:

(1) *Account* has the same meaning as in Regulation E, 12 CFR 1005.2(b).

(2) *Affiliate* has the same meaning as in 12 U.S.C. 5481(1).

(3) *Closed-end credit* means an extension of credit to a consumer that is not open-end credit under paragraph (a)(16) of this section.

(4) *Consumer* has the same meaning as in 12 U.S.C. 5481(4).

(5) *Consummation* means the time that a consumer becomes contractually obligated on a new loan or a modification that increases the amount of an existing loan.

(6) *Cost of credit* means the cost of consumer credit as expressed as a per annum rate and is determined as follows:

(i) *Charges included in the cost of credit.* The cost of credit includes all finance charges as set forth by Regulation Z, 12 CFR 1026.4, but without regard to whether the credit is consumer credit, as that term is defined in 12 CFR 1026.2(a)(12), or is extended to a consumer, as that term is defined in 12 CFR 1026.2(a)(11).

(ii) *Calculation of the cost of credit*—(A) *Closed-end credit.* For closed-end credit, the cost of credit must be calculated according to the requirements of Regulation Z, 12 CFR 1026.22.

(B) *Open-end credit.* For open-end credit, the cost of credit must be calculated according to the rules for calculating the effective annual percentage rate for a billing cycle as set forth in Regulation Z, 12 CFR 1026.14(c) and (d).

(7) *Covered longer-term balloon-payment loan* means a loan described in § 1041.3(b)(2).

(8) *Covered longer-term loan* means a loan described in § 1041.3(b)(3).

(9) *Covered person* has the same meaning as in the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5481(6).

(10) *Covered short-term loan* means a loan described in § 1041.3(b)(1).

(11) *Credit* has the same meaning as in Regulation Z, 12 CFR 1026.2(a)(14).

(12) *Electronic fund transfer* has the same meaning as in Regulation E, 12 CFR 1005.3(b).

(13) *Lender* means a person who regularly extends credit to a consumer primarily for personal, family, or household purposes.

(14) *Loan sequence* or *sequence* means a series of consecutive or concurrent covered short-term loans or covered longer-term balloon-payment loans, or a combination thereof, in which each of the loans (other than the first loan) is made during the period in which the consumer has a covered short-term loan or covered longer-term balloon-payment loan outstanding and for 30 days thereafter. For the purpose of determining where a loan is located within a loan sequence:

(i) A covered short-term loan or covered longer-term balloon-payment loan is the first loan in a sequence if the loan is extended to a consumer who had no covered short-term loan or covered longer-term balloon-payment loan outstanding within the immediately preceding 30 days;

(ii) A covered short-term or covered longer-term balloon-payment loan is the second loan in the sequence if the consumer has a currently outstanding covered short-term loan or covered longer-term balloon-payment loan that is the first loan in a sequence, or if the consummation date of the second loan is within 30 days following the last day on which the consumer's first loan in the sequence was outstanding;

(iii) A covered short-term or covered longer-term balloon-payment loan is the third loan in the sequence if the consumer has a currently outstanding covered short-term loan or covered longer-term balloon-payment loan that is the second loan in the sequence, or if the consummation date of the third loan is within 30 days following the last day on which the consumer's second loan in the sequence was outstanding; and

(iv) A covered short-term or covered longer-term balloon-payment loan would be the fourth loan in the sequence if the consumer has a currently outstanding covered short-term loan or covered longer-term balloon-payment loan that is the third loan in the sequence, or if the consummation date of the fourth loan would be within 30 days following the last day on which the consumer's third loan in the sequence was outstanding.

(15) *Motor vehicle* means any self-propelled vehicle primarily used for on-road transportation. The term does not include motor homes, recreational vehicles, golf carts, and motor scooters.

(16) *Open-end credit* means an extension of credit to a consumer that is an open-end credit plan as defined in Regulation Z, 12 CFR 1026.2(a)(20), but without regard to whether the credit is consumer credit, as defined in 12 CFR 1026.2(a)(12), is extended by a creditor, as defined in 12 CFR 1026.2(a)(17), is extended to a consumer, as defined in 12 CFR 1026.2(a)(11), or permits a finance charge to be imposed from time to time on an outstanding balance as defined in 12 CFR 1026.4.

(17) *Outstanding loan* means a loan that the consumer is legally obligated to repay, regardless of whether the loan is delinquent or is subject to a repayment plan or other workout arrangement, except that a loan ceases to be an outstanding loan if the consumer has not made at least one payment on the loan within the previous 180 days.

(18) *Service provider* has the same meaning as in the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5481(26).

(19) *Vehicle security* means an interest in a consumer's motor vehicle obtained by the lender or service provider as a condition of the credit, regardless of how the transaction is characterized by State law, including:

(i) Any security interest in the motor vehicle, motor vehicle title, or motor vehicle registration whether or not the security interest is perfected or recorded; or

(ii) A pawn transaction in which the consumer's motor vehicle is the pledged good and the consumer retains use of the motor vehicle during the period of the pawn agreement.

(b) *Rule of construction.* For purposes of this part, where definitions are incorporated from other statutes or regulations, the terms have the meaning and incorporate the embedded definitions, appendices, and commentary from those other laws except to the extent that this part provides a different definition for a parallel term.

§ 1041.3 Scope of coverage; exclusions; exemptions.

(a) *General.* This part applies to a lender that extends credit by making covered loans.

(b) *Covered loan.* Covered loan means closed-end or open-end credit that is extended to a consumer primarily for personal, family, or household purposes that is not excluded under paragraph (d) of this section or conditionally exempted under paragraph (e) or (f) of this section; and:

(1) For closed-end credit that does not provide for multiple advances to consumers, the consumer is required to repay substantially the entire amount of the loan within 45 days of consummation, or for all other loans, the consumer is required to repay substantially the entire amount of any advance within 45 days of the advance;

(2) For loans not otherwise covered by paragraph (b)(1) of this section:

(i) For closed-end credit that does not provide for multiple advances to consumers, the consumer is required to repay substantially the entire balance of the loan in a single payment more than 45 days after consummation or to repay such loan through at least one payment that is more than twice as large as any other payment(s).

(ii) For all other loans, either:

(A) The consumer is required to repay substantially the entire amount of an advance in a single payment more than 45 days after the advance is made or is required to make at least one payment on the advance that is more than twice as large as any other payment(s); or

(B) A loan with multiple advances is structured such that paying the required minimum payments may not fully amortize the outstanding balance by a specified date or time, and the amount of the final payment to repay the outstanding balance at such time could be more than twice the amount of other minimum payments under the plan; or

(3) For loans not otherwise covered by paragraph (b)(1) or (2) of this section, if both of the following conditions are satisfied:

(i) The cost of credit for the loan exceeds 36 percent per annum, as measured:

(A) At the time of consummation for closed-end credit; or

(B) At the time of consummation and, if the cost of credit at consummation is not more than 36 percent per annum, again at the end of each billing cycle for open-end credit, except that:

(*1*) Open-end credit meets the condition set forth in this paragraph (b)(3)(i)(B) in any billing cycle in which a lender imposes a finance charge, and the principal balance is $0; and

(*2*) Once open-end credit meets the condition set forth in this paragraph (b)(3)(i)(B), it meets the condition set forth in paragraph (b)(3)(i)(B) for the duration of the plan.

(ii) The lender or service provider obtains a leveraged payment mechanism as defined in paragraph (c) of this section.

(c) *Leveraged payment mechanism.* For purposes of paragraph (b) of this section, a lender or service provider obtains a leveraged payment mechanism if it has the right to initiate a transfer of money, through any means, from a consumer's account to satisfy an obligation on a loan, except that the lender or service provider does not obtain a leveraged payment mechanism by initiating a single immediate payment transfer at the consumer's request.

(d) *Exclusions for certain types of credit.* This part does not apply to the following:

(1) *Certain purchase money security interest loans.* Credit extended for the sole and express purpose of financing a consumer's initial purchase of a good when the credit is secured by the property being purchased, whether or not the security interest is perfected or recorded.

(2) *Real estate secured credit.* Credit that is secured by any real property, or by personal property used or expected to be used as a dwelling, and the lender records or otherwise perfects the security interest within the term of the loan.

(3) *Credit cards.* Any credit card account under an open-end (not home-secured) consumer credit plan as defined in Regulation Z, 12 CFR 1026.2(a)(15)(ii).

(4) *Student loans.* Credit made, insured, or guaranteed pursuant to a program authorized by subchapter IV of the Higher Education Act of 1965, 20 U.S.C. 1070 through 1099d, or a private education loan as defined in Regulation Z, 12 CFR 1026.46(b)(5).

(5) *Non-recourse pawn loans.* Credit in which the lender has sole physical possession and use of the property securing the credit for the entire term of the loan and for which the lender's sole recourse if the consumer does not elect to redeem the pawned item and repay the loan is the retention of the property securing the credit.

(6) *Overdraft services and lines of credit.* Overdraft services as defined in 12 CFR 1005.17(a), and overdraft lines of credit otherwise excluded from the definition of overdraft services under 12 CFR 1005.17(a)(1).

(7) *Wage advance programs.* Advances of wages that constitute credit if made by an employer, as defined in the Fair Labor Standards Act, 29 U.S.C. 203(d), or by the employer's business partner, to the employer's employees, provided that:

(i) The advance is made only against the accrued cash value of any wages the employee has earned up to the date of the advance; and

(ii) Before any amount is advanced, the entity advancing the funds warrants to the consumer as part of the contract between the parties on behalf of itself and any business partners, that it or they, as applicable:

(A) Will not require the consumer to pay any charges or fees in connection with the advance, other than a charge for participating in the wage advance program;

(B) Has no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in the event the amount advanced is not repaid in full; and

(C) With respect to the amount advanced to the consumer, will not engage in any debt collection activities if the advance is not deducted directly from wages or otherwise repaid on the scheduled date, place the amount advanced as a debt with or sell it to a third party, or report to a consumer reporting agency concerning the amount advanced.

(8) *No-cost advances.* Advances of funds that constitute credit if the consumer is not required to pay any charge or fee to be eligible to receive or in return for receiving the advance, provided that before any amount is advanced, the entity advancing the funds warrants to the consumer as part of the contract between the parties:

(i) That it has no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in the event the amount advanced is not repaid in full; and

(ii) That, with respect to the amount advanced to the consumer, such entity will not engage in any debt collection activities if the advance is not repaid on the scheduled date, place the amount advanced as a debt with or sell it to a third party, or report to a consumer reporting agency concerning the amount advanced.

(e) *Alternative loan.* Alternative loans are conditionally exempt from the requirements of this part. *Alternative loan* means a covered loan that satisfies the following conditions and requirements:

(1) *Loan term conditions.* An alternative loan must satisfy the following conditions:

(i) The loan is not structured as open-end credit, as defined in § 1041.2(a)(16);

(ii) The loan has a term of not less than one month and not more than six months;

(iii) The principal of the loan is not less than $200 and not more than $1,000;

(iv) The loan is repayable in two or more payments, all of which payments are substantially equal in amount and fall due in substantially equal intervals, and the loan amortizes completely during the term of the loan; and

(v) The lender does not impose any charges other than the rate and application fees permissible for Federal credit unions under regulations issued by the National Credit Union Administration at 12 CFR 701.21(c)(7)(iii).

(2) *Borrowing history condition.* Prior to making an alternative loan under this paragraph (e), the lender must determine from its records that the loan would not result in the consumer being indebted on more than three outstanding loans made under this section from the lender within a period of 180 days. The lender must also make no more than one alternative loan under this paragraph (e) at a time to a consumer.

(3) *Income documentation condition.* In making an alternative loan under this paragraph (e), the lender must maintain and comply with policies and procedures for documenting proof of recurring income.

(4) *Safe harbor.* Loans made by Federal credit unions in compliance with the conditions set forth by the National Credit Union Administration at 12 CFR 701.21(c)(7)(iii) for a Payday Alternative Loan are deemed to be in compliance with the requirements and conditions of paragraphs (e)(1), (2), and (3) of this section.

(f) *Accommodation loans.* Accommodation loans are conditionally exempt from the requirements of this part. *Accommodation loan* means a covered loan if at the time that the loan is consummated:

(1) The lender and its affiliates collectively have made 2,500 or fewer covered loans in the current calendar year, and made 2,500 or fewer such covered loans in the preceding calendar year; and

(2)(i) During the most recent completed tax year in which the lender was in operation, if applicable, the lender and any affiliates that were in operation and used the same tax year derived no more than 10 percent of their receipts from covered loans; or

(ii) If the lender was not in operation in a prior tax year, the lender reasonably anticipates that the lender and any of its affiliates that use the same tax year will derive no more than 10 percent of their receipts from covered loans during the current tax year.

(3) Provided, however, that covered longer-term loans for which all transfers meet the conditions in § 1041.8(a)(1)(ii), and receipts from such loans, are not included for the purpose of determining whether the conditions of paragraphs (f)(1) and (2) of this section have been satisfied.

(g) *Receipts.* For purposes of paragraph (f) of this section, receipts means ''total income'' (or in the case of a sole proprietorship ''gross income'') plus ''cost of goods sold'' as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; and Form 1040, Schedule C for sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers but excluding taxes levied on the entity or its employees; or amounts collected for another (but fees earned in connection with such collections are receipts). Items such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes are included in receipts.

(h) *Tax year.* For purposes of paragraph (f) of this section, ''tax year'' has the meaning attributed to it by the IRS as set forth in IRS Publication 538, which provides that a ''tax year'' is an annual accounting period for keeping records and reporting income and expenses.

Subpart B—Underwriting

§ 1041.4 Identification of unfair and abusive practice.

It is an unfair and abusive practice for a lender to make covered short-term loans or covered longer-term balloon-payment loans without reasonably determining that the consumers will have the ability to repay the loans according to their terms.

§ 1041.5 Ability-to-repay determination required.

(a) *Definitions.* For purposes of this section:

(1) *Basic living expenses* means expenditures, other than payments for major financial obligations, that a consumer makes for goods and services that are necessary to maintain the consumer's health, welfare, and ability to produce income, and the health and welfare of the members of the consumer's household who are financially dependent on the consumer.

(2) *Debt-to-income ratio* means the ratio, expressed as a percentage, of the sum of the amounts that the lender projects will be payable by the consumer for major financial obligations during the relevant monthly period and the payments under the covered short-term loan or covered longer-term balloon-payment loan during the relevant monthly period, to the net income that the lender projects the consumer will receive during the relevant monthly period, all of which projected amounts are determined in accordance with paragraph (c) of this section.

(3) *Major financial obligations* means a consumer's housing expense, required payments under debt obligations (including, without limitation, outstanding covered loans), child support obligations, and alimony obligations.

(4) *National consumer report* means a consumer report, as defined in section 603(d) of the Fair Credit Reporting Act, 15 U.S.C. 1681a(d), obtained from a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis, as defined in section 603(p) of the Fair Credit Reporting Act, 15 U.S.C. 1681a(p).

(5) *Net income* means the total amount that a consumer receives after the payer deducts amounts for taxes, other obligations, and voluntary contributions (but before deductions of any amounts for payments under a prospective covered short-term loan or covered longer-term balloon-payment loan or for any major financial obligation); provided that, the lender may include in the consumer's net income the amount of any income of another person to which the consumer has a reasonable expectation of access.

(6) *Payment under the covered short-term loan or covered longer-term balloon-payment loan.* (i) Means the combined dollar amount payable by the consumer at a particular time following consummation in connection with the covered short-term loan or covered longer-term balloon-payment loan, assuming that the consumer has made preceding required payments and in the absence of any affirmative act by the consumer to extend or restructure the repayment schedule or to suspend, cancel, or delay payment for any product, service, or membership provided in connection with the loan;

(ii) Includes all principal, interest, charges, and fees; and

(iii) For a line of credit is calculated assuming that:

(A) The consumer will utilize the full amount of credit under the covered short-term loan or covered longer-term balloon-payment loan as soon as the credit is available to the consumer; and

(B) The consumer will make only minimum required payments under the covered short-term loan or covered longer-term balloon-payment loan for as long as permitted under the loan agreement.

(7) *Relevant monthly period* means the calendar month in which the highest sum of payments is due under the covered short-term or covered longer-term balloon-payment loan.

(8) *Residual income* means the sum of net income that the lender projects the consumer will receive during the relevant monthly period, minus the sum of the amounts that the lender projects will be payable by the consumer for major financial obligations during the relevant monthly period and payments under the covered short-term loan or covered longer-term balloon-payment loan during the relevant monthly period, all of which projected amounts are determined in accordance with paragraph (c) of this section.

(b) *Reasonable determination required.* (1)(i) Except as provided in § 1041.6, a lender must not make a covered short-term loan or covered longer-term balloon-payment loan or increase the credit available under a covered short-term loan or covered longer-term balloon-payment loan, unless the lender first makes a reasonable determination that the consumer will have the ability to repay the loan according to its terms.

(ii) For a covered short-term loan or covered longer-term balloon-payment loan that is a line of credit, a lender must not permit a consumer to obtain an advance under the line of credit more than 90 days after the date of a required determination under this paragraph (b), unless the lender first makes a new determination that the consumer will have the ability to repay the covered short-term loan or covered longer-term balloon-payment loan according to its terms.

(2) A lender's determination of a consumer's ability to repay a covered short-term loan or covered longer-term balloon-payment loan is reasonable only if either:

(i) Based on the calculation of the consumer's debt-to-income ratio for the relevant monthly period and the estimates of the consumer's basic living expenses for the relevant monthly period, the lender reasonably concludes that:

(A) For a covered short-term loan, the consumer can make payments for major financial obligations, make all payments under the loan, and meet basic living expenses during the shorter of the term of the loan or the period ending 45 days after consummation of the loan, and for 30 days after having made the highest payment under the loan; and

(B) For a covered longer-term balloon-payment loan, the consumer can make payments for major financial obligations, make all payments under the loan, and meet basic living expenses during the relevant monthly period, and for 30 days after having made the highest payment under the loan; or

(ii) Based on the calculation of the consumer's residual income for the relevant monthly period and the estimates of the consumer's basic living expenses for the relevant monthly period, the lender reasonably concludes that:

(A) For a covered short-term loan, the consumer can make payments for major financial obligations, make all payments under the loan, and meet basic living expenses during the shorter of the term of the loan or the period ending 45 days after consummation of the loan, and for 30 days after having made the highest payment under the loan; and

(B) For a covered longer-term balloon-payment loan, the consumer can make payments for major financial obligations, make all payments under the loan, and meet basic living expenses during the relevant monthly period, and for 30 days after having made the highest payment under the loan.

(c) *Projecting consumer net income and payments for major financial obligations*—(1) *General.* To make a reasonable determination required under paragraph (b) of this section, a lender must obtain the consumer's written statement in accordance with paragraph (c)(2)(i) of this section, obtain verification evidence to the extent required by paragraph (c)(2)(ii) of this section, assess information about rental housing expense as required by paragraph (c)(2)(iii) of this section, and use those sources of information to make a reasonable projection of the amount of a consumer's net income and payments for major financial obligations during the relevant monthly period. The lender must consider major financial obligations that are listed in a consumer's written statement described in paragraph (c)(2)(i)(B) of this section even if they cannot be verified by the sources listed in paragraph (c)(2)(ii)(B) of this section. To be reasonable, a projection of the amount of net income or payments for major financial obligations may be based on a consumer's written statement of amounts under paragraph (c)(2)(i) of this section only as specifically permitted by paragraph (c)(2)(ii) or (iii) or to the extent the stated amounts are consistent with the verification evidence that is obtained in accordance with paragraph (c)(2)(ii) of this section. In determining whether the stated amounts are consistent with the verification evidence, the lender may reasonably consider other reliable evidence the lender obtains from or about the consumer, including any explanations the lender obtains from the consumer.

(2) *Evidence of net income and payments for major financial obligations*—(i) *Consumer statements.* A lender must obtain a consumer's written statement of:

(A) The amount of the consumer's net income, which may include the amount of any income of another person to which the consumer has a reasonable expectation of access; and

(B) The amount of payments required for the consumer's major financial obligations.

(ii) *Verification evidence.* A lender must obtain verification evidence for the amounts of the consumer's net income and payments for major financial obligations other than rental housing expense, as follows:

(A) For the consumer's net income:

(*1*) The lender must obtain a reliable record (or records) of an income payment (or payments) directly to the consumer covering sufficient history to support the lender's projection under paragraph (c)(1) of this section if a reliable record (or records) is reasonably available. If a lender determines that a reliable record (or records) of some or all of the consumer's net income is not reasonably available, then, the lender may reasonably rely on the consumer's written statement described in paragraph (c)(2)(i)(A) of this section for that portion of the consumer's net income.

(*2*) If the lender elects to include in the consumer's net income for the relevant monthly period any income of another person to which the consumer has a reasonable expectation of access, the lender must obtain verification evidence to support the lender's projection under paragraph (c)(1) of this section.

(B) For the consumer's required payments under debt obligations, the lender must obtain a national consumer report, the records of the lender and its affiliates, and a consumer report obtained from an information system that has been registered for 180 days or

more pursuant to § 1041.11(c)(2) or is registered pursuant to § 1041.11(d)(2), if available. If the reports and records do not include a debt obligation listed in the consumer's written statement described in paragraph (c)(2)(i)(B) of this section, the lender may reasonably rely on the written statement in determining the amount of the required payment.

(C) For a consumer's required payments under child support obligations or alimony obligations, the lender must obtain a national consumer report. If the report does not include a child support or alimony obligation listed in the consumer's written statement described in paragraph (c)(2)(i)(B) of this section, the lender may reasonably rely on the written statement in determining the amount of the required payment.

(D) Notwithstanding paragraphs (c)(2)(ii)(B) and (C) of this section, the lender is not required to obtain a national consumer report as verification evidence for the consumer's debt obligations, alimony obligations, and child support obligations if during the preceding 90 days:

(*1*) The lender or an affiliate obtained a national consumer report for the consumer, retained the report under § 1041.12(b)(1)(ii), and checked it again in connection with the new loan; and

(*2*) The consumer did not complete a loan sequence of three loans made under this section and trigger the prohibition under paragraph (d)(2) of this section since the previous report was obtained.

(iii) *Rental housing expense.* For a consumer's housing expense other than a payment for a debt obligation that appears on a national consumer report obtained pursuant to paragraph (c)(2)(ii)(B) of this section, the lender may reasonably rely on the consumer's written statement described in paragraph (c)(2)(i)(B) of this section.

(d) *Additional limitations on lending—covered short-term loans and covered longer-term balloon-payment loans*—(1) *Borrowing history review.* Prior to making a covered short-term loan or covered longer-term balloon-payment loan under this section, in order to determine whether any of the prohibitions in this paragraph (d) are applicable, a lender must obtain and review information about the consumer's borrowing history from the records of the lender and its affiliates, and from a consumer report obtained from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered with the Bureau pursuant to § 1041.11(d)(2), if available.

(2) *Prohibition on loan sequences of more than three covered short-term loans or covered longer-term balloon-payment loans made under this section.* A lender must not make a covered short-term loan or covered longer-term balloon-payment loan under this section during the period in which the consumer has a covered short-term loan or covered longer-term balloon-payment loan made under this section outstanding and for 30 days thereafter if the new covered short-term loan or covered longer-term balloon-payment loan would be the fourth loan in a sequence of covered short-term loans, covered longer-term balloon-payment loans, or a combination of covered short-term loans and covered longer-term balloon-payment loans made under this section.

(3) *Prohibition on making a covered short-term loan or covered longer-term balloon-payment loan under this section following a covered short-term loan made under § 1041.6.* A lender must not make a covered short-term loan or covered longer-term balloon-payment loan under this section during the period in which the consumer has a covered short-term loan made under § 1041.6 outstanding and for 30 days thereafter.

(e) *Prohibition against evasion.* A lender must not take any action with the intent of evading the requirements of this section.

§ 1041.6 Conditional exemption for certain covered short-term loans.

(a) *Conditional exemption for certain covered short-term loans.* Sections 1041.4 and 1041.5 do not apply to a covered short-term loan that satisfies the requirements set forth in paragraphs (b) through (e) of this section. Prior to making a covered short-term loan under this section, a lender must review the consumer's borrowing history in its own records, the records of the lender's affiliates, and a consumer report from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered with the Bureau pursuant to § 1041.11(d)(2). The lender must use this borrowing history information to determine a potential loan's compliance with the requirements in paragraphs (b) and (c) of this section.

(b) *Loan term requirements.* A covered short-term loan that is made under this section must satisfy the following requirements:

(1) The loan satisfies the following principal amount limitations, as applicable:

(i) For the first loan in a loan sequence of covered short-term loans made under this section, the principal amount is no greater than $500.

(ii) For the second loan in a loan sequence of covered short-term loans made under this section, the principal amount is no greater than two-thirds of the principal amount of the first loan in the loan sequence.

(iii) For the third loan in a loan sequence of covered short-term loans made under this section, the principal amount is no greater than one-third of the principal amount of the first loan in the loan sequence.

(2) The loan amortizes completely during the term of the loan and the payment schedule provides for the lender allocating a consumer's payments to the outstanding principal and interest and fees as they accrue only by applying a fixed periodic rate of interest to the outstanding balance of the unpaid loan principal during every scheduled repayment period for the term of the loan.

(3) The lender and any service provider do not take vehicle security as a condition of the loan, as defined in § 1041.2(a)(19).

(4) The loan is not structured as open-end credit, as defined in § 1041.2(a)(16).

(c) *Borrowing history requirements.* Prior to making a covered short-term loan under this section, the lender must determine that the following requirements are satisfied:

(1) The consumer has not had in the past 30 days an outstanding covered short-term loan under § 1041.5 or covered longer-term balloon-payment loan under § 1041.5;

(2) The loan would not result in the consumer having a loan sequence of more than three covered short-term loans under this section; and

(3) The loan would not result in the consumer having during any consecutive 12-month period:

(i) More than six covered short-term loans outstanding; or

(ii) Covered short-term loans outstanding for an aggregate period of more than 90 days.

(d) *Restrictions on making certain covered loans and non-covered loans following a covered short-term loan made under the conditional exemption.* If a lender makes a covered short-term loan under this section to a consumer, the lender or its affiliate must not subsequently make a covered loan, except a covered short-term loan made in accordance with the requirements in this section, or a non-covered loan to the consumer while the covered short-term loan made under this section is outstanding and for 30 days thereafter.

(e) *Disclosures*—(1) *General form of disclosures*—(i) *Clear and conspicuous.*

Disclosures required by this paragraph (e) must be clear and conspicuous. Disclosures required by this section may contain commonly accepted or readily understandable abbreviations.

(ii) *In writing or electronic delivery.* Disclosures required by this paragraph (e) must be provided in writing or through electronic delivery. The disclosures must be provided in a form that can be viewed on paper or a screen, as applicable. This paragraph (e)(1)(ii) is not satisfied by a disclosure provided orally or through a recorded message.

(iii) *Retainable.* Disclosures required by this paragraph (e) must be provided in a retainable form.

(iv) *Segregation requirements for notices.* Notices required by this paragraph (e) must be segregated from all other written or provided materials and contain only the information required by this section, other than information necessary for product identification, branding, and navigation. Segregated additional content that is not required by this paragraph (e) must not be displayed above, below, or around the required content.

(v) *Machine readable text in notices provided through electronic delivery.* If provided through electronic delivery, the notices required by paragraphs (e)(2)(i) and (ii) of this section must use machine readable text that is accessible via both web browsers and screen readers.

(vi) *Model forms*—(A) *First loan notice.* The content, order, and format of the notice required by paragraph (e)(2)(i) of this section must be substantially similar to Model Form A–1 in appendix A to this part.

(B) *Third loan notice.* The content, order, and format of the notice required by paragraph (e)(2)(ii) of this section must be substantially similar to Model Form A–2 in appendix A to this part.

(vii) *Foreign language disclosures.* Disclosures required under this paragraph (e) may be made in a language other than English, provided that the disclosures are made available in English upon the consumer's request.

(2) *Notice requirements*—(i) *First loan notice.* A lender that makes a first loan in a sequence of loans made under this section must provide to a consumer a notice that includes, as applicable, the following information and statements, using language substantially similar to the language set forth in Model Form A–1 in appendix A to this part:

(A) *Identifying statement.* The statement ''Notice of restrictions on future loans,'' using that phrase.

(B) *Warning for loan made under this section*—(*1*) *Possible inability to repay.* A statement that warns the consumer not to take out the loan if the consumer is unsure of being able to repay the total amount of principal and finance charges on the loan by the contractual due date.

(*2*) *Contractual due date.* Contractual due date of the loan made under this section.

(*3*) *Total amount due.* Total amount due on the contractual due date.

(C) *Restriction on a subsequent loan required by Federal law.* A statement that informs a consumer that Federal law requires a similar loan taken out within the next 30 days to be smaller.

(D) *Borrowing limits.* In a tabular form:

(*1*) Maximum principal amount on loan 1 in a sequence of loans made under this section.

(*2*) Maximum principal amount on loan 2 in a sequence of loans made under this section.

(*3*) Maximum principal amount on loan 3 in a sequence of loans made under this section.

(*4*) Loan 4 in a sequence of loans made under this section is not allowed.

(E) *Lender name and contact information.* Name of the lender and a telephone number for the lender and, if applicable, a URL of the Web site for the lender.

(ii) *Third loan notice.* A lender that makes a third loan in a sequence of loans made under this section must provide to a consumer a notice that includes the following information and statements, using language substantially similar to the language set forth in Model Form A–2 in appendix A to this part:

(A) *Identifying statement.* The statement ''Notice of borrowing limits on this loan and future loans,'' using that phrase.

(B) *Two similar loans without 30-day break.* A statement that informs a consumer that the lender's records show that the consumer has had two similar loans without taking at least a 30-day break between them.

(C) *Restriction on loan amount required by Federal law.* A statement that informs a consumer that Federal law requires the third loan to be smaller than previous loans in the loan sequence.

(D) *Prohibition on subsequent loan.* A statement that informs a consumer that the consumer cannot take out a similar loan for at least 30 days after repaying the loan.

(E) *Lender name and contact information.* Name of the lender and a telephone number for the lender and, if applicable, a URL of the Web site for the lender.

(3) *Timing.* A lender must provide the notices required in paragraphs (e)(2)(i) and (ii) of this section to the consumer before the applicable loan under this section is consummated.

Subpart C—Payments

§ 1041.7 Identification of unfair and abusive practice.

It is an unfair and abusive practice for a lender to make attempts to withdraw payment from consumers' accounts in connection with a covered loan after the lender's second consecutive attempts to withdraw payments from the accounts from which the prior attempts were made have failed due to a lack of sufficient funds, unless the lender obtains the consumers' new and specific authorization to make further withdrawals from the accounts.

§ 1041.8 Prohibited payment transfer attempts.

(a) *Definitions.* For purposes of this section and § 1041.9:

(1) *Payment transfer* means any lender-initiated debit or withdrawal of funds from a consumer's account for the purpose of collecting any amount due or purported to be due in connection with a covered loan.

(i) *Means of transfer.* A debit or withdrawal meeting the description in paragraph (a)(1) of this section is a payment transfer regardless of the means through which the lender initiates it, including but not limited to a debit or withdrawal initiated through any of the following means:

(A) Electronic fund transfer, including a preauthorized electronic fund transfer as defined in Regulation E, 12 CFR 1005.2(k).

(B) Signature check, regardless of whether the transaction is processed through the check network or another network, such as the automated clearing house (ACH) network.

(C) Remotely created check as defined in Regulation CC, 12 CFR 229.2(fff).

(D) Remotely created payment order as defined in 16 CFR 310.2(cc).

(E) When the lender is also the account-holder, an account-holding institution's transfer of funds from a consumer's account held at the same institution, other than such a transfer meeting the description in paragraph (a)(1)(ii) of this section.

(ii) *Conditional exclusion for certain transfers by account-holding institutions.* When the lender is also the account-holder, an account-holding institution's transfer of funds from a consumer's account held at the same institution is not a payment transfer if all of the conditions in this paragraph (a)(1)(ii) are met, notwithstanding that the transfer otherwise meets the

description in paragraph (a)(1) of this section.

(A) The lender, pursuant to the terms of the loan agreement or account agreement, does not charge the consumer any fee, other than a late fee under the loan agreement, in the event that the lender initiates a transfer of funds from the consumer's account in connection with the covered loan for an amount that the account lacks sufficient funds to cover.

(B) The lender, pursuant to the terms of the loan agreement or account agreement, does not close the consumer's account in response to a negative balance that results from a transfer of funds initiated in connection with the covered loan.

(2) *Single immediate payment transfer at the consumer's request* means:

(i) A payment transfer initiated by a one-time electronic fund transfer within one business day after the lender obtains the consumer's authorization for the one-time electronic fund transfer.

(ii) A payment transfer initiated by means of processing the consumer's signature check through the check system or through the ACH system within one business day after the consumer provides the check to the lender.

(b) *Prohibition on initiating payment transfers from a consumer's account after two consecutive failed payment transfers*—(1) *General.* A lender must not initiate a payment transfer from a consumer's account in connection with any covered loan that the consumer has with the lender after the lender has attempted to initiate two consecutive failed payment transfers from that account in connection with any covered loan that the consumer has with the lender. For purposes of this paragraph (b), a payment transfer is deemed to have failed when it results in a return indicating that the consumer's account lacks sufficient funds or, if the lender is the consumer's account-holding institution, it is for an amount that the account lacks sufficient funds to cover.

(2) *Consecutive failed payment transfers.* For purposes of the prohibition in this paragraph (b):

(i) *First failed payment transfer.* A failed payment transfer is the first failed payment transfer from the consumer's account if it meets any of the following conditions:

(A) The lender has initiated no other payment transfer from the account in connection with the covered loan or any other covered loan that the consumer has with the lender.

(B) The immediately preceding payment transfer was successful, regardless of whether the lender has previously initiated a first failed payment transfer.

(C) The payment transfer is the first payment transfer to fail after the lender obtains the consumer's authorization for additional payment transfers pursuant to paragraph (c) of this section.

(ii) *Second consecutive failed payment transfer.* A failed payment transfer is the second consecutive failed payment transfer from the consumer's account if the immediately preceding payment transfer was a first failed payment transfer. For purposes of this paragraph (b)(2)(ii), a previous payment transfer includes a payment transfer initiated at the same time or on the same day as the failed payment transfer.

(iii) *Different payment channel.* A failed payment transfer meeting the conditions in paragraph (b)(2)(ii) of this section is the second consecutive failed payment transfer regardless of whether the first failed payment transfer was initiated through a different payment channel.

(c) *Exception for additional payment transfers authorized by the consumer*—(1) *General.* Notwithstanding the prohibition in paragraph (b) of this section, a lender may initiate additional payment transfers from a consumer's account after two consecutive failed payment transfers if the additional payment transfers are authorized by the consumer in accordance with the requirements and conditions in this paragraph (c) or if the lender executes a single immediate payment transfer at the consumer's request in accordance with paragraph (d) of this section.

(2) *General authorization requirements and conditions*—(i) *Required payment transfer terms.* For purposes of this paragraph (c), the specific date, amount, and payment channel of each additional payment transfer must be authorized by the consumer, except as provided in paragraph (c)(2)(ii) or (iii) of this section.

(ii) *Application of specific date requirement to re-initiating a returned payment transfer.* If a payment transfer authorized by the consumer pursuant to this paragraph (c) is returned for nonsufficient funds, the lender may re-initiate the payment transfer, such as by re-presenting it once through the ACH system, on or after the date authorized by the consumer, provided that the returned payment transfer has not triggered the prohibition in paragraph (b) of this section.

(iii) *Special authorization requirements and conditions for payment transfers to collect a late fee or returned item fee.* A lender may initiate a payment transfer pursuant to this paragraph (c) solely to collect a late fee or returned item fee without obtaining the consumer's authorization for the specific date and amount of the payment transfer only if the consumer has authorized the lender to initiate such payment transfers in advance of the withdrawal attempt. For purposes of this paragraph (c)(2)(iii), the consumer authorizes such payment transfers only if the consumer's authorization obtained under paragraph (c)(3)(iii) of this section includes a statement, in terms that are clear and readily understandable to the consumer, that payment transfers may be initiated solely to collect a late fee or returned item fee and that specifies the highest amount for such fees that may be charged and the payment channel to be used.

(3) *Requirements and conditions for obtaining the consumer's authorization*—(i) *General.* For purposes of this paragraph (c), the lender must request and obtain the consumer's authorization for additional payment transfers in accordance with the requirements and conditions in this paragraph (c)(3).

(ii) *Provision of payment transfer terms to the consumer.* The lender may request the consumer's authorization for additional payment transfers no earlier than the date on which the lender provides to the consumer the consumer rights notice required by § 1041.9(c). The request must include the payment transfer terms required under paragraph (c)(2)(i) of this section and, if applicable, the statement required by paragraph (c)(2)(iii) of this section. The lender may provide the terms and statement to the consumer by any one of the following means:

(A) In writing, by mail or in person, or in a retainable form by email if the consumer has consented to receive electronic disclosures in this manner under § 1041.9(a)(4) or agrees to receive the terms and statement by email in the course of a communication initiated by the consumer in response to the consumer rights notice required by § 1041.9(c).

(B) By oral telephone communication, if the consumer affirmatively contacts the lender in that manner in response to the consumer rights notice required by § 1041.9(c) and agrees to receive the terms and statement in that manner in the course of, and as part of, the same communication.

(iii) *Signed authorization required*—(A) *General.* For an authorization to be valid under this paragraph (c), it must be signed or otherwise agreed to by the consumer in writing or electronically and in a retainable format that memorializes the payment transfer

terms required under paragraph (c)(2)(i) of this section and, if applicable, the statement required by paragraph (c)(2)(iii) of this section. The signed authorization must be obtained from the consumer no earlier than when the consumer receives the consumer rights notice required by § 1041.9(c) in person or electronically, or the date on which the consumer receives the notice by mail. For purposes of this paragraph (c)(3)(iii)(A), the consumer is considered to have received the notice at the time it is provided to the consumer in person or electronically, or, if the notice is provided by mail, the earlier of the third business day after mailing or the date on which the consumer affirmatively responds to the mailed notice.

(B) *Special requirements for authorization obtained by oral telephone communication.* If the authorization is granted in the course of an oral telephone communication, the lender must record the call and retain the recording.

(C) *Memorialization required.* If the authorization is granted in the course of a recorded telephonic conversation or is otherwise not immediately retainable by the consumer at the time of signature, the lender must provide a memorialization in a retainable form to the consumer by no later than the date on which the first payment transfer authorized by the consumer is initiated. A memorialization may be provided to the consumer by email in accordance with the requirements and conditions in paragraph (c)(3)(ii)(A) of this section.

(4) *Expiration of authorization.* An authorization obtained from a consumer pursuant to this paragraph (c) becomes null and void for purposes of the exception in this paragraph (c) if:

(i) The lender subsequently obtains a new authorization from the consumer pursuant to this paragraph (c); or

(ii) Two consecutive payment transfers initiated pursuant to the consumer's authorization fail, as specified in paragraph (b) of this section.

(d) *Exception for initiating a single immediate payment transfer at the consumer's request.* After a lender's second consecutive payment transfer has failed as specified in paragraph (b) of this section, the lender may initiate a payment transfer from the consumer's account without obtaining the consumer's authorization for additional payment transfers pursuant to paragraph (c) of this section if:

(1) The payment transfer is a single immediate payment transfer at the consumer's request as defined in paragraph (a)(2) of this section; and

(2) The consumer authorizes the underlying one-time electronic fund transfer or provides the underlying signature check to the lender, as applicable, no earlier than the date on which the lender provides to the consumer the consumer rights notice required by § 1041.9(c) or on the date that the consumer affirmatively contacts the lender to discuss repayment options, whichever date is earlier.

(e) *Prohibition against evasion.* A lender must not take any action with the intent of evading the requirements of this section.

§ 1041.9 Disclosure of payment transfer attempts.

(a) *General form of disclosures*—(1) *Clear and conspicuous.* Disclosures required by this section must be clear and conspicuous. Disclosures required by this section may contain commonly accepted or readily understandable abbreviations.

(2) *In writing or electronic delivery.* Disclosures required by this section must be provided in writing or, so long as the requirements of paragraph (a)(4) of this section are satisfied, through electronic delivery. The disclosures must be provided in a form that can be viewed on paper or a screen, as applicable. This paragraph (a)(2) is not satisfied by a disclosure provided orally or through a recorded message.

(3) *Retainable.* Disclosures required by this section must be provided in a retainable form, except for electronic short notices delivered by mobile application or text message under paragraph (b) or (c) of this section.

(4) *Electronic delivery.* Disclosures required by this section may be provided through electronic delivery if the following consent requirements are satisfied:

(i) *Consumer consent*—(A) *General.* Disclosures required by this section may be provided through electronic delivery if the consumer affirmatively consents in writing or electronically to the particular electronic delivery method.

(B) *Email option required.* To obtain valid consumer consent to electronic delivery under this paragraph, a lender must provide the consumer with the option to select email as the method of electronic delivery, separate and apart from any other electronic delivery methods such as mobile application or text message.

(ii) *Subsequent loss of consent.* Notwithstanding paragraph (a)(4)(i) of this section, a lender must not provide disclosures required by this section through a method of electronic delivery if:

(A) The consumer revokes consent to receive disclosures through that delivery method; or

(B) The lender receives notification that the consumer is unable to receive disclosures through that delivery method at the address or number used.

(5) *Segregation requirements for notices.* All notices required by this section must be segregated from all other written or provided materials and contain only the information required by this section, other than information necessary for product identification, branding, and navigation. Segregated additional content that is not required by this section must not be displayed above, below, or around the required content.

(6) *Machine readable text in notices provided through electronic delivery.* If provided through electronic delivery, the payment notice required by paragraph (b) of this section and the consumer rights notice required by paragraph (c) of this section must use machine readable text that is accessible via both web browsers and screen readers.

(7) *Model forms*—(i) *Payment notice.* The content, order, and format of the payment notice required by paragraph (b) of this section must be substantially similar to Model Forms A–3 through A–4 in appendix A to this part.

(ii) *Consumer rights notice.* The content, order, and format of the consumer rights notice required by paragraph (c) of this section must be substantially similar to Model Form A–5 in appendix A to this part.

(iii) *Electronic short notice.* The content, order, and format of the electronic short notice required by paragraph (b) of this section must be substantially similar to Model Clauses A–6 and A–7 in appendix A to this part. The content, order, and format of the electronic short notice required by paragraph (c) of this section must be substantially similar to Model Clause A–8 in appendix A to this part.

(8) *Foreign language disclosures.* Disclosures required under this section may be made in a language other than English, provided that the disclosures are made available in English upon the consumer's request.

(b) *Payment notice*—(1) *General.* Prior to initiating the first payment withdrawal or an unusual withdrawal from a consumer's account, a lender must provide to the consumer a payment notice in accordance with the requirements in this paragraph (b) as applicable.

(i) *First payment withdrawal* means the first payment transfer scheduled to be initiated by a lender for a particular

covered loan, not including a single immediate payment transfer initiated at the consumer's request as defined in § 1041.8(a)(2).

(ii) *Unusual withdrawal* means a payment transfer that meets one or more of the conditions described in paragraph (b)(3)(ii)(C) of this section.

(iii) *Exceptions.* The payment notice need not be provided when the lender initiates:

(A) The initial payment transfer from a consumer's account after obtaining consumer authorization pursuant to § 1041.8(c), regardless of whether any of the conditions in paragraph (b)(3)(ii)(C) of this section apply; or

(B) A single immediate payment transfer initiated at the consumer's request in accordance with § 1041.8(a)(2).

(2) *First payment withdrawal notice*—(i) *Timing*—(A) *Mail.* If the lender provides the first payment withdrawal notice by mail, the lender must mail the notice no earlier than when the lender obtains payment authorization and no later than six business days prior to initiating the transfer.

(B) *Electronic delivery.* (*1*) If the lender provides the first payment withdrawal notice through electronic delivery, the lender must send the notice no earlier than when the lender obtains payment authorization and no later than three business days prior to initiating the transfer.

(*2*) If, after providing the first payment withdrawal notice through electronic delivery pursuant to the timing requirements in paragraph (b)(2)(i) of this section, the lender loses the consumer's consent to receive the notice through a particular electronic delivery method according to paragraph (a)(4)(ii) of this section, the lender must provide notice of any future unusual withdrawal, if applicable, through alternate means.

(C) *In person.* If the lender provides the first payment withdrawal notice in person, the lender must provide the notice no earlier than when the lender obtains payment authorization and no later than three business days prior to initiating the transfer.

(ii) *Content requirements.* The notice must contain the following information and statements, as applicable, using language substantially similar to the language set forth in Model Form A–3 in appendix A to this part:

(A) *Identifying statement.* The statement, ''Upcoming Withdrawal Notice,'' using that phrase, and, in the same statement, the name of the lender providing the notice.

(B) *Transfer terms*—(*1*) *Date.* Date that the lender will initiate the transfer.

(*2*) *Amount.* Dollar amount of the transfer.

(*3*) *Consumer account.* Sufficient information to permit the consumer to identify the account from which the funds will be transferred. The lender must not provide the complete account number of the consumer, but may use a truncated version similar to Model Form A–3 in appendix A to this part.

(*4*) *Loan identification information.* Sufficient information to permit the consumer to identify the covered loan associated with the transfer.

(*5*) *Payment channel.* Payment channel of the transfer.

(*6*) *Check number.* If the transfer will be initiated by a signature or paper check, remotely created check (as defined in Regulation CC, 12 CFR 229.2(fff)), or remotely created payment order (as defined in 16 CFR 310.2(cc)), the check number associated with the transfer.

(C) *Payment breakdown.* In a tabular form:

(*1*) *Payment breakdown heading.* A heading with the statement ''Payment Breakdown,'' using that phrase.

(*2*) *Principal.* The amount of the payment that will be applied to principal.

(*3*) *Interest.* The amount of the payment that will be applied to accrued interest on the loan.

(*4*) *Fees.* If applicable, the amount of the payment that will be applied to fees.

(*5*) *Other charges.* If applicable, the amount of the payment that will be applied to other charges.

(*6*) *Amount.* The statement ''Total Payment Amount,'' using that phrase, and the total dollar amount of the payment as provided in paragraph (b)(2)(ii)(B)(*2*) of this section.

(*7*) *Explanation of interest-only or negatively amortizing payment.* If applicable, a statement explaining that the payment will not reduce principal, using the applicable phrase ''When you make this payment, your principal balance will stay the same and you will not be closer to paying off your loan'' or ''When you make this payment, your principal balance will increase and you will not be closer to paying off your loan.''

(D) *Lender name and contact information.* Name of the lender, the name under which the transfer will be initiated (if different from the consumer-facing name of the lender), and two different forms of lender contact information that may be used by the consumer to obtain information about the consumer's loan.

(3) *Unusual withdrawal notice*—(i) *Timing*—(A) *Mail.* If the lender provides the unusual withdrawal notice by mail, the lender must mail the notice no earlier than 10 business days and no later than six business days prior to initiating the transfer.

(B) *Electronic delivery.* (*1*) If the lender provides the unusual withdrawal notice through electronic delivery, the lender must send the notice no earlier than seven business days and no later than three business days prior to initiating the transfer.

(*2*) If, after providing the unusual withdrawal notice through electronic delivery pursuant to the timing requirements in paragraph (b)(3)(i)(B) of this section, the lender loses the consumer's consent to receive the notice through a particular electronic delivery method according to paragraph (a)(4)(ii) of this section, the lender must provide notice of any future unusual withdrawal attempt, if applicable, through alternate means.

(C) *In person.* If the lender provides the unusual withdrawal notice in person, the lender must provide the notice no earlier than seven business days and no later than three business days prior to initiating the transfer.

(D) *Exception for open-end credit.* If the unusual withdrawal notice is for open-end credit as defined in § 1041.2(a)(16), the lender may provide the unusual withdrawal notice in conjunction with the periodic statement required under Regulation Z, 12 CFR 1026.7(b), in accordance with the timing requirements of that section.

(ii) *Content requirements.* The unusual withdrawal notice must contain the following information and statements, as applicable, using language substantially similar to the language set forth in Model Form A–4 in appendix A to this part:

(A) *Identifying statement.* The statement, ''Alert: Unusual Withdrawal,'' using that phrase, and, in the same statement, the name of the lender that is providing the notice.

(B) *Basic payment information.* The content required for the first withdrawal notice under paragraphs (b)(2)(ii)(B) through (D) of this section.

(C) *Description of unusual withdrawal.* The following content, as applicable, in a form substantially similar to the form in Model Form A–4 in appendix A to this part:

(*1*) *Varying amount*—(*i*) *General.* If the amount of a transfer will vary in amount from the regularly scheduled payment amount, a statement that the transfer will be for a larger or smaller amount than the regularly scheduled payment amount, as applicable.

(*ii*) *Open-end credit.* If the payment transfer is for open-end credit as defined in § 1041.2(a)(16), the varying amount

content is required only if the amount deviates from the scheduled minimum payment due as disclosed in the periodic statement required under Regulation Z, 12 CFR 1026.7(b).

(*2*) *Date other than date of regularly scheduled payment.* If the payment transfer date is not a date on which a regularly scheduled payment is due under the terms of the loan agreement, a statement that the transfer will be initiated on a date other than the date of a regularly scheduled payment.

(*3*) *Different payment channel.* If the payment channel will differ from the payment channel of the transfer directly preceding it, a statement that the transfer will be initiated through a different payment channel and a statement of the payment channel used for the prior transfer.

(*4*) *For purpose of re-initiating returned transfer.* If the transfer is for the purpose of re-initiating a returned transfer, a statement that the lender is re-initiating a returned transfer, a statement of the date and amount of the previous unsuccessful attempt, and a statement of the reason for the return.

(4) *Electronic delivery*—(i) *General.* When the consumer has consented to receive disclosures through electronic delivery, the lender may provide the applicable payment notice required by paragraph (b)(1) of this section through electronic delivery only if it also provides an electronic short notice, except for email delivery as provided in paragraph (b)(4)(iii) of this section.

(ii) *Electronic short notice*—(A) *General content.* The electronic short notice required by this paragraph (b) must contain the following information and statements, as applicable, in a form substantially similar to Model Clause A–6 in appendix A to this part:

(*1*) *Identifying statement,* as required under paragraphs (b)(2)(ii)(A) and (b)(3)(ii)(A) of this section;

(*2*) *Transfer terms*—(*i*) *Date,* as required under paragraphs (b)(2)(ii)(B)(*1*) and (b)(3)(ii)(B) of this section;

(*ii*) *Amount,* as required under paragraphs (b)(2)(ii)(B)(*2*) and (b)(3)(ii)(B) of this section;

(*iii*) *Consumer account,* as required and limited under paragraphs (b)(2)(ii)(B)(*3*) and (b)(3)(ii)(B) of this section; and

(*3*) *Web site URL.* When the full notice is being provided through a linked URL rather than as a PDF attachment, the unique URL of a Web site that the consumer may use to access the full payment notice required by paragraph (b) of this section.

(B) *Additional content requirements.* If the transfer meets any of the conditions for unusual attempts described in paragraph (b)(3)(ii)(C) of this section, the electronic short notice must also contain the following information and statements, as applicable, using language substantially similar to the language in Model Clause A–7 in appendix A to this part:

(*1*) *Varying amount,* as defined under paragraph (b)(3)(ii)(C)(*1*) of this section;

(*2*) *Date other than due date of regularly scheduled payment,* as defined under paragraph (b)(3)(ii)(C)(*2*) of this section; and

(*3*) *Different payment channel,* as defined under paragraph (b)(3)(ii)(C)(*3*) of this section.

(iii) *Email delivery.* When the consumer has consented to receive disclosures through electronic delivery, and the method of electronic delivery is email, the lender may either deliver the full notice required by paragraph (b)(1) of this section in the body of the email or deliver the full notice as a linked URL Web page or PDF attachment along with the electronic short notice as provided in paragraph (b)(4)(ii) of this section.

(c) *Consumer rights notice*—(1) *General.* After a lender initiates two consecutive failed payment transfers from a consumer's account as described in § 1041.8(b), the lender must provide to the consumer a consumer rights notice in accordance with the requirements of paragraphs (c)(2) through (4) of this section.

(2) *Timing.* The lender must send the notice no later than three business days after it receives information that the second consecutive attempt has failed.

(3) *Content requirements.* The notice must contain the following information and statements, using language substantially similar to the language set forth in Model Form A–5 in appendix A to this part:

(i) *Identifying statement.* A statement that the lender, identified by name, is no longer permitted to withdraw loan payments from the consumer's account.

(ii) *Last two attempts were returned.* A statement that the lender's last two attempts to withdraw payment from the consumer's account were returned due to non-sufficient funds, or, if applicable to payments initiated by the consumer's account-holding institution, caused the account to go into overdraft status.

(iii) *Consumer account.* Sufficient information to permit the consumer to identify the account from which the unsuccessful payment attempts were made. The lender must not provide the complete account number of the consumer, but may use a truncated version similar to Model Form A–5 in appendix A to this part.

(iv) *Loan identification information.* Sufficient information to permit the consumer to identify any covered loans associated with the unsuccessful payment attempts.

(v) *Statement of Federal law prohibition.* A statement, using that phrase, that in order to protect the consumer's account, Federal law prohibits the lender from initiating further payment transfers without the consumer's permission.

(vi) *Contact about choices.* A statement that the lender may be in contact with the consumer about payment choices going forward.

(vii) *Previous unsuccessful payment attempts.* In a tabular form:

(A) *Previous payment attempts heading.* A heading with the statement ''previous payment attempts.''

(B) *Payment due date.* The scheduled due date of each previous unsuccessful payment transfer attempted by the lender.

(C) *Date of attempt.* The date of each previous unsuccessful payment transfer initiated by the lender.

(D) *Amount.* The amount of each previous unsuccessful payment transfer initiated by the lender.

(E) *Fees.* The fees charged by the lender for each unsuccessful payment attempt, if applicable, with an indication that these fees were charged by the lender.

(viii) *CFPB information.* A statement, using that phrase, that the Consumer Financial Protection Bureau created this notice, a statement that the CFPB is a Federal government agency, and the URL to *www.consumerfinance.gov/payday-rule.* This statement must be the last piece of information provided in the notice.

(4) *Electronic delivery*—(i) *General.* When the consumer has consented to receive disclosures through electronic delivery, the lender may provide the consumer rights notice required by paragraph (c) of this section through electronic delivery only if it also provides an electronic short notice, except for email delivery as provided in paragraph (c)(4)(iii) of this section.

(ii) *Electronic short notice*—(A) *Content.* The notice must contain the following information and statements, as applicable, using language substantially similar to the language set forth in Model Clause A–8 in appendix A to this part:

(*1*) *Identifying statement.* As required under paragraph (c)(3)(i) of this section;

(*2*) *Last two attempts were returned.* As required under paragraph (c)(3)(ii) of this section;

(*3*) *Consumer account.* As required and limited under paragraph (c)(3)(iii) of this section;

(*4*) *Statement of Federal law prohibition.* As required under paragraph (c)(3)(v) of this section; and

(*5*) *Web site URL.* When the full notice is being provided through a linked URL rather than as a PDF attachment, the unique URL of a Web site that the consumer may use to access the full consumer rights notice required by paragraph (c) of this section.

(B) [Reserved]

(iii) *Email delivery.* When the consumer has consented to receive disclosures through electronic delivery, and the method of electronic delivery is email, the lender may either deliver the full notice required by paragraph (c)(1) of this section in the body of the email or deliver the full notice as a linked URL Web page or PDF attachment along with the electronic short notice as provided in paragraph (c)(4)(ii) of this section.

Subpart D—Information Furnishing, Recordkeeping, Anti-Evasion, and Severability

§ 1041.10 Information furnishing requirements.

(a) *Loans subject to furnishing requirement.* For each covered short-term loan and covered longer-term balloon-payment loan a lender makes, the lender must furnish the loan information described in paragraph (c) of this section to each information system described in paragraph (b)(1) of this section.

(b) *Information systems to which information must be furnished.* (1) A lender must furnish information as required in paragraphs (a) and (c) of this section to each information system that, as of the date the loan is consummated:

(i) Has been registered with the Bureau pursuant to § 1041.11(c)(2) for 180 days or more; or

(ii) Has been provisionally registered with the Bureau pursuant to § 1041.11(d)(1) for 180 days or more or subsequently has become registered with the Bureau pursuant to § 1041.11(d)(2).

(2) The Bureau will publish on its Web site and in the **Federal Register** notice of the provisional registration of an information system pursuant to § 1041.11(d)(1), registration of an information system pursuant to § 1041.11(c)(2) or (d)(2), and suspension or revocation of the provisional registration or registration of an information system pursuant to § 1041.11(h). For purposes of paragraph (b)(1) of this section, an information system is provisionally registered or registered, and its provisional registration or registration is suspended or revoked, on the date that the Bureau publishes notice of such provisional registration, registration, suspension, or revocation on its Web site. The Bureau will maintain on the Bureau's Web site a current list of information systems provisionally registered pursuant to § 1041.11(d)(1) and registered pursuant to § 1041.11(c)(2) and (d)(2). In the event that a provisional registration or registration of an information system is suspended, the Bureau will provide instructions on its Web site concerning the scope and terms of the suspension.

(c) *Information to be furnished.* A lender must furnish the information described in this paragraph (c), at the times described in this paragraph (c), concerning each covered loan as required in paragraphs (a) and (b) of this section. A lender must furnish the information in a format acceptable to each information system to which it must furnish information.

(1) *Information to be furnished at loan consummation.* A lender must furnish the following information no later than the date on which the loan is consummated or as close in time as feasible to the date the loan is consummated:

(i) Information necessary to uniquely identify the loan;

(ii) Information necessary to allow the information system to identify the specific consumer(s) responsible for the loan;

(iii) Whether the loan is a covered short-term loan or a covered longer-term balloon-payment loan;

(iv) Whether the loan is made under § 1041.5 or § 1041.6, as applicable;

(v) The loan consummation date;

(vi) For a loan made under § 1041.6, the principal amount borrowed;

(vii) For a loan that is closed-end credit:

(A) The fact that the loan is closed-end credit;

(B) The date that each payment on the loan is due; and

(C) The amount due on each payment date; and

(viii) For a loan that is open-end credit:

(A) The fact that the loan is open-end credit;

(B) The credit limit on the loan;

(C) The date that each payment on the loan is due; and

(D) The minimum amount due on each payment date.

(2) *Information to be furnished while loan is an outstanding loan.* During the period that the loan is an outstanding loan, a lender must furnish any update to information previously furnished pursuant to this section within a reasonable period of the event that causes the information previously furnished to be out of date.

(3) *Information to be furnished when loan ceases to be an outstanding loan.* A lender must furnish the following information no later than the date the loan ceases to be an outstanding loan or as close in time as feasible to the date the loan ceases to be an outstanding loan:

(i) The date as of which the loan ceased to be an outstanding loan; and

(ii) Whether all amounts owed in connection with the loan were paid in full, including the amount financed, charges included in the cost of credit, and charges excluded from the cost of credit.

§ 1041.11 Registered information systems.

(a) *Definitions.* (1) *Consumer report* has the same meaning as in section 603(d) of the Fair Credit Reporting Act, 15 U.S.C. 1681a(d).

(2) *Federal consumer financial law* has the same meaning as in section 1002(14) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5481(14).

(b) *Eligibility criteria for information systems.* An entity is eligible to be a provisionally registered information system pursuant to paragraph (d)(1) of this section or a registered information system pursuant to paragraph (c)(2) or (d)(2) of this section only if the Bureau determines that the following conditions are satisfied:

(1) *Receiving capability.* The entity possesses the technical capability to receive information lenders must furnish pursuant to § 1041.10 immediately upon the furnishing of such information and uses reasonable data standards that facilitate the timely and accurate transmission and processing of information in a manner that does not impose unreasonable costs or burdens on lenders.

(2) *Reporting capability.* The entity possesses the technical capability to generate a consumer report containing, as applicable for each unique consumer, all information described in § 1041.10 substantially simultaneous to receiving the information from a lender.

(3) *Performance.* The entity will perform or performs in a manner that facilitates compliance with and furthers the purposes of this part.

(4) *Federal consumer financial law compliance program.* The entity has developed, implemented, and maintains a program reasonably designed to ensure compliance with all applicable Federal consumer financial laws, which

includes written policies and procedures, comprehensive training, and monitoring to detect and to promptly correct compliance weaknesses.

(5) *Independent assessment of Federal consumer financial law compliance program.* The entity provides to the Bureau in its application for provisional registration or registration a written assessment of the Federal consumer financial law compliance program described in paragraph (b)(4) of this section and such assessment:

(i) Sets forth a detailed summary of the Federal consumer financial law compliance program that the entity has implemented and maintains;

(ii) Explains how the Federal consumer financial law compliance program is appropriate for the entity's size and complexity, the nature and scope of its activities, and risks to consumers presented by such activities;

(iii) Certifies that, in the opinion of the assessor, the Federal consumer financial law compliance program is operating with sufficient effectiveness to provide reasonable assurance that the entity is fulfilling its obligations under all Federal consumer financial laws; and

(iv) Certifies that the assessment has been conducted by a qualified, objective, independent third-party individual or entity that uses procedures and standards generally accepted in the profession, adheres to professional and business ethics, performs all duties objectively, and is free from any conflicts of interest that might compromise the assessor's independent judgment in performing assessments.

(6) *Information security program.* The entity has developed, implemented, and maintains a comprehensive information security program that complies with the Standards for Safeguarding Customer Information, 16 CFR part 314.

(7) *Independent assessment of information security program.* (i) The entity provides to the Bureau in its application for provisional registration or registration and on at least a biennial basis thereafter, a written assessment of the information security program described in paragraph (b)(6) of this section and such assessment:

(A) Sets forth the administrative, technical, and physical safeguards that the entity has implemented and maintains;

(B) Explains how such safeguards are appropriate to the entity's size and complexity, the nature and scope of its activities, and the sensitivity of the customer information at issue;

(C) Explains how the safeguards that have been implemented meet or exceed the protections required by the Standards for Safeguarding Customer Information, 16 CFR part 314;

(D) Certifies that, in the opinion of the assessor, the information security program is operating with sufficient effectiveness to provide reasonable assurance that the entity is fulfilling its obligations under the Standards for Safeguarding Customer Information, 16 CFR part 314; and

(E) Certifies that the assessment has been conducted by a qualified, objective, independent third-party individual or entity that uses procedures and standards generally accepted in the profession, adheres to professional and business ethics, performs all duties objectively, and is free from any conflicts of interest that might compromise the assessor's independent judgment in performing assessments.

(ii) Each written assessment obtained and provided to the Bureau on at least a biennial basis pursuant to paragraph (b)(7)(i) of this section must be completed and provided to the Bureau within 60 days after the end of the period to which the assessment applies.

(8) *Bureau supervisory authority.* The entity acknowledges it is, or consents to being, subject to the Bureau's supervisory authority.

(c) *Registration of information systems prior to August 19, 2019*—(1) *Preliminary approval.* Prior to August 19, 2019, the Bureau may preliminarily approve an entity for registration only if the entity submits an application for preliminary approval to the Bureau by the deadline set forth in paragraph (c)(3)(i) of this section containing information sufficient for the Bureau to determine that the entity is reasonably likely to satisfy the conditions set forth in paragraph (b) of this section by the deadline set forth in paragraph (c)(3)(ii) of this section. The assessments described in paragraphs (b)(5) and (7) of this section need not be included with an application for preliminary approval for registration or completed prior to the submission of the application. The Bureau may require additional information and documentation to facilitate this determination.

(2) *Registration.* Prior to August 19, 2019, the Bureau may approve the application of an entity to be a registered information system only if:

(i) The entity received preliminary approval pursuant to paragraph (c)(1) of this section; and

(ii) The entity submits an application to the Bureau by the deadline set forth in paragraph (c)(3)(ii) of this section that contains information and documentation sufficient for the Bureau to determine that the entity satisfies the conditions set forth in paragraph (b) of this section. The Bureau may require additional information and documentation to facilitate this determination or otherwise to assess whether registration of the entity would pose an unreasonable risk to consumers.

(3) *Deadlines.* (i) The deadline to submit an application for preliminary approval for registration pursuant to paragraph (c)(1) of this section is April 16, 2018.

(ii) The deadline to submit an application to be a registered information system pursuant to paragraph (c)(2) of this section is 120 days from the date preliminary approval for registration is granted.

(iii) The Bureau may waive the deadlines set forth in this paragraph (c).

(d) *Registration of information systems on or after August 19, 2019*—(1) *Provisional registration.* On or after August 19, 2019, the Bureau may approve an entity to be a provisionally registered information system only if the entity submits an application to the Bureau that contains information and documentation sufficient for the Bureau to determine that the entity satisfies the conditions set forth in paragraph (b) of this section. The Bureau may require additional information and documentation to facilitate this determination or otherwise to assess whether provisional registration of the entity would pose an unreasonable risk to consumers.

(2) *Registration.* An information system that is provisionally registered pursuant to paragraph (d)(1) of this section shall automatically become a registered information system pursuant to this paragraph (d)(2) upon the expiration of the 240-day period commencing on the date the information system is provisionally registered. For purposes of this paragraph (d)(2), an information system is provisionally registered on the date that the Bureau publishes notice of the provisional registration on the Bureau's Web site.

(e) *Applications.* Applications for preliminary approval, registration, and provisional registration shall be submitted in the form required by the Bureau and shall include, in addition to the information described in paragraph (c) or (d) of this section, as applicable, the following information:

(1) The name under which the applicant conducts business, including any ''doing business as'' or other trade name;

(2) The applicant's main business address, mailing address if it is different from the main business address,

telephone number, electronic mail address, and Internet Web site; and

(3) The name and contact information (including telephone number and electronic mail address) of the person authorized to communicate with the Bureau on the applicant's behalf concerning the application.

(f) *Denial of application.* The Bureau will deny the application of an entity seeking preliminary approval for registration under paragraph (c)(1) of this section, registration under paragraph (c)(2) of this section, or provisional registration under paragraph (d)(1) of this section, if the Bureau determines, as applicable, that:

(1) The entity does not satisfy the conditions set forth in paragraph (b) of this section, or, in the case of an entity seeking preliminary approval for registration, is not reasonably likely to satisfy the conditions as of the deadline set forth in paragraph (c)(3)(ii) of this section;

(2) The entity's application is untimely or materially inaccurate or incomplete; or

(3) Preliminary approval, provisional registration, or registration of the entity would pose an unreasonable risk to consumers.

(g) *Notice of material change.* An entity that is a provisionally registered or registered information system must provide to the Bureau in writing a description of any material change to information contained in its application for registration submitted pursuant to paragraph (c)(2) of this section or provisional registration submitted pursuant to paragraph (d)(1) of this section, or to information previously provided to the Bureau pursuant to this paragraph (g), within 14 days of such change.

(h) *Suspension and revocation.* (1) The Bureau will suspend or revoke an entity's preliminary approval for registration pursuant to paragraph (c)(1) of this section, provisional registration pursuant to paragraph (d)(1) of this section, or registration pursuant to paragraph (c)(2) or (d)(2) of this section if the Bureau determines:

(i) That the entity has not satisfied or no longer satisfies the conditions described in paragraph (b) of this section or has not complied with the requirement described in paragraph (g) of this section; or

(ii) That preliminary approval, provisional registration, or registration of the entity poses an unreasonable risk to consumers.

(2) The Bureau may require additional information and documentation from an entity if it has reason to believe suspension or revocation under paragraph (h)(1) of this section may be warranted.

(3) Except in cases of willfulness or those in which the public interest requires otherwise, prior to suspension or revocation under paragraph (h)(1) of this section, the Bureau will provide written notice of the facts or conduct that may warrant the suspension or revocation and an opportunity for the entity or information system to demonstrate or achieve compliance with this section or otherwise address the Bureau's concerns.

(4) The Bureau will revoke an entity's preliminary approval for registration, provisional registration, or registration if the entity submits a written request to the Bureau that its preliminary approval, provisional registration, or registration be revoked.

(5) For purposes of §§ 1041.5 and 1041.6, suspension or revocation of an information system's registration is effective five days after the date that the Bureau publishes notice of the suspension or revocation on the Bureau's Web site. For purposes of § 1041.10(b)(1), suspension or revocation of an information system's provisional registration or registration is effective on the date that the Bureau publishes notice of the suspension or revocation on the Bureau's Web site. The Bureau will also publish notice of a suspension or revocation in the **Federal Register**.

(6) In the event that a provisional registration or registration of an information system is suspended, the Bureau will provide instructions concerning the scope and terms of the suspension on its Web site and in the notice of suspension published in the **Federal Register**.

(i) *Administrative appeals*—(1) *Grounds for administrative appeals.* An entity may appeal a determination of the Bureau that:

(i) Denies the application of an entity seeking preliminary approval for registration under paragraph (c)(1) of this section, registration under paragraph (c)(2) of this section, or provisional registration under paragraph (d)(1) of this section; or

(ii) Suspends or revokes the entity's preliminary approval for registration pursuant to paragraph (c)(1) of this section, provisional registration pursuant to paragraph (d)(1) of this section, or registration pursuant to paragraph (c)(2) or (d)(2) of this section.

(2) *Time limits for filing administrative appeals.* An appeal must be submitted on a date that is within 30 business days of the date of the determination. The Bureau may extend this time for good cause.

(3) *Form and content of administrative appeals.* An appeal shall be made by electronic means as follows:

(i) The appeal shall be submitted as set forth on the Bureau's Web site. The appeal shall be labeled ''Information System Registration Appeal;''

(ii) The appeal shall set forth contact information for the appellant including, to the extent available, a mailing address, telephone number, or email address at which the Bureau may contact the appellant regarding the appeal;

(iii) The appeal shall specify the date of the letter of determination, and enclose a copy of the determination being appealed; and

(iv) The appeal shall include a description of the issues in dispute, specify the legal and factual basis for appealing the determination, and include appropriate supporting information.

(4) *Appeals process.* The filing and pendency of an appeal does not by itself suspend the determination that is the subject of the appeal during the appeals process. Notwithstanding the foregoing, the Bureau may, in its discretion, suspend the determination that is the subject of the appeal during the appeals process.

(5) *Decisions to grant or deny administrative appeals.* The Bureau shall decide whether to affirm the determination (in whole or in part) or to reverse the determination (in whole or in part) and shall notify the appellant of this decision in writing.

§ 1041.12 Compliance program and record retention.

(a) *Compliance program.* A lender making a covered loan must develop and follow written policies and procedures that are reasonably designed to ensure compliance with the requirements in this part. These written policies and procedures must be appropriate to the size and complexity of the lender and its affiliates, and the nature and scope of the covered loan lending activities of the lender and its affiliates.

(b) *Record retention.* A lender must retain evidence of compliance with this part for 36 months after the date on which a covered loan ceases to be an outstanding loan.

(1) *Retention of loan agreement and documentation obtained in connection with originating a covered short-term or covered longer-term balloon-payment loan.* To comply with the requirements in this paragraph (b), a lender must retain or be able to reproduce an image of the loan agreement and documentation obtained in connection

with a covered short-term or covered longer-term balloon-payment loan, including the following documentation, as applicable:

(i) Consumer report from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered with the Bureau pursuant to § 1041.11(d)(2);

(ii) Verification evidence, as described in § 1041.5(c)(2)(ii); and

(iii) Written statement obtained from the consumer, as described in § 1041.5(c)(2)(i).

(2) *Electronic records in tabular format regarding origination calculations and determinations for a covered short-term or covered longer-term balloon-payment loan under § 1041.5.* To comply with the requirements in this paragraph (b), a lender must retain electronic records in tabular format that include the following information for a covered loan made under § 1041.5:

(i) The projection made by the lender of the amount of a consumer's net income during the relevant monthly period;

(ii) The projections made by the lender of the amounts of a consumer's major financial obligations during the relevant monthly period;

(iii) Calculated residual income or debt-to-income ratio during the relevant monthly period;

(iv) Estimated basic living expenses for the consumer during the relevant monthly period; and

(v) Other consumer-specific information considered in making the ability-to-repay determination.

(3) *Electronic records in tabular format regarding type, terms, and performance of covered short-term or covered longer-term balloon-payment loan.* To comply with the requirements in this paragraph (b), a lender must retain electronic records in tabular format that include the following information for a covered short-term or covered longer-term balloon-payment loan:

(i) As applicable, the information listed in § 1041.10(c)(1)(i) through (viii) and (c)(2);

(ii) Whether the lender obtained vehicle security from the consumer;

(iii) The loan number in a loan sequence of covered short-term loans, covered longer-term balloon-payment loans, or a combination thereof;

(iv) For any full payment on the loan that was not received or transferred by the contractual due date, the number of days such payment was past due, up to a maximum of 180 days;

(v) For a loan with vehicle security: Whether repossession of the vehicle was initiated;

(vi) Date of last or final payment received; and

(vii) The information listed in § 1041.10(c)(3).

(4) *Retention of records relating to payment practices for covered loans.* To comply with the requirements in this paragraph (b), a lender must retain or be able to reproduce an image of the following documentation, as applicable, in connection with a covered loan:

(i) Leveraged payment mechanism(s) obtained by the lender from the consumer;

(ii) Authorization of additional payment transfer, as described in § 1041.8(c)(3)(iii); and

(iii) Underlying one-time electronic transfer authorization or underlying signature check, as described in § 1041.8(d)(2).

(5) *Electronic records in tabular format regarding payment practices for covered loans.* To comply with the requirements in this paragraph (b), a lender must retain electronic records in tabular format that include the following information for covered loans:

(i) History of payments received and attempted payment transfers, as defined in § 1041.8(a)(1), including:

(A) Date of receipt of payment or attempted payment transfer;

(B) Amount of payment due;

(C) Amount of attempted payment transfer;

(D) Amount of payment received or transferred; and

(E) Payment channel used for attempted payment transfer.

(ii) If an attempt to transfer funds from a consumer's account is subject to the prohibition in § 1041.8(b)(1), whether the lender or service provider obtained authorization to initiate a payment transfer from the consumer in accordance with the requirements in § 1041.8(c) or (d).

§ 1041.13 Prohibition against evasion.

A lender must not take any action with the intent of evading the requirements of this part.

§ 1041.14 Severability.

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect.

Appendix A to Part 1041—Model Forms

BILLING CODE 4810–AM–P

A-1 Model Form for First § 1041.6 Loan

WILLOW LENDING
800-555-5555
willowlending.com

Notice of restrictions on future loans

If you are unsure whether you will be able to pay $360.00 by November 12th, 2016, you should not take out this loan.

After you repay this loan, any similar loan you take out within the next 30 days will have to be smaller. This restriction is required by federal law.

Borrowing limits:

Loan order	Maximum amount that you will be able to borrow
Loan #1 (*this loan*)	$300.00
Loan #2	$200.00
Loan #3	$100.00
Loan #4	Not allowed

A-2 Model Form for Third § 1041.6 Loan

WILLOW LENDING
800-555-5555
willowlending.com

Notice of borrowing limits on this loan and future loans

Our records show that you have had two similar loans without taking a 30-day break. Under federal law, this loan must be smaller than your prior loans. And after you repay this loan, **you will not be able to take out another similar loan for at least 30 days**.

A-3 Model Form for First Payment Withdrawal Notice under § 1041.9(b)(2)

WILLOW LENDING
800-555-5555
willowlending.com

Upcoming Withdrawal Notice from Willow Lending

On November 12, 2016, Willow Lending will attempt to withdraw a payment of $80 from your account ending in 0022. The payment will be withdrawn by check, using check #999.

If this payment is not successful, we will add a $10 returned payment fee to your balance on loan #5432.

Contact Willow Lending at 1-800-555-5555 if you have questions or need to stop this withdrawal. The institution where you have your account also may be able to assist you.

Payment breakdown

Principal now	$0
Interest	$80
Total payment amount	$80

When you make this payment, your principal balance will stay the same and you will not be closer to paying off your loan.

A-4 Model Form for Unusual Withdrawal Notice under § 1041.9(b)(3)

WILLOW LENDING
800-555-5555
willowlending.com

Alert: Unusual Withdrawal from Willow Lending

On November 12, 2016, Willow Lending will attempt to withdraw a payment of $80 from your account ending in 0022. This electronic withdrawal will be made by ACH transfer.

This payment is unusual because it is larger than your originally scheduled payment. The previous withdrawal was initiated on November 2, 2016, for $60.

If this payment is not successful, we will add a $10 returned payment fee to your balance on loan #5432.

Contact Willow Lending at 1-800-555-5555 if you have questions or need to stop this withdrawal. The institution where you have your account also may be able to assist you.

Payment breakdown

Principal	$50
Interest	$20
Fees	$10
Total payment amount	$80

A-5 Model Form for Consumer Rights Notice under § 1041.9(c)

WILLOW LENDING
800-555-5555
willowlending.com

Notice: Willow Lending is no longer permitted to withdraw loan payments from your account

Our last two attempts to withdraw payment on your loan #5432 from your account ending in 0022 were returned because your account did not contain enough funds to cover the payment. To protect your account, federal law prohibits us from trying to withdraw payment again without your permission.

We may contact you to talk about your payment choices going forward.

Previous payment attempts

Payment due date	Date of attempt	Amount	Fees charged by Willow Lending
November 7, 2016	November 7, 2016	$80	$10 returned payment fee
November 7, 2016	November 10, 2016	$80	$10 returned payment fee

The Consumer Financial Protection Bureau (CFPB) created this notice to inform you of your rights under federal law. The CFPB is a federal government agency built to protect consumers. To learn more about your rights as a borrower, visit www.cfpb.gov/payday.

A-6 Model Clause for First Payment Withdrawal Electronic Short Notice under § 1041.9(b)(4)

Subject (applicable to email only)
Upcoming Withdrawal Notice from Willow Lending

Body
Upcoming Withdrawal Notice from Willow Lending
On Nov 12, 2016, we will attempt to withdraw a payment of $80 from your account ending in 0022.

View the details at willowlending.com/xox302ksw.

A-7 Model Clause for Unusual Withdrawal Electronic Short Notice under § 1041.9(b)(4)(ii)(B)

Subject (applicable to email only)
Alert: Unusual Withdrawal from Willow Lending

Body
Alert: Unusual Withdrawal from Willow Lending
On Nov 12, 2016, we will attempt to withdraw a payment of $80 from your account ending in 0022. This payment is unusual because it is larger than your originally scheduled payment.

View the details at willowlending.com/xox302ksw.

A-8 Model Clause for Consumer Rights Electronic Short Notice under § 1041.9(c)(4)

Subject (applicable to email only)
Notice: Willow Lending is no longer permitted to withdraw loan payments from your account

Body
Notice: Willow Lending is no longer permitted to withdraw loan payments from your account
Our last two attempts to withdraw payment from your account ending in 0022 were returned. To protect your account, federal law prohibits us from trying to withdraw payment again without your permission.

View the details at willowlending.com/xox302ksw.

BILLING CODE 4810–AM–C

Supplement I to Part 1041—Official Interpretations

Section 1041.2—Definitions

2(a)(3) Closed-End Credit

1. *In general.* Institutions may rely on 12 CFR 1026.2(a)(10) and its related commentary in determining the meaning of closed-end credit, but without regard to whether the credit is consumer credit, as that term is defined in 12 CFR 1026.2(a)(12), or is extended to a consumer, as that term is defined in 12 CFR 1026.2(a)(11).

2(a)(5) Consummation

1. *New loan.* When a contractual obligation on the consumer's part is created is a matter to be determined under applicable law. A contractual commitment agreement, for example, that under applicable law binds the consumer to the loan terms would be consummation. Consummation, however, does not occur merely because the consumer has made some financial investment in the transaction (for example, by paying a non-refundable fee) unless applicable law holds otherwise.

2. *Modification of existing loan that triggers underwriting requirements.* A modification of an existing loan that increases the amount of an existing loan triggers underwriting requirements under § 1041.5 in certain circumstances. If the outstanding amount of an existing loan is increased, or if the total amount available under an open-end credit plan is increased, the modification is consummated as of the time that the consumer becomes contractually obligated on such a modification or increase. In those cases, the modification must comply with the requirements of § 1041.5(b). A loan modification does not trigger underwriting requirements under § 1041.5 if the modification reduces the outstanding amount or the total amount available under an open-end credit plan, or if the modification results only in the consumer receiving additional time in which to repay the loan. For example, providing a cost-free ''off-ramp'' or repayment plan to a consumer who cannot repay a loan during the allotted term of the loan is a modification of an existing loan—not a new loan—that results only in the consumer receiving additional time in which to repay the loan. Thus, providing a no-cost repayment plan does not constitute a modification that increases the amount of an existing loan.

2(a)(11) Credit

1. *In general.* Institutions may rely on 12 CFR 1026.2(a)(14) and its related commentary in determining the meaning of credit.

2(a)(12) Electronic Fund Transfer

1. *In general.* Institutions may rely on 12 CFR 1005.3(b) and its related commentary in determining the meaning of electronic fund transfer.

2(a)(13) Lender

1. *Regularly extends credit.* The test for determining whether a person regularly extends credit for personal, family, or household purposes is explained in Regulation Z, 12 CFR 1026.2(a)(17)(v). Any loan to a consumer primarily for personal, family, or household purposes, whether or not the loan is a covered loan under this part, counts toward the numeric threshold for determining whether a person regularly extends credit.

2(a)(16) Open-End Credit

1. *In general.* Institutions may rely on 12 CFR 1026.2(a)(20) and its related commentary in determining the meaning of open-end credit, but without regard to whether the credit permits a finance charge to be imposed from time to time on an outstanding balance as defined in 12 CFR 1026.4. Also, for the purposes of defining open-end credit under this part, the term credit, as defined in § 1041.2(a)(11), is substituted for the term consumer credit, as defined in 12 CFR 1026.2(a)(12); the term lender, as defined in § 1041.2(a)(13), is substituted for the term creditor, as defined in 12 CFR 1026.2(a)(17); and the term consumer, as defined in § 1041.2(a)(4), is substituted for the term consumer, as defined in 12 CFR 1026.2(a)(11). See generally § 1041.2(b).

2(a)(17) Outstanding Loan

1. *Payments owed to third parties.* A loan is an outstanding loan if it meets all the criteria set forth in § 1041.2(a)(17), regardless of whether the consumer is required to pay the lender, an affiliate of the lender, or a service provider. A lender selling the loan or the loan servicing rights to a third party does not affect whether a loan is an outstanding loan under § 1041.2(a)(17).

2. *Stale loans.* A loan is generally an outstanding loan if the consumer has a legal obligation to repay the loan, even if the consumer is delinquent or if the consumer is in a repayment plan or workout arrangement. However, a loan that the consumer otherwise has a legal obligation to repay is not an outstanding loan for purposes of this part if the consumer has not made any payment on the loan within the previous 180-day period. A loan ceases to be an outstanding loan as of: The earliest of the date the consumer repays the loan in full, the date the consumer is released from the legal obligation to repay, the date the loan is otherwise legally discharged, or the date that is 180 days following the last payment that the consumer has made on the loan, even if the payment is not a regularly scheduled payment in a scheduled amount. If the consumer does not make any payments on a loan and none of these other events occur, the loan ceases to be outstanding 180 days after consummation. A loan cannot become an outstanding loan due to any events that occur after the consumer repays the loan in full, the consumer is released from the legal obligation to repay, the loan is otherwise legally discharged, 180 days following the last payment that the consumer has made on the loan, or 180 days after consummation of a loan on which the consumer makes no payments.

2(a)(18) Service Provider

1. *Credit access businesses and credit services organizations.* Persons who provide a material service to lenders in connection with the lenders' offering or provision of covered loans are service providers, subject to the specific limitations in section 1002(26) of the Dodd-Frank Act. Accordingly, credit access businesses and credit service organizations that provide a material service to lenders during the course of obtaining for consumers, or assisting consumers in obtaining, loans from lenders, are service providers, subject to the specific limitations in section 1002(26) of the Dodd-Frank Act.

2(a)(19) Vehicle Security

1. *An interest in a consumer's motor vehicle as a condition of credit.* Subject to the exclusion described in § 1041.3(d)(1), a lender's or service provider's interest in a consumer's motor vehicle constitutes vehicle security only to the extent that the security interest is obtained in connection with the credit. If a party obtains such a security interest in a consumer's motor vehicle for a reason that is unrelated to an extension of credit, the security interest does not constitute vehicle security. For example, if a mechanic performs work on a consumer's motor vehicle and a mechanic's lien attaches to the consumer's motor vehicle by operation of law because the consumer did not timely pay the mechanic's bill, the mechanic does not obtain vehicle security for the purposes of § 1041.2(a)(19).

2(b) Rule of Construction

1. *Incorporation of terms from underlying statutes and regulations.* For purposes of this part, where definitions are incorporated from other statutes or regulations, users may as applicable rely on embedded definitions, appendices, and commentary for those other laws. For example, 12 CFR 1005.2(b) and its related commentary determine the meaning of account under § 1041.2(a)(1). However, where this part defines the same term or a parallel term in a way that creates a substantive distinction, the definition in this part shall control. See, for example, the definition of open-end credit in § 1041.2(a)(16), which is generally determined according to 12 CFR 1026.2(a)(20) and its related commentary but without regard to whether the credit is consumer credit, as that term is defined in 12 CFR 1026.2(a)(12), or is extended to a consumer, as that term is defined in 12 CFR 1026.2(a)(11), because this part provides a different and arguably broader definition of consumer in § 1041.2(a)(4).

Section 1041.3—Scope of Coverage; Exclusions; Exemptions

3(b) Covered Loans

1. *Credit structure.* The term covered loan includes open-end credit and closed-end credit, regardless of the form or structure of the credit.

2. *Primary purpose.* Under § 1041.3(b), a loan is not a covered loan unless it is extended primarily for personal, family, or household purposes. Institutions may rely on 12 CFR 1026.3(a) and its related commentary in determining the primary purpose of a loan.

Paragraph 3(b)(1)

1. *Closed-end credit that does not provide for multiple advances to consumers.* A loan does not provide for multiple advances to a consumer if the loan provides for full disbursement of the loan proceeds only through disbursement on a single specific date.

2. *Loans that provide for multiple advances to consumers.* Both open-end credit and closed-end credit may provide for multiple advances to consumers. Open-end credit can have a fixed expiration date, as long as during the plan's existence the consumer may use credit, repay, and reuse the credit. Likewise, closed-end credit may consist of a series of advances. For example:

i. Under a closed-end commitment, the lender might agree to lend a total of $1,000 in a series of advances as needed by the consumer. When a consumer has borrowed the full $1,000, no more is advanced under that particular agreement, even if there has been repayment of a portion of the debt.

3. *Facts and circumstances test for determining whether loan is substantially repayable within 45 days.* Substantially repayable means that the

substantial majority of the loan or advance is required to be repaid within 45 days of consummation or advance, as the case may be. Application of the standard depends on the specific facts and circumstances of each loan, including the timing and size of the scheduled payments. A loan or advance is not substantially repayable within 45 days of consummation or advance merely because a consumer chooses to repay within 45 days when the loan terms do not require the consumer to do so.

4. *Deposit advance products.* A loan or advance is substantially repayable within 45 days of consummation or advance if the lender has the right to be repaid through a sweep or withdrawal of any qualifying electronic deposit made into the consumer's account within 45 days of consummation or advance. A loan or advance described in this paragraph is substantially repayable within 45 days of consummation or advance even if no qualifying electronic deposit is actually made into or withdrawn by the lender from the consumer's account.

5. *Loans with alternative, ambiguous, or unusual payment schedules.* If a consumer, under any applicable law, would breach the terms of the agreement between the consumer and the lender or service provider by not substantially repaying the entire amount of the loan or advance within 45 days of consummation or advance, as the case may be, the loan is a covered short-term loan under § 1041.3(b)(1). For loans or advances that are not required to be repaid within 45 days of consummation or advance, if the consumer, under applicable law, would not breach the terms of the agreement between the consumer and the lender by not substantially repaying the loan or advance in full within 45 days, the loan is a covered longer-term balloon-payment loan under § 1041.3(b)(2) or a covered longer-term loan under § 1041.3(b)(3) if the loan otherwise satisfies the criteria specified in § 1041.3(b)(2) or (3), respectively.

Paragraph 3(b)(2)

1. *Closed-end credit that does not provide for multiple advances to consumers. See* comments 3(b)(1)–1 and 3(b)(1)–2.

2. *Payments more than twice as large as other payments.* For purposes of § 1041.3(b)(2)(i) and (ii), all required payments of principal and any charges (or charges only, depending on the loan features) due under the loan are used to determine whether a particular payment is more than twice as large as another payment, regardless of whether the payments have changed during the loan term due to rate adjustments or other payment changes permitted or required under the loan.

3. *Charges excluded.* Charges for actual unanticipated late payments, for exceeding a credit limit, or for delinquency, default, or a similar occurrence that may be added to a payment are excluded from the determination of whether the loan is repayable in a single payment or a particular payment is more than twice as large as another payment. Likewise, sums that are accelerated and due upon default are excluded from the determination of whether the loan is repayable in a single payment or a particular payment is more than twice as large as another payment.

4. *Multiple-advance structures.* Loans that provide for more than one advance are considered to be a covered longer-term balloon-payment loan under § 1041.3(b)(2)(ii) if either:

i. The consumer is required to repay substantially the entire amount of an advance more than 45 days after the advance is made or is required to make at least one payment on the advance that is more than twice as large as any other payment; or

ii. A loan with multiple advances is structured such that paying the required minimum payment may not fully amortize the outstanding balance by a specified date or time, and the amount of the final payment to repay the outstanding balance at such time could be more than twice the amount of other minimum payments under the plan. For example, the lender extends an open-end credit plan with a $500 credit limit, monthly billing cycles, and a minimum payment due each billing cycle that is equal to 10% of the outstanding principal. Fees or interest on the plan are equal to 10% of the outstanding principal per month, so that if a consumer pays nothing other than the minimum payment amount, the outstanding principal remains the same. All outstanding amounts must be repaid within six months of the advance. The credit plan is a covered loan under § 1041.3(b)(2)(ii) because if the consumer drew the entire amount at one time and then made only minimum payments, the sixth payment would be more than twice the amount of the minimum payment required ($50).

Paragraph 3(b)(3)

1. *Conditions for coverage of a longer-term loan.* A loan that is not a covered short-term loan or a covered longer-term balloon-payment loan is a covered longer-term loan only if it satisfies both the cost of credit requirement of § 1041.3(b)(3)(i) and leveraged payment mechanism requirement of § 1041.3(b)(3)(ii). If the requirements of § 1041.3(b)(3) are met, and the loan is not otherwise excluded or conditionally exempted from coverage by § 1041.3(d), (e), or (f), the loan is a covered longer-term loan. For example, a 60-day loan that is not a covered longer-term balloon-payment loan is not a covered longer-term loan if the cost of credit as measured pursuant to § 1041.2(a)(6) is less than or equal to a rate of 36 percent per annum even if the lender or service provider obtains a leveraged payment mechanism.

2. *No balance during a billing cycle.* Under § 1041.2(a)(6)(ii)(B), the cost of credit for open-end credit must be calculated according to the rules for calculating the effective annual percentage rate for a billing cycle as set forth in Regulation Z, 12 CFR 1026.14(c) and (d), which provide that the annual percentage rate cannot be calculated for billing cycles in which there is a finance charge but no other balance. Accordingly, pursuant to § 1041.2(a)(6)(ii)(B), the cost of credit could not be calculated for such billing cycles. Section 1041.3(b)(3)(i)(B)(*1*) provides that, for such billing cycles, an open-end credit plan is determined to have exceeded the threshold set forth in that paragraph if there is no balance other than a finance charge imposed by the lender.

3. *Timing for coverage determination.* A loan may become a covered longer-term loan at any such time as both of the requirements of § 1041.3(b)(3)(i) and (ii) are met. For example:

i. A lender originates a closed-end loan that is not a longer-term balloon-payment loan to be repaid within six months of consummation with a cost of credit equal to 60 percent. At the time of consummation, the loan is not a covered longer-term loan because it does not have a leveraged payment mechanism. After two weeks, the lender obtains a leveraged payment mechanism. The loan is now a covered longer-term loan because it meets both of the requirements of § 1041.3(b)(3)(i) and (ii).

ii. A lender extends an open-end credit plan with monthly billing cycles and a leveraged payment mechanism. At consummation and again at the end of the first billing cycle, the plan is not a covered longer-term loan because its cost of credit is below 36 percent. In the second billing cycle, the plan's cost of credit is 45 percent because several fees are triggered in addition to interest on the principal balance. The plan is now a covered longer-term loan because it meets both of the requirements of

§ 1041.3(b)(3)(i) and (ii). Beginning on the first day of the third billing cycle, and thereafter for the duration of the plan, the lender must therefore comply with the requirements of this part including by, for example, providing a first withdrawal notice before initiating the first payment transfer on or after the first day of the third billing cycle. The requirements to provide certain payment withdrawal notices under § 1041.9 have been structured so that the notices can be provided in the same mailing as the periodic statements that are required by Regulation Z, 12 CFR 1026.7(b). *See, e.g.,* § 1041.9(b)(3)(i)(D).

Paragraph 3(b)(3)(ii)

1. *Timing.* The condition in § 1041.3(b)(3)(ii) is satisfied if a lender or service provider obtains a leveraged payment mechanism before, at the same time as, or after the consumer receives the entire amount of funds that the consumer is entitled to receive under the loan, regardless of the means by which the lender or service provider obtains a leveraged payment mechanism.

2. *Leveraged payment mechanism in contract.* The condition in § 1041.3(b)(3)(ii) is satisfied if a loan agreement authorizes the lender to elect to obtain a leveraged payment mechanism, regardless of the time at which the lender actually obtains a leveraged payment mechanism. The following are examples of situations in which a lender obtains a leveraged payment mechanism under § 1041.3(b)(3)(ii):

i. *Future authorization.* A loan agreement provides that the consumer, at some future date, must authorize the lender or service provider to debit the consumer's account on a recurring basis.

ii. *Delinquency or default provisions.* A loan agreement provides that the consumer must authorize the lender or service provider to debit the consumer's account on a one-time or a recurring basis if the consumer becomes delinquent or defaults on the loan.

Paragraph 3(c)

1. *Initiating a transfer of money from a consumer's account.* A lender or service provider obtains the ability to initiate a transfer of money when that person can collect payment, or otherwise withdraw funds, from a consumer's account, either on a single occasion or on a recurring basis, without the consumer taking further action. Generally, when a lender or service provider has the ability to ''pull'' funds or initiate a transfer from the consumer's account, that person has a leveraged payment mechanism. However, a ''push'' transaction from the consumer to the lender or service provider does not in itself give the lender or service provider a leveraged payment mechanism.

2. *Lender-initiated transfers.* The following are examples of situations in which a lender or service provider has the ability to initiate a transfer of money from a consumer's account:

i. *Check.* A lender or service provider obtains a check, draft, or similar paper instrument written by the consumer, other than a single immediate payment transfer at the consumer's request as described in § 1041.3(c) and comment 3(c)–3.

ii. *Electronic fund transfer authorization.* The consumer authorizes a lender or service provider to initiate an electronic fund transfer from the consumer's account in advance of the transfer, other than a single immediate payment transfer at the consumer's request as described in § 1041.3(c) and comment 3(c)–3.

iii. *Remotely created checks and remotely created payment orders.* A lender or service provider has authorization to create or present a remotely created check (as defined by Regulation CC, 12 CFR 229.2(fff)), remotely created payment order (as defined in 16 CFR 310.2(cc)), or similar instrument drafted on the consumer's account.

iv. *Transfer by account-holding institution.* A lender or service provider that is an account-holding institution has a right to initiate a transfer of funds between the consumer's account and an account of the lender or affiliate, including, but not limited to, an account-holding institution's right of set-off.

3. *Single immediate payment transfer at the consumer's request excluded.* A single immediate payment transfer at the consumer's request, as defined in § 1041.8(a)(2), is excluded from the definition of leveraged payment mechanism. Accordingly, if the loan or other agreement between the consumer and the lender or service provider does not otherwise provide for the lender or service provider to initiate a transfer without further consumer action, the lender or service provider can initiate a single immediate payment transfer at the consumer's request without causing the loan to become a covered loan under § 1041.3(b)(3). See § 1041.8(a)(2) and related commentary for guidance on what constitutes a single immediate payment transfer at the consumer's request.

4. *Transfers not initiated by the lender.* A lender or service provider does not initiate a transfer of money from a consumer's account if the consumer authorizes a third party, such as a bank's automatic bill pay service, to initiate a transfer of money from the consumer's account to a lender or service provider.

3(d) Exclusions

3(d)(1) Certain Purchase Money Security Interest Loans

1. ''*Sole purpose*'' *test.* The requirements of this part do not apply to loans made solely and expressly to finance the consumer's initial purchase of a good in which the lender takes a security interest as a condition of the credit. For example, the requirements of this part would not apply to a transaction in which a lender makes a loan to a consumer for the express purpose of initially purchasing a motor vehicle, television, household appliance, or furniture in which the lender takes a security interest and the amount financed is approximately equal to, or less than, the cost of acquiring the good, even if the cost of credit exceeds 36 percent per annum and the lender also obtains a leveraged payment mechanism. A loan is made solely and expressly to finance the consumer's initial purchase of a good even if the amount financed under the loan includes Federal, State, or local taxes or amounts required to be paid under applicable State and Federal licensing and registration requirements. This exclusion does not apply to refinances of credit extended for the purchase of a good.

3(d)(2) Real Estate Secured Credit

1. *Real estate and dwellings.* The requirements of this part do not apply to credit secured by any real property, or by any personal property, such as a mobile home, used or expected to be used as a dwelling if the lender records or otherwise perfects the security interest within the term of the loan, even if the cost of credit exceeds 36 percent per annum and the lender or servicer provider also obtains a leveraged payment mechanism. If the lender does not record or perfect the security interest during the term of the loan, however, the credit is not excluded from the requirements of this part under § 1041.3(d)(2).

3(d)(5) Non-Recourse Pawn Loans

1. *Lender possession required and no recourse permitted.* A pawn loan must satisfy two conditions to be excluded from the requirements of this part under § 1041.3(d)(5). First, the lender must have sole physical possession and use of the property securing the pawned property at all times during the entire

term of the loan. If the consumer retains either possession or use of the property, however limited the consumer's possession or use of the property might be, the loan is not excluded from the requirements of this part under § 1041.3(d)(5). Second, the lender must have no recourse if the consumer does not elect to redeem the pawned item and repay the loan other than retaining the pawned property to dispose of according to State or local law. If any consumer, or if any co-signor, guarantor, or similar person, is personally liable for the difference between the outstanding balance on the loan and the value of the pawned property, the loan is not excluded from the requirements of this part under § 1041.3(d)(5).

3(d)(6) Overdraft Services

1. *Definitions.* Institutions may rely on 12 CFR 1005.17(a) and its related commentary in determining whether credit is an overdraft service or an overdraft line of credit that is excluded from the requirements of this part under § 1041.3(d)(6).

3(d)(7) Wage Advance Programs

1. Advances of wages under § 1041.3(d)(7) must be offered by an employer, as defined in the Fair Labor Standards Act, 29 U.S.C. 203(d), or by the employer's business partner to the employer's employees pursuant to a wage advance program. For example, an advance program might be offered by a company that provides payroll card services or accounting services to the employer, or by the employer with the assistance of such a company. Similarly, an advance program might be offered by a company that provides consumer financial products and services as part of the employer's benefits program, such that the company would have information regarding the wages accrued by the employee.

Paragraph 3(d)(7)(i)

1. Under the exclusion in § 1041.3(d)(7)(i), the advance must be made only against accrued wages. To qualify for that exclusion, the amount advanced must not exceed the amount of the employee's accrued wages. Accrued wages are wages that the employee is entitled to receive under State law in the event of separation from the employer for work performed for the employer, but for which the employee has yet to be paid.

Paragraph 3(d)(7)(ii)(B)

1. Under § 1041.3(d)(7)(ii)(B), the entity advancing the funds is required to warrant that it has no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in the event the amount advanced is not repaid in full. This provision does not prevent the entity from obtaining a one-time authorization to seek repayment from the consumer's transaction account.

3(d)(8) No-Cost Advances

1. Under § 1041.3(d)(8)(i), the entity advancing the funds is required to warrant that it has no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in the event the amount advanced is not repaid in full. This provision does not prevent the entity from obtaining a one-time authorization to seek repayment from the consumer's transaction account.

3(e) Alternative Loans

1. *General.* Section 1041.3(e) conditionally exempts from this part alternative covered loans that satisfy the conditions and requirements set forth in § 1041.3(e). Nothing in § 1041.3(e) provides lenders with an exemption from the requirements of other applicable laws, including State laws. The conditions for an alternative loan made under § 1041.3(e) largely track the conditions set forth by the National Credit Union Administration at 12 CFR 701.21(c)(7)(iii) for a Payday Alternative Loan made by a Federal credit union. All lenders, including Federal credit unions and persons that are not Federal credit unions, are permitted to make loans under § 1041.3(e), provided that such loans are permissible under other applicable laws, including State laws.

3(e)(1) Loan Term Conditions

Paragraph 3(e)(1)(iv)

1. *Substantially equal payments.* Under § 1041.3(e)(1)(iv), payments are substantially equal in amount if the amount of each scheduled payment on the loan is equal to or within a small variation of the others. For example, if a loan is repayable in six biweekly payments and the amount of each scheduled payment is within 1 percent of the amount of the other payments, the loan is repayable in substantially equal payments. In determining whether a loan is repayable in substantially equal payments, a lender may disregard the effects of collecting the payments in whole cents.

2. *Substantially equal intervals.* The intervals for scheduled payments are substantially equal if the payment schedule requires repayment on the same date each month or in the same number of days of the prior scheduled payment. For example, a loan for which payment is due every 15 days has payments due in substantially equal intervals. A loan for which payment is due on the 15th day of each month also has payments due in substantially equal intervals. In determining whether payments fall due in substantially equal intervals, a lender may disregard that dates of scheduled payments may be slightly changed because the scheduled date is not a business day, that months have different numbers of days, and the occurrence of leap years. Section 1041.3(e)(1)(iv) does not prevent a lender from accepting prepayment on a loan made under § 1041.3(e).

3. *Amortization.* Section 1041.3(e)(1)(iv) requires that the scheduled payments fully amortize the loan over the contractual period and prohibits lenders from making loans under § 1041.3(e) with interest-only payments or with a payment schedule that front-loads payments of interest and fees. While under § 1041.3(e)(1)(iv) the payment amount must be substantially equal for each scheduled payment, the amount of the payment that goes to principal and to interest will vary. The amount of payment applied to interest will be greater for earlier payments when there is a larger principal outstanding.

Paragraph 3(e)(1)(v)

1. *Cost of credit.* Under § 1041.3(e)(1)(v), the lender must not impose any charges other than the rate and application fees permissible for Federal credit unions to charge under 12 CFR 701.21(c)(7)(iii). Under 12 CFR 701.21(c)(7)(iii), application fees must reflect the actual costs associated with processing the application and must not exceed $20.

3(e)(2) Borrowing History Condition

1. *Relevant records.* A lender may make an alternative covered loan under § 1041.3(e) only if the lender determines from its records that the consumer's borrowing history on alternative covered loans made under § 1041.3(e) meets the criteria set forth in § 1041.3(e)(2). The lender is not required to obtain information about a consumer's borrowing history from other persons, such as by obtaining a consumer report from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered with the Bureau pursuant to § 1041.11(d)(2).

2. *Determining 180-day period.* For purposes of counting the number of loans made under § 1041.3(e)(2), the 180-day period begins on the date that is 180 days prior to the consummation date of the loan to be made under

§ 1041.3(e) and ends on the consummation date of such loan.

3. *Total number of loans made under § 1041.3(e)(2).* Section 1041.3(e)(2) excludes loans from the conditional exemption in § 1041.3(e) if the loan would result in the consumer being indebted on more than three outstanding loans made under § 1041.3(e) from the lender in any consecutive 180-day period. See § 1041.2(a)(17) for the definition of outstanding loan. Under § 1041.3(e)(2), the lender is required to determine from its records the consumer's borrowing history on alternative covered loans made under § 1041.3(e) by the lender. The lender must use this information about borrowing history to determine whether the loan would result in the consumer being indebted on more than three outstanding loans made under § 1041.3(e) from the lender in a consecutive 180-day period, determined in the manner described in comment 3(e)(2)–2. Section 1041.3(e) does not prevent lenders from making a covered loan subject to the requirements of this part.

4. *Example.* For example, assume that a lender seeks to make an alternative loan under § 1041.3(e) to a consumer and the loan does not qualify for the safe harbor under § 1041.3(e)(4). The lender checks its own records and determines that during the 180 days preceding the consummation date of the prospective loan, the consumer was indebted on two outstanding loans made under § 1041.3(e) from the lender. The loan, if made, would be the third loan made under § 1041.3(e) on which the consumer would be indebted during the 180-day period and, therefore, would be exempt from this part under § 1041.3(e). If, however, the lender determined that the consumer was indebted on three outstanding loans under § 1041.3(e) from the lender during the 180 days preceding the consummation date of the prospective loan, the condition in § 1041.3(e)(2) would not be satisfied and the loan would not be an alternative loan subject to the exemption under § 1041.3(e) but would instead be a covered loan subject to the requirements of this part.

3(e)(3) Income Documentation Condition

1. *General.* Section 1041.3(e)(3) requires lenders to maintain policies and procedures for documenting proof of recurring income and to comply with those policies and procedures when making alternative loans under § 1041.3(e). Section 1041.3(e)(3) does not require lenders to undertake the same income documentation procedures required by § 1041.5(c)(2). For the purposes of § 1041.3(e)(3), lenders may establish any procedure for documenting recurring income that satisfies the lender's own underwriting obligations. For example, lenders may choose to use the procedure contained in the National Credit Union Administration's guidance at 12 CFR 701.21(c)(7)(iii) on Payday Alternative Loan programs recommending that Federal credit unions document consumer income by obtaining two recent paycheck stubs.

3(f) Accommodation Lending

1. *General.* Section 1041.3(f) provides a conditional exemption for covered loans if, at the time of origination: (1) The lender and its affiliates collectively have made 2,500 or fewer covered loans in the current calendar year and made 2,500 or fewer covered loans in the preceding calendar year; and (2) during the most recent completed tax year in which the lender was in operation, if applicable, the lender and any affiliates that were in operation and used the same tax year derived no more than 10 percent of their receipts from covered loans, or if the lender was not in operation in a prior tax year, the lender reasonably anticipates that the lender and any of its affiliates that use the same tax year will, during the current tax year, derive no more than 10 percent of their combined receipts from covered loans. For example, assume a lender begins operation in January 2019, uses the calendar year as its tax year, and has no affiliates. In 2019, the lender could originate up to 2,500 covered loans that are not subject to the requirements of this part if at the time of each origination it reasonably anticipates that no more than 10 percent of its receipts during the current tax year will derive from covered loans. In 2020, the lender could originate up to 2,500 covered loans that are not subject to the requirements of this part if the lender made 2,500 or fewer covered loans in 2019 and the lender derived no more than 10 percent of its receipts in the 2019 tax year from covered loans. Section 1041.3(f) provides that covered longer-term loans for which all transfers meet the conditions in § 1041.8(a)(1)(ii), and receipts from such loans, are not included for the purpose of determining whether the conditions of § 1041.3(f)(1) and (2) have been satisfied. For example, a bank that makes a covered longer-term loan using a loan agreement that includes the conditions in § 1041.8(a)(1)(ii) does not need to include that loan, or the receipts from that loan, in determining whether it is below the 2,500 loan threshold or the 10 percent of receipts threshold in § 1041.3(f)(1) and (2).

2. *Reasonable anticipation of receipts for current tax year.* A lender and its affiliates can look to receipts to date in forecasting their total receipts for the current tax year, but are expected to make reasonable adjustments to account for an upcoming substantial change in business plans or other relevant and known factors.

Section 1041.4— Identification of Unfair and Abusive Practice

1. *General.* A lender who complies with § 1041.5 in making a covered short-term loan or a covered longer-term balloon-payment loan has not engaged in the unfair and abusive practice under § 1041.4. A lender who complies with § 1041.6 in making a covered short-term loan has not committed the unfair and abusive practice under § 1041.4 and is not subject to § 1041.5.

Section 1041.5—Ability-to-Repay Determination Required

5(a) Definitions

5(a)(1) Basic Living Expenses

1. *General.* Under § 1041.5(b), a lender must make a reasonable determination that the consumer has the ability to repay a covered short-term loan or covered longer-term balloon-payment loan according to its terms. The consumer's ability to meet basic living expenses is part of the broader ability-to-repay determination under § 1041.5(b). *See* comment 5(b)–1 for additional clarification. The lender's estimate of basic living expenses must be reasonable. The lender may make a reasonable estimate of basic living expenses without making an individualized determination. *See* comment 5(b)–2.i.C for additional clarification.

2. *Expenditures included in basic living expenses.* Section 1041.5(a)(1) defines basic living expenses as expenditures, other than payments for major financial obligations, that the consumer makes for goods and services necessary to maintain the consumer's health, welfare, and ability to produce income, and the health and welfare of the members of the consumer's household who are financially dependent on the consumer. Examples of basic living expenses include food, utilities not paid as part of rental housing expenses, transportation, out-of-pocket medical expenses, phone and Internet services, and childcare. Basic living expenses do not include expenditures for discretionary personal and household goods or services, such as newspaper subscriptions, or vacation

activities. If the consumer is responsible for payment of household goods and services on behalf of the consumer's dependents, those expenditures are included in basic living expenses. As part of its reasonable ability-to-repay determination, the lender may reasonably consider whether another person (*e.g.,* a spouse or adult family member living with the consumer) is regularly contributing toward the consumer's payment of basic living expenses (*see* comment 5(b)–2.i.C.*2*).

5(a)(2) Debt-to-Income Ratio

1. *General.* Section 1041.5(a)(2) defines debt-to-income ratio as the ratio, expressed as a percentage, of the sum of the amounts that the lender projects will be payable by the consumer for major financial obligations during the relevant monthly period and the payments under the covered short-term loan or covered longer-term balloon-payment loan during the relevant monthly period, to the monthly net income that the lender projects the consumer will receive during the relevant monthly period, all of which projected amounts are determined in accordance with § 1041.5(c). *See* § 1041.5(b)(2)(i) and associated commentary for further clarification on the use of debt-to-income methodology to determine ability to repay. For covered longer-term balloon-payment loans, where the relevant monthly period may fall well into the future relative to the consummation of the loan, the lender must calculate the debt-to-income ratio using the projections made under § 1041.5(c) and in so doing must make reasonable assumptions about the consumer's net income and major financial obligations during the relevant monthly period compared to the period covered by the verification evidence. For example, the lender cannot assume, absent a reasonable basis, that there will be a substantial increase in net income or decrease in major financial obligations between consummation and the relevant monthly period. For further clarification, see comment 5(c)(1)–1 regarding the consistency between the consumer's written statement and verification evidence and comment 5(c)(2)(ii)(A)–2 regarding what constitutes sufficient history of net income for purposes of verification evidence.

5(a)(3) Major Financial Obligations

1. *General.* Section 1041.5(a)(3) defines major financial obligations as a consumer's housing expense, required payments due under debt obligations (including, without limitation, outstanding covered loans), child support obligations, and alimony obligations. Housing expense includes the total periodic amount that the consumer pays for housing during the relevant monthly period, such as the amount the consumer pays to a landlord for rent or to a creditor for a mortgage (including principal, interest, and any escrowed amounts if required). Debt obligations for purposes of § 1041.5(a)(3) do not include amounts due or past due for medical bills, utilities, and other items that are generally defined as basic living expenses under § 1041.5(a)(1). The amount of a payment required under a debt obligation includes the amount the consumer must pay when due to avoid delinquency under the debt obligation in the absence of any affirmative act by the consumer to extend, delay, or restructure the repayment schedule. Thus, this would include periodic or lump-sum payments for automobile loans, student loans, and other covered and non-covered loans, and minimum monthly credit card payments due during the relevant monthly period. It also includes any delinquent amounts on such obligations that are due as of the relevant monthly period, except where an obligation on a covered short-term loan or a covered longer-term balloon-payment loan is no longer outstanding or where the obligation is listed as charged off on a national consumer report. For example, if the consumer has a periodic automobile loan payment from a prior period that is past due and the automobile finance company adds the past due payment to the next regularly scheduled periodic payment which falls during the relevant monthly period, then the past due periodic payment is a major financial obligation.

2. *Motor vehicle leases.* For purposes of this rule, motor vehicle leases shall be treated as a debt obligation.

5(a)(5) Net Income

1. *General.* Section 1041.5(a)(5) defines a consumer's net income to mean the total amount that a consumer receives after the payer has deducted amounts for taxes withheld by the consumer, other obligations, and voluntary contributions (but before deductions of any amounts for payments under a prospective covered short-term loan or covered longer-term balloon-payment loan or for any major financial obligation); provided that, a lender may elect to include in the consumer's net income the amount of any income of another person to which a consumer has a reasonable expectation of access (*see* comment 5(a)(5)–3). Net income includes income that is regularly received by the consumer as take-home pay, whether the consumer is treated as an employee or independent contractor. Net income also includes income regularly received by the consumer from other sources, such as child support or alimony received by the consumer and any payments received by the consumer from retirement, social security, disability, or other government benefits, or annuity plans. Lenders may include in net income irregular or seasonal income, such as tips, bonuses, and overtime pay. Net income does not include one-time payments anticipated to be received in the future from non-standard sources, such as legal settlements, tax refunds, jury prizes, or remittances, unless there is verification evidence of the amount and expected timing of such income. If the consumer receives a traditional pay check but the verification evidence obtained under § 1041.5(c)(2) shows payment of gross income or otherwise is unclear about whether deductions for the consumer's taxes, other obligations, or voluntary contributions have been made, or if the consumer is not paid via a traditional pay check, then the lender may draw reasonable conclusions from the information provided and is not required to inquire further about deductions for the consumer's taxes, other obligations, or voluntary contributions.

2. *Other obligations and voluntary contributions.* An example of other obligations is a consumer's portion of payments for premiums for employer-sponsored health insurance plans. An example of a voluntary contribution is a consumer's contribution to a defined contribution plan meeting the requirements of Internal Revenue Code section 401(a), 26 U.S.C. 401(a). The lender may inquire about and reasonably consider whether voluntary contributions will be discontinued prior to the relevant monthly period, in which case they would not be deducted from the amount of net income that is projected.

3. *Reasonable expectation of access to another person's income.* Under § 1041.5(a)(5), a lender may elect to include in the consumer's net income the amount of any income of another person to which the consumer has a reasonable expectation of access. The income of any other person is considered net income to which the consumer has a reasonable expectation of access if the consumer has direct access to those funds on a regular basis through a transaction account in which the consumer is an accountholder or cardholder. If the lender elects to include any income of another person to which the consumer has a reasonable

expectation of access, then as part of the lender's obligation to make a reasonable projection of the consumer's net income during the applicable period, the lender must obtain verification evidence demonstrating that the consumer has a reasonable expectation of access to the portion of the other person's income that the lender includes within its net income projection. *See* § 1041.5(c)(2)(ii)(A) and associated commentary. The following examples illustrate when a consumer has reasonable expectation of access to the income of another person for purposes of § 1041.5(a)(5):

i. The consumer's spouse has a salary or income that is deposited regularly into a joint account the spouse shares with the consumer. The consumer has a reasonable expectation of access to the spouse's income.

ii. The consumer shares a household with a sibling. The sibling's salary or other income is deposited into an account in which the consumer does not have access. However, the sibling regularly transfers a portion of that income from the sibling's deposit account into the consumer's deposit account. The consumer has a reasonable expectation of access to that portion of the sibling's income.

iii. The consumer's spouse has a salary or other income that is deposited into an account to which the consumer does not have access, and the spouse does not regularly transfer a portion of that income into the consumer's account. The consumer does not have a reasonable expectation of access to the spouse's income.

iv. The consumer does not have a joint bank account with his spouse, nor does the spouse make regular deposits into the consumer's individual deposit account. However, the spouse regularly pays for a portion of the consumer's basic living expenses. The consumer does not have a reasonable expectation of access to the spouse's income. However, regular contributions toward payment of the consumer's basic living expenses may be considered by the lender as a consumer-specific factor that is relevant if the lender makes an individualized estimate of basic living expenses (*see* comment 5(b)–2.i.C.*2* for further clarification).

5(a)(6) Payment Under the Covered Short-Term Loan or Covered Longer-Term Balloon-Payment Loan

Paragraphs 5(a)(6)(i) and (ii)

1. *General.* Section 1041.5(a)(6)(i) defines payment under a covered short-term loan or covered longer-term balloon-payment loan as the combined dollar amount payable by the consumer at a particular time following consummation in connection with the loan, assuming that the consumer has made preceding required payments and in the absence of any affirmative act by the consumer to extend or restructure the repayment schedule or to suspend, cancel, or delay payment for any product, service, or membership provided in connection with the covered short-term loan or covered longer-term balloon-payment loan. Section 1041.5(a)(6)(ii) clarifies that it includes all principal, interest, charges, and fees. A lender may not exclude a portion of the payment simply because a consumer could avoid or delay paying a portion of the payment, such as by requesting forbearance for that portion or by cancelling a service provided in exchange for that portion. For example:

i. Assume that in connection with a covered longer-term balloon-payment loan, a consumer would owe a periodic payment on a particular date of $100 to the lender, which consists of $15 in finance charges, $80 in principal, and a $5 service fee, and the consumer also owes $10 as a credit insurance premium to a separate insurance company. Assume further that under the terms of the loan or other agreements entered into in connection with the loan, the consumer has the right to cancel the credit insurance at any time and avoid paying the $10 credit insurance premium. The payment under the loan is $110.

ii. Assume that in connection with a covered short-term loan, a consumer would owe on a particular date $25 in finance charges to the lender. Under the terms of the loan, the consumer has the option of paying $50 in principal on that date, in which case the lender would charge $20 in finance charges instead. The payment under the loan is $25.

iii. Assume that in connection with a covered short-term loan, a consumer would owe on a particular date $25 in finance charges to the lender and $70 in principal. Under the terms of the loan, the consumer has the option of logging into her account on the lender's Web site and selecting an option to defer the due date of the $70 payment toward principal. The payment under the covered loan is $95.

Paragraph 5(a)(6)(iii)

1. *General.* Section 1041.5(a)(6)(iii) provides assumptions that a lender must make in calculating the payment under § 1041.5(a)(6) for a covered short-term loan or covered longer-term balloon-payment loan that is a line of credit (regardless of the extent to which available credit will be replenished as the consumer repays earlier advances). For a line of credit, the amount and timing of the consumer's actual payments after consummation may depend on the consumer's utilization of the credit or on amounts that the consumer has repaid prior to the payments in question. Section 1041.5(a)(6)(iii) requires the lender to calculate the total loan payment assuming that the consumer will utilize the full amount of credit under the loan as soon as the credit is available and that the consumer will make only minimum required payments for as long as permitted under the loan agreement. Lenders should use the same test with the same assumptions when they make a new ability-to-repay determination under § 1041.5(b)(1)(ii) prior to an advance under the line of credit that is more than 90 days after the date of a prior ability-to-repay determination for the line of credit, in order to determine whether the consumer still has the ability to repay the current credit line.

5(a)(8) Residual Income

1. *General.* Under § 1041.5(a)(8), residual income is defined as the sum of net income that the lender projects the consumer will receive during the relevant monthly period, minus the sum of amounts that the lender projects will be payable by the consumer for major financial obligations during the relevant monthly period and payments under the covered short-term loan or covered longer-term balloon-payment loan during the relevant monthly period, all of which projected amounts are determined in accordance with § 1041.5(c). *See* § 1041.5(b)(2)(ii) and associated commentary for further clarification on the use of residual income methodology to determine ability to repay. For covered longer-term balloon-payment loans, where the relevant monthly period may fall well into the future relative to the consummation of the loan, the lender must calculate the residual income using the projections made under § 1041.5(c) and in so doing must make reasonable assumptions about the consumer's net income and major financial obligations during the relevant monthly period compared to the period covered by the verification evidence. For example, the lender cannot assume, absent a reasonable basis, that there will be a substantial increase in net income or decrease in major financial obligations between consummation and the relevant monthly period. For further clarification, see comment 5(c)(1)–1 regarding the consistency between the consumer's written statement and

verification evidence and comment 5(c)(2)(ii)(A)–2 regarding what constitutes sufficient history of net income for purposes of verification evidence.

5(b) Reasonable Determination Required

1. *Overview.* Section 1041.5(b) prohibits a lender from making a covered short-term loan (other than a covered short-term loan described in § 1041.6) or a covered longer-term balloon-payment loan or increasing the amount of credit available on such loan unless it first makes a reasonable determination that the consumer will have the ability to repay the loan according to its terms. For discussion of loan modifications, see comment 2(a)(5)–2. Section 1041.5(b) provides minimum standards that the lender's determination must meet to constitute a reasonable determination. Section 1041.5(b)(2) provides that a lender's ability-to-repay determination for a covered short-term loan or covered longer-term balloon-payment loan is reasonable only if the lender reasonably concludes that, based on the estimates of the consumer's basic living expenses for the relevant monthly period and the calculation of the consumer's residual income or the debt-to-income ratio for the relevant monthly period, as applicable, the consumer can pay for major financial obligations, make any payments under the loan, and meet basic living expenses during the periods specified in § 1041.5(b)(2). For covered short-term loans, the periods are the shorter of the term of the loan or the period ending 45 days after consummation of the loan, and 30 days after having made the highest payment on the loan. For covered longer-term balloon-payment loans, the periods are the relevant monthly period, and 30 days after having made the highest payment on the loan. Thus, the rule requires lenders to make a debt-to-income ratio or residual income calculation and an estimate of basic living expenses for the relevant monthly period—the calendar month in which the highest payments are due on the covered short-term loan or covered longer-term balloon payment loan—and to use the results of the calculation and estimate to make reasonable inferences and draw a reasonable conclusion about whether the consumer can make loan payments, pay for major financial obligations, and meet basic living expenses during the periods specified in § 1041.5(b)(2). This analysis is designed to determine whether the consumer has the ability to repay the loan according to its terms. *See* § 1041.5(b)(2)(i) and (ii) and corresponding commentary.

2. *Reasonable determination.* To comply with the requirements of § 1041.5(b), a lender's determination that a consumer will have the ability to repay a covered short-term loan or covered longer-term balloon-payment loan must be reasonable in all respects.

i. To be reasonable, a lender's determination of a consumer's ability to repay a covered short-term loan or covered longer-term balloon-payment loan must:

A. Include the reasonable conclusions required in § 1041.5(b)(2), using either the debt-to-income ratio methodology under § 1041.5(b)(2)(i) or the residual income methodology under § 1041.5(b)(2)(ii) as applied to the relevant monthly period;

B. Be based on reasonable projections of a consumer's net income and major financial obligations during the relevant monthly period in accordance with § 1041.5(c);

C. Be based on reasonable estimates of basic living expenses during the relevant monthly period. The following provides additional clarification on what constitutes reasonable estimates of basic living expenses:

1. Section 1041.5(a)(1) and (b) do not specify a particular method that a lender must use to determine a consumer's basic living expenses. A lender is not required to itemize the basic living expenses of each consumer, but may instead arrive at estimates for the amount needed to cover the costs of food, utilities not paid as part of rental housing expenses, transportation, out-of-pocket medical expenses, phone and Internet services, and childcare. A lender may reasonably estimate the dollar amount or percentage of net income the consumer will need to meet these basic living expenses based upon such sources as the lender's own experience in making covered short-term or longer-term balloon-payment loans to similarly-situated consumers, reasonably reliable information available from government surveys or other publications about the basic living expenses of similarly-situated consumers, or some combination thereof. For example, it would be reasonable for the lender to use data about relevant categories of expenses from the Consumer Expenditure Survey of the Bureau of Labor Statistics or the Internal Revenue Code's Collection Financial Standards, or a combination of the two data sources, to develop non-individualized estimates of food, utilities not paid as part of rental housing expenses, transportation, out-of-pocket medical expenses, phone and internet services, and childcare for consumers seeking covered short-term or longer-term balloon-payment loans. In using the data from those sources to estimate the amount spent on a particular category, the lender may make reasonable adjustments to arrive at an estimate of basic living expenses, for instance where a data source's information on a particular type of basic living expenses overlaps with a type of major financial obligation as defined in § 1041.5(a)(3) or where a data source groups expenses into different categories than comment 5(a)(1)–2.

2. If the lender is conducting an individualized estimate by itemizing the consumer's costs of food, utilities not paid as part of rental housing expenses, transportation, out-of-pocket medical expenses, phone and Internet services, and childcare, the lender may reasonably consider other factors specific to the consumer that are not required to be projected under § 1041.5(c). Such consumer-specific factors could include whether other persons are regularly contributing toward the consumer's payment of basic living expenses. The lender may consider such consumer-specific factors only when it is reasonable to do so. It is not reasonable for the lender to consider whether other persons are regularly contributing toward the consumer's payment of basic living expenses if the lender is separately including in its projection of net income any income of another person to which the consumer has a reasonable expectation of access; and

D. Be consistent with a lender's written policies and procedures required under § 1041.12 and grounded in reasonable inferences and conclusions as to a consumer's ability to repay a covered short-term loan or covered longer-term balloon-payment loan according to its terms in light of information the lender is required to obtain or consider as part of its determination under § 1041.5(b).

ii. A determination of ability to repay is not reasonable if it:

A. Relies on an implicit or explicit assumption that the consumer will obtain additional consumer credit to be able to make payments under the covered short-term loan or covered longer-term balloon-payment loan, to make payments under major financial obligations, or to meet basic living expenses;

B. Assumes that a consumer needs implausibly low amounts of funds to meet basic living expenses under the residual income methodology or an implausibly low percentage of net income to meet basic living expenses if a lender uses the debt-to-income methodology. For example, assume a

consumer seeks a covered short-term loan. The lender uses a debt-to-income methodology to make an ability-to-repay determination. Based on the lender's projections of the consumer's net income and major financial obligations under § 1041.5(c), the lender calculates that the consumer's debt-to-income ratio would be 90 percent, which means that only 10 percent of the consumer's net income will be remaining to pay for basic living expenses. It is not reasonable for the lender to conclude under § 1041.5(b)(2) that a consumer with a 90 percent debt-to-income ratio would have the ability to repay the loan. *See* comment 5(b)(2)(i)–3 for additional examples of ability-to-repay determinations using the debt-to-income methodology; or

C. For covered longer-term balloon-payment loans, if the lender relies on an assumption that a consumer will accumulate savings while making one or more payments under a covered longer-term balloon-payment loan and that, because of such assumed savings, the consumer will be able to make a subsequent loan payment under the loan.

iii. Evidence that a lender's determinations of ability to repay are not reasonable may include, without limitation, the factors described under paragraphs (A) through (E) of comment 5(b)–2.iii. These factors may be evaluated across a lender's entire portfolio of covered short-term loans or covered longer-term balloon-payment loans or with respect to particular products, geographic regions, particular periods during which the loans were made, or other relevant categorizations. Other relevant categorizations would include, without limitation, loans made in reliance on consumer statements of income in the absence of verification evidence (*see* comment 5(c)(2)(ii)(A)–4). The factors described under paragraphs (A) through (E) of comment 5(b)–2.iii may be considered either individually or in combination with one another. These factors also are not absolute in their application; instead, they exist on a continuum and may apply to varying degrees. Each of these factors is viewed in the context of the facts and circumstances relevant to whether the lender's ability-to-repay determinations are reasonable. Relevant evidence may also include a comparison of the following factors on the part of the lender to that of other lenders making covered short-term loans or covered longer-term balloon-payment loans to similarly situated consumers; however, such evidence about comparative performance is not dispositive as to the evaluation of a lender's ability-to-repay determinations.

A. *Default rates.* This evidence includes defaults during and at the expiration of covered loan sequences as calculated on a per sequence or per consumer basis;

B. *Re-borrowing rates.* This evidence includes the frequency with which the lender makes consumers multiple covered short-term loans or covered longer-term balloon-payment loans within a loan sequence as defined in § 1041.2(a)(14) (*i.e.,* consecutive or concurrent loans taken out within 30 days of a prior loan being outstanding);

C. *Patterns of lending across loan sequences.* This evidence includes the frequency with which the lender makes multiple sequences of covered short-term loans or covered longer-term balloon-payment loans to consumers. This evidence also includes the frequency with which the lender makes consumers new covered short-term loans or covered longer-term balloon-payment loans immediately or soon after the expiration of a cooling-off period under § 1041.5(d)(2) or the 30-day period that separates one loan sequence from another (*see* § 1041.2(a)(14));

D. *Evidence of delinquencies and collateral impacts.* This evidence includes the proportion of consumers who incur late fees, failed presentments, delinquencies, and repossessions of motor vehicles for loans involving vehicle security; and

E. *Patterns of non-covered lending.* This evidence includes the frequency with which the lender makes non-covered loans shortly before or shortly after consumers repay a covered short-term loan or covered longer-term balloon-payment loan, and the non-covered loan bridges all or a substantial part of either the period between two loans that otherwise would be part of a loan sequence or of a cooling-off period. An example would be where the lender, its affiliate, or a service provider frequently makes 30-day non-recourse pawn loans to consumers shortly before or soon after repayment of covered short-term loans made by the lender, and where the lender then makes additional covered short-term loans to the same consumers soon after repayment of the pawn loans.

iv. *Examples of evidence of the reasonableness of ability-to-repay determinations.* The following examples illustrate how the factors described in comment 5(b)–2.iii may constitute evidence about whether lenders' determinations of ability to repay are reasonable under § 1041.5(b):

A. A significant percentage of consumers who obtain covered short-term loans from a lender under § 1041.5 re-borrow within 30 days of repaying their initial loan, re-borrow within 30 days of repaying their second loan, and re-borrow shortly after the end of the cooling-off period that follows the initial loan sequence of three loans. Based on the combination of these factors, this evidence suggests that the lender's ability-to-repay determinations are not reasonable.

B. A lender frequently makes at or near the maximum number of loans permitted under § 1041.6 to consumers early within a 12-month period (*i.e.,* the loans do not require ability-to-repay determinations) and then makes a large number of additional covered short-term loans to those same consumers under § 1041.5 (*i.e.,* the loans require ability-to-repay determinations) later within the 12-month period. Assume that the loans made under § 1041.5 are part of multiple loan sequences of two or three loans each and the sequences begin soon after the expiration of applicable cooling-off periods or 30-day periods that separate one loan sequence from another. This evidence suggests that the lender's ability-to-repay determinations for the covered short-term loans made under § 1041.5 are not reasonable. The fact that some of the loans in the observed pattern were made under § 1041.6 and thus are conditionally exempted from the ability-to-repay requirements does not mitigate the potential unreasonableness of the ability-to-repay determinations for the covered short-term loans that were made under § 1041.5.

C. A lender frequently makes at or near the maximum number of loans permitted under § 1041.6 to consumers early within a 12-month period (*i.e.,* the loans do not require ability-to-repay determinations) and then only occasionally makes additional covered short-term loans to those same consumers under § 1041.5 (*i.e.,* the loans require ability-to-repay determinations) later within the 12-month period. Very few of those additional loans are part of loans sequences longer than one loan. Absent other evidence that the ability-to-repay determination is unreasonable (*see* comment 5(b)–2.iii.A through E), this evidence suggests that the lender's ability-to-repay determinations for the loans made under § 1041.5 are reasonable.

D. Within a lender's portfolio of covered short-term loans, a small percentage of loans result in default, consumers generally have short loan sequences (fewer than three loans), and

the consumers who take out multiple loan sequences typically do not begin a new loan sequence until several months after the end of a prior loan sequence. There is no evidence of the lender or an affiliate making non-covered loans to consumers to bridge cooling-off periods or the periods between loan sequences. This evidence suggests that the lender's ability-to-repay determinations are reasonable.

3. *Payments under the covered short-term loan or longer-term balloon-payment loan.* Under the ability-to-repay requirements in § 1041.5(b)(2)(i) and (ii), a lender must determine the amount of the payments due in connection with the covered short-term loan or covered longer-term balloon-payment loan during the relevant monthly period. See § 1041.5(a)(6) for the definition of payment under a covered short-term loan or covered longer-term balloon-payment loan, including assumptions that the lender must make in calculating the amount of payments under a loan that is a line of credit.

Paragraph 5(b)(2)

1. *General.* For a covered short-term loan, § 1041.5(b)(2) requires the lender to reasonably conclude that, based on the estimates of the consumer's basic living expenses for the relevant monthly period and the lender's calculation of the consumer's debt-to-income ratio or residual income for the relevant monthly period, as applicable, the consumer can pay major financial obligations, make any payments on the loan, and meet basic living expenses during the shorter of the term of the loan or the period ending 45 days after consummation of the loan, and for 30 days after having made the highest payment on the loan. *See* § 1041.5(b)(2)(i)(A) (the debt-to-income methodology) and § 1041.5(b)(2)(ii)(A) (the residual income methodology) and corresponding commentary. For a covered longer-term balloon-payment loan, § 1041.5(b)(2) requires the lender to reasonably conclude that, based on the estimates of the consumer's basic living expenses for the relevant monthly period and the lender's calculation of the consumer's debt-to-income ratio or residual income, as applicable, the consumer can pay major financial obligations, make any payments on the loan, and meet basic living expenses during the relevant monthly period, and for 30 days after having made the highest payment on the loan. *See* § 1041.5(b)(2)(i)(B) (the debt-to-income methodology) and § 1041.5(b)(2)(ii)(B) (the residual income methodology) and corresponding commentary. If the loan has two or more payments that are equal to each other in amount and higher than all other payments, the date of the highest payment under the loan is considered the later in time of the two or more highest payments. Under § 1041.5(b)(2), lenders must comply with either § 1041.5(b)(2)(i) or (ii) depending on whether they utilize the residual income or debt-to-income ratio methodology.

Paragraph 5(b)(2)(i)

1. *Relation of periods under § 1041.5(b)(2)(i) to relevant monthly period.* Section 1041.5(a)(2) defines debt-to-income ratio as the ratio, expressed as a percentage, of the sum of the amounts that the lender projects will be payable by the consumer for major financial obligations during the relevant monthly period and the payments under the covered short-term loan or covered longer-term balloon-payment loan during the relevant monthly period, to the net income that the lender projects the consumer will receive during the relevant monthly period, all of which projected amounts are determined in accordance with § 1041.5(c). Comment 5(a)(2)–1 clarifies that the relevant monthly period is the calendar month during which the highest sum of payments on the loan is due. The relevant monthly period is not the same period as the periods set forth in § 1041.5(b)(2)(i), which for covered short-term loans are the shorter of the loan term or 45 days following consummation, and 30 days following the date of the highest payment under the loan, and for covered longer-term balloon-payment loans are the relevant monthly period, and 30 days following the date of the highest payment under the loan. There may be overlap between the relevant monthly period and the periods set forth in § 1041.5(b)(2)(i), but the degree of overlap will depend on the contractual duration of the loan and the consummation and contractual due dates. For example, assume a consumer takes a covered short-term loan of 30 days in duration that is consummated on June 15 and with a single payment due on July 14. The relevant monthly period is the calendar month in which the sum of the highest payments on the loan is due, which is the calendar month of July. This means that a portion of both the loan term (*i.e.,* June 15 to June 30) and the 30-day period following the date of the highest payment on the loan (*i.e.,* August 1 to August 13) are outside of the relevant monthly period.

2. *Use of projections for relevant monthly period to comply with § 1041.5(b)(2)(i).* The lender is not required under § 1041.5(b)(2)(i) to estimate the consumer's basic living expenses, make a projection under § 1041.5(c) of the consumer's net income and major financial obligations, or calculate the consumer's debt-to-income ratio for any period other than the relevant monthly period. The lender may use the estimates of the consumer's basic living expenses for the relevant monthly period, the projections about the consumer's net income and major financial obligations during the relevant monthly period, and the calculation of the consumer's debt-to-income ratio as a baseline of information from which to make reasonable inferences and draw a reasonable conclusion about whether the consumer will pay major financial obligations, make the payments on the loan, and meet basic living expenses during the periods specified in § 1041.5(b)(2)(i). To make reasonable inferences and draw a reasonable conclusion, the lender cannot, for example, assume that the consumer will defer payment of major financial obligations and basic living expenses until after the 30-day period that follows the date of the highest payment on the loan, or assume that obligations and expenses (other than payments on the covered loan itself) during the 30-day period will be less than during the relevant monthly period. Nor can the lender assume the consumer will be able to obtain additional credit during the loan term or during the 30-day period that follows the highest payment on the loan.

3. *Examples.* The following examples illustrate § 1041.5(b)(2)(i):

i. Assume a lender considers making a covered short-term loan to a consumer on March 1. The prospective loan would be repayable in a single payment of $385 on March 17. The lender calculates that, based on its projections of the consumer's net income and major financial obligations during March (*i.e.,* the relevant monthly period), the consumer will have a debt-to-income ratio of 55 percent. The lender complies with the requirement in § 1041.5(b)(2) if, using that debt-to-income ratio, the lender reasonably concludes that the consumer can pay for major financial obligations, make the loan payment, and meet basic living expenses during the loan term and to pay for major financial obligations and meet basic living expenses for 30 days following the contractual due date (*i.e.,* from March 18 to April 16). The lender would not make a reasonable conclusion if the lender were to assume, for example, that the consumer would defer payment of major financial obligations until after April 16 or that the consumer would obtain an

additional extension of credit on April 1.

ii. Assume a lender considers making a covered longer-term balloon-payment loan to a consumer on March 1. The prospective loan would be repayable in six biweekly payments. The first five of which would be for $100, and the last of which would be for $275, due on May 20. The highest sum of these payments that would be due within a monthly period would be $375, during the month of May. The lender further calculates that, based on its projections of net income and major financial obligations during the relevant monthly period, the consumer will have a debt-to-income ratio of 50 percent. The lender complies with the requirement in § 1041.5(b)(2)(i) if, applying that debt-to-income ratio, the lender reasonably concludes that the consumer can pay for major financial obligations, make the payments under the loan, and meet basic living expenses during the month in which the highest sum of payments on the loan are due (*i.e.,* during the month of May) and for 30 days following the highest payment on the loan (*i.e.,* from May 21 to June 19). The lender would not make a reasonable conclusion if the lender were to assume, for example, that the consumer would defer payment of major financial obligations until after June 19 or that the consumer would obtain an additional extension of credit on June 1.

Paragraph 5(b)(2)(ii)

1. *Relation of periods under § 1041.5(b)(2)(ii) to relevant monthly period.* Section 1041.5(a)(8) defines residual income as the sum of net income that the lender projects the consumer will receive during the relevant monthly period, minus the sum of the amounts that the lender projects will be payable by the consumer for major financial obligations during the relevant monthly period and payments under the covered short-term loan or covered longer-term balloon-payment loan during the relevant monthly period, all of which projected amounts are determined in accordance with paragraph (c). The relevant monthly period is the calendar month in which the highest sum of payments on the loan is due. The relevant monthly period is not the same period as the periods set forth in § 1041.5(b)(2)(ii), although there may be some overlap. *See* comment 5(b)(2)(i)–1 for further clarification and an analogous example.

2. *Use of projections for relevant monthly period to comply with § 1041.5(b)(2)(ii).* The lender is not required under § 1041.5(b)(2)(ii) to estimate the consumer's basic living expenses, make a projection under § 1041.5(c) of the consumer's net income and major financial obligations, or calculate the consumer's residual income for any period other than the relevant monthly period. The lender may use the estimates of the consumer's basic living expenses for the relevant monthly period, projections about the consumer's net income and major financial obligations during the relevant monthly period and the calculation of the consumer's residual income as a baseline of information on which to make reasonable inferences and draw a reasonable conclusion about whether the consumer will pay major financial obligations, make the payments on the loan, and meet basic living expenses during the periods specified in § 1041.5(b)(2)(ii). *See* comment 5(b)(2)(i)–2 for further clarification.

3. *Examples.* The following examples illustrate § 1041.5(b)(2)(ii):

i. Assume a lender considers making a covered short-term loan to a consumer on March 1. The prospective loan would be repayable in a single payment of $385 on March 17. The lender calculates that, based on its projections of the consumer's net income and major financial obligations during March (*i.e.,* the relevant monthly period), the consumer will have $1,000 in residual income for the month. The lender complies with the requirement in § 1041.5(b)(2)(ii) if, based on the calculation of residual income, it reasonably concludes that the consumer will be able to pay major financial obligations, make the loan payment, and meet basic living expenses during the loan term and for 30 days following the contractual due date (*i.e.,* from March 18 to April 16). The lender would not make a reasonable conclusion if the lender were to assume, for example, that the consumer would defer payment of major financial obligations until after April 16, that the consumer would obtain an additional extension of credit on April 1, or that the consumer's net income will increase in April relative to the relevant monthly period (*i.e.,* March).

ii. Assume a lender considers making a covered longer-term balloon-payment loan to a consumer on March 1. The prospective loan would be repayable in six biweekly payments. The first five payments would be for $100, and the last payment would be for $275, on May 20. The highest sum of these payments that would be due within a monthly period would be $375, during the month of May. The lender further calculates that, based on its projections of net income and major financial obligations during the relevant monthly period (*i.e.,* May), and accounting for the $375 amount, which is the highest sum of loan payments due within a monthly period, the consumer will have $1,200 in residual income. The lender complies with the requirement in § 1041.5(b)(2)(ii) if, based on the calculation of residual income, it reasonably concludes that the consumer will be able to pay major financial obligations, make the loan payments, and meet basic living expenses during the relevant monthly period (*i.e.,* May) and to pay for basic living expenses and major financial obligations for 30 days following the highest payment on the loan (*i.e.,* from May 21 to June 19). The lender would not make a reasonable conclusion if the lender were to assume, for example, that the consumer would be able to defer payment of major financial obligations until after June 19 or that the consumer would obtain an additional extension of credit on June 1, or that the consumer's net income will increase in June relative to the relevant monthly period (*i.e.,* May).

5(c) Projecting Consumer Net Income and Payments for Major Financial Obligations

Paragraph 5(c)(1)

1. *General.* Section 1041.5(c)(1) requires lenders to consider major financial obligations that are listed in a consumer's written statement described in § 1041.5(c)(2)(i)(B) even if the obligations do not appear in the national credit report or other verification documentation that lenders are required to compile under § 1041.5(c)(2)(ii)(B). To be reasonable, § 1041.5(c)(1) provides that a projection of the amount of net income or payments for major financial obligations may be based on a consumer's written statement of amounts under § 1041.5(c)(2)(i) only as specifically permitted by § 1041.5(c)(2)(ii) or (iii) or to the extent the stated amounts are consistent with the verification evidence that is obtained in accordance with § 1041.5(c)(2)(ii). Section 1041.5(c)(1) further provides that, in determining whether the stated amounts are consistent with the verification evidence, the lender may reasonably consider other reliable evidence the lender obtains from or about the consumer, including any explanations the lender obtains from the consumer. For example:

i. Assume that a consumer states that her net income is $900 every two weeks, pursuant to § 1041.5(c)(2)(i)(A). The consumer pay stub the lender obtains as reasonably available verification evidence pursuant to § 1041.5(c)(2)(ii)(A) shows that the consumer received $900 during the

preceding pay period. The lender complies with § 1041.5(c)(1) if it makes the determination required under § 1041.5(b) based on a projection of $1,800 in net income for the relevant monthly period because the reasonably available verification evidence supports a projection of $900 in net income every two weeks.

ii. Assume that a consumer states that net income is $1,000 every two weeks, pursuant to § 1041.5(c)(2)(i)(A). The lender obtains a copy of the consumer's recent deposit account transaction records as verification evidence pursuant to § 1041.5(c)(2)(ii)(A). The account transaction records show biweekly take-home pay of $800 during the preceding two-week period. The lender does not comply with § 1041.5(c)(1) if it makes the determination required under § 1041.5(b) based on a net income projection of a $2,000 for the relevant monthly period because this projection is not consistent with the reasonably available verification evidence (which, rather, is consistent with a total of $1,600 net income for the relevant monthly period). The lender may request additional deposit account transaction records for prior recent pay cycles and may reasonably project $2,000 in net income for the relevant monthly period if such additional evidence is consistent with the consumer's statement.

iii. Assume that a consumer states that net income is $1,000 every two weeks, pursuant to § 1041.5(c)(2)(i)(A). The lender obtains a copy of the consumer's recent deposit account transaction records as verification evidence pursuant to § 1041.5(c)(2)(ii)(A). The account transaction records show biweekly take-home pay of $800 during the preceding two-week period. Assume also, however, that the consumer states that the consumer supplements his regular payroll income with cash income from a second job, for which verification evidence is not reasonably available because the consumer is paid in cash and does not deposit the cash into the consumer's bank account, and that the consumer earns between $100 and $300 every two weeks from this job. In this instance, the lender complies with § 1041.5(c)(1) if it makes the determination required under § 1041.5(b) based on a net income projection of $2,000 for the relevant monthly period. The lender's projection includes both the payroll income from the first job for which verification evidence is reasonably available and the cash income from the second job for which verification evidence is not reasonably available (*see* comment 5(c)(2)(ii)(A)–3). In such circumstances, the lender may reasonably consider the additional income reflected in the consumer's written statement pursuant to § 1041.5(c)(2)(ii)(A)(*1*).

iv. Assume that a consumer states that her net income is $1,000 every two weeks, pursuant to § 1041.5(c)(2)(i)(A). The lender obtains electronic records of the consumer's deposit account transactions as verification evidence pursuant to § 1041.5(c)(2)(ii)(A) showing a biweekly direct deposit $800 during the preceding two-week period and a biweekly direct deposit of $1,000 during the prior two-week period. The consumer explains that the most recent income was lower than her usual income of $1,000 because she missed two days of work due to illness. The lender complies with § 1041.5(c)(1) if it makes the determination required under § 1041.5(b) based on a projection of $2,000 for the relevant monthly period because it reasonably considers the consumer's explanation in determining whether the stated amount is consistent with the verification evidence.

v. Assume that a consumer states that her net income is $2,000 every two weeks, pursuant to § 1041.5(c)(2)(i)(A). The lender obtains electronic records of the consumer's deposit account transactions as verification evidence pursuant to § 1041.5(c)(2)(ii)(A) showing no income transactions in the preceding month but showing consistent biweekly direct deposits of $2,000 from ABC Manufacturing prior to that month. The consumer explains that she was temporarily laid off for one month while ABC Manufacturing retooled the plant where she works but that she recently resumed work there. The lender complies with § 1041.5(c)(1) if it makes the determination required under § 1041.5(b) based on a projection of $4,000 for the relevant monthly period because it reasonably considers the consumer's explanation in determining whether the stated amount is consistent with the verification evidence.

vi. Assume that a consumer states that she owes a child support payment of $200 each month, pursuant to § 1041.5(c)(2)(i)(B). The national consumer report that the lender obtains as verification evidence pursuant to § 1041.5(c)(2)(ii)(C) does not include any child support payment. The lender must consider the child support obligation listed in the written statement. The lender complies with § 1041.5(c)(1) if it reasonably relies on the amount in the consumer's written statement pursuant to § 1041.5(c)(2)(ii)(C) to make the determination required under § 1041.5(b) based on a projection of a $200 child support payment each month.

vii. Assume that a consumer does not list a student loan in her written statement pursuant to § 1041.5(c)(2)(i)(B), but the national consumer report that the lender obtains as verification evidence pursuant to § 1041.5(c)(2)(ii)(B) lists such a loan with a payment due during the relevant monthly period. The lender does not comply with § 1041.5(c)(1) if it makes the determination required under § 1041.5(b) without including the student loan payment based on the consumer's failure to list the loan in the written statement or on the consumer's explanation that the loan has recently been paid off. The lender may obtain and reasonably consider other reliable evidence, such as records from the consumer or an updated national consumer report, and may exclude the student loan payment if such additional evidence is consistent with the consumer's statement or explanation.

viii. Assume that a consumer states that he owes a child support payment of $200 each month, pursuant to § 1041.5(c)(2)(i)(B). The national consumer report that the lender obtains as verification evidence pursuant to § 1041.5(c)(2)(ii)(C) includes the child support payment. The consumer states, further, that his child support payment is deducted out of his paycheck prior to his receipt of take-home pay. The lender obtains a recent pay stub of the consumer as verification evidence which shows a $200 deduction but does not identify the payee or include any other information regarding the nature of the deduction. The lender complies with § 1041.5(c)(1) if it makes the determination required under § 1041.5(b) based on a projection of major financial obligations that does not include the $200 child support payment each month, because it relies on the consumer's statement that the child support payment is deducted from his paycheck prior to receipt of take-home pay and nothing in the verification evidence is inconsistent with the statement.

2. *Consumer-specific factors regarding payment of major financial obligations.* Under § 1041.5(c)(1), in projecting major financial obligations the lender may consider consumer-specific factors, such as whether other persons are regularly contributing toward the consumer's payment of major financial obligations. The lender may consider such consumer-specific factors only when it is reasonable to do so. It is not reasonable for the lender to consider whether other persons are regularly

contributing toward the consumer's payment of major financial obligations if the lender is separately including in its projection of net income any income of another person to which the consumer has a reasonable expectation of access (see comment 5(a)(5)–3).

5(c)(2) Evidence of Net Income and Payments for Major Financial Obligations

Paragraph 5(c)(2)(i)

1. *Statements from the consumer.* Section 1041.5(c)(2)(i) requires a lender to obtain a consumer's written statement of the amounts of the consumer's net income and payments for the consumer's major financial obligations currently and for the relevant monthly period. Section 1041.5(c)(2)(i) also provides that the written statement from the consumer may include a statement from the consumer about the amount of any income of another person to which the consumer has a reasonable expectation of access. A consumer's written statement includes a statement the consumer writes on a paper application or enters into an electronic record, or an oral consumer statement that the lender records and retains or memorializes in writing or electronically and retains.

Paragraph 5(c)(2)(ii)

1. *Verification requirement.* Section 1041.5(c)(2)(ii) establishes requirements for a lender to obtain verification evidence for the amounts of a consumer's net income and required payments for major financial obligations other than rental housing expense.

Paragraph 5(c)(2)(ii)(A)

1. *Income.* Section 1041.5(c)(2)(ii)(A) requires a lender to obtain a reliable record (or records) of an income payment (or payments) directly to the consumer covering sufficient history to support the lender's projection under § 1041.5(c)(1) if a reliable record (or records) of income payment (or payments) is reasonably available. Section 1041.5(c)(2)(ii)(A) also provides that if the lender elects to include as the consumer's net income for the relevant monthly period the income of another person to which the consumer has a reasonable expectation of access, the lender must obtain verification evidence of that income in the form of a reliable record (or records) demonstrating that the consumer has regular access to that income. Such verification evidence could consist of bank account statements indicating that the consumer has access to a joint bank account in which the other person's income is deposited, or that the other person regularly deposits income into the consumer's bank account (*see* comment 5(a)(5)–3 for further clarification). For purposes of verifying net income, a reliable transaction record includes a facially genuine original, photocopy, or image of a document produced by or on behalf of the payer of income, or an electronic or paper compilation of data included in such a document, stating the amount and date of the income paid to the consumer. A reliable transaction record also includes a facially genuine original, photocopy, or image of an electronic or paper record of depository account transactions, prepaid account transactions (including transactions on a general purpose reloadable prepaid card account, a payroll card account, or a government benefits card account) or money services business check-cashing transactions showing the amount and date of a consumer's receipt of income.

2. *Sufficient history.* Under § 1041.5(c)(2)(ii)(A), the lender must obtain a reliable record or records of the consumer's net income covering sufficient history to support the lender's projection under § 1041.5(c). For a covered short-term loan, sufficient history typically would consist of one biweekly pay cycle or one monthly pay cycle, depending on how frequently the consumer is paid. However, if there is inconsistency between the consumer's written statement regarding net income and the verification evidence which must be reconciled by the lender (*see* comment 5(c)(1)–1), then depending on the circumstances more than one pay cycle may be needed to constitute sufficient history. For a covered longer-term balloon-payment loan, sufficient history would generally consist of two biweekly pay cycles or two monthly pay cycles, depending on how frequently the consumer is paid. However, depending on the length of the loan, and the need to resolve inconsistency between the consumer's written statement regarding net income and the verification evidence, more than two pay cycles may be needed to constitute sufficient history.

3. *Reasonably available.* The lender's obligation to obtain a reliable record (or records) of income payment (or payments) covering sufficient history to support the lender's projection under § 1041.5(c)(1) applies if and to the extent a reliable record (or records) is reasonably available. A reliable record of the consumer's net income is reasonably available if, for example, the consumer's source of income is from her employment and she possesses or can access a copy of the consumer's recent pay stub. The consumer's recent transaction account deposit history is a reliable record (or records) that is reasonably available if the consumer has such an account. With regard to such bank account deposit history, the lender could obtain it directly from the consumer or, at its discretion, with the consumer's permission via an account aggregator service that obtains and categorizes consumer deposit account and other account transaction data. In situations in which income is neither documented through pay stubs nor transaction account records, the reasonably available standard requires the lender to act in good faith and exercise due diligence as appropriate for the circumstances to determine whether another reliable record (or records) is reasonably available.

4. *Reasonable reliance on consumer's statement if reliable record not reasonably available.* Under § 1041.5(c)(2)(ii)(A), if a lender determines that a reliable record (or records) of some or all of the consumer's net income is not reasonably available, the lender may reasonably rely on the consumer's written statement described in § 1041.5(c)(2)(i)(A) for that portion of the consumer's net income. Section 1041.5(c)(2)(ii)(A) does not permit a lender to rely on a consumer's written statement that the consumer has a reasonable expectation of access to the income of another person (*see* comment 5(c)(2)(ii)(A)–1). A lender reasonably relies on the consumer's written statement if such action is consistent with a lender's written policies and procedures required under § 1041.12 and there is no indication that the consumer's stated amount of net income on a particular loan is implausibly high or that the lender is engaged in a pattern of systematically overestimating consumers' income. Evidence of the lender's systematic overestimation of consumers' income could include evidence that the subset of the lender's portfolio consisting of the loans where the lender relies on the consumers' statements to project income in the absence of verification evidence perform worse, on a non-trivial level, than other covered loans made by the lender with respect to the factors noted in comment 5(b)–2.iii indicating poor loan performance (*e.g.,* high rates of default, frequent re-borrowings). If the lender periodically reviews the performance of covered short-term loans or covered longer-term balloon-payment loans where the lender has relied on consumers' written statements of income and uses the results of those reviews to make necessary adjustments to its policies and procedures and future lending decisions, such actions indicate

that the lender is reasonably relying on consumers' statements. Such necessary adjustments could include, for example, the lender changing its underwriting criteria for covered short-term loans to provide that the lender may not rely on the consumer's statement of net income in absence of reasonably available verification evidence unless the consumer's debt-to-income ratio is lower, on a non-trivial level, than that of similarly situated applicants who provide verification evidence of net income. A lender is not required to consider income that cannot be verified other than through the consumer's written statement. For an illustration of a lender's reliance on a consumer's written statement as to a portion of her income for which verification evidence is not reasonably available, see comment 5(c)(1)–1.iii.

Paragraph 5(c)(2)(ii)(B)

1. *Payments under debt obligations.* To verify a consumer's required payments under debt obligations, § 1041.5(c)(2)(ii)(B) requires a lender to obtain a national consumer report, the records of the lender and its affiliates, and a consumer report obtained from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered pursuant to § 1041.11(d)(2), if available. A lender satisfies its obligation under § 1041.5(d)(1) to obtain a consumer report from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered pursuant to § 1041.11(d)(2), if available, when it complies with the requirement in § 1041.5(c)(2)(ii)(B) to obtain this same consumer report. *See* comment 5(a)(3)–1 regarding the definition of required payments.

2. *Deduction of debt obligations prior to consumer's receipt of take-home pay.* If verification evidence shows that a debt obligation is deducted prior to the consumer's receipt of take-home pay, the lender does not include the debt obligation in the projection of major financial obligations under § 1041.5(c).

3. *Inconsistent information.* If the consumer reports and lender and affiliate records do not include a debt obligation listed in the consumer's written statement described in § 1041.5(c)(2)(ii)(B), the lender must consider the debt obligation listed in the consumer's written statement to make a reasonable projection of the amount of payments for debt obligations. The lender may reasonably rely on the written statement in determining the amount of the required payment for the debt obligation. If the reports and records include a debt obligation that is not listed in the consumer's written statement, the lender must consider the debt obligation listed in the report or record unless it obtains additional verification evidence confirming that the obligation has been paid off or otherwise released. A lender is not responsible for information about a major financial obligation that is not owed to the lender, its affiliates, or its service providers if such obligation is not listed in a consumer's written statement, a national consumer report, or a consumer report from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered pursuant to § 1041.11(d)(2).

Paragraph 5(c)(2)(ii)(C)

1. *Payments under child support or alimony obligations.* Section 1041.5(c)(2)(ii)(B) requires a lender to obtain a national consumer report to verify a consumer's required payments under child support obligations or alimony obligations under § 1041.5(c)(2)(ii)(C). A lender may use the same national consumer report to satisfy the verification requirements under both § 1041.5(c)(2)(ii)(B) and (C). *See* comment 5(c)(2)(ii)(B)–1 for clarification on the interplay between this obligation and § 1041.5(d)(1). If the report does not include a child support or alimony obligation listed in the consumer's written statement described in § 1041.5(c)(2)(i)(B), the lender must consider the obligation listed in the consumer's written statement to make a reasonable projection of the amount of payments for the child support or alimony obligation. The lender may reasonably rely on the written statement in determining the amount of the required payment for the obligation.

2. *Deduction of child support or alimony obligations prior to consumer's receipt of take-home pay.* If verification evidence shows that a child support or alimony obligation is deducted prior to the consumer's receipt of take-home pay, the lender does not include the child support or alimony obligation in the projection of major financial obligations under § 1041.5(c). For an illustration, see comment 5(c)(1)–1.viii.

Paragraph 5(c)(2)(ii)(D)

1. *Exception to obligation to obtain consumer report.* Section 1041.5(c)(2)(ii)(D) provides that notwithstanding § 1041.5(c)(2)(ii)(B) and (C), a lender is not required to obtain a national consumer report to verify debt obligations and child support and alimony obligations if during the preceding 90 days: The lender or its affiliate has obtained a national consumer report for the consumer, retained the report under § 1041.12(b)(1)(ii) and checked it again in connection with the new loan; and the consumer did not complete a loan sequence of three loans under § 1041.5 and trigger the 30-day cooling-off period under § 1041.5(d)(2) since the previous report was obtained. To illustrate how the two conditions relate to each other, assume a consumer obtains a sequence of three covered short-term loans under § 1041.5, with each loan being 15 days in duration, the first loan consummating on June 1, and the final loan no longer being outstanding as of July 15. The lender obtained a consumer report on May 30 as part of its ability-to-repay determination for the first loan in the sequence. Under § 1041.5(c)(2)(ii)(D), the lender is not required to obtain a consumer report for the second and third loan in the sequence. Because the consumer took a three-loan sequence, the consumer is subject to a 30-day cooling-off period which expires on August 15 pursuant to § 1041.5(d)(2). If the consumer returns to the lender for another covered short-term loan under § 1041.5 on August 15, the lender must obtain a consumer report under § 1041.5(c)(2)(ii)(B) and (C) to verify debt obligations and child support and alimony obligations even though fewer than 90 days has elapsed since the lender previously obtained a consumer report for the consumer because the consumer completed a three-loan sequence and triggered the 30-day cooling-off period since the previous report was obtained.

2. *Conflicts between consumer's written statement and national consumer report.* A lender is not required to obtain a new national consumer report if the conditions under § 1041.5(c)(2)(ii)(D) are met; however, there may be circumstances in which a lender would voluntarily obtain a new national consumer report to resolve potential conflicts between a consumer's written statement and a national consumer report obtained in the previous 90 days. See comments 5(c)(1)–1.vii and 5(c)(2)(ii)(B)–3.

Paragraph 5(c)(2)(iii)

1. *Rental housing expense.* Section 1041.5(c)(2)(iii) provides that for the consumer's housing expense other than a payment for a debt obligation that appears on a national consumer report obtained pursuant to § 1041.5(c)(2)(ii)(B) (*i.e.,* with respect to lease or other rental housing payments), the lender may reasonably rely on the consumer's statement described in § 1041.5(c)(2)(i)(B). A lender reasonably relies on the consumer's written

statement if such actions are consistent with a lender's written policies and procedures required under § 1041.12, and there is no evidence that the stated amount for rental housing expense on a particular loan is implausibly low or that there is a pattern of the lender underestimating consumers' rental housing expense.

2. *Mortgage obligations.* For a housing expense under a debt obligation (*i.e.,* a mortgage), a lender generally must verify the obligation by obtaining a national consumer report that includes the housing expense under a debt obligation pursuant to § 1041.5(c)(2)(ii)(B). Under § 1041.5(c)(2)(ii)(D), however, a lender is not required to obtain a national consumer report if, during the preceding 90 days: the lender or its affiliate has obtained a national consumer report for the consumer and retained the report under § 1041.12(b)(1)(ii) and checked it again in connection with the new loan; and the consumer did not complete a loan sequence of three loans under § 1041.5 and trigger the 30-day cooling-off period under § 1041.5(d)(2) since the previous report was obtained (*see* comment 5(c)(2)(ii)(D)–1).

5(d) Additional Limitations on Lending—Covered Short-Term Loans and Covered Longer-Term Balloon-Payment Loans

Paragraph 5(d)

1. *General.* Section 1041.5(d) specifies certain circumstances in which making a new covered short-term loan or a covered longer-term balloon-payment loan under § 1041.5 during or after a sequence of covered short-term loans, covered longer-term balloon-payment loans, or a combination of covered short-term loans and covered longer-term balloon-payment loans is prohibited during a mandatory cooling-off period. The prohibitions apply to making a covered short-term loan or covered longer-term balloon-payment loan under § 1041.5.

2. *Application to rollovers.* The prohibitions in § 1041.5(d) apply to new covered short-term loans or covered longer-term balloon-payment loans under § 1041.5, as well as to loans that are a rollover of a prior loan (or what is termed a ''renewal'' in some States). Rollovers are defined as a matter of State law but typically involve deferral of repayment of the principal amount of a short-term loan for a period of time in exchange for a fee. In the event that a lender is permitted under State law to roll over a loan, the rollover would be treated as applicable as a new covered short-term loan or covered longer-term balloon-payment loan that, depending on when it occurs in the sequence, would be subject to the prohibitions in § 1041.5(d). For example, assume that a lender is permitted under applicable State law to roll over a covered short-term loan and the lender makes a covered short-term loan with $500 in principal and a 14-day contractual duration. Assume that the consumer returns to the lender on day 14 (the repayment date of the first loan), the lender reasonably determines that the consumer has the ability to repay a new loan, and the consumer is offered the opportunity to roll over the first loan for an additional 14 days for a $75 fee. The rollover would be the second loan in a loan sequence, as defined under § 1041.2(a)(14), because fewer than 30 days would have elapsed between consummation of the new covered short-term loan (the rollover) and the consumer having had a covered short-term loan made under § 1041.5 outstanding. Assume that the consumer returns on day 28 (the repayment date of the first rollover, *i.e.,* the second loan in the sequence) and the lender again reasonably determines that the consumer has the ability to repay a new loan and offers to roll over the loan again for an additional 14 days for a $75 fee. The second rollover would be the third loan in a loan sequence. If the consumer were to return on day 42 (the repayment date of the second rollover, which is the third loan in the sequence) and attempt to roll over the loan again, that rollover would be considered the fourth loan in the loan sequence. Therefore, that rollover would be prohibited and the consumer could not obtain another covered short-term loan or covered longer-term balloon-payment loan until the expiration of the 30-day cooling-off period, which begins after the consumer repays the second rollover (*i.e.,* the third loan in the sequence).

5(d)(1) Borrowing History Review

1. *Relationship to § 1041.5(c)(2)(ii)(B) and (C).* A lender satisfies its obligation under § 1041.5(d)(1) to obtain a consumer report from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered pursuant to § 1041.11(d)(2), if available, when it complies with the requirement in § 1041.5(c)(2)(ii)(B) and (C) to obtain this same consumer report.

2. *Availability of information systems that have been registered for 180 days or more pursuant to § 1041.11(c)(2) or are registered pursuant to § 1041.11(d)(2).* If no information systems that have been registered for 180 days or more pursuant to § 1041.11(c)(2) or are registered pursuant to § 1041.11(d)(2) are available at the time that the lender is required to obtain the information about the consumer's borrowing history, the lender is nonetheless required to obtain information about the consumer's borrowing history from the records of the lender and its affiliates and to obtain the consumer's statement about the amount and timing of payments of major financial obligations as required under § 1041.5(c)(2)(i)(B) (which would include information on current debt obligations including any outstanding covered loans). A lender may be unable to obtain a consumer report from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or that is registered pursuant to § 1041.11(d)(2) if, for example, all registered information systems are temporarily unavailable.

5(d)(2) Prohibition on Loan Sequences of More Than Three Covered Short-Term Loans or Covered Longer-Term Balloon-Payment Loans Made Under § 1041.5.

1. *Prohibition.* Section 1041.5(d)(2) prohibits a lender from making a fourth covered short-term loan or covered longer-term balloon-payment loan under § 1041.5 in a loan sequence of covered short-term loans, covered longer-term balloon-payment loans, or a combination of covered short-term loans and covered longer-term balloon-payment loans made under § 1041.5. *See* § 1041.2(a)(14) for the definition of a loan sequence.

2. *Examples.* The following examples illustrate application of the prohibition under § 1041.5(d)(2):

i. Assume that a lender makes a covered short-term loan to a consumer under the requirements of § 1041.5 on February 1 with a contractual due date of February 15, the consumer repays the loan on February 15, and the consumer returns to the lender on March 1 for another loan. Assume that the second loan is a covered short-term loan with a contractual due date of March 15. The second loan would be part of the same loan sequence as the first loan because 30 or fewer days have elapsed since repayment of the first loan. Assume that the lender makes the second loan, the consumer repays the loan on March 15, and the consumer returns to the lender on April 1 for another loan. Assume that the third loan is a covered short-term loan with a contractual due date of April 15. The third loan would be part of the same loan sequence as the first and second loans because 30 or fewer days have elapsed since repayment of the second loan. Assume that the lender

makes the third loan and the consumer repays the loan on April 15. Assume that all loans are reported to a registered information system. The consumer would not be eligible for another covered short-term loan or covered longer-term balloon-payment loan under § 1041.5(d) from any lender until a 30-day cooling-off period following April 15 has elapsed, that is, starting on May 16. The consumer also would not be eligible for another covered short-term loan under § 1041.6 during the same 30-day cooling-off period. *See* § 1041.6(c)(1) and accompanying commentary.

ii. Assume that a lender makes a covered short-term loan to a consumer under the requirements of § 1041.5 on February 1 with a contractual due date of February 15, the consumer repays the loan on February 15, and the consumer returns to the lender on March 1 for another loan. Assume that the second loan is a covered longer-term balloon-payment loan that has biweekly installment payments followed by a final balloon payment on the contractual due date of May 1. The second loan would be part of the same loan sequence as the first loan because 30 or fewer days have elapsed since repayment of the first loan. Assume that the lender makes the second loan, the consumer repays the loan in full as of May 1, and the consumer returns to the lender on May 15 for another loan. Assume that the third loan is a covered short-term loan with a contractual due date of May 30. The third loan would be part of the same loan sequence as the first and second loans because 30 or fewer days have elapsed since repayment of the second loan. Assume that the lender makes the third loan and the consumer repays the loan on May 30. Assume that all loans are reported to a registered information system. The consumer would not be eligible to receive another covered short-term loan or covered longer-term balloon-payment loan under § 1041.5(d) from any lender until a 30-day cooling-off period following May 30 has elapsed, that is until after June 29. The consumer also would not be eligible for another covered short-term loan under § 1041.6 during the same 30-day cooling-off period. *See* § 1041.6(c)(1) and accompanying commentary.

5(e) Prohibition Against Evasion

1. *General.* Section 1041.5(e) provides that a lender must not take any action with the intent of evading the requirements of § 1041.5. In determining whether a lender has taken action with the intent of evading the requirements of § 1041.5, the form, characterization, label, structure, or written documentation of the lender's action shall not be dispositive. Rather, the actual substance of the lender's action as well as other relevant facts and circumstances will determine whether the lender's action was taken with the intent of evading the requirements of § 1041.5. If the lender's action is taken solely for legitimate business purposes, it is not taken with the intent of evading the requirements of § 1041.5. By contrast, if a consideration of all relevant facts and circumstances reveals a purpose that is not a legitimate business purpose, the lender's action may have been taken with the intent of evading the requirements of § 1041.5. A lender action that is taken with the intent of evading the requirements of this part may be knowing or reckless. Fraud, deceit, or other unlawful or illegitimate activity may be one fact or circumstance that is relevant to the determination of whether a lender's action was taken with the intent of evading the requirements of § 1041.5, but fraud, deceit, or other unlawful or illegitimate activity is not a prerequisite to such a finding.

2. *Illustrative example—lender action that may have been taken with the intent of evading the requirements of the rule.* The following example illustrates a lender action that, depending on the relevant facts and circumstances, may have been taken with the intent of evading the requirements of § 1041.5 and thus may have violated § 1041.5(e):

i. A storefront payday lender makes covered short-term loans to consumers with a contractual duration of 14 days and a lump-sum repayment structure. The lender's policies and procedures provide for a standard loan contract including a ''recurring late fee'' as a lender remedy that is automatically triggered in the event of the consumer's delinquency (*i.e.,* if the consumer does not pay the entire lump-sum amount on the contractual due date, with no grace period), and in the loan contract the consumer grants the lender authorization to initiate a recurring ACH in the event such remedy is triggered. Assume that the recurring late fee is to be paid biweekly while the loan remains outstanding and is substantially equal to or greater than the fee that the lender charges on transactions that are considered rollovers under applicable State law. The practice of imposing a recurring late fee by contract differs from the lender's prior practice of contacting the consumer on or about the contractual due date requesting that the consumer visit the store to discuss payment options including rollovers. Assume that as a matter of practice, if a consumer does not repay the first loan in a sequence when it is due, the lender charges recurring late fees for 60 days unless the consumer repays the outstanding balance. Such a period is roughly equivalent to two 14-day loan cycles or two rollovers following the initial loan in the sequence, plus a 30-day cooling-off period. *See* § 1041.5(d)(2) and related commentary. Depending on the relevant facts and circumstances, this action may have been taken with the intent of evading the requirements of § 1041.5. By charging the recurring late fee for 60 days after the initial loan was due, the lender avoided its obligation under § 1041.5(b) to make an ability-to-repay determination for the second and third loans in the sequence and to comply with the mandatory cooling-off period in § 1041.5(d)(2) after the third loan was no longer outstanding.

Section 1041.6—Conditional Exemption for Certain Covered Short-Term Loans

6(a) Conditional Exemption for Certain Covered Short-Term Loans

1. *General.* Under § 1041.6(a), a lender that complies with § 1041.6(b) through (e) can make a covered short-term loan without complying with the otherwise applicable requirements under § 1041.5. A lender who complies with § 1041.6 in making a covered short-term loan has not committed the unfair and abusive practice under § 1041.4 and is not subject to § 1041.5. However, nothing in § 1041.6 provides lenders with an exemption to the requirements of other applicable laws, including subpart C of this part and State laws.

2. *Obtaining consumer borrowing history information.* Under § 1041.6(a), the lender must determine prior to making a covered short-term loan under § 1041.6 that requirements under § 1041.6(b) and (c) are satisfied. In particular, § 1041.6(a) requires the lender to obtain information about the consumer's borrowing history from the records of the lender and the records of the lender's affiliates. (This information about borrowing history with the lender and its affiliates is also important to help a lender avoid violations of § 1041.6(d)). Furthermore, § 1041.6(a) requires the lender to obtain a consumer report from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered pursuant to § 1041.11(d)(2). If no information systems have been registered for 180 days or more pursuant to § 1041.11(c)(2) or are registered pursuant to § 1041.11(d)(2) and available as of the time the lender is required to obtain the report, the lender

cannot comply with the requirements in § 1041.6(b) and (c). A lender may be unable to obtain such a consumer report if, for example:

i. No information systems have been registered for 180 days or more pursuant to § 1041.11(c)(2) or are registered pursuant to § 1041.11(d)(2); or

ii. If information systems have been registered for 180 days or more pursuant to § 1041.11(c)(2) or are registered pursuant to § 1041.11(d)(2) but all such registered information systems are temporarily unavailable. Under these circumstances, a lender cannot make a covered short-term loan under § 1041.6.

3. *Consumer reports.* A lender is not responsible for inaccurate or incomplete information contained in a consumer report from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered pursuant to § 1041.11(d)(2).

6(b) Loan Term Requirements

Paragraph 6(b)(1)

1. *Loan sequence.* Section 1041.2(a)(14) defines a loan sequence. For further clarification and examples regarding the definition of loan sequence, see § 1041.2(a)(14).

2. *Principal amount limitations—general.* For a covered short-term loan made under § 1041.6, different principal amount limitations apply under § 1041.6(b)(1) depending on whether the loan is the first, second, or third loan in a loan sequence. The principal amount limitations apply regardless of whether any or all of the loans are made by the same lender, an affiliate, or unaffiliated lenders. Under § 1041.6(b)(1)(i), for the first loan in a loan sequence, the principal amount must be no greater than $500. Under § 1041.6(b)(1)(ii), for the second loan in a loan sequence, the principal amount must be no greater than two-thirds of the principal amount of the first loan in the loan sequence. Under § 1041.6(b)(1)(iii), for the third loan in a loan sequence, the principal amount must be no greater than one-third of the principal amount of the first loan in the loan sequence.

3. *Application to rollovers.* The principal amount limitations under § 1041.6 apply to rollovers of the first or second loan in a loan sequence as well as new loans that are counted as part of the same loan sequence. Rollovers are defined as a matter of State law but typically involve deferral of repayment of the principal amount of a short-term loan for a period of time in exchange for a fee. In the event the lender is permitted under State law to make rollovers, the lender may, in a manner otherwise consistent with applicable State law and § 1041.6, roll over a covered short-term loan made under § 1041.6, but the rollover would be treated as the next loan in the loan sequence, as applicable, and would therefore be subject to the principal amount limitations set forth in § 1041.6(b)(1) as well as other limitations in § 1041.6. For example, assume that a lender is permitted under applicable State law to make a rollover. If the consumer obtains a first loan in a loan sequence under § 1041.6 with a principal amount of $300, under § 1041.6(b)(1)(ii), the lender may allow the consumer to roll over that loan so long as the consumer repays at least $100, so that the principal of the loan that is rolled over would be no greater than $200. Similarly, under § 1041.6(b)(1)(iii), the lender may allow the consumer to roll over the second loan in the loan sequence as permitted by State law, so long as the consumer repays at least an additional $100, so that the principal of the loan that is rolled over would be no greater than $100.

4. *Example.* Assume that a consumer who otherwise satisfies the requirements of § 1041.6 seeks a covered short-term loan and that the lender chooses to make the loan without meeting all the specified underwriting criteria required in § 1041.5. Under § 1041.6(b)(1)(i), the principal amount of the loan must not exceed $500. Assume that the consumer obtains a covered short-term loan under § 1041.6 with a principal amount of $450, the loan is contractually due in 14 days, and the consumer repays the loan on the contractual due date. Assume that the consumer returns to the lender 10 days after the repayment of the first loan to take out a second covered short-term loan under § 1041.6. Under § 1041.6(b)(1)(ii), the principal amount of the second loan may not exceed $300. Assume, further, that the consumer is then made a covered short-term loan under § 1041.6 with a principal amount of $300, the loan is contractually due in 14 days, and the consumer repays the loan on the contractual due date. If the consumer returns to the lender 25 days after the repayment of the second loan to take out a third covered short-term loan under § 1041.6, under § 1041.6(b)(1)(iii), the principal amount of the third loan may not exceed $150. These same limitations would apply if the consumer went to a different, unaffiliated lender for the second or third loan. If, however, the consumer does not return to the lender seeking a new loan under § 1041.6 until 32 days after the date on which the second loan in the loan sequence was repaid, the subsequent loan would not be part of the prior loan sequence and instead would be the first loan in a new loan sequence. Therefore, if otherwise permissible under § 1041.6, that loan would be subject to the $500 principal amount limitation under § 1041.6(b)(1)(i).

Paragraph 6(b)(2)

1. *Equal payments and amortization for loans with multiple payments.* Section 1041.6(b)(2) provides that for a loan with multiple payments, the loan must amortize completely during the term of the loan and the payment schedule must allocate a consumer's payments to the outstanding principal and interest and fees as they accrue only by applying a fixed periodic rate of interest to the outstanding balance of the unpaid loan principal during every repayment period for the term of the loan. For example, if the loan has a contractual duration of 30 days with two scheduled biweekly payments, under § 1041.6(b)(2) the lender cannot require the consumer to pay interest only for the first scheduled biweekly payment and the full principal balance at the second scheduled biweekly payment. Rather, the two scheduled payments must be equal in amount and amortize over the course of the loan term in the manner required under § 1041.6(b)(2).

Paragraph 6(b)(3)

1. *Inapplicability of conditional exemption to a loan with vehicle security.* Section 1041.6(b)(3) prohibits a lender from making a covered-short-term loan under § 1041.6 with vehicle security. If the lender or its service provider take vehicle security in connection with a covered short-term loan, the loan must be originated in compliance with all of the requirements under § 1041.5, including the ability-to-repay determination.

Paragraph 6(b)(4)

1. *Inapplicability of conditional exemption to an open-end loan.* Section 1041.6(b)(4) prohibits a lender from making a covered short-term loan under § 1041.6 structured as an open-end loan under § 1041.2(a)(16). If a covered short-term loan is structured as an open-end loan, the loan must be originated in compliance with all of the requirements under § 1041.5.

6(c) Borrowing History Requirements

Paragraph 6(c)(1)

1. *Preceding loans.* Section 1041.6(c)(1) provides that prior to making a covered short-term loan under

§ 1041.6, the lender must determine that more than 30 days has elapsed since the consumer had an outstanding loan that was either a covered short-term loan (as defined in § 1041.2(a)(10)) made under § 1041.5 or a covered longer-term balloon-payment loan (as defined in § 1041.2(a)(7)) made under § 1041.5. This requirement applies regardless of whether this prior loan was made by the same lender, an affiliate, or an unaffiliated lender. For example, assume that a lender makes a covered short-term loan to a consumer under § 1041.5, that the loan has a contractual duration of 14 days, and that the consumer repays the loan on the contractual due date. If the consumer returns for a second loan 20 days after repaying the loan, the lender cannot make a covered short-term loan under § 1041.6.

Paragraph 6(c)(2)

1. *Loan sequence limitation.* Section 1041.6(c)(2) provides that a lender cannot make a covered short-term loan under § 1041.6 if the loan would result in the consumer having a loan sequence of more than three covered short-term loans under § 1041.6 made by any lender. This requirement applies regardless of whether any or all of the loans in the loan sequence are made by the same lender, an affiliate, or unaffiliated lenders. See comments 6(b)(1)–1 and –2 for further clarification on the definition of loan sequence, as well as § 1041.2(a)(14) and accompanying commentary. For example, assume that a consumer obtains a covered short-term loan under the requirements of § 1041.6 on February 1 that has a contractual due date of February 15, that the consumer repays the loan on February 15, and that the consumer returns to the lender on March 1 for another loan under § 1041.6. The second loan under § 1041.6 would be part of the same loan sequence because 30 or fewer days have elapsed since repayment of the first loan. Assume that the lender makes the second loan with a contractual due date of March 15, that the consumer repays the loan on March 15, and that the consumer returns to the lender on April 1 for another loan under § 1041.6. The third loan under § 1041.6 would be part of the same loan sequence as the first and second loans because fewer than 30 days have elapsed since repayment of the second loan. Assume that the lender makes the third loan, which has a contractual due date of April 15 and that the consumer repays the loan on April 15. The consumer would not be permitted to receive another covered short-term loan under § 1041.6 until the 30-day period following April 15 has elapsed, that is until after May 15, assuming the other requirements under § 1041.6 are satisfied. The consumer would also be prohibited from obtaining other forms of credit from the same lender or its affiliate for 30 days under § 1041.6(d); see comment 6(d)–1. Loans that are rollovers count toward the sequence limitation under § 1041.6(c)(2). For further clarification on how the requirements of § 1041.6 apply to rollovers, see comment 6(b)(1)–3.

Paragraph 6(c)(3)

1. *Consecutive 12-month period.* Section 1041.6(c)(3) requires that a covered short-term loan made under § 1041.6 not result in the consumer having more than six covered short-term loans outstanding during a consecutive 12-month period or having covered short-term loans outstanding for an aggregate period of more than 90 days during a consecutive 12-month period. The consecutive 12-month period begins on the date that is 12 months prior to the proposed contractual due date of the new covered short-term loan to be made under § 1041.6 and ends on the proposed contractual due date. The lender must review the consumer's borrowing history on covered short-term loans for the 12 months preceding the consummation date of the new covered short-term loan less the period of proposed contractual indebtedness on that loan. For example, for a new covered short-term loan to be made under § 1041.6 with a proposed contractual term of 14 days, the lender must review the consumer's borrowing history during the 351 days preceding the consummation date of the new loan. The lender also must consider the making of the new loan and the days of proposed contractual indebtedness on that loan to determine whether the requirement under § 1041.6(c)(3) regarding the total number of covered short-term loans and total time of indebtedness on covered short-term loans during a consecutive 12-month period is satisfied.

Paragraph 6(c)(3)(i)

1. *Total number of covered short-term loans.* Section 1041.6(c)(3)(i) provides that a lender cannot make a covered-short term loan under § 1041.6 if the loan would result in the consumer having more than six covered short-term loans outstanding in any consecutive 12-month period. The requirement counts covered short-term loans made under either § 1041.5 or § 1041.6 toward the limit. This requirement applies regardless of whether any or all of the loans subject to the limitations are made by the same lender, an affiliate, or an unaffiliated lender. Under § 1041.6(c)(3)(i), the lender must use the consumer's borrowing history to determine whether the loan would result in the consumer having more than six covered short-term loans outstanding during a consecutive 12-month period. A lender may make a loan that would comply with the requirement under § 1041.6(c)(3)(i) even if the six-loan limit would prohibit the consumer from taking out one or two subsequent loans in the sequence.

2. *Example.* Assume that a lender seeks to make a covered short-term loan to a consumer under § 1041.6 with a contractual duration of 14 days. Assume, further, that the lender determines that during the past 30 days the consumer has not had an outstanding covered short-term loan and that during the 351 days preceding the consummation date of the new loan the consumer had outstanding a total of five covered short-term loans. The new loan would be the sixth covered short-term loan that was outstanding during a consecutive 12-month period. Therefore, the loan would comply with the requirement regarding the aggregate number of covered short-term loans under § 1041.6. Because the consumer has not had an outstanding covered short-term loan in the preceding 30 days, this loan would be the first loan in a new loan sequence. Assume that a week after repaying this first loan the consumer seeks another covered short-term loan under § 1041.6, also with a contractual duration of 14 days. Under § 1041.6(c)(3)(i), this second loan in the loan sequence cannot be made if it would result in the consumer taking out more than six covered short-term loans in the 351 days preceding the proposed consummation date of this loan.

Paragraph 6(c)(3)(ii)

1. *Aggregate period of indebtedness.* Section 1041.6(c)(3)(ii) provides that a lender cannot make a covered short-term loan under § 1041.6 if the loan would result in the consumer having covered short-term loans outstanding for an aggregate period of more than 90 days in any consecutive 12-month period. In addition to the proposed contractual duration of the new loan, the aggregate period in which all covered short-term loans made to the consumer during the consecutive 12-month period under either § 1041.5 or § 1041.6 were outstanding is counted toward the limit. This requirement applies regardless of whether any or all of the covered short-term loans are made by the same lender, an affiliate, or

an unaffiliated lender. Under § 1041.6(c)(3)(ii), the lender must use the information it has obtained about the consumer's borrowing history to determine whether the loan would result in the consumer having covered short-term loans outstanding for an aggregate period of more than 90 days during a consecutive 12-month period. A lender may make a loan that would comply with the requirement under § 1041.6(c)(3)(ii) even if the 90-day limit would prohibit the consumer from taking out one or two subsequent loans in the sequence.

2. *Example.* Assume that Lender A seeks to make a covered short-term loan under § 1041.6 with a contractual duration of 14 days. Assume, further, that Lender A determines that during the past 30 days the consumer did not have an outstanding covered short-term loan and that during the 351 days preceding the consummation date of the new loan the consumer had outstanding three covered short-term loans made by Lender A and a fourth covered short-term loan made by Lender B. Assume that each of the three loans made by Lender A had a contractual duration of 14 days and that the loan made by Lender B had a contractual duration of 30 days, for an aggregate total of 72 days of contractual indebtedness. Assume, further, that the consumer repaid each loan on its contractual due date. The new loan, if made, would result in the consumer having covered short-term loans outstanding for an aggregate period of 86 days during the consecutive 12-month period. Therefore, the loan would comply with the requirement regarding aggregate time of indebtedness. Because the consumer has not had an outstanding covered short-term loan in the preceding 30 days, this loan would be the first loan in a new loan sequence. Assume that a week after repaying this first loan the consumer seeks another covered short-term loan under § 1041.6, also with a contractual duration of 14 days. Under § 1041.6(c)(3)(ii), this second loan in the loan sequence cannot be made if it would result in the consumer being in debt on covered short-term loans for more than 90 days in the 351 days preceding the proposed consummation date of this loan.

6(d) Restrictions on Making Certain Covered Loans and Non-Covered Loans Following a Covered Short-Term Loan Made Under the Conditional Exemption

1. *General.* If a lender makes a covered short-term loan under § 1041.6 to a consumer, § 1041.6(d) prohibits the lender or its affiliate from making a covered short-term loan under § 1041.5, a covered longer-term balloon payment loan under § 1041.5, a covered longer-term loan, or a non-covered loan to the consumer while the covered short-term loan made under § 1041.6 is outstanding and for 30 days thereafter. During this period, a lender or its affiliate could make a subsequent covered short-term loan in accordance with the requirements in § 1041.6.

2. *Example.* Assume that a lender makes both covered short-term loans under § 1041.6 and non-covered installment loans. Assume, further, that the lender makes on April 1 a covered short-term loan under § 1041.6 to a consumer who has not obtained a covered short-term loan under § 1041.6 in the previous 30 days. Assume that the consumer repays this loan on April 15 and that the consumer returns to the lender on April 30 to seek a non-covered installment loan. Because 30 days have not elapsed since the consumer repaid the loan made under § 1041.6, neither the lender nor its affiliate can make a non-covered installment loan to the consumer on April 30. May 16 is the earliest the lender or its affiliate could make a non-covered installment loan to the consumer. The prohibition in § 1041.6(d) applies to covered short-term loans and covered longer-term balloon payment loans made under § 1041.5 and covered longer-term loans but not to covered short-term loans made under § 1041.6. Section 1041.6(d) would, therefore, not prohibit the consumer from obtaining an additional covered short-term loan under § 1041.6 from the same lender or its affiliate on April 30, provided that such loan complies with the principal amount reduction and other requirements of § 1041.6. The prohibition in § 1041.6(d) on making subsequent non-covered loans applies only to a lender and its affiliates. Section 1041.6(d) would, therefore, not prohibit the consumer from obtaining on April 30 a non-covered installment loan from a lender not affiliated with the lender that made the covered short-term loan on April 1.

6(e) Disclosures

1. *General.* Section 1041.6(e) sets forth two main disclosure requirements related to a loan made under the requirements in § 1041.6. The first, set forth in § 1041.6(e)(2)(i), is a notice of the restriction on the principal amount on the loan and restrictions on the number of future loans and the principal amounts of such loans, which is required to be provided to a consumer when the consumer seeks the first loan in a sequence of covered short-term loans made under § 1041.6. The second, set forth in § 1041.6(e)(2)(ii), is a notice of the restriction on the principal amount on the loan and the prohibition on another similar loan for at least 30 days after the loan is repaid, which is required to be provided to a consumer when the consumer seeks the third loan in a sequence of covered short-term loans made under § 1041.6.

6(e)(1) General Form of Disclosures

6(e)(1)(i) Clear and Conspicuous

1. *Clear and conspicuous standard.* Disclosures are clear and conspicuous for purposes of § 1041.6(e) if they are readily understandable by the consumer and their location and type size are readily noticeable to the consumer.

6(e)(1)(ii) In Writing or Electronic Delivery

1. *General.* Section 1041.6(e)(1)(ii) requires that disclosures required by § 1041.6 be provided to the consumer in writing or through electronic delivery.

2. *E-Sign Act requirements.* The notices required by § 1041.6(e)(2)(i) and (ii) may be provided to the consumer in electronic form without regard to the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*).

6(e)(1)(iii) Retainable

1. *General.* Electronic disclosures are retainable for purposes of § 1041.6(e) if they are in a format that is capable of being printed, saved, or emailed by the consumer.

6(e)(1)(iv) Segregation Requirements for Notices

1. *Segregated additional content.* Although segregated additional content that is not required by this section may not appear above, below, or around the required content, this additional content may be delivered through a separate form, such as a separate piece of paper or Web page.

6(e)(1)(vi) Model Forms

1. *Safe harbor provided by use of model forms.* Although the use of the model forms and clauses is not required, lenders using them will be deemed to be in compliance with the disclosure requirement with respect to such model forms consistent with section 1032(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5481, *et seq.*)

6(e)(2) Notice Requirements

6(e)(2)(i) First Loan Notice

1. *As applicable standard.* Due to the requirements in § 1041.6(c)(3), a consumer may not be eligible to

complete a three-loan sequence of covered short-term loans under § 1041.6 because additional loans within 30 days of the expected pay-off date for the first loan would violate one or more provisions of § 1041.6(c)(3). Such a consumer may be permitted to obtain only one or two loans in a sequence of covered short-term loans under § 1041.6, as applicable. Under these circumstances, § 1041.6(e)(2)(i) would require the lender to modify the notice in § 1041.6(e)(2)(i) to reflect these limitations on subsequent loans. For example, if a consumer can receive only a sequence of two covered short-term loans under § 1041.6 because of the requirements in § 1041.6(c)(3), the lender would have to modify the notice to list the maximum principal amount on loans 1 and 2 and to indicate that loan 3 would not be permitted.

6(e)(3) Timing

1. *General.* Section 1041.6(e)(3) requires a lender to provide the notices required in § 1041.6(e)(2)(i) and (ii) to the consumer before the applicable covered short-term loan under § 1041.6 is consummated. For example, a lender can provide the notice after a consumer has completed a loan application but before the consumer has signed the loan agreement. A lender would not have to provide the notices to a consumer who inquires about a covered short-term loan under § 1041.6 but does not fill out an application to obtain this type of loan.

2. *Electronic notices.* If a lender delivers a notice required by this section electronically in accordance with § 1041.6(e)(1)(ii), § 1041.6(e)(3) requires a lender to provide the electronic notice to the consumer before a covered short-term loan under § 1041.6 is consummated. Specifically, § 1041.6(e)(3) requires a lender to present the retainable notice to the consumer before the consumer is contractually obligated on the loan. To comply with § 1041.6(e)(3), a lender could, for example, display a screen on a web browser with the notices required in § 1041.6(e)(2)(i) and (ii), provided the screen can be emailed, printed, or saved, before the covered short-term loan under § 1041.6 has been consummated.

Section 1041.7—Identification of Unfair and Abusive Practice

1. *General.* A lender who complies with § 1041.8 with regard to a covered loan has not committed the unfair and abusive practice under § 1041.7.

Section 1041.8—Prohibited Payment Transfer Attempts

8(a) Definitions

8(a)(1) Payment Transfer

1. *Lender-initiated.* A lender-initiated debit or withdrawal includes a debit or withdrawal initiated by the lender's agent, such as a payment processor.

2. *Any amount due.* The following are examples of funds transfers that are for the purpose of collecting any amount due in connection with a covered loan:

i. A transfer for the amount of a scheduled payment due under a loan agreement for a covered loan.

ii. A transfer for an amount smaller than the amount of a scheduled payment due under a loan agreement for a covered loan.

iii. A transfer for the amount of the entire unpaid loan balance collected pursuant to an acceleration clause in a loan agreement for a covered loan.

iv. A transfer for the amount of a late fee or other penalty assessed pursuant to a loan agreement for a covered loan.

3. *Amount purported to be due.* A transfer for an amount that the consumer disputes or does not legally owe is a payment transfer if it otherwise meets the definition set forth in § 1041.8(a)(1).

4. *Transfers of funds not initiated by the lender.* A lender does not initiate a payment transfer when:

i. A consumer, on her own initiative or in response to a request or demand from the lender, makes a payment to the lender in cash withdrawn by the consumer from the consumer's account.

ii. A consumer makes a payment via an online or mobile bill payment service offered by the consumer's account-holding institution.

iii. The lender seeks repayment of a covered loan pursuant to a valid court order authorizing the lender to garnish a consumer's account.

Paragraph 8(a)(1)(i)(A)

1. *Electronic fund transfer.* Any electronic fund transfer meeting the general definition in § 1041.8(a)(1) is a payment transfer, including but not limited to an electronic fund transfer initiated by a debit card or a prepaid card.

Paragraph 8(a)(1)(i)(B)

1. *Signature check.* A transfer of funds by signature check meeting the general definition in § 1041.8(a)(1) is a payment transfer regardless of whether the transaction is processed through the check network or through another network, such as the ACH network. The following example illustrates this concept: A lender processes a consumer's signature check through the check system to collect a scheduled payment due under a loan agreement for a covered loan. The check is returned for nonsufficient funds. The lender then converts and processes the check through the ACH system, resulting in a successful payment. Both transfers are payment transfers, because both were initiated by the lender for purposes of collecting an amount due in connection with a covered loan.

Paragraph 8(a)(1)(i)(E)

1. *Transfer by account-holding institution.* Under § 1041.8(a)(1)(i)(E), when the lender is the account holder, a transfer of funds by the account-holding institution from a consumer's account held at the same institution is a payment transfer if it meets the general definition in § 1041.8(a)(1)(i), unless the transfer of funds meets the conditions in § 1041.8(a)(1)(ii) and is therefore excluded from the definition. See § 1041.8(a)(1)(ii) and related commentary.

2. *Examples.* Payment transfers initiated by an account-holding institution from a consumer's account include, but are not limited to, the following:

i. Initiating an internal transfer from a consumer's account to collect a scheduled payment on a covered loan.

ii. Sweeping the consumer's account in response to a delinquency on a covered loan.

iii. Exercising a right of offset to collect against an outstanding balance on a covered loan.

Paragraph 8(a)(1)(ii) Conditional Exclusion for Certain Transfers by Account-Holding Institutions

1. *General.* The exclusion in § 1041.8(a)(1)(ii) applies only to a lender that is also the consumer's account-holding institution. The exclusion applies only if the conditions in both § 1041.8(a)(1)(ii)(A) and (B) are met with respect to a particular transfer of funds. A lender whose transfer meets the exclusion has not committed the unfair and abusive practice under § 1041.7 and is not subject to § 1041.8 or § 1041.9 in connection with that transaction, but is subject to subpart C for any transfers that do not meet the exclusion in § 1041.8(a)(1)(ii) and are therefore payment transfers under § 1041.8(a)(1).

Paragraph 8(a)(1)(ii)(A)

1. *Terms of loan agreement or account agreement.* The condition in § 1041.8(a)(1)(ii)(A) is met only if the terms of the loan agreement or account agreement setting forth the restrictions on charging fees are in effect at the time

the covered loan is made and remain in effect for the duration of the loan.

2. *Fees prohibited.* Examples of the types of fees restricted under § 1041.8(a)(1)(ii)(A) include, but are not limited to, nonsufficient fund fees, overdraft fees, and returned-item fees. A lender seeking to initiate transfers of funds pursuant to the exclusion in § 1041.8(a)(1)(ii) may still charge the consumer a late fee for failure to make a timely payment, as permitted under the terms of the loan agreement and other applicable law, notwithstanding that the lender has initiated a transfer of funds meeting the description in § 1041.8(a)(1)(ii)(A) in an attempt to collect the payment.

Paragraph 8(a)(1)(ii)(B)

1. *General.* Under § 1041.8(a)(1)(ii)(B), to be eligible for the exclusion in § 1041.8(a)(1)(ii), a lender may not close the consumer's account in response to a negative balance that results from a lender-initiated transfer of funds in connection with the covered loan. A lender is not restricted from closing the consumer's account in response to another event, even if the event occurs after a lender-initiated transfer of funds has brought the account to a negative balance. For example, a lender may close the account at the consumer's request, for purposes of complying with other regulatory requirements, or to protect the account from suspected fraudulent use or unauthorized access, and still meet the condition in § 1041.8(a)(1)(ii)(B).

2. *Terms of loan agreement or account agreement.* The condition in § 1041.8(a)(1)(ii)(B) is met only if the terms of the loan agreement or account agreement providing that the lender will not close the account in the specified circumstances are in effect at the time the covered loan is made and remain in effect for the duration of the loan.

8(a)(2) Single Immediate Payment Transfer at the Consumer's Request

Paragraph 8(a)(2)(i)

1. *Time of initiation.* A one-time electronic fund transfer is initiated at the time that the transfer is sent out of the lender's control. Thus, the electronic fund transfer is initiated at the time that the lender or its agent sends the transfer to be processed by a third party, such as the lender's bank. The following example illustrates this concept: A lender obtains a consumer's authorization for a one-time electronic fund transfer at 2 p.m. and sends the payment entry to its agent, a payment processor, at 5 p.m. on the same day. The agent then sends the payment entry to the lender's bank for further processing the next business day at 8 a.m. The timing condition in § 1041.8(a)(2)(ii) is satisfied, because the lender's agent sent the transfer out of its control within one business day after the lender obtained the consumer's authorization.

Paragraph 8(a)(2)(ii)

1. *Time of processing.* A signature check is processed at the time that the check is sent out of the lender's control. Thus, the check is processed at the time that the lender or its agent sends the check to be processed by a third party, such as the lender's bank. For an example illustrating this concept within the context of initiating a one-time electronic fund transfer, see comment 8(a)(2)(i)–1.

2. *Check provided by mail.* For purposes of § 1041.8(a)(2)(ii), if the consumer provides the check by mail, the check is deemed to be provided on the date that the lender receives it.

8(b) Prohibition on Initiating Payment Transfers From a Consumer's Account After Two Consecutive Failed Payment Transfers

1. *General.* When the prohibition in § 1041.8(b) applies, a lender is generally restricted from initiating any further payment transfers from the consumer's account in connection with any covered loan that the consumer has with the lender at the time the prohibition is triggered, unless the requirements and conditions in either § 1041.8(c) or (d) are satisfied for each such covered loan for which the lender seeks to initiate further payment transfers. The prohibition applies, for example, to payment transfers that might otherwise be initiated to collect payments that later fall due under a loan agreement for a covered loan and to transfers to collect late fees or returned item fees as permitted under the terms of such a loan agreement. In addition, the prohibition applies regardless of whether the lender holds an otherwise valid authorization or instrument from the consumer, including but not limited to an authorization to collect payments by preauthorized electronic fund transfers or a post-dated check. See § 1041.8(c) and (d) and accompanying commentary for guidance on the requirements and conditions that a lender must satisfy to initiate a payment transfer from a consumer's account after the prohibition applies.

2. *Account.* The prohibition in § 1041.8(b) applies only to the account from which the lender attempted to initiate the two consecutive failed payment transfers.

3. *More than one covered loan.* The prohibition in § 1041.8(b) is triggered after the lender has attempted to initiate two consecutive failed payment transfers in connection with any covered loan or covered loans that the consumer has with the lender. Thus, when a consumer has more than one covered loan with the lender, the two consecutive failed payment transfers need not be initiated in connection with the same loan in order for the prohibition to be triggered, but rather can be initiated in connection with two different loans. For example, the prohibition is triggered if the lender initiates the first failed payment transfer to collect payment on one covered loan and the second consecutive failed payment transfer to collect payment on a different covered loan, assuming that the conditions for a first failed payment transfer, in § 1041.8(b)(2)(i), and second consecutive failed transfer, in § 1041.8(b)(2)(ii), are met.

4. *Application to bona fide subsequent loan.* If a lender triggers the prohibition in § 1041.8(b), the lender is not prohibited under § 1041.8(b) from initiating a payment transfer in connection with a bona fide subsequent covered loan that was originated after the prohibition was triggered, provided that the lender has not attempted to initiate two consecutive failed payment transfers from the consumer's account in connection with the bona fide subsequent covered loan. For purposes of § 1041.8(b) only, a bona fide subsequent covered loan does not include a covered loan that refinances or rolls over any covered loan that the consumer has with the lender at the time the prohibition is triggered.

8(b)(1) General

1. *Failed payment transfer.* A payment transfer results in a return indicating that the consumer's account lacks sufficient funds when it is returned unpaid, or is declined, due to nonsufficient funds in the consumer's account.

2. *Date received.* The prohibition in § 1041.8(b) applies as of the date on which the lender or its agent, such as a payment processor, receives the return of the second consecutive failed transfer or, if the lender is the consumer's account-holding institution, the date on which the second consecutive failed payment transfer is initiated.

3. *Return for other reason.* A transfer that results in a return for a reason other than a lack of sufficient funds, such as a return made due to an incorrectly entered account number, is not a failed transfer for purposes of § 1041.8(b).

4. Failed payment transfer initiated by a lender that is the consumer's account-holding institution. When a lender that is the consumer's account-holding institution initiates a payment transfer for an amount that the account lacks sufficient funds to cover, the payment transfer is a failed payment transfer for purposes of the prohibition in § 1041.8(b), regardless of whether the result is classified or coded in the lender's internal procedures, processes, or systems as a return for nonsufficient funds or, if applicable, regardless of whether the full amount of the payment transfer is paid out of overdraft. Such a lender does not initiate a failed payment transfer for purposes of the prohibition if the lender merely defers or foregoes debiting or withdrawing payment from an account based on the lender's observation that the account lacks sufficient funds.

8(b)(2) Consecutive Failed Payment Transfers

8(b)(2)(i) First Failed Payment Transfer

1. *Examples.* The following examples illustrate concepts of first failed payment transfers under § 1041.8(b)(2)(i). All of the examples assume that the consumer has only one covered loan with the lender:

i. A lender, having made no other attempts, initiates an electronic fund transfer to collect the first scheduled payment due under a loan agreement for a covered loan, which results in a return for nonsufficient funds. The failed transfer is the first failed payment transfer. The lender, having made no attempts in the interim, re-presents the electronic fund transfer and the re-presentment results in the collection of the full payment. Because the subsequent attempt did not result in a return for nonsufficient funds, the number of consecutive failed payment transfers resets to zero. The following month, the lender initiates an electronic fund transfer to collect the second scheduled payment due under the covered loan agreement, which results in a return for nonsufficient funds. That failed transfer is a first failed payment transfer.

ii. A storefront lender, having made no prior attempts, processes a consumer's signature check through the check system to collect the first scheduled payment due under a loan agreement for a covered loan. The check is returned for nonsufficient funds. This constitutes the first failed payment transfer. The lender does not thereafter convert and process the check through the ACH system, or initiate any other type of payment transfer, but instead contacts the consumer. At the lender's request, the consumer comes into the store and makes the full payment in cash withdrawn from the consumer's account. The number of consecutive failed payment transfers remains at one, because the consumer's cash payment was not a payment transfer as defined in § 1041.8(a)(2).

8(b)(2)(ii) Second Consecutive Failed Payment Transfer

1. *General.* Under § 1041.8(b)(2)(ii), a failed payment transfer is the second consecutive failed transfer if the previous payment transfer was a first failed payment transfer. The following examples illustrate this concept:

i. Assume that a consumer has only one covered loan with a lender. The lender, having initiated no other payment transfer in connection with the covered loan, initiates an electronic fund transfer to collect the first scheduled payment due under the loan agreement. The transfer is returned for nonsufficient funds. The returned transfer is the first failed payment transfer. The lender next initiates an electronic fund transfer for the following scheduled payment due under the loan agreement for the covered loan, which is also returned for nonsufficient funds. The second returned transfer is the second consecutive failed payment transfer.

ii. Assume that a consumer has two covered loans, Loan A and Loan B, with a lender. Further assume that the lender has initiated no failed payment transfers in connection with either covered loan. On the first of the month, the lender initiates an electronic fund transfer to collect a regularly scheduled payment on Loan A, resulting in a return for nonsufficient funds. The returned transfer is the first failed payment transfer. Two weeks later, the lender, having initiated no further payment transfers in connection with either covered loan, initiates an electronic fund transfer to collect a regularly scheduled payment on Loan B, also resulting in a return for nonsufficient funds. The second returned transfer is the second consecutive failed payment transfer, and the lender is thus prohibited under § 1041.8(b) from initiating further payment transfers in connection with either covered loan.

2. *Previous payment transfer.* Section 1041.8(b)(2)(ii) provides that a previous payment transfer includes a payment transfer initiated at the same time or on the same day as the first failed payment transfer. The following example illustrates how this concept applies in determining whether the prohibition in § 1041.8(b) is triggered: Assume that a consumer has only one covered loan with a lender. The lender has made no other payment transfers in connection with the covered loan. On Monday at 9 a.m., the lender initiates two electronic fund transfers to collect the first scheduled payment under the loan agreement, each for half of the total amount due. Both transfers are returned for nonsufficient funds. Because each transfer is one of two failed transfers initiated at the same time, the lender has initiated a second consecutive failed payment transfer under § 1041.8(b)(2)(ii), and the prohibition in § 1041.8(b) is therefore triggered.

3. *Application to exception in § 1041.8(d).* When, after a second consecutive failed payment transfer, a lender initiates a single immediate payment transfer at the consumer's request pursuant to the exception in § 1041.8(d), the failed transfer count remains at two, regardless of whether the transfer succeeds or fails. Further, the exception is limited to a single payment transfer. Accordingly, if a payment transfer initiated pursuant to the exception fails, the lender is not permitted to re-initiate the transfer, such as by re-presenting it through the ACH system, unless the lender obtains a new authorization under § 1041.8(c) or (d).

8(b)(2)(iii) Different Payment Channel

1. *General.* Section 8(b)(2)(iii) provides that if a failed payment transfer meets the descriptions set forth in § 1041.8(b)(2)(ii), it is the second consecutive failed transfer regardless of whether the first failed transfer was made through a different payment channel. The following example illustrates this concept: A lender initiates an electronic funds transfer through the ACH system for the purpose of collecting the first payment due under a loan agreement for a covered loan. The transfer results in a return for nonsufficient funds. This constitutes the first failed payment transfer. The lender next processes a remotely created check through the check system for the purpose of collecting the same first payment due. The remotely created check is returned for nonsufficient funds. The second failed attempt is the second consecutive failed attempt because it meets the description set forth in § 1041.8(b)(2)(ii).

8(c) Exception for Additional Payment Transfers Authorized by the Consumer

1. *General.* Section 1041.8(c) sets forth one of two exceptions to the prohibition in § 1041.8(b). Under the exception in § 1041.8(c), a lender is permitted to initiate additional payment transfers from a consumer's account

after the lender's second consecutive transfer has failed if the additional transfers are authorized by the consumer in accordance with certain requirements and conditions as specified in the rule. In addition to the exception under § 1041.8(c), a lender is permitted to execute a single immediate payment transfers at the consumer's request under § 1041.8(d), if certain requirements and conditions are satisfied.

8(c)(1) General

1. *Consumer's underlying payment authorization or instrument still required.* The consumer's authorization required by § 1041.8(c) is in addition to, and not in lieu of, any separate payment authorization or instrument required to be obtained from the consumer under applicable laws.

8(c)(2) General Authorization Requirements and Conditions

8(c)(2)(i) Required Payment Transfer Terms

1. *General.* Section 1041.8(c)(2)(i) sets forth the general requirement that, for purposes of the exception in § 1041.8(c), the specific date, amount, and payment channel of each additional payment transfer must be authorized by the consumer, subject to a limited exception in § 1041.8(c)(2)(iii) for payment transfers solely to collect a late fee or returned item fee. Accordingly, for the exception to apply to an additional payment transfer, the transfer's specific date, amount, and payment channel must be included in the signed authorization obtained from the consumer under § 1041.8(c)(3)(iii). For guidance on the requirements and conditions that apply when obtaining the consumer's signed authorization, see § 1041.8(c)(3)(iii) and accompanying commentary.

2. *Specific date.* The requirement that the specific date of each additional payment transfer be authorized by the consumer is satisfied if the consumer authorizes the month, day, and year of each transfer.

3. *Amount larger than specific amoun*t. The exception in § 1041.8(c)(2) does not apply if the lender initiates a payment transfer for an amount larger than the specific amount authorized by the consumer. Accordingly, such a transfer would violate the prohibition on additional payment transfers under § 1041.8(b).

4. *Smaller amount.* A payment transfer initiated pursuant to § 1041.8(c) is initiated for the specific amount authorized by the consumer if its amount is equal to or smaller than the authorized amount.

8(c)(2)(iii) Special Authorization Requirements and Conditions for Payment Transfers To Collect a Late Fee or Returned Item Fee

1. *General.* If a lender obtains the consumer's authorization to initiate a payment transfer solely to collect a late fee or returned item fee in accordance with the requirements and conditions under § 1041.8(c)(2)(iii), the general requirement in § 1041.8(c)(2) that the consumer authorize the specific date and amount of each additional payment transfer need not be satisfied.

2. *Highest amount.* The requirement that the consumer's signed authorization include a statement that specifies the highest amount that may be charged for a late fee or returned item fee is satisfied, for example, if the statement specifies the maximum amount permitted under the loan agreement for a covered loan.

3. *Varying fee amounts.* If a fee amount may vary due to the remaining loan balance or other factors, the rule requires the lender to assume the factors that result in the highest amount possible in calculating the specified amount.

8(c)(3) Requirements and Conditions for Obtaining the Consumer's Authorization

8(c)(3)(ii) Provision of Payment Transfer Terms to the Consumer

1. *General.* A lender is permitted under § 1041.8(c)(3)(ii) to request a consumer's authorization on or after the day that the lender provides the consumer rights notice required by § 1041.9(c). For the exception in § 1041.8(c) to apply, however, the consumer's signed authorization must be obtained no earlier than the date on which the consumer is considered to have received the consumer rights notice, as specified in § 1041.8(c)(3)(iii).

2. *Different options.* Nothing in § 1041.8(c)(3)(ii) prohibits a lender from providing different options for the consumer to consider with respect to the date, amount, or payment channel of each additional payment transfer for which the lender is requesting authorization. In addition, if a consumer declines a request, nothing in § 1041.8(c)(3)(ii) prohibits a lender from making a follow-up request by providing a different set of terms for the consumer to consider. For example, if the consumer declines an initial request to authorize two recurring payment transfers for a particular amount, the lender may make a follow-up request for the consumer to authorize three recurring payment transfers for a smaller amount.

Paragraph 8(c)(3)(ii)(A)

1. *Request by email.* Under § 1041.8(c)(3)(ii)(A), a lender is permitted to provide the required terms and statement to the consumer in writing or in a retainable form by email if the consumer has consented to receive electronic disclosures in that manner under § 1041.9(a)(4) or agrees to receive the terms and statement by email in the course of a communication initiated by the consumer in response to the consumer rights notice required by § 1041.9(c). The following example illustrates a situation in which the consumer agrees to receive the required terms and statement by email after affirmatively responding to the notice:

i. After a lender provides the consumer rights notice in § 1041.9(c) by mail to a consumer who has not consented to receive electronic disclosures under § 1041.9(a)(4), the consumer calls the lender to discuss her options for repaying the loan, including the option of authorizing additional payment transfers pursuant to § 1041.8(c). In the course of the call, the consumer asks the lender to provide the request for the consumer's authorization via email. Because the consumer has agreed to receive the request via email in the course of a communication initiated by the consumer in response to the consumer rights notice, the lender is permitted under § 1041.8(c)(3)(ii)(A) to provide the request to the consumer by that method.

2. *E-Sign Act does not apply to provision of terms and statement.* The required terms and statement may be provided to the consumer electronically in accordance with the requirements for requesting the consumer's authorization in § 1041.8(c)(3) without regard to the E-Sign Act. However, under § 1041.8(c)(3)(iii)(A), an authorization obtained electronically is valid only if it is signed or otherwise agreed to by the consumer in accordance with the signature requirements in the E-Sign Act. *See* § 1041.8(c)(3)(iii)(A) and comment 8(c)(3)(iii)(A)–1.

3. *Same communication.* Nothing in § 1041.8(c)(3)(ii) prohibits a lender from requesting the consumer's authorization for additional payment transfers and providing the consumer rights notice in the same communication, such as a single written mailing or a single email to the consumer. Nonetheless, the consumer rights notice may be provided to the consumer only in accordance with the requirements and conditions in § 1041.9, including but not limited to the segregation requirements that apply to the notice. Thus, for example, if a lender mails the request for

authorization and the notice to the consumer in the same envelope, the lender must provide the notice on a separate piece of paper, as required under § 1041.9. Similarly, a lender could provide the notice to a consumer in the body of an email and attach a document containing the request for authorization. In such cases, it would be permissible for the lender to add language after the text of the notice explaining that the other document is a request for a new authorization.

Paragraph 8(c)(3)(ii)(B)

1. *Request by oral telephone communication.* Nothing in § 1041.8(c)(3)(ii) prohibits a lender from contacting the consumer by telephone to discuss repayment options, including the option of authorizing additional payment transfers. However, under § 1041.8(c)(3)(ii)(B), a lender is permitted to provide the required terms and statement to the consumer by oral telephone communication for purposes of requesting authorization only if the consumer affirmatively contacts the lender in that manner in response to the consumer rights notice required by § 1041.9(c) and agrees to receive the terms and statement by that method of delivery in the course of, and as part of, the same communication.

8(c)(3)(iii) Signed Authorization Required

8(c)(3)(iii)(A) General

1. *E-Sign Act signature requirements.* For authorizations obtained electronically, the requirement that the authorization be signed or otherwise agreed to by the consumer is satisfied if the E-Sign Act requirements for electronic records and signatures are met. Thus, for example, the requirement is satisfied by an email from the consumer or by a code entered by the consumer into the consumer's telephone keypad, assuming that in each case the signature requirements in the E-Sign Act are complied with.

2. *Consumer's affirmative response to the notice.* A consumer affirmatively responds to the consumer rights notice that was provided by mail when, for example, the consumer calls the lender on the telephone to discuss repayment options after receiving the notice.

8(c)(3)(iii)(C) Memorialization Required

1. *Timing.* The memorialization is deemed to be provided to the consumer on the date it is mailed or transmitted.

2. *Form of memorialization.* The requirement that the memorialization be provided in a retainable form is not satisfied by a copy of a recorded telephone call, notwithstanding that the authorization was obtained in that manner.

3. *Electronic delivery.* A lender is permitted under § 1041.8(c)(3)(iii)(C) to provide the memorialization to the consumer by email in accordance with the requirements and conditions for requesting authorization in § 1041.8(c)(3)(ii)(A), regardless of whether the lender requested the consumer's authorization in that manner. For example, if the lender requested the consumer's authorization by telephone but also has obtained the consumer's consent to receive electronic disclosures by email under § 1041.9(a)(4), the lender may provide the memorialization to the consumer by email, as specified in § 1041.8(c)(3)(ii)(A).

8(d) Exception for Initiating a Single Immediate Payment Transfer at the Consumer's Request

1. *General.* For guidance on the requirements and conditions that must be satisfied for a payment transfer to meet the definition of a single immediate payment transfer at the consumer's request, see § 1041.8(a)(2) and accompanying commentary.

2. *Application of prohibition.* A lender is permitted under the exception in § 1041.8(d) to initiate a single payment transfer requested by the consumer only once and thus is prohibited under § 1041.8(b) from re-initiating the payment transfer if it fails, unless the lender subsequently obtains the consumer's authorization to re-initiate the payment transfer under § 1041.8(c) or (d). However, a lender is permitted to initiate any number of payment transfers from a consumer's account pursuant to the exception in § 1041.8(d), provided that the requirements and conditions are satisfied for each such transfer. See comment 8(b)(2)(ii)–3 for further guidance on how the prohibition in § 1041.8(b) applies to the exception in § 1041.8(d).

3. *Timing.* A consumer affirmatively contacts the lender when, for example, the consumer calls the lender after noticing on her bank statement that the lender's last two payment withdrawal attempts have been returned for nonsufficient funds.

8(e) Prohibition Against Evasion

1. *General.* Section 1041.8(e) provides that a lender must not take any action with the intent of evading the requirements of § 1041.8. In determining whether a lender has taken action with the intent of evading the requirements of § 1041.8, the form, characterization, label, structure, or written documentation of the lender's action shall not be dispositive. Rather, the actual substance of the lender's action as well as other relevant facts and circumstances will determine whether the lender's action was taken with the intent of evading the requirements of § 1041.8. If the lender's action is taken solely for legitimate business purposes, it is not taken with the intent of evading the requirements of § 1041.8. By contrast, if a consideration of all relevant facts and circumstances reveals a purpose that is not a legitimate business purpose, the lender's action may have been taken with the intent of evading the requirements of § 1041.8. A lender action that is taken with the intent of evading the requirements of this part may be knowing or reckless. Fraud, deceit, or other unlawful or illegitimate activity may be one fact or circumstance that is relevant to the determination of whether a lender's action was taken with the intent of evading the requirements of § 1041.8, but fraud, deceit, or other unlawful or illegitimate activity is not a prerequisite to such a finding.

2. *Illustrative example.* A lender collects payment on its covered loans primarily through recurring electronic fund transfers authorized by consumers at consummation. As a matter of lender policy and practice, after a first attempt to initiate an ACH payment transfer from a consumer's account for the full payment amount is returned for nonsufficient funds, the lender initiates a second payment transfer from the account on the following day for $1.00. If the second payment transfer succeeds, the lender immediately splits the amount of the full payment into two separate payment transfers and initiates both payment transfers from the account at the same time, resulting in two returns for nonsufficient funds in the vast majority of cases. The lender developed the policy and began the practice shortly prior to August 19, 2019. The lender's prior policy and practice when re-presenting the first failed payment transfer was to re-present for the payment's full amount. Depending on the relevant facts and circumstances, the lender's actions may have been taken with the intent of evading the requirements of § 1041.8. Specifically, by initiating a second payment transfer for $1.00 from the consumer's account the day after a first transfer for the full payment amount fails and, if that payment transfer succeeds, initiating two simultaneous payment transfers from the account for the split amount of the full payment, resulting in two returns for

nonsufficient funds in the vast majority of cases, the lender avoided the prohibition in § 1041.8(b) on initiating payment transfers from a consumer's account after two consecutive payment transfers have failed.

Section 1041.9—Disclosure of Payment Transfer Attempts

1. *General.* Section 1041.9 sets forth two main disclosure requirements related to collecting payments from a consumer's account in connection with a covered loan. The first, set forth in § 1041.9(b), is a payment notice required to be provided to a consumer in advance of a initiating the first payment withdrawal or an unusual withdrawal from the consumer's account, subject to certain exceptions. The second, set forth in § 1041.9(c), is a consumer rights notice required to be provided to a consumer after a lender receives notice of a second consecutive failed payment transfer from the consumer's account, as described in § 1041.8(b). In addition, § 1041.9 requires lenders to provide an electronic short notice in two situations when they are providing the disclosures required by this section through certain forms of electronic delivery. The first, set forth in § 1041.9(b)(4), is an electronic short notice that must be provided along with the payment notice. This provision allows an exception for when the method of electronic delivery is email; for that method, the lender may use the electronic short notice under § 1041.9(b)(4)(ii) or may provide the full notice within the body of the email. The second, set forth in § 1041.9(c)(4), is an electronic short notice that must be provided along with the consumer rights notice. As with the payment notices, this consumer rights notice provision also allows an exception for when the method of electronic delivery is email; for that method, the lender may use the electronic short notice under § 1041.9(c)(4)(ii) or may provide the full notice within the body of the email.

9(a) General Form of Disclosures

9(a)(1) Clear and Conspicuous

1. *Clear and conspicuous standard.* Disclosures are clear and conspicuous for purposes of § 1041.9 if they are readily understandable and their location and type size are readily noticeable to consumers.

9(a)(2) In Writing or Electronic Delivery

1. *Electronic delivery.* Section 1041.9(a)(2) allows the disclosures required by § 1041.9 to be provided through electronic delivery as long as the requirements of § 1041.9(a)(4) are satisfied, without regard to the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*).

9(a)(3) Retainable

1. *General.* Electronic disclosures, to the extent permitted by § 1041.9(a)(4), are retainable for purposes of § 1041.9 if they are in a format that is capable of being printed, saved, or emailed by the consumer. The general requirement to provide disclosures in a retainable form does not apply when the electronic short notices are provided in via mobile application or text message. For example, the requirement does not apply to an electronic short notice that is provided to the consumer's mobile telephone as a text message. In contrast, if the access is provided to the consumer via email, the notice must be in a retainable form, regardless of whether the consumer uses a mobile telephone to access the notice.

9(a)(4) Electronic Delivery

1. *General.* Section 1041.9(a)(4) permits disclosures required by § 1041.9 to be provided through electronic delivery if the consumer consent requirements under § 1041.9(a)(4) are satisfied.

9(a)(4)(i) Consumer Consent

9(a)(4)(i)(A) General

1. *General.* Section 1041.9(a)(4)(i) permits disclosures required by § 1041.9 to be provided through electronic delivery if the lender obtains the consumer's affirmative consent to receive the disclosures through a particular electronic delivery method. This affirmative consent requires lenders to provide consumers with an option to select a particular electronic delivery method. The consent must clearly show the method of electronic delivery that will be used, such as email, text message, or mobile application. Consent provided by checking a box during the origination process may qualify as being in writing. Consent can be obtained for multiple methods of electronic delivery, but the consumer must have affirmatively selected and provided consent for each method.

9(a)(4)(i)(B) Email Option Required

1. *General.* Section § 1041.9(a)(4)(i)(B) provides that when obtaining consumer consent to electronic delivery under § 1041.9(a)(4), a lender must provide the consumer with an option to receive the disclosures through email. The lender may choose to offer email as the only method of electronic delivery under § 1041.9(a)(4).

9(a)(4)(ii) Subsequent Loss of Consent

1. *General.* The prohibition on electronic delivery of disclosures in § 1041.9(a)(4)(ii) applies to the particular electronic method for which consent is lost. When a lender loses a consumer's consent to receive disclosures via text message, for example, but has not lost the consumer's consent to receive disclosures via email, the lender may continue to provide disclosures via email, assuming that all of the requirements in § 1041.9(a)(4) are satisfied.

2. *Loss of consent applies to all notices.* The loss of consent applies to all notices required by § 1041.9. For example, if a consumer revokes consent in response to the electronic short notice text message delivered along with the payment notice under § 1041.9(b)(4)(ii), that revocation also applies to text delivery of the electronic short notice that would be delivered with the consumer rights notice under § 1041.9(c)(4)(ii).

Paragraph 9(a)(4)(ii)(A)

1. *Revocation.* For purposes of § 1041.9(a)(4)(ii)(A), a consumer may revoke consent for any reason and by any reasonable means of communication. Reasonable means of communication may include calling the lender and revoking consent orally, mailing a revocation to an address provided by the lender on its consumer correspondence, sending an email response or clicking on a revocation link provided in an email from the lender, and responding by text message to a text message sent by the lender.

Paragraph 9(a)(4)(ii)(B)

1. *Notice.* A lender receives notification for purposes of § 1041.9(a)(4)(ii)(B) when the lender receives any information indicating that the consumer did not receive or is unable to receive disclosures in a particular electronic manner. Examples of notice include but are not limited to the following:

i. An email returned with a notification that the consumer's account is no longer active or does not exist.

ii. A text message returned with a notification that the consumer's mobile telephone number is no longer in service.

iii. A statement from the consumer that the consumer is unable to access or review disclosures through a particular electronic delivery method.

9(a)(5) Segregation Requirements for Notices

1. *Segregated additional content.* Although segregated additional content that is not required by § 1041.9 may not appear above, below, or around the required content, additional content may be delivered through a separate form, such as a separate piece of paper or Web page.

9(a)(7) Model Forms

1. *Safe harbor provided by use of model forms.* Although the use of the model forms and clauses is not required, lenders using them will be deemed to be in compliance with the disclosure requirement with respect to such model forms.

9(b) Payment Notice

9(b)(1)(i) First Payment Withdrawal

1. *First payment withdrawal.* Depending on when the payment authorization granted by the consumer is obtained on a covered loan and whether the exception for a single immediate payment transfer made at the consumer's request applies, the first payment withdrawal may or may not be the first payment made on a covered loan. When a lender obtains payment authorization during the origination process, the lender may provide the first payment withdrawal notice at that time. A lender that obtains payment authorization after a payment has been made by the consumer in cash, or after initiating a single immediate payment transfer at the consumer's request, would deliver the notice later in the loan term. If a consumer provides one payment authorization that the lender uses to initiate a first payment withdrawal after a notice as required by § 1041.9(b)(1)(i), but the consumer later changes the authorization or provides an additional authorization, the lender's exercise of that new authorization would not be the first payment withdrawal; however, it may be an unusual withdrawal under § 1041.9(b)(1)(ii).

2. *First payment withdrawal is determined when the loan is in covered status.* As discussed in comment 3(b)(3)–3, there may be situations where a longer-term loan is not covered at the time of origination but becomes covered at a later date. The lender's first attempt to execute a payment transfer after a loan becomes a covered loan under this part is the first payment withdrawal. For example, consider a loan that is not considered covered at the time of origination. If the lender initiates a payment withdrawal during the first and second billing cycles and the loan becomes covered at the end of the second cycle, any lender initiated payment during the third billing cycle is considered a first payment withdrawal under this section.

3. *Intervening payments.* Unscheduled intervening payments do not change the determination of first payment withdrawal for purposes of the notice requirement. For example, a lender originates a loan on April 1, with a payment scheduled to be withdrawn on May 1. At origination, the lender provides the consumer with a first payment withdrawal notice for May 1. On April 28, the consumer makes the payment due on May 1 in cash. The lender does not initiate a withdrawal on May 1. The lender initiates a withdrawal for the next scheduled payment June 1. The lender satisfied its notice obligation with the notice provided at origination, so it is not required to send a first payment notice in connection with the June 1 payment although it may have to send an unusual payment notice if the transfer meets one of the conditions in § 1041.9(b)(3)(ii)(C).

9(b)(1)(iii) Exceptions

1. *Exception for initial payment transfer applies even if the transfer is unusual.* The exception in § 1041.9(b)(1)(iii)(A) applies even if the situation would otherwise trigger the additional disclosure requirements for unusual attempts under § 1041.9(b)(3). For example, if the payment channel of the initial payment transfer after obtaining the consumer's consent is different than the payment channel used before the prohibition under § 1041.8 was triggered, the exception in § 1041.9(b)(1)(iii)(A) applies.

2. *Multiple transfers in advance.* If a consumer has affirmatively consented to multiple transfers in advance, the exception in § 1041.9(b)(1)(iii)(A) applies only to the first initial payment transfer of that series.

9(b)(2) First Payment Withdrawal Notice

9(b)(2)(i) Timing

1. *When the lender obtains payment authorization.* For all methods of delivery, the earliest point that the lender may provide the first payment withdrawal notice is when the lender obtains the payment authorization. For example, the notice can be provided simultaneously when the lender provides a consumer with a copy of a completed payment authorization, or after providing the authorization copy. The provision allows the lender to provide consumers with the notice at a convenient time because the lender and consumer are already communicating about the loan, but also allows flexibility for lenders that prefer to provide the notice closer to the payment transfer date. For example, the lender could obtain consumer consent to electronic delivery and deliver the notice through email 4 days before initiating the transfer, or the lender could hand deliver it to the consumer at the end of the loan origination process.

9(b)(2)(i)(A) Mail

1. *General.* The six business-day period begins when the lender places the notice in the mail, not when the consumer receives the notice. For example, if a lender places the notice in the mail on Monday, June 1, the lender may initiate the transfer of funds on Tuesday, June 9, if it is the 6th business day following mailing of the notice.

9(b)(2)(i)(B) Electronic Delivery

Paragraph 9(b)(2)(i)(B)(1)

1. *General.* The three-business-day period begins when the lender sends the notice, not when the consumer receives or is deemed to have received the notice. For example, if a lender sends the notice by email on Monday, June 1, the lender may initiate the transfer of funds on Thursday, June 4, the third business day following transmitting the notice.

Paragraph 9(b)(2)(i)(B)(2)

1. *General.* In some circumstances, a lender may lose a consumer's consent to receive disclosures through a particular electronic delivery method after the lender has provided the notice. In such circumstances, the lender may initiate the transfer for the payment currently due as scheduled. If the lender is scheduled to make a future unusual withdrawal attempt following the one that was disclosed in the previously provided first withdrawal notice, the lender must provide notice for that unusual withdrawal through alternate means, in accordance with the applicable timing requirements in § 1041.9(b)(3)(i).

2. Alternate Means. The alternate means may include a different electronic delivery method that the consumer has consented to, in person, or by mail, in accordance with the applicable timing requirements in § 1041.9(b)(3)(i).

9(b)(2)(ii) Content Requirements

9(b)(2)(ii)(B) Transfer Terms

Paragraph 9(b)(2)(ii)(B)(1) Date

1. *Date.* The initiation date is the date that the payment transfer is sent outside of the lender's control. Accordingly, the initiation date of the transfer is the date

that the lender or its agent sends the payment to be processed by a third party. For example, if a lender sends its ACH payments to a payment processor working on the lender's behalf on Monday, June 1, but the processor does not submit them to its bank and the ACH network until Tuesday, June 2, the date of the payment transfer is Tuesday the 2nd.

Paragraph 9(b)(2)(ii)(B)(2) Amount

1. *Amount.* The amount of the transfer is the total amount of money that will be transferred from the consumer's account, regardless of whether the total corresponds to the amount of a regularly scheduled payment. For example, if a single transfer will be initiated for the purpose of collecting a regularly scheduled payment of $50.00 and a late fee of $30.00, the amount that must be disclosed under § 1041.9(b)(2)(ii)(B)(*2*) is $80.00.

Paragraph 9(b)(2)(ii)(B)(5) Payment Channel

1. *General.* Payment channel refers to the specific payment method, including the network that the transfer will travel through and the form of the transfer. For example, a lender that uses the consumer's paper check information to initiate a payment transfer through the ACH network would use the ACH payment channel under § 1041.9(b)(2)(ii)(B)(*5*). A lender that uses consumer account and routing information to initiate a remotely created check over the check network would use the remotely created check payment channel. A lender that uses a post-dated signature check to initiate a transfer over the check network would use the signature check payment channel. A lender that initiates a payment from a consumer's prepaid card would specify whether that payment is processed as an ACH transfer, a PIN debit card network payment, or a signature debit card network payment.

2. *Illustrative examples.* In describing the payment channel in the disclosure, the most common payment channel descriptions include, but are not limited to, ACH transfers, checks, remotely created checks, remotely created payment orders, internal transfers, PIN debit card payments, and signature debit card network payments.

9(b)(2)(ii)(C) Payment Breakdown

9(b)(2)(ii)(C)(2) Principal

1. *General.* The amount of the payment that is applied to principal must always be included in the payment breakdown table, even if the amount applied is $0.

9(b)(2)(ii)(C)(4) Fees

1. *General.* This field must only be provided if some of the payment amount will be applied to fees. In situations where more than one fee applies, fees may be disclosed separately or aggregated. A lender may use its own term to describe the fee, such as ''late payment fee.''

9(b)(2)(ii)(C)(5) Other Charges

1. *General.* This field must only be provided if some of the payment amount will be applied to other charges. In situations when more than one other charge applies, other charges may be disclosed separately or aggregated. A lender may use its own term to describe the charge, such as ''insurance charge.''

9(b)(3) Unusual Withdrawal Notice

9(b)(3)(i) Timing

1. *General.* See comments on 9(b)(2) regarding the first payment withdrawal notice.

9(b)(3)(ii) Content Requirements

1. *General.* If the payment transfer is unusual according to the circumstances described in § 1041.9(b)(3)(ii)(C), the payment notice must contain both the basic payment information required by § 1041.9(b)(2)(ii)(B) through (D) and the description of unusual withdrawal required by § 1041.9(b)(3)(ii)(C).

9(b)(3)(ii)(C) Description of Unusual Withdrawal

1. *General.* An unusual withdrawal notice is required under § 1041.9(b)(3) if one or more conditions are present. The description of an unusual withdrawal informs the consumer of the condition that makes the pending payment transfer unusual.

2. *Illustrative example.* The lender provides a first payment withdrawal notice at origination. The first payment withdrawal initiated by the lender occurs on March 1, for $75, as a paper check. The second payment is scheduled for April 1, for $75, as an ACH transfer. Before the second payment, the lender provides an unusual withdrawal notice. The notice contains the basic payment information along with an explanation that the withdrawal is unusual because the payment channel has changed from paper check to ACH. Because the amount did not vary, the payment is taking place on the regularly scheduled date, and this is not a re-initiated payment, the only applicable content under § 1041.9(b)(3)(ii)(C) is the different payment channel information.

3. *Varying amount.* The information about varying amount for closed-end loans in § 1041.9(b)(3)(ii)(C)(*1*)(*i*) applies in two circumstances. First, the requirement applies when a transfer is for the purpose of collecting a payment that is not specified by amount on the payment schedule, including, for example, a one-time electronic payment transfer to collect a late fee. Second, the requirement applies when the transfer is for the purpose of collecting a regularly scheduled payment for an amount different from the regularly scheduled payment amount according to the payment schedule. Given existing requirements for open-end credit, circumstances that trigger an unusual withdrawal for open-end credit are more limited according to § 1041.9(b)(3)(ii)(C)(*1*)(*ii*). Because the outstanding balance on open-end credit may change over time, the minimum payment due on the scheduled payment date may also fluctuate. However, the minimum payment amount due for open-end credit would be disclosed to the consumer according to the periodic statement requirement in Regulation Z. The payment transfer amount would not be considered unusual with regards to open-end credit unless the amount deviates from the minimum payment due as disclosed in the periodic statement. The requirement for a first payment withdrawal notice under § 1041.9(b)(2) and the other circumstances that could trigger an unusual withdrawal notice under § 1041.9(b)(3)(ii)(C)(*2*) through (*4*), continue to apply.

4. *Date other than due date of regularly scheduled payment.* The changed date information in § 1041.9(b)(3)(ii)(C)(*2*) applies in two circumstances. First, the requirement applies when a transfer is for the purpose of collecting a payment that is not specified by date on the payment schedule, including, for example, a one-time electronic payment transfer to collect a late fee. Second, the requirement applies when the transfer is for the purpose of collecting a regularly scheduled payment on a date that differs from the regularly scheduled payment date according to the payment schedule.

9(b)(4) Electronic Delivery

1. *General.* If the lender is using a method of electronic delivery other than email, such as text or mobile application, the lender must provide the notice with the electronic short notice as provided in § 1041.9(b)(4)(ii). If the lender is using email as the method of electronic delivery, § 1041.9(b)(4)(iii) allows the lender to determine whether to use the electronic short notice

approach or to include the full text of the notice in the body of the email.

9(b)(4)(ii) Electronic Short Notice

9(b)(4)(ii)(A) General Content

1. *Identifying statement.* If the lender is using email as the method of electronic delivery, the identifying statement required in § 1041.9(b)(2)(ii)(A) and (b)(3)(ii)(A) must be provided in both the email subject line and the body of the email.

9(c) Consumer Rights Notice

9(c)(2) Timing

1. *General.* Any information provided to the lender or its agent that the payment transfer has failed would trigger the timing requirement provided in § 1041.9(c)(2). For example, if the lender's agent, a payment processor, learns on Monday, June 1 that an ACH payment transfer initiated by the processor on the lender's behalf has been returned for non-sufficient funds, the lender would be required to send the consumer rights notice by Thursday, June 4.

9(c)(3) Content Requirements

1. *Identifying statement.* If the lender is using email as the method of electronic delivery, the identifying statement required in § 1041.9(c)(3)(i) must be provided in both the email subject line and the body of the email.

2. *Fees.* If the lender is also the consumer's account-holding institution, this includes all fees charged in relation to the transfer, including any returned payment fees charged to outstanding loan balance and any fees, such as overdraft or insufficient fund fees, charged to the consumer's account.

9(c)(4) Electronic Delivery

1. *General.* See comments 9(b)(4)–1 and 9(b)(4)(ii)(A)–1.

Section 1041.10—Furnishing Information to Registered Information Systems

10(a) Loans Subject to Furnishing Requirement

1. *Application to rollovers.* The furnishing requirements in § 1041.10(a) apply to each covered short-term loan or covered longer-term balloon-payment loan a lender makes, as well as to loans that are a rollover of a prior covered short-term loan or covered longer-term balloon-payment loan (or what is termed a ''renewal'' in some States). Rollovers are defined as a matter of State law but typically involve deferral of repayment of the principal amount of a short-term loan for a period of time in exchange for a fee. In the event that a lender is permitted under State law to roll over a covered short-term loan or covered longer-term balloon-payment loan and does so in accordance with the requirements of § 1041.5 or § 1041.6, the rollover would be treated, as applicable, as a new covered short-term loan or as a new covered longer-term balloon-payment loan for purposes of § 1041.10. For example, assume that a lender is permitted under applicable State law to roll over a covered short-term loan; the lender makes a covered short-term loan with a 14-day contractual duration; and on day 14 the lender reasonably determines that the consumer has the ability to repay a new loan under § 1041.5 and offers the consumer the opportunity to roll over the first loan for an additional 14 days. If the consumer accepts the rollover, the lender would report the original loan as no longer outstanding and would report the rollover as a new covered short-term loan.

2. *Furnishing through third parties.* Section 1041.10(a) requires that, for each covered short-term loan and covered longer-term balloon loan a lender makes, the lender must furnish the information concerning the loan described in § 1041.10(c) to each information system described in § 1041.10(b). A lender may furnish information to such information system directly, or may furnish through a third party acting on its behalf, including a provisionally registered or registered information system.

10(b) Information Systems to Which Information Must Be Furnished

1. *Provisional registration and registration of information system while loan is outstanding.* Pursuant to § 1041.10(b)(1), a lender is only required to furnish information about a covered loan to an information system that, at the time the loan is consummated, has been registered pursuant to § 1041.11(c)(2) for 180 days or more or has been provisionally registered pursuant to § 1041.11(d)(1) for 180 days or more or subsequently has become registered pursuant to § 1041.11(d)(2). For example, if an information system is provisionally registered on March 1, 2020, the obligation to furnish information to that system begins on August 28, 2020, 180 days from the date of provisional registration. A lender is not required to furnish information about a loan consummated on August 27, 2020 to an information system that became provisionally registered on March 1, 2020.

2. *Preliminary approval.* Section 1041.10(b) requires that lenders furnish information to information systems that are provisionally registered pursuant to § 1041.11(d)(1) and information systems that are registered pursuant to § 1041.11(c)(2) or (d)(2). Lenders are not required to furnish information to entities that have received preliminary approval for registration pursuant to § 1041.11(c)(1) but are not registered pursuant to § 1041.11(c)(2).

10(c) Information To Be Furnished

1. *Deadline for furnishing under § 1041.10(c)(1) and (3).* Section 1041.10(c)(1) requires that a lender furnish specified information no later than the date on which the loan is consummated or as close in time as feasible to the date the loan is consummated. Section 1041.10(c)(3) requires that a lender furnish specified information no later than the date the loan ceases to be an outstanding loan or as close in time as feasible to the date the loan ceases to be an outstanding loan. Under each of § 1041.10(c)(1) and (3), if it is feasible to report on the specified date (such as the consummation date), the specified date is the date by which the information must be furnished.

10(c)(1) Information To Be Furnished at Loan Consummation

1. *Type of loan.* Section 1041.10(c)(1)(iii) requires that a lender furnish information that identifies a covered loan as either a covered short-term loan or a covered longer-term balloon-payment loan. For example, a lender must identify a covered short-term loan as a covered short-term loan.

2. *Whether a loan is made under § 1041.5 or § 1041.6.* Section 1041.10(c)(1)(iv) requires that a lender furnish information that identifies a covered loan as made under § 1041.5 or made under § 1041.6. For example, a lender must identify a loan made under § 1041.5 as a loan made under § 1041.5.

10(c)(2) Information To Be Furnished While Loan Is an Outstanding Loan

1. *Examples.* Section 1041.10(c)(2) requires that, during the period that the loan is an outstanding loan, a lender must furnish any update to information previously furnished pursuant to § 1041.10 within a reasonable period of the event that causes the information previously furnished to be out of date. Information previously furnished can become out of date due to changes in the loan terms or due to actions by the consumer. For example, if a lender extends the term of a closed-end loan, § 1041.10(c)(2) would require the lender to furnish an update to the date that each payment on the loan is due, previously furnished pursuant to

§ 1041.10(c)(1)(vii)(B), and to the amount due on each payment date, previously furnished pursuant to § 1041.10(c)(1)(vii)(C), to reflect the updated payment dates and amounts. If the amount or minimum amount due on future payment dates changes because the consumer fails to pay the amount due on a scheduled payment date, § 1041.10(c)(2) would require the lender to furnish an update to the amount or minimum amount due on each payment date, previously furnished pursuant to § 1041.10(c)(1)(vii)(C) or (c)(1)(viii)(D), as applicable, to reflect the updated amount or minimum amount due on each payment date. However, if a consumer makes payment on a closed-end loan as agreed and the loan is not modified to change the dates or amounts of future payments on the loan, § 1041.10(c)(2) would not require the lender to furnish an update to information concerning the date that each payment on the loan is due, previously furnished pursuant to § 1041.10(c)(1)(vii)(B), or the amount due on each payment date, previously furnished pursuant to § 1041.10(c)(1)(vii)(C). Section 1041.10(c)(2) does not require a lender to furnish an update to reflect that a payment was made.

2. *Changes to information previously furnished pursuant to § 1041.10(c)(2).* Section 1041.10(c)(2) requires that, during the period that the loan is an outstanding loan, a lender must furnish any update to information previously furnished pursuant to § 1041.10 within a reasonable period of the event that causes the information previously furnished to be out of date. This requirement extends to information previously furnished pursuant to § 1041.10(c)(2). For example, if a lender furnishes an update to the amount or minimum amount due on each payment date, previously furnished pursuant to § 1041.10(c)(1)(vii)(C) or (c)(1)(viii)(D), as applicable, and the amount or minimum amount due on each payment date changes again after the update, § 1041.10(c)(2) requires that the lender must furnish an update to the information previously furnished pursuant to § 1041.10(c)(2).

Section 1041.11—Registered Information Systems

11(b) Eligibility Criteria for Registered Information Systems

11(b)(2) Reporting Capability

1. *Timing.* To be eligible for provisional registration or registration, an entity must possess the technical capability to generate a consumer report containing, as applicable for each unique consumer, all information described in § 1041.10 substantially simultaneous to receiving the information from a lender. Technological limitations may cause some slight delay in the appearance on a consumer report of the information furnished pursuant to § 1041.10, but any delay must reasonable.

11(b)(3) Performance

1. *Relationship with other law.* To be eligible for provisional registration or registration, an entity must perform in a manner that facilitates compliance with and furthers the purposes of this part. However, this requirement does not supersede consumer protection obligations imposed upon a provisionally registered or registered information system by other Federal law or regulation. For example, the Fair Credit Reporting Act requires that, whenever a consumer reporting agency prepares a consumer report it, shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates. See 15 U.S.C. 1681e(b). If including information furnished pursuant to § 1041.10 in a consumer report would cause a provisionally registered or registered information system to violate this requirement, § 1041.11(b)(3) would not require that the information be included in a consumer report.

2. *Evidence of ability to perform in a manner that facilitates compliance with and furthers the purposes of this part.* Section 1041.11(c)(1) requires that an entity seeking preliminary approval to be a registered information system must submit an application to the Bureau containing information sufficient for the Bureau to determine that the entity is reasonably likely to satisfy the conditions set forth in § 1041.11(b). Section 1041.11(c)(2) and (d)(1) requires that an entity seeking to be a registered information system or a provisionally registered information system must submit an application that contains information and documentation sufficient for the Bureau to determine that the entity satisfies the conditions set forth in § 1041.11(b). In evaluating whether an applicant is reasonably likely to satisfy or satisfies the requirement set forth in § 1041.11(b)(3), the Bureau will consider the extent to which an applicant has experience functioning as a consumer reporting agency.

11(b)(4) Federal Consumer Financial Law Compliance Program

1. *Policies and procedures.* To be eligible for provisional registration or registration, an entity must have policies and procedures that are documented in sufficient detail to implement effectively and maintain its Federal consumer financial law compliance program. The policies and procedures must address compliance with applicable Federal consumer financial laws in a manner reasonably designed to prevent violations and to detect and prevent associated risks of harm to consumers. The entity must also maintain and modify, as needed, the policies and procedures so that all relevant personnel can reference them in their day-to-day activities.

2. *Training.* To be eligible for provisional registration or registration, an entity must provide specific, comprehensive training to all relevant personnel that reinforces and helps implement written policies and procedures. Requirements for compliance with Federal consumer financial laws must be incorporated into training for all relevant officers and employees. Compliance training must be current, complete, directed to appropriate individuals based on their roles, effective, and commensurate with the size of the entity and nature and risks to consumers presented by its activity. Compliance training also must be consistent with written policies and procedures and designed to enforce those policies and procedures.

3. *Monitoring.* To be eligible for provisional registration or registration, an entity must implement an organized and risk-focused monitoring program to promptly identify and correct procedural or training weaknesses so as to provide for a high level of compliance with Federal consumer financial laws. Monitoring must be scheduled and completed so that timely corrective actions are taken where appropriate.

11(b)(5) Independent Assessment of Federal Consumer Financial Law Compliance Program

1. *Assessor qualifications.* An objective and independent third-party individual or entity is qualified to perform the assessment required by § 1041.11(b)(5) if the individual or entity has substantial experience in performing assessments of a similar size, scope, or subject matter; has substantial expertise in both the applicable Federal consumer financial laws and in the entity's or information system's business; and has the appropriate professional qualifications necessary to perform the required assessment adequately.

2. *Written assessment.* A written assessment described in § 1041.11(b)(5) need not conform to any particular

format or style as long as it succinctly and accurately conveys the required information.

11(b)(7) Independent Assessment of Information Security Program

1. *Periodic assessments.* Section 1041.11(b)(7) requires that, to maintain its registration, an information system must obtain and provide to the Bureau, on at least a biennial basis, a written assessment of the information security program described in § 1041.11(b)(6). The period covered by each assessment obtained and provided to the Bureau to satisfy this requirement must commence on the day after the last day of the period covered by the previous assessment obtained and provided to the Bureau.

2. *Assessor qualifications.* Professionals qualified to conduct assessments required under § 1041.11(b)(7) include: A person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security (SANS) Institute; and an individual or entity with a similar qualification or certification.

3. *Written assessment.* A written assessment described in § 1041.11(b)(7) need not conform to any particular format or style as long as it succinctly and accurately conveys the required information.

11(c) Registration of Information Systems Prior to August 19, 2019

11(c)(1) Preliminary Approval

1. *In general.* An entity seeking to become preliminarily approved for registration pursuant to § 1041.11(c)(1) must submit an application to the Bureau containing information sufficient for the Bureau to determine that the entity is reasonably likely to satisfy the conditions set forth in § 1041.11(b) as of the deadline set forth in § 1041.11(c)(3)(ii). The application must describe the steps the entity plans to take to satisfy the conditions set forth in § 1041.11(b) by the deadline and the entity's anticipated timeline for such steps. The entity's plan must be reasonable and achievable.

11(c)(2) Registration

1. *In general.* An entity seeking to become a registered information system pursuant to § 1041.11(c)(2) must submit an application to the Bureau by the deadline set forth in § 1041.11(c)(3)(ii) containing information and documentation adequate for the Bureau to determine that the conditions described in § 1041.11(b) are satisfied. The application must succinctly and accurately convey the required information, and must include the written assessments described in § 1041.11(b)(5) and (7).

11(d) Registration of Information Systems on or After August 19, 2019

11(d)(1) Provisional Registration

1. *In general.* An entity seeking to become a provisionally registered information system pursuant to § 1041.11(d)(1) must submit an application to the Bureau containing information and documentation adequate for the Bureau to determine that the conditions described in § 1041.11(b) are satisfied. The application must succinctly and accurately convey the required information, and must include the written assessments described in § 1041.11(b)(5) and (7).

Section 1041.12—Compliance Program and Record Retention

12(a) Compliance Program

1. *General.* Section 1041.12(a) requires a lender making a covered loan to develop and follow written policies and procedures that are reasonably designed to ensure compliance with the applicable requirements in this part. These written policies and procedures must provide guidance to a lender's employees on how to comply with the requirements in this part. In particular, under § 1041.12(a), a lender must develop and follow detailed written policies and procedures reasonably designed to achieve compliance, as applicable, with the ability-to-repay requirements in § 1041.5, alternative requirements in § 1041.6, payments requirements in §§ 1041.8 and 1041.9, and requirements on furnishing loan information to registered and provisionally registered information systems in § 1041.10. The provisions and commentary in each section listed above provide guidance on what specific directions and other information a lender must include in its written policies and procedures.

2. *Examples.* The written policies and procedures a lender must develop and follow under § 1041.12(a) depend on the types of loans that the lender makes. A lender that makes a covered loan under § 1041.5 must develop and follow written policies and procedures to ensure compliance with the ability-to-repay requirements, including on projecting a consumer's net income and payments on major financial obligations, and estimating a consumer's basic living expenses. Among other written policies and procedures, a lender that makes a covered loan under § 1041.5 or § 1041.6 must develop and follow written policies and procedures to furnish loan information to registered and provisionally registered information systems in accordance with § 1041.10. A lender that makes a covered loan subject to the requirements in § 1041.6 or § 1041.9 must develop and follow written policies and procedures to provide the required disclosures to consumers.

12(b) Record Retention

1. *General.* Section 1041.12(b) requires a lender to retain various categories of documentation and information in connection with the underwriting and performance of covered short-term loans and covered longer-term balloon payment loans, as well as payment practices in connection with covered loans generally. The items listed are non-exhaustive as to the records that may need to be retained as evidence of compliance with this part concerning loan origination and underwriting, terms and performance, and payment practices.

12(b)(1) Retention of Loan Agreement and Documentation Obtained in Connection With Originating a Covered Short-Term or Covered Longer-Term Balloon-Payment Loan

1. *Methods of retaining loan agreement and documentation obtained for a covered short-term or covered longer-term balloon-payment loan.* Section 1041.12(b)(1) requires a lender either to retain the loan agreement and documentation obtained in connection with a covered short-term or covered longer-term balloon-payment loan in original form or to be able to reproduce an image of the loan agreement and documentation accurately. For example, if the lender uses a consumer's pay stub to verify the consumer's net income, § 1041.12(b)(1) requires the lender to either retain a paper copy of the pay stub itself or be able to reproduce an image of the pay stub, and not merely the net income information that was contained in the pay stub. For documentation that the lender receives electronically, such as a consumer report from a registered information system, the lender may retain either the electronic version or a printout of the report.

12(b)(2) Electronic Records in Tabular Format Regarding Origination Calculations and Determinations for a Covered Short-Term or Longer-Term Balloon-Payment Loan Under § 1041.5

1. *Electronic records in tabular format.* Section 1041.12(b)(2) requires a lender to retain records regarding origination calculations and determinations for a covered loan in electronic, tabular format. Tabular format means a format in which the individual data elements comprising the record can be transmitted, analyzed, and processed by a computer program, such as a widely used spreadsheet or database program. Data formats for image reproductions, such as PDF, and document formats used by word processing programs are not tabular formats. A lender does not have to retain the records required in § 1041.12(b)(2) in a single, combined spreadsheet or database with the records required in § 1041.12(b)(3) and (5). Section 1041.12(b)(2), however, requires a lender to be able to associate the records for a particular covered short-term or covered longer-term balloon payment loan in § 1041.12(b)(2) with unique loan and consumer identifiers in § 1041.12(b)(3).

12(b)(3) Electronic Records in Tabular Format Regarding Type, Terms, and Performance of Covered Short-Term or Covered Longer-Term Balloon-Payment Loans

1. *Electronic records in tabular format.* Section 1041.12(b)(3) requires a lender to retain records regarding loan type, terms, and performance of covered short-term or covered longer-term balloon-payment loans for a covered loan in electronic, tabular format. *See* comment 12(b)(2)–1 for a description of how to retain electronic records in tabular format. A lender does not have to retain the records required in § 1041.12(b)(3) in a single, combined spreadsheet or database with the records required in § 1041.12(b)(2). Section 1041.12(b)(3), however, requires a lender to be able to associate the records for a particular covered short-term or covered longer-term balloon payment loan in § 1041.12(b)(2) and (5) with unique loan and consumer identifiers in § 1041.12(b)(3).

Paragraph 12(b)(3)(iv)

1. *Maximum number of days, up to 180 days, any full payment was past due.* Section 1041.12(b)(3)(iv) requires a lender that makes a covered loan to retain information regarding the number of days any full payment is past due beyond the payment schedule established in the loan agreement, up to 180 days. For this purpose, a full payment is defined as principal, interest, and any charges. If a consumer makes a partial payment on the contractual due date and the remainder of the payment 10 days later, the lender must record the full payment as being 10 days past due. If a consumer fails to make a full payment on a covered loan more than 180 days after the contractual due date, the lender must only record the full payment as being 180 days past due.

12(b)(4) Retention of Records Relating to Payment Practices for Covered Loans

1. *Methods of retaining documentation.* Section 1041.12(b)(4) requires a lender either to retain certain payment-related information in connection with covered loans in original form or to be able to reproduce an image of such documents accurately. For example, § 1041.12(b)(4) requires the lender to either retain a paper copy of the leveraged payment mechanism obtained in connection with a covered longer-term loan or to be able to reproduce an image of the mechanism. For documentation that the lender receives electronically, the lender may retain either the electronic version or a printout.

12(b)(5) Electronic Records in Tabular Format Regarding Payment Practices for Covered Loans

1. *Electronic records in tabular format.* Section 1041.12(b)(5) requires a lender to retain records regarding payment practices in electronic, tabular format. *See* comment 12(b)(2)–1 for a description of how to retain electronic records in tabular format. A lender does not have to retain the records required in § 1041.12(b)(5) in a single, combined spreadsheet or database with the records required in § 1041.12(b)(2) and (3). Section 1041.12(b)(5), however, requires a lender to be able to associate the records for a particular covered short-term or covered longer-term balloon payment loan in § 1041.12(b)(5) with unique loan and consumer identifiers in § 1041.12(b)(3).

Section 1041.13—Prohibition Against Evasion

1. *Lender action taken with the intent of evading the requirements of the rule.* Section 1041.13 provides that a lender must not take any action with the intent of evading the requirements of this part. In determining whether a lender has taken action with the intent of evading the requirements of this part, the form, characterization, label, structure, or written documentation of the lender's action shall not be dispositive. Rather, the actual substance of the lender's action as well as other relevant facts and circumstances will determine whether the lender's action was taken with the intent of evading the requirements of this part. If the lender's action is taken solely for legitimate business purposes, it is not taken with the intent of evading the requirements of this part. By contrast, if a consideration of all relevant facts and circumstances reveals the presence of a purpose that is not a legitimate business purpose, the lender's action may have been taken with the intent of evading the requirements of this part. A lender action that is taken with the intent of evading the requirements of this part may be knowing or reckless. Fraud, deceit, or other unlawful or illegitimate activity may be one fact or circumstance that is relevant to the determination of whether a lender's action was taken with the intent of evading the requirements of this part, but fraud, deceit, or other unlawful or illegitimate activity is not a prerequisite to such a finding.

Dated: October 4, 2017.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

[FR Doc. 2017–21808 Filed 11–16–17; 8:45 am]

BILLING CODE 4810–AM–P

FEDERAL REGISTER

Vol. 82 Friday,

No. 221 November 17, 2017

Part III

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 700, 701, 773, et al.

Congressional Nullification of the Stream Protection Rule Under the Congressional Review Act; Final Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 700, 701, 773, 774, 777, 779, 780, 783, 784, 785, 800, 816, 817, 824, and 827

[Docket ID: OSM–2010–0018; S1D1S SS08011000 SX064A000 178S180110; S2D2S SS08011000 SX064A000 17X501520]

RIN 1029–AC63

Congressional Nullification of the Stream Protection Rule Under the Congressional Review Act

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

ACTION: Final rule; CRA Revocation.

SUMMARY: By operation of the Congressional Review Act, the Stream Protection Rule shall be treated as if it had never taken effect. The Office of Surface Mining Reclamation and Enforcement issues this document to effect the removal of any amendments, deletions or other modifications made by the nullified rule, and the reversion to the text of the regulations in effect immediately prior to the effective date of the Stream Protection Rule.

DATES: This rule is effective on November 17, 2017. The incorporation by reference of material listed in the rule was previously approved by the Director of the Federal Register.

ADDRESSES: Previous documents related to the Stream Protection Rule, published at 81 FR 93066 (Dec. 20, 2016), are available at *www.regulations.gov* in Docket No. OSM–2010–0018.

FOR FURTHER INFORMATION CONTACT: Kathleen Vello, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1849 C Street NW., Mail Stop 4550, MIB, Washington, DC 20240 Telephone: 202–208–1908.

SUPPLEMENTARY INFORMATION: The Office of Surface Mining Reclamation and Enforcement published the Stream Protection Rule on December 20, 2016 (81 FR 93066). The rule became effective on January 19, 2017. On February 1, 2017, the United States House of Representatives passed a joint resolution of disapproval (H.J. Res. 38) of the Stream Protection Rule in accordance with the Congressional Review Act, 5 U.S.C. 801 *et seq.* The Senate passed the joint resolution of disapproval on February 2, 2017 (Cong. Rec. p. S611). President Trump then signed the resolution into law as Public Law 115–5 on February 16, 2017. Under the terms of the Congressional Review Act, the Office of Surface Mining Reclamation and Enforcement's Stream Protection Rule must be ''treated as though such rule had never taken effect.'' 5 U.S.C. 801(f).

However, because the Congressional Review Act does not include direction regarding the removal, by the Office of the Federal Register or otherwise, of the voided language from the Code of Federal Regulations, the Office of Surface Mining Reclamation and Enforcement must publish this document to effect the removal of the voided text. This document will enable the Office of the Federal Register to effectuate congressional intent to remove the voided text of the Stream Protection Rule which is to be treated as if it had never taken effect and to restore the previous language and prior state of the Code of Federal Regulations.

This action is not an exercise of the Department's rulemaking authority under the Administrative Procedure Act because the Department is not ''formulating, amending, or repealing a rule'' under 5 U.S.C. 551(5). Rather, the Department is effectuating changes to the Code of Federal Regulations to reflect what congressional action has already accomplished—namely, the nullification of any changes purported to have been made to the Code of Federal Regulations by the Stream Protection Rule and the reversion to the regulatory text in effect immediately prior to January 19, 2017, the effective date of the Stream Protection Rule. Accordingly, the Department is not soliciting comments on this action. Moreover, this action is not a final agency action subject to judicial review.

List of Subjects

30 CFR Part 700

Administrative practice and procedure, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 701

Law enforcement, Surface mining, Underground mining.

30 CFR Part 773

Administrative practice and procedure, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 774

Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 777

Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 779

Environmental protection, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 780

Incorporation by reference, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 783

Environmental protection, Reporting and recordkeeping requirements, Underground mining.

30 CFR Part 784

Reporting and recordkeeping requirements, Underground mining.

30 CFR Part 785

Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 800

Insurance, Reporting and recordkeeping requirements, Surety bonds, Surface mining, Underground mining.

30 CFR Part 816

Environmental protection, Incorporation by reference, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 817

Environmental protection, Incorporation by reference, Reporting and recordkeeping requirements, Underground mining.

30 CFR Part 824

Environmental protection, Surface mining.

30 CFR Part 827

Environmental protection, Surface mining, Underground mining.

■ For the reasons given in the preamble, and under the authority of the Congressional Review Act (5 U.S.C. 801 *et seq.*) and Public Law 115–5 (February 16, 2017), the Department of the Interior, Office of Surface Mining Reclamation and Enforcement amends parts 700, 701, 773, 774, 777, 779, 780, 783, 784, 785, 800, 816, 817, 824, and 827 of chapter VII of title 30 of the Code of Federal Regulations as follows:

■ 1. Revise part 700 to read as follows:

PART 700—GENERAL

Sec.
700.1 Scope.
700.2 Objective.
700.3 Authority.
700.4 Responsibility.
700.5 Definitions.

700.10 Information collection.
700.11 Applicability.
700.12 Petitions to initiate rulemaking.
700.13 Notice of citizen suits.
700.14 Availability of records.
700.15 Computation of time.

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

§ 700.1 Scope.

The regulations in chapter VII of 30 CFR, consisting of parts 700 through 899, establish the procedures through which the Secretary of the Interior will implement the Surface Mining Control and Reclamation Act of 1977 (Pub. L. 95–87, 91 Stat. 445 (30 U.S.C. 1201 *et. seq.*)). Chapter VII is divided into 13 subchapters.

(a) Subchapter A contains introductory information intended to serve as a guide to the rest of the chapter and to the regulatory requirements and definitions generally applicable to the programs and persons covered by the Act.

(b) Subchapter B contains regulations covering the initial regulatory program which apply before the applicability of permanent program regulations to persons conducting surface coal mining and reclamation operations and other persons covered by the Act.

(c) Subchapter C sets forth regulations covering applications for and decisions on permanent State programs; the process to be followed for substituting a Federal program for an approved State program, if necessary; the process for assuming temporary Federal enforcement of an approved State program; and the process for implementing a Federal program in a State when required by the Act.

(d) Subchapter D of this chapter identifies the procedures that apply to surface coal mining and reclamation operations conducted on Federal lands rather than State or private lands and incorporates by reference the requirements of the applicable regulatory program and the inspection and enforcement requirements of subchapter L of this chapter.

(e) Subchapter E of this chapter contains regulations that apply to surface coal mining and reclamation operations conducted on Indian lands.

(f)(1) Subchapter F implements the requirements of the Act for—

(i) Designating lands which are unsuitable for all or certain types of surface coal mining operations;

(ii) Terminating designations no longer found to be appropriate; and

(iii) Prohibiting surface coal mining and reclamation operations on those lands or areas where the Act states that surface coal mining operations should not be permitted or should be permitted only after specified determinations are made.

(2) Subchapter F does not include regulations governing designation of areas unsuitable for noncoal mining under the terms of section 601 of the Act or the designation of Federal lands under the Federal lands review provisions of section 522(b) of the Act. The Bureau of Land Management of the Department of the Interior is responsible for these provisions which will be implemented when promulgated by regulations in title 43 of the Code of Federal Regulations.

(g) Subchapter G governs applications for and decisions on permits for surface coal mining and reclamation operations on non-Indian and non-Federal lands under a State or Federal program. It also governs coal exploration and permit application and decisions on permits for special categories of coal mining on non-Indian and non-Federal lands under a State or Federal program. Regulations implementing the experimental practices provision of the Act are also included in subchapter G.

(h) Subchapter J sets forth requirements for performance bonds and public liability insurance for both surface mining and underground mining activities.

(i) Subchapter K sets forth the environmental and other performance standards which apply to coal exploration and to surface coal mining and reclamation operations during the permanent regulatory program. The regulations establish the minimum requirements for operations under State and Federal programs. Performance standards applicable to special mining situations such as anthracite mines, steep slope mining, alluvial valley floors, and prime farmlands are included.

(j) Subchapter L sets forth the inspection, enforcement, and civil penalty provisions that apply to a State, Federal, or Federal lands program.

(k) Subchapter M sets forth the requirements for the training, examination, and certification of blasters.

(l) Subchapter P sets forth the provisions for protection of employees who initiate proceedings under the Act or testify in any proceedings resulting from the administration or enforcement of the Act.

(m) Subchapter R sets forth the regulations for the abandoned mine land reclamation program. These regulations include the fee collection requirements and the mechanisms for implementing the State and Federal portions of the abandoned mine land reclamation program.

(n) Subchapter S sets forth the regulations that apply to grants for mining and mineral research institutes and grants for mineral research projects.

§ 700.2 Objective.

The objective of chapter VII is to fulfill the purposes of the Act found in section 102 in a manner which is consistent with the language of the Act, its legislative history, other applicable laws, and judicial interpretations.

§ 700.3 Authority.

The Secretary is authorized to administer the requirements of the Act, except the following:

(a) Provisions of the Act that authorize the Secretary of Agriculture to establish programs for the reclamation of rural lands, identification of prime agricultural lands, and other responsibilities described in the Act. Regulations promulgated by the Secretary of Agriculture are in 7 CFR;

(b) Provisions of the Act for which responsibility is specifically assigned to other Federal agencies, including the Department of Labor, the Environmental Protection Agency, the Corps of Engineers, the Council on Environmental Quality, and the Department of Energy; and

(c) Authority retained by the States to enforce State laws or regulations which are not inconsistent with the Act and this chapter, including the authority to enforce more stringent land use and environmental controls and regulations.

§ 700.4 Responsibility.

(a) The Director of the Office of Surface Mining Reclamation and Enforcement, under the general direction of the Assistant Secretary, Energy and Minerals, is responsible for exercising the authority of the Secretary, except for the following:

(1) Approval, disapproval or withdrawal of approval of a State program and implementation of a Federal program. The Director is responsible for exercising the authority of the Secretary to substitute Federal enforcement of a State program under section 521(b) of the Act.

(2) Designation of non-Federal lands or Federal lands without the concurrence of the Federal surface managing agency as unsuitable for all or certain types of surface coal mining operations under section 522 of the Act and as unsuitable for non-coal mining under section 601 of the Act; and

(3) Authority to approve or disapprove mining plans to conduct surface coal mining and reclamation operations on Federal lands.

(b) The Director is responsible for consulting with Federal land-managing

agencies and Federal agencies with responsibility for natural and historic resources on Federal lands on actions which may have an effect on their responsibilities.

(c) The States are responsible for the regulation of surface coal mining and reclamation operations under the initial regulatory program and surface coal mining and reclamation operations and coal exploration under an approved State program and the reclamation of abandoned mine lands under an approved State Reclamation Plan on non-Federal and non-Indian lands in accordance with procedures in this chapter.

(d) The Secretary may delegate to a State through a cooperative agreement certain authority relating to the regulation of surface coal mining and reclamation operations on Federal lands in accordance with 30 CFR part 745.

(e) The Director, Office of Hearings and Appeals, U.S. Department of the Interior, is responsible for the administration of administrative hearings and appeals required or authorized by the Act pursuant to the regulations in 43 CFR part 4.

§ 700.5 Definitions.

As used throughout this chapter, the following terms have the specified meaning except where otherwise indicated—

Act means the Surface Mining Control and Reclamation Act of 1977 (Pub. L. 95–87).

AML means abandoned mine land(s).

AML inventory means OSM's listing of abandoned mine land problems eligible to be reclaimed using moneys from the Abandoned Mine Reclamation Fund or the Treasury as appropriate.

Anthracite means coal classified as anthracite in ASTM Standard D 388–77. Coal classifications are published by the American Society of Testing and Materials under the title, *Standard Specification for Classification of Coals by Rank,* ASTM D 388–77, on pages 220 through 224. Table 1 which classifies the coals by rank is presented on page 223. This publication is hereby incorporated by reference as it exists on the date of adoption of these regulations. Notices of changes made to this publication will be periodically published by the Office of Surface Mining in the **Federal Register**. This ASTM Standard is on file and available for inspection at the OSM Office, U.S. Department of the Interior, South Interior Building, Washington, DC 20240, at each OSM Regional Office, District Office and Field Office, and at the central office of the applicable State Regulatory Authority, if any. Copies of this publication may also be obtained by writing to the above locations. A copy of this publication will also be on file for public inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* Incorporation by reference provisions approved by the Director of the Federal Register February 7, 1979. The Director's approval of this incorporation by reference expires on July 1, 1981.

Coal means combustible carbonaceous rock, classified as anthracite, bituminous, subbituminous, or lignite by ASTM Standard D 388–77, referred to and incorporated by reference in the definition of *Anthracite* immediately above.

Department means the Department of the Interior.

Director means the Director, Office of Surface Mining Reclamation and Enforcement, or the Director's representative.

Eligible lands and water means lands and water eligible for expenditures under title IV of SMCRA and this chapter. Eligible lands and water for reclamation or drainage abatement expenditures under the Abandoned Mine Land program contained in this chapter are those which were mined for coal or which were affected by such mining, wastebanks, coal processing, or other coal mining processes and left or abandoned in either an unreclaimed or inadequately reclaimed condition prior to August 3, 1977, and for which there is no continuing reclamation responsibility. However, lands and water damaged by coal mining operations after that date and on or before November 5, 1990, may also be eligible for reclamation if they meet the requirements specified in § 874.12(d) and (e) of this chapter. Following certification of the completion of all known coal problems, eligible lands and water for noncoal reclamation purposes are those sites that meet the eligibility requirements specified in § 875.14 of this chapter. For additional eligibility requirements for water projects, see § 874.14 of this chapter, and for lands affected by remining operations, see section 404 of SMCRA.

Emergency means a sudden danger or impairment that presents a high probability of substantial physical harm to the health, safety, or general welfare of people before the danger can be abated under normal program operation procedures.

Expended means that moneys have been obligated, encumbered, or committed by contract by the State, Tribe, or us for work to be accomplished or services to be rendered.

Extreme danger means a condition that could reasonably be expected to cause substantial physical harm to persons, property, or the environment and to which persons or improvements on real property are currently exposed.

Federal lands means any land, including mineral interests, owned by the United States, without regard to how the United States acquired ownership of the lands or which agency manages the lands. It does not include Indian lands. However, lands or mineral interests east of the 100th meridian west longitude owned by the United States and entrusted to or managed by the Tennessee Valley Authority are not subject to sections 714 (surface owner protection) and 715 (Federal lessee protection) of the Act.

Federal lands program means a program established by the Secretary pursuant to section 523 of the Act to regulate surface coal mining and reclamation operations on Federal lands.

Fund means the Abandoned Mine Reclamation Fund established on the books of the U.S. Treasury for the purpose of accumulating revenues designated for reclamation of abandoned mine lands and other activities authorized by section 401 of SMCRA.

Indian lands means all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe.

Indian tribe means any Indian tribe, band, group, or community having a governing body recognized by the Secretary.

Office means the Office of Surface Mining Reclamation and Enforcement established under title II of the Act.

Left or abandoned in either an unreclaimed or inadequately reclaimed condition means, for Abandoned Mine Land programs, lands and water:

(1) Which were mined or which were affected by such mining, wastebanks, processing or other mining processes prior to August 3, 1977, or between August 3, 1977, and November 5, 1990, as authorized pursuant to section 402(g)(4) of SMCRA, and on which all mining has ceased;

(2) Which continue, in their present condition, to degrade substantially the quality of the environment, prevent or

damage the beneficial use of land or water resources, or endanger the health and safety of the public; and

(3) For which there is no continuing reclamation responsibility under State or Federal laws, except as provided in sections 402(g)(4) and 403(b)(2) of SMCRA.

OSM and *OSMRE* mean the Office of Surface Mining Reclamation and Enforcement established under title II of the Act.

Person means an individual, Indian tribe when conducting surface coal mining and reclamation operations on non-Indian lands, partnership, association, society, joint venture, joint stock company, firm, company, corporation, cooperative or other business organization and any agency, unit, or instrumentality of Federal, State or local government including any publicly owned utility or publicly owned corporation of Federal State or local government.

Person having an interest which is or may be adversely affected or *person with a valid legal interest* shall include any person—

(a) Who uses any resource of economic, recreational, esthetic, or environmental value that may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Secretary or the State regulatory authority; or

(b) Whose property is or may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Secretary or the State regulatory authority.

Project means a delineated area containing one or more abandoned mine land problems. A project may be a group of related reclamation activities with a common objective within a political subdivision of a State or within a logical, geographically defined area, such as a watershed, conservation district, or county planning area.

Public office means a facility under the direction and control of a governmental entity which is open to public access on a regular basis during reasonable business hours.

Reclamation activity means the reclamation, abatement, control, or prevention of adverse effects of past mining by an Abandoned Mine Land program.

Reclamation program means a program established by a State or an Indian tribe in accordance with Title IV of SMCRA for reclamation of lands and water adversely affected by past mining, including the reclamation plan and annual applications for grants under the plan.

Regional Director means a Regional Director of the Office or a Regional Director's representative.

Regulatory authority means the department or agency in each State which has primary responsibility at the State level for administering the Act in the initial program, or the State regulatory authority where the State is administering the Act under a State regulatory program, or the Secretary in the initial or permanent program where the Secretary is administering the Act, or the Secretary when administering a Federal program or Federal lands program or when enforcing a State program pursuant to section 521(b) of the Act.

Regulatory program means any approved State or Federal program or, in a State with no approved State or Federal program and coal exploration and surface coal mining and reclamation operations are on Federal lands, the requirements of subchapters A, F, G, J, K, L, M, and P of this chapter.

Secretary means the Secretary of the Interior or the Secretary's representative.

SMCRA means the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.,* as amended.

State regulatory authority means the department or agency in each State which has primary responsibility at the State level for administering the initial or permanent State regulatory program.

Surface coal mining operations mean—

(a) Activities conducted on the surface of lands in connection with a surface coal mine or, subject to the requirements of section 516 of the Act, surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountain top removal, box cut, open pit, and area mining; the use of explosives and blasting; in situ distillation or retorting; leaching or other chemical or physical processing; and the cleaning, concentrating, or other processing or preparation of coal. Such activities also include the loading of coal for interstate commerce at or near the mine site. *Provided,* these activities do not include the extraction of coal incidental to the extraction of other minerals, where coal does not exceed 16⅔ percent of the tonnage of minerals removed for purposes of commercial use or sale, or coal exploration subject to section 512 of the Act; and, *Provided further,* that excavation for the purpose of obtaining coal includes extraction of coal from coal refuse piles; and

(b) The areas upon which the activities described in paragraph (a) of this definition occur or where such activities disturb the natural land surface. These areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of those activities and for haulage and excavation, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are sited structures, facilities, or other property or material on the surface, resulting from or incident to those activities.

Surface coal mining and reclamation operations means surface coal mining operations and all activities necessary or incidental to the reclamation of such operations. This term includes the term surface coal mining operations.

Ton means 2000 pounds avoirdupois (.90718 metric ton).

§ 700.10 Information collection.

The collection of information, and recordkeeping requirements, contained in 30 CFR 700.11(d), 700.12(b) and 700.13 has approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1029–0094. The information collected in § 700.11(d) is used by OSMRE and States to establish standards for determining when a mine site is no longer a surface coal mining and reclamation operation and thereby when regulatory jurisdiction may end. The information collection under § 700.12(b) is used by OSMRE to consider need, costs, and benefits of a proposed regulatory change in order to grant or deny a petition that has been submitted. Information collected in § 700.13 identifies the person and nature of a citizen's suit, so that OSMRE or a state can respond appropriately.

§ 700.11 Applicability.

(a) Except as provided in paragraph (b) of this section, this chapter applies to all coal exploration and surface coal mining and reclamation operations, except:

(1) The extraction of coal by a landowner for his or her own noncommercial use from land owned or leased by him or her. Noncommercial

use does not include the extraction of coal by one unit of an integrated company or other business or nonprofit entity which uses the coal in its own manufacturing or power plants;

(2) The extraction of 250 tons of coal or less by a person conducting a surface coal mining and reclamation operation. A person who intends to remove more than 250 tons is not exempted;

(3) The extraction of coal as an incidental part of Federal, State or local government-financed highway or other construction in accordance with part 707 of this chapter;

(4) The extraction of coal incidental to the extraction of other minerals where coal does not exceed 16⅔ percent of the total tonnage of coal and other minerals removed for purposes of commercial use or sale in accordance with part 702 of this chapter.

(5) Coal exploration on lands subject to the requirement of 43 CFR parts 3480–3487.

(b) This chapter does not apply to the extraction of coal for commercial purposes where the surface coal mining and reclamation operation, together with any related operations, has or will have an affected area of two acres or less. For purposes of this paragraph:

(1) Where a segment of a road is used for access or coal haulage by more than one surface coal mining operation, the entire segment shall be included in the affected area of each of those operations; provided, that two or more operations which are deemed related pursuant to paragraph (b)(2) of this section shall be considered as one operation for purposes of this paragraph.

(2) Except as provided in paragraph (b)(3) of this section, surface coal mining operations shall be deemed related if they occur within twelve months of each other, are physically related, and are under common ownership or control.

(i) Operations shall be deemed physically related if drainage from both operations flows into the same watershed at or before a point within five aerial miles of either operation.

(ii) Operations shall be deemed under common ownership or control if they are owned or controlled, directly or indirectly, by or on behalf of:

(A) The same person;

(B) Two or more persons, one of whom controls, is under common control with, or is controlled by the other; or

(C) Members of the same family and their relatives, unless it is established that there is no direct or indirect business relationship between or among them;

(iii) For purposes of this paragraph, *control* means: Ownership of 50 percent or more of the voting shares of, or general partnership in, an entity; any relationship which gives one person the ability in fact or law to direct what the other does; or any relationship which gives one person express or implied authority to determine the manner in which coal at different sites will be mined, handled, sold or disposed of.

(3) Notwithstanding the provisions of paragraph (b)(2) of this section, the regulatory authority may determine, in accordance with the procedures applicable to requests for determination of exemption pursuant to paragraph (c) of this section, that two or more surface coal mining operations shall not be deemed related if, considering the history and circumstances relating to the coal, its location, the operations at the sites in question, all related operations and all persons mentioned in paragraph (b)(2)(ii) of this section, the regulatory authority concludes in writing that the operations are not of the type which the Act was intended to regulate and that there is no intention on the part of such operations or persons to evade the requirements of the Act or the applicable regulatory program.

(4) The exemption provided by paragraph (b) of this section applies only to operations with an affected area of less than two acres where coal is being extracted for commercial purposes and to surface coal mining operations within that affected area incidental to such operations.

(c) The regulatory authority may on its own initiative and shall, within a reasonable time of a request from any person who intends to conduct surface coal mining operations, make a written determination whether the operation is exempt under this section. The regulatory authority shall give reasonable notice of the request to interested persons. Prior to the time a determination is made, any person may submit, and the regulatory authority shall consider, any written information relevant to the determination. A person requesting that an operation be declared exempt shall have the burden of establishing the exemption. If a written determination of exemption is reversed through subsequent administrative or judicial action, any person who, in good faith, has made a complete and accurate request for an exemption and relied upon the determination, shall not be cited for violations which occurred prior to the date of the reversal.

(d)(1) A regulatory authority may terminate its jurisdiction under the regulatory program over the reclaimed site of a completed surface coal mining and reclamation operation, or increment thereof, when:

(i) The regulatory authority determines in writing that under the initial program, all requirements imposed under subchapter B of this chapter have been successfully completed; or

(ii) The regulatory authority determines in writing that under the permanent program, all requirements imposed under the applicable regulatory program have been successfully completed or, where a performance bond was required, the regulatory authority has made a final decision in accordance with the State or Federal program counterpart to part 800 of this chapter to release the performance bond fully.

(2) Following a termination under paragraph (d)(1) of this section, the regulatory authority shall reassert jurisdiction under the regulatory program over a site if it is demonstrated that the bond release or written determination referred to in paragraph (d)(1) of this section was based upon fraud, collusion, or misrepresentation of a material fact.

§ 700.12 Petitions to initiate rulemaking.

(a) Any person may petition the Director to initiate a proceeding for the issuance, amendment, or repeal of any regulation under the Act. The petition shall be submitted to the Office of the Director, Office of Surface Mining Reclamation and Enforcement, Department of the Interior, Washington, DC 20240.

(b) The petition shall be a concise statement of the facts, technical justification, and law which require issuance, amendment, or repeal of a regulation under the Act and shall indicate whether the petitioner desires a public hearing.

(c) Upon receipt of the petition, the Director shall determine if the petition sets forth facts, technical justification and law which may provide a reasonable basis for issuance, amendment or repeal of a regulation. Facts, technical justification or law previously considered in a petition or rulemaking on the same issue shall not provide a reasonable basis. If the Director determines that the petition has a reasonable basis, a notice shall be published in the **Federal Register** seeking comments from the public on the proposed change. The Director may hold a public hearing, may conduct an investigation or take other action to determine whether the petition should be granted.

(d) Within 90 days from receipt of the petition, the Director shall issue a written decision either granting or denying the petition. The Director's decision shall constitute the final decision for the Department.

(1) If the petition is granted, the Director shall initiate a rulemaking proceeding.

(2) If the petition is denied, the Director shall notify the petitioner in writing, setting forth the reasons for denial.

§ 700.13 Notice of citizen suits.

(a) A person who intends to initiate a civil action on his or her own behalf under section 520 of the Act shall give notice of intent to do so, in accordance with this section.

(b) Notice shall be given by certified mail to the Secretary and the Director in all cases and to the head of the State regulatory authority, if a complaint involves or relates to a specific State. A copy of the notice shall be sent by first class mail to the Regional Director, if the complaint involves or relates to surface coal mining and reclamation operations in a specific region of the Office.

(c) Notice shall be given by certified mail to the alleged violator, if the complaint alleges a violation of the Act or any regulation, order, or permit issued under the Act.

(d) Service of notice under this section is complete upon mailing to the last known address of the person being notified.

(e) A person giving notice regarding an alleged violation shall state, to the extent known—

(1) Sufficient information to identify the provision of the Act, regulation, order, or permit allegedly violated;

(2) The act or omission alleged to constitute a violation;

(3) The name, address, and telephone numbers of the person or persons responsible for the alleged violation;

(4) The date, time, and location of the alleged violation;

(5) The name, address, and telephone number of the person giving notice; and

(6) The name, address, and telephone number of legal counsel, if any, of the person giving notice.

(f) A person giving notice of an alleged failure by the Secretary or a State regulatory authority to perform a mandatory act or duty under the Act shall state, to the extent known:

(1) The provision of the Act containing the mandatory act or duty allegedly not performed;

(2) Sufficient information to identify the omission alleged to constitute the failure to perform a mandatory act or duty under the Act;

(3) The name, address, and telephone number of the person giving notice; and

(4) The name, address, and telephone number of legal counsel, if any, of the person giving notice.

§ 700.14 Availability of records.

(a) Records required by the Act to be made available locally to the public shall be retained at the geographically closest office of the State or Federal regulatory authority having jurisdiction over the area involved.

(b) Other records or documents in the possession of the Office may be requested under 43 CFR part 2, which implements the Freedom of Information Act and the Privacy Act.

§ 700.15 Computation of time.

(a) Except as otherwise provided, computation of time under this chapter is based on calendar days.

(b) In computing any period of prescribed time, the day on which the designated period of time begins is not included. The last day of the period is included unless it is a Saturday, Sunday, or legal holiday on which the regulatory authority is not open for business, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.

(c) Intermediate Saturdays, Sundays, and legal holidays are excluded from the computation when the period of prescribed time is 7 days or less.

■ 2. Revise part 701 to read as follows:

PART 701—PERMANENT REGULATORY PROGRAM

Sec.

701.1 Scope.
701.2 Objective.
701.3 Authority.
701.4 Responsibility.
701.5 Definitions.
701.11 Applicability.

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

§ 701.1 Scope.

(a) This part provides general introductory material for the permanent regulatory program required by the Act.

(b) The following regulations apply to the permanent regulatory program:

(1) Subchapter C on State program application, approval, withdrawal, and grants, and Federal program implementation;

(2) Subchapter D on surface coal mining and reclamation operations on Federal lands;

(3) Subchapter E on surface coal mining and reclamation operations on Indian lands.

(4) Subchapter F on criteria for designating lands unsuitable for surface coal mining operations and the process for designating these lands or withdrawing the designation by the regulatory authority; *Provided,* That, part 761 is applicable during the initial regulatory program under subchapter B of this chapter and 30 CFR part 211[1] and that part 769 and other parts incorporated therein are applicable to the initial Federal lands program under 30 CFR part 211;

(5) Subchapter G on the process for application, approval, denial, revision, and renewal of permits for surface coal mining and reclamation operations, including the small operator assistance program, requirements for special categories of these operations, and requirements for coal exploration;

(6) Subchapter J on public liability insurance and performance bonds or other assurances of performance for surface coal mining and reclamation operations;

(7) Subchapter K on performance standards which apply to coal exploration, surface coal mining and reclamation operations, and special categories of these operations;

(8) Subchapter L on inspection and enforcement responsibilities and civil penalties; and

(9) Subchapter M on the training, examination, and certification of blasters.

§ 701.2 Objective.

The regulations in this part give—

(a) A general overview of the regulatory program to be implemented by the State or Federal regulatory authority;

(b) The applicability of that program to coal exploration and surface coal mining and reclamation operations; and

(c) The definitions that apply to the regulation of coal exploration and surface coal mining and reclamation operations.

§ 701.3 Authority.

The Secretary is required by section 501(b) of the Act to promulgate regulations which establish the permanent regulatory program; by section 523 of the Act to promulgate regulations which establish the Federal lands programs; and is authorized by section 710 of the Act to promulgate regulations which establish a Federal program for Indian lands.

§ 701.4 Responsibility.

(a) A State regulatory authority shall assume primary responsibility for regulation of coal exploration and surface coal mining and reclamation operations during the permanent regulatory program upon submission to

and approval by the Secretary of a State program meeting all applicable requirements of the Act and this chapter. After approval of the State program, the State regulatory authority has responsibility for review of and decisions on permits and bonding for surface coal mining and reclamation operations, approval of coal exploration which substantially disturbs the natural land surface and removes more than 250 tons of coal from the earth in any one location, inspection of coal exploration and surface coal mining and reclamation operations for compliance with the Act, this chapter, the State program, permits and exploration approvals, and for enforcement of the State program.

(b) While a State regulatory program is in effect, the Office's responsibility includes, but is not limited to—

(1) Evaluating the administration of the State program through such means as periodic inspections of coal exploration and surface coal mining and reclamation operations in the State and review of exploration approvals, permits, inspection reports, and other documents required to be made available to the Office;

(2) Referring to the State regulatory authority information which creates reasonable belief that a person is in violation of the Act, this chapter, the State regulatory program, a permit condition, or coal exploration approval condition, and initiating an inspection when authorized by the Act or this chapter;

(3) Issuing notices of violation when a State regulatory authority fails to take appropriate action to cause a violation to be corrected; and

(4) Issuing cessation orders, including imposing affirmative obligations, when a condition, practice, or violation exists which creates an imminent danger to the health or safety of the public, or is causing or could reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

(c) The Office shall implement a Federal program in a State, if that State does not have an approved State program by June 3, 1980. The Office shall not implement a Federal program in a State for a period of up to 1 year following that date if the State's failure to have an approved program by that date is due to an injunction imposed by a court of competent jurisdiction.

(d) Under a Federal program, the Office shall be the regulatory authority for all coal exploration and surface coal mining and reclamation operations in that State and shall perform the functions that a State regulatory authority would perform under an approved State program.

(e) During the period in which a State program is in effect, the Office shall assume responsibility for enforcing permit conditions, issuing new or revised permits, and issuing necessary notices and orders, when required by 30 CFR part 733.

(f) The Secretary shall substitute a Federal program under 30 CFR part 736 for an approved State program, when required by 30 CFR part 733.

(g) The Secretary shall have the responsibility for administration of the Federal lands program. The Director and other Federal authorities shall have the responsibilities under a Federal lands program as are provided for under subchapter D of this chapter. In addition, State regulatory authorities shall have responsibilities to administer the Federal lands program as provided for under cooperative agreements approved by the Secretary in accordance with 30 CFR part 745.

(h) The Secretary shall have the responsibility for the administration of the Federal program for Indian lands, as provided for under subchapter E of this chapter. The Director and other Federal authorities have the responsibilities under the Indian lands program as are provided for under subchapter E of this chapter.

§ 701.5 Definitions.

As used in this chapter, the following terms have the specified meanings, except where otherwise indicated:

Acid drainage means water with a pH of less than 6.0 and in which total acidity exceeds total alkalinity, discharged from an active, inactive or abandoned surface coal mine and reclamation operation or from an area affected by surface coal mining and reclamation operations.

Acid-forming materials means earth materials that contain sulfide minerals or other materials which, if exposed to air, water, or weathering processes, form acids that may create acid drainage.

Adjacent area means the area outside the permit area where a resource or resources, determined according to the context in which *adjacent area* is used, are or reasonably could be expected to be adversely impacted by proposed mining operations, including probable impacts from underground workings.

Administratively complete application means an application for permit approval or approval for coal exploration where required, which the regulatory authority determines to contain information addressing each application requirement of the regulatory program and to contain all information necessary to initiate processing and public review.

Affected area means any land or water surface area which is used to facilitate, or is physically altered by, surface coal mining and reclamation operations. The affected area includes the disturbed area; any area upon which surface coal mining and reclamation operations are conducted; any adjacent lands the use of which is incidental to surface coal mining and reclamation operations; all areas covered by new or existing roads used to gain access to, or for hauling coal to or from, surface coal mining and reclamation operations, except as provided in this definition; any area covered by surface excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, shipping areas; any areas upon which are sited structures, facilities, or other property material on the surface resulting from, or incident to, surface coal mining and reclamation operations; and the area located above underground workings. The affected area shall include every road used for purposes of access to, or for hauling coal to or from, surface coal mining and reclamation operations, unless the road (a) was designated as a public road pursuant to the laws of the jurisdiction in which it is located; (b) is maintained with public funds, and constructed, in a manner similar to other public roads of the same classification within the jurisdiction; and (c) there is substantial (more than incidental) public use.

Agricultural activities means, with respect to alluvial valley floors, the use of any tract of land for the production of animal or vegetable life, based on regional agricultural practices, where the use is enhanced or facilitated by subirrigation or flood irrigation. These uses include, but are not limited to, farming and the pasturing or grazing of livestock. These uses do not include agricultural activities which have no relationship to the availability of water from subirrigation or flood irrigation practices.

Agricultural use means the use of any tract of land for the production of animal or vegetable life. The uses include, but are not limited to, the pasturing, grazing, and watering of livestock, and the cropping, cultivation, and harvesting of plants.

Alluvial valley floors means the unconsolidated stream-laid deposits holding streams with water availability sufficient for subirrigation or flood irrigation agricultural activities but does not include upland areas which are

generally overlain by a thin veneer of colluvial deposits composed chiefly of debris from sheet erosion, deposits formed by unconcentrated runoff or slope wash, together with talus, or other mass-movement accumulations, and windblown deposits.

Applicant means any person seeking a permit, permit revision, renewal, and transfer, assignment, or sale of permit rights from a regulatory authority to conduct surface coal mining and reclamation operations or, where required, seeking approval for coal exploration.

Applicant/Violator System or *AVS* means an automated information system of applicant, permittee, operator, violation and related data OSM maintains to assist in implementing the Act.

Application means the documents and other information filed with the regulatory authority under this chapter for the issuance of permits; revisions; renewals; and transfer, assignment, or sale of permit rights for surface coal mining and reclamation operations or, where required, for coal exploration.

Approximate original contour means that surface configuration achieved by backfilling and grading of the mined areas so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls, spoil piles and coal refuse piles eliminated. Permanent water impoundments may be permitted where the regulatory authority has determined that they comply with 30 CFR 816.49 and 816.56, 816.133 or 817.49, 817.56, and 817.133.

Aquifer means a zone, stratum, or group of strata that can store and transmit water in sufficient quantities for a specific use.

Arid and semiarid area means, in the context of alluvial valley floors, an area of the interior western United States, west of the 100th meridian west longitude, experiencing water deficits, where water use by native vegetation equals or exceeds that supplied by precipitation. All coalfields located in North Dakota west of the 100th meridian west longitude, all coalfields in Montana, Wyoming, Utah, Colorado, New Mexico, Idaho, Nevada, and Arizona, the Eagle Pass field in Texas, and the Stone Canyon and the Ione fields in California are in arid and semiarid areas.

Auger mining means a method of mining coal at a cliff or highwall by drilling holes into an exposed coal seam from the highwall and transporting the coal along an auger bit to the surface.

Best technology currently available means equipment, devices, systems, methods, or techniques which will (a) prevent, to the extent possible, additional contributions of suspended solids to stream flow or runoff outside the permit area, but in no event result in contributions of suspended solids in excess of requirements set by applicable State or Federal laws; and (b) minimize, to the extent possible, disturbances and adverse impacts on fish, wildlife and related environmental values, and achieve enhancement of those resources where practicable. The term includes equipment, devices, systems, methods, or techniques which are currently available anywhere as determined by the Director, even if they are not in routine use. The term includes, but is not limited to, construction practices, siting requirements, vegetative selection and planting requirements, animal stocking requirements, scheduling of activities and design of sedimentation ponds in accordance with 30 CFR parts 816 and 817. Within the constraints of the permanent program, the regulatory authority shall have the discretion to determine the best technology currently available on a case-by-case basis, as authorized by the Act and this chapter.

Coal exploration means the field gathering of:

(a) surface or subsurface geologic, physical, or chemical data by mapping, trenching, drilling, geophysical, or other techniques necessary to determine the quality and quantity of overburden and coal of an area; or

(b) the gathering of environmental data to establish the conditions of an area before beginning surface coal mining and reclamation operations under the requirements of this chapter.

Coal mine waste means coal processing waste and underground development waste.

Coal preparation means chemical or physical processing and the cleaning, concentrating, or other processing or preparation of coal.

Coal preparation plant means a facility where coal is subjected to chemical or physical processing or cleaning, concentrating, or other processing or preparation. It includes facilities associated with coal preparation activities, including, but not limited to the following: loading facilities; storage and stockpile facilities; sheds; shops, and other buildings; water-treatment and water-storage facilities; settling basins and impoundments; and coal processing and other waste disposal areas.

Coal processing waste means earth materials which are separated and wasted from the product coal during cleaning, concentrating, or other processing or preparation of coal.

Combustible material means organic material that is capable of burning, either by fire or through oxidation, accompanied by the evolution of heat and a significant temperature rise.

Compaction means increasing the density of a material by reducing the voids between the particles and is generally accomplished by controlled placement and mechanical effort such as from repeated application of wheel, track, or roller loads from heavy equipment.

Complete and accurate application means an application for permit approval or approval for coal exploration where required, which the regulatory authority determines to contain all information required under the Act, this subchapter, and the regulatory program that is necessary to make a decision on permit issuance.

Control or *controller,* when used in parts 773, 774, and 778 of this chapter, refers to or means—

(a) A permittee of a surface coal mining operation;

(b) An operator of a surface coal mining operation; or

(c) Any person who has the ability to determine the manner in which a surface coal mining operation is conducted.

Cropland means land used for the production of adapted crops for harvest, alone or in a rotation with grasses and legumes, and includes row crops, small grain crops, hay crops, nursery crops, orchard crops, and other similar specialty crops.

Cumulative impact area means the area, including the permit area, within which impacts resulting from the proposed operation may interact with the impacts of all anticipated mining on surface- and ground-water systems. Anticipated mining shall include, at a minimum, the entire projected lives through bond releases of:

(a) The proposed operation,

(b) all existing operations,

(c) any operation for which a permit application has been submitted to the regulatory authority, and

(d) all operations required to meet diligent development requirements for leased Federal coal for which there is actual mine development information available.

Disturbed area means an area where vegetation, topsoil, or overburden is removed or upon which topsoil, spoil, coal processing waste, underground development waste, or noncoal waste is

placed by surface coal mining operations. Those areas are classified as *disturbed* until reclamation is complete and the performance bond or other assurance of performance required by subchapter J of this chapter is released.

Diversion means a channel, embankment, or other manmade structure constructed to divert water from one area to another.

Downslope means the land surface between the projected outcrop of the lowest coalbed being mined along each highwall and a valley floor.

Drinking, domestic or residential water supply means water received from a well or spring and any appurtenant delivery system that provides water for direct human consumption or household use. Wells and springs that serve only agricultural, commercial or industrial enterprises are not included except to the extent the water supply is for direct human consumption or human sanitation, or domestic use.

Embankment means an artificial deposit of material that is raised above the natural surface of the land and used to contain, divert, or store water, support roads or railways, or for other similar purposes.

Ephemeral stream means a stream which flows only in direct response to precipitation in the immediate watershed or in response to the melting of a cover of snow and ice, and which has a channel bottom that is always above the local water table.

Essential hydrologic functions means the role of an alluvial valley floor in collecting, storing, regulating, and making the natural flow of surface or ground water, or both, usefully available for agricultural activities by reason of the valley floor's topographic position, the landscape, and the physical properties of its underlying materials. A combination of these functions provides a water supply during extended periods of low precipitation.

Excess spoil means spoil material disposed of in a location other than the mined-out area; provided that spoil material used to achieve the approximate original contour or to blend the mined-out area with the surrounding terrain in accordance with §§ 816.102(d) and 817.102(d) of this chapter in non-steep slope areas shall not be considered excess spoil.

Existing structure means a structure or facility used in connection with or to facilitate surface coal mining and reclamation operations for which construction begins prior to the approval of a State program or implementation of a Federal program or Federal lands program, whichever occurs first.

Farming means, with respect to alluvial valley floors, the primary use of those areas for the cultivation, cropping or harvesting of plants which benefit from irrigation, or natural subirrigation, that results from the increased moisture content in the alluvium of the valley floors. For purposes of this definition, harvesting does not include the grazing of livestock.

Federal program means a program established by the Secretary pursuant to section 504 of the Act to regulate coal exploration and surface coal mining and reclamation operations on non-Federal and non-Indian lands within a State in accordance with the Act and this chapter.

(a) *Complete Federal program* means a program established by the Secretary pursuant to section 504 of the Act before June 3, 1980, or upon the complete withdrawal of a State program after June 3, 1980, by which the Director regulates all coal exploration and surface coal mining and reclamation operations.

(b) *Partial Federal program* means a program established by the Secretary pursuant to sections 102, 201 and 504 of the Act upon the partial withdrawal of a State program, by which the Director may regulate appropriate portions of coal exploration and surface coal mining and reclamation operations.

Flood irrigation means, with respect to alluvial valley floors, supplying water to plants by natural overflow or the diversion of flows, so that the irrigated surface is largely covered by a sheet of water.

Fugitive dust means that particulate matter not emitted from a duct or stack which becomes airborne due to the forces of wind or surface coal mining and reclamation operations or both. During surface coal mining and reclamation operations it may include emissions from haul roads; wind erosion of exposed surfaces, storage piles, and spoil piles; reclamation operations; and other activities in which material is either removed, stored, transported, or redistributed.

Gravity discharge means, with respect to underground mining activities, mine drainage that flows freely in an open channel downgradient. Mine drainage that occurs as a result of flooding a mine to the level of the discharge is not gravity discharge.

Ground cover means the area of ground covered by the combined aerial parts of vegetation and the litter that is produced naturally onsite, expressed as a percentage of the total area of measurement.

Ground water means subsurface water that fills available openings in rock or soil materials to the extent that they are considered water saturated.

Half-shrub means a perennial plant with a woody base whose annually produced stems die back each year.

Head-of-hollow fill means a fill structure consisting of any material, other than organic material, placed in the uppermost reaches of a hollow where side slopes of the existing hollow, measured at the steepest point, are greater than 20 degrees or the average slope of the profile of the hollow from the toe of the fill to the top of the fill is greater than 10 degrees. In head-of-hollow fills the top surface of the fill, when completed, is at approximately the same elevation as the adjacent ridge line, and no significant area of natural drainage occurs above the fill draining into the fill area.

Higher or better uses means postmining land uses that have a higher economic value or nonmonetary benefit to the landowner or the community than the premining land uses.

Highwall means the face of exposed overburden and coal in an open cut of a surface coal mining activity or for entry to underground mining activities.

Highwall remnant means that portion of highwall that remains after backfilling and grading of a remining permit area.

Historically used for cropland means

(a) lands that have been used for cropland for any 5 years or more out of the 10 years immediately preceding the acquisition, including purchase, lease, or option, of the land for the purpose of conducting or allowing through resale, lease or option the conduct of surface coal mining and reclamation operations;

(b) lands that the regulatory authority determines, on the basis of additional cropland history of the surrounding lands and the lands under consideration, that the permit area is clearly cropland but falls outside the specific 5-years-in-10 criterion, in which case the regulations for prime farmland may be applied to include more years of cropland history only to increase the prime farmland acreage to be preserved; or

(c) lands that would likely have been used as cropland for any 5 out of the last 10 years, immediately preceding such acquisition but for the same fact of ownership or control of the land unrelated to the productivity of the land.

Hydrologic balance means the relationship between the quality and quantity of water inflow to, water outflow from, and water storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir. It encompasses the dynamic

relationships among precipitation, runoff, evaporation, and changes in ground and surface water storage.

Hydrologic regime means the entire state of water movement in a given area. It is a function of the climate and includes the phenomena by which water first occurs as atmospheric water vapor, passes into a liquid or solid form, falls as precipitation, moves along or into the ground surface, and returns to the atmosphere as vapor by means of evaporation and transpiration.

Imminent danger to the health and safety of the public means the existence of any condition or practice, or any violation of a permit or other requirements of the Act in a surface coal mining and reclamation operation, which could reasonably be expected to cause substantial physical harm to persons outside the permit area before the condition, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same condition or practice giving rise to the peril, would avoid exposure to the danger during the time necessary for abatement.

Impounding structure means a dam, embankment or other structure used to impound water, slurry, or other liquid or semi-liquid material.

Impoundments means all water, sediment, slurry or other liquid or semi-liquid holding structures and depressions, either naturally formed or artificially built.

In situ processes means activities conducted on the surface or underground in connection with in-place distillation, retorting, leaching, or other chemical or physical processing of coal. The term includes, but is not limited to, in situ gasification, in situ leaching, slurry mining, solution mining, borehole mining, and fluid recovery mining.

Intermittent stream means—

(a) A stream or reach of a stream that drains a watershed of at least one square mile, or

(b) A stream or reach of a stream that is below the local water table for at least some part of the year, and obtains its flow from both surface runoff and ground water discharge.

Irreparable damage to the environment means any damage to the environment, in violation of the Act, the regulatory program, or this chapter, that cannot be corrected by actions of the applicant.

Knowing or *knowingly* means that a person who authorized, ordered, or carried out an act or omission knew or had reason to know that the act or omission would result in either a violation or a failure to abate or correct a violation.

Land use means specific uses or management-related activities, rather than the vegetation or cover of the land. Land uses may be identified in combination when joint or seasonal uses occur and may include land used for support facilities that are an integral part of the use. Changes of land use from one of the following categories to another shall be considered as a change to an alternative land use which is subject to approval by the regulatory authority.

(a) *Cropland.* Land used for the production of adapted crops for harvest, alone or in rotation with grasses and legumes, that include row crops, small grain crops, hay crops, nursery crops, orchard crops, and other similar crops.

(b) *Pastureland or land occasionally cut for hay.* Land used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or occasionally cut and cured for livestock feed.

(c) *Grazingland.* Land used for grasslands and forest lands where the indigenous vegetation is actively managed for grazing, browsing, or occasional hay production.

(d) *Forestry.* Land used or managed for the long-term production of wood, wood fiber, or wood-derived products.

(e) *Residential.* Land used for single- and multiple-family housing, mobile home parks, or other residential lodgings.

(f) *Industrial/Commercial.* Land used for—

(1) Extraction or transformation of materials for fabrication of products, wholesaling of products, or long-term storage of products. This includes all heavy and light manufacturing facilities.

(2) Retail or trade of goods or services, including hotels, motels, stores, restaurants, and other commercial establishments.

(g) *Recreation.* Land used for public or private leisure-time activities, including developed recreation facilities such as parks, camps, and amusement areas, as well as areas for less intensive uses such as hiking, canoeing, and other undeveloped recreational uses.

(h) *Fish and wildlife habitat.* Land dedicated wholly or partially to the production, protection, or management of species of fish or wildlife.

(i) *Developed water resources.* Land used for storing water for beneficial uses, such as stockponds, irrigation, fire protection, flood control, and water supply.

(j) *Undeveloped land or no current use or land management.* Land that is undeveloped or, if previously developed, land that has been allowed to return naturally to an undeveloped state or has been allowed to return to forest through natural succession.

Lands eligible for remining means those lands that would otherwise be eligible for expenditures under section 404 or under section 402(g)(4) of the Act.

Material damage, in the context of §§ 784.20 and 817.121 of this chapter, means:

(a) Any functional impairment of surface lands, features, structures or facilities;

(b) Any physical change that has a significant adverse impact on the affected land's capability to support any current or reasonably foreseeable uses or causes significant loss in production or income; or

(c) Any significant change in the condition, appearance or utility of any structure or facility from its pre-subsidence condition.

Materially damage the quantity or quality of water means, with respect to alluvial valley floors, to degrade or reduce by surface coal mining and reclamation operations the water quantity or quality supplied to the alluvial valley floor to the extent that resulting changes would signficantly decrease the capability of the alluvial valley floor to support farming.

MSHA means the Mine Safety and Health Administration.

Moist bulk density means the weight of soil (oven dry) per unit volume. Volume is measured when the soil is at field moisture capacity (1⁄3 bar moisture tension). Weight is determined after drying the soil at 105 °C.

Mulch means vegetation residues or other suitable materials that aid in soil stabilization and soil moisture conservation, thus providing micro-climatic conditions suitable for germination and growth.

Non-commercial building means any building, other than an occupied residential dwelling, that, at the time the subsidence occurs, is used on a regular or temporary basis as a public building or community or institutional building as those terms are defined in § 761.5 of this chapter. Any building used only for commercial agricultural, industrial, retail or other commercial enterprises is excluded.

Noxious plants means species that have been included on official State lists of noxious plants for the State in which the surface coal mining and reclamation operation occurs.

Occupied residential dwelling and structures related thereto means, for purposes of §§ 784.20 and 817.121, any building or other structure that, at the

time the subsidence occurs, is used either temporarily, occasionally, seasonally, or permanently for human habitation. This term also includes any building, structure or facility installed on, above or below, or a combination thereof, the land surface if that building, structure or facility is adjunct to or used in connection with an occupied residential dwelling. Examples of such structures include, but are not limited to, garages; storage sheds and barns; greenhouses and related buildings; utilities and cables; fences and other enclosures; retaining walls; paved or improved patios, walks and driveways; septic sewage treatment facilities; and lot drainage and lawn and garden irrigation systems. Any structure used only for commercial agricultural, industrial, retail or other commercial purposes is excluded.

Operator means any person engaged in coal mining who removes or intends to remove more than 250 tons of coal from the earth or from coal refuse piles by mining within 12 consecutive calendar months in any one location.

Other treatment facilities mean any chemical treatments, such as flocculation or neutralization, or mechanical structures, such as clarifiers or precipitators, that have a point source discharge and are utilized:

(a) To prevent additional contributions of dissolved or suspended solids to streamflow or runoff outside the permit area, or

(b) To comply with all applicable State and Federal water-quality laws and regulations.

Outslope means the face of the spoil or embankment sloping downward from the highest elevation to the toe.

Overburden means material of any nature, consolidated or unconsolidated, that overlies a coal deposit, excluding topsoil.

Own, owner, or *ownership,* as used in parts 773, 774, and 778 of this chapter (except when used in the context of ownership of real property), means being a sole proprietor or owning of record in excess of 50 percent of the voting securities or other instruments of ownership of an entity.

Perennial stream means a stream or part of a stream that flows continuously during all of the calendar year as a result of ground-water discharge or surface runoff. The term does not include *intermittent stream* or *ephemeral stream.*

Performance bond means a surety bond, collateral bond or self-bond or a combination thereof, by which a permittee assures faithful performance of all the requirements of the Act, this chapter, a State, Federal or Federal lands program, and the requirements of the permit and reclamation plan.

Permanent diversion means a diversion remaining after surface coal mining and reclamation operations are completed which has been approved for retention by the regulatory authority and other appropriate State and Federal agencies.

Permanent impoundment means an impoundment which is approved by the regulatory authority and, if required, by other State and Federal agencies for retention as part of the postmining land use.

Permit means a permit to conduct surface coal mining and reclamation operations issued by the State regulatory authority pursuant to a State program or by the Secretary pursuant to a Federal program. For purposes of the Federal lands program, permit means a permit issued by the State regulatory authority under a cooperative agreement or by OSM where there is no cooperative agreement.

Permit area means the area of land, indicated on the approved map submitted by the operator with his or her application, required to be covered by the operator's performance bond under subchapter J of this chapter and which shall include the area of land upon which the operator proposes to conduct surface coal mining and reclamation operations under the permit, including all disturbed areas; provided that areas adequately bonded under another valid permit may be excluded from the permit area.

Permittee means a person holding or required by the Act or this chapter to hold a permit to conduct surface coal mining and reclamation operations issued by a State regulatory authority pursuant to a State program, by the Director pursuant to a Federal program, by the Director pursuant to a Federal lands program, or, where a cooperative agreement pursuant to section 523 of the Act has been executed, by the Director and the State regulatory authority.

Precipitation event means a quantity of water resulting from drizzle, rain, snow, sleet, or hail in a limited period of time. It may be expressed in terms of recurrence interval. As used in these regulations, *precipitation event* also includes that quantity of water emanating from snow cover as snowmelt in a limited period of time.

Previously mined area means land affected by surface coal mining operations prior to August 3, 1977, that has not been reclaimed to the standards of 30 CFR chapter VII.

Prime farmland means those lands which are defined by the Secretary of Agriculture in 7 CFR part 657 (**Federal Register** Vol. 4 No. 21) and which have historically been used for cropland as that phrase is defined above.

Principal shareholder means any person who is the record or beneficial owner of 10 percent or more of any class of voting stock.

Property to be mined means both the surface estates and mineral estates within the permit area and the area covered by underground workings.

Rangeland means land on which the natural potential (climax) plant cover is principally native grasses, forbs, and shrubs valuable for forage. This land includes natural grasslands and savannahs, such as prairies, and juniper savannahs, such as brushlands. Except for brush control, management is primarily achieved by regulating the intensity of grazing and season of use.

Reasonably available spoil means spoil and suitable coal mine waste material generated by the remining operation or other spoil or suitable coal mine waste material located in the permit area that is accessible and available for use and that when rehandled will not cause a hazard to public safety or significant damage to the environment.

Recharge capacity means the ability of the soils and underlying materials to allow precipitation and runoff to infiltrate and reach the zone of saturation.

Reclamation means those actions taken to restore mined land as required by this chapter to a postmining land use approved by the regulatory authority.

Recurrence interval means the interval of time in which a precipitation event is expected to occur once, on the average. For example, the 10-year 24-hour precipitation event would be that 24-hour precipitation event expected to occur on the average once in 10 years.

Reference area means a land unit maintained under appropriate management for the purpose of measuring vegetation ground cover, productivity and plant species diversity that are produced naturally or by crop production methods approved by the regulatory authority. Reference areas must be representative of geology, soil, slope, and vegetation in the permit area.

Refuse pile means a surface deposit of coal mine waste that does not impound water, slurry, or other liquid or semi-liquid material.

Remining means conducting surface coal mining and reclamation operations which affect previously mined areas.

Renewable resource lands means aquifers and areas for the recharge of aquifers and other underground waters, areas for agricultural or silvicultural

production of food and fiber, and grazinglands.

Replacement of water supply means, with respect to protected water supplies contaminated, diminished, or interrupted by coal mining operations, provision of water supply on both a temporary and permanent basis equivalent to premining quantity and quality. Replacement includes provision of an equivalent water delivery system and payment of operation and maintenance costs in excess of customary and reasonable delivery costs for premining water supplies.

(a) Upon agreement by the permittee and the water supply owner, the obligation to pay such operation and maintenance costs may be satisfied by a one-time payment in an amount which covers the present worth of the increased annual operation and maintenance costs for a period agreed to by the permittee and the water supply owner.

(b) If the affected water supply was not needed for the land use in existence at the time of loss, contamination, or diminution, and if the supply is not needed to achieve the postmining land use, replacement requirements may be satisfied by demonstrating that a suitable alternative water source is available and could feasibly be developed. If the latter approach is selected, written concurrence must be obtained from the water supply owner.

Road means a surface right-of-way for purposes of travel by land vehicles used in surface coal mining and reclamation operations or coal exploration. A road consists of the entire area within the right-of-way, including the roadbed, shoulders, parking and side areas, approaches, structures, ditches, and surface. The term includes access and haulroads constructed, used, reconstructed, improved, or maintained for use in surface coal mining and reclamation operations or coal exploration, including use by coal hauling vehicles to and from transfer, processing, or storage areas. The term does not include ramps and routes of travel within the immediate mining area or within spoil or coal mine waste disposal areas.

Safety factor means the ratio of the available shear strength to the developed shear stress, or the ratio of the sum of the resisting forces to the sum of the loading or driving forces, as determined by accepted engineering practices.

Sedimentation pond means an impoundment used to remove solids from water in order to meet water quality standards or effluent limitations before the water leaves the permit area.

Significant, imminent environmental harm to land, air or water resources means—

(a) An environmental harm is an adverse impact on land, air, or water resources which resources include, but are not limited to, plant and animal life.

(b) An environmental harm is imminent, if a condition, practice, or violation exists which—

(1) Is causing such harm; or,

(2) May reasonably be expected to cause such harm at any time before the end of the reasonable abatement time that would be set under section 521(a)(3) of the Act.

(c) An environmental harm is significant if that harm is appreciable and not immediately reparable.

Siltation structure means a sedimentation pond, a series of sedimentation ponds, or other treatment facility.

Slope means average inclination of a surface, measured from the horizontal, generally expressed as the ratio of a unit of vertical distance to a given number of units of horizontal distance (*e.g.,* 1v: 5h). It may also be expressed as a percent or in degrees.

Soil horizons means contrasting layers of soil parallel or nearly parallel to the land surface. Soil horizons are differentiated on the basis of field characteristics and laboratory data. The four master soil horizons are—

(a) *A horizon.* The uppermost mineral layer, often called the surface soil. It is the part of the soil in which organic matter is most abundant, and leaching of soluble or suspended particles is typically the greatest;

(b) *E horizon.* The layer commonly near the surface below an A horizon and above a B horizon. An E horizon is most commonly differentiated from an overlying A horizon by lighter color and generally has measurably less organic matter than the A horizon. An E horizon is most commonly differentiated from an underlying B horizon in the same sequum by color of higher value or lower chroma, by coarser texture, or by a combination of theses properties;

(c) *B horizon.* The layer that typically is immediately beneath the E horizon and often called the subsoil. This middle layer commonly contains more clay, iron, or aluminum than the A, E, or C horizons; and

(d) *C horizon.* The deepest layer of soil profile. It consists of loose material or weathered rock that is relatively unaffected by biologic activity.

Soil survey means a field and other investigation, resulting in a map showing the geographic distribution of different kinds of soils and an accompanying report that describes, classifies, and interprets such soils for use. Soil surveys must meet the standards of the National Cooperative Soil Survey as incorporated by reference in 30 CFR 785.17(c)(1).

Special bituminous coal mines means those mines in existence on January 1, 1972, or mines adjoining or having a common boundary with those mines for which development began after August 3, 1977, that are located in the State of Wyoming and that are being mined or will be mined according to the following criteria:

(a) Surface mining takes place on a relatively limited site for an extended period of time. The surface opening of the excavation is at least the full size of the excavation and has a continuous border.

(b) Excavation of the mine pit follows a coal seam that inclines 15° or more from the horizontal, and as the excavation proceeds downward it expands laterally to maintain stability of the pitwall or as necessary to accommodate the orderly expansion of the total mining operation.

(c) The amount of material removed from the pit is large in comparison to the surface area disturbed.

(d) There is no practicable alternative to the deep open-pit method of mining the coal.

(e) There is no practicable way to reclaim the land as required in subchapter K.

Spoil means overburden that has been removed during surface coal mining operations.

Stabilize means to control movement of soil, spoil piles, or areas of disturbed earth by modifying the geometry of the mass, or by otherwise modifying physical or chemical properties, such as by providing a protective surface coating.

State program means a program established by a State and approved by the Secretary pursuant to section 503 of the Act to regulate surface coal mining and reclamation operations on non-Indian and non-Federal lands within that State, according to the requirements of the Act and this chapter. If a cooperative agreement under part 745 has been entered into, a State program may apply to Federal lands, in accordance with the terms of the cooperative agreement.

Steep slope means any slope of more than 20° or such lesser slope as may be designated by the regulatory authority after consideration of soil, climate, and other characteristics of a region or State.

Subirrigation means, with respect to alluvial valley floors, the supplying of water to plants from underneath or from a semisaturated or saturated subsurface

zone where water is available for use by vegetation.

Substantially disturb means, for purposes of coal exploration, to significantly impact land or water resources by blasting; by removal of vegetation, topsoil, or overburden; by construction of roads or other access routes; by placement of excavated earth or waste material on the natural land surface or by other such activities; or to remove more than 250 tons of coal.

Successor in interest means any person who succeeds to rights granted under a permit, by transfer, assignment, or sale of those rights.

Surface mining activities means those surface coal mining and reclamation operations incident to the extraction of coal from the earth by removing the materials over a coal seam, before recovering the coal, by auger coal mining, or by recovery of coal from a deposit that is not in its original geologic location.

Suspended solids or nonfilterable residue, expressed as milligrams per liter, means organic or inorganic materials carried or held in suspension in water which are retained by a standard glass fiber filter in the procedure outlined by the Environmental Protection Agency's regulations for waste water and analyses (40 CFR part 136).

Temporary diversion means a diversion of a stream or overland flow which is used during coal exploration or surface coal mining and reclamation operations and not approved by the regulatory authority to remain after reclamation as part of the approved postmining land use.

Temporary impoundment means an impoundment used during surface coal mining and reclamation operations, but not approved by the regulatory authority to remain as part of the approved postmining land use.

Topsoil means the A and E soil horizon layers of the four master soil horizons.

Toxic-forming materials means earth materials or wastes which, if acted upon by air, water, weathering, or microbiological processes, are likely to produce chemical or physical conditions in soils or water that are detrimental to biota or uses of water.

Toxic mine drainage means water that is discharged from active or abandoned mines or other areas affected by coal exploration or surface coal mining and reclamation operations, which contains a substance that through chemical action or physical effects is likely to kill, injure, or impair biota commonly present in the area that might be exposed to it.

Transfer, assignment, or sale of permit rights means a change of a permittee.

Unanticipated event or condition, as used in § 773.13 of this chapter, means an event or condition related to prior mining activity which arises from a surface coal mining and reclamation operation on lands eligible for remining and was not contemplated by the applicable permit.

Underground development waste means waste-rock mixtures of coal, shale, claystone, siltstone, sandstone, limestone, or related materials that are excavated, moved, and disposed of from underground workings in connection with underground mining activities.

Underground mining activities means a combination of—

(a) Surface operations incident to underground extraction of coal or in situ processing, such as construction, use, maintenance, and reclamation of roads, above-ground repair areas, storage areas, processing areas, shipping areas, areas upon which are sited support facilities including hoist and ventilating ducts, areas utilized for the disposal and storage of waste, and areas on which materials incident to underground mining operations are placed; and

(b) Underground operations such as underground construction, operation, and reclamation of shafts, adits, underground support facilities, in situ processing, and underground mining, hauling, storage, and blasting.

Undeveloped rangeland means, for purposes of alluvial valley floors, lands where the use is not specifically controlled and managed.

Upland areas means, with respect to alluvial valley floors, those geomorphic features located outside the floodplain and terrace complex, such as isolated higher terraces, alluvial fans, pediment surfaces, landslide deposits, and surfaces covered with residuum, mud flows or debris flows, as well as highland areas underlain by bedrock and covered by residual weathered material or debris deposited by sheetwash, rillwash, or windblown material.

Valley fill means a fill structure consisting of any material, other than organic material, that is placed in a valley where side slopes of the existing valley, measured at the steepest point, are greater than 20 degrees, or where the average slope of the profile of the valley from the toe of the fill to the top of the fill is greater than 10 degrees.

Violation, when used in the context of the permit application information or permit eligibility requirements of sections 507 and 510(c) of the Act and related regulations, means—

(1) A failure to comply with an applicable provision of a Federal or State law or regulation pertaining to air or water environmental protection, as evidenced by a written notification from a governmental entity to the responsible person; or

(2) A noncompliance for which OSM has provided one or more of the following types of notice or a State regulatory authority has provided equivalent notice under corresponding provisions of a State regulatory program—

(i) A notice of violation under § 843.12 of this chapter.

(ii) A cessation order under § 843.11 of this chapter.

(iii) A final order, bill, or demand letter pertaining to a delinquent civil penalty assessed under part 845 or 846 of this chapter.

(iv) A bill or demand letter pertaining to delinquent reclamation fees owed under part 870 of this chapter.

(v) A notice of bond forfeiture under § 800.50 of this chapter when—

(A) One or more violations upon which the forfeiture was based have not been abated or corrected;

(B) The amount forfeited and collected is insufficient for full reclamation under § 800.50(d)(1) of this chapter, the regulatory authority orders reimbursement for additional reclamation costs, and the person has not complied with the reimbursement order; or

(C) The site is covered by an alternative bonding system approved under § 800.11(e) of this chapter, that system requires reimbursement of any reclamation costs incurred by the system above those covered by any site-specific bond, and the person has not complied with the reimbursement requirement and paid any associated penalties.

Violation, failure or refusal, for purposes of parts 724 and 846 of this chapter, means—

(1) A failure to comply with a condition of a Federally-issued permit or of any other permit that OSM is directly enforcing under section 502 or 521 of the Act or the regulations implementing those sections; or

(2) A failure or refusal to comply with any order issued under section 521 of the Act, or any order incorporated in a final decision issued by the Secretary under the Act, except an order incorporated in a decision issued under section 518(b) or section 703 of the Act.

Violation notice means any written notification from a regulatory authority or other governmental entity, as specified in the definition of *violation* in this section.

Water table means the upper surface of a zone of saturation, where the body of ground water is not confined by an overlying impermeable zone.

Willful or *willfully* means that a person who authorized, ordered or carried out an act or omission that resulted in either a violation or the failure to abate or correct a violation acted—

(1) Intentionally, voluntarily, or consciously; and

(2) With intentional disregard or plain indifference to legal requirements.

§ 701.11 Applicability.

(a) Any person who conducts surface coal mining operations on non-Indian or non-Federal lands on or after 8 months from the date of approval of a State program or implementation of a Federal program shall have a permit issued pursuant to the applicable State or Federal program. However, under conditions specified in 30 CFR 773.4(b) of this chapter, a person may continue operations under a previously issued permit after 8 months from the date of approval of a State program or implementation of a Federal program.

(b) Any person who conducts surface coal mining operations on Federal lands on or after 8 months from the date of approval of a State program or implementation of a Federal program for the State in which the Federal lands are located shall have a permit issued pursuant to part 740 of this chapter. However, under conditions specified in § 740.13(a)(3) of this chapter, a person may continue such operations under a mining plan previously approved pursuant to 43 CFR part 3480 or a permit issued by the State under the interim State program after 8 months after the date of approval of a State program or implementation of a Federal program.

(c) Any person who conducts surface coal mining operations on Indian lands on or after eight months from the effective date of the Federal program for Indian lands shall have a permit issued pursuant to part 750 of this chapter. However, a person who is authorized to conduct surface coal mining operations may continue to conduct those operations beyond eight months from the effective date of the Federal program for Indian lands if the following conditions are met:

(1) An application for a permit to conduct those operations has been made to the Director within two months after the effective date of the Federal program for Indian lands and the initial administrative decision on that application has not been issued; and

(2) Those operations are conducted in compliance with all terms and conditions of the existing authorization to mine, the requirements of the Act, 25 CFR part 216, and the requirements of all applicable mineral agreements, leases or licenses.

(d) The requirements of subchapter K of this chapter shall be effective and shall apply to each surface coal mining and reclamation operation for which the surface coal mining operation is required to obtain a permit under the Act, on the earliest date upon which the Act and this chapter require a permit to be obtained, except as provided in paragraph (e) of this section.

(e)(1) Each structure used in connection with or to facilitate a coal exploration or surface coal mining and reclamation operation shall comply with the performance standards and the design requirements of subchapter K of this chapter, except that—

(i) An existing structure which meets the performance standards of subchapter K of this chapter but does not meet the design requirements of subchapter K of this chapter may be exempted from meeting those design requirements by the regulatory authority. The regulatory authority may grant this exemption only as part of the permit application process after obtaining the information required by 30 CFR 780.12 or 784.12 and after making the findings required in 30 CFR 773.15;

(ii) If the performance standard of subchapter B of this chapter is at least as stringent as the comparable performance standard of subchapter K of this chapter, an existing structure which meets the performance standards of subchapter B of this chapter may be exempted by the regulatory authority from meeting the design requirements of subchapter K of this chapter. The regulatory authority may grant this exemption only as part of the permit application process after obtaining the information required by 30 CFR 780.12 or 784.12 and after making the findings required in 30 CFR 773.15;

(iii) An existing structure which meets a performance standard of subchapter B of this chapter which is less stringent than the comparable performance standards of subchapter K of this chapter or which does not meet a performance standard of subchapter K of this chapter, for which there was no equivalent performance standards in subchapter B of this chapter, shall be modified or reconstructed to meet the performance and design standard of subchapter K of this chapter pursuant to a compliance plan approved by the regulatory authority only as part of the permit application as required in 30 CFR 780.12 or 784.12 and according to the findings required by 30 CFR 773.15;

(iv) An existing structure which does not meet the performance standards of subchapter B of this chapter and which the applicant proposes to use in connection with or to facilitate the coal exploration or surface coal mining and reclamation operation shall be modified or reconstructed to meet the performance and design standards of subchapter K prior to issuance of the permit.

(2) The exemptions provided in paragraphs (e)(1)(i) and (e)(1)(ii) of this section shall not apply to—

(i) The requirements for existing and new coal mine waste disposal facilities; and

(ii) The requirements to restore the approximate original contour of the land.

(f)(1) Any person conducting coal exploration on non-Federal and non-Indian lands on or after the date on which a State program is approved or a Federal program implemented, shall either file a notice of intention to explore or obtain approval of the regulatory authority, as required by 30 CFR part 772.

(2) Coal exploration performance standards in 30 CFR part 815 shall apply to coal exploration on non-Federal and non-Indian lands which substantially disturbs the natural land surface 2 months after approval of a State program or implementation of a Federal program.

■ 3. Revise part 773 to read as follows:

PART 773—REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

Sec.

773.1 Scope and purpose.
773.3 Information collection.
773.4 Requirements to obtain permits.
773.5 Regulatory coordination with requirements under other laws.
773.6 Public participation in permit processing.
773.7 Review of permit applications.
773.8 General provisions for review of permit application information and entry of information into AVS.
773.9 Review of applicant and operator information.
773.10 Review of permit history.
773.11 Review of compliance history.
773.12 Permit eligibility determination.
773.13 Unanticipated events or conditions at remaining sites.
773.14 Eligibility for provisionally issued permits.
773.15 Written findings for permit application approval.
773.16 Performance bond submittal.
773.17 Permit conditions.
773.19 Permit issuance and right of renewal.

773.21 Initial review and finding requirements for improvidently issued permits.
773.22 Notice requirements for improvidently issued permits.
773.23 Suspension or rescission requirements for improvidently issued permits.
773.25 Who may challenge ownership or control listings and findings.
773.26 How to challenge an ownership or control listing or finding.
773.27 Burden of proof for ownership or control challenges.
773.28 Written agency decision on challenges to ownership or control listings or findings.

Authority: 30 U.S.C. 1201 *et seq.,* 16 U.S.C. 470 *et seq.,* 16 U.S.C. 661 *et seq.,* 16 U.S.C. 703 *et seq.,* 16 U.S.C. 668a *et seq.,* 16 U.S.C. 469 *et seq.,* and 16 U.S.C. 1531 *et seq.*

§ 773.1 Scope and purpose.

This part provides minimum requirements for permits and permit processing and covers obtaining and reviewing permits; coordinating with other laws; public participation; permit decision and notification; permit conditions; and permit term and right of renewal.

§ 773.3 Information collection.

The collections of information contained in part 773 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1029–0115. The information collected will be used by the regulatory authority in processing surface coal mining permit applications. Persons intending to conduct surface coal mining operations must respond to obtain a benefit. A Federal 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. Response is required to obtain a benefit in accordance with SMCRA. Send comments regarding burden estimates or any other aspect of this collection of information, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 202—SIB, 1951 Constitution Avenue NW., Washington, DC 20240.

§ 773.4 Requirements to obtain permits.

(a) *All operations.* On and after 8 months from the effective date of a permanent regulatory program within a State, no person shall engage in or carry out any surface coal mining operations, unless such person has first obtained a permit issued by the regulatory authority except as provided for in paragraph (b) of this section. A permittee need not renew the permit if no surface coal mining operations will be conducted under the permit and solely reclamation activities remain to be done. Obligations established under a permit continue until completion of surface coal mining and reclamation operations, regardless of whether the authorization to conduct surface coal mining operations has expired or has been terminated, revoked, or suspended.

(b) *Continuation of initial program operations.* (1) If a State program receives final disapproval under part 732 of this chapter, including judicial review of the disapproval, existing surface coal mining and reclamation operations may continue pursuant to the provisions of subchapter B of this chapter and section 502 of the Act until promulgation of a complete Federal program for the State. During this period, no new permits for surface coal mining and reclamation operations shall be issued by the State. Permits that lapse during this period may continue in full force and effect within the specified permit area until promulgation of a Federal program for the State.

(2) Except for coal preparation plants separately authorized to operate under 30 CFR 785.21(e), a person conducting surface coal mining operations, under a permit issued or amended by the regulatory authority in accordance with the requirements of section 502 of the Act, may conduct such operations beyond the period prescribed in paragraph (a) of this section if—

(i) Not later than 2 months following the effective date of a permanent regulatory program, regardless of litigation contesting that program, an application for a permanent regulatory program permit is filed for any operation to be conducted after the expiration of 8 months from such effective date in accordance with the provisions of the regulatory program;

(ii) The regulatory authority has not yet rendered an initial administrative decision approving or disapproving the permit; and

(iii) The surface coal mining and reclamation operation is conducted in compliance with the requirements of the Act, subchapter B of this chapter, applicable State statutes and regulations, and all terms and conditions of the initial program authorization or permit.

(3) No new initial program permits may be issued after the effective date of a State program unless the application was received prior to such date.

(c) *Continued operations under Federal program permits.* (1) A permit issued by the Director pursuant to a Federal program for a State shall be valid under any superseding State program approved by the Secretary.

(2) The Federal permittee shall have the right to apply to the State regulatory authority for a State permit to supersede the Federal permit.

(3) The State regulatory authority may review a permit issued pursuant to the superseded Federal program to determine that the requirements of the Act and the approved State program are not violated by the Federal permit, and to the extent that the approved State program contains additional requirements not contained in the Federal program for the State, the State regulatory authority shall—

(i) Inform the permittee in writing;

(ii) Provide the permittee an opportunity for a hearing;

(iii) Provide the permittee a reasonable opportunity to resubmit the permit application in whole or in part, as appropriate; and

(iv) Provide the permittee a reasonable time to conform ongoing surface coal mining and reclamation operations to the requirements of the State program.

(d) *Continued operations under State program permits.* (1) A permit issued pursuant to a previously approved or conditionally approved State program shall be valid under a superseding Federal program.

(2) Immediately following promulgation of a Federal program, the Director shall review the permits issued under the previously approved State program to determine that the requirements of the Act, this chapter, and the Federal program are not violated. If the Director determines that a permit was granted contrary to the requirments of this Act, the Director shall—

(i) Inform the permittee in writing;

(ii) Provide the permittee an opportunity for a hearing;

(iii) Provide the permittee a reasonable opportunity to resubmit the permit application in whole or in part, as appropriate; and

(iv) Provide the permittee a reasonable time to conform ongoing surface coal mining and reclamation operations to the requirements of the Federal program, as prescribed in the Federal program for the State.

§ 773.5 Regulatory coordination with requirements under other laws.

Each regulatory program shall, to avoid duplication, provide for the coordination of review and issuance of permits for surface coal mining and reclamation operations with applicable requirements of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531

et seq.); the Fish and Wildlife Coordination Act, as amended (16 U.S.C. 661 *et seq.*); the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. 703 *et seq.*); The National Historic Preservation Act of 1966, as amended (16 U.S.C. 470 *et seq.*); the Bald Eagle Protection Act, as amended (16 U.S.C. 668a); for Federal programs only, the Archeological and Historic Preservation Act of 1974 (16 U.S.C. 469 *et seq.*); and the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa *et seq.*) where Federal and Indian lands covered by that Act are involved.

§ 773.6 Public participation in permit processing.

(a) *Filing and public notice.* (1) Upon submission of an administratively complete application, an applicant for a permit, significant revision of a permit under § 774.13, or renewal of a permit under § 774.15, shall place an advertisement in a local newspaper of general circulation in the locality of the proposed surface coal mining and reclamation operation at least once a week for four consecutive weeks. A copy of the advertisement as it will appear in the newspaper shall be submitted to the regulatory authority. The advertisement shall contain, at a minimum, the following:

(i) The name and business address of the applicant.

(ii) A map or description which clearly shows or describes the precise location and boundaries of the proposed permit area and is sufficient to enable local residents to readily identify the proposed permit area. It may include towns, bodies of water, local landmarks, and any other information which would identify the location. If a map is used, it shall indicate the north direction.

(iii) The location where a copy of the application is available for public inspection.

(iv) The name and address of the regulatory authority where written comments, objections, or requests for informal conferences on the application may be submitted under paragraphs (b) and (c) of this section.

(v) If an applicant seeks a permit to mine within 100 feet of the outside right-of-way of a public road or to relocate or close a public road, except where public notice and hearing have previously been provided for this particular part of the road in accordance with § 761.14 of this chapter; a concise statement describing the public road, the particular part to be relocated or closed, and the approximate timing and duration of the relocation or closing.

(vi) If the application includes a request for an experimental practice under § 785.13, a statement indicating that an experimental practice is requested and identifying the regulatory provisions for which a variance is requested.

(2) The applicant shall make an application for a permit, significant revision under § 774.13, or renewal of a permit under § 774.15 available for the public to inspect and copy by filing a full copy of the application with the recorder at the courthouse of the county where the mining is proposed to occur, or an accessible public office approved by the regulatory authority. This copy of the application need not include confidential information exempt from disclosure under paragraph (d) of this section. The application required by this paragraph shall be filed by the first date of newspaper advertisement of the application. The applicant shall file any changes to the application with the public office at the same time the change is submitted to the regulatory authority.

(3) Upon receipt of an administratively complete application for a permit, a significant revision to a permit under § 774.13, or a renewal of a permit under § 774.15, the regulatory authority shall issue written notification indicating the applicant's intention to mine the described tract of land, the application number or other identifier, the location where the copy of the application may be inspected, and the location where comments on the application may be submitted. The notification shall be sent to—

(i) Local governmental agencies with jurisdiction over or an interest in the area of the proposed surface coal mining and reclamation operation, including but not limited to planning agencies, sewage and water treatment authorities, water companies; and

(ii) All Federal or State governmental agencies with authority to issue permits and licenses applicable to the proposed surface coal mining and reclamation operation and which are part of the permit coordinating process developed in accordance with section 503(a)(6) or section 504(h) of the Act, or § 773.5; or those agencies with an interest in the proposed operation, including the U.S. Department of Agriculture Soil Conservation Service district office, the local U.S. Army Corps of Engineers district engineer, the National Park Service, State and Federal fish and wildlife agencies, and the historic preservation officer.

(b) *Comments and objections on permit applications.* (1) Within a reasonable time established by the regulatory authority, written comments or objections on an application for a permit, significant revision to a permit under § 774.13, or renewal of a permit under § 774.15 may be submitted to the regulatory authority by public entities notified under paragraph (a)(3) of this section with respect to the effects of the proposed mining operations on the environment within their areas of responsibility.

(2) Written objections to an application for a permit, significant revision to a permit under § 774.13, or renewal of a permit under § 774.15 may be submitted to the regulatory authority by any person having an interest which is or may be adversely affected by the decision on the application, or by an officer or head of any Federal, State, or local government agency or authority, within 30 days after the last publication of the newspaper notice required by paragraph (a) of this section.

(3) The regulatory authority shall upon receipt of such written comments or objections—

(i) Transmit a copy of the comments or objections to the applicants; and

(ii) File a copy for public inspection at the same public office where the application is filed.

(c) *Informal conferences.* (1) Any person having an interest which is or may be adversely affected by the decision on the application, or an officer or a head of a Federal, State, or local government agency, may request in writing that the regulatory authority hold an informal conference on the application for a permit, significant revision to a permit under § 774.13, or renewal of a permit under § 774.15. The request shall—

(i) Briefly summarize the issues to be raised by the requestor at the conference;

(ii) State whether the requestor desires to have the conference conducted in the locality of the proposed operation; and

(iii) Be filed with the regulatory authority no later than 30 days after the last publication of the newspaper advertisement required under paragraph (a) of this section.

(2) Except as provided in paragraph (c)(3) of this section, if an informal conference is requested in accordance with paragraph (c)(1) of this section, the regulatory authority shall hold an informal conference within a reasonable time following the receipt of the request. The informal conference shall be conducted as follows:

(i) If requested under paragraph (c)(1)(ii) of this section, it shall be held in the locality of the proposed surface coal mining and reclamation operation.

(ii) The date, time, and location of the informal conference shall be sent to the applicant and other parties to the conference and advertised by the regulatory authority in a newspaper of general circulation in the locality of the proposed surface coal mining and reclamation operation at least 2 weeks before the scheduled conference.

(iii) If requested in writing by a conference requestor at a reasonable time before the conference, the regulatory authority may arrange with the applicant to grant parties to the conference access to the proposed permit area and, to the extent that the applicant has the right to grant access to it, to the adjacent area prior to the established date of the conference for the purpose of gathering information relevant to the conference.

(iv) The requirements of section 5 of the Administrative Procedure Act, as amended (5 U.S.C. 554), shall not apply to the conduct of the informal conference. The conference shall be conducted by a representative of the regulatory authority, who may accept oral or written statements and any other relevant information from any party to the conference. An electronic or stenographic record shall be made of the conference, unless waived by all the parties. The record shall be maintained and shall be accessible to the parties of the conference until final release of the applicant's performance bond or other equivalent guarantee pursuant to subchapter J of this chapter.

(3) If all parties requesting the informal conference withdraw their request before the conference is held, the informal conference may be canceled.

(4) Informal conferences held in accordance with this section may be used by the regulatory authority as the public hearing required under § 761.14(c) of this chapter on proposed relocation or closing of public roads.

(d) *Public availability of permit applications*—(1) *General availability.* Except as provided in paragraph (d)(2) or (d)(3) of this section, all applications for permits; revisions; renewals; and transfers, assignments or sales of permit rights on file with the regulatory authority shall be available, at reasonable times, for public inspection and copying.

(2) *Limited availability.* Except as provided in paragraph (d)(3)(i) of this section, information pertaining to coal seams, test borings, core samplings, or soil samples in an application shall be made available to any person with an interest which is or may be adversely affected. Information subject to this paragraph shall be made available to the public when such information is required to be on public file pursuant to State law.

(3) *Confidentiality.* The regulatory authority shall provide procedures, including notice and opportunity to be heard for persons both seeking and opposing disclosure, to ensure confidentiality of qualified confidential information, which shall be clearly identified by the applicant and submitted separately from the remainder of the application. Confidential information is limited to—

(i) Information that pertains only to the analysis of the chemical and physical properties of the coal to be mined, except information on components of such coal which are potentially toxic in the environment;

(ii) Information required under section 508 of the Act that is not on public file pursuant to State law and that the applicant has requested in writing to be held confidential;

(iii) Information on the nature and location of archeological resources on public land and Indian land as required under the Archeological Resources Protection Act of 1979 (Pub. L. 96–95, 93 Stat. 721, 16 U.S.C. 470).

§ 773.7 Review of permit applications.

(a) The regulatory authority will review an application for a permit, revision, or renewal; written comments and objections submitted; and records of any informal conference or hearing held on the application and issue a written decision, within a reasonable time set by the regulatory authority, either granting, requiring modification of, or denying the application. If an informal conference is held under § 773.6(c) of this part, the decision will be made within 60 days of the close of the conference.

(b) The applicant for a permit or revision of a permit shall have the burden of establishing that his application is in compliance with all the requirements of the regulatory program.

§ 773.8 General provisions for review of permit application information and entry of information into AVS.

(a) Based on an administratively complete application, we, the regulatory authority, must undertake the reviews required under §§ 773.9 through 773.11 of this part.

(b) We will enter into AVS—

(1) The information you are required to submit under §§ 778.11 and 778.12(c) of this subchapter.

(2) The information you submit under § 778.14 of this subchapter pertaining to violations which are unabated or uncorrected after the abatement or correction period has expired.

(c) We must update the information referred to in paragraph (b) of this section in AVS upon our verification of any additional information submitted or discovered during our permit application review.

§ 773.9 Review of applicant and operator information.

(a) We, the regulatory authority, will rely upon the information that you, the applicant, are required to submit under § 778.11 of this subchapter, information from AVS, and any other available information, to review your and your operator's organizational structure and ownership or control relationships.

(b) We must conduct the review required under paragraph (a) of this section before making a permit eligibility determination under § 773.12 of this part.

§ 773.10 Review of permit history.

(a) We, the regulatory authority, will rely upon the permit history information you, the applicant, submit under § 778.12 of this subchapter, information from AVS, and any other available information to review your and your operator's permit histories. We must conduct this review before making a permit eligibility determination under § 773.12 of this part.

(b) We will also determine if you or your operator have previous mining experience.

(c) If you or your operator do not have any previous mining experience, we may conduct an additional review under § 774.11(f) of this subchapter. The purpose of this review will be to determine if someone else with mining experience controls the mining operation.

§ 773.11 Review of compliance history.

(a) We, the regulatory authority, will rely upon the violation information supplied by you, the applicant, under § 778.14 of this subchapter, a report from AVS, and any other available information to review histories of compliance with the Act or the applicable State regulatory program, and any other applicable air or water quality laws, for—

(1) You;

(2) Your operator;

(3) Operations you own or control; and

(4) Operations your operator owns or controls.

(b) We must conduct the review required under paragraph (a) of this section before making a permit eligibility determination under § 773.12 of this part.

§ 773.12 Permit eligibility determination.

Based on the reviews required under §§ 773.9 through 773.11 of this part, we, the regulatory authority, will determine whether you, the applicant, are eligible for a permit under section 510(c) of the Act.

(a) Except as provided in §§ 773.13 and 773.14 of this part, you are not eligible for a permit if we find that any surface coal mining operation that—

(1) You directly own or control has an unabated or uncorrected violation; or

(2) You or your operator indirectly control has an unabated or uncorrected violation and your control was established or the violation was cited after November 2, 1988.

(b) We will not issue you a permit if you or your operator are permanently ineligible to receive a permit under § 774.11(c) of this subchapter.

(c) After we approve your permit under § 773.15 of this part, we will not issue the permit until you comply with the information update and certification requirement of § 778.9(d) of this subchapter. After you complete that requirement, we will again request a compliance history report from AVS to determine if there are any unabated or uncorrected violations which affect your permit eligibility under paragraphs (a) and (b) of this section. We will request this report no more than five business days before permit issuance under § 773.19 of this part.

(d) If you are ineligible for a permit under this section, we will send you written notification of our decision. The notice will tell you why you are ineligible and include notice of your appeal rights under part 775 of this subchapter and 43 CFR 4.1360 through 4.1369.

§ 773.13 Unanticipated events or conditions at remining sites.

(a) You, the applicant, are eligible for a permit under § 773.12 if an unabated violation—

(1) Occurred after October 24, 1992; and

(2) Resulted from an unanticipated event or condition at a surface coal mining and reclamation operation on lands that are eligible for remining under a permit that was held by the person applying for the new permit.

(b) For permits issued under § 785.25 of this subchapter, an event or condition is presumed to be unanticipated for the purpose of this section if it—

(1) Arose after permit issuance;

(2) Was related to prior mining; and

(3) Was not identified in the permit application.

§ 773.14 Eligibility for provisionally issued permits.

(a) This section applies to you if you are an applicant who owns or controls a surface coal mining and reclamation operation with—

(1) A notice of violation issued under § 843.12 of this chapter or the State regulatory program equivalent for which the abatement period has not yet expired; or

(2) A violation that is unabated or uncorrected beyond the abatement or correction period.

(b) We, the regulatory authority, will find you eligible for a provisionally issued permit under this section if you demonstrate that one or more of the following circumstances exists with respect to all violations listed in paragraph (a) of this section—

(1) For violations meeting the criteria of paragraph (a)(1) of this section, you certify that the violation is being abated to the satisfaction of the regulatory authority with jurisdiction over the violation, and we have no evidence to the contrary.

(2) As applicable, you, your operator, and operations that you or your operator own or control are in compliance with the terms of any abatement plan (or, for delinquent fees or penalties, a payment schedule) approved by the agency with jurisdiction over the violation.

(3) You are pursuing a good faith—

(i) Challenge to all pertinent ownership or control listings or findings under §§ 773.25 through 773.27 of this part; or

(ii) Administrative or judicial appeal of all pertinent ownership or control listings or findings, unless there is an initial judicial decision affirming the listing or finding and that decision remains in force.

(4) The violation is the subject of a good faith administrative or judicial appeal contesting the validity of the violation, unless there is an initial judicial decision affirming the violation and that decision remains in force.

(c) We will consider a provisionally issued permit to be improvidently issued, and we must immediately initiate procedures under §§ 773.22 and 773.23 of this part to suspend or rescind that permit, if—

(1) Violations included in paragraph (b)(1) of this section are not abated within the specified abatement period;

(2) You, your operator, or operations that you or your operator own or control do not comply with the terms of an abatement plan or payment schedule mentioned in paragraph (b)(2) of this section;

(3) In the absence of a request for judicial review, the disposition of a challenge and any subsequent administrative review referenced in paragraph (b)(3) or (4) of this section affirms the validity of the violation or the ownership or control listing or finding; or

(4) The initial judicial review decision referenced in paragraph (b)(3)(ii) or (4) of this section affirms the validity of the violation or the ownership or control listing or finding.

§ 773.15 Written findings for permit application approval.

No permit application or application for a significant revision of a permit shall be approved unless the application affirmatively demonstrates and the regulatory authority finds, in writing, on the basis of information set forth in the application or from information otherwise available that is documented in the approval, the following:

(a) The application is accurate and complete and the applicant has complied with all requirements of the Act and the regulatory program.

(b) The applicant has demonstrated that reclamation as required by the Act and the regulatory program can be accomplished under the reclamation plan contained in the permit application.

(c) The proposed permit area is—

(1) Not within an area under study or administrative proceedings under a petition, filed pursuant to parts 764 and 769 of this chapter, to have an area designated as unsuitable for surface coal mining operations, unless the applicant demonstrates that before January 4, 1977, he has made substantial legal and financial commitments in relation to the operation covered by the permit application; or

(2) Not within an area designated as unsuitable for surface coal mining operations under parts 762 and 764 or 769 of this chapter or within an area subject to the prohibitions of § 761.11 of this chapter.

(d) For mining operations where the private mineral estate to be mined has been severed from the private surface estate, the applicant has submitted to the regulatory authority the documentation required under § 778.15(b) of this chapter.

(e) The regulatory authority has made an assessment of the probable cumulative impacts of all anticipated coal mining on the hydrologic balance in the cumulative impact area and has determined that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

(f) The applicant has demonstrated that any existing structure will comply

with § 701.11(d), and the applicable performance standards of subchapter B or K of this chapter.

(g) The applicant has paid all reclamation fees from previous and existing operations as required by subchapter R of this chapter.

(h) The applicant has satisfied the applicable requirements of part 785 of this chapter.

(i) The applicant has, if applicable, satisfied the requirements for approval of a long-term, intensive agricultural postmining land use, in accordance with the requirements of § 816.111(d) or § 817.111(d).

(j) The operation would not affect the continued existence of endangered or threatened species or result in destruction or adverse modification of their critical habitats, as determined under the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

(k) The regulatory authority has taken into account the effect of the proposed permitting action on properties listed on and eligible for listing on the National Register of Historic Places. This finding may be supported in part by inclusion of appropriate permit conditions or changes in the operation plan protecting historic resources, or a documented decision that the regulatory authority has determined that no additional protection measures are necessary.

(l) For a proposed remining operation where the applicant intends to reclaim in accordance with the requirements of § 816.106 or § 817.106 of this chapter, the site of the operation is a *previously mined area* as defined in § 701.5 of this chapter.

(m) For permits to be issued under § 785.25 of this chapter, the permit application must contain:

(i) Lands eligible for remining;

(ii) An identification of the potential environmental and safety problems related to prior mining activity which could reasonably be anticipated to occur at the site; and

(iii) Mitigation plans to sufficiently address these potential environmental and safety problems so that reclamation as required by the applicable requirements of the regulatory program can be accomplished.

(n) The applicant is eligible to receive a permit, based on the reviews under §§ 773.7 through 773.14 of this part.

§ 773.16 Performance bond submittal.

If the regulatory authority decides to approve the application, it shall require that the applicant file the performance bond or provide other equivalent guarantee before the permit is issued, in accordance with the provisions of subchapter J of this chapter.

§ 773.17 Permit conditions.

Each permit issued by the regulatory authority shall be subject to the following conditions:

(a) The permittee shall conduct surface coal mining and reclamation operations only on those lands that are specifically designated as the permit area on the maps submitted with the application and authorized for the term of the permit and that are subject to the performance bond or other equivalent guarantee in effect pursuant to subchapter J of this chapter.

(b) The permittee shall conduct all surface coal mining and reclamation operations only as described in the approved application, except to the extent that the regulatory authority otherwise directs in the permit.

(c) The permittee shall comply with the terms and conditions of the permit, all applicable performance standards of the Act, and the requirements of the regulatory program.

(d) Without advance notice, delay, or a search warrant, upon presentation of appropriate credentials, the permittee shall allow the authorized representatives of the Secretary and the State regulatory authority to—

(1) Have the right of entry provided for in §§ 842.13 and 840.12 of this chapter; and

(2) Be accompanied by private persons for the purpose of conducting an inspection in accordance with parts 840 and 842, when the inspection is in response to an alleged violation reported to the regulatory authority by the private person.

(e) The permittee shall take all possible steps to minimize any adverse impact to the environment or public health and safety resulting from noncompliance with any term or condition or the permit, including, but not limited to—

(1) Any accelerated or additional monitoring necessary to determine the nature and extent of noncompliance and the results of the noncompliance;

(2) Immediate implementation of measures necessary to comply; and

(3) Warning, as soon as possible after learning of such noncompliance, any person whose health and safety is in imminent danger due to the noncompliance.

(f) As applicable, the permittee shall comply with § 701.11(d) and subchapter B or K of this chapter for compliance, modification, or abandonment of existing structures.

(g) The operator shall pay all reclamation fees required by subchapter R of this chapter for coal produced under the permit for sale, transfer or use, in the manner required by that subchapter.

§ 773.19 Permit issuance and right of renewal.

(a) *Decision.* If the application is approved, the permit shall be issued upon submittal of a performance bond in accordance with subchapter J. If the application is disapproved, specific reasons therefore shall be set forth in the notification required by paragraph (b) of this section.

(b) *Notification.* The regulatory authority shall issue written notification of the decision to the following persons and entities:

(1) The applicant, each person who files comments or objections to the permit application, and each party to an informal conference.

(2) The local governmental officials in the local political subdivision in which the land to be affected is located within 10 days after the issuance of a permit, including a description of the location of the land.

(3) If the regulatory authority is a State agency, the local OSM office.

(c) *Permit term.* Each permit shall be issued for a fixed term of 5 years or less, unless the requirements of § 778.17 of this chapter are met.

(d) *Right of renewal.* Permit application approval shall apply to those lands that are specifically designated as the permit area on the maps submitted with the application and for which the application is complete and accurate. Any valid permit issued in accordance with paragraph (a) of this section shall carry with it the right of successive renewal, within the approved boundaries of the existing permit, upon expiration of the term of the permit, in accordance with § 774.15.

(e) *Initiation of operations.* (1) A permit shall terminate if the permittee has not begun the surface coal mining and reclamation operation covered by the permit within 3 years of the issuance of the permit.

(2) The regulatory authority may grant a reasonable extension of time for commencement of these operations, upon receipt of a written statement showing that such an extension of time is necessary, if—

(i) Litigation precludes the commencement or threatens substantial economic loss to the permittee; or

(ii) There are conditions beyond the control and without the fault or negligence of the permittee.

(3) With respect to coal to be mined for use in a synthetic fuel facility or specified major electric generating facility, the permittee shall be deemed

to have commenced surface mining operations at the time that the construction of the synthetic fuel or generating facility is initiated.

(4) Extensions of time granted by the regulatory authority under this paragraph shall be specifically set forth in the permit, and notice of the extension shall be made public by the regulatory authority.

§ 773.21 Initial review and finding requirements for improvidently issued permits.

(a) If we, the regulatory authority, have reason to believe that we improvidently issued a permit to you, the permittee, we must review the circumstances under which the permit was issued. We will make a preliminary finding that your permit was improvidently issued if, under the permit eligibility criteria of the applicable regulations implementing section 510(c) of the Act in effect at the time of permit issuance, your permit should not have been issued because you or your operator owned or controlled a surface coal mining and reclamation operation with an unabated or uncorrected violation.

(b) We will make a finding under paragraph (a) of this section only if you or your operator—

(1) Continue to own or control the operation with the unabated or uncorrected violation;

(2) The violation remains unabated or uncorrected; and

(3) The violation would cause you to be ineligible under the permit eligibility criteria in our current regulations.

(c) When we make a preliminary finding under paragraph (a) of this section, we must serve you with a written notice of the preliminary finding, which must be based on evidence sufficient to establish a *prima facie* case that your permit was improvidently issued.

(d) Within 30 days of receiving a notice under paragraph (c) of this section, you may challenge the preliminary finding by providing us with evidence as to why the permit was not improvidently issued under the criteria in paragraphs (a) and (b) of this section.

(e) The provisions of §§ 773.25 through 773.27 of this part apply when a challenge under paragraph (d) of this section concerns a preliminary finding under paragraphs (a) and (b)(1) of this section that you or your operator currently own or control, or owned or controlled, a surface coal mining operation.

§ 773.22 Notice requirements for improvidently issued permits.

(a) We, the regulatory authority, must serve you, the permittee, with a written notice of proposed suspension or rescission, together with a statement of the reasons for the proposed suspension or rescission, if—

(1) After considering any evidence submitted under § 773.21(d) of this part, we find that a permit was improvidently issued under the criteria in § 773.21 paragraphs (a) and (b) of § 773.21 of this part; or

(2) Your permit was provisionally issued under § 773.14(b) of this part and one or more of the conditions in §§ 773.14(c)(1) through (4) exists.

(b) If we propose to suspend your permit, we will provide 60 days notice.

(c) If we propose to rescind your permit, we will provide 120 days notice.

(d) If you wish to appeal the notice, you must exhaust administrative remedies under the procedures at 43 CFR 4.1370 through 4.1377 (when OSM is the regulatory authority) or under the State regulatory program equivalent (when a State is the regulatory authority).

(e) After we serve you with a notice of proposed suspension or rescission under this section, we will take action under § 773.23 of this part.

(f) The regulations for service at § 843.14 of this chapter, or the State regulatory program equivalent, will govern service under this section.

(g) The times specified in paragraphs (b) and (c) of this section will apply unless you obtain temporary relief under the procedures at 43 CFR 4.1376 or the State regulatory program equivalent.

§ 773.23 Suspension or rescission requirements for improvidently issued permits.

(a) Except as provided in paragraph (b) of this section, we, the regulatory authority, must suspend or rescind your permit upon expiration of the time specified in § 773.22(b) or (c) of this part unless you submit evidence and we find that—

(1) The violation has been abated or corrected to the satisfaction of the agency with jurisdiction over the violation;

(2) You or your operator no longer own or control the relevant operation;

(3) Our finding for suspension or rescission was in error;

(4) The violation is the subject of a good faith administrative or judicial appeal (unless there is an initial judicial decision affirming the violation, and that decision remains in force);

(5) The violation is the subject of an abatement plan or payment schedule that is being met to the satisfaction of the agency with jurisdiction over the violation; or

(6) You are pursuing a good faith challenge or administrative or judicial appeal of the relevant ownership or control listing or finding (unless there is an initial judicial decision affirming the listing or finding, and that decision remains in force).

(b) If you have requested administrative review of a notice of proposed suspension or rescission under § 773.22(e) of this part, we will not suspend or rescind your permit unless and until the Office of Hearings and Appeals or its State counterpart affirms our finding that your permit was improvidently issued.

(c) When we suspend or rescind your permit under this section, we must—

(1) Issue you a written notice requiring you to cease all surface coal mining operations under the permit; and

(2) Post the notice at our office closest to the permit area.

(d) If we suspend or rescind your permit under this section, you may request administrative review of the notice under the procedures at 43 CFR 4.1370 through 4.1377 (when OSM is the regulatory authority) or under the State regulatory program equivalent (when a State is the regulatory authority). Alternatively, you may seek judicial review of the notice.

§ 773.25 Who may challenge ownership or control listings and findings.

You may challenge a listing or finding of ownership or control using the provisions under §§ 773.26 and 773.27 of this part if you are—

(a) Listed in a permit application or AVS as an owner or controller of an entire surface coal mining operation, or any portion or aspect thereof:

(b) Found to be an owner or controller of an entire surface coal mining operation, or any portion or aspect thereof, under §§ 773.21 or 774.11(g) of this subchapter; or

(c) An applicant or permittee affected by an ownership or control listing or finding.

§ 773.26 How to challenge an ownership or control listing or finding.

This section applies to you if you challenge an ownership or control listing or finding.

(a) To challenge an ownership or control listing or finding, you must submit a written explanation of the basis for the challenge, along with any evidence or explanatory materials you wish to provide under § 773.27(b) of this part, to the regulatory authority, as identified in the following table.

If the challenge concerns . . .	Then you must submit a written explanation to . . .
(1) a pending State or Federal permit application	the regulatory authority with jurisdiction over the application.
(2) your ownership or control of a surface coal mining operation, and you are not currently seeking a permit.	the regulatory authority with jurisdiction over the surface coal mining operation.

(b) The provisions of this section and of §§ 773.27 and 773.28 of this part apply only to challenges to ownership or control listings or findings. You may not use these provisions to challenge your liability or responsibility under any other provision of the Act or its implementing regulations.

(c) When the challenge concerns a violation under the jurisdiction of a different regulatory authority, the regulatory authority with jurisdiction over the permit application or permit must consult the regulatory authority with jurisdiction over the violation and the AVS Office to obtain additional information.

(d) A regulatory authority responsible for deciding a challenge under paragraph (a) of this section may request an investigation by the AVS Office.

(e) At any time, you, a person listed in AVS as an owner or controller of a surface coal mining operation, may request an informal explanation from the AVS Office as to the reason you are shown in AVS in an ownership or control capacity. Within 14 days of your request, the AVS Office will provide a response describing why you are listed in AVS.

§ 773.27 Burden of proof for ownership or control challenges.

This section applies to you if you challenge an ownership or control listing or finding.

(a) When you challenge a listing of ownership or control, or a finding of ownership or control made under § 774.11(g) of this subchapter, you must prove by a preponderance of the evidence that you either—

(1) Do not own or control the entire surface coal mining operation or relevant portion or aspect thereof; or

(2) Did not own or control the entire surface coal mining operation or relevant portion or aspect thereof during the relevant time period.

(b) In meeting your burden of proof, you must present reliable, credible, and substantial evidence and any explanatory materials to the regulatory authority. The materials presented in connection with your challenge will become part of the permit file, an investigation file, or another public file. If you request, we will hold as confidential any information you submit under this paragraph which is not required to be made available to the public under § 842.16 of this chapter (when OSM is the regulatory authority) or under § 840.14 of this chapter (when a State is the regulatory authority).

(c) Materials you may submit in response to the requirements of paragraph (b) of this section include, but are not limited to—

(1) Notarized affidavits containing specific facts concerning the duties that you performed for the relevant operation, the beginning and ending dates of your ownership or control of the operation, and the nature and details of any transaction creating or severing your ownership or control of the operation.

(2) Certified copies of corporate minutes, stock ledgers, contracts, purchase and sale agreements, leases, correspondence, or other relevant company records.

(3) Certified copies of documents filed with or issued by any State, municipal, or Federal governmental agency.

(4) An opinion of counsel, when supported by—

(i) Evidentiary materials;

(ii) A statement by counsel that he or she is qualified to render the opinion; and

(iii) A statement that counsel has personally and diligently investigated the facts of the matter.

§ 773.28 Written agency decision on challenges to ownership or control listings or findings.

(a) Within 60 days of receipt of your challenge under § 773.26(a) of this part, we, the regulatory authority identified under § 773.26(a) of this part, will review and investigate the evidence and explanatory materials you submit and any other reasonably available information bearing on your challenge and issue a written decision. Our decision must state whether you own or control the relevant surface coal mining operation, or owned or controlled the operation, during the relevant time period.

(b) We will promptly provide you with a copy of our decision by either—

(1) Certified mail, return receipt requested; or

(2) Any means consistent with the rules governing service of a summons and complaint under Rule 4 of the Federal Rules of Civil Procedure, or its State regulatory program counterparts.

(c) Service of the decision on you is complete upon delivery and is not incomplete if you refuse to accept delivery.

(d) We will post all decisions made under this section on AVS.

(e) Any person who receives a written decision under this section, and who wishes to appeal that decision, must exhaust administrative remedies under the procedures at 43 CFR 4.1380 through 4.1387 or, when a State is the regulatory authority, the State regulatory program counterparts, before seeking judicial review.

(f) Following our written decision or any decision by a reviewing administrative or judicial tribunal, we must review the information in AVS to determine if it is consistent with the decision. If it is not, we must promptly revise the information in AVS to reflect the decision.

■ 4. Revise part 774 to read as follows:

PART 774—REVISION; RENEWAL; TRANSFER, ASSIGNMENT, OR SALE OF PERMIT RIGHTS; POST-PERMIT ISSUANCE REQUIREMENTS; AND OTHER ACTIONS BASED ON OWNERSHIP, CONTROL, AND VIOLATION INFORMATION

Sec.

774.1 Scope and purpose.
774.9 Information collection.
774.10 Regulatory authority review of permits.
774.11 Post-permit issuance requirements for regulatory authorities and other actions based on ownership, control, and violation information.
774.12 Post-permit issuance information requirements for permittees.
774.13 Permit revisions.
774.15 Permit renewals.
774.17 Transfer, assignment, or sale of permit rights.

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

§ 774.1 Scope and purpose.

This part provides requirements for revision; renewal; transfer, assignment, or sale of permit rights; entering and updating information in AVS following the issuance of a permit; post-permit issuance requirements for regulatory authorities and permittees; and other actions based on ownership, control, and violation information.

§ 774.9 Information collection.

(a) The collections of information contained in part 774 have been approved by the Office of Management

and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1029–0116. Regulatory authorities will use this information to:

(1) Determine if the applicant meets the requirements for revision; renewal; transfer, assignment, or sale of permit rights;

(2) Enter and update information in AVS following the issuance of a permit; and

(3) Fulfill post-permit issuance requirements and other obligations based on ownership, control, and violation information.

(b) A Federal 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. Response is required to obtain a benefit in accordance with SMCRA. Send comments regarding burden estimates or any other aspect of this collection of information, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 202–SIB, 1951 Constitution Avenue NW., Washington, DC 20240.

§ 774.10 Regulatory authority review of permits.

(a) The regulatory authority shall review each permit issued and outstanding under an approved regulatory program during the term of the permit. This review shall occur not later than the middle of each permit term and as follows:

(1) Permits with a term longer than 5 years shall be reviewed no less frequently than the permit midterm or every 5 years, whichever is more frequent.

(2) Permits with variances granted in accordance with § 785.14 of this chapter (mountaintop removal) and § 785.18 of this chapter (variance for delay in contemporaneous reclamation requirement in combined surface and underground mining operations) of this chapter shall be reviewed no later than 3 years from the date of issuance of the permit unless, for variances issued in accordance with § 785.14 of this chapter, the permittee affirmatively demonstrates that the proposed development is proceeding in accordance with the terms of the permit.

(3) Permits containing experimental practices issued in accordance with § 785.13 of this chapter and permits with a variance from approximate original contour requirements in accordance with § 785.16 shall be reviewed as set forth in the permit or at least every 2½ years from the date of issuance as required by the regulatory authority, in accordance with §§ 785.13(g) and 785.16(c) of this chapter, respectively.

(b) After the review required by paragraph (a) of this section, or at any time, the regulatory authority may, by order, require reasonable revision of a permit in accordance with § 774.13 to ensure compliance with the Act and the regulatory program.

(c) Any order of the regulatory authority requiring revision of a permit shall be based upon written findings and shall be subject to the provisions for administrative and judicial review in part 775 of this chapter. Copies of the order shall be sent to the permittee.

(d) Permits may be suspended or revoked in accordance with subchapter L of this chapter.

§ 774.11 Post-permit issuance requirements for regulatory authorities and other actions based on ownership, control, and violation information.

(a) For the purposes of future permit eligibility determinations and enforcement actions, we, the regulatory authority, must enter into AVS the data shown in the following table—

We must enter into AVS all . . .	Within 30 days after . . .
(1) permit records	the permit is issued or subsequent changes made.
(2) unabated or uncorrected violations	the abatement or correction period for a violation expires.
(3) changes to information initially required to be provided by an applicant under 30 CFR 778.11.	receiving notice of a change.
(4) changes in violation status	abatement, correction, or termination of a violation, or a decision from an administrative or judicial tribunal.

(b) If, at any time, we discover that any person owns or controls an operation with an unabated or uncorrected violation, we will determine whether enforcement action is appropriate under part 843, 846 or 847 of this chapter. We must enter the results of each enforcement action, including administrative and judicial decisions, into AVS.

(c) We must serve a preliminary finding of permanent permit ineligibility under section 510(c) of the Act on you, an applicant or operator, if the criteria in paragraphs (c)(1) and (c)(2) are met. In making a finding under this paragraph, we will only consider control relationships and violations which would make, or would have made, you ineligible for a permit under §§ 773.12(a) and (b) of this subchapter. We must make a preliminary finding of permanent permit ineligibility if we find that—

(1) You control or have controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violations under section 510(c) of the Act; and

(2) The violations are of such nature and duration with such resulting irreparable damage to the environment as to indicate your intent not to comply with the Act, its implementing regulations, the regulatory program, or your permit.

(d) You may request a hearing on a preliminary finding of permanent permit ineligibility under 43 CFR 4.1350 through 4.1356.

(e) Entry into AVS.

(1) If you do not request a hearing, and the time for seeking a hearing has expired, we will enter our finding into AVS.

(2) If you request a hearing, we will enter our finding into AVS only if that finding is upheld on administrative appeal.

(f) At any time, we may identify any person who owns or controls an entire surface coal mining operation or any relevant portion or aspect thereof. If we identify such a person, we must issue a written preliminary finding to the person and the applicant or permittee describing the nature and extent of ownership or control. Our written preliminary finding must be based on evidence sufficient to establish a prima facie case of ownership or control.

(g) After we issue a written preliminary finding under paragraph (f) of this section, we will allow you, the person subject to the preliminary finding, 30 days in which to submit any information tending to demonstrate your lack of ownership or control. If, after reviewing any information you submit, we are persuaded that you are not an owner or controller, we will

serve you a written notice to that effect. If, after reviewing any information you submit, we still find that you are an owner or controller, or if you do not submit any information within the 30-day period, we will issue a written finding and enter our finding into AVS.

(h) If we identify you as an owner or controller under paragraph (g) of this section, you may challenge the finding using the provisions of §§ 773.25, 773.26, and 773.27 of this subchapter.

§ 774.12 Post-permit issuance information requirements for permittees.

(a) Within 30 days after the issuance of a cessation order under § 843.11 of this chapter, or its State regulatory program equivalent, you, the permittee, must provide or update all the information required under § 778.11 of this subchapter.

(b) You do not have to submit information under paragraph (a) of this section if a court of competent jurisdiction grants a stay of the cessation order and the stay remains in effect.

(c) Within 60 days of any addition, departure, or change in position of any person identified in § 778.11(c) of this subchapter, you must provide—

(1) The information required under § 778.11(d) of this subchapter; and

(2) The date of any departure.

§ 774.13 Permit revisions.

(a) *General.* During the term of a permit, the permittee may submit an application to the regulatory authority for a revision of the permit.

(b) *Application requirements and procedures.* the regulatory authority shall establish—

(1) A time period within which the regulatory authority will approve or disapprove an application for a permit revision; and

(2) Guidelines establishing the scale or extent of revisions for which all the permit application information requirements and procedures of this subchapter, including notice, public participation, and notice of decision requirements of §§ 773.6, 773.19(b) (1) and (3), and 778.21, shall apply. Such requirements and procedures shall apply at a minimum to all significant permit revisions.

(c) *Criteria for approval.* No application for a permit revision shall be approved unless the application demonstrates and the regulatory authority finds that reclamation as required by the Act and the regulatory program can be accomplished, applicable requirements under § 773.15 which are pertinent to the revision are met, and the application for a revision complies with all requirements of the Act and the regulatory program.

(d) *Request to change permit boundary.* Any extensions to the area covered by the permit, except incidental boundary revisions, shall be made by application for a new permit.

§ 774.15 Permit renewals.

(a) *General.* A valid permit, issued pursuant to an approved regulatory program, shall carry with it the right of successive renewal, within the approved boundaries of the existing permit, upon expiration of the term of the permit.

(b) *Application requirements and procedures.* (1) An application for renewal of a permit shall be filed with the regulatory authority at least 120 days before expiration of the existing permit term.

(2) An application for renewal of a permit shall be in the form required by the regulatory authority and shall include at a minimum—

(i) The name and address of the permittee, the term of the renewal requested, and the permit number or other identifier;

(ii) Evidence that a liability insurance policy or adequate self-insurance under § 800.60 of this chapter will be provided by the applicant for the proposed period of renewal;

(iii) Evidence that the performance bond in effect for the operation will continue in full force and effect for any renewal requested, as well as any additional bond required by the regulatory authorities pursuant to subchapter J of this chapter;

(iv) A copy of the proposed newspaper notice and proof of publication of same, as required by § 778.21 of this chapter; and

(v) Additional revised or updated information required by the regulatory authority.

(3) Applications for renewal shall be subject to the requirements of public notification and public participation contained in §§ 773.6 and 773.19(b) of this chapter.

(4) If an application for renewal includes any proposed revisions to the permit, such revisions shall be identified and subject to the requirements of § 774.13.

(c) *Approval process*—(1) *Criteria for approval.* The regulatory authority shall approve a complete and accurate application for permit renewal, unless it finds, in writing that—

(i) The terms and conditions of the existing permit are not being satisfactorily met;

(ii) The present surface coal mining and reclamation operations are not in compliance with the environmental protection standards of the Act and the regulatory program;

(iii) The requested renewal substantially jeopardizes the operator's continuing ability to comply with the Act and the regulatory program on existing permit areas;

(iv) The operator has not provided evidence of having liability insurance or self-insurance as required in § 800.60 of this chapter;

(v) The operator has not provided evidence that any performance bond required to be in effect for the operation will continue in full force and effect for the proposed period of renewal, as well as any additional bond the regulatory authority might require pursuant to subchapter J of this chapter; or

(vi) Additional revised or updated information required by the regulatory authority has not been provided by the applicant.

(2) *Burden of proof.* In the determination of whether to approve or deny a renewal of a permit, the burden of proof shall be on the opponents of renewal.

(3) *Alluvial valley floor variance.* If the surface coal mining and reclamation operation authorized by the original permit was not subject to the standards contained in sections 510(b)(5) (A) and (B) of the Act and § 785.19 of this chapter, because the permittee complied with the exceptions in the proviso to section 510(b)(5) of the Act, the portion of the application for renewal of the permit that addresses new land areas previously identified in the reclamation plan for the original permit shall not be subject to the standards contained in sections 510(b)(5) (A) and (B) of the Act and § 785.19 of this chapter.

(d) *Renewal term.* Any permit renewal shall be for a term not to exceed the period of the original permit established under § 773.19.

(e) *Notice of decision.* The regulatory authority shall send copies of its decision to the applicant, to each person who filed comments or objections on the renewal, to each party to any informal conference held on the permit renewal, and to OSM if OSM is not the regulatory authority.

(f) *Administrative and judicial review.* Any person having an interest which is or may be adversely affected by the decision of the regulatory authority shall have the right to administrative and judicial review set forth in part 775 of this chapter.

§ 774.17 Transfer, assignment, or sale of permit rights.

(a) *General.* No transfer, assignment, or sale of rights granted by a permit shall be made without the prior written approval of the regulatory authority. At its discretion, the regulatory authority

may allow a prospective successor in interest to engage in surface coal mining and reclamation operations under the permit during the pendency of an application for approval of a transfer, assignment, or sale of permit rights submitted under paragraph (b) of this section, provided that the prospective successor in interest can demonstrate to the satisfaction of the regulatory authority that sufficient bond coverage will remain in place.

(b) *Application requirements.* An applicant for approval of the transfer, assignment, or sale of permit rights shall—

(1) Provide the regulatory authority with an application for approval of the proposed transfer, assignment, or sale including—

(i) The name and address of the existing permittee and permit number or other identifier;

(ii) A brief description of the proposed action requiring approval; and

(iii) The legal, financial, compliance, and related information required by part 778 of this chapter for the applicant for approval of the transfer, assignment, or sale of permit rights.

(2) Advertise the filing of the application in a newspaper of general circulation in the locality of the operations involved, indicating the name and address of the applicant, the permittee, the permit number or other identifier, the geographic location of the permit, and the address to which written comments may be sent;

(3) Obtain appropriate performance bond coverage in an amount sufficient to cover the proposed operations, as required under subchapter J of this chapter.

(c) *Public participation.* Any person having an interest which is or may be adversely affected by a decision on the transfer, assignment, or sale of permit rights, including an official of any Federal, State, or local government agency, may submit written comments on the application to the regulatory authority within a time specified by the regulatory authority.

(d) *Criteria for approval.* The regulatory authority may allow a permittee to transfer, assign, or sell permit rights to a successor, if it finds in writing that the successor—

(1) Is eligible to receive a permit in accordance with §§ 773.12 and 773.14 of this chapter;

(2) Has submitted a performance bond or other guarantee, or obtained the bond coverage of the original permittee, as required by subchapter J of this chapter; and

(3) Meets any other requirements specified by the regulatory authority.

(e) *Notification.* (1) The regulatory authority shall notify the permittee, the successor, commenters, and OSM, if OSM is not the regulatory authority, of its findings.

(2) The successor shall immediately provide notice to the regulatory authority of the consummation of the transfer, assignment, or sale of permit rights.

(f) *Continued operation under existing permit.* The successor in interest shall assume the liability and reclamation responsibilities of the existing permit and shall conduct the surface coal mining and reclamation operations in full compliance with the Act, the regulatory program, and the terms and conditions of the existing permit, unless the applicant has obtained a new or revised permit as provided in this subchapter.

■ 5. Revise part 777 to read as follows:

PART 777—GENERAL CONTENT REQUIREMENTS FOR PERMIT APPLICATIONS

Sec.

777.1 Scope.
777.10 Information collection.
777.11 Format and contents.
777.13 Reporting of technical data.
777.14 Maps and plans: General requirements.
777.15 Completeness.
777.17 Permit fees.

Authority: Pub. L. 95–87, 30 U.S.C. 1201 *et seq.*

§ 777.1 Scope.

This part provides minimum requirements concerning the general content for permit applications under a State or Federal program.

§ 777.10 Information collection.

The information collection requirements contained in part 777 have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned clearance number 1029–0032. The information is being collected to meet the requirements of sections 507, 508, and 510(b) of the Act. It provides general requirements for permit application format and contents. The obligation to respond is mandatory.

§ 777.11 Format and contents.

(a) An application shall—

(1) Contain current information, as required by this subchapter;

(2) Be clear and concise; and

(3) Be filed in the format required by the regulatory authority.

(b) If used in the application, referenced materials shall either be provided to the regulatory authority by the applicant or be readily available to the regulatory authority. If provided, relevant portions of referenced published materials shall be presented briefly and concisely in the application by photocopying or abstracting and with explicit citations.

(c) Applications for permits; revisions; renewals; or transfers, sales or assignments of permit rights shall be verified under oath, by a responsible official of the applicant, that the information contained in the application is true and correct to the best of the official's information and belief.

§ 777.13 Reporting of technical data.

(a) All technical data submitted in the application shall be accompanied by the names of persons or organizations that collected and analyzed the data, dates of the collection and analysis of the data, and descriptions of the methodology used to collect and analyze the data.

(b) Technical analyses shall be planned by or under the direction of a professional qualified in the subject to be analyzed.

§ 777.14 Maps and plans: General requirements.

(a) Maps submitted with applications shall be presented in a consolidated format, to the extent possible, and shall include all the types of information that are set forth on topographic maps of the U.S. Geological Survey of the 1:24,000 scale series. Maps of the permit area shall be at a scale of 1:6,000 or larger. Maps of the adjacent area shall clearly show the lands and waters within those areas and be in a scale determined by the regulatory authority, but in no event smaller than 1:24,000.

(b) All maps and plans submitted with the application shall distinguish among each of the phases during which surface coal mining operations were or will be conducted at any place within the life of operations. At a minimum, distinctions shall be clearly shown among those portions of the life of operations in which surface coal mining operations occurred—

(1) Prior to August 3, 1977;

(2) After August 3, 1977, and prior to either—

(i) May 3, 1978; or

(ii) In the case of an applicant or operator which obtained a small operator's exemption in accordance with § 710.12 of this chapter, January 1, 1979;

(3) After May 3, 1978 (or January 1, 1979, for persons who received a small operator's exemption) and prior to the approval of the applicable regulatory program;

(4) After the estimated date of issuance of a permit by the regulatory

authority under the approved regulatory program.

§ 777.15 Completeness.

An application for a permit to conduct surface coal mining and reclamation operations shall be complete and shall include at a minimum—

(a) For surface mining activities, the information required under parts 778, 779, and 780 of this chapter, and, as applicable to the operation, part 785 of this chapter; and

(b) For underground mining activities, the information required under parts 778, 783, and 784 of this chapter, and, as applicable to the operation, part 785 of this chapter.

§ 777.17 Permit fees.

An application for a surface coal mining and reclamation permit shall be accompanied by a fee determined by the regulatory authority. The fee may be less than, but shall not exceed, the actual or anticipated cost of reviewing, administering, and enforcing the permit. The regulatory authority may develop procedures to allow the fee to be paid over the term of the permit.

■ 6. Revise part 779 to read as follows:

PART 779—SURFACE MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR INFORMATION ON ENVIRONMENTAL RESOURCES

Sec.

779.1 Scope.
779.2 Objectives.
779.4 Responsibilities.
779.10 Information collection.
779.11 General requirements.
779.12 General environmental resources information.
779.18 Climatological information.
779.19 Vegetation information.
779.20 [Reserved]
779.21 Soil resources information.
779.24 Maps: General requirements.
779.25 Cross sections, maps, and plans.

Authority: 30 U.S.C. 1201 *et seq.;* sec. 115 of Pub. L. 98–146, (30 U.S.C. 1257), and 16 U.S.C. 470 *et seq.*

§ 779.1 Scope.

This part establishes the minimum requirements for the Secretary's approval of regulatory program provisions for the environmental resources contents of applications for surface mining activities.

§ 779.2 Objectives.

The objectives of this part are to ensure that each application provides to the regulatory authority a complete and accurate description of the environmental resources that may be impacted or affected by proposed surface mining activities.

§ 779.4 Responsibilities.

(a) It is the responsibility of the applicant to provide, except where specifically exempted in this part, all information required by this part in the application.

(b) It is the responsibility of State and Federal government agencies to provide information for applications as specifically required by this part.

§ 779.10 Information collection.

The information collection requirements contained in 30 CFR 779.11, 779.12, 779.13, 779.14, 779.15, 779.16, 779.17, 779.18, 779.19, 779.21, 779.22, 779.24, 779.25 and 779.27 have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned clearance number 1029–0035. The information is being collected to meet the requirements of sections 507 and 508 of Pub. L. 95–87, which require the applicant to present an adequate description of the existing pre-mining environmental resources within and around the proposed mine plan area. This information will be used by the regulatory authority to determine whether the applicant can comply with the performance standards of the regulations for surface coal mining and whether reclamation of these areas is feasible. The obligation to respond is mandatory.

§ 779.11 General requirements.

Each permit application shall include a description of the existing, premining environmental resources within the proposed permit area and adjacent areas that may be affected or impacted by the proposed surface mining activities.

§ 779.12 General environmental resources information.

Each application shall describe and identify—

(a) The lands subject to surface coal mining operations over the estimated life of those operations and the size, sequence, and timing of the subareas for which it is anticipated that individual permits for mining will be sought; and

(b)(1) The nature of cultural, historic and archeological resources listed or eligible for listing on the National Register of Historic Places and known archeological sites within the proposed permit and adjacent areas. The description shall be based on all available information, including, but not limited to, information from the State Historic Preservation Officer and from local archeological, historical, and cultural preservation agencies.

(2) The regulatory authority may require the applicant to identify and evaluate important historic and archeological resources that may be eligible for listing on the National Register of Historic Places, through

(i) Collection of additional information,

(ii) Conduct of field investigations, or

(iii) Other appropriate analyses.

§ 779.18 Climatological information.

(a) When requested by the regulatory authority, the application shall contain a statement of the climatological factors that are representative of the proposed permit area, including:

(1) The average seasonal precipitation;

(2) The average direction and velocity of prevailing winds; and

(3) Seasonal temperature ranges.

(b) The regulatory authority may request such additional data as deemed necessary to ensure compliance with the requirements of this subchapter.

§ 779.19 Vegetation information.

(a) The permit application shall, if required by the regulatory authority, contain a map that delineates existing vegetative types and a description of the plant communities within the proposed permit area and within any proposed reference area. This description shall include information adequate to predict the potential for reestablishing vegetation.

(b) When a map or aerial photograph is required, sufficient adjacent areas shall be included to allow evaluation of vegetation as important habitat for fish and wildlife for those species of fish and wildlife identified under 30 CFR 780.16.

§ 779.20 [Reserved]

§ 779.21 Soil resources information.

(a) The applicant shall provide adequate soil survey information of the permit area consisting of the following:

(1) A map delineating different soils;

(2) Soil identification;

(3) Soil description; and

(4) Present and potential productivity of existing soils.

(b) Where the applicant proposes to use selected overburden materials as a supplement or substitute for topsoil, the application shall provide results of the analyses, trials, and tests required under 30 CFR 816.22.

§ 779.24 Maps: General requirements.

The permit application shall include maps showing—

(a) All boundaries of lands and names of present owners of record of those lands, both surface and subsurface, included in or contiguous to the permit area;

(b) The boundaries of land within the proposed permit area upon which the applicant has the legal right to enter and begin surface mining activities;

(c) The boundaries of all areas proposed to be affected over the estimated total life of the proposed surface mining activities, with a description of size, sequence, and timing of the mining of sub-areas for which it is anticipated that additional permits will be sought;

(d) The location of all buildings on and within 1,000 feet of the proposed permit area, with identification of the current use of the buildings;

(e) The location of surface and sub-surface man-made features within, passing through, or passing over the proposed permit area, including, but not limited to major electric transmission lines, pipelines, and agricultural drainage tile fields;

(f) The location and boundaries of any proposed reference areas for determining the success of revegetation;

(g) The locations of water supply intakes for current users of surface water flowing into, out of, and within a hydrologic area defined by the regulatory authority, and those surface waters which will receive discharges from affected areas in the proposed permit area;

(h) Each public road located in or within 100 feet of the proposed permit area;

(i) The boundaries of any public park and locations of any cultural or historical resources listed or eligible for listing in the National Register of Historic Places and known archeological sites within the permit and adjacent areas.

(j) Each cemetery that is located in or within 100 feet of the proposed permit area.

(k) Any land within the proposed permit area which is within the boundaries of any units of the National System of Trails or the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act; and

(l) Other relevant information required by the regulatory authority.

§ 779.25 Cross sections, maps, and plans.

(a) The application shall include cross sections, maps, and plans showing—

(1) Elevations and locations of test borings and core samplings;

(2) Elevations and locations of monitoring stations used to gather data for water quality and quantity, fish and wildlife, and air quality, if required, in preparation of the application;

(3) Nature, depth, and thickness of the coal seams to be mined, any coal or rider seams above the seam to be mined, each stratum of the overburden, and the stratum immediately below the lowest coal seam to be mined;

(4) All coal crop lines and the strike and dip of the coal to be mined within the proposed permit area;

(5) Location and extent of known workings of active, inactive, or abandoned underground mines, including mine openings to the surface within the proposed permit and adjacent areas;

(6) Location and extent of sub-surface water, if encountered, within the proposed permit or adjacent areas;

(7) Location of surface water bodies such as streams, lakes, ponds, springs, constructed or natural drains, and irrigation ditches within the proposed permit and adjacent areas;

(8) Location and extent of existing or previously surface-mined areas within the proposed permit area;

(9) Location and dimensions of existing areas of spoil, waste, and non-coal waste disposal, dams, embankments, other impoundments, and water treatment and air pollution control facilities within the proposed permit area;

(10) Location, and depth if available, of gas and oil wells within the proposed permit area and water wells in the permit area and adjacent area;

(b) Cross sections, maps and plans included in a permit application as required by this section shall be prepared by, or under the direction of, and certified by a qualified, registered, professional engineer, a professional geologist, or in any State which authorizes land surveyors to prepare and certify such cross sections, maps and plans, a qualified, registered, professional, land surveyor, with assistance from experts in related fields such as landscape architecture, and shall be updated as required by the regulatory authority.

■ 7. Revise part 780 to read as follows:

PART 780—SURFACE MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENT FOR RECLAMATION AND OPERATION PLAN

Sec.

780.1 Scope.
780.2 Objectives.
780.4 Responsibilities.
780.10 Information collection.
780.11 Operation plan: General requirements.
780.12 Operation plan: Existing structures.
780.13 Operation plan: Blasting.
780.14 Operation plan: Maps and plans.
780.15 Air pollution control plan.
780.16 Fish and wildlife information.
780.18 Reclamation plan: General requirements.
780.21 Hydrologic information.
780.22 Geologic information.
780.23 Reclamation plan: Land use information.
780.25 Reclamation plan: Siltation structures, impoundments, banks, dams, and embankments.
780.27 Reclamation plan: Surface mining near underground mining.
780.28 [Reserved]
780.29 Diversions.
780.31 Protection of publicly owned parks and historic places.
780.33 Relocation or use of public roads.
780.35 Disposal of excess spoil.
780.37 Road systems.
780.38 Support facilities.

Authority: 30 U.S.C. 1201 *et seq.* and 16 U.S.C. 470 *et seq.*

§ 780.1 Scope.

This part provides the minimum requirements for the Secretary's approval of regulatory program provisions for the mining operations and reclamation plan portions of applications for permits for surface mining activities, except to the extent that different requirements for those plans are established under 30 CFR part 785.

§ 780.2 Objectives.

The objectives of this part are to insure that the regulatory authority is provided with comprehensive and reliable information on proposed surface mining activities, and to ensure that those activities are allowed to be conducted only in compliance with the Act, this chapter, and the regulatory program.

§ 780.4 Responsibilities.

(a) It is the responsibility of the applicant to provide to the regulatory authority all of the information required by this part, except where specifically exempted in this part.

(b) It is the responsibility of State and Federal governmental agencies to provide information to the regulatory authority where specifically required in this part.

§ 780.10 Information collection.

(a) The collections of information contained in part 780 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1029–0036. The information will be used by the regulatory authority to determine whether the applicant can comply with the applicable performance and environmental standards in Public Law 95–87. Response is required to obtain a benefit.

(b) Public Reporting burden for this information is estimated to average 28 hours per response, including the time

for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave. NW., Room 203, Washington, DC 20240; and the Office of Management and Budget, Paperwork Reduction Project 1029–0036, Washington, DC 20503.

§ 780.11 Operation plan: General requirements.

Each application shall contain a description of the mining operations proposed to be conducted during the life of the mine within the proposed permit area, including, at a minimum, the following:

(a) A narrative description of the type and method of coal mining procedures and proposed engineering techniques, anticipated annual and total production of coal, by tonnage, and the major equipment to be used for all aspects of those operations; and

(b) A narrative explaining the construction, modification, use, maintenance, and removal of the following facilities (unless retention of such facilities is necessary for postmining land use as specified in § 816.133):

(1) Dams, embankments, and other impoundments;

(2) Overburden and topsoil handling and storage areas and structures;

(3) Coal removal, handling, storage, cleaning, and transportation areas and structures;

(4) Spoil, coal processing waste, and non-coal waste removal, handling, storage, transportation, and disposal areas and structures;

(5) Mine facilities; and

(6) Water and air pollution control facilities.

§ 780.12 Operation plan: Existing structures.

(a) Each application shall contain a description of each existing structure proposed to be used in connection with or to facilitate the surface coal mining and reclamation operation. The description shall include—

(1) Location;

(2) Plans of the structure which describe its current condition;

(3) Approximate dates on which construction of the existing structure was begun and completed; and

(4) A showing, including relevant monitoring data or other evidence, whether the structure meets the performance standards of subchapter K (Permanent Program Standards) of this chapter or, if the structure does not meet the performance standards of subchapter K of this chapter, a showing whether the structure meets the performance standards of subchapter B (Interim Program Standards) of this chapter.

(b) Each application shall contain a compliance plan for each existing structure proposed to be modified or reconstructed for use in connection with or to facilitate the surface coal mining and reclamation operation. The compliance plan shall include—

(1) Design specifications for the modification or reconstruction of the structure to meet the design and performance standards of subchapter K of this chapter;

(2) A construction schedule which shows dates for beginning and completing interim steps and final reconstruction;

(3) Provisions for monitoring the structure during and after modification or reconstruction to ensure that the performance standards of subchapter K of this chapter are met; and

(4) A showing that the risk of harm to the environment or to public health or safety is not significant during the period of modification or reconstruction.

§ 780.13 Operation plan: Blasting.

(a) *Blasting plan.* Each application shall contain a blasting plan for the proposed permit area, explaining how the applicant will comply with the requirements of §§ 816.61 through 816.68 of this chapter. This plan shall include, at a minimum, information setting forth the limitations the operator will meet with regard to ground vibration and airblast, the bases for those limitations, and the methods to be applied in controlling the adverse effects of blasting operations.

(b) *Monitoring system.* Each application shall contain a description of any system to be used to monitor compliance with the standards of § 816.67 including the type, capability, and sensitivity of any blast-monitoring equipment and proposed procedures and locations of monitoring.

(c) *Blasting near underground mines.* Blasting operations within 500 feet of active underground mines require approval of the State and Federal regulatory authorities concerned with the health and safety of underground miners.

§ 780.14 Operation plan: Maps and plans.

Each application shall contain maps and plans as follows:

(a) The maps and plans shall show the lands proposed to be affected throughout the operation and any change in a facility or feature to be caused by the proposed operations, if the facility or feature was shown under 30 CFR 779.24 through 779.25.

(b) The following shall be shown for the proposed permit area:

(1) Buildings, utility corridors and facilities to be used;

(2) The area of land to be affected within the proposed permit area, according to the sequence of mining and reclamation;

(3) Each area of land for which a performance bond or other equivalent guarantee will be posted under subchapter J of this chapter;

(4) Each coal storage, cleaning and loading area;

(5) Each topsoil, spoil, coal waste, and non-coal waste storage area;

(6) Each water diversion, collection, conveyance, treatment, storage, and discharge facility to be used;

(7) Each air pollution collection and control facility;

(8) Each source of waste and each waste disposal facility relating to coal processing or pollution control;

(9) Each facility to be used to protect and enhance fish and wildlife and related environmental values;

(10) Each explosive storage and handling facility; and

(11) Location of each sedimentation pond, permanent water impoundment, coal processing waste bank, and coal processing waste dam and embankment, in accordance with 30 CFR 780.25, and fill area for the disposal of excess spoil in accordance 30 CFR 780.35.

(c) Except as provided in §§ 780.25(a)(2), 780.25(a)(3), 780.35(a), 816.71(b), 816.73(c), 816.74(c) and 816.81(c) of this chapter, cross sections, maps and plans required under paragraphs (b)(4), (5), (6), (10) and (11) of this section shall be prepared by, or under the direction of, and certified by a qualified registered professional engineer, a professional geologist, or in any State which authorizes land surveyors to prepare and certify such cross sections, maps and plans, a qualified, registered, professional, land surveyor, with assistance from experts in related fields such as landscape architecture.

§ 780.15 Air pollution control plan.

(a) For all surface mining activities with projected production rates exceeding 1,000,000 tons of coal per year and located west of the 100th

meridian west longitude, the application shall contain an air pollution control plan which includes the following:

(1) An air quality monitoring program to provide sufficient data to evaluate the effectiveness of the fugitive dust control practices proposed under paragraph (a)(2) of this section to comply with Federal and State air quality standards; and

(2) A plan for fugitive dust control practices as required under 30 CFR 816.95.

(b) For all other surface mining activities the application shall contain an air pollution control plan which includes the following:

(1) An air quality monitoring program, if required by the regulatory authority, to provide sufficient data to evaluate the effectiveness of the fugitive dust control practices under paragraph (b)(2) of this section to comply with applicable Federal and State air quality standards; and

(2) A plan for fugitive dust control practices, as required under 30 CFR 816.95.

§ 780.16 Fish and wildlife information.

(a) *Resource information.* Each application shall include fish and wildlife resource information for the permit area and adjacent area.

(1) The scope and level of detail for such information shall be determined by the regulatory authority in consultation with State and Federal agencies with responsibilities for fish and wildlife and shall be sufficient to design the protection and enhancement plan required under paragraph (b) of this section.

(2) Site-specific resource information necessary to address the respective species or habitats shall be required when the permit area or adjacent area is likely to include:

(i) Listed or proposed endangered or threatened species of plants or animals or their critical habitats listed by the Secretary under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), or those species or habitats protected by similar State statutes;

(ii) Habitats of unusually high value for fish and wildlife such as important streams, wetlands, riparian areas, cliffs supporting raptors, areas offering special shelter or protection, migration routes, or reproduction and wintering areas; or

(iii) Other species or habitats identified through agency consultation as requiring special protection under State or Federal law.

(b) *Protection and enhancement plan.* Each application shall include a description of how, to the extent possible using the best technology currently available, the operator will minimize disturbances and adverse impacts on fish and wildlife and related environmental values, including compliance with the Endangered Species Act, during the surface coal mining and reclamation operations and how enhancement of these resources will be achieved where practicable. This description shall—

(1) Be consistent with the requirements of § 816.97 of this chapter;

(2) Apply, at a minimum, to species and habitats identified under paragraph (a) of this section; and

(3) Include—

(i) Protective measures that will be used during the active mining phase of operation. Such measures may include the establishment of buffer zones, the selective location and special design of haul roads and powerlines, and the monitoring of surface water quality and quantity; and

(ii) Enhancement measures that will be used during the reclamation and postmining phase of operation to develop aquatic and terrestrial habitat. Such measures may include restoration of streams and other wetlands, retention of ponds and impoundments, establishment of vegetation for wildlife food and cover, and the replacement of perches and nest boxes. Where the plan does not include enhancement measures, a statement shall be given explaining why enhancement is not practicable.

(c) *Fish and Wildlife Service review.* Upon request, the regulatory authority shall provide the resource information required under paragraph (a) of this section and the protection and enhancement plan required under paragraph (b) of this section to the U.S. Department of the Interior, Fish and Wildlife Service Regional or Field Office for their review. This information shall be provided within 10 days of receipt of the request from the Service.

§ 780.18 Reclamation plan: General requirements.

(a) Each application shall contain a plan for reclamation of the lands within the proposed permit area, showing how the applicant will comply with section 515 of the Act, subchapter K of this chapter, and the environmental protection performance standards of the regulatory program. The plan shall include, at a minimum, all information required under 30 CFR 780.18 through 780.37.

(b) Each plan shall contain the following information for the proposed permit area—

(1) A detailed timetable for the completion of each major step in the reclamation plan;

(2) A detailed estimate of the cost of reclamation of the proposed operations required to be covered by a performance bond under subchapter J of this chapter, with supporting calculations for the estimates;

(3) A plan for backfilling, soil stabilization, compacting, and grading, with contour maps or cross sections that show the anticipated final surface configuration of the proposed permit area, in accordance with 30 CFR 816.102 through 816.107;

(4) A plan for removal, storage, and redistribution of topsoil, subsoil, and other material to meet the requirements of § 816.22 of this chapter. A demonstration of the suitability of topsoil substitutes or supplements under § 816.22(b) of this chapter shall be based upon analysis of the thickness of soil horizons, total depth, texture, percent coarse fragments, pH, and areal extent of the different kinds of soils. The regulatory authority may require other chemical and physical analyses, field-site trials, or greenhouse tests if determined to be necessary or desirable to demonstrate the suitability of the topsoil substitutes or supplements.

(5) A plan for revegetation as required in 30 CFR 816.111 through 816.116, including, but not limited to, descriptions of the—

(i) Schedule of revegetation;

(ii) Species and amounts per acre of seeds and seedlings to be used;

(iii) Methods to be used in planting and seeding;

(iv) Mulching techniques;

(v) Irrigation, if appropriate, and pest and disease control measures, if any; and

(vi) Measures proposed to be used to determine the success of revegetation as required in 30 CFR 816.116.

(vii) A soil testing plan for evaluation of the results of topsoil handling and reclamation procedures related to revegetation.

(6) A description of the measures to be used to maximize the use and conservation of the coal resource as required in 30 CFR 816.59;

(7) A description of measures to be employed to ensure that all debris, acid-forming and toxic-forming materials, and materials constituting a fire hazard are disposed of in accordance with 30 CFR 816.89 and 816.102 and a description of the contingency plans which have been developed to preclude sustained combustion of such materials;

(8) A description, including appropriate cross sections and maps, of the measures to be used to seal or

manage mine openings, and to plug, case, or manage exploration holes, other bore holes, wells, and other openings within the proposed permit area, in accordance with 30 CFR 816.13 through 816.15; and

(9) A description of steps to be taken to comply with the requirements of the Clean Air Act (42 U.S.C. 7401 *et seq.*), the Clean Water Act (33 U.S.C. 1251 *et seq.*), and other applicable air and water quality laws and regulations and health and safety standards.

§ 780.21 Hydrologic information.

(a) *Sampling and analysis methodology.* All water-quality analyses performed to meet the requirements of this section shall be conducted according to the methodology in the 15th edition of ''Standard Methods for the Examination of Water and Wastewater,'' which is incorporated by reference, or the methodology in 40 CFR parts 136 and 434. Water quality sampling performed to meet the requirements of this section shall be conducted according to either methodology listed above when feasible. ''Standard Methods for the Examination of Water and Wastewater,'' is a joint publication of the American Public Health Association, the American Water Works Association, and the Water Pollution Control Federation and is available from the American Public Health Association, 1015 15th Street NW., Washington, DC 20036. This document is also available for inspection at the Office of the OSM Administrative Record, U.S. Department of the Interior, Room 5315, 1100 L Street NW., Washington, DC; at the OSM Eastern Technical Service Center, U.S. Department of the Interior, Building 10, Parkway Center, Pittsburgh, Pa.; at the OSM Western Technical Service Center, U.S. Department of the Interior, Brooks Tower, 1020 15th Street, Denver, Colo or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* This incorporation by reference was approved by the Director of the Federal Register on October 26, 1983. This document is incorporated as it exists on the date of the approval, and a notice of any change in it will be published in the **Federal Register**.

(b) *Baseline information.* The application shall include the following baseline hydrologic information, and any additional information required by the regulatory authority.

(1) *Ground-water information.* The location and ownership for the permit and adjacent areas of existing wells, springs, and other ground-water resources, seasonal quality and quantity of ground water, and usage. Water quality descriptions shall include, at a minimum, total dissolved solids or specific conductance corrected to 25°C, pH, total iron, and total manganese. Ground-water quantity descriptions shall include, at a minimum, approximate rates of discharge or usage and depth to the water in the coal seam, and each water-bearing stratum above and potentially impacted stratum below the coal seam.

(2) *Surface-water information.* The name, location, ownership, and description of all surface-water bodies such as streams, lakes, and impoundments, the location of any discharge into any surface-water body in the proposed permit and adjacent areas, and information on surface-water quality and quantity sufficient to demonstrate seasonal variation and water usage. Water quality descriptions shall include, at a minimum, baseline information on total suspended solids, total dissolved solids or specific conductance corrected to 25°C, pH, total iron, and total manganese. Baseline acidity and alkalinity information shall be provided if there is a potential for acid drainage from the proposed mining operation. Water quantity descriptions shall include, at a minimum, baseline information on seasonal flow rates.

(3) *Supplemental information.* If the determination of the probable hydrologic consequences (PHC) required by paragraph (f) of this section indicates that adverse impacts on or off the proposed permit area may occur to the hydrologic balance, or that acid-forming or toxic-forming material is present that may result in the contamination of ground-water or surface-water supplies, then information supplemental to that required under paragraphs (b) (1) and (2) of this section shall be provided to evaluate such probable hydrologic consequences and to plan remedial and reclamation activities. Such supplemental information may be based upon drilling, aquifer tests, hydrogeologic analysis of the water-bearing strata, flood flows, or analysis of other water quality or quantity characteristics.

(c) *Baseline cumulative impact area information.* (1) Hydrologic and geologic information for the cumulative impact area necessary to assess the probable cumulative hydrologic impacts of the proposed operation and all anticipated mining on surface- and ground-water systems as required by paragraph (g) of this section shall be provided to the regulatory authority if available from appropriate Federal or State agencies.

(2) If the information is not available from such agencies, then the applicant may gather and submit this information to the regulatory authority as part of the permit application.

(3) The permit shall not be approved until the necessary hydrologic and geologic information is available to the regulatory authority.

(d) *Modeling.* The use of modeling techniques, interpolation or statistical techniques may be included as part of the permit application, but actual surface- and ground-water information may be required by the regulatory authority for each site even when such techniques are used.

(e) *Alternative water source information.* If the PHC determination required by paragraph (f) of this section indicates that the proposed mining operation may proximately result in contamination, diminution, or interruption of an underground or surface source of water within the proposed permit or adjacent areas which is used for domestic, agricultural, industrial or other legitimate purpose, then the application shall contain information on water availability and alternative water sources, including the suitability of alternative water sources for existing premining uses and approved postmining land uses.

(f) *Probable hydrologic consequences determination.* (1) The application shall contain a determination of the probable hydrologic consequences (PHC) of the proposed operation upon the quality and quantity of surface and ground water under seasonal flow conditions for the proposed permit and adjacent areas.

(2) The PHC determination shall be based on baseline hydrologic, geologic and other information collected for the permit application and may include data statistically representative of the site.

(3) The PHC determination shall include findings on:

(i) Whether adverse impacts may occur to the hydrologic balance;

(ii) Whether acid-forming or toxic-forming materials are present that could result in the contamination of surface or ground water supplies;

(iii) Whether the proposed operation may proximately result in contamination, diminution or interruption of an underground or surface source of water within the proposed permit or adjacent areas which is used for domestic, agricultural, industrial or other legitimate purpose; and

(iv) What impact the proposed operation will have on:

(A) Sediment yields from the disturbed area; (B) acidity, total suspended and dissolved solids, and other important water quality parameters of local impact; (C) flooding or streamflow alteration; (D) ground water and surface water availability; and (E) other characteristics as required by the regulatory authority.

(4) An application for a permit revision shall be reviewed by the regulatory authority to determine whether a new or updated PHC determination shall be required.

(g) *Cumulative hydrologic impact assessment.* (1) The regulatory authority shall provide an assessment of the probable cumulative hydrologic impacts (CHIA) of the proposed operation and all anticipated mining upon surface- and ground-water systems in the cumulative impact area. The CHIA shall be sufficient to determine, for purposes of permit approval, whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. The regulatory authority may allow the applicant to submit data and analyses relevant to the CHIA with the permit application.

(2) An application for a permit revision shall be reviewed by the regulatory authority to determine whether a new or updated CHIA shall be required.

(h) *Hydrologic reclamation plan.* The application shall include a plan, with maps and descriptions, indicating how the relevant requirements of part 816, including §§ 816.41 to 816.43, will be met. The plan shall be specific to the local hydrologic conditions. It shall contain the steps to be taken during mining and reclamation through bond release to minimize disturbances to the hydrologic balance within the permit and adjacent areas; to prevent material damage outside the permit area; to meet applicable Federal and State water quality laws and regulations; and to protect the rights of present water users. The plan shall include the measures to be taken to: Avoid acid or toxic drainage; prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow; provide water-treatment facilities when needed; control drainage; restore approximate premining recharge capacity and protect or replace rights of present water users. The plan shall specifically address and potential adverse hydrologic consequences identified in the PHC determination prepared under paragraph (f) of this section and shall include preventive and remedial measures.

(i) *Ground-water monitoring plan.* (1) The application shall include a ground-water monitoring plan based upon the PHC determination required under paragraph (f) of this section and the analysis of all baseline hydrologic, geologic and other information in the permit application. The plan shall provide for the monitoring of parameters that relate to the suitability of the ground water for current and approved postmining land uses and to the objectives for protection of the hydrologic balance set forth in paragraph (h) of this section. It shall identify the quantity and quality parameters to be monitored, sampling frequency, and site locations. It shall describe how the data may be used to determine the impacts of the operation upon the hydrologic balance. At a minimum, total dissolved solids or specific conductance corrected to 25 °C, pH, total iron, total manganese, and water levels shall be monitored and data submitted to the regulatory authority at least every 3 months for each monitoring location. The regulatory authority may require additional monitoring.

(2) If an applicant can demonstrate by the use of the PHC determination and other available information that a particular water-bearing stratum in the proposed permit and adjacent areas is not one which serves as an aquifer which significantly ensures the hydrologic balance within the cumulative impact area, then monitoring of that stratum may be waived by the regulatory authority.

(j) *Surface-water monitoring plan.* (1) The application shall include a surface-water monitoring plan based upon the PHC determination required under paragraph (f) of this section and the analysis of all baseline hydrologic, geologic, and other information in the permit application. The plan shall provide for the monitoring of parameters that relate to the suitability of the surface water for current and approved postmined land uses and to the objectives for protection of the hydrologic balance as set forth in paragraph (h) of this section as well as the effluent limitations found at 40 CFR part 434.

(2) The plan shall identify the surface-water quantity and quality parameters to be monitored, sampling frequency and site locations. It shall describe how the data may be used to determine the impacts of the operation upon the hydrologic balance.

(i) At all monitoring locations in the surface-water bodies such as streams, lakes, and impoundments, that are potentially impacted or into which water will be discharged and at upstream monitoring locations the total dissolved solids or specific conductance corrected to 25 °C, total suspended solids, pH, total iron, total manganese, and flow shall be monitored.

(ii) For point-source discharges, monitoring shall be conducted in accordance with 40 CFR parts 122, 123 and 434 and as required by the National Pollutant Discharge Elimination System permitting authority.

(3) The monitoring reports shall be submitted to the regulatory authority every 3 months. The regulatory authority may require additional monitoring.

§ 780.22 Geologic information.

(a) *General.* Each application shall include geologic information in sufficient detail to assist in determining—

(1) The probable hydrologic consequences of the operation upon the quality and quantity of surface and ground water in the permit and adjacent areas, including the extent to which surface- and ground-water monitoring is necessary;

(2) All potentially acid- or toxic-forming strata down to and including the stratum immediately below the lowest coal seam to be mined; and

(3) Whether reclamation as required by this chapter can be accomplished and whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

(b) Geologic information shall include, at a minimum the following:

(1) A description of the geology of the proposed permit and adjacent areas down to and including the deeper of either the stratum immediately below the lowest coal seam to be mined or any aquifer below the lowest coal seam to be mined which may be adversely impacted by mining. The description shall include the areal and structural geology of the permit and adjacent areas, and other parameters which influence the required reclamation and the occurrence, availability, movement, quantity, and quality of potentially impacted surface and ground waters. It shall be based on—

(i) The cross sections, maps and plans required by § 779.25 of this chapter;

(ii) The information obtained under paragraphs (b)(2) and (c) of this section; and

(iii) Geologic literature and practices.

(2) Analyses of samples collected from test borings; drill cores; or fresh, unweathered, uncontaminated samples

from rock outcrops from the permit area, down to and including the deeper of either the stratum immediately below the lowest coal seam to be mined or any aquifer below the lowest seam to be mined which may be adversely impacted by mining. The analyses shall result in the following:

(i) Logs showing the lithologic characteristics including physical properties and thickness of each stratum and location of ground water where occurring;

(ii) Chemical analyses identifying those strata that may contain acid- or toxic-forming or alkalinity-producing materials and to determine their content except that the regulatory authority may find that the analysis for alkalinity-producing materials is unnecessary; and

(iii) Chemical analyses of the coal seam for acid- or toxic-forming materials, including the total sulfur and pyritic sulfur, except that the regulatory authority may find that the analysis of pyritic sulfur content is unnecessary.

(c) If determined to be necessary to protect the hydrologic balance or to meet the performance standards of this chapter, the regulatory authority may require the collection, analysis, and description of geologic information in addition to that required by paragraph (b) of this section.

(d) An applicant may request the regulatory authority to waive in whole or in part the requirements of paragraph (b)(2) of this section. The waiver may be granted only if the regulatory authority finds in writing that the collection and analysis of such data is unnecessary because other equivalent information is available to the regulatory authority in a satisfactory form.

§ 780.23 Reclamation plan: Land use information.

(a) The plan shall contain a statement of the condition, capability, and productivity of the land within the proposed permit area, including:

(1) A map and supporting narrative of the uses of the land existing at the time of the filing of the application. If the premining use of the land was changed within 5 years before the anticipated date of beginning the proposed operations, the historic use of the land shall also be described. In the case of previously mined land, the use of the land prior to any mining shall also be described to the extent such information is available.

(2) A narrative of land capability and productivity, which analyzes the land-use description under paragraph (a) of this section in conjunction with other environmental resources information. The narrative shall provide analyses of:

(i) The capability of the land before any mining to support a variety of uses, giving consideration to soil and foundation characteristics, topography, vegetative cover, and the hydrology of the proposed permit area; and

(ii) The productivity of the proposed permit area before mining, expressed as average yield of food, fiber, forage, or wood products from such lands obtained under high levels of management. The productivity shall be determined by yield data or estimates for similar sites based on current data from the U.S. Department of Agriculture, State agricultural universities, or appropriate State natural resource or agricultural agencies.

(b) Each plan shall contain a detailed description of the proposed use, following reclamation, of the land within the proposed permit area, including a discussion of the utility and capacity of the reclaimed land to support a variety of alternative uses, and the relationship of the proposed use of existing land use policies and plans. This description shall explain:

(1) How the proposed post mining land use is to be achieved and the necessary support activities which may be needed to achieve the proposed land use; and

(2) Where a land use different from the premining land use is proposed, all materials needed for approval of the alternative use under 30 CFR 816.133.

(3) The consideration which has been given to making all of the proposed surface mining activities consistent with surface owner plans and applicable State and local land use plans and programs.

(c) The description shall be accompanied by a copy of the comments concerning the proposed use by the legal or equitable owner of record of the surface of the proposed permit area and the State and local government agencies which would have to initiate, implement, approve, or authorize the proposed use of the land following reclamation.

§ 780.25 Reclamation plan: Siltation structures, impoundments, banks, dams, and embankments.

(a) *General.* Each application shall include a general plan and a detailed design plan for each proposed siltation structure, water impoundment, and coal processing waste bank, dam, or embankment within the proposed permit area.

(1) Each general plan shall—(i) Be prepared by, or under the direction of, and certified by a qualified, registered, professional engineer, a professional geologist, or in any State which authorizes land surveyors to prepare and certify such plans, a qualified, registered, professional, land surveyor, with assistance from experts in related fields such as landscape architecture;

(ii) Contain a description, map, and cross section of the structure and its location;

(iii) Contain preliminary hydrologic and geologic information required to assess the hydrologic impact of the structure;

(iv) Contain a survey describing the potential effect on the structure from subsidence of the subsurface strata resulting from past underground mining operations if underground mining has occurred; and

(v) Contain a certification statement which includes a schedule setting forth the dates that any detailed design plans for structures that are not submitted with the general plan will be submitted to the regulatory authority. The regulatory authority shall have approved, in writing, the detailed design plan for a structure before construction of the structure begins.

(2) Impoundments meeting the Class B or C criteria for dams in the U.S. Department of Agriculture, Soil Conservation Service Technical Release No. 60 (210–VI–TR60, Oct. 1985), ''Earth Dams and Reservoirs,'' Technical Release No. 60 (TR–60) shall comply with the requirements of this section for structures that meet or exceed the size of other criteria of the Mine Safety and Health Administration (MSHA). The technical release is hereby incorporated by reference. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. TR–60 may be viewed and downloaded from OSM's Web site at *http://www.osmre.gov/programs/TDT/damsafety.shtm.* It also is available for inspection at the OSM Headquarters Office, Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 252, 1951 Constitution Ave. NW., Washington, DC or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* Each detailed design plan for a structure that meets or exceeds the size or other criteria of MSHA, § 77.216(a) of this chapter shall:

(i) Be prepared by, or under the direction of, and certified by a qualified registered professional engineer with assistance from experts in related fields

such as geology, land surveying, and landscape architecture;

(ii) Include any geotechnical investigation, design, and construction requirements for the structure;

(iii) Describe the operation and maintenance requirements for each structure; and

(iv) Describe the timetable and plans to remove each structure, if appropriate.

(3) Each detailed design plan for structures not included in paragraph (a)(2) of this section shall:

(i) Be prepared by, or under the direction of, and certified by a qualified, registered, professional engineer, or in any State which authorizes land surveyors to prepare and certify such plans, a qualified, registered, professional land surveyor, except that all coal processing waste dams and embankments covered by §§ 816.81–816.84 of this chapter shall be certified by a qualified, registered, professional engineer;

(ii) Include any design and construction requirements for the structure, including any required geotechnical information;

(iii) Describe the operation and maintenance requirements for each structure; and

(iv) Describe the timetable and plans to remove each structure, if appropriate.

(b) *Siltation structures.* Siltation structures shall be designed in compliance with the requirements of § 816.46 of this chapter.

(c) *Permanent and temporary impoundments.* (1) Permanent and temporary impoundments shall be designed to comply with the requirements of § 816.49 of this chapter.

(2) Each plan for an impoundment meeting the size or other criteria of the Mine Safety and Health Administration shall comply with the requirements of §§ 77.216–1 and 77.216–2 of this title. The plan required to be submitted to the District Manager of MSHA under § 77.216 of this title shall be submitted to the regulatory authority as part of the permit application in accordance with paragraph (a) of this section.

(3) For impoundments not included in paragraph (a)(2) of this section, the regulatory authority may establish through the State program approval process, engineering design standards that ensure stability comparable to a 1.3 minimum static safety factor in lieu of engineering tests to establish compliance with the minimum static safety factor of 1.3 specified in § 816.49(a)(4)(ii) of this chapter.

(d) *Coal processing waste banks.* Coal processing waste banks shall be designed to comply with the requirements of 30 CFR 816.81–816.84.

(e) *Coal processing waste dams and embankments.* Coal processing waste dams and embankments shall be designed to comply with the requirements of 30 CFR 816.81–816.84. Each plan shall comply with the requirements of the Mine Safety and Health Administration, 30 CFR 77.216–1 and 77.216–2, and shall contain the results of a geotechnical investigation of the proposed dam or embankment foundation area, to determine the structural competence of the foundation which will support the proposed dam or embankment structure and the impounded material. The geotechnical investigation shall be planned and supervised by an engineer or engineering geologist, according to the following:

(1) The number, location, and depth of borings and test pits shall be determined using current prudent engineering practice for the size of the dam or embankment, quantity of material to be impounded, and subsurface conditions.

(2) The character of the overburden and bedrock, the proposed abutment sites, and any adverse geotechnical conditions which may affect the particular dam, embankment, or reservoir site shall be considered.

(3) All springs, seepage, and ground water flow observed or anticipated during wet periods in the area of the proposed dam or embankment shall be identified on each plan.

(4) Consideration shall be given to the possibility of mudflows, rock-debris falls, or other landslides into the dam, embankment, or impounded material.

(f) If the structure meets the Class B or C criteria for dams in TR–60 or meets the size or other criteria of § 77.216(a) of this chapter, each plan under paragraphs (b), (c), and (e) of this section shall include a stability analysis of the structure. The stability analysis shall include, but not be limited to, strength parameters, pore pressures, and long-term seepage conditions. The plan shall also contain a description of each engineering design assumption and calculation with a discussion of each alternative considered in selecting the specific design parameters and construction methods.

§ 780.27 Reclamation plan: Surface mining near underground mining.

For surface mining activities within the proposed permit area to be conducted within 500 feet of an underground mine, the application shall describe the measures to be used to comply with 30 CFR 816.79.

§ 780.28 [Reserved]

§ 780.29 Diversions.

Each application shall contain descriptions, including maps and cross sections, of stream channel diversions and other diversions to be constructed within the proposed permit area to achieve compliance with 30 CFR 816.43 of this chapter.

§ 780.31 Protection of publicly owned parks and historic places.

(a) For any publicly owned parks or any places listed on the National Register of Historic Places that may be adversely affected by the proposed operation, each plan shall describe the measures to be used—

(1) To prevent adverse impacts, or

(2) If a person has valid existing rights, as determined under § 761.16 of this chapter, or if joint agency approval is to be obtained under § 761.17(d) of this chapter, to minimize adverse impacts.

(b) The regulatory authority may require the applicant to protect historic or archeological properties listed on or eligible for listing on the National Register of Historic Places through appropriate mitigation and treatment measures. Appropriate mitigation and treatment measures may be required to be taken after permit issuance provided that the required measures are completed before the properties are affected by any mining operation.

§ 780.33 Relocation or use of public roads.

Each application shall describe, with appropriate maps and cross-sections, the measures to be used to ensure that the interests of the public and landowners affected are protected if, under § 761.14 of this chapter, the applicant seeks to have the regulatory authority approve—

(a) Conducting the proposed surface mining activities within 100 feet of the right-of-way line of any public road, except where mine access or haul roads join that right-of-way; or

(b) Relocating a public road.

§ 780.35 Disposal of excess spoil.

(a) Each application shall contain descriptions, including appropriate maps and cross section drawings, of the proposed disposal site and design of the spoil disposal structures according to 30 CFR 816.71–816.74. These plans shall describe the geotechnical investigation, design, construction, operation, maintenance, and removal, if appropriate, of the site and structures.

(b) Except for the disposal of excess spoil on pre existing benches, each application shall contain the results of a geotechnical investigation of the

proposed disposal site, including the following:

(1) The character of bedrock and any adverse geologic conditions in the disposal area,

(2) A survey identifying all springs, seepage, and ground water flow observed or anticipated during wet periods in the area of the disposal site;

(3) A survey of the potential effects of subsidence of the subsurface strata due to past and future mining operations;

(4) A technical description of the rock materials to be utilized in the construction of those disposal structures containing rock chimney cores or underlain by a rock drainage blanket; and

(5) A stability analysis including, but not limited to, strength parameters, pore pressures and long-term seepage conditions. These data shall be accompanied by a description of all engineering design assumptions and calculations and the alternatives considered in selecting the specific design specifications and methods.

(c) If, under 30 CFR 816.71(d), rock-toe buttresses or key-way cuts are required, the application shall include the following:

(1) The number, location, and depth of borings or test pits which shall be determined with respect to the size of the spoil disposal structure and subsurface conditions; and

(2) Engineering specifications utilized to design the rock-toe buttress or key-way cuts which shall be determined in accordance with paragraph (b)(5) of this section.

§ 780.37 Road systems.

(a) *Plans and drawings.* Each applicant for a surface coal mining and reclamation permit shall submit plans and drawings for each road, as defined in § 701.5 of this chapter, to be constructed, used, or maintained within the proposed permit area. The plans and drawings shall—

(1) Include a map, appropriate cross sections, design drawings and specifications for road widths, gradients, surfacing materials, cuts, fill embankments, culverts, bridges, drainage ditches, low-water crossings, and drainage structures;

(2) Contain the drawings and specifications of each proposed road that is located in the channel of an intermittent or perennial stream, as necessary for approval of the road by the regulatory authority in accordance with § 816.150(d)(1) of this chapter;

(3) Contain the drawings and specifications for each proposed ford of perennial or intermittent streams that is used as a temporary route, as necessary for approval of the ford by the regulatory authority in accordance with § 816.151(c)(2) of this chapter;

(4) Contain a description of measures to be taken to obtain approval of the regulatory authority for alteration or relocation of a natural stream channel under § 816.151(d)(5) of this chapter;

(5) Contain the drawings and specifications for each low-water crossing of perennial or intermittent stream channels so that the regulatory authority can maximize the protection of the stream in accordance with § 816.151(d)(6) of this chapter; and

(6) Describe the plans to remove and reclaim each road that would not be retained under an approved postmining land use, and the schedule for this removal and reclamation.

(b) *Primary road certification.* The plans and drawings for each primary road shall be prepared by, or under the direction of, and certified by a qualified registered professional engineer, or in any State which authorizes land surveyors to certify the design of primary roads a qualified registered professional land surveyor, with experience in the design and construction of roads, as meeting the requirements of this chapter; current, prudent engineering practices; and any design criteria established by the regulatory authority.

(c) *Standard design plans.* The regulatory authority may establish engineering design standards for primary roads through the State program approval process, in lieu of engineering tests, to establish compliance with the minimum static safety factor of 1.3 for all embankments specified in § 816.151(b) of this chapter.

§ 780.38 Support facilities.

Each applicant for a surface coal mining and reclamation permit shall submit a description, plans, and drawings for each support facility to be constructed, used, or maintained within the proposed permit area. The plans and drawings shall include a map, appropriate cross sections, design drawings, and specifications sufficient to demonstrate compliance with § 816.181 of this chapter for each facility.

■ 8. Revise part 783 to read as follows:

PART 783—UNDERGROUND MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR INFORMATION ON ENVIRONMENTAL RESOURCES

Sec.

783.1 Scope.
783.2 Objectives.
783.4 Responsibilities.
783.10 Information collection.
783.11 General requirements.
783.12 General environmental resources information.
783.18 Climatological information.
783.19 Vegetation information.
783.20 [Reserved]
783.21 Soil resources information.
783.24 Maps: General requirements.
783.25 Cross sections, maps, and plans.

Authority: 30 U.S.C. 1201 *et seq.;* sec. 115 of Pub. L. 98–146, (30 U.S.C. 1257), and 16 U.S.C. 470 *et seq.*

§ 783.1 Scope.

This part establishes the minimum requirements for the Secretary's approval of regulatory program provisions for the environmental resources contents of applications for permits for underground mining activities.

§ 783.2 Objectives.

The objectives of this part are to ensure that each application provides to the regulatory authority a complete and accurate description of the environmental resources that may be impacted or affected by proposed underground mining activities.

§ 783.4 Responsibilities.

(a) It is the responsibility of the applicant to provide, except where specifically exempted in this part, all information required by this part in the application.

(b) It is the responsibility of State and Federal Government agencies to provide information for applications as specifically required by this part.

§ 783.10 Information collection.

The information collection requirements contained in 30 CFR 783.11, 783.12, 783.13, 783.14, 783.15, 783.16, 783.17, 783.18, 783.19, 783.21, 783.22, 783.23, 783.24 and 783.25 have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned clearance number 1029–0038. The information is being collected to meet the requirements of sections 507 and 508 of Pub. L. 95–87, which require the permit applicant to present an adequate description of the existing pre-mining environmental resources within and around the proposed mine plan area. This information will be used by the regulatory authority to determine whether the applicant can comply with the performance standards for underground mining. The obligation to respond is mandatory.

§ 783.11 General requirements.

Each permit application shall include a description of the existing, premining environmental resources within the

proposed permit area and adjacent areas that may be affected or impacted by the proposed underground mining activities.

§ 783.12 General environmental resources information.

Each application shall describe and identify—

(a) The lands subject to surface coal mining operations over the estimated life of those operations and the size, sequence, and timing of the subareas for which it is anticipated that individual permits for mining will be sought; and

(b) The nature of cultural historic and archeological resources listed or eligible for listing on the National Register of Historic Places and known archeological sites within the proposed permit and adjacent areas.

(1) The description shall be based on all available information, including, but not limited to, information from the State Historic Preservation Officer and local archeological, historical, and cultural preservation groups.

(2) The regulatory authority may require the applicant to identify and evaluate important historic and archeological resources that may be eligible for listing on the National Register of Historic Places, through the—

(i) Collection of additional information,

(ii) Conduct of field investigations, or

(iii) Other appropriate analyses.

§ 783.18 Climatological information.

(a) When requested by the regulatory authority, the application shall contain a statement of the climatological factors that are representative of the proposed permit area, including—

(1) The average seasonal precipitation;

(2) The average direction and velocity of prevailing winds; and

(3) Seasonal temperature ranges.

(b) The regulatory authority may request such additional data as deemed necessary to ensure compliance with the requirements of this subchapter.

§ 783.19 Vegetation information.

(a) The permit application shall, if required by the regulatory authority, contain a map that delineates existing vegetative types and a description of the plant communities within the area affected by surface operations and facilities and within any proposed reference area. This description shall include information adequate to predict the potential for reestablishing vegetation.

(b) When a map or aerial photograph is required, sufficient adjacent areas shall be included to allow evaluation of vegetation as important habitat for fish and wildlife for those species of fish and wildlife identified under 30 CFR 784.21.

§ 783.20 [Reserved]

§ 783.21 Soil resources information.

(a) The applicant shall provide adequate soil survey information on those portions of the permit area to be affected by surface operations or facilities consisting of the following:

(1) A map delineating different soils;

(2) Soil identification;

(3) Soil description; and

(4) Present and potential productivity of existing soils.

(b) Where the applicant proposes to use selected overburden materials as a supplement or substitute for topsoil, the application shall provide results of the analyses, trials and tests required under 30 CFR 817.22.

§ 783.24 Maps: General requirements.

The permit application shall include maps showing:

(a) All boundaries of lands and names of present owners of record of those lands, both surface and sub-surface, included in or contiguous to the permit area;

(b) The boundaries of land within the proposed permit area upon which the applicant has the legal right to enter and begin underground mining activities;

(c) The boundaries of all areas proposed to be affected over the estimated total life of the underground mining activities, with a description of size, sequence and timing of the mining of sub-areas for which it is anticipated that additional permits will be sought;

(d) The location of all buildings in and within 1000 feet of the proposed permit area, with identification of the current use of the buildings;

(e) The location of surface and sub-surface man-made features within, passing through, or passing over the proposed permit area, including, but not limited to, major electric transmission lines, pipelines, and agricultural drainage tile fields;

(f) The location and boundaries of any proposed reference areas for determining the success of revegetation;

(g) The locations of water supply intakes for current users of surface waters flowing into, out of, and within a hydrologic area defined by the regulatory authority, and those surface waters which will receive discharges from affected areas in the proposed permit area;

(h) Each public road located in or within 100 feet of the proposed permit area;

(i) The boundaries of any public park and locations of any cultural or historical resources listed or eligible for listing in the National Register of Historic Places and known archeological sites within the permit and adjacent areas.

(j) Each cemetery that is located in or within 100 feet of the proposed permit area.

(k) Any land within the proposed permit area which is within the boundaries of any units of the National System of Trails or the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act; and

(l) Other relevant information required by the regulatory authority.

§ 783.25 Cross sections, maps, and plans.

(a) The application shall include cross sections, maps, and plans showing—

(1) Elevations and locations of test borings and core samplings;

(2) Elevations and locations of monitoring stations used to gather data on water quality and quantity, fish and wildlife, and air quality, if required, in preparation of the application.

(3) Nature, depth, and thickness of the coal seams to be mined, any coal or rider seams above the seam to be mined, each stratum of the overburden, and the stratum immediately below the lowest coal seam to be mined;

(4) All coal crop lines and the strike and dip of the coal to be mined within the proposed permit area;

(5) Location and extent of known workings of active, inactive, or abandoned underground mines, including mine openings to the surface within the proposed permit and adjacent areas;

(6) Location and extent of sub-surface water, if encountered, within the proposed permit or adjacent areas, including, but not limited to areal and vertical distribution of aquifers, and portrayal of seasonal differences of head in different aquifers on cross-sections and contour maps;

(7) Location of surface water bodies such as streams, lakes, ponds, springs, constructed or natural drains, and irrigation ditches within the proposed permit and adjacent areas;

(8) Location and extent of existing or previously surface-mined areas within the proposed permit area;

(9) Location and dimensions of existing areas of spoil, waste, coal development waste, and non-coal waste disposal, dams, embankments, other impoundments, and water treatment and air pollution control facilities within the proposed permit area;

(10) Location, and depth if available, of gas and oil wells within the proposed permit area and water wells in the permit area and adjacent areas;

(b) Cross-sections, maps and plans included in a permit application as required by this section shall be prepared by, or under the direction of, and certified by a qualified, registered, professional engineer, a professional geologist, or in any State which authorizes land surveyors to prepare and certify such cross sections, maps and plans, a qualified, registered, professional, land surveyor, with assistance from experts in related fields such as landscape architecture, and shall be updated as required by the regulatory authority.

■ 9. Revise part 784 to read as follows:

PART 784—UNDERGROUND MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN

Sec.

784.1 Scope.
784.2 Objectives.
784.4 Responsibilities.
784.10 Information collection.
784.11 Operation plan: General requirements.
784.12 Operation plan: Existing structures.
784.13 Reclamation plan: General requirements.
784.14 Hydrologic information.
784.15 Reclamation plan: Land use information.
784.16 Reclamation plan: Siltation structures, impoundments, banks, dams, and embankments.
784.17 Protection of publicly owned parks and historic places.
784.18 Relocation or use of public roads.
784.19 Underground development waste.
784.20 Subsidence control plan.
784.21 Fish and wildlife information.
784.22 Geologic information.
784.23 Operation plan: Maps and plans.
784.24 Road systems.
784.25 Return of coal processing waste to abandoned underground workings.
784.26 Air pollution control plan.
784.29 Diversions.
784.30 Support facilities.
784.200 Interpretive rules related to General Performance Standards.

Authority: 30 U.S.C. 1201 *et seq.* and 16 U.S.C. 470 *et seq.*

§ 784.1 Scope.

This part provides the minimum requirements for the Secretary's approval of regulatory program provisions for the mining operations and reclamation plans portions of applications for permits for underground mining activities, except to the extent that different requirements for those plans are established under 30 CFR part 785.

§ 784.2 Objectives.

The objectives of this part are to ensure that the regulatory authority is provided with comprehensive and reliable information on proposed underground mining activities, and to ensure that those activities are allowed to be conducted only in compliance with the Act, this chapter, and the regulatory program.

§ 784.4 Responsibilities.

(a) It is the responsibility of the applicant to provide to the regulatory authority all of the information required by this part, except where specifically exempted in this part.

(b) It is the responsibility of State and Federal governmental agencies to provide information to the regulatory authority where specifically required in this part.

§ 784.10 Information collection.

(a) The collections of information contained in part 784 have been approved by Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1029–0039. The information will be used to meet the requirements of 30 U.S.C. 1211(b), 1251, 1257, 1258, 1266, and 1309a. The obligation to respond is required to obtain a benefit.

(b) Public reporting burden for this information is estimated to average 513 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

§ 784.11 Operation plan: General requirements.

Each application shall contain a description of the mining operations proposed to be conducted during the life of the mine within the proposed permit area, including, at a minimum, the following:

(a) A narrative description of the type and method of coal mining procedures and proposed engineering techniques, anticipated annual and total production of coal, by tonnage, and the major equipment to be used for all aspects of those operations; and

(b) A narrative explaining the construction, modification, use, maintenance, and removal of the following facilities (unless retention of such facility is necessary for postmining land use as specified in § 817.133):

(1) Dams, embankments, and other impoundments;

(2) Overburden and topsoil handling and storage areas and structures;

(3) Coal removal, handling, storage, cleaning, and transportation areas and structures;

(4) Spoil, coal processing waste, mine development waste, and non-coal waste removal, handling, storage, transportation, and disposal areas and structures;

(5) Mine facilities; and

(6) Water pollution control facilities.

§ 784.12 Operation plan: Existing structures.

(a) Each application shall contain a description of each existing structure proposed to be used in connection with or to facilitate the surface coal mining and reclamation operation. The description shall include:

(1) Location;

(2) Plans of the structure which describe its current condition;

(3) Approximate dates on which construction of the existing structure was begun and completed; and

(4) A showing, including relevant monitoring data or other evidence, whether the structure meets the performance standards of subchapter K (Permanent Program Standards) of this chapter or, if the structure does not meet the performance standards of subchapter K of this chapter, a showing whether the structure meets the performance standards of subchapter B (Interim Program Standards) of this chapter.

(b) Each application shall contain a compliance plan for each existing structure proposed to be modified or reconstructed for use in connection with or to facilitate the surface coal mining and reclamation operation. The compliance plan shall include—

(1) Design specifications for the modification or reconstruction of the structure to meet the design and performance standards of subchapter K of this chapter;

(2) A construction schedule which shows dates for beginning and completing interim steps and final reconstruction;

(3) Provisions for monitoring the structure during and after modification or reconstruction to ensure that the performance standards of subchapter K of this chapter are met; and

(4) A showing that the risk of harm to the environment or to public health or safety is not significant during the period of modification or reconstruction.

§ 784.13 Reclamation plan: General requirements.

(a) Each application shall contain a plan for the reclamation of the lands within the proposed permit area, showing how the applicant will comply with sections 515 and 516 of the Act, subchapter K of this chapter, and the environmental protection performance standards of the regulatory program.

The plan shall include, at a minimum, all information required under 30 CFR 784.13 through 784.26.

(b) Each plan shall contain the following information for the proposed permit area;

(1) A detailed timetable for the completion of each major step in the reclamation plan;

(2) A detailed estimate of the cost of the reclamation of the proposed operations required to be covered by a performance bond under subchapter J of this chapter, with supporting calculations for the estimates;

(3) A plan for backfilling, soil stabilization, compacting and grading, with contour maps or cross sections that show the anticipated final surface configuration of the proposed permit area, in accordance with 30 CFR 817.102 through 817.107;

(4) A plan for removal, storage, and redistribution of topsoil, subsoil, and other material to meet the requirements of § 817.22 of this chapter. A demonstration of the suitability of topsoil substitutes or supplements under § 817.22(b) of this chapter shall be based upon analysis of the thickness of soil horizons, total depth, texture, percent coarse fragments, pH, and areal extent of the different kinds of soils. The regulatory authority may require other chemical and physical analyses, field-site trials, or greenhouse tests if determined to be necessary or desirable to demonstrate the suitability of the topsoil substitutes or supplements.

(5) A plan for revegetation as required in 30 CFR 817.111 through 817.116, including, but not limited to, descriptions of the—

(i) Schedule of revegetation;

(ii) Species and amounts per acre of seeds and seedlings to be used;

(iii) Methods to be used in planting and seeding;

(iv) Mulching techniques;

(v) Irrigation, if appropriate, and pest and disease control measures, if any;

(vi) Measures proposed to be used to determine the success of revegetation as required in 30 CFR 817.116; and,

(vii) A soil testing plan for evaluation of the results of topsoil handling and reclamation procedures related to revegetation.

(6) A description of the measures to be used to maximize the use and conservation of the coal resource as required in 30 CFR 817.59;

(7) A description of measures to be employed to ensure that all debris, acid-forming and toxic-forming materials, and materials constituting a fire hazard are disposed of in accordance with 30 CFR 817.89 and 817.102 and a description of the contingency plans which have been developed to preclude sustained combustion of such materials;

(8) A description, including appropriate cross sections and maps, of the measures to be used to seal or manage mine openings, and to plug, case or manage exploration holes, other bore holes, wells and other openings within the proposed permit area, in accordance with 30 CFR 817.13–817.15; and

(9) A description of steps to be taken to comply with the requirements of the Clean Air Act (42 U.S.C. 7401 *et seq.*), the Clean Water Act (33 U.S.C. 1251 *et seq.*), and other applicable air and water quality laws and regulations and health and safety standards.

§ 784.14 Hydrologic information.

(a) *Sampling and analysis.* All water quality analyses performed to meet the requirements of this section shall be conducted according to the methodology in the 15th edition of ''Standard Methods for the Examination of Water and Wastewater,'' which is incorporated by reference, or the methodology in 40 CFR parts 136 and 434. Water quality sampling performed to meet the requirements of this section shall be conducted according to either methodology listed above when feasible. ''Standard Methods for the Examination of Water and Wastewater,'' is a joint publication of the American Public Health Association, the American Water Works Association, and the Water Pollution Control Federation and is available from the American Public Health Association, 1015 Fifteenth Street NW., Washington, DC 20036. This document is also available for inspection at the Office of the OSM Administrative Record, U.S. Department of the Interior, Room 5315, 1100 L Street NW., Washington, DC; at the OSM Eastern Technical Service Center, U.S. Department of the Interior, Building 10, Parkway Center, Pittsburgh, Pa.; at the OSM Western Technical Service Center, U.S. Department of the Interior, Brooks Tower, 1020 15th Street, Denver, Colo or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* This incorporation by reference was approved by the Director of the Federal Register on October 26, 1983. This document is incorporated as it exists on the date of the approval, and a notice of any change in it will be published in the **Federal Register.**

(b) *Baseline information.* The application shall include the following baseline hydrologic information, and any additional information required by the regulatory authority.

(1) *Ground-water information.* The location and ownership for the permit and adjacent areas of existing wells, springs, and other ground-water resources, seasonal quality and quantity of ground water, and usage. Water quality descriptions shall include, at a minimum, total dissolved solids or specific conductance corrected to 25°C, pH, total iron, and total manganese. Ground-water quantity descriptions shall include, at a minimum, approximate rates of discharge or usage and depth to the water in the coal seam, and each water-bearing stratum above and potentially impacted stratum below the coal seam.

(2) *Surface-water information.* The name, location, ownership and description of all surface-water bodies such as streams, lakes, and impoundments, the location of any discharge into any surface-water body in the proposed permit and adjacent areas, and information on surface-water quality and quantity sufficient to demonstrate seasonal variation and water usage. Water quality descriptions shall include, at a minimum, baseline information on total suspended solids, total dissolved solids or specific conductance corrected to 25°C, pH, total iron, and total manganese. Baseline acidity and alkalinity information shall be provided if there is a potential for acid drainage from the proposed mining operation. Water quantity descriptions shall include, at a minimum, baseline information on seasonal flow rates.

(3) *Supplemental information.* If the determination of the probable hydrologic consequences (PHC) required by paragraph (e) of this section indicates that adverse impacts on or off the proposed permit area may occur to the hydrologic balance, or that acid-forming or toxic-forming material is present that may result in the contamination of ground-water or surface-water supplies, then information supplemental to that required under paragraphs (b) (1) and (2) of this section shall be provided to evaluate such probable hydrologic consequences and to plan remedial and reclamation activities. Such supplemental information may be based upon drilling, aquifer tests, hydrogeologic analysis of the water-bearing strata, flood flows, or analysis of other water quality or quantity characteristics.

(c) *Baseline cumulative impact area information.* (1) Hydrologic and geologic information for the cumulative impact area necessary to assess the probable cumulative hydrologic impacts of the

proposed operation and all anticipated mining on surface- and ground-water systems as required by paragraph (f) of this section shall be provided to the regulatory authority if available from appropriate Federal or State agencies.

(2) If this information is not available from such agencies, then the applicant may gather and submit this information to the regulatory authority as part of the permit application.

(3) The permit shall not be approved until the necessary hydrologic and geologic information is available to the regulatory authority.

(d) *Modeling.* The use of modeling techniques, interpolation or statistical techniques may be included as part of the permit application, but actual surface- and ground-water information may be required by the regulatory authority for each site even when such techniques are used.

(e) *Probable hydrologic consequences determination.* (1) The application shall contain a determination of the probable hydrologic consequences (PHC) of the proposed operation upon the quality and quantity of surface and ground water under seasonal flow conditions for the proposed permit and adjacent areas.

(2) The PHC determination shall be based on baseline hydrologic, geologic, and other information collected for the permit application and may include data statistically representative of the site.

(3) The PHC determination shall include findings on:

(i) Whether adverse impacts may occur to the hydrologic balance;

(ii) Whether acid-forming or toxic-forming materials are present that could result in the contamination of surface or ground water supplies;

(iii) What impact the proposed operation will have on:

(A) Sediment yield from the disturbed area; (B) acidity, total suspended and dissolved solids, and other important water quality parameters of local impact; (C) flooding or streamflow alteration; (D) ground water and surface water availability; and (E) other characteristics as required by the regulatory authority;

(iv) Whether the underground mining activities conducted after October 24, 1992 may result in contamination, diminution or interruption of a well or spring in existence at the time the permit application is submitted and used for domestic, drinking, or residential purposes within the permit or adjacent areas.

(4) An application for a permit revision shall be reviewed by the regulatory authority to determine whether a new or updated PHC shall be required.

(f) *Cumulative hydrologic impact assessment.* (1) The regulatory authority shall provide an assessment of the probable cumulative hydrologic impacts (CHIA) of the proposed operation and all anticipated mining upon surface- and ground-water systems in the cumulative impact area. The CHIA shall be sufficient to determine, for purposes of permit approval, whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. The regulatory authority may allow the applicant to submit data and analyses relevant to the CHIA with the permit application.

(2) An application for a permit revision shall be reviewed by the regulatory authority to determine whether a new or updated CHIA shall be required.

(g) *Hydrologic reclamation plan.* The application shall include a plan, with maps and descriptions, indicating how the relevant requirements of part 817 of this chapter, including §§ 817.41 to 817.43, will be met. The plan shall be specific to the local hydrologic conditions. It shall contain the steps to be taken during mining and reclamation through bond release to minimize disturbance to the hydrologic balance within the permit and adjacent areas; to prevent material damage outside the permit area; and to meet applicable Federal and State water quality laws and regulations. The plan shall include the measures to be taken to: avoid acid or toxic drainage; prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow; provide water treatment facilities when needed; and control drainage. The plan shall specifically address any potential adverse hydrologic consequences identified in the PHC determination prepared under paragraph (e) of this section and shall include preventive and remedial measures.

(h) *Ground-water monitoring plan.* (1) The application shall include a ground-water monitoring plan based upon the PHC determination required under paragraph (e) of this section and the analysis of all baseline hydrologic, geologic and other information in the permit application. The plan shall provide for the monitoring of parameters that relate to the suitability of the ground water for current and approved postmining land uses and to the objectives for protection of the hydrologic balance set forth in paragraph (g) of this section. It shall identify the quantity and quality parameters to be monitored, sampling frequency and site locations. It shall describe how the data may be used to determine the impacts of the operation upon the hydrologic balance. At a minimum, total dissolved solids or specific conductance corrected to 25°C, pH, total iron, total manganese, and water levels shall be monitored and data submitted to the regulatory authority at least every 3 months for each monitoring location. The regulatory authority may require additional monitoring.

(2) If an applicant can demonstrate by the use of the PHC determination and other available information that a particular water-bearing stratum in the proposed permit and adjacent areas is not one which serves as an aquifer which significantly ensures the hydrologic balance within the cumulative impact area, then monitoring of that stratum may be waived by the regulatory authority.

(i) *Surface-water monitoring plan.* (1) The application shall include a surface-water monitoring plan based upon the PHC determination required under paragraph (e) of this section and the analysis of all baseline hydrologic, geologic and other information in the permit application. The plan shall provide for the monitoring of parameters that relate to the suitability of the surface water for current and approved postmining land uses and to the objectives for protection of the hydrologic balance as set forth in paragraph (g) of this section as well as the effluent limitations found at 40 CFR part 434.

(2) The plan shall identify the surface-water quantity and quality parameters to be monitored, sampling frequency and site locations. It shall describe how the data may be used to determine the impacts of the operation upon the hydrologic balance.

(i) At all monitoring locations in streams, lakes, and impoundments, that are potentially impacted or into which water will be discharged and at upstream monitoring locations, the total dissolved solids or specific conductance corrected at 25°C, total suspended solids, pH, total iron, total manganese, and flow shall be monitored.

(ii) For point-source discharges, monitoring shall be conducted in accordance with 40 CFR parts 122, 123 and 434 and as required by the National Pollutant Discharge Elimination System permitting authority.

(3) The monitoring reports shall be submitted to the regulatory authority every 3 months. The regulatory

authority may require additional monitoring.

§ 784.15 Reclamation plan: Land use information.

(a) The plan shall contain a statement of the condition, capability, and productivity of the land within the proposed permit area, including:

(1) A map and supporting narrative of the uses of the land existing at the time of the filing of the application. If the premining use of the land was changed within 5 years before the anticipated date of beginning the proposed operations, the historic use of the land shall also be described. In the case of previously mined land, the use of the land prior to any mining shall also be described to the extent such information is available.

(2) A narrative of land capability and productivity, which analyzes the land-use description under paragraph (a) of this section in conjunction with other environmental resources information. The narrative shall provide analyses of:

(i) The capability of the land before any mining to support a variety of uses, giving consideration to soil and foundation characteristics, topography, vegetative cover, and the hydrology of the proposed permit area; and

(ii) The productivity of the proposed permit area before mining, expressed as average yield of food, fiber, forage, or wood products from such lands obtained under high levels of management. The productivity shall be determined by yield data or estimates for similar sites based on current data from the U.S. Department of Agriculture, State agricultural universities, or appropriate State natural resource or agricultural agencies.

(b) Each plan shall contain a detailed description of the proposed use, following reclamation, of the land within the proposed permit area including a discussion of the utility and capacity of the reclaimed land to support a variety of alternative uses, and the relationship of the proposed use to existing land use policies and plans. This description shall explain:

(1) How the proposed postmining land use is to be achieved and the necessary support activities which may be needed to achieve the proposed land use; and

(2) Where a land use different from the premining land use is proposed, all materials needed for approval of the alternative use under 30 CFR 817.133.

(3) The consideration which has been given to making all of the proposed surface mining activities consistent with surface owner plans and applicable State and local land use plans and programs.

(c) The description shall be accompanied by a copy of the comments concerning the proposed use by the legal or equitable owner of record of the surface of the proposed permit area and the State and local government agencies which would have to initiate, implement, approve, or authorize the proposed use of the land following reclamation.

§ 784.16 Reclamation plan: Siltation structures, impoundments, banks, dams, and embankments.

(a) *General.* Each application shall include a general plan and a detailed design plan for each proposed siltation structure, water impoundment, and coal processing waste bank, dam, or embankment within the proposed permit area.

(1) Each general plan shall—

(i) Be prepared by, or under the direction of, and certified by a qualified, registered, professional engineer, a professional geologist, or in any State which authorizes land surveyors to prepare and certify such plans, a qualified, registered, professional, land surveyor with assistance from experts in related fields such as landscape architecture;

(ii) Contain a description, map, and cross section of the structure and its location;

(iii) Contain preliminary hydrologic and geologic information required to assess the hydrologic impact of the structure;

(iv) Contain a survey describing the potential effect on the structure from subsidence of the subsurface strata resulting from past underground mining operations if underground mining has occurred; and

(v) Contain a certification statement which includes a schedule setting forth the dates when any detailed design plans for structures that are not submitted with the general plan will be submitted to the regulatory authority. The regulatory authority shall have approved, in writing, the detailed design plan for a structure before construction of the structure begins.

(2) Impoundments meeting the Class B or C criteria for dams in the U.S. Department of Agriculture, Soil Conservation Service Technical Release No. 60 (210–VI–TR60, Oct. 1985), "Earth Dams and Reservoirs," Technical Release No. 60 (TR–60) shall comply with the requirements of this section for structures that meet or exceed the size or other criteria of the Mine Safety and Health Administration (MSHA). The technical release is hereby incorporated by reference. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. TR–60 may be viewed or downloaded from OSM's Web site at *http://www.osmre.gov/programs/TDT/damsafety.shtm.* It also is available for inspection at the OSM Headquarters Office, Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 252, 1951 Constitution Ave. NW., Washington, DC or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* Each detailed design plan for a structure that meets or exceeds the size or other criteria of MSHA, § 77.216(a) of this chapter shall:

(i) Be prepared by, or under the direction of, and certified by a qualified registered professional engineer with assistance from experts in related fields such as geology, land surveying, and landscape architecture;

(ii) Include any geotechnical investigation, design, and construction requirements for the structure;

(iii) Describe the operation and maintenance requirements for each structure; and

(iv) Describe the timetable and plans to remove each structure, if appropriate.

(3) Each detailed design plan for structures not included in paragraph (a)(2) of this section shall:

(i) Be prepared by, or under the direction of, and certified by a qualified, registered, professional engineer, or in any State which authorizes land surveyors to prepare and certify such plans, a qualified, registered, professional, land surveyor, except that all coal processing waste dams and embankments covered by §§ 817.81 through 817.84 of this chapter shall be certified by a qualified, registered, professional engineer;

(ii) Include any design and construction requirements for the structure, including any required geotechnical information;

(iii) Describe the operation and maintenance requirements for each structure; and

(iv) Describe the timetable and plans to remove each structure, if appropriate.

(b) *Siltation structures.* Siltation structures shall be designed in compliance with the requirements of § 817.46 of this chapter.

(c) *Permanent and temporary impoundments.* (1) Permanent and temporary impoundments shall be

designed to comply with the requirements of § 817.49 of this chapter.

(2) Each plan for an impoundment meeting the size of other criteria of the Mine Safety and Health Administration shall comply with the requirements of §§ 77.216–1 and 77.216–2 of this title. The plan required to be submitted to the District Manager of MSHA under § 77.216 of this title shall be submitted to the regulatory authority as part of the permit application in accordance with paragraph (a) of this section.

(3) For impoundments not included in paragraph (a)(2) of this section the regulatory authority may establish through the State program approval process engineering design standards that ensure stability comparable to a 1.3 minimum static safety factor in lieu of engineering tests to establish compliance with the minimum static safety factor of 1.3 specified in § 817.49(a)(4)(ii) of this chapter.

(d) *Coal processing waste banks.* Coal processing waste banks shall be designed to comply with the requirements of 30 CFR 817.81 through 817.84.

(e) *Coal processing waste dams and embankments.* Coal processing waste dams and embankments shall be designed to comply with the requirements of 30 CFR 817.81 through 817.84. Each plan shall comply with the requirements of the Mine Safety and Health Administration, 30 CFR 77.216–1 and 77.216–2, and shall contain the results of a geotechnical investigation of the proposed dam or embankment foundation area, to determine the structural competence of the foundation which will support the proposed dam or embankment structure and the impounded material. The geotechnical investigation shall be planned and supervised by an engineer or engineering geologist, according to the following:

(1) The number, location, and depth of borings and test pits shall be determined using current prudent engineering practice for the size of the dam or embankment, quantity of material to be impounded, and subsurface conditions.

(2) The character of the overburden and bedrock, the proposed abutment sites, and any adverse geotechnical conditions which may affect the particular dam, embankment, or reservoir site shall be considered.

(3) All springs, seepage, and ground water flow observed or anticipated during wet periods in the area of the proposed dam or embankment shall be identified on each plan.

(4) Consideration shall be given to the possibility of mudflows, rock-debris falls, or other landslides into the dam, embankment, or impounded material.

(f) If the structure meets the Class B or C criteria for dams in TR–60 or meets the size or other criteria of § 77.216(a) of this chapter, each plan under paragraphs (b), (c), and (e) of this section shall include a stability analysis of the structure. The stability analysis shall include, but not be limited to, strength parameters, pore pressures, and long-term seepage conditions. The plan shall also contain a description of each engineering design assumption and calculation with a discussion of each alternative considered in selecting the specific design parameters and construction methods.

§ 784.17 Protection of publicly owned parks and historic places.

(a) For any publicly owned parks or any places listed on the National Register of Historic Places that may be adversely affected by the proposed operation, each plan shall describe the measures to be used.

(1) To prevent adverse impacts, or

(2) If a person has valid existing rights, as determined under § 761.16 of this chapter, or if joint agency approval is to be obtained under § 761.17(d) of this chapter, to minimize adverse impacts.

(b) The regulatory authority may require the applicant to protect historic and archeological properties listed on or eligible for listing on the National Register of Historic Places through appropriate mitigation and treatment measures. Appropriate mitigation and treatment measures may be required to be taken after permit issuance provided that the required measures are completed before the properties are affected by any mining operation.

§ 784.18 Relocation or use of public roads.

Each application shall describe, with appropriate maps and cross sections, the measures to be used to ensure that the interests of the public and landowners affected are protected if, under § 761.14 of this chapter, the applicant seeks to have the regulatory authority approve—

(a) Conducting the proposed surface coal mining operations within 100 feet of the right-of-way line of any public road, except where mine access or haul roads join that right-of-way; or

(b) Relocating a public road.

§ 784.19 Underground development waste.

Each plan shall contain descriptions, including appropriate maps and cross section drawings of the proposed disposal methods and sites for placing underground development waste and excess spoil generated at surface areas affected by surface operations and facilities, according to 30 CFR 817.71 through 817.74. Each plan shall describe the geotechnical investigation, design, construction, operation, maintenance and removal, if appropriate, of the structures and be prepared according to 30 CFR 780.35.

§ 784.20 Subsidence control plan.

(a) *Pre-subsidence survey.* Each application must include:

(1) A map of the permit and adjacent areas at a scale of 1:12,000, or larger if determined necessary by the regulatory authority, showing the location and type of structures and renewable resource lands that subsidence may materially damage or for which the value or reasonably foreseeable use may be diminished by subsidence, and showing the location and type of drinking, domestic, and residential water supplies that could be contaminated, diminished, or interrupted by subsidence.

(2) A narrative indicating whether subsidence, if it occurred, could cause material damage to or diminish the value or reasonably foreseeable use of such structures or renewable resource lands or could contaminate, diminish, or interrupt drinking, domestic, or residential water supplies.

(3) A survey of the condition of all non-commercial buildings or occupied residential dwellings and structures related thereto, that may be materially damaged or for which the reasonably foreseeable use may be diminished by subsidence, within the area encompassed by the applicable angle of draw; as well as a survey of the quantity and quality of all drinking, domestic, and residential water supplies within the permit area and adjacent area that could be contaminated, diminished, or interrupted by subsidence. If the applicant cannot make this survey because the owner will not allow access to the site, the applicant will notify the owner, in writing, of the effect that denial of access will have as described in § 817.121(c)(4) of this chapter. The applicant must pay for any technical assessment or engineering evaluation used to determine the pre-mining condition or value of such non-commercial buildings or occupied residential dwellings and structures related thereto and the quantity and quality of drinking, domestic, or residential water supplies. The applicant must provide copies of the survey and any technical assessment or engineering evaluation to the property owner and regulatory authority. However, the requirements to perform a survey of the condition of all noncommercial buildings or occupied

residential dwellings and structures related thereto, that may be materially damaged or for which the reasonably foreseeable use may be diminished by subsidence, within the areas encompassed by the applicable angle of draw is suspended per court order.

(b) *Subsidence control plan.* If the survey conducted under paragraph (a) of this section shows that no structures, or drinking, domestic, or residential water supplies, or renewable resource lands exist, or that no material damage or diminution in value or reasonably foreseeable use of such structures or lands, and no contamination, diminution, or interruption of such water supplies would occur as a result of mine subsidence, and if the regulatory authority agrees with this conclusion, no further information need be provided under this section. If the survey shows that structures, renewable resource lands, or water supplies exist and that subsidence could cause material damage or diminution in value or reasonably foreseeable use, or contamination, diminution, or interruption of protected water supplies, or if the regulatory authority determines that damage, diminution in value or foreseeable use, or contamination, diminution, or interruption could occur, the application must include a subsidence control plan that contains the following information:

(1) A description of the method of coal removal, such as longwall mining, room-and-pillar removal or hydraulic mining, including the size, sequence and timing of the development of underground workings;

(2) A map of the underground workings that describes the location and extent of the areas in which planned-subsidence mining methods will be used and that identifies all areas where the measures described in paragraphs (b)(4), (b)(5), and (b)(7) of this section will be taken to prevent or minimize subsidence and subsidence-related damage; and, when applicable, to correct subsidence-related material damage;

(3) A description of the physical conditions, such as depth of cover, seam thickness and lithology of overlaying strata, that affect the likelihood or extent of subsidence and subsidence-related damage;

(4) A description of the monitoring, if any, needed to determine the commencement and degree of subsidence so that, when appropriate, other measures can be taken to prevent, reduce or correct material damage in accordance with § 817.121(c) of this chapter;

(5) Except for those areas where planned subsidence is projected to be used, a detailed description of the subsidence control measures that will be taken to prevent or minimize subsidence and subsidence-related damage, such as, but not limited to:

(i) Backstowing or backfilling of voids;

(ii) Leaving support pillars of coal;

(iii) Leaving areas in which no coal is removed, including a description of the overlying area to be protected by leaving coal in place; and

(iv) Taking measures on the surface to prevent or minimize material damage or diminution in value of the surface;

(6) A description of the anticipated effects of planned subsidence, if any;

(7) For those areas where planned subsidence is projected to be used, a description of methods to be employed to minimize damage from planned subsidence to non-commercial buildings and occupied residential dwellings and structures related thereto; or the written consent of the owner of the structure or facility that minimization measures not be taken; or, unless the anticipated damage would constitute a threat to health or safety, a demonstration that the costs of minimizing damage exceed the anticipated costs of repair;

(8) A description of the measures to be taken in accordance with §§ 817.41(j) and 817.121(c) of this chapter to replace adversely affected protected water supplies or to mitigate or remedy any subsidence-related material damage to the land and protected structures; and

(9) Other information specified by the regulatory authority as necessary to demonstrate that the operation will be conducted in accordance with § 817.121 of this chapter.

§ 784.21 Fish and wildlife information.

(a) *Resource information.* Each application shall include fish and wildlife resource information for the permit area and adjacent area.

(1) The scope and level of detail for such information shall be determined by the regulatory authority in consultation with State and Federal agencies with responsibilities for fish and wildlife and shall be sufficient to design the protection and enhancement plan required under paragraph (b) of this section.

(2) Site-specific resource information necessary to address the respective species or habitats shall be required when the permit area or adjacent area is likely to include:

(i) Listed or proposed endangered or threatened species of plants or animals or their critical habitats listed by the Secretary under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), or those species or habitats protected by similar State statutes;

(ii) Habitats of unusually high value for fish and wildlife such as important streams, wetlands, riparian areas, cliffs supporting raptors, areas offering special shelter or protection, migration routes, or reproduction and wintering areas; or

(iii) Other species or habitats identified through agency consultation as requiring special protection under State or Federal law.

(b) *Protection and enhancement plan.* Each application shall include a description of how, to the extent possible using the best technology currently available, the operator will minimize disturbances and adverse impacts on fish and wildlife and related environmental values, including compliance with the Endangered Species Act, during the surface coal mining and reclamation operations and how enhancement of these resources will be achieved where practicable. This description shall—

(1) Be consistent with the requirements of § 817.97 of this chapter;

(2) Apply, at a minimum, to species and habitats identified under paragraph (a) of this section; and

(3) Include—

(i) Protective measures that will be used during the active mining phase of operation. Such measures may include the establishment of buffer zones, the selective location and special design of haul roads and powerlines, and the monitoring of surface water quality and quantity; and

(ii) Enchancement measures that will be used during the reclamation and postmining phase of operation to develop aquatic and terrestrial habitat. Such measures may include restoration of streams and other wetlands, retention of ponds and impoundments, establishment of vegetation for wildlife food and cover, and the placement of perches and nest boxes. Where the plan does not include enhancement measures, a statement shall be given explaining why enhancement is not practicable.

(c) *Fish and Wildlife Service review.* Upon request, the regulatory authority shall provide the resource information required under paragraph (a) of this section and the protection and enhancement plan required under paragraph (b) of this section to the U.S. Department of the Interior, Fish and Wildlife Service Regional or Field Office for their review. This information shall be provided within 10 days of receipt of the request from the Service.

§ 784.22 Geologic information.

(a) *General.* Each application shall include geologic information in sufficient detail to assist in—

(1) Determining the probable hydrologic consequences of the operation upon the quality and quantity of surface and ground water in the permit and adjacent areas, including the extent to which surface- and ground-water monitoring is necessary;

(2) Determining all potentially acid- or toxic-forming strata down to and including the stratum immediately below the coal seam to be mined;

(3) Determining whether reclamation as required by this chapter can be accomplished and whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area; and

(4) Preparing the subsidence control plan under § 784.20.

(b) Geologic information shall include, at a minimum, the following:

(1) A description of the geology of the proposed permit and adjacent areas down to and including the deeper of either the stratum immediately below the lowest coal seam to be mined or any aquifer below the lowest coal seam to be mined which may be adversely impacted by mining. This description shall include the areal and structural geology of the permit and adjacent areas, and other parameters which influence the required reclamation and it shall also show how the areal and structural geology may affect the occurrence, availability, movement, quantity and quality of potentially impacted surface and ground water. It shall be based on—

(i) The cross sections, maps, and plans required by § 783.25 of this chapter;

(ii) The information obtained under paragraphs (b)(2), (b)(3), and (c) of this section; and

(iii) Geologic literature and practices.

(2) For any portion of a permit area in which the strata down to the coal seam to be mined will be removed or are already exposed, samples shall be collected and analyzed from test borings; drill cores; or fresh, unweathered, uncontaminated samples from rock outcrops down to and including the deeper of either the stratum immediately below the lowest coal seam to be mined or any aquifer below the lowest coal seam to be mined which may be adversely impacted by mining. The analyses shall result in the following:

(i) Logs showing the lithologic characteristics including physical properties and thickness of each stratum and location of ground water where occurring;

(ii) Chemical analyses identifying those strata that may contain acid- or toxic-forming, or alkalinity-producing materials and to determine their content except that the regulatory authority may find that the analysis for alkalinity-producing material is unnecessary; and

(iii) Chemical analysis of the coal seam for acid- or toxic-forming materials, including the total sulfur and pyritic sulfur, except that the regulatory authority may find that the analysis of pyritic sulfur content is unnecessary.

(3) For lands within the permit and adjacent areas where the strata above the coal seam to be mined will not be removed, samples shall be collected and analyzed from test borings or drill cores to provide the following data:

(i) Logs of drill holes showing the lithologic characteristics, including physical properties and thickness of each stratum that may be impacted, and location of ground water where occurring;

(ii) Chemical analyses for acid- or toxic-forming or alkalinity-producing materials and their content in the strata immediately above and below the coal seam to be mined;

(iii) Chemical analyses of the coal seam for acid- or toxic-forming materials, including the total sulfur and pyritic sulfur, except that the regulatory authority may find that the analysis of pyrite sulfur content is unnecessary; and

(iv) For standard room and pillar mining operations, the thickness and engineering properties of clays or soft rock such as clay shale, if any, in the stratum immediately above and below each coal seam to be mined.

(c) If determined to be necessary to protect the hydrologic balance, to minimize or prevent subsidence, or to meet the performance standards of this chapter, the regulatory authority may require the collection, analysis and description of geologic information in addition to that required by paragraph (b) of this section.

(d) An applicant may request the regulatory authority to waive in whole or in part the requirements of paragraphs (b) (2) and (3) of this section. The waiver may be granted only if the regulatory authority finds in writing that the collection and analysis of such data is unnecessary because other information having equal value or effect is available to the regulatory authority in a satisfactory form.

§ 784.23 Operation plan: Maps and plans.

Each application shall contain maps and plans as follows:

(a) The maps, plans and cross-sections shall show the underground mining activities to be conducted, the lands to be affected throughout the operation, and any change in a facility or feature to be caused by the proposed operations, if the facility or feature was shown under 30 CFR 783.24 and 783.25.

(b) The following shall be shown for the proposed permit area:

(1) Buildings, utility corridors, and facilities to be used;

(2) The area of land to be affected within the proposed permit area, according to the sequence of mining and reclamation;

(3) Each area of land for which a performance bond or other equivalent guarantee will be posted under subchapter J of this chapter;

(4) Each coal storage, cleaning and loading area;

(5) Each topsoil, spoil, coal preparation waste, underground development waste, and non-coal waste storage area;

(6) Each water diversion, collection, conveyance, treatment, storage and discharge facility to be used;

(7) Each source of waste and each waste disposal facility relating to coal processing or pollution control;

(8) Each facility to be used to protect and enhance fish and wildlife related environmental values;

(9) Each explosive storage and handling facility;

(10) Location of each sedimentation pond, permanent water impoundment, coal processing waste bank, and coal processing waste dam and embankment, in accordance with 30 CFR 784.16 and disposal areas for underground development waste and excess spoil, in accordance with 30 CFR 784.19;

(11) Each profile, at cross-sections specified by the regulatory authority, of the anticipated final surface configuration to be achieved for the affected areas;

(12) Location of each water and subsidence monitoring point;

(13) Location of each facility that will remain on the proposed permit area as a permanent feature, after the completion of underground mining activities.

(c) Except as provided in §§ 784.16(a)(2), 784.16(a)(3), 784.19, 817.71(b), 817.73(c), 817.74(c) and 817.81(c) of this chapter, cross sections, maps and plans required under paragraphs (b)(4), (5), (6), (10) and (11) of this section shall be prepared by, or under the direction of, and certified by a qualified, registered, professional engineer, a professional geologist, or in any State which authorizes land surveyors to prepare and certify such

cross sections, maps and plans, a qualified, registered, professional, land surveyor, with assistance from experts in related fields such as landscape architecture.

§ 784.24 Road systems.

(a) *Plans and drawings.* Each applicant for an underground coal mining and reclamation permit shall submit plans and drawings for each road, as defined in § 701.5 of this chapter, to be constructed, used, or maintained within the proposed permit area. The plans and drawings shall—

(1) Include a map, appropriate cross sections, design drawings, and specifications for road widths, gradients, surfacing materials, cuts, fill embankments, culverts, bridges, drainage ditches, low-water crossings, and drainage structures;

(2) Contain the drawings and specifications of each proposed road that is located in the channel of an intermittent or perennial stream, as necessary for approval of the road by the regulatory authority in accordance with § 817.150(d)(1) of this chapter;

(3) Contain the drawings and specifications for each proposed ford of perennial or intermittent streams that is used as a temporary route, as necessary for approval of the ford by the regulatory authority in accordance with § 817.151(c)(2) of this chapter;

(4) Contain a description of measures to be taken to obtain approval of the regulatory authority for alteration or relocation of a natural stream channel under § 817.151(d)(5) of this chapter;

(5) Contain the drawings and specifications for each low-water crossing of perennial or intermittent stream channels so that the regualtory authority can maximize the protection of the stream in accordance with § 817.151(d)(6) of this chapter; and

(6) Describe the plans to remove and reclaim each road that would not be retained under an approved postmining land use, and the schedule for this removal and reclamation.

(b) *Primary road certification.* The plans and drawings for each primary road shall be prepared by, or under the direction of, and certified by a qualified registered professional engineer, or in any State which authorizes land surveyors to certify the design of primary roads a qualified registered professional land surveyor, experienced in the design and construction of roads, as meeting the requirements of this chapter; current, prudent engineering practices; and any design criteria established by the regulatory authority.

(c) *Standard design plans.* The regulatory authority may establish engineering design standards for primary roads through the State program approval process, in lieu of engineering tests, to establish compliance with the minimum static safety factor of 1.3 for all embankments specified in § 817.151(b) of this chapter.

§ 784.25 Return of coal processing waste to abandoned underground workings.

(a) Each plan shall describe the design, operation and maintenance of any proposed coal processing waste disposal facility, including flow diagrams and any other necessary drawings and maps, for the approval of the regulatory authority and the Mine Safety and Health Administration under 30 CFR 817.81(f).

(b) Each plan shall describe the source and quality of waste to be stowed, area to be backfilled, percent of the mine void to be filled, method of constructing underground retaining walls, influence of the backfilling operation on active underground mine operations, surface area to be supported by the backfill, and the anticipated occurrence of surface effects following backfilling.

(c) The applicant shall describe the source of the hydraulic transport mediums, method of dewatering the placed backfill, retainment of water underground, treatment of water if released to surface streams, and the effect on the hydrologic regime.

(d) The plan shall describe each permanent monitoring well to be located in the backfilled area, the stratum underlying the mined coal, and gradient from the backfilled area.

(e) The requirements of paragraphs (a), (b), (c), and (d) of this section shall also apply to pneumatic backfilling operations, except where the operations are exempted by the regulatory authority from requirements specifying hydrologic monitoring.

§ 784.26 Air pollution control plan.

For all surface operations associated with underground mining activities, the application shall contain an air pollution control plan which includes the following:

(a) An air quality monitoring program, if required by the regulatory authority, to provide sufficient data to evaluate the effectiveness of the fugitive dust control practices, under paragraph (b) of this section to comply with applicable Federal and State air quality standards; and

(b) A plan for fugitive dust control practices, as required under 30 CFR 817.95.

§ 784.29 Diversions.

Each application shall contain descriptions, including maps and cross sections, of stream channel diversions and other diversions to be constructed within the proposed permit area to achieve compliance with § 817.43 of this chapter.

§ 784.30 Support facilities.

Each applicant for an underground coal mining and reclamation permit shall submit a description, plans, and drawings for each support facility to be constructed, used, or maintained within the proposed permit area. The plans and drawings shall include a map, appropriate cross sections, design drawings, and specifications sufficient to demonstrate compliance with § 817.181 of this chapter for each facility.

§ 784.200 Interpretive rules related to General Performance Standards.

The following interpretation of rules promulgated in part 784 of this chapter have been adopted by the Office of Surface Mining Reclamation and Enforcement.

(a) *Interpretation of § 784.15: Reclamation plan: Postmining land uses.* (1) The requirements of § 784.15(a)(2), for approval of an alternative postmining land use, may be met by requesting approval through the permit revision procedures of § 774.13 rather than requesting such approval in the original permit application. The original permit application, however, must demonstrate that the land will be returned to its premining land use capability as required by § 817.133(a). An application for a permit revision of this type, (i) must be submitted in accordance with the filing deadlines of § 774.13, (ii) shall constitute a significant alteration from the mining operations contemplated by the original permit, and (iii) shall be subject to the requirements of 30 CFR parts 773 and 775.

(b) [Reserved]

■ 10. Revise part 785 to read as follows:

PART 785—REQUIREMENTS FOR PERMITS FOR SPECIAL CATEGORIES OF MINING

Sec.

785.1 Scope.
785.2 Objective.
785.10 Information collection.
785.11 Anthracite surface coal mining and reclamation operations.
785.12 Special bituminous surface coal mining and reclamation operations.
785.13 Experimental practices mining.
785.14 Mountaintop removal mining.
785.15 Steep slope mining.
785.16 Permits incorporating variances from approximate original contour restoration requirements for steep slope mining.

785.17 Prime farmlands.
785.18 Variances for delay in contemporaneous reclamation requirement in combined surface and underground mining activities.
785.19 Surface coal mining and reclamation operations on areas or adjacent to areas including alluvial valley floors in the arid and semi-arid areas west of the 100th meridian.
785.20 Augering.
785.21 Coal preparation plants not located within the permit area of a mine.
785.22 In situ processing activities.
785.25 Lands eligible for remining.

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

§ 785.1 Scope.

This part establishes the minimum requirements for regulatory program provisions for permits for certain categories of surface coal mining and reclamation operations. These requirements are in addition to the general permit requirements contained in this subchapter G. All of the provisions of subchapter G apply to these operations, unless otherwise specifically provided in this part.

§ 785.2 Objective.

The objective of this part is to ensure that permits are issued for certain categories of surface coal mining and reclamation operations only after the regulatory authority receives information that shows that these operations will be conducted according to the applicable requirements of the Act, subchapter K, and applicable regulatory programs.

§ 785.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.,* the Office of Management and Budget (OMB) has approved the information collection requirements of part 785 and assigned it control number 1029–0040. The information is being collected to meet the requirements of sections 507, 508, 510, 515, 701 and 711 of Public Law 95–87, which requires applicants for special types of mining activities to provide descriptions, maps, plans and data of the proposed activity. This information will be used by the regulatory authority in determining if the applicant can meet the applicable performance standards for the special type of mining activity. Persons must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

§ 785.11 Anthracite surface coal mining and reclamation operations.

(a) This section applies to any person who conducts or intends to conduct anthracite surface coal mining and reclamation operations in Pennsylvania.

(b) Each person who intends to conduct anthracite surface coal mining and reclamation operations in Pennsylvania shall apply for and obtain a permit in accordance with the requirements of this subchapter. The following standards apply to applications for and issuance of permits:

(1) In lieu of the requirements of 30 CFR parts 816–817, the requirements of 30 CFR part 820 shall apply.

(2) All other requirements of this chapter including the bonding and insurance requirements of 30 CFR 800.70, except the bond limits and the period of revegetation responsibility, to the extent they are required under sections 509 or 510 of the Act, shall apply.

(c) If the Pennsylvania anthracite permanent regulatory program in effect on August 3, 1977, is amended with respect to environmental protection performance standards, the Secretary shall issue additional regulations necessary to meet the purposes of the Act.

§ 785.12 Special bituminous surface coal mining and reclamation operations.

(a) This section applies to any person who conducts or intends to conduct certain special bituminous coal surface mine operations in Wyoming.

(b) Each application for a permit for a special bituminous coal mine operation shall include, as part of the mining operations and reclamation plan, the detailed descriptions, maps and plans needed to demonstrate that the operations will comply with the requirements of the Act and 30 CFR part 825.

(c) The regulatory authority may issue a permit for a special bituminous coal mine operation for which a complete application has been filed in accordance with this section, if it finds, in writing, that the operation will be conducted in compliance with the Act and 30 CFR part 825.

(d) Upon amendment or revision to the Wyoming regulatory program, regulations, or decisions made thereunder, governing special bituminous coal mines, the Secretary shall issue additional regulations necessary to meet the purposes of the Act.

§ 785.13 Experimental practices mining.

(a) Experimental practices provide a variance from environmental protection performance standards of the Act, of subchapter K of this chapter, and the regulatory program for experimental or research purposes, or to allow an alternative postmining land use, and may be undertaken if they are approved by the regulatory authority and the Director and if they are incorporated in a permit or permit revision issued in accordance with the requirements of subchapter G of this chapter.

(b) An application for an experimental practice shall contain descriptions, maps, plans, and data which show—

(1) The nature of the experimental practice, including a description of the performance standards for which variances are requested, the duration of the experimental practice, and any special monitoring which will be conducted;

(2) How use of the experimental practice encourages advances in mining and reclamation technology or allows a postmining land use for industrial, commercial, residential, or public use (including recreation facilities) on an experimental basis;

(3) That the experimental practice—

(i) Is potentially more, or at least as, environmentally protective, during and after mining operations, as would otherwise be required by standards promulgated under subchapter K of this chapter; and

(ii) Will not reduce the protection afforded public health and safety below that provided by the requirements of subchapter K of this chapter; and

(4) That the applicant will conduct monitoring of the effects of the experimental practice. The monitoring program shall ensure the collection, analysis, and reporting of reliable data that are sufficient to enable the regulatory authority and the Director to—

(i) Evaluate the effectiveness of the experimental practice; and

(ii) Identify, at the earliest possible time, potential risk to the environment and public health and safety which may be caused by the experimental practice during and after mining.

(c) Applications for experimental practices shall comply with the public notice requirements of § 773.6 of this chapter.

(d) No application for an experimental practice under this section shall be approved until the regulatory authority first finds in writing and the Director then concurs that—

(1) The experimental practice encourages advances in mining and reclamation technology or allows a postmining land use for industrial, commercial, residential, or public use (including recreational facilities) on an experimental basis;

(2) The experimental practice is potentially more, or at least as, environmentally protective, during and

after mining operations, as would otherwise be required by standards promulgated under subchapter K of this chapter;

(3) The mining operations approved for a particular land-use or other purpose are not larger or more numerous than necessary to determine the effectiveness and economic feasibility of the experimental practice; and

(4) The experimental practice does not reduce the protection afforded public health and safety below that provided by standards promulgated under subchapter K of this chapter.

(e) Experimental practices granting variances from the special environmental protection performance standards of sections 515 and 516 of the Act applicable to prime farmlands shall be approved only after consultation with the U.S. Department of Agriculture, Soil Conservation Service.

(f) Each person undertaking an experimental practice shall conduct the periodic monitoring, recording and reporting program set forth in the application, and shall satisfy such additional requirements as the regulatory authority or the Director may impose to ensure protection of the public health and safety and the environment.

(g) Each experimental practice shall be reviewed by the regulatory authority at a frequeny set forth in the approved permit, but no less frequently than every 2½ years. After review, the regulatory authority may require such reasonable modifications of the experimental practice as are necessary to ensure that the activities fully protect the environment and the public health and safety. Copies of the decision of the regulatory authority shall be sent to the permittee and shall be subject to the provisions for administrative and judicial review of part 775 of this chapter.

(h) Revisions or modifications to an experimental practice shall be processed in accordance with the requirements of § 774.13 of this chapter and approved by the regulatory authority. Any revisions which propose significant alterations in the experimental practice shall, at a minimum, be subject to notice, hearing, and public participation requirements of § 773.6 of this chapter and concurrence by the Director. Revisions that do not propose significant alterations in the experimental practice shall not require concurrence by the Director.

§ 785.14 Mountaintop removal mining.

(a) This section applies to any person who conducts or intends to conduct surface mining activities by mountaintop removal mining.

(b) Mountaintop removal mining means surface mining activities, where the mining operation removes an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill, except as provided for in 30 CFR 824.11(a)(6), by removing substantially all of the overburden off the bench and creating a level plateau or a gently rolling contour, with no highwalls remaining, and capable of supporting postmining land uses in accordance with the requirements of this section.

(c) The regulatory authority may issue a permit for mountaintop removal mining, without regard to the requirements of §§ 816.102, 816.104, 816.105, and 816.107 of this chapter to restore the lands disturbed by such mining to their approximate original contour, if it first finds, in writing, on the basis of a complete application, that the following requirements are met:

(1) The proposed postmining land use of the lands to be affected will be an industrial, commercial, agricultural, residential, or public facility (including recreational facilities) use and, if—

(i) After consultation with the appropriate land-use planning agencies, if any, the proposed land use is deemed by the regulatory authority to constitute an equal or better economic or public use of the affected land compared with the pre-mining use;

(ii) The applicant demonstrates compliance with the requirements for acceptable alternative postmining land uses of paragraphs (a) through (c) of § 816.133 of this chapter;

(iii) The applicant has presented specific plans for the proposed postmining land use and appropriate assurances that such use will be—

(A) Compatible with adjacent land uses;

(B) Obtainable according to data regarding expected need and market;

(C) Assured of investment in necessary public facilities;

(D) Supported by commitments from public agencies where appropriate;

(E) Practicable with respect to private financial capability for completion of the proposed use;

(F) Planned pursuant to a schedule attached to the reclamation plan so as to integrate the mining operation and reclamation with the postmining land use; and

(G) Designed by a registered engineer in conformance with professional standards established to assure the stability, drainage, and configuation necessary for the intended use of the site.

(iv) The proposed use would be consistent with adjacent land use and existing State and local land use plans and programs; and

(v) The regulatory authority has provided, in writing, an opportunity of not more than 60 days to review and comment on such proposed use to the governing body of general purpose government in whose jurisdiction the land is located and any State or Federal agency which the regulatory authority, in its discretion, determines to have an interest in the proposed use.

(2) The applicant demonstrates that in place of restoration of the land to be affected to the approximate original contour under §§ 816.102, 816.104, 816.105, and 816.107 of this chapter, the operation will be conducted in compliance with the requirements of part 824 of this chapter.

(3) The requirements of 30 CFR 824 are made a specific condition of the permit.

(4) All other requirements of the Act, this chapter, and the regulatory program are met by the proposed operations.

(5) The permit is clearly identified as being for mountaintop removal mining.

(d)(1) Any permits incorporating a variance issued under this section shall be reviewed by the regulatory authority to evaluate the progress and development of mining activities to establish that the operator is proceeding in accordance with the terms of the variance—

(i) Within the sixth month preceding the third year from the date of its issuance;

(ii) Before each permit renewal; and

(iii) Not later than the middle of each permit term.

(2) Any review required under paragraph (d)(1) of this section need not be held if the permittee has demonstrated and the regulatory authority finds, in writing, within three months before the scheduled review, that all operations under the permit are proceeding and will continue to be conducted in accordance with the terms of the permit and requirements of the Act, this chapter, and the regulatory program.

(3) The terms and conditions of a permit for mountaintop removal mining may be modified at any time by the regulatory authority, if it determines that more stringent measures are necessary to insure that the operation involved is conducted in compliance with the requirements of the Act, this chapter, and the regulatory program.

§ 785.15 Steep slope mining.

(a) This section applies to any persons who conducts or intends to conduct

steep slope surface coal mining and reclamation operations, except—

(1) Where an operator proposes to conduct surface coal mining and reclamation operations on flat or gently rolling terrain, leaving a plain or predominantly flat area, but on which an occasional steep slope is encountered as the mining operation proceeds;

(2) Where a person obtains a permit under the provisions of § 785.14; or

(3) To the extent that a person obtains a permit incorporating a variance under § 785.16.

(b) Any application for a permit for surface coal mining and reclamation operations covered by this section shall contain sufficient information to establish that the operations will be conducted in accordance with the requirements of § 816.107 or § 817.107 of this chapter.

(c) No permit shall be issued for any operations covered by this section, unless the regulatory authority finds, in writing, that in addition to meeting all other requirements of this subchapter, the operation will be conducted in accordance with the requirements of § 816.107 or § 817.107 of this chapter.

§ 785.16 Permits incorporating variances from approximate original contour restoration requirements for steep slope mining.

(a) The regulatory authority may issue a permit for non-mountaintop removal, steep slope, surface coal mining and reclamation operations which includes a variance from the requirements to restore the disturbed areas to their approximate original contour that are contained in §§ 816.102, 816.104, 816.105, and 816.107, or §§ 817.102 and 817.107 of this chapter. The permit may contain such a variance only if the regulatory authority finds, in writing, that the applicant has demonstrated, on the basis of a complete application, that the following requirments are met:

(1) After reclamation, the lands to be affected by the variance within the permit area will be suitable for an industrial, commercial, residential, or public postmining land use (including recreational facilities).

(2) The requirements of § 816.133 or § 817.133 of this chapter will be met.

(3) The watershed of lands within the proposed permit and adjacent areas will be improved by the operations when compared with the condition of the watershed before mining or with its condition if the approximate original contour were to be restored. The watershed will be deemed improved only if—

(i) The amount of total suspended solids or other pollutants discharged to ground or surface water from the permit area will be reduced, so as to improve the public or private uses or the ecology of such water, or flood hazards within the watershed containing the permit area will be reduced by reduction of the peak flow discharge from precipitation events or thaws;

(ii) The total volume of flow from the proposed permit area, during every season of the year, will not vary in a way that adversely affects the ecology of any surface water or any existing or planned use of surface or ground water; and

(iii) The appropriate State environmental agency approves the plan.

(4) The owner of the surface of the lands within the permit area has knowingly requested, in writing, as part of the application, that a variance be granted. The request shall be made separately from any surface owner consent given for the operations under § 778.15 of this chapter and shall show an understanding that the variance could not be granted without the surface owner's request.

(b) If a variance is granted under this section—

(1) The requirements of § 816.133(d) or § 817.133(d) of this chapter shall be included as a specific condition of the permit; and

(2) The permit shall be specifically marked as containing a variance from approximate original contour.

(c) A permit incorporating a variance under this section shall be reviewed by the regulatory authority at least every 30 months following the issuance of the permit to evaluate the progress and development of the surface coal mining and reclamation operations to establish that the operator is proceeding in accordance with the terms of the variance.

(d) If the permittee demonstrates to the regulatory authority that the operations have been, and continue to be, conducted in compliance with the terms and conditions of the permit, the requirements of the Act, this chapter, and the regulatory program, the review specified in paragraph (c) of this section need not be held.

(e) The terms and conditions of a permit incorporating a variance under this section may be modified at any time by the regulatory authority, if it determines that more stringent measures are necessary to ensure that the operations involved are conducted in compliance with the requirements of the Act, this chapter, and the regulatory program.

(f) The regulatory authority may grant variances in accordance with this section only if it has promulgated specific rules to govern the granting of variances in accordance with the provisions of this section and any necessary, more stringent requirements.

§ 785.17 Prime farmland.

(a) This section applies to any person who conducts or intends to conduct surface coal mining and reclamation operations on prime farmlands historically used for cropland. This section does not apply to:

(1) Lands on which surface coal mining and reclamation operations are conducted pursuant to any permit issued prior to August 3, 1977; or

(2) Lands on which surface coal mining and reclamation operations are conducted pursuant to any renewal or revision of a permit issued prior to August 3, 1977; or

(3) Lands included in any existing surface coal mining operations for which a permit was issued for all or any part thereof prior to August 3, 1977, provided that:

(i) Such lands are part of a single continuous surface coal mining operation begun under a permit issued before August 3, 1977; and

(ii) The permittee had a legal right to mine the lands prior to August 3, 1977, through ownership, contract, or lease but not including an option to buy, lease, or contract; and

(iii) The lands contain part of a continuous recoverable coal seam that was being mined in a single continuous mining pit (or multiple pits if the lands are proven to be part of a single continuous surface coal mining operation) begun under a permit issued prior to August 3, 1977.

(4) For purposes of this section:

(i) ''Renewal'' of a permit shall mean a decision by the regulatory authority to extend the time by which the permittee may complete mining within the boundaries of the original permit, and ''revision'' of the permit shall mean a decision by the regulatory authority to allow changes in the method of mining operations within the original permit area, or the decision of the regulatory authority to allow incidental boundary changes to the original permit;

(ii) A pit shall be deemed to be a single continuous mining pit even if portions of the pit are crossed by a road, pipeline, railroad, or powerline or similar crossing;

(iii) A single continuous surface coal mining operation is presumed to consist only of a single continuous mining pit under a permit issued prior to August 3, 1977, but may include non-contiguous parcels if the operator can prove by clear and convincing evidence that,

prior to August 3, 1977, the non-contiguous parcels were part of a single permitted operation. For the purposes of this paragraph, clear and convincing evidence includes, but is not limited to, contracts, leases, deeds or other properly executed legal documents (not including options) that specifically treat physically separate parcels as one surface coal mining operation.

(b) *Application contents—Reconnaissance inspection.* (1) All permit applications, whether or not prime farmland is present, shall include the results of a reconnaissance inspection of the proposed permit area to indicate whether prime farmland exists. The regulatory authority in consultation with the U.S. Soil Conservation Service shall determine the nature and extent of the required reconnaissance inspection.

(2) If the reconnaissance inspection establishes that no land within the proposed permit area is prime farmland historically used for cropland, the applicant shall submit a statement that no prime farmland is present. The statement shall identify the basis upon which such a conclusion was reached.

(3) If the reconnaissance inspection indicates that land within the proposed permit area may be prime farmland historically used for cropland, the applicant shall determine if a soil survey exists for those lands and whether soil mapping units in the permit area have been designated as prime farmland. If no soil survey exists, the applicant shall have a soil survey made of the lands within the permit area which the reconnaissance inspection indicates could be prime farmland. Soil surveys of the detail used by the U.S. Soil Conservation Service for operational conservation planning shall be used to identify and locate prime farmland soils.

(i) If the soil survey indicates that no prime farmland soils are present within the proposed permit area, paragraph (b)(2) of this section shall apply.

(ii) If the soil survey indicates that prime farmland soils are present within the proposed permit area, paragraph (c) of this section shall apply.

(c) *Application contents—Prime farmland.* All permit applications for areas in which prime farmland has been identified within the proposed permit area shall include the following:

(1) A soil survey of the permit area according to the standards of the National Cooperative Soil Survey and in accordance with the procedures set forth in U.S. Department of Agriculture Handbooks 436 ''Soil Taxonomy'' (U.S. Soil Conservation Service, 1975) as amended on March 22, 1982 and October 5, 1982, and 18, ''Soil Survey Manual'' (U.S. Soil Conservation Service, 1951), as amended on December 18, 1979, May 7, 1980, May 9, 1980, September 11, 1980, June 9, 1981, June 29, 1981, November 16, 1982. The U.S. Soil Conservation Service establishes the standards of the National Cooperative Soil Survey and maintains a National Soils Handbook which gives current acceptable procedures for conducting soil surveys. This National Soils Handbook is available for review at area and State SCS offices.

(i) U.S. Department of Agriculture Handbooks 436 and 18 are incorporated by reference as they exist on the date of adoption of this section. Notices of changes made to these publications will be periodically published by OSM in the **Federal Register**. The handbooks are on file and available for inspection at the OSM Central Office, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC, at each OSM Technical Center and Field Office, and at the central office of the applicable State regulatory authority, if any. Copies of these documents are also available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, Stock Nos. 001–000–02597–0 and 001–000–00688–6, respectively. In addition, these documents are available for inspection at the national, State, and area offices of the Soil Conservation Service, U.S. Department of Agriculture, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* Incorporation by reference provisions were approved by the Director of the Federal Register on June 29, 1981.

(ii) The soil survey shall include a description of soil mapping units and a representative soil profile as determined by the U.S. Soil Conservation Service, including, but not limited to, soil-horizon depths, pH, and the range of soil densities for each prime farmland soil unit within the permit area. Other representative soil-profile descriptions from the locality, prepared according to the standards of the National Cooperative Soil Survey, may be used if their use is approved by the State Conservationist, U.S. Soil Conservation Service. The regulatory authority may request the operator to provide information on other physical and chemical soil properties as needed to make a determination that the operator has the technological capability to restore the prime farmland within the permit area to the soil-reconstruction standards of part 823 of this chapter.

(2) A plan for soil reconstruction, replacement, and stabilization for the purpose of establishing the technological capability of the mine operator to comply with the requirements of part 823 of this chapter.

(3) Scientific data, such as agricultural-school studies, for areas with comparable soils, climate, and management that demonstrate that the proposed method of reclamation, including the use of soil mixtures or substitutes, if any, will achieve, within a reasonable time, levels of yield equivalent to, or higher than, those of nonmined prime farmland in the surrounding area.

(4) The productivity prior to mining, including the average yield of food, fiber, forage, or wood products obtained under a high level of management.

(d) *Consultation with Secretary of Agriculture.* (1) The Secretary of Agriculture has responsibilities with respect to prime farmland soils and has assigned the prime farmland responsibilities arising under the Act to the Chief of the U.S. Soil Conservation Service. The U.S. Soil Conservation Service shall carry out consultation and review through the State Conservationist located in each State.

(2) The State Conservationist shall provide to the regulatory authority a list of prime farmland soils, their location, physical and chemical characteristics, crop yields, and associated data necessary to support adequate prime farmland soil descriptions.

(3) The State Conservationist shall assist the regulatory authority in describing the nature and extent of the reconnaissance inspection required in paragraph (b)(1) of this section.

(4) Before any permit is issued for areas that include prime farmland, the regulatory authority shall consult with the State Conservationist. The State Conservationist shall provide for the review of, and comment on, the proposed method of soil reconstruction in the plan submitted under paragraph (c) of this section. If the State Conservationist considers those methods to be inadequate, he or she shall suggest revisions to the regulatory authority which result in more complete and adequate reconstruction.

(e) *Issuance of permit.* A permit for the mining and reclamation of prime farmland may be granted by the regulatory authority, if it first finds, in writing, upon the basis of a complete application, that—

(1) The approved proposed postmining land use of these prime farmlands will be cropland;

(2) The permit incorporates as specific conditions the contents of the plan submitted under paragraph (c) of this section, after consideration of any revisions to that plan suggested by the State Conservationist under paragraph (d)(4) of this section;

(3) The applicant has the technological capability to restore the prime farmland, within a reasonable time, to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management; and

(4) The proposed operations will be conducted in compliance with the requirements of 30 CFR part 823 and other environmental protection performance and reclamation standards for mining and reclamation of prime farmland of the regulatory program.

(5) The aggregate total prime farmland acreage shall not be decreased from that which existed prior to mining. Water bodies, if any, to be constructed during mining and reclamation operations must be located within the post-reclamation non-prime farmland portions of the permit area. The creation of any such water bodies must be approved by the regulatory authority and the consent of all affected property owners within the permit area must be obtained.

§ 785.18 Variances for delay in contemporaneous reclamation requirement in combined surface and underground mining activities.

(a) *Scope.* This section shall apply to any person or persons conducting or intending to conduct combined surface and underground mining activities where a variance is requested from the contemporaneous reclamation requirements of § 816.100 of this chapter.

(b) *Application contents for variances.* Any person desiring a variance under this section shall file with the regulatory authority complete applications for both the surface mining activities and underground mining activities which are to be combined. The reclamation and operation plans for these permits shall contain appropriate narratives, maps, and plans, which—

(1) Show why the proposed underground mining activities are necessary or desirable to assure maximum practical recovery of the coal;

(2) Show how multiple future disturbances of surface lands or waters will be avoided;

(3) Identify the specific surface areas for which a variance is sought and the sections of the Act, this chapter, and the regulatory program from which a variance is being sought;

(4) Show how the activities will comply with § 816.79 of this chapter and other applicable requirements of the regulatory program;

(5) Show why the variance sought is necessary for the implementation of the proposed underground mining activities;

(6) Provide an assessment of the adverse environmental consequences and damages, if any, that will result if the reclamation of surface mining activities is delayed; and

(7) Show how offsite storage of spoil will be conducted to comply with the requirements of the Act, §§ 816.71 through 816.74 of this chapter, and the regulatory program.

(c) *Issuance of permit.* A permit incorporating a variance under this section may be issued by the regulatory authority if it first finds, in writing, upon the basis of a complete application filed in accordance with this section, that—

(1) The applicant has presented, as part of the permit application, specific, feasible plans for the proposed underground mining activities;

(2) The proposed underground mining activities are necessary or desirable to assure maximum practical recovery of the mineral resource and will avoid multiple future disturbances of surface land or waters;

(3) The applicant has satisfactorily demonstrated that the applications for the surface mining activities and underground mining activities conform to the requirements of the regulatory program and that all other permits necessary for the underground mining activities have been issued by the appropriate authority;

(4) The surface area of surface mining activities proposed for the variance has been shown by the applicant to be necessary for implementing the proposed underground mining activities;

(5) No substantial adverse environmental damage, either onsite or offsite, will result from the delay in completion of reclamation otherwise required by section 515(b)(16) of the Act, part 816 of this chapter, and the regulatory program;

(6) The operations will, insofar as a variance is authorized, be conducted in compliance with the requirements of § 816.79 of this chapter and the regulatory program;

(7) Provisions for offsite storage of spoil will comply with the requirements of section 515(b)(22) of the Act, §§ 816.71 through 816.74 of this chapter, and the regulatory program;

(8) Liability under the performance bond required to be filed by the applicant with the regulatory authority pursuant to subchapter J of this chapter and the regulatory program will be for the duration of the underground mining activities and until all requirements of subchapter J and the regulatory program have been complied with; and

(9) The permit for the surface mining activities contains specific conditions—

(i) Delineating the particular surface areas for which a variance is authorized;

(ii) Identifying the applicable provisions of section 515(b) of the Act, part 816 of this chapter, and the regulatory program; and

(iii) Providing a detailed schedule for compliance with the provisions of this section.

(d) *Review of permits containing variances.* Variances granted by permits issued under this section shall be reviewed by the regulatory authority no later than 3 years from the dates of issuance of the permit and any permit renewals.

§ 785.19 Surface coal mining and reclamation operations on areas or adjacent to areas including alluvial valley floors in the arid and semiarid areas west of the 100th meridian.

(a) *Alluvial valley floor determination.* (1) Permit applicants who propose to conduct surface coal mining and reclamation operations within a valley holding a stream or in a location where the permit area or adjacent area includes any stream, in the arid and semiarid regions of the United States, as an initial step in the permit process, may request the regulatory authority to make an alluvial valley floor determination with respect to that valley floor. The applicant shall demonstrate and the regulatory authority shall determine, based on either available data or field studies submitted by the applicant, or a combination of available data and field studies, the presence or absence of an alluvial valley floor. Studies shall include sufficiently detailed geologic, hydrologic, land use, soils, and vegetation data and analysis to demonstrate the probable existence of an alluvial valley floor in the area. The regulatory authority may require additional data collection and analysis or other supporting documents, maps, and illustrations in order to make the determination.

(2) The regulatory authority shall make a written determination as to the extent of any alluvial valley floors within the area. The regulatory authority shall determine that an alluvial valley floor exists if it finds that—

(i) Unconsolidated streamlaid deposits holding streams are present; and

(ii) There is sufficient water available to support agricultural activities as evidenced by—

(A) The existence of current flood irrigation in the area in question;

(B) The capability of an area to be flood irrigated, based on evaluations of typical regional agricultural practices, historical flood irrigation, streamflow, water quality, soils, and topography; or

(C) Subirrigation of the lands in question derived from the ground-water system of the valley floor.

(3) If the regulatory authority determines in writing that an alluvial valley does not exist pursuant to paragraph (a)(2) of this section, no further consideration of this section is required.

(b) *Applicability of statutory exclusions.* (1) If an alluvial valley floor is identified pursuant to paragraph (a)(2) of this section and the proposed surface coal mining operation may affect this alluvial valley floor or waters that supply the alluvial valley floor, the applicant may request the regulatory authority, as a preliminary step in the permit application process, to separately determine the applicability of the statutory exclusions set forth in paragraph (b)(2) of this section. The regulatory authority may make such a determination based on the available data, may require additional data collection and analysis in order to make the determination, or may require the applicant to submit a complete permit application and not make the determination until after the complete application is evaluated.

(2) An applicant need not submit the information required in paragraphs (d)(2) (ii) and (iii) of this section and a regulatory authority is not required to make the findings of paragraphs (e)(2) (i) and (ii) of this section when the regulatory authority determines that one of the following circumstances, heretofore called statutory exclusions, exist:

(i) The premining land use is undeveloped rangeland which is not significant to farming;

(ii) Any farming on the alluvial valley floor that would be affected by the surface coal mining operation is of such small acreage as to be of negligible impact on the farm's agricultural production. Negligible impact of the proposed operation on farming will be based on the relative importance of the affected farmland areas of the alluvial valley floor area to the farm's total agricultural production over the life of the mine; or

(iii) The circumstances set forth in § 822.12(b) (3) or (4) of this chapter exist.

(3) For the purpose of this section, a farm is one or more land units on which farming is conducted. A farm is generally considered to be the combination of land units with acreage and boundaries in existence prior to August 3, 1977, or if established after August 3, 1977, with those boundaries based on enhancement of the farm's agricultural productivity and not related to surface coal operations.

(c) *Summary denial.* If the regulatory authority determines that the statutory exclusions are not applicable and that any of the required findings of paragraph (e)(2) of this section cannot be made, the regulatory authority may, at the request of the applicant:

(1) Determine that mining is precluded on the proposed permit area and deny the permit without the applicant filing any additional information required by this section; or

(2) Prohibit surface coal mining and reclamation operations in all or parts of the area to be affected by mining.

(d) *Application contents for operations affecting designated alluvial valley floors.* (1) If land within the permit area or adjacent area is identified as an alluvial valley floor and the proposed surface coal mining operation may affect an alluvial valley floor or waters supplied to an alluvial valley floor, the applicant shall submit a complete application for the proposed surface coal mining and reclamation operations to be used by the regulatory authority together with other relevant information as a basis for approval or denial of the permit. If an exclusion of paragraph (b)(2) of this section applies, then the applicant need not submit the information required in paragraphs (d)(2) (ii) and (iii) of this section.

(2) The complete application shall include detailed surveys and baseline data required by the regulatory authority for a determination of—

(i) The essential hydrologic functions of the alluvial valley floor which might be affected by the mining and reclamation process. The information required by this subparagraph shall evaluate those factors which contribute to the collecting, storing, regulating and making the natural flow of water available for agricultural activities on the alluvial valley floor and shall include, but are not limited to:

(A) Factors contributing to the function of collecting water, such as amount, rate and frequency of rainfall and runoff, surface roughness, slope and vegetative cover, infiltration, and evapotranspiration, relief, slope and density of drainage channels;

(B) Factors contributing to the function of storing water, such as permeability, infiltration, porosity, depth and direction of ground water flow, and water holding capacity;

(C) Factors contributing to the function of regulating the flow of surface and ground water, such as the longitudinal profile and slope of the valley and channels, the sinuosity and cross-sections of the channels, interchange of water between streams and associated alluvial and bedrock aquifers, and rates and amount of water supplied by these aquifers; and

(D) Factors contributing to water availability, such as the presence of flood plains and terraces suitable for agricultural activities.

(ii) Whether the operation will avoid during mining and reclamation the interruption, discontinuance, or preclusion of farming on the alluvial valley floor;

(iii) Whether the operation will cause material damage to the quantity or quality of surface or ground waters supplied to the alluvial valley floor;

(iv) Whether the reclamation plan is in compliance with requirements of the Act, this chapter, and regulatory program; and

(v) Whether the proposed monitoring system will provide sufficient information to measure compliance with part 822 of this chapter during and after mining and reclamation operations.

(e) *Findings.* (1) The findings of paragraphs (e)(2) (i) and (ii) of this section are not required with regard to alluvial valley floors to which are applicable any of the exclusions of paragraph (b)(2) of this section.

(2) No permit or permit revision application for surface coal mining and reclamation operations on lands located west of the 100th meridian west longitude shall be approved by the regulatory authority unless the application demonstrates and the regulatory authority finds in writing, on the basis of information set forth in the application, that—

(i) The proposed operations will not interrupt, discontinue, or preclude farming on an alluvial valley floor;

(ii) The proposed operations will not materially damage the quantity or quality of water in surface and underground water systems that supply alluvial valley floors; and

(iii) The proposed operations will comply with part 822 of this chapter and the other applicable requirements of the Act and the regulatory program.

§ 785.20 Augering.

(a) This section applies to any person who conducts or intends to conduct surface coal mining and reclamation operations utilizing augering operations.

(b) Any application for a permit for operations covered by this section shall contain, in the mining and reclamation plan, a description of the augering methods to be used and the measures to be used to comply with 30 CFR part 819.

(c) No permit shall be issued for any operations covered by this section unless the regulatory authority finds, in writing, that in addition to meeting all other applicable requirements of this subchapter, the operation will be conducted in compliance with 30 CFR part 819.

§ 785.21 Coal preparation plants not located within the permit area of a mine.

(a) This section applies to any person who operates or intends to operate a coal preparation plant in connection with a coal mine but outside the permit area for a specific mine. Any person who operates such a preparation plant shall obtain a permit from the regulatory authority in accordance with the requirements of this section

(b) Any application for a permit for operations covered by this section shall contain an operation and reclamation plan which specifies plans, including descriptions, maps, and cross sections, of the construction, operation, maintenance, and removal of the preparation plant and support facilities operated incident thereto or resulting therefrom. The plan shall demonstrate that those operations will be conducted in compliance with part 827 of this chapter.

(c) No permit shall be issued for any operation covered by this section, unless the regulatory authority finds in writing that, in addition to meeting all other applicable requirements of this subchapter, the operations will be conducted in compliance with the requirements of part 827 of this chapter.

(d)(1) Except as provided in paragraph (d)(2) of this section, any person who operates a coal preparation plant beyond May 10, 1986, that was not subject to this chapter before July 6, 1984, shall have applied for a permit no later than November 11, 1985.

(2)(i) State programs that have a statutory or regulatory bar precluding issuance of permits to facilities covered by paragraph (d)(1) of this section shall notify OSMRE not later than November 7, 1985, and shall establish a schedule for actions necessary to allow the permitting of such facilities as soon as practicable. Not later than December 9, 1985, this schedule shall be submitted to OSMRE for approval.

(ii) Any person who operates a coal preparation plant that was not subject to this chapter before July 6, 1984, in a state which submits a schedule in accordance with paragraph (d)(2)(i) of this section shall apply for a permit in accordance with the schedule approved by OSMRE.

(e) Notwithstanding § 773.4 of this chapter and except as prohibited by § 761.11 of this chapter, any person operating a coal preparation plant that was not subject to this chapter before July 6, 1984, may continue to operate without a permit until May 10, 1986, and may continue to operate beyond that date if:

(1) A permit application has been timely filed under paragraph (d)(1) of this section or under a State imposed schedule specified in paragraph (d)(2) of this section,

(2) The regulatory authority has yet to either issue or deny the permit, and

(3) The person complies with the applicable performance standards of § 827.13 of this chapter.

§ 785.22 In situ processing activities.

(a) This section applies to any person who conducts or intends to conduct surface coal mining and reclamation operations utilizing in situ processing activities.

(b) Any application for a permit for operations covered by this section shall be made according to all requirements of this subchapter applicable to underground mining activities. In addition, the mining and reclamation operations plan for operations involving in situ processing activities shall contain information establishing how those operations will be conducted in compliance with the requirements of 30 CFR part 828, including—

(1) Delineation of proposed holes and wells and production zone for approval of the regulatory authority;

(2) Specifications of drill holes and casings proposed to be used;

(3) A plan for treatment, confinement or disposal of all acid-forming, toxic-forming or radioactive gases, solids, or liquids constituting a fire, health, safety or environmental hazard caused by the mining and recovery process; and

(4) Plans for monitoring surface and ground water and air quality, as required by the regulatory authority.

(c) No permit shall be issued for operations covered by this section, unless the regulatory authority first finds, in writing, upon the basis of a complete application made in accordance with paragraph (b) of this section, that the operation will be conducted in compliance with all requirements of this subchapter relating to underground mining activities, and 30 CFR parts 817 and 828.

§ 785.25 Lands eligible for remining.

(a) This section contains permitting requirements to implement § 773.13. Any person who submits a permit application to conduct a surface coal mining operation on lands eligible for remining must comply with this section.

(b) Any application for a permit under this section shall be made according to all requirements of this subchapter applicable to surface coal mining and reclamation operations. In addition, the application shall—

(1) To the extent not otherwise addressed in the permit application, identify potential environmental and safety problems related to prior mining activity at the site and that could be reasonably anticipated to occur. This identification shall be based on a due diligence investigation which shall include visual observations at the site, a record review of past mining at the site, and environmental sampling tailored to current site conditions.

(2) With regard to potential environmental and safety problems referred to in paragraph (b)(1) of this section, describe the mitigative measures that will be taken to ensure that the applicable reclamation requirements of the regulatory program can be met.

■ 11. Revise part 800 to read as follows:

PART 800—BOND AND INSURANCE REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS UNDER REGULATORY PROGRAMS

Sec.

800.1 Scope and purpose.
800.4 Regulatory authority responsibilities.
800.5 Definitions.
800.10 Information collection.
800.11 Requirement to file a bond.
800.12 Form of the performance bond.
800.13 Period of liability.
800.14 Determination of bond amount.
800.15 Adjustment of amount.
800.16 General terms and conditions of bond.
800.17 Bonding requirements for underground coal mines and long-term coal-related surface facilities and structures.
800.20 Surety bonds.
800.21 Collateral bonds.
800.23 Self-bonding.
800.30 Replacement of bonds.
800.40 Requirement to release performance bonds.
800.50 Forfeiture of bonds.
800.60 Terms and conditions for liability insurance.

800.70 Bonding for anthracite operations in Pennsylvania.

Authority: 30 U.S.C. 1201 *et seq.,* as amended; and Pub. L. 100–34.

§ 800.1 Scope and purpose.

This part sets forth the minimum requirements for filing and maintaining bonds and insurance for surface coal mining and reclamation operations under regulatory programs in accordance with the Act.

§ 800.4 Regulatory authority responsibilities.

(a) The regulatory authority shall prescribe and furnish forms for filing performance bonds.

(b) The regulatory authority shall prescribe by regulation terms and conditions for performance bonds and insurance.

(c) The regulatory authority shall determine the amount of the bond for each area to be bonded, in accordance with § 800.14. The regulatory authority shall also adjust the amount as acreage in the permit area is revised, or when other relevant conditions change according to the requirements of § 800.15.

(d) The regulatory authority may accept a self-bond if the permittee meets the requirements of § 800.23 and any additional requirements in the State or Federal program.

(e) The regulatory authority shall release liability under a bond or bonds in accordance with § 800.40.

(f) If the conditions specified in § 800.50 occur, the regulatory authority shall take appropriate action to cause all or part of a bond to be forfeited in accordance with procedures of that section.

(g) The regulatory authority shall require in the permit that adequate bond coverage be in effect at all times. Except as provided in § 800.16(e)(2), operating without a bond is a violation of a condition upon which the permit is issued.

§ 800.5 Definitions.

(a) *Surety bond* means an indemnity agreement in a sum certain payable to the regulatory authority, executed by the permittee as principal and which is supported by the performance guarantee of a corporation licensed to do business as a surety in the State where the operation is located.

(b) *Collateral bond* means an indemnity agreement in a sum certain executed by the permittee as principal which is supported by the deposit with the regulatory authority of one or more of the following:

(1) A cash account, which shall be the deposit of cash in one or more federally-insured or equivalently protected accounts, payable only to the regulatory authority upon demand, or the deposit of cash directly with the regulatory authority;

(2) Negotiable bonds of the United States, a State, or a municipality, endorsed to the order of, and placed in the possession of, the regulatory authority;

(3) Negotiable certificates of deposit, made payable or assigned to the regulatory authority and placed in its possession or held by a federally-insured bank;

(4) An irrevocable letter of credit of any bank organized or authorized to transact business in the United States, payable only to the regulatory authority upon presentation;

(5) A perfected, first-lien security interest in real property in favor of the regulatory authority; or

(6) Other investment-grade rated securities having a rating of AAA, AA, or A or an equivalent rating issued by a nationally recognized securities rating service, endorsed to the order of, and placed in the possession of, the regulatory authority.

(c) *Self-bond* means an indemnity agreement in a sum certain executed by the applicant or by the applicant and any corporate guarantor and made payable to the regulatory authority, with or without separate surety.

§ 800.10 Information collection.

The collection of information contained in §§ 800.11, 800.21(c), 800.23(b)(2), 800.23(b)(3), 800.40(a), and 800.60(a) have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1029–0043. The information will be used to determine if reclamation bonds are sufficient to comply with the Act. Response is required to obtain a benefit in accordance with the requirements of 30 U.S.C. 1201 *et seq.* Public reporting burden for this collection of information is estimated to average 28 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspects of this collection of information, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, 1951 Constitution Avenue NW., rm 5415 L, Washington, DC 20240 and the Office of Management and Budget, Paperwork Reduction Project (1029–0043), Washington, DC 20503.

§ 800.11 Requirement to file a bond.

(a) After a permit application under subchapter G of this chapter has been approved, but before a permit is issued, the applicant shall file with the regulatory authority, on a form prescribed and furnished by the regulatory authority, a bond or bonds for performance made payable to the regulatory authority and conditioned upon the faithful performance of all the requirements of the Act, the regulatory program, the permit, and the reclamation plan.

(b)(1) The bond or bonds shall cover the entire permit area, or an identified increment of land within the permit area upon which the operator will initiate and conduct surface coal mining and reclamation operations during the initial term of the permit.

(2) As surface coal mining and reclamation operations on succeeding increments are initiated and conducted within the permit area, the permittee shall file with the regulatory authority an additional bond or bonds to cover such increments in accordance with this section.

(3) The operator shall identify the initial and successive areas or increments for bonding on the permit application map submitted for approval as provided in the application (under parts 780 and 784 of this chapter), and shall specify the bond amount to be provided for each area or increment.

(4) Independent increments shall be of sufficient size and configuration to provide for efficient reclamation operations should reclamation by the regulatory authority become necessary pursuant to § 800.50.

(c) An operator shall not disturb any surface areas, succeeding increments, or extend any underground shafts, tunnels or operations prior to acceptance by the regulatory authority of the required performance bond.

(d) The applicant shall file, with the approval of the regulatory authority, a bond or bonds under one of the following schemes to cover the bond amounts for the permit area as determined in accordance with § 800.14:

(1) A performance bond or bonds for the entire permit area;

(2) A cumulative bond schedule and the performance bond required for full reclamation of the initial area to be disturbed; or

(3) An incremental bond schedule and the performance bond required for the first increment in the schedule.

(e) OSM may approve, as part of a State or Federal program, an alternative

bonding system, if it will achieve the following objectives and purposes of the bonding program:

(1) The alternative must assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time; and

(2) The alternative must provide a substantial economic incentive for the permittee to comply with all reclamation provisions.

§ 800.12 Form of the performance bond.

The regulatory authority shall prescribe the form of the performance bond. The regulatory authority may allow for:

(a) A surety bond;

(b) A collateral bond;

(c) A self-bond; or

(d) A combination of any of these bonding methods.

§ 800.13 Period of liability.

(a)(1) Performance bond liability shall be for the duration of the surface coal mining and reclamation operation and for a period which is coincident with the operator's period of extended responsibility for successful revegetation provided in § 816.116 or § 817.116 of this chapter or until achievement of the reclamation requirements of the Act, regulatory programs, and permit, whichever is later.

(2) With the approval of regulatory authority, a bond may be posted and approved to guarantee specific phases of reclamation within the permit area provided the sum of phase bonds posted equals or exceeds the total amount required under §§ 800.14 and 800.15. The scope of work to be guaranteed and the liability assumed under each phase bond shall be specified in detail.

(b) Isolated and clearly defined portions of the permit area requiring extended liability may be separated from the original area and bonded separately with the approval of the regulatory authority. Such areas shall be limited in extent and not constitute a scattered, intermittent, or checkerboard pattern of failure. Access to the separated areas for remedial work may be included in the area under extended liability if deemed necessary by the regulatory authority.

(c) If the regulatory authority approves a long-term, intensive agricultural postmining land use, in accordance with § 816.133 or § 817.133 of this chapter, the applicable 5 or 10 year period of liability shall commence at the date of initial planting for such long-term agricultural use.

(d)(1) The bond liability of the permittee shall include only those actions which he or she is obligated to take under the permit, including completion of the reclamation plan, so that the land will be capable of supporting the postmining land use approved under § 816.133 or § 817.133 of this chapter.

(2) Implementation of an alternative postmining land use approved under §§ 816.133(c) and 817.133(c) which is beyond the control of the permittee, need not be covered by the bond. Bond liability for prime farmland shall be as specified in § 800.40(c)(2).

§ 800.14 Determination of bond amount.

(a) The amount of the bond required for each bonded area shall:

(1) Be determined by the regulatory authority;

(2) Depend upon the requirements of the approved permit and reclamation plan;

(3) Reflect the probable difficulty of reclamation, giving consideration to such factors as topography, geology, hydrology, and revegetation potential; and

(4) Be based on, but not limited to, the estimated cost submitted by the permit applicant.

(b) The amount of the bond shall be sufficient to assure the completion of the reclamation plan if the work has to be performed by the regulatory authority in the event of forfeiture, and in no case shall the total bond initially posted for the entire area under one permit be less than $10,000.

(c) An operator's financial responsibility under § 817.121(c) of this chapter for repairing material damage resulting from subsidence may be satisfied by the liability insurance policy required under § 800.60.

§ 800.15 Adjustment of amount.

(a) The amount of the bond or deposit required and the terms of the acceptance of the applicant's bond shall be adjusted by the regulatory authority from time to time as the area requiring bond coverage is increased or decreased or where the cost of future reclamation changes. The regulatory authority may specify periodic times or set a schedule for reevaluating and adjusting the bond amount to fulfill this requirement.

(b) The regulatory authority shall—

(1) Notify the permittee, the surety, and any person with a property interest in collateral who has requested notification under § 800.21(f) of any proposed adjustment to the bond amount; and

(2) Provide the permittee an opportunity for an informal conference on the adjustment.

(c) A permittee may request reduction of the amount of the performance bond upon submission of evidence to the regulatory authority proving that the permittee's method of operation or other circumstances reduces the estimated cost for the regulatory authority to reclaim the bonded area. Bond adjustments which involve undisturbed land or revision of the cost estimate of reclamation are not considered bond release subject to procedures of § 800.40.

(d) In the event that an approved permit is revised in accordance with subchapter G of this chapter, the regulatory authority shall review the bond for adequacy and, if necessary, shall require adjustment of the bond to conform to the permit as revised.

§ 800.16 General terms and conditions of bond.

(a) The performance bond shall be in an amount determined by the regulatory authority as provided in § 800.14.

(b) The performance bond shall be payable to the regulatory authority.

(c) The performance bond shall be conditioned upon faithful performance of all the requirements of the Act, this chapter, the regulatory program, and the approved permit, including completion of the reclamation plan.

(d) The duration of the bond shall be for the time period provided in § 800.13.

(e)(1) The bond shall provide a mechanism for a bank or surety company to give prompt notice to the regulatory authority and the permittee of any action filed alleging the insolvency or bankruptcy of the surety company, the bank, or the permittee, or alleging any violations which would result in suspension or revocation of the surety or bank charter or license to do business.

(2) Upon the incapacity of a bank or surety company by reason of bankruptcy, insolvency, or suspension or revocation of a charter or license, the permittee shall be deemed to be without bond coverage and shall promptly notify the regulatory authority. The regulatory authority, upon notification received through procedures of paragraph (e)(1) of this section or from the permittee, shall, in writing, notify the operator who is without bond coverage and specify a reasonable period, not to exceed 90 days, to replace bond coverage. If an adequate bond is not posted by the end of the period allowed, the operator shall cease coal extraction and shall comply with the provisions of § 816.132 or § 817.132 of this chapter and shall immediately begin to conduct reclamation operations in accordance with the reclamation plan. Mining

operations shall not resume until the regulatory authority has determined that an acceptable bond has been posted.

§ 800.17 Bonding requirements for underground coal mines and long-term coal-related surface facilities and structures.

(a) *Responsibilities.* The regulatory authority shall require bond coverage, in an amount determined under § 800.14, for long-term surface facilities and structures, and for areas disturbed by surface impacts incident to underground mines, for which a permit is required. Specific reclamation techniques required for underground mines and long-term facilities shall be considered in determining the amount of bond to complete the reclamation.

(b) *Long-term period of liability.* (1) The period of liability for every bond covering long-term surface disturbances shall commence with the issuance of a permit, except that to the extent that such disturbances will occur on a succeeding increment to be bonded, such liability will commence upon the posting of the bond for that increment before the initial surface disturbance of that increment. The liability period shall extend until all reclamation, restoration, and abatement work under the permit has been completed and the bond is released under the provisions of § 800.40, or until the bond has been replaced or extended in accordance with § 800.17(b)(3).

(2) Long-term surface disturbances shall include long-term coal-related surface facilities and structures, and surface impacts incident to underground coal mining, which disturb an area for a period that exceeds 5 years. Long-term surface disturbances include, but are not limited to: surface features of shafts and slope facilities, coal refuse areas, powerlines, bore-holes, ventilation shafts, preparation plants, machine shops, roads, and loading and treatment facilities.

(3) To achieve continuous bond coverage for long-term surface disturbances, the bond shall be conditioned upon extension, replacement, or payment in full, 30 days prior to the expiration of the bond term.

(4) Continuous bond coverage shall apply throughout the period of extended responsibility for successful revegetation and until the provisions of § 800.40 have been met.

(c) *Bond forfeiture.* The regulatory authority shall take action to forfeit a bond pursuant to this section, if 30 days prior to bond expiration, the operator has not filed: (1) A performance bond for a new term as required for continuous coverage, or (2) a performance bond providing coverage for the period of liability, including the period of extended responsibility for successful revegetation.

§ 800.20 Surety bonds.

(a) A surety bond shall be executed by the operator and a corporate surety licensed to do business in the State where the operation is located.

(b) Surety bonds shall be noncancellable during their terms, except that surety bond coverage for lands not disturbed may be cancelled with the prior consent of the regulatory authority. The regulatory authority shall advise the surety, within 30 days after receipt of a notice to cancel bond, whether the bond may be cancelled on an undisturbed area.

§ 800.21 Collateral bonds.

(a) Collateral bonds, except for letters of credit, cash accounts, and real property, shall be subject to the following conditions:

(1) The regulatory authority shall keep custody of collateral deposited by the applicant until authorized for release or replacement as provided in this subchapter.

(2) The regulatory authority shall value collateral at its current market value, not at face value.

(3) The regulatory authority shall require that certificates of deposit be made payable to or assigned to the regulatory authority, both in writing and upon the records of the bank issuing the certificates. If assigned, the regulatory authority shall require the banks issuing these certificates to waive all rights of setoff or liens against those certificates.

(4) The regulatory authority shall not accept an individual certificate of deposit in an amount in excess of $100,000 or the maximum insurable amount as determined by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation.

(b) Letters of credit shall be subject to the following conditions:

(1) The letter may be issued only by a bank organized or authorized to do business in the United States;

(2) Letters of credit shall be irrevocable during their terms. A letter of credit used as security in areas requiring continuous bond coverage shall be forfeited and shall be collected by the regulatory authority if not replaced by other suitable bond or letter of credit at least 30 days before its expiration date.

(3) The letter of credit shall be payable to the regulatory authority upon demand, in part or in full, upon receipt from the regulatory authority of a notice of forfeiture issued in accordance with § 800.50.

(c) Real property posted as a collateral bond shall meet the following conditions:

(1) The applicant shall grant the regulatory authority a first mortgage, first deed of trust, or perfected first-lien security interest in real property with a right to sell or otherwise dispose of the property in the event of forfeiture under § 800.50.

(2) In order for the regulatory authority to evaluate the adequacy of the real property offered to satisfy collateral requirements, the applicant shall submit a schedule of the real property which shall be mortgaged or pledged to secure the obligations under the indemnity agreement. The list shall include—

(i) A description of the property;

(ii) The fair market value as determined by an independent appraisal conducted by a certified appraiser; and

(iii) Proof of possession and title to the real property.

(3) The property may include land which is part of the permit area; however, land pledged as collateral for a bond under this section shall not be disturbed under any permit while it is serving as security under this section.

(d) Cash accounts shall be subject to the following conditions:

(1) The regulatory authority may authorize the operator to supplement the bond through the establishment of a cash account in one or more federally-insured or equivalently protected accounts made payable upon demand to, or deposited directly with, the regulatory authority. The total bond including the cash account shall not be less than the amount required under terms of performance bonds including any adjustments, less amounts released in accordance with § 800.40.

(2) Any interest paid on a cash account shall be retained in the account and applied to the bond value of the account unless the regulatory authority has approved the payment of interest to the operator.

(3) Certificates of deposit may be substituted for a cash account with the approval of the regulatory authority.

(4) The regulatory authority shall not accept an individual cash account in an amount in excess of $100,000 or the maximum insurable amount as determined by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation.

(e)(1) The estimated bond value of all collateral posted as assurance under this section shall be subject to a margin which is the ratio of bond value to

market value, as determined by the regulatory authority. The margin shall reflect legal and liquidation fees, as well as value depreciation, marketability, and fluctuations which might affect the net cash available to the regulatory authority to complete reclamation.

(2) The bond value of collateral may be evaluated at any time but it shall be evaluated as part of permit renewal and, if necessary, the performance bond amount increased or decreased. In no case shall the bond value of collateral exceed the market value.

(f) Persons with an interest in collateral posted as a bond, and who desire notification of actions pursuant to the bond, shall request the notification in writing to the regulatory authority at the time collateral is offered.

§ 800.23 Self-bonding.

(a) *Definitions.* For the purposes of this section only:

Current assets means cash or other assets or resources which are reasonably expected to be converted to cash or sold or consumed within one year or within the normal operating cycle of the business.

Current liabilities means obligations which are reasonably expected to be paid or liquidated within one year or within the normal operating cycle of the business.

Fixed assets means plants and equipment, but does not include land or coal in place.

Liabilities means obligations to transfer assets or provide services to other entities in the future as a result of past transactions.

Net worth means total assets minus total liabilities and is equivalent to owners' equity.

Parent corporation means a corporation which owns or controls the applicant.

Tangible net worth means net worth minus intangibles such as goodwill and rights to patents or royalties.

(b) The regulatory authority may accept a self-bond from an applicant for a permit if all of the following conditions are met by the applicant or its parent corporation guarantor:

(1) The applicant designates a suitable agent to receive service of process in the State where the proposed surface coal mining operation is to be conducted.

(2) The applicant has been in continuous operation as a business entity for a period of not less than 5 years. Continuous operation shall mean that business was conducted over a period of 5 years immediately preceding the time of application.

(i) The regulatory authority may allow a joint venture or syndicate with less than 5 years of continuous operation to qualify under this requirement, if each member of the joint venture or syndicate has been in continuous operation for at least 5 years immediately preceding the time of application.

(ii) When calculating the period of continuous operation, the regulatory authority may exclude past periods of interruption to the operation of the business entity that were beyond the applicant's control and that do not affect the applicant's likelihood of remaining in business during the proposed surface coal mining and reclamation operations.

(3) The applicant submits financial information in sufficient detail to show that the applicant meets one of the following criteria:

(i) The applicant has a current rating for its most recent bond issuance of ''A'' or higher as issued by either Moody's Investor Service or Standard and Poor's Corporation;

(ii) The applicant has a tangible net worth of at least $10 million, a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater; or

(iii) The applicant's fixed assets in the United States total at least $20 million, and the applicant has a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater.

(4) The applicant submits;

(i) Financial statements for the most recently completed fiscal year accompanied by a report prepared by an independent certified public accountant in conformity with generally accepted accounting principles and containing the accountant's audit opinion or review opinion of the financial statements with no adverse opinion;

(ii) Unaudited financial statements for completed quarters in the current fiscal year; and

(iii) Additional unaudited information as requested by the regulatory authority.

(c)(1) The regulatory authority may accept a written guarantee for an applicant's self-bond from a parent corporation guarantor, if the guarantor meets the conditions of paragraphs (b)(1) through (b)(4) of this section as if it were the applicant. Such a written guarantee shall be referred to as a ''corporate guarantee.'' The terms of the corporate guarantee shall provide for the following:

(i) If the applicant fails to complete the reclamation plan, the guarantor shall do so or the guarantor shall be liable under the indemnity agreement to provide funds to the regulatory authority sufficient to complete the reclamation plan, but not to exceed the bond amount.

(ii) The corporate guarantee shall remain in force unless the guarantor sends notice of cancellation by certified mail to the applicant and to the regulatory authority at least 90 days in advance of the cancellation date, and the regulatory authority accepts the cancellation.

(iii) The cancellation may be accepted by the regulatory authority if the applicant obtains suitable replacement bond before the cancellation date or if the lands for which the self-bond, or portion thereof, was accepted have not been disturbed.

(2) The regulatory authority may accept a written guarantee for an applicant's self-bond from any corporate guarantor, whenever the applicant meets the conditions of paragraphs (b)(1), (b)(2) and (b)(4) of this section, and the guarantor meets the conditions of paragraphs (b)(1) through (b)(4) of this section. Such a written guarantee shall be referred to as a ''non-parent corporate guarantee.'' The terms of this guarantee shall provide for compliance with the conditions of paragraphs (c)(1)(i) through (c)(1)(iii) of this section. The regulatory authority may require the applicant to submit any information specified in paragraph (b)(3) of this section in order to determine the financial capabilities of the applicant.

(d) For the regulatory authority to accept an applicant's self-bond, the total amount of the outstanding and proposed self-bonds of the applicant for surface coal mining and reclamation operations shall not exceed 25 percent of the applicant's tangible net worth in the United States. For the regulatory authority to accept a corporate guarantee, the total amount of the parent corporation guarantor's present and proposed self-bonds and guaranteed self-bonds for surface coal mining and reclamation operations shall not exceed 25 percent of the guarantor's tangible net worth in the United States. For the regulatory authority to accept a non-parent corporate guarantee, the total amount of the non-parent corporate guarantor's present and proposed self-bonds and guaranteed self-bonds shall not exceed 25 percent of the guarantor's tangible net worth in the United States.

(e) If the regulatory authority accepts an applicant's self-bond, an indemnity agreement shall be submitted subject to the following requirements:

(1) The indemnity agreement shall be executed by all persons and parties who are to be bound by it, including the parent corporation guarantor, and shall bind each jointly and severally.

(2) Corporations applying for a self-bond, and parent and non-parent corporations guaranteeing an applicant's self-bond shall submit an indemnity agreement signed by two corporate officers who are authorized to bind their corporations. A copy of such authorization shall be provided to the regulatory authority along with an affidavit certifying that such an agreement is valid under all applicable Federal and State laws. In addition, the guarantor shall provide a copy of the corporate authorization demonstrating that the corporation may guarantee the self-bond and execute the indemnity agreement.

(3) If the applicant is a partnership, joint venture or syndicate, the agreement shall bind each partner or party who has a beneficial interest, directly or indirectly, in the applicant.

(4) Pursuant to § 800.50, the applicant, parent or non-parent corporate guarantor shall be required to complete the approved reclamation plan for the lands in default or to pay to the regulatory authority an amount necessary to complete the approved reclamation plan, not to exceed the bond amount. If permitted under State law, the indemnity agreement when under forfeiture shall operate as a judgment against those parties liable under the indemnity agreement.

(f) A regulatory authority may require self-bonded applicants, parent and non-parent corporate guarantors to submit an update of the information required under paragraphs (b)(3) and (b)(4) of this section within 90 days after the close of each fiscal year following the issuance of the self-bond or corporate guarantee.

(g) If at any time during the period when a self-bond is posted, the financial conditions of the applicant, parent or non-parent corporate guarantor change so that the criteria of paragraphs (b)(3) and (d) of this section are not satisfied, the permittee shall notify the regulatory authority immediately and shall within 90 days post an alternate form of bond in the same amount as the self-bond. Should the permittee fail to post an adequate substitute bond, the provisions of § 800.16(e) shall apply.

§ 800.30 Replacement of bonds.

(a) The regulatory authority may allow a permittee to replace existing bonds with other bonds that provide equivalent coverage.

(b) The regulatory authority shall not release existing performance bonds until the permittee has submitted, and the regulatory authority has approved, acceptable replacement performance bonds. Replacement of a performance bond pursuant to this section shall not constitute a release of bond under § 800.40.

§ 800.40 Requirement to release performance bonds.

(a) *Bond release application.* (1) The permittee may file an application with the regulatory authority for the release of all or part of a performance bond. Applications may be filed only at times or during seasons authorized by the regulatory authority in order to properly evaluate the completed reclamation operations. The times or seasons appropriate for the evaluation of certain types of reclamation shall be established in the regulatory program or identified in the mining and reclamation plan required in subchapter G of this chapter and approved by the regulatory authority.

(2) Within 30 days after an application for bond release has been filed with the regulatory authority, the permittee shall submit a copy of an advertisement placed at least once a week for four successive weeks in a newspaper of general circulation in the locality of the surface coal mining operation. The advertisement shall be considered part of any bond release application and shall contain the permittee's name, permit number and approval date, notification of the precise location of the land affected, the number of acres, the type and amount of the bond filed and the portion sought to be released, the type and appropriate dates of reclamation work performed, a description of the results achieved as they relate to the permittee's approved reclamation plan, and the name and address of the regulatory authority to which written comments, objections, or requests for public hearings and informal conferences on the specific bond release may be submitted pursuant to § 800.40 (f) and (h). In addition, as part of any bond release application, the permittee shall submit copies of letters which he or she has sent to adjoining property owners, local governmental bodies, planning agencies, sewage and water treatment authorities, and water companies in the locality in which the surface coal mining and reclamation operation took place, notifying them of the intention to seek release from the bond.

(3) The permittee shall include in the application for bond release a notarized statement which certifies that all applicable reclamation activities have been accomplished in accordance with the requirements of the Act, the regulatory program, and the approved reclamation plan. Such certification shall be submitted for each application or phase of bond release.

(b) *Inspection by regulatory authority.* (1) Upon receipt of the bond release application, the regulatory authority shall, within 30 days, or as soon thereafter as weather conditions permit, conduct an inspection and evaluation of the reclamation work involved. The evaluation shall consider, among other factors, the degree of difficulty to complete any remaining reclamation, whether pollution of surface and subsurface water is occurring, the probability of future occurrence of such pollution, and the estimated cost of abating such pollution. The surface owner, agent, or lessee shall be given notice of such inspection and may participate with the regulatory authority in making the bond release inspection. The regulatory authority may arrange with the permittee to allow access to the permit area, upon request by any person with an interest in bond release, for the purpose of gathering information relevant to the proceeding.

(2) Within 60 days from the filing of the bond release application, if no public hearing is held pursuant to paragraph (f) of this section, or, within 30 days after a public hearing has been held pursuant to paragraph (f) of this section, the regulatory authority shall notify in writing the permittee, the surety or other persons with an interest in bond collateral who have requested notification under § 800.21(f), and the persons who either filed objections in writing or objectors who were a party to the hearing proceedings, if any, of its decision to release or not to release all or part of the performance bond.

(c) The regulatory authority may release all or part of the bond for the entire permit area or incremental area if the regulatory authority is satisfied that all the reclamation or a phase of the reclamation covered by the bond or portion thereof has been accomplished in accordance with the following schedules for reclamation of Phases I, II, and III:

(1) At the completion of Phase I, after the operator completes the backfilling, regrading (which may include the replacement of topsoil) and drainage control of a bonded area in accordance with the approved reclamation plan, 60 percent of the bond or collateral for the applicable area.

(2) At the completion of Phase II, after revegetation has been established on the regraded mined lands in accordance with the approved reclamation plan, an additional amount of bond. When determining the amount of bond to be released after successful revegetation has been established, the regulatory authority shall retain that amount of bond for the revegetated area which

would be sufficient to cover the cost of reestablishing revegetation if completed by a third party and for the period specified for operator responsibility in section 515 of the Act for reestablishing revegetation. No part of the bond or deposit shall be released under this paragraph so long as the lands to which the release would be applicable are contributing suspended solids to streamflow or runoff outside the permit area in excess of the requirements set by section 515(b)(10) of the Act and by subchapter K of this chapter or until soil productivity for prime farmlands has returned to the equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices as determined from the soil survey performed pursuant to section 507(b)(16) of the Act and part 823 of this chapter. Where a silt dam is to be retained as a permanent impoundment pursuant to subchapter K of this chapter, the Phase II portion of the bond may be released under this paragraph so long as provisions for sound future maintenance by the operator or the landowner have been made with the regulatory authority.

(3) At the completion of Phase III, after the operator has completed successfully all surface coal mining and reclamation activities, the release of the remaining portion of the bond, but not before the expiration of the period specified for operator responsibility in § 816.116 or § 817.116 of this chapter. However, no bond shall be fully released under provisions of this section until reclamation requirements of the Act and the permit are fully met.

(d) If the regulatory authority disapproves the application for release of the bond or portion thereof, the regulatory authority shall notify the permittee, the surety, and any person with an interest in collateral as provided for in § 800.21(f), in writing, stating the reasons for disapproval and recommending corrective actions necessary to secure the release and allowing an opportunity for a public hearing.

(e) When any application for total or partial bond release is filed with the regulatory authority, the regulatory authority shall notify the municipality in which the surface coal mining operation is located by certified mail at least 30 days prior to the release of all or a portion of the bond.

(f) Any person with a valid legal interest which might be adversely affected by release of the bond, or the responsible officer or head of any Federal, State, or local governmental agency which has jurisdiction by law or special expertise with respect to any environmental, social, or economic impact involved in the operation or which is authorized to develop and enforce environmental standards with respect to such operations, shall have the right to file written objections to the proposed release from bond with the regulatory authority within 30 days after the last publication of the notice required by § 800.40(a)(2). If written objections are filed and a hearing is requested, the regulatory authority shall inform all the interested parties of the time and place of the hearing, and shall hold a public hearing within 30 days after receipt of the request for the hearing. The date, time, and location of the public hearing shall be advertised by the regulatory authority in a newspaper of general circulation in the locality for two consecutive weeks. The public hearing shall be held in the locality of the surface coal mining operation from which bond release is sought, at the location of the regulatory authority office, or at the State capital, at the option of the objector.

(g) For the purpose of the hearing under paragraph (f) of this section, the regulatory authority shall have the authority to administer oaths, subpoena witnesses or written or printed material, compel the attendance of witnesses or the production of materials, and take evidence including, but not limited to, inspection of the land affected and other surface coal mining operations carried on by the applicant in the general vicinity. A verbatim record of each public hearing shall be made, and a transcript shall be made available on the motion of any party or by order of the regulatory authority.

(h) Without prejudice to the right of an objector or the applicant, the regulatory authority may hold an informal conference as provided in section 513(b) of the Act to resolve such written objections. The regulatory authority shall make a record of the informal conference unless waived by all parties, which shall be accessible to all parties. The regulatory authority shall also furnish all parties of the informal conference with a written finding of the regulatory authority based on the informal conference, and the reasons for said finding.

§ 800.50 Forfeiture of bonds.

(a) If an operator refuses or is unable to conduct reclamation of an unabated violation, if the terms of the permit are not met, or if the operator defaults on the conditions under which the bond was accepted, the regulatory authority shall take the following action to forfeit all or part of a bond or bonds for any permit area or an increment of a permit area:

(1) Send written notification by certified mail, return receipt requested, to the permittee and the surety on the bond, if any, informing them of the determination to forfeit all or part of the bond, including the reasons for the forfeiture and the amount to be forfeited. The amount shall be based on the estimated total cost of achieving the reclamation plan requirements.

(2) Advise the permittee and surety, if applicable, of the conditions under which forfeiture may be avoided. Such conditions may include, but are not limited to—

(i) Agreement by the permittee or another party to perform reclamation operations in accordance with a compliance schedule which meets the conditions of the permit, the reclamation plan, and the regulatory program and a demonstration that such party has the ability to satisfy the conditions; or

(ii) The regulatory authority may allow a surety to complete the reclamation plan, or the portion of the reclamation plan applicable to the bonded phase or increment, if the surety can demonstrate an ability to complete the reclamation in accordance with the approved reclamation plan. Except where the regulatory authority may approve partial release authorized under § 800.40, no surety liability shall be released until successful completion of all reclamation under the terms of the permit, including applicable liability periods of § 800.13.

(b) In the event forfeiture of the bond is required by this section, the regulatory authority shall—

(1) Proceed to collect the forfeited amount as provided by applicable laws for the collection of defaulted bonds or other debts if actions to avoid forfeiture have not been taken, or if rights of appeal, if any, have not been exercised within a time established by the regulatory authority, or if such appeal, if taken, is unsuccessful.

(2) Use funds collected from bond forfeiture to complete the reclamation plan, or portion thereof, on the permit area or increment, to which bond coverage applies.

(c) Upon default, the regulatory authority may cause the forfeiture of any and all bonds deposited to complete reclamation for which the bonds were posted. Unless specifically limited, as provided in § 800.11(b), bond liability shall extend to the entire permit area under conditions of forfeiture.

(d)(1) In the event the estimated amount forfeited is insufficient to pay for the full cost of reclamation, the

operator shall be liable for remaining costs. The regulatory authority may complete, or authorize completion of, reclamation of the bonded area and may recover from the operator all costs of reclamation in excess of the amount forfeited.

(2) In the event the amount of performance bond forfeited was more than the amount necessary to complete reclamation, the unused funds shall be returned by the regulatory authority to the party from whom they were collected.

§ 800.60 Terms and conditions for liability insurance.

(a) The regulatory authority shall require the applicant to submit as part of its permit application a certificate issued by an insurance company authorized to do business in the United States certifying that the applicant has a public liability insurance policy in force for the surface coal mining and reclamation operations for which the permit is sought. Such policy shall provide for personal injury and property damage protection in an amount adequate to compensate any persons injured or property damaged as a result of the surface coal mining and reclamation operations, including the use of explosives, and who are entitled to compensation under the applicable provisions of State law. Minimum insurance coverage for bodily injury and property damage shall be $300,000 for each occurrence and $500,000 aggregate.

(b) The policy shall be maintained in full force during the life of the permit or any renewal thereof and the liability period necessary to complete all reclamation operations under this Chapter.

(c) The policy shall include a rider requiring that the insurer notify the regulatory authority whenever substantive changes are made in the policy including any termination or failure to renew.

(d) The regulatory authority may accept from the applicant, in lieu of a certificate for a public liability insurance policy, satisfactory evidence from the applicant that it satisfies applicable State self-insurance requirements approved as part of the regulatory program and the requirements of this section.

§ 800.70 Bonding for anthracite operations in Pennsylvania.

(a) All of the provisions of this subchapter shall apply to bonding and insuring anthracite surface coal mining and reclamation operations in Pennsylvania except that—

(1) Specified bond limits shall be determined by the regulatory authority in accordance with applicable provisions of Pennsylvania statutes, rules and regulations promulgated thereunder, and implementing policies of the Pennsylvania Department of Environmental Resources.

(2) The period of liability for responsibility under each bond shall be established for those operations in accordance with applicable laws of the State of Pennsylvania, rules and regulations promulgated thereunder, and implementing policies of the Pennsylvania Department of Environmental Resources.

(b) Upon amendment of the Pennsylvania permanent regulatory program with respect to specified bond limits and period of revegetation responsibility for anthracite surface coal mining and reclamation operations, any person engaging in or seeking to engage in those operations shall comply with additional regulations the Secretary may issue as are necessary to meet the purposes of the Act.

■ 12. Revise part 816 to read as follows:

PART 816—PERMANENT PROGRAM PERFORMANCE STANDARDS—SURFACE MINING ACTIVITIES

Sec.

816.1 Scope.
816.2 Objectives.
816.10 Information collection.
816.11 Signs and markers.
816.13 Casing and sealing of drilled holes: General requirements.
816.14 Casing and sealing of drilled holes: Temporary.
816.15 Casing and sealing of drilled holes: Permanent.
816.22 Topsoil and subsoil.
816.41 Hydrologic-balance protection.
816.42 Hydrologic balance: Water quality standards and effluent limitations.
816.43 Diversions.
816.45 Hydrologic balance: Sediment control measures.
816.46 Hydrologic balance: Siltation structures.
816.47 Hydrologic balance: Discharge structures.
816.49 Impoundments.
816.56 Postmining rehabilitation of sedimentation ponds, diversions, impoundments, and treatment facilities.
816.57 Hydrologic balance: Stream buffer zones.
816.59 Coal recovery.
816.61 Use of explosives: General requirements.
816.62 Use of explosives: Preblasting survey.
816.64 Use of explosives: Blasting schedule.
816.66 Use of explosives: Blasting signs, warnings, and access control.
816.67 Use of explosives: Control of adverse effects.
816.68 Use of explosives: Records of blasting operations.
816.71 Disposal of excess spoil: General requirements.
816.72 Disposal of excess spoil: Valley fills/head-of-hollow fills.
816.73 Disposal of excess spoil: Durable rock fills.
816.74 Disposal of excess spoil: Preexisting benches.
816.79 Protection of underground mining.
816.81 Coal mine waste: General requirements.
816.83 Coal mine waste: Refuse piles.
816.84 Coal mine waste: Impounding structures.
816.87 Coal mine waste: Burning and burned waste utilization.
816.89 Disposal of noncoal mine wastes.
816.95 Stabilization of surface areas.
816.97 Protection of fish, wildlife, and related environmental values.
816.99 Slides and other damage.
816.100 Contemporaneous reclamation.
816.101 Backfilling and grading: Time and distance requirements.
816.102 Backfilling and grading: General grading requirements.
816.104 Backfilling and grading: Thin overburden.
816.105 Backfilling and grading: Thick overburden.
816.106 Backfilling and grading: Previously mined areas.
816.107 Backfilling and grading: Steep slopes.
816.111 Revegetation: General requirements.
816.113 Revegetation: Timing.
816.114 Revegetation: Mulching and other soil stabilizing practices.
816.116 Revegetation: Standards for success.
816.131 Cessation of operations: Temporary.
816.132 Cessation of operations: Permanent.
816.133 Postmining land use.
816.150 Roads: General.
816.151 Primary roads.
816.180 Utility installations.
816.181 Support facilities.
816.200 Interpretative rules related to general performance standards.

Authority: 30 U.S.C. 1201 *et seq.;* and sec 115 of Pub. L. 98–146.

§ 816.1 Scope.

This part sets forth the minimum environmental protection performance standards to be adopted and implemented under regulatory programs for surface mining activities.

§ 816.2 Objectives.

This part is intended to ensure that all surface mining activities are conducted in a manner which preserves and enhances environmental and other values in accordance with the Act.

§ 816.10 Information collection.

(a) The collections of information contained in part 816 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

and assigned clearance number 1029–0047. The information will be used by the regulatory authority to monitor and inspect surface coal mining activities to ensure that they are in compliance with the Surface Mining Control and Reclamation Act. Response is required to obtain a benefit.

(b) Public Reporting Burden for this information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave. NW., Room 203, Washington, DC 20240; and the Office of Management and Budget, Paperwork Reduction Project (1029–0047), Washington, DC 20503.

§ 816.11 Signs and markers.

(a) *Specifications.* Signs and markers required under this part shall—

(1) Be posted and maintained by the person who conducts the surface mining activities;

(2) Be of a uniform design throughout the operation that can be easily seen and read;

(3) Be made of durable material; and

(4) Conform to local ordinances and codes.

(b) *Duration of maintenance.* Signs and markers shall be maintained during the conduct of all activities to which they pertain.

(c) *Mine and permit identification signs.* (1) Identification signs shall be displayed at each point of access to the permit area from public roads.

(2) Signs shall show the name, business address, and telephone number of the person who conducts the surface mining activities and the identification number of the current permit authorizing surface mining activities.

(3) Signs shall be retained and maintained until after the release of all bonds for the permit area.

(d) *Perimeter markers.* The perimeter of a permit area shall be clearly marked before the beginning of surface mining activities.

(e) *Buffer zone markers.* Buffer zones shall be marked along their boundaries as required under § 816.57.

(f) *Topsoil markers.* Where topsoil or other vegetation-supporting material is segregated and stockpiled as required under § 816.22, the stockpiled material shall be clearly marked.

§ 816.13 Casing and sealing of drilled holes: General requirements.

Each exploration hole, other drill or borehole, well, or other exposed underground opening shall be cased, sealed, or otherwise managed, as approved by the regulatory authority, to prevent acid or other toxic drainage from entering ground or surface waters, to minimize disturbance to the prevailing hydrologic balance, and to ensure the safety of people, livestock, fish and wildlife, and machinery in the permit area and adjacent area. If these openings are uncovered or exposed by surface mining activities within the permit area they shall be permanently closed, unless approved for water monitoring, or otherwise managed in a manner approved by the regulatory authority. Use of a drilled hole or borehole or monitoring well as a water well must meet the provisions of § 816.41 of this part. This section does not apply to holes solely drilled and used for blasting.

§ 816.14 Casing and sealing of drilled holes: Temporary.

Each exploration hole, other drill or boreholes, wells and other exposed underground openings which have been identified in the approved permit application for use to return coal processing waste or water to underground workings, or to be used to monitor ground water conditions, shall be temporarily sealed before use and protected during use by barricades, or fences, or other protective devices approved by the regulatory authority. These devices shall be periodically inspected and maintained in good operating condition by the person who conducts the surface mining activities.

§ 816.15 Casing and sealing of drilled holes: Permanent.

When no longer needed for monitoring or other use approved by the regulatory authority upon a finding of no adverse environmental or health and safety effect, or unless approved for transfer as a water well under § 816.41, each exploration hole, other drilled hole or borehole, well, and other exposed underground opening shall be capped, sealed, backfilled, or otherwise properly managed, as required by the regulatory authority, under § 816.13 and consistent with 30 CFR 75.1711. Permanent closure measures shall be designed to prevent access to the mine workings by people, livestock, fish and wildlife, and machinery, and to keep acid or other toxic drainage from entering ground or surface waters.

§ 816.22 Topsoil and subsoil.

(a) *Removal.* (1)(i) All topsoil shall be removed as a separate layer from the area to be disturbed, and segregated.

(ii) Where the topsoil is of insufficient quantity or poor quality for sustaining vegetation, the materials approved by the regulatory authority in accordance with paragraph (b) of this section shall be removed as a separate layer from the area to be disturbed, and segregated.

(2) If topsoil is less than 6 inches thick, the operator may remove the topsoil and the unconsolidated materials immediately below the topsoil and treat the mixture as topsoil.

(3) The regulatory authority may choose not to require the removal of topsoil for minor disturbances which—

(i) Occur at the site of small structures, such as power poles, signs, or fence lines; or

(ii) Will not destroy the existing vegetation and will not cause erosion.

(4) *Timing.* All material to be removed under this section shall be removed after the vegetative cover that would interfere with its salvage is cleared from the area to be disturbed, but before any drilling, blasting, mining, or other surface disturbance takes place.

(b) *Substitutes and supplements.* Selected overburden materials may be substituted for, or used as a supplement to topsoil if the operator demonstrates to the regulatory authority that the resulting soil medium is equal to, or more suitable for sustaining vegetation than, the existing topsoil, and the resulting soil medium is the best available in the permit area to support revegetation.

(c) *Storage.* (1) Materials removed under paragraph (a) of this section shall be segregated and stockpiled when it is impractical to redistribute such materials promptly on regraded areas.

(2) Stockpiled materials shall—

(i) Be selectively placed on a stable site within the permit area;

(ii) Be protected from contaminants and unnecessary compaction that would interfere with revegetation;

(iii) Be protected from wind and water erosion through prompt establishment and maintenance of an effective, quick growing vegetative cover or through other measures approved by the regulatory authority; and

(iv) Not be moved until required for redistribution unless approved by the regulatory authority.

(3) Where long-term surface disturbances will result from facilities such as support facilities and preparation plants and where stockpiling of materials removed under paragraph (a)(1) of this section would be detrimental to the quality or quantity of

those materials, the regulatory authority may approve the temporary distribution of the soil materials so removed to an approved site within the permit area to enhance the current use of that site until needed for later reclamation, provided that—

(i) Such action will not permanently diminish the capability of the topsoil of the host site; and

(ii) The material will be retained in a condition more suitable for redistribution than if stockpiled.

(d) *Redistribution.* (1) Topsoil materials and topsoil substitutes and supplements removed under paragraphs (a) and (b) of this section shall be redistributed in a manner that—

(i) Achieves an approximately uniform, stable thickness when consistent with the approved postmining land use, contours, and surface-water drainage systems. Soil thickness may also be varied to the extent such variations help meet the specific revegetation goals identified in the permit;

(ii) Prevents excess compaction of the materials; and

(iii) Protects the materials from wind and water erosion before and after seeding and planting.

(2) Before redistribution of the material removed under paragraph (a) of this section the regraded land shall be treated if necessary to reduce potential slippage of the redistributed material and to promote root penetration. If no harm will be caused to the redistributed material and reestablished vegetation, such treatment may be conducted after such material is replaced.

(3) The regulatory authority may choose not to require the redistribution of topsoil or topsoil substitutes on the approved postmining embankments of permanent impoundments or of roads if it determines that—

(i) Placement of topsoil or topsoil substitutes on such embankments is inconsistent with the requirement to use the best technology currently available to prevent sedimentation, and

(ii) Such enbankments will be otherwise stabilized.

(4) *Nutrients and soil amendments.* Nutrients and soil amendments shall be applied to the initially redistributed material when necessary to establish the vegetative cover.

(e) *Subsoil segregation.* The regulatory authority may require that the B horizon, C horizon, or other underlying strata, or portions thereof, be removed and segrgated, stockpiled, and redistributed as subsoil in accordance with the requirements of paragraphs (c) and (d) of this section if it finds that such subsoil layers are necessary to comply with the revegetation requirements of §§ 816.111, 816.113, 816.114, and 816.116 of this chapter.

§ 816.41 Hydrologic-balance protection.

(a) *General.* All surface mining and reclamation activities shall be conducted to minimize disturbance of the hydrologic balance within the permit and adjacent areas, to prevent material damage to the hydrologic balance outside the permit area, to assure the protection or replacement of water rights, and to support approved postmining land uses in accordance with the terms and conditions of the approved permit and the performance standards of this part. The regulatory authority may require additional preventative, remedial, or monitoring measures to assure that material damage to the hydrologic balance outside the permit area is prevented. Mining and reclamation practices that minimize water pollution and changes in flow shall be used in preference to water treatment.

(b) *Ground-water protection.* In order to protect the hydrologic balance, surface mining activities shall be conducted according to the plan approved under § 780.21(h) of this chapter and the following:

(1) Ground-water quality shall be protected by handling earth materials and runoff in a manner that minimizes acidic, toxic, or other harmful infiltration to ground-water systems and by managing excavations and other disturbances to prevent or control the discharge of pollutants into the ground water.

(2) Ground-water quantity shall be protected by handling earth materials and runoff in a manner that will restore the approximate premining recharge capacity of the reclaimed area as a whole, excluding coal mine waste disposal areas and fills, so as to allow the movement of water to the ground-water system.

(c) *Ground-water monitoring.* (1) Ground-water monitoring shall be conducted according to the ground-water monitoring plan approved under § 780.21(i) of this chapter. The regulatory authority may require additional monitoring when necessary.

(2) Ground-water monitoring data shall be submitted every 3 months to the regulatory authority or more frequently as prescribed by the regulatory authority. Monitoring reports shall include analytical results from each sample taken during the reporting period. When the analysis of any ground-water sample indicates noncompliance with the permit conditions, then the operator shall promptly notify the regulatory authority and immediately take the actions provided for in §§ 773.17(e) and 780.21(h) of this chapter.

(3) Ground-water monitoring shall proceed through mining and continue during reclamation until bond release. Consistent with the procedures of § 774.13 of this chapter, the regulatory authority may modify the monitoring requirements, including the parameters covered and the sampling frequency, if the operator demonstrates, using the monitoring data obtained under this paragraph, that—

(i) The operation has minimized disturbance to the hydrologic balance in the permit and adjacent areas and prevented material damage to the hydrologic balance outside the permit area; water quantity and quality are suitable to support approved postmining land uses; and the water rights of other users have been protected or replaced; or

(ii) Monitoring is no longer necessary to achieve the purposes set forth in the monitoring plan approved under § 780.21(i) of this chapter.

(4) Equipment, structures, and other devices used in conjuction with monitoring the quality and quantity of ground water onsite and offsite shall be properly installed, maintained, and operated and shall be removed by the operator when no longer needed.

(d) *Surface-water protection.* In order to protect the hydrologic balance, surface mining activities shall be conducted according to the plan approved under § 780.21(h) of this chapter, and the following:

(1) Surface-water quality shall be protected by handling earth materials, ground-water discharges, and runoff in a manner that minimizes the formation of acidic or toxic drainage; prevents, to the extent possible using the best technology currently available, additional contribution of suspended solids to streamflow outside the permit area; and otherwise prevents water pollution. If drainage control, restabilization and revegetation of disturbed areas, diversion of runoff, mulching, or other reclamation and remedial practices are not adequate to meet the requirements of this section and § 816.42, the operator shall use and maintain the necessary water-treatment facilities or water quality controls.

(2) Surface-water quality and flow rates shall be protected by handling earth materials and runoff in accordance with the steps outlined in the plan approved under § 780.21(h) of this chapter.

(e) *Surface-water monitoring.* (1) Surface-water monitoring shall be

conducted according to the surface-water monitoring plan approved under § 780.21(j) of this chapter. The regulatory authority may require additional monitoring when necessary.

(2) Surface-water monitoring data shcll be submitted every 3 months to the regulatory authority or more frequently as prescribed by the regulatory authority. Monitoring reports shall include analytical results from each sample taken during the reporting period. When the analysis of any surface-water sample indicates noncompliance with the permit conditions, the operator shall promptly notify the regulatory authority and immediately take the actions provided for in §§ 773.17(e) and 780.21(h) of this chapter. The reporting requirements of this paragraph do not exempt the operator from meeting any National Pollutant Discharge Elimination System (NPDES) reporting requirements.

(3) Surface-water monitoring shall proceed through mining and continue during reclamation until bond release. Consistent with § 774.13 of this chapter, the regulatory authority may modify the monitoring requirements, except those required by the NPDES permitting authority, including the parameters covered and sampling frequency if the operator demonstrates, using the monitoring data obtained under this paragraph, that—

(i) The operation has minimized disturbance to the hydrologic balance in the permit and adjacent areas and prevented material damage to the hydrologic balance outside the permit area; water quantity and quality are suitable to support approved postmining land uses; and the water rights of other users have been protected or replaced; or

(ii) Monitoring is no longer necessary to achieve the purposes set forth in the monitoring plan approved under § 780.21(j) of this chapter.

(4) Equipment, structures, and other devices used in conjunction with monitoring the quality and quantity of surface water onsite and offsite shall be properly installed, maintained, and operated and shall be removed by the operator when no longer needed.

(f) *Acid- and toxic-forming materials.* (1) Drainage from acid- and toxic-forming materials into surface water and ground water shall be avoided by—

(i) Identifying and burying and/or treating, when necessary, materials which may adversely affect water quality, or be detrimental to vegetation or to public health and safety if not buried and/or treated, and

(ii) Storing materials in a manner that will protect surface water and ground water by preventing erosion, the formation of polluted runoff, and the infiltration of polluted water. Storage shall be limited to the period until burial and/or treatment first become feasible, and so long as storage will not result in any risk of water pollution or other environmental damage.

(2) Storage, burial or treatment practices shall be consistent with other material handling and disposal provisions of this chapter.

(g) *Transfer of wells.* Before final release of bond, exploratory or monitoring wells shall be sealed in a safe and environmentally sound manner in accordance with §§ 816.13 to 816.15. With the prior approval of the regulatory authority, wells may be transferred to another party for further use. At a minimum, the conditions of such transfer shall comply with State and local law and the permittee shall remain responsible for the proper management of the well until bond release in accordance with §§ 816.13 to 816.15.

(h) *Water rights and replacement.* Any person who conducts surface mining activities shall replace the water supply of an owner of interest in real property who obtains all or part of his or her supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source, where the water supply has been adversely impacted by contamination, diminution, or interruption proximately resulting from the surface mining activities. Baseline hydrologic information required in §§ 780.21 and 780.22 of this chapter shall be used to determine the extent of the impact of mining upon ground water and surface water.

(i) *Discharges into an underground mine.* (1) Discharges into an underground mine are prohibited, unless specifically approved by the regulatory authority after a demonstration that the discharge will—

(i) Minimize disturbance to the hydrologic balance on the permit area, prevent material damage outside the permit area and otherwise eliminate public hazards resulting from surface mining activities;

(ii) Not result in a violation of applicable water quality standards or effluent limitations;

(iii) Be at a known rate and quality which shall meet the effluent limitations of § 816.42 for pH and total suspended solids, except that the pH and total suspended-solids limitations may be exceeded, if approved by the regulatory authority; and

(iv) Meet with the approval of the Mine Safety and Health Administration.

(2) Discharges shall be limited to the following:

(i) Water;

(ii) Coal processing waste;

(iii) Fly ash from a coal-fired facility;

(iv) Sludge from an acid-mine-drainage treatment facility;

(v) Flue-gas desulfurization sludge;

(vi) Inert materials used for stabilizing underground mines; and

(vii) Underground mine development wastes.

§ 816.42 Hydrologic balance: Water quality standards and effluent limitations.

Discharges of water from areas disturbed by surface mining activities shall be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 CFR part 434.

§ 816.43 Diversions.

(a) *General requirements.* (1) With the approval of the regulatory authority, any flow from mined areas abandoned before May 3, 1978, and any flow from undisturbed areas or reclaimed areas, after meeting the criteria of § 816.46 for siltation structure removal, may be diverted from disturbed areas by means of temporary or permanent diversions. All diversions shall be designed to minimize adverse impacts to the hydrologic balance within the permit and adjacent areas, to prevent material damage outside the permit area and to assure the safety of the public. Diversions shall not be used to divert water into underground mines without approval of the regulatory authority under § 816.41(i).

(2) The diversion and its appurtenant structures shall be designed, located, constructed, maintained and used to—

(i) Be stable;

(ii) Provide protection against flooding and resultant damage to life and property;

(iii) Prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow outside the permit area; and

(iv) Comply with all applicable local, State, and Federal laws and regulations.

(3) Temporary diversions shall be removed promptly when no longer needed to achieve the purpose for which they were authorized. The land disturbed by the removal process shall be restored in accordance with this part. Before diversions are removed, downstream water-treatment facilities previously protected by the diversion shall be modified or removed, as

necessary, to prevent overtopping or failure of the facilities. This requirement shall not relieve the operator from maintaining water-treatment facilities as otherwise required. A permanent diversion or a stream channel reclaimed after the removal of a temporary diversion shall be designed and constructed so as to restore or approximate the premining characteristics of the original stream channel including the natural riparian vegetation to promote the recovery and the enhancement of the aquatic habitat.

(4) The regulatory authority may specify design criteria for diversions to meet the requirements of this section.

(b) *Diversion of perennial and intermittent streams.* (1) Diversion of perennial and intermittent streams within the permit area may be approved by the regulatory authority after making the finding relating to stream buffer zones that the diversion will not adversely affect the water quantity and quality and related environmental resources of the stream.

(2) The design capacity of channels for temporary and permanent stream channel diversions shall be at least equal to the capacity of the unmodified stream channel immediately upstream and downstream from the diversion.

(3) The requirements of paragraph (a)(2)(ii) of this section shall be met when the temporary and permanent diversions for perennial and intermittent streams are designed so that the combination of channel, bank and flood-plain configuration is adequate to pass safely the peak runoff of a 10-year, 6-hour precipitation event for a temporary diversion and a 100-year, 6-hour precipitation event for a permanent diversion.

(4) The design and construction of all stream channel diversions of perennial and intermittent streams shall be certified by a qualified registered professional engineer as meeting the performance standards of this part and any design criteria set by the regulatory authority.

(c) *Diversion of miscellaneous flows.* (1) Miscellaneous flows, which consist of all flows except for perennial and intermittent streams, may be diverted away from disturbed areas if required or approved by the regulatory authority. Miscellaneous flows shall include ground-water discharges and ephemeral streams.

(2) The design, location, construction, maintenance, and removal of diversions of miscellaneous flows shall meet all of the performance standards set forth in paragraph (a) of this section:

(3) The requirements of paragraph (a)(2)(ii) of this section shall be met when the temporary and permanent diversions for miscellaneous flows are designed so that the combination of channel, bank and flood-plain configuration is adequate to pass safely the peak runoff of a 2-year, 6-hour precipitation event for a temporary diversion and a 10-year, 6-hour precipitation event for a permanent diversion.

§ 816.45 Hydrologic balance: Sediment control measures.

(a) Appropriate sediment control measures shall be designed, constructed, and maintained using the best technology currently available to:

(1) Prevent, to the extent possible, additional contributions of sediment to streamflow or to runoff outside the permit area,

(2) Meet the more stringent of applicable State or Federal effluent limitations,

(3) Minimize erosion to the extent possible.

(b) Sediment control measures include practices carried out within and adjacent to the disturbed area. The sedimentation storage capacity of practices in and downstream from the disturbed area shall reflect the degree to which successful mining and reclamation techniques are applied to reduce erosion and control sediment. Sediment control measures consist of the utilization of proper mining and reclamation methods and sediment control practices, singly or in combination. Sediment control methods include but are not limited to—

(1) Disturbing the smallest practicable area at any one time during the mining operation through progressive backfilling, grading, and prompt revegetation as required in § 816.111(b);

(2) Stabilizing the backfill material to promote a reduction in the rate and volume of runoff, in accordance with the requirements of § 816.102;

(3) Retaining sediment within disturbed areas;

(4) Diverting runoff away from disturbed areas;

(5) Diverting runoff using protected channels or pipes through disturbed areas so as not to cause additional erosion;

(6) Using straw dikes, riprap, check dams, mulches, vegetative sediment filters, dugout ponds, and other measures that reduce overland flow velocity, reduce runoff volume, or trap sediment; and

(7) Treating with chemicals.

§ 816.46 Hydrologic balance: Siltation structures.

(a) For the purpose of this section only, *disturbed areas* shall not include those areas—

(1) In which the only surface mining activities include diversion ditches, siltation structures, or roads that are designed constructed and maintained in accordance with this part; and

(2) For which the upstream area is not otherwise disturbed by the operator.

(b) *General requirements.* (1) Additional contributions of suspended solids sediment to streamflow or runoff outside the permit area shall be prevented to the extent possible using the best technology currently available.

(2) All surface drainage from the disturbed area shall be passed through a siltation structure before leaving the permit area, except as provided in paragraph (b)(5) or (e) of this section. The requirements of this paragraph are suspended effective December 22, 1986, per court order.

(3) Siltation structures for an area shall be constructed before beginning any surface mining activities in that area, and upon construction shall be certified by a qualified registered professional engineer, or in any State which authorizes land surveyors to prepare and certify plans in accordance with § 780.25(a) of this chapter a qualified registered professional land surveyor, to be constructed as designed and as approved in the reclamation plan.

(4) Any siltation structure which impounds water shall be designed, constructed and maintained in accordance with § 816.49 of this chapter.

(5) Siltation structures shall be maintained until removal is authorized by the regulatory authority and the disturbed area has been stabilized and revegetated. In no case shall the structure be removed sooner than 2 years after the last augmented seeding.

(6) When siltation structure is removed, the land on which the siltation structure was located shall be regraded and revegetated in accordance with the reclamation plan and §§ 816.111 through 816.116 of this chapter. Sedimentation ponds approved by the regulatory authority for retention as permanent impoundments may be exempted from this requirement.

(c) *Sedimentation ponds.* (1) When used, sedimentation ponds shall—

(i) Be used individually or in series;

(ii) Be located as near as possible to the disturbed area and out of perennial streams unless approved by the regulatory authority, and

(iii) Be designed, constructed, and maintained to—

(A) Provide adequate sediment storage volume;

(B) Provide adequate detention time to allow the effluent from the ponds to meet State and Federal effluent limitations;

(C) Contain or treat the 10-year, 24-hour precipitation event (''design event'') unless a lesser design event is approved by the regulatory authority based on terrain, climate, other site-specific conditions and on a demonstration by the operator that the effluent limitations of § 816.42 will be met;

(D) Provide a nonclogging dewatering device adequate to maintain the detention time required under paragraph (c)(1)(iii)(B) of this section;

(E) Minimize, to the extent possible, short circuiting;

(F) Provide periodic sediment removal sufficient to maintain adequate volume for the design event;

(G) Ensure against excessive settlement;

(H) Be free of sod, large roots, frozen soil, and acid- or toxic-forming coal-processing waste; and

(I) Be compacted properly.

(2) *Spillways.* A sedimentation pond shall include either a combination of principal and emergency spillways or single spillway configured as specified in § 816.49(a)(9).

(d) *Other treatment facilities.* (1) Other treatment facilities shall be designed to treat the 10-year, 24-hour precipitation event unless a lesser design event is approved by the regulatory authority based on terrain, climate, other site-specific conditions and a demonstration by the operator that the effluent limitations of § 816.42 will be met.

(2) Other treatment facilities shall be designed in accordance with the applicable requirements of paragraph (c) of this section.

(e) *Exemptions.* Exemptions to the requirements of this section may be granted if—

(1) The disturbed drainage area within the total disturbed area is small; and

(2) The operator demonstrates that siltation structures and alternate sediment control measures are not necessary for drainage from the disturbed area to meet the effluent limitations under § 816.42 and the applicable State and Federal water quality standards for the receiving waters.

§ 816.47 Hydrologic balance: Discharge structures.

Discharge from sedimentation ponds, permanent and temporary impoundments, coal processing waste dams and embankments, and diversions shall be controlled, by energy dissipators, riprap channels, and other devices, where necessary, to reduce erosion, to prevent deepening or enlargement of stream channels, and to minimize disturbance of the hydrologic balance. Discharge structures shall be designed according to standard engineering-design procedures.

§ 816.49 Impoundments.

(a) *General requirements.* The requirements of this paragraph apply to both temporary and permanent impoundments.

(1) Impoundments meeting the Class B or C criteria for dams in the U.S. Department of Agriculture, Soil Conservation Service Technical Release No. 60 (210–VI–TR60, Oct. 1985), ''Earth Dams and Reservoirs,'' 1985 shall comply with ''Minimum Emergency Spillway Hydrologic Criteria'' table in TR–60 and the requirements of this section. The technical release is hereby incorporated by reference. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161, order No. PB 87–157509/AS. Copies can be inspected at the OSM Headquarters Office, Office of Surface Mining Reclamation and Enforcement, Administrative Record, 1951 Constitution Avenue NW., Washington, DC, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(2) An impoundment meeting the size or other criteria of § 77.216(a) of this title shall comply with the requirements of § 77.216 of this title and this section.

(3) *Design certification.* The design of impoundments shall be certified in accordance with § 780.25(a) of this chapter as designed to meet the requirements of this part using current, prudent, engineering practices and any design criteria established by the regulatory authority. The qualified, registered, professional engineer or qualified, registered, professional, land surveyor shall be experienced in the design and construction of impoundments.

(4) *Stability.* (i) An impoundment meeting the Class B or C criteria for dams in TR–60, or the size or other criteria of § 77.216(a) of this title shall have a minimum static safety factor of 1.5 for a normal pool with steady state seepage saturation conditions, and a seismic safety factor of at least 1.2.

(ii) Impoundments not included in paragraph (a)(4)(i) of this section, except for a coal mine waste impounding structure, shall have a minimum static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions or meet the requirements of § 780.25(c)(3).

(5) *Freeboard.* Impoundments shall have adequate freeboard to resist overtopping by waves and by sudden increases in storage volume. Impoundments meeting the Class B or C criteria for dams in TR–60 shall comply with the freeboard hydrograph criteria in the ''Minimum Emergency Spillway Hydrologic Criteria'' table in TR–60.

(6) *Foundation.* (i) Foundations and abutments for an impounding structure shall be stable during all phases of construction and operation and shall be designed based on adequate and accurate information on the foundation conditions. For an impoundment meeting the Class B or C criteria for dams in TR–60, or the size or other criteria of § 77.216(a) of this title, foundation investigation, as well as any necessary laboratory testing of foundation material, shall be performed to determine the design requirements for foundation stability.

(ii) All vegetative and organic materials shall be removed and foundations excavated and prepared to resist failure. Cutoff trenches shall be installed if necessary to ensure stability.

(7) Slope protection shall be provided to protect against surface erosion at the site and protect against sudden drawdown.

(8) Faces of embankments and surrounding areas shall be vegetated, except that faces where water is impounded may be riprapped or otherwise stabilized in accordance with accepted design practices.

(9) *Spillways.* An impoundment shall include either a combination of principal and emergency spillways or a single spillway configured as specified in paragraph (a)(9)(i) of this section, designed and constructed to safely pass the applicable design precipitation event specified in paragraph (a)(9)(ii) of this section, except as set forth in paragraph (c)(2) of this section.

(i) The regulatory authority may approve a single open-channel spillway that is:

(A) Of nonerodible construction and designed to carry sustained flows; or

(B) Earth- or grass-lined and designed to carry short-term, infrequent flows at

non-erosive velocities where sustained flows are not expected.

(ii) Except as specified in paragraph (c)(2) of this section, the required design precipitation event for an impoundment meeting the spillway requirements of paragraph (a)(9) of this section is:

(A) For an impoundment meeting the Class B or C criteria for dams in TR–60, the emergency spillway hydrograph criteria in the ''Minimum Emergency Spillway Hydrologic Criteria'' table in TR–60, or greater event as specified by the regulatory authority.

(B) For an impoundment meeting or exceeding the size or other criteria of § 77.216(a) of this title, a 100-year 6-hour event, or greater event as specified by the regulatory authority.

(C) For an impoundment not included in paragraph (a)(9)(ii) (A) and (B) of this section, a 25-year 6-hour or greater event as specified by the regulatory authority.

(10) The vertical portion of any remaining highwall shall be located far enough below the low-water line along the full extent of highwall to provide adequate safety and access for the proposed water users.

(11) *Inspections.* Except as provided in paragraph (a)(11)(iv) of this section, a qualified registered professional engineer or other qualified professional specialist under the direction of a professional engineer, shall inspect each impoundment as provided in paragraph (a)(11)(i) of this section. The professional engineer or specialist shall be experienced in the construction of impoundments.

(i) Inspections shall be made regularly during construction, upon completion of construction, and at least yearly until removal of the structure or release of the performance bond.

(ii) The qualified registered professional engineer, or qualified registered professional land surveyor as specified in paragraph (a)(11)(iv) of this section, shall promptly after each inspection required in paragraph (a)(11)(i) of this section provide to the regulatory authority a certified report that the impoundment has been constructed and/or maintained as designed and in accordance with the approved plan and this chapter. The report shall include discussion of any appearance of instability, structural weakness or other hazardous condition, depth and elevation of any impounded waters, existing storage capacity, any existing or required monitoring procedures and instrumentation, and any other aspects of the structure affecting stability.

(iii) A copy of the report shall be retained at or near the minesite.

(iv) In any State which authorizes land surveyors to prepare and certify plans in accordance with § 780.25(a) of this chapter, a qualified registered professional land surveyor may inspect any temporary or permanent impoundment that does not meet the SCS Class B or C criteria for dams in TR–60, or the size or other criteria of § 77.216(a) of this title and certify and submit the report required by paragraph (a)(11)(ii) of this section, except that all coal mine waste impounding structures covered by § 816.84 of this chapter shall be certified by a qualified registered professional engineer. The professional land surveyor shall be experienced in the construction of impoundments.

(12) Impoundments meeting the SCS Class B or C criteria for dams in TR–60, or the size or other criteria of § 77.216 of this title must be examined in accordance with § 77.216–3 of this title. Impoundments not meeting the SCS Class B or C criteria for dams in TR–60, or subject to § 77.216 of this title, shall be examined at least quarterly. A qualified person designated by the operator shall examine impoundments for the appearance of structural weakness and other hazardous conditions.

(13) *Emergency procedures.* If any examination or inspection discloses that a potential hazard exists, the person who examined the impoundment shall promptly inform the regulatory authority of the finding and of the emergency procedures formulated for public protection and remedial action. If adequate procedures cannot be formulated or implemented, the regulatory authority shall be notified immediately. The regulatory authority shall then notify the appropriate agencies that other emergency procedures are required to protect the public.

(b) *Permanent impoundments.* A permanent impoundment of water may be created, if authorized by the regulatory authority in the approved permit based upon the following demonstration:

(1) The size and configuration of such impoundment will be adequate for its intended purposes.

(2) The quality of impounded water will be suitable on a permanent basis for its intended use and, after reclamation, will meet applicable State and Federal water quality standards, and discharges from the impoundment will meet applicable effluent limitations and will not degrade the quality of receiving water below applicable State and Federal water quality standards.

(3) The water level will be sufficiently stable and be capable of supporting the intended use.

(4) Final grading will provide for adequate safety and access for proposed water users.

(5) The impoundment will not result in the diminution of the quality and quantity of water utilized by adjacent or surrounding landowners for agricultural, industrial, recreational, or domestic uses.

(6) The impoundment will be suitable for the approved postmining land use.

(c) *Temporary impoundments.* (1) The regulatory authority may authorize the construction of temporary impoundments as part of a surface coal mining operation.

(2) In lieu of meeting the requirements in paragraph (a)(9)(i) of this section, the regulatory authority may approve an impoundment that relies primarily on storage to control the runoff from the design precipitation event when it is demonstrated by the operator and certified by a qualified registered professional engineer or qualified registered professional land surveyor in accordance with § 780.25(a) of this chapter that the impoundment will safely control the design precipitation event, the water from which shall be safely removed in accordance with current, prudent, engineering practices. Such an impoundment shall be located where failure would not be expected to cause loss of life or serious property damage, except where:

(i) Impoundments meeting the SCS Class B or C criteria for dams in TR–60, or the size or other criteria of § 77.216(a) of this title shall be designed to control the precipitation of the probable maximum precipitation of a 6-hour event, or greater event specified by the regulatory authority.

(ii) Impoundments not included in paragraph (c)(2)(i) of this section shall be designed to control the precipitation of the 100-year 6-hour event, or greater event specified by the regulatory authority.

§ 816.56 Postmining rehabilitation of sedimentation ponds, diversions, impoundments, and treatment facilities.

Before abandoning a permit area or seeking bond release, the operator shall ensure that all temporary structures are removed and reclaimed, and that all permanent sedimentation ponds, diversions, impoundments, and treatment facilities meet the requirements of this chapter for permanent structures, have been maintained properly, and meet the requirements of the approved reclamation plan for permanent

structures and impoundments. The operator shall renovate such structures if necessary to meet the requirements of this chapter and to conform to the approved reclamation plan.

§ 816.57 Hydrologic balance: Stream buffer zones.

(a) No land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by surface mining activities, unless the regulatory authority specifically authorizes surface mining activities closer to, or through, such a stream. The regulatory authority may authorize such activities only upon finding that—

(1) Surface mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream; and

(2) If there will be a temporary or permanent stream-channel diversion, it will comply with § 816.43.

(b) The area not to be disturbed shall be designated as a buffer zone, and the operator shall mark it as specified in § 816.11.

§ 816.59 Coal recovery.

Surface mining activities shall be conducted so as to maximize the utilization and conservation of the coal, while utilizing the best appropriate technology currently available to maintain environmental integrity, so that reaffecting the land in the future through surface coal mining operations is minimized.

§ 816.61 Use of explosives: General requirements.

(a) Each operator shall comply with all applicable State and Federal laws and regulations in the use of explosives.

(b) Blasts that use more than 5 pounds of explosive or blasting agent shall be conducted according to the schedule required under § 816.64.

(c) *Blasters.* (1) No later than 12 months after the blaster certification program for a State required by part 850 of this chapter has been approved under the procedures of subchapter C of this chapter, all blasting operations in that State shall be conducted under the direction of a certified blaster. Before that time, all such blasting operations in that State shall be conducted by competent, experienced persons who understand the hazards involved.

(2) Certificates of blaster certification shall be carried by blasters or shall be on file at the permit area during blasting operations.

(3) A blaster and at least one other person shall be present at the firing of a blast.

(4) Any blaster who is responsible for conducting blasting operations at a blasting site shall:

(i) Be familiar with the blasting plan and site-specific performance standards; and

(ii) Give direction and on-the-job training to persons who are not certified and who are assigned to the blasting crew or assist in the use of explosives.

(d) *Blast design.* (1) An anticipated blast design shall be submitted if blasting operations will be conducted within—

(i) 1,000 feet of any building used as a dwelling, public building, school, church, or community or institutional building outside the permit area; or

(ii) 500 feet of an active or abandoned underground mine.

(2) The blast design may be presented as part of a permit application or at a time, before the blast, approved by the regulatory authority.

(3) The blast design shall contain sketches of the drill patterns, delay periods, and decking and shall indicate the type and amount of explosives to be used, critical dimensions, and the location and general description of structures to be protected, as well as a discussion of design factors to be used, which protect the public and meet the applicable airblast, flyrock, and ground-vibration standards in § 816.67.

(4) The blast design shall be prepared and signed by a certified blaster.

(5) The regulatory authority may require changes to the design submitted.

§ 816.62 Use of explosives: Preblasting survey.

(a) At least 30 days before initiation of blasting, the operator shall notify, in writing, all residents or owners of dwellings or other structures located within ½ mile of the permit area how to request a preblasting survey.

(b) A resident or owner of a dwelling or structure within ½ mile of any part of the permit area may request a preblasting survey. This request shall be made, in writing, directly to the operator or to the regulatory authority, who shall promptly notify the operator. The operator shall promptly conduct a preblasting survey of the dwelling or structure and promptly prepare a written report of the survey. An updated survey of any additions, modifications, or renovations shall be performed by the operator if requested by the resident or owner.

(c) The operator shall determine the condition of the dwelling or structure and shall document any preblasting damage and other physical factors that could reasonably be affected by the blasting. Structures such as pipelines, cables, transmission lines, and cisterns, wells, and other water systems warrant special attention; however, the assessment of these structures may be limited to surface conditions and other readily available data.

(d) The written report of the survey shall be signed by the person who conducted the survey. Copies of the report shall be promptly provided to the regulatory authority and to the person requesting the survey. If the person requesting the survey disagrees with the contents and/or recommendations contained therein, he or she may submit to both the operator and the regulatory authority a detailed description of the specific areas of disagreement.

(e) Any surveys requested more than 10 days before the planned initiation of blasting shall be completed by the operator before the initiation of blasting.

§ 816.64 Use of explosives: Blasting schedule.

(a) *General requirements.* (1) The operator shall conduct blasting operations at times approved by the regulatory authority and announced in the blasting schedule. The regulatory authority may limit the area covered, timing, and sequence of blasting as listed in the schedule, if such limitations are necessary and reasonable in order to protect the public health and safety or welfare.

(2) All blasting shall be conducted between sunrise and sunset, unless nighttime blasting is approved by the regulatory authority based upon a showing by the operator that the public will be protected from adverse noise and other impacts. The regulatory authority may specify more restrictive time periods for blasting.

(3) Unscheduled blasts may be conducted only where public or operator health and safety so require and for emergency blasting actions. When an operator conducts an unscheduled blast, the operator, using audible signals, shall notify residents within ½ mile of the blasting site and document the reason for the unscheduled blast in accordance with § 816.68(p).

(b) *Blasting schedule publication and distribution.* (1) The operator shall publish the blasting schedule in a newspaper of general circulation in the locality of the blasting site at least 10 days, but not more than 30 days, before beginning a blasting program.

(2) The operator shall distribute copies of the schedule to local governments and public utilities and to

each local residence within ½ mile of the proposed blasting site described in the schedule.

(3) The operator shall republish and redistribute the schedule at least every 12 months and revise and republish the schedule at least 10 days, but not more than 30 days, before blasting whenever the area covered by the schedule changes or actual time periods for blasting significantly differ from the prior announcement.

(c) *Blasting schedule contents.* The blasting schedule shall contain, at a minimum—

(1) Name, address, and telephone number of operator;

(2) Identification of the specific areas in which blasting will take place;

(3) Dates and time periods when explosives are to be detonated;

(4) Methods to be used to control access to the blasting area; and

(5) Type and patterns of audible warning and all-clear signals to be used before and after blasting.

§ 816.66 Use of explosives: Blasting signs, warnings, and access control.

(a) *Blasting signs.* Blasting signs shall meet the specifications of § 816.11. The operator shall—

(1) Conspicuously place signs reading ''Blasting Area'' along the edge of any blasting area that comes within 100 feet of any public road right-of-way, and at the point where any other road provides access to the blasting area; and

(2) At all entrances to the permit area from public roads or highways, place conspicuous signs which state ''Warning! Explosives in Use,'' which clearly list and describe the meaning of the audible blast warning and all-clear signals that are in use, and which explain the marking of blasting areas and charged holes awaiting firing within the permit area.

(b) *Warnings.* Warning and all-clear signals of different character or pattern that are audible within a range of ½ mile from the point of the blast shall be given. Each person within the permit area and each person who resides or regularly works within ½ mile of the permit area shall be notified of the meaning of the signals in the blasting schedule.

(c) *Access control.* Access within the blasting area shall be controlled to prevent presence of livestock or unauthorized persons during blasting and until an authorized representative of the operator has reasonably determined that—

(1) No unusual hazards, such as imminent slides or undetonated charges, exist; and

(2) Access to and travel within the blasting area can be safely resumed.

§ 816.67 Use of explosives: Control of adverse effects.

(a) *General requirements.* Blasting shall be conducted to prevent injury to persons, damage to public or private property outside the permit area, adverse impacts on any underground mine, and change in the course, channel, or availability of surface or ground water outside the permit area.

(b) *Airblast*—(1) *Limits.* (i) Airblast shall not exceed the maximum limits listed below at the location of any dwelling, public building, school, church, or community or institutional building outside the permit area, except as provided in paragraph (e) of this section.

Lower frequency limit of measuring system, in Hz (±3 dB)	Maximum level, in dB
0.1 Hz or lower—flat response [1]	134 peak.
2 Hz or lower—flat response	133 peak.
6 Hz or lower—flat response	129 peak.
C-weighted—slow response [1]	105 peak dBC.

[1] Only when approved by the regulatory authority.

(ii) If necessary to prevent damage, the regulatory authority shall specify lower maximum allowable airblast levels than those of paragraph (b)(1)(i) of this section for use in the vicinity of a specific blasting operation.

(2) *Monitoring.* (i) The operator shall conduct periodic monitoring to ensure compliance with the airblast standards. The regulatory authority may require airblast measurement of any or all blasts and may specify the locations at which such measurements are taken.

(ii) The measuring systems shall have an upper-end flat-frequency response of at least 200 Hz.

(c) *Flyrock.* Flyrock travelling in the air or along the ground shall not be cast from the blasting site—

(1) More than one-half the distance to the nearest dwelling or other occupied structure;

(2) Beyond the area of control required under § 816.66(c); or

(3) Beyond the permit boundary.

(d) *Ground vibration*—(1) *General.* In all blasting operations, except as otherwise authorized in paragraph (e) of this section, the maximum ground vibration shall not exceed the values approved in the blasting plan required under § 780.13 of this chapter. The maximum ground vibration for protected structures listed in paragraph (d)(2)(i) of this section shall be established in accordance with either the maximum peak-particle-velocity limits of paragraph (d)(2), the scaled-distance equation of paragraph (d)(3), the blasting-level chart of paragraph (d)(4) of this section, or by the regulatory authority under paragraph (d)(5) of this section. All structures in the vicinity of the blasting area, not listed in paragraph (d)(2)(i) of this section, such as water towers, pipelines and other utilities, tunnels, dams, impoundments, and underground mines, shall be protected from damage by establishment of a maximum allowable limit on the ground vibration, submitted by the operator in the blasting plan and approved by the regulatory authority.

(2) *Maximum peak particle velocity.* (i) The maximum ground vibration shall not exceed the following limits at the location of any dwelling, public building, school, church, or community or institutional building outside the permit area:

Distance (*D*), from the blasting site, in feet	Maximum allowable peak particle velocity (*V* max) for ground vibration, in inches/second [1]	Scaled-distance factor to be applied without seismic monitoring [2] (*Ds*)
0 to 300	1.25	50
301 to 5,000	1.00	55
5,001 and beyond	0.75	65

[1] Ground vibration shall be measured as the particle velocity. Particle velocity shall be recorded in three mutually perpendicular directions. The maximum allowable peak particle velocity shall apply to each of the three measurements.
[2] Applicable to the scaled-distance equation of paragraph (d)(3)(i) of this section.

(ii) A seismographic record shall be provided for each blast.

(3) *Scale-distance equation.* (i) An operator may use the scaled-distance equation, $W = (D/Ds)^2$, to determine the allowable charge weight of explosives to be detonated in any 8-millisecond period, without seismic monitoring; where W = the maximum weight of explosives, in pounds; D = the distance, in feet, from the blasting site to the nearest protected structure; and Ds = the scaled-distance factor, which may initially be approved by the regulatory authority using the values for scaled-distance factor listed in paragraph (d)(2)(i) of this section.

(ii) The development of a modified scaled-distance factor may be authorized by the regulatory authority on receipt of a written request by the operator, supported by seismographic records of blasting at the minesite. The modified scale-distance factor shall be determined such that the particle velocity of the predicted ground vibration will not exceed the prescribed maximum allowable peak particle velocity of paragraph (d)(2)(i) of this section, at a 95-percent confidence level.

(4) *Blasting-level chart.* (i) An operator may use the ground-vibration limits in Figure 1 to determine the maximum allowable ground vibration.

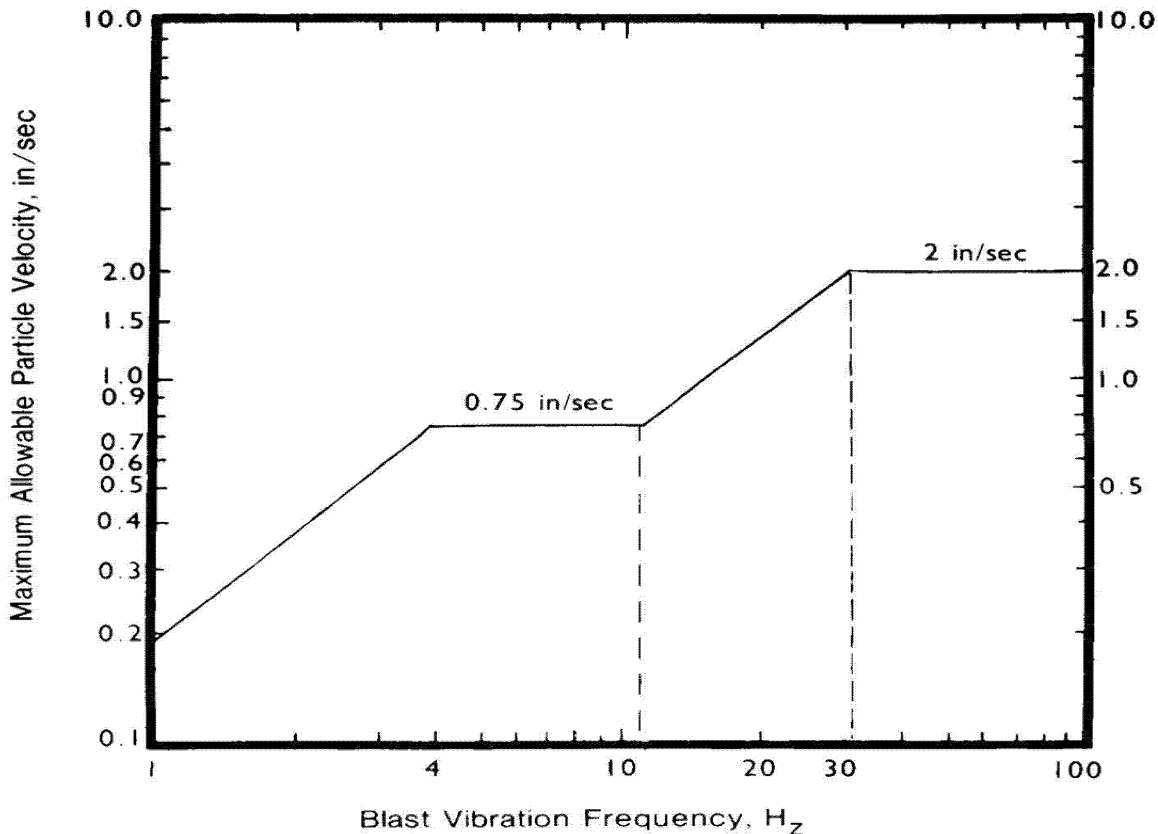


Figure 1. Alternative blasting level criteria.
(Source: Modified from figure B-1, Bureau of Mines RI 8507)

(ii) If the Figure 1 limits are used, a seismographic record including both particle velocity and vibration-frequency levels shall be provided for each blast. The method for the analysis of the predominant frequency contained in the blasting records shall be approved by the regulatory authority before application of this alternative blasting criterion.

(5) The maximum allowable ground vibration shall be reduced by the regulatory authority beyond the limits otherwise provided by this section, if

determined necessary to provide damage protection.

(6) The regulatory authority may require an operator to conduct seismic monitoring of any or all blasts or may specify the location at which the measurements are taken and the degree of detail necessary in the measurement.

(e) The maximum airblast and ground-vibration standards of paragraphs (b) and (d) of this section shall not apply at the following locations:

(1) At structures owned by the permittee and not leased to another person.

(2) At structures owned by the permittee and leased to another person, if a written waiver by the lessee is submitted to the regulatory authority before blasting.

§ 816.68 Use of explosives: Records of blasting operations.

The operator shall retain a record of all blasts for at least 3 years. Upon request, copies of these records shall be made available to the regulatory authority and to the public for inspection. Such records shall contain the following data:

(a) Name of the operator conducting the blast.

(b) Location, date, and time of the blast.

(c) Name, signature, and certification number of the blaster conducting the blast.

(d) Identification, direction, and distance, in feet, from the nearest blast hole to the nearest dwelling, public building, school, church, community or institutional building outside the permit area, except those described in § 816.67(e).

(e) Weather conditions, including those which may cause possible adverse blasting effects.

(f) Type of material blasted.

(g) Sketches of the blast pattern including number of holes, burden, spacing, decks, and delay pattern.

(h) Diameter and depth of holes.

(i) Types of explosives used.

(j) Total weight of explosives used per hole.

(k) The maximum weight of explosives detonated in an 8-millisecond period.

(l) Initiation system.

(m) Type and length of stemming.

(n) Mats or other protections used.

(o) Seismographic and airblast records, if required, which shall include—

(1) Type of instrument, sensitivity, and calibration signal or certification of annual calibration;

(2) Exact location of instrument and the date, time, and distance from the blast;

(3) Name of the person and firm taking the reading;

(4) Name of the person and firm analyzing the seismographic record; and

(5) The vibration and/or airblast level recorded.

(p) Reasons and conditions for each unscheduled blast.

§ 816.71 Disposal of excess spoil: General requirements.

(a) *General.* Excess spoil shall be placed in designated disposal areas within the permit area, in a controlled manner to—

(1) Minimize the adverse effects of leachate and surface water runoff from the fill on surface and ground waters;

(2) Ensure mass stability and prevent mass movement during and after construction; and

(3) Ensure that the final fill is suitable for reclamation and revegetation compatible with the natural surroundings and the approved postmining land use.

(b) *Design certification.* (1) The fill and appurtenant structures shall be designed using current, prudent engineering practices and shall meet any design criteria established by the regulatory authority. A qualified registered professional engineer experienced in the design of earth and rock fills shall certify the design of the fill and appurtenant structures.

(2) The fill shall be designed to attain a minimum long-term static safety factor of 1.5. The foundation and abutments of the fill must be stable under all conditions of construction.

(c) *Location.* The disposal area shall be located on the most moderately sloping and naturally stable areas available, as approved by the regulatory authority, and shall be placed, where possible, upon or above a natural terrace, bench, or berm, if such placement provides additional stability and prevents mass movement.

(d) *Foundation.* (1) Sufficient foundation investigations, as well as any necessary laboratory testing of foundation material, shall be performed in order to determine the design requirements for foundation stability. The analyses of foundation conditions shall take into consideration the effect of underground mine workings, if any, upon the stability of the fill and appurtenant structures.

(2) Where the slope in the disposal area is in excess of 2.8h:1v (36 percent), or such lesser slope as may be designated by the regulatory authority based on local conditions, keyway cuts (excavations to stable bedrock) or rock toe buttresses shall be constructed to ensure stability of the fill. Where the toe of the spoil rests on a downslope, stability analyses shall be performed in accordance with § 780.35(c) of this chapter to determine the size of rock toe buttresses and keyway cuts.

(e) *Placement of excess spoil.* (1) All vegetative and organic materials shall be removed from the disposal area prior to placement of the excess spoil. Topsoil shall be removed, segregated and stored or redistributed in accordance with § 816.22. If approved by the regulatory authority, organic material may be used as mulch or may be included in the topsoil to control erosion, promote growth of vegetation or increase the moisture retention of the soil.

(2) Excess spoil shall be transported and placed in a controlled manner in horizontal lifts not exceeding 4 feet in thickness; concurrently compacted as necessary to ensure mass stability and to prevent mass movement during and after construction; graded so that surface and subsurface drainage is compatible with the natural surroundings; and covered with topsoil or substitute material in accordance with § 816.22 of this chapter. The regulatory authority may approve a design which incorporates placement of excess spoil in horizontal lifts other than 4 feet in thickness when it is demonstrated by the operator and certified by a qualified registered professional engineer that the design will ensure the stability of the fill and will meet all other applicable requirements.

(3) The final configuration of the fill shall be suitable for the approved postmining land use. Terraces may be constructed on the outslope of the fill if required for stability, control of erosion, to conserve soil moisture, or to facilitate the approved postmining land use. The grade of the outslope between terrace benches shall not be steeper than 2h: 1v (50 percent).

(4) No permanent impoundments are allowed on the completed fill. Small depressions may be allowed by the regulatory authority if they are needed to retain moisture, minimize erosion, create and enhance wildlife habitat, or assist revegetation; and if they are not incompatible with the stability of the fill.

(5) Excess spoil that is acid- or toxic-forming or combustible shall be adequately covered with nonacid, nontoxic and noncombustible material, or treated, to control the impact on surface and ground water in accordance with § 816.41, to prevent sustained combustion, and to minimize adverse

effects on plant growth and the approved postmining land use.

(f) *Drainage control.* (1) If the disposal area contains springs, natural or manmade water courses, or wet weather seeps, the fill design shall include diversions and underdrains as necessary to control erosion, prevent water infiltration into the fill, and ensure stability.

(2) Diversions shall comply with the requirements of § 816.43.

(3) Underdrains shall consist of durable rock or pipe, be designed and constructed using current, prudent engineering practices and meet any design criteria established by the regulatory authority. The underdrain system shall be designed to carry the anticipated seepage of water due to rainfall away from the excess spoil fill and from seeps and springs in the foundation of the disposal area and shall be protected from piping and contamination by an adequate filter. Rock underdrains shall be constructed of durable, nonacid-,nontoxic-forming rock (*e.g.,* natural sand and gravel, sandstone, limestone, or other durable rock) that does not slake in water or degrade to soil material, and which is free of coal, clay or other nondurable material. Perforated pipe underdrains shall be corrosion resistant and shall have characteristics consistent with the long-term life of the fill.

(g) *Surface area stabilization.* Slope protection shall be provided to minimize surface erosion at the site. All disturbed areas, including diversion channels that are not riprapped or otherwise protected, shall be revegetated upon completion of construction.

(h) *Inspections.* A qualified registered professional engineer, or other qualified professional specialist under the direction of the professional engineer, shall periodically inspect the fill during construction. The professional engineer or specialist shall be experienced in the construction of earth and rock fills.

(1) Such inspections shall be made at least quarterly throughout construction and during critical construction periods. Critical construction periods shall include at a minimum:

(i) Foundation preparation, including the removal of all organic material and topsoil; (ii) placement of underdrains and protective filter systems; (iii) installation of final surface drainage systems; and (iv) the final graded and revegetated fill. Regular inspections by the engineer or specialist shall also be conducted during placement and compaction of fill materials.

(2) The qualified registered professional engineer shall provide a certified report to the regulatory authority promptly after each inspection that the fill has been constructed and maintained as designed and in accordance with the approved plan and this chapter. The report shall include appearances of instability, structural weakness, and other hazardous conditions.

(3)(i) The certified report on the drainage system and protective filters shall include color photographs taken during and after construction, but before underdrains are covered with excess spoil. If the underdrain system is constructed in phases, each phase shall be certified separately.

(ii) Where excess durable rock spoil is placed in single or multiple lifts such that the underdrain system is constructed simultaneously with excess spoil placement by the natural segregation of dumped materials, in accordance with § 816.73, color photographs shall be taken of the underdrain as the underdrain system is being formed.

(iii) The photographs accompanying each certified report shall be taken in adequate size and number with enough terrain or other physical features of the site shown to provide a relative scale to the photographs and to specifically and clearly identify the site.

(4) A copy of each inspection report shall be retained at or near the mine site.

(i) *Coal mine waste.* Coal mine waste may be disposed of in excess spoil fills if approved by the regulatory authority and, if such waste is—

(1) Placed in accordance with § 816.83;

(2) Nontoxic and nonacid forming; and

(3) Of the proper characteristics to be consistent with the design stability of the fill.

(j) *Underground disposal.* Excess spoil may be disposed of in underground mine workings, but only in accordance with a plan approved by the regulatory authority and MSHA under § 784.25 of this chapter.

§ 816.72 Disposal of excess spoil: Valley fills/head-of-hollow fills.

Valley fills and head-of-hollow fills shall meet the requirements of § 816.71 and the additional requirements of this section.

(a) *Drainage control.* (1) The top surface of the completed fill shall be graded such that the final slope after settlement will be toward properly designed drainage channels. Uncontrolled surface drainage may not be directed over the outslope of the fill.

(2) Runoff from areas above the fill and runoff from the surface of the fill shall be diverted into stabilized diversion channels designed to meet the requirements of § 816.43 and, in addition, to safely pass the runoff from a 100-year, 6-hour precipitation event.

(b) *Rock-core chimney drains.* A rock-core chimney drain may be used in a head-of-hollow fill, instead of the underdrain and surface diversion system normally required, as long as the fill is not located in an area containing intermittent or perennial streams. A rock-core chimney drain may be used in a valley fill if the fill does not exceed 250,000 cubic yards of material and upstream drainage is diverted around the fill. The alternative rock-core chimney drain system shall be incorporated into the design and construction of the fill as follows.

(1) The fill shall have, along the vertical projection of the main buried stream channel or rill, a vertical core of durable rock at least 16 feet thick which shall extend from the toe of the fill to the head of the fill, and from the base of the fill to the surface of the fill. A system of lateral rock underdrains shall connect this rock core to each area of potential drainage or seepage in the disposal area. The underdrain system and rock core shall be designed to carry the anticipated seepage of water due to rainfall away from the excess spoil fill and from seeps and springs in the foundation of the disposal area. Rocks used in the rock core and underdrains shall meet the requirements of § 816.71(f).

(2) A filter system to ensure the proper long-term functioning of the rock core shall be designed and constucted using current, prudent engineering practices.

(3) Grading may drain surface water away from the outslope of the fill and toward the rock core. In no case, however, may intermittent or perennial streams be diverted into the rock core. The maximum slope of the top of the fill shall be 33h:1v (3 percent). A drainage pocket may be maintained at the head of the fill during and after construction, to intercept surface runoff and discharge the runoff through or over the rock drain, if stability of the fill is not impaired. In no case shall this pocket or sump have a potential capacity for impounding more than 10,000 cubic feet of water. Terraces on the fill shall be graded with a 3 to 5 percent grade toward the fill and a 1 percent slope toward the rock core.

§ 816.73 Disposal of excess spoil: Durable rock fills.

The regulatory authority may approve the alternative method of disposal of excess durable rock spoil by gravity

placement in single or multiple lifts, provided the following conditions are met:

(a) Except as provided in this section, the requirements of § 816.71 are met.

(b) The excess spoil consists of at least 80 percent, by volume, durable, nonacid- and nontoxic-forming rock (*e.g.,* sandstone or limestone) that does not slake in water and will not degrade to soil material. Where used, noncemented clay shale, clay spoil, soil or other nondurable excess spoil materials shall be mixed with excess durable rock spoil in a controlled manner such that no more than 20 percent of the fill volume, as determined by tests performed by a registered engineer and approved by the regulatory authority, is not durable rock.

(c) A qualified registered professional engineer certifies that the design will ensure the stability of the fill and meet all other applicable requirements.

(d) The fill is designed to attain a minimum long-term static safety factor of 1.5, and an earthquake safety factor of 1.1.

(e) The underdrain system may be constructed simultaneously with excess spoil placement by the natural segregation of dumped materials, provided the resulting underdrain system is capable of carrying anticipated seepage of water due to rainfall away from the excess spoil fill and from seeps and springs in the foundation of the disposal area and the other requirements for drainage control are met.

(f) Surface water runoff from areas adjacent to and above the fill is not allowed to flow onto the fill and is diverted into stabilized diversion channels designed to meet the requirements of § 816.43 and to safely pass the runoff from a 100-year, 6-hour precipitation event.

§ 816.74 Disposal of excess spoil: Preexisting benches.

(a) The regulatory authority may approve the disposal of excess spoil through placement on a preexisting bench if the affected portion of the preexisting bench is permitted and the standards set forth in §§ 816.102(c), (e) through (h), and (j), and the requirements of this section are met.

(b) All vegetation and organic materials shall be removed from the affected portion of the preexisting bench prior to placement of the excess spoil. Any available topsoil on the bench shall be removed, stored and redistributed in accordance with § 816.22 of this part. Substitute or supplemental materials may be used in accordance with § 816.22(b) of this part.

(c) The fill shall be designed and constructed using current, prudent engineering practices. The design will be certified by a registered professional engineer. The spoil shall be placed on the solid portion of the bench in a controlled manner and concurrently compacted as necessary to attain a long term static safety factor of 1.3 for all portions of the fill. Any spoil deposited on any fill portion of the bench will be treated as excess spoil fill under § 816.71.

(d) The preexisting bench shall be backfilled and graded to—

(1) Achieve the most moderate slope possible which does not exceed the angle of repose;

(2) Eliminate the highwall to the maximum extent technically practical;

(3) Minimize erosion and water pollution both on and off the site; and

(4) If the disposal area contains springs, natural or manmade water courses, or wet weather seeps, the fill design shall include diversions and underdrains as necessary to control erosion, prevent water infiltration into the fill, and ensure stability.

(e) All disturbed areas, including diversion channels that are not riprapped or otherwise protected, shall be revegetated upon completion of construction.

(f) Permanent impoundments may not be constructed on preexisting benches backfilled with excess spoil under this regulation.

(g) Final configuration of the backfill must be compatible with the natural drainage patterns and the surrounding area, and support the approved postmining land use.

(h) Disposal of excess spoil from an upper actively mined bench to a lower preexisting bench by means of gravity transport may be approved by the regulatory authority provided that—

(1) The gravity transport courses are determined on a site-specific basis by the operator as part of the permit application and approved by the regulatory authority to minimize hazards to health and safety and to ensure that damage will be minimized between the benches, outside the set course, and downslope of the lower bench should excess spoil accidentally move;

(2) All gravity transported excess spoil, including that excess spoil immediately below the gravity transport courses and any preexisting spoil that is disturbed, is rehandled and placed in horizontal lifts in a controlled manner, concurrently compacted as necessary to ensure mass stability and to prevent mass movement, and graded to allow surface and subsurface drainage to be compatible with the natural surroundings and to ensure a minimum long-term static safety factor of 1.3. Excess spoil on the bench prior to the current mining operation that is not disturbed need not be rehandled except where necessary to ensure stability of the fill;

(3) A safety berm is constructed on the solid portion of the lower bench prior to gravity transport of the excess spoil. Where there is insufficient material on the lower bench to construct a safety berm, only that amount of excess spoil necessary for the construction of the berm may be gravity transported to the lower bench prior to construction of the berm.

(4) Excess spoil shall not be allowed on the downslope below the upper bench except on designated gravity transport courses properly prepared according to § 816.22. Upon completion of the fill, no excess spoil shall be allowed to remain on the designated gravity transport course between the two benches and each transport course shall be reclaimed in accordance with the requirements of this part.

§ 816.79 Protection of underground mining.

No surface mining activities shall be conducted closer than 500 feet to any point of either an active or abandoned underground mine, except to the extent that—

(a) The activities result in improved resource recovery, abatement of water pollution, or elimination of hazards to the health and safety of the public; and

(b) The nature, timing, and sequence of the activities that propose to mine closer than 500 feet to an active underground mine are jointly approved by the regulatory authority, the Mine Safety and Health Administration, and the State agency, if any, responsible for the safety of underground mine workers.

§ 816.81 Coal mine waste: General requirements.

(a) *General.* All coal mine waste disposed of in an area other than the mine workings or excavations shall be placed in new or existing disposal areas within a permit area, which are approved by the regulatory authority for this purpose. Coal mine waste shall be hauled or conveyed and placed for final placement in a controlled manner to—

(1) Minimize adverse effects of leachate and surface-water runoff on surface and ground water quality and quantity;

(2) Ensure mass stability and prevent mass movement during and after construction;

(3) Ensure that the final disposal facility is suitable for reclamation and

revegetation compatible with the natural surroundings and the approved postmining land use;

(4) Not create a public hazard; and

(5) Prevent combustion.

(b) Coal mine waste material from activities located outside a permit area may be disposed of in the permit area only if approved by the regulatory authority. Approval shall be based upon a showing that such disposal will be in accordance with the standards of this section.

(c) *Design certification.* (1) The disposal facility shall be designed using current, prudent engineering practices and shall meet any design criteria established by the regulatory authority. A qualified registered professional engineer, experienced in the design of similar earth and waste structures, shall certify the design of the disposal facility.

(2) The disposal facility shall be designed to attain a minimum long-term static safety factor of 1.5. The foundation and abutments must be stable under all conditions of construction.

(d) *Foundation.* Sufficient foundation investigations, as well as any necessary laboratory testing of foundation material, shall be performed in order to determine the design requirements for foundation stability. The analyses of the foundation conditions shall take into consideration the effect of underground mine workings, if any, upon the stability of the disposal facility.

(e) *Emergency procedures.* If any examination or inspection discloses that a potential hazard exists, the regulatory authority shall be informed promptly of the finding and of the emergency procedures formulated for public protection and remedial action. If adequate procedures cannot be formulated or implemented, the regulatory authority shall be notified immediately. The regulatory authority shall then notify the appropriate agencies that other emergency procedures are required to protect the public.

(f) *Underground disposal.* Coal mine waste may be disposed of in underground mine workings, but only in accordance with a plan approved by the regulatory authority and MSHA under § 784.25 of this chapter.

§ 816.83 Coal mine waste: Refuse piles.

Refuse piles shall meet the requirements of § 816.81, the additional requirements of this section, and the requirements of §§ 77.214 and 77.215 of this title.

(a) *Drainage control.* (1) If the disposal area contains springs, natural or manmade water courses, or wet weather seeps, the design shall include diversions and underdrains as necessary to control erosion, prevent water infiltration into the disposal facility and ensure stability.

(2) Uncontrolled surface drainage may not be diverted over the outslope of the refuse piles. Runoff from the areas above the refuse pile and runoff from the surface of the refuse pile shall be diverted into stabilized diversion channels designed to meet the requirements of § 816.43 to safely pass the runoff from a 100-year, 6-hour precipitation event. Runoff diverted from undisturbed areas need not be commingled with runoff from the surface of the refuse pile.

(3) Underdrains shall comply with the requirements of § 816.71(f)(3).

(b) *Surface area stabilization.* Slope protection shall be provided to minimize surface erosion at the site. All disturbed areas, including diversion channels that are not riprapped or otherwise protected, shall be revegetated upon completion of construction.

(c) *Placement.* (1) All vegetative and organic materials shall be removed from the disposal area prior to placement of coal mine waste. Topsoil shall be removed, segregated and stored or redistributed in accordance with § 816.22. If approved by the regulatory authority, organic material may be used as mulch, or may be included in the topsoil to control erosion, promote growth of vegetation or increase the moisture retention of the soil.

(2) The final configuration of the refuse pile shall be suitable for the approved postmining land use. Terraces may be constructed on the outslope of the refuse pile if required for stability, control or erosion, conservation of soil moisture, or facilitation of the approved postmining land use. The grade of the outslope between terrace benches shall not be steeper than 2h:1v (50 percent).

(3) No permanent impoundments shall be allowed on the completed refuse pile. Small depressions may be allowed by the regulatory authority if they are needed to retain moisture, minimize erosion, create and enhance wildlife habitat, or assist revegetation, and if they are not incompatible with stability of the refuse pile.

(4) Following final grading of the refuse pile, the coal mine waste shall be covered with a minimum of 4 feet of the best available, nontoxic and noncombustible material, in a manner that does not impede drainage from the underdrains. The regulatory authority may allow less than 4 feet of cover material based on physical and chemical analyses which show that the requirements of §§ 816.111 through 816.116 will be met.

(d) *Inspections.* A qualified registered professional engineer, or other qualified professional specialist under the direction of the professional engineer, shall inspect the refuse pile during construction. The professional engineer or specialist shall be experienced in the construction of similar earth and waste structures.

(1) Such inspections shall be made at least quarterly throughout construction and during critical construction periods. Critical construction periods shall include at a minimum:

(i) Foundation preparation including the removal of all organic material and topsoil; (ii) placement of underdrains and protective filter systems; (iii) installation of final surface drainage systems; and (iv) the final graded and revegetated facility. Regular inspections by the engineer or specialist shall also be conducted during placement and compaction of coal mine waste materials. More frequent inspections shall be conducted if a danger of harm exists to the public health and safety or the environment. Inspections shall continue until the refuse pile has been finally graded and revegetated or until a later time as required by the regulatory authority.

(2) The qualified registered professional engineer shall provide a certified report to the regulatory authority promptly after each inspection that the refuse pile has been constructed and maintained as designed and in accordance with the approved plan and this chapter. The report shall include appearances of instability, structural weakness, and other hazardous conditions.

(3) The certified report on the drainage system and protective filters shall include color photographs taken during and after construction, but before underdrains are covered with coal mine waste. If the underdrain system is constructed in phases, each phase shall be certified separately. The photographs accompanying each certified report shall be taken in adequate size and number with enough terrain or other physical features of the site shown to provide a relative scale to the photographs and to specifically and clearly identify the site.

(4) A copy of each inspection report shall be retained at or near the minesite.

§ 816.84 Coal mine waste: Impounding structures.

New and existing impounding structures constructed of coal mine waste or intended to impound coal mine

waste shall meet the requirements of § 816.81.

(a) Coal mine waste shall not be used for construction of impounding structures unless it has been demonstrated to the regulatory authority that the stability of such a structure conforms to the requirements of this part and the use of coal mine waste will not have a detrimental effect on downstream water quality or the environment due to acid seepage through the impounding structure. The stability of the structure and the potential impact of acid mine seepage through the impounding structure shall be discussed in detail in the design plan submitted to the regulatory authority in accordance with § 780.25 of this chapter.

(b)(1) Each impounding structure constructed of coal mine waste or intended to impound coal mine waste shall be designed, constructed and maintained in accordance with § 816.49 (a) and (c). Such structures may not be retained permanently as part of the approved postmining land use.

(2) Each impounding structure constructed of coal mine waste or intended to impound coal mine waste that meets the criteria of § 77.216(a) of this title shall have sufficient spillway capacity to safely pass, adequate storage capacity to safely contain, or a combination of storage capacity and spillway capacity to safely control, the probable maximum precipitation of a 6-hour precipitation event, or greater event as specified by the regulatory authority.

(c) Spillways and outlet works shall be designed to provide adequate protection against erosion and corrosion. Inlets shall be protected against blockage.

(d) *Drainage control.* Runoff from areas above the disposal facility or runoff from surface of the facility that may cause instability or erosion of the impounding structure shall be diverted into stabilized diversion channels designed to meet the requirements of § 816.43 and designed to safely pass the round off from a 100-year, 6-hour design precipitation event.

(e) Impounding structures constructed of or impounding coal mine waste shall be designed so that at least 90 percent of the water stored during the design precipitation event can be removed within a 10-day period.

(f) For an impounding structure constructed of or impounding coal mine waste, at least 90 percent of the water stored during the design precipitation event shall be removed within the 10-day period following the design precipitation event.

§ 816.87 Coal mine waste: Burning and burned waste utilization.

(a) Coal mine waste fires shall be extinguished by the person who conducts the surface mining activities, in accordance with a plan approved by the regulatory authority and the Mine Safety and Health Administration. The plan shall contain, at a minimum, provisions to ensure that only those persons authorized by the operator, and who have an understanding of the procedures to be used, shall be involved in the extinguishing operations.

(b) No burning or burned coal mine waste shall be removed from a permitted disposal area without a removal plan approved by the regulatory authority. Consideration shall be given to potential hazards to persons working or living in the vicinity of the structure.

§ 816.89 Disposal of noncoal mine wastes.

(a) Noncoal mine wastes including, but not limited to grease, lubricants, paints, flammable liquids, garbage, abandoned mining machinery, lumber and other combustible materials generated during mining activities shall be placed and stored in a controlled manner in a designated portion of the permit area. Placement and storage shall ensure that leachate and surface runoff do not degrade surface or ground water, that fires are prevented, and that the area remains stable and suitable for reclamation and revegetation compatible with the natural surroundings.

(b) Final disposal of noncoal mine wastes shall be in a designated disposal site in the permit area or a State-approved solid waste disposal area. Disposal sites in the permit area shall be designed and constructed to ensure that leachate and drainage from the noncoal mine waste area does not degrade surface or underground water. Wastes shall be routinely compacted and covered to prevent combustion and wind-borne waste. When the disposal is completed, a minimum of 2 feet of soil cover shall be placed over the site, slopes stabilized, and revegetation accomplished in accordance with §§ 816.111 through 816.116. Operation of the disposal site shall be conducted in accordance with all local, State and Federal requirements.

(c) At no time shall any noncoal mine waste be deposited in a refuse pile or impounding structure, nor shall an excavation for a noncoal mine waste disposal site be located within 8 feet of any coal outcrop or coal storage area.

§ 816.95 Stabilization of surface areas.

(a) All exposed surface areas shall be protected and stabilized to effectively control erosion and air pollution attendant to erosion.

(b) Rills and gullies, which form in areas that have been regraded and topsoiled and which either (1) disrupt the approved postmining land use or the reestablishment of the vegetative cover, or (2) cause or contribute to a violation of water quality standards for receiving streams shall be filled, regraded, or otherwise stabilized; topsoil shall be replaced; and the areas shall be reseeded or replanted.

§ 816.97 Protection of fish, wildlife, and related environmental values.

(a) The operator shall, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish, wildlife, and related environmental values and shall achieve enhancement of such resources where practicable.

(b) *Endangered and threatened species.* No surface mining activity shall be conducted which is likely to jeopardize the continued existence of endangered or threatened species listed by the Secretary or which is likely to result in the destruction or adverse modification of designated critical habitats of such species in violation of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). The operator shall promptly report to the regulatory authority any State- or federally-listed endangered or threatened species within the permit area of which the operator becomes aware. Upon notification, the regulatory authority shall consult with appropriate State and Federal fish and wildlife agencies and, after consultation, shall identify whether, and under what conditions, the operater may proceed.

(c) *Bald and golden eagles.* No surface mining activity shall be conducted in a manner which would result in the unlawful taking of a bald or golden eagle, its nest, or any of its eggs. The operator shall promptly report to the regulatory authority any golden or bald eagle nest within the permit area of which the operator becomes aware. Upon notification, the regulatory authority shall consult with the U.S. Fish and Wildlife Service and also, where appropriate, the State fish and wildlife agency and, after consultation, shall identify whether, and under what conditions, the operator may proceed.

(d) Nothing in this chapter shall authorize the taking of an endangered or threatened species or a bald or golden eagle, its nest, or any of its eggs in violation of the Endangered Species Act

of 1973, as amended, 16 U.S.C. 1531 *et seq.,* or the Bald Eagle Protection Act, as amended, 16 U.S.C. 668 *et seq.*

(e) Each operator shall, to the extent possible using the best technology currently available—

(1) Ensure that electric powerlines and other transmission facilities used for, or incidental to, surface mining activities on the permit area are designed and constructed to minimize electrocution hazards to raptors, except where the regulatory authority determines that such requirements are unnecessary;

(2) Locate and operate haul and access roads so as to avoid or minimize impacts on important fish and wildlife species or other species protected by State or Federal law;

(3) Design fences, overland conveyors, and other potential barriers to permit passage for large mammals, except where the regulatory authority determines that such requirements are unnecessary; and

(4) Fence, cover, or use other appropriate methods to exclude wildlife from ponds which contain hazardous concentrations of toxic-forming materials.

(f) *Wetlands and habitats of unusually high value for fish and wildlife.* The operator conducting surface mining activities shall avoid disturbances to, enhance where practicable, restore, or replace, wetlands, and riparian vegetation along rivers and streams and bordering ponds and lakes. Surface mining activities shall avoid disturbances to, enhance where practicable, or restore, habitats of unusually high value for fish and wildlife.

(g) Where fish and wildlife habitat is to be a postmining land use, the plant species to be used on reclaimed areas shall be selected on the basis of the following criteria:

(1) Their proven nutritional value for fish or wildlife.

(2) Their use as cover for fish or wildlife.

(3) Their ability to support and enhance fish or wildlife habitat after the release of performance bonds. The selected plants shall be grouped and distributed in a manner which optimizes edge effect, cover, and other benefits to fish and wildlife.

(h) Where cropland is to be the postmining land use, and where appropriate for wildlife- and crop-management practices, the operator shall intersperse the fields with trees, hedges, or fence rows throughout the harvested area to break up large blocks of monoculture and to diversify habitat types for birds and other animals.

(i) Where residential, public service, or industrial uses are to be the postmining land use, and where consistent with the approved postmining land use, the operator shall intersperse reclaimed lands with greenbelts utilizing species of grass, shrubs, and trees useful as food and cover for wildlife.

§ 816.99 Slides and other damage.

(a) An undisturbed natural barrier shall be provided beginning at the elevation of the lowest coal seam to be mined and extending from the outslope for such distance as may be determined by the regulatory authority as is needed to assure stability. The barrier shall be retained in place to prevent slides and erosion.

(b) At any time a slide occurs which may have a potential adverse affect on public property, health, safety, or the environment, the person who conducts the surface mining activities shall notify the regulatory authority by the fastest available means and comply with any remedial measures required by the regulatory authority.

§ 816.100 Contemporaneous reclamation.

Reclamation efforts, including but not limited to backfilling, grading, topsoil replacement, and revegetation, on all land that is disturbed by surface mining activities shall occur as contemporaneously as practicable with mining operations, except when such mining operations are conducted in accordance with a variance for concurrent surface and underground mining activities issued under § 785.18 of this chapter.

§ 816.101 Backfilling and grading: Time and distance requirements.

(a) Except as provided in paragraph (b) of this section, rough backfilling and grading for surface mining activities shall be completed according to one of the following schedules:

(1) Contour mining. Within 60 days or 1,500 linear feet following coal removal;

(2) Area mining. Within 180 days following coal removal, and not more than four spoil ridges behind the pit being worked, the spoil from the active pit constituting the first ridge; or

(3) Other surface mining methods. In accordance with the schedule established by the regulatory authority. For States with approved State programs, schedules are subject to the State program approval process.

(b) The regulatory authority may extend the time allowed for rough backfilling and grading for the entire permit area or for a specified portion of the permit area if the permittee demonstrates in accordance with § 780.18(b)(3) of this chapter that additional time is necessary.

§ 816.102 Backfilling and grading: General requirements.

(a) Disturbed areas shall be backfilled and graded to—

(1) Achieve the approximate original contour, except as provided in paragraph (k) of this section;

(2) Eliminate all highwalls, spoil piles, and depressions, except as provided in paragraph (h) (small depressions) and in paragraph (k)(3)(iii) (previously mined highwalls) of this section;

(3) Achieve a postmining slope that does not exceed either the angle of repose or such lesser slope as is necessary to achieve a minimum long-term static safety factor of 1.3 and to prevent slides;

(4) Minimize erosion and water pollution both on and off the site; and

(5) Support the approved postmining land use.

(b) Spoil, except excess spoil disposed of in accordance with §§ 816.71 through 816.74, shall be returned to the mined-out area.

(c) Spoil and waste materials shall be compacted where advisable to ensure stability or to prevent leaching of toxic materials.

(d) Spoil may be placed on the area outside the mined-out area in nonsteep slope areas to restore the approximate original contour by blending the spoil into the surrounding terrain if the following requirements are met:

(1) All vegetative and organic material shall be removed from the area.

(2) The topsoil on the area shall be removed, segregated, stored, and redistributed in accordance with § 816.22.

(3) The spoil shall be backfilled and graded on the area in accordance with the requirements of this section.

(e) Disposal of coal processing waste and underground development waste in the mined-out area shall be in accordance with §§ 816.81 and 816.83, except that a long-term static safety factor of 1.3 shall be achieved.

(f) Exposed coal seams, acid- and toxic-forming materials, and combustible materials exposed, used, or produced during mining shall be adequately covered with nontoxic and noncombustible material, or treated, to control the impact on surface and ground water in accordance with § 816.41, to prevent sustained combustion, and to minimize adverse effects on plant growth and the approved postmining land use.

(g) Cut-and-fill terraces may be allowed by the regulatory authority where—

(1) Needed to conserve soil moisture, ensure stability, and control erosion on final-graded slopes, if the terraces are compatible with the approved postmining land use; or

(2) Specialized grading, foundation conditions, or roads are required for the approved postmining land use, in which case the final grading may include a terrace of adequate width to ensure the safety, stability, and erosion control necessary to implement the postmining land-use plan.

(h) Small depressions may be constructed if they are needed to retain moisture, minimize erosion, create and enhance wildlife habitat, or assist revegetation.

(i) Permanent impoundments may be approved if they meet the requirements of §§ 816.49 and 816.56 and if they are suitable for the approved postmining land use.

(j) Preparation of final-graded surfaces shall be conducted in a manner that minimizes erosion and provides a surface for replacement of topsoil that will minimize slippage.

(k) The postmining slope may vary from the approximate original contour when—

(1) The standards for thin overburden in § 816.104 are met;

(2) The standards for thick overburden in § 816.105 are met; or

(3) Approval is obtained from the regulatory authority for—

(i) Mountaintop removal operations in accordance with § 785.14 of this chapter;

(ii) A variance from approximate original contour requirements in accordance with § 785.16 of this chapter; or

(iii) Incomplete elimination of highwalls in previously mined areas in accordance with § 816.106.

§ 816.104 Backfilling and grading: Thin overburden.

(a) *Definition.* Thin overburden means insufficient spoil and other waste materials available from the entire permit area to restore the disturbed area to its approximate original contour. Insufficient spoil and other waste materials occur where the overburden thickness times the swell factor, plus the thickness of other available waste materials, is less than the combined thickness of the overburden and coal bed prior to removing the coal, so that after backfilling and grading the surface configuration of the reclaimed area would not:

(1) Closely resemble the surface configuration of the land prior to mining; or

(2) Blend into and complement the drainage pattern of the surrounding terrain.

(b) *Performance standards.* Where thin overburden occurs within the permit area, the permittee at a minimum shall:

(1) Use all spoil and other waste materials available from the entire permit area to attain the lowest practicable grade, but not more than the angle of repose; and

(2) Meet the requirements of §§ 816.102(a)(2) through (j) of this part.

§ 816.105 Backfilling and grading: Thick overburden.

(a) *Definition.* Thick overburden means more than sufficient spoil and other waste materials available from the entire permit area to restore the disturbed area to its approximate original contour. More than sufficient spoil and other waste materials occur where the overburden thickness times the swell factor exceeds the combined thickness of the overburden and coal bed prior to removing the coal, so that after backfilling and grading the surface configuration of the reclaimed area would not:

(1) Closely resemble the surface configuration of the land prior to mining; or

(2) Blend into and complement the drainage pattern of the surrounding terrain.

(b) *Performance standards.* Where thick overburden occurs within the permit area, the permittee at a minimum shall:

(1) Restore the approximate original contour and then use the remaining spoil and other waste materials to attain the lowest practicable grade, but not more than the angle of repose;

(2) Meet the requirements of §§ 816.102 (a)(2) through (j) of this part; and

(3) Dispose of any excess spoil in accordance with §§ 816.71 through 816.74 of this part.

§ 816.106 Backfilling and grading: Previously mined areas.

(a) Remining operations on previously mined areas that contain a preexisting highwall shall comply with the requirements of §§ 816.102 through 816.107 of this chapter, except as provided in this section.

(b) The requirements of § 816.102(a)(1) and (2) requiring the elimination of highwalls shall not apply to remining opertions where the volume of all reasonably available spoil is demonstrated in writing to the regulatory authority to be insufficient to completely backfill the reaffected or enlarged highwall. The highwall shall be eliminated to the maximum extent technically practical in accordance with the following criteria:

(1) All spoil generated by the remining operation and any other reasonably available spoil shall be used to backfill the area. Reasonably available spoil in the immediate vicinity of the remining operation shall be included within the permit area.

(2) The backfill shall be graded to a slope which is compatible with the approved postmining land use and which provides adequate drainage and long-term stability.

(3) Any highwall remnant shall be stable and not pose a hazard to the public health and safety or to the environment. The operator shall demonstrate, to the satisfaction of the regulatory authority, that the highwall remnant is stable.

(4) Spoil placed on the outslope during previous mining operations shall not be disturbed if such disturbances will cause instability of the remaining spoil or otherwise increase the hazard to the public health and safety or to the environment.

§ 816.107 Backfilling and grading: Steep slopes.

(a) Surface mining activities on steep slopes shall be conducted so as to meet the requirements of §§ 816.102–816.106, and the requirements of this section except where mining is conducted on flat or gently rolling terrain with an occasional steep slope through which the mining proceeds and leaves a plain or predominantly flat area or where operations are conducted in accordance with part 824 of this chapter.

(b) The following materials shall not be placed on the downslope:

(1) Spoil.

(2) Waste materials of any type.

(3) Debris, including that from clearing and grubbing.

(4) Abandoned or disabled equipment.

(c) Land above the highwall shall not be disturbed unless the regulatory authority finds that this disturbance will facilitate compliance with the environmental protection standards of this subchapter and the disturbance is limited to that necessary to facilitate compliance.

(d) Woody materials shall not be buried in the backfilled area unless the regulatory authority determines that the proposed method for placing woody material within the backfill will not deteriorate the stable condition of the backfilled area.

§ 816.111 Revegetation: General requirements.

(a) The permittee shall establish on regraded areas and on all other disturbed areas except water areas and surface areas of roads that are approved as part of the postmining land use, a vegetative cover that is in accordance with the approved permit and reclamation plan and that is—

(1) Diverse, effective, and permanent;

(2) Comprised of species native to the area, or of introduced species where desirable and necessary to achieve the approved postmining land use and approved by the regulatory authority;

(3) At least equal in extent of cover to the natural vegetation of the area; and

(4) Capable of stabilizing the soil surface from erosion.

(b) The reestablished plant species shall—

(1) Be compatible with the approved postmining land use;

(2) Have the same seasonal characteristics of growth as the original vegetation;

(3) Be capable of self-regeneration and plant succession;

(4) Be compatible with the plant and animal species of the area; and

(5) Meet the requirements of applicable State and Federal seed, poisonous and noxious plant, and introduced species laws or regulations.

(c) The regulatory authority may grant exception to the requirements of paragraphs (b) (2) and (3) of this section when the species are necessary to achieve a quick-growing, temporary, stabilizing cover, and measures to establish permanent vegetation are included in the approved permit and reclamation plan.

(d) When the regulatory authority approves a cropland postmining land use, the regulatory authority may grant exception to the requirements of paragraphs (a) (1), (3), (b) (2), and (3) of this section. The requirements of part 823 of this chapter apply to areas identified as prime farmland.

§ 816.113 Revegetation: Timing.

Disturbed areas shall be planted during the first normal period for favorable planting conditions after replacement of the plant-growth medium. The normal period for favorable planting is that planting time generally accepted locally for the type of plant materials selected.

§ 816.114 Revegetation: Mulching and other soil stabilizing practices.

Suitable mulch and other soil stabilizing practices shall be used on all areas that have been regraded and covered by topsoil or topsoil substitutes. The regulatory authority may waive this requirement if seasonal, soil, or slope factors result in a condition where mulch and other soil stabilizing practices are not necessary to control erosion and to promptly establish an effective vegetative cover.

§ 816.116 Revegetation: Standards for success.

(a) Success of revegetation shall be judged on the effectiveness of the vegetation for the approved postmining land use, the extent of cover compared to the cover occurring in natural vegetation of the area, and the general requirements of § 816.111.

(1) Standards for success and statistically valid sampling techniques for measuring success shall be selected by the regulatory authority, described in writing, and made available to the public.

(2) Standards for success shall include criteria representative of unmined lands in the area being reclaimed to evaluate the appropriate vegetation parameters of ground cover, production, or stocking. Ground cover, production, or stocking shall be considered equal to the approved success standard when they are not less than 90 percent of the success standard. The sampling techniques for measuring success shall use a 90-percent statistical confidence interval (*i.e.,* one-sided test with a 0.10 alpha error).

(b) Standards for success shall be applied in accordance with the approved postmining land use and, at a minimum, the following conditions:

(1) For areas developed for use as grazing land or pasture land, the ground cover and production of living plants on the revegetated area shall be at least equal to that of a reference area or such other success standards approved by the regulatory authority.

(2) For areas developed for use as cropland, crop production on the revegetated area shall be at least equal to that of a reference area or such other success standards approved by the regulatory authority.

(3) For areas to be developed for fish and wildlife habitat, recreation, undeveloped land, or forest products, success of vegetation shall be determined on the basis of tree and shrub stocking and vegetative ground cover. Such parameters are described as follows:

(i) Minimum stocking and planting arrangements shall be specified by the regulatory authority on the basis of local and regional conditions and after consultation with and approval by the State agencies responsible for the administration of forestry and wildlife programs. Consultation and approval may occur on either a programwide or a permit-specific basis.

(ii) Trees and shrubs that will be used in determining the success of stocking and the adequacy of the plant arrangement shall have utility for the approved postmining land use. Trees and shrubs counted in determining such success shall be healthy and have been in place for not less than two growing seasons. At the time of bond release, at least 80 percent of the trees and shrubs used to determine such success shall have been in place for 60 percent of the applicable minimum period of responsibility. The requirements of this section apply to trees and shrubs that have been seeded or transplanted and can be met when records of woody vegetation planted show that no woody plants were planted during the last two growing seasons of the responsibility period and, if any replanting of woody plants took place during the responsibility period, the total number planted during the last 60 percent of that period is less than 20 percent of the total number of woody plants required. Any replanting must be by means of transplants to allow for adequate accounting of plant stocking. This final accounting may include volunteer trees and shrubs of approved species. Volunteer trees and shrubs of approved species shall be deemed equivalent to planted specimens two years of age or older and can be counted towards success. Suckers on shrubby vegetation can be counted as volunteer plants when it is evident the shrub community is vigorous and expanding.

(iii) Vegetative ground cover shall not be less than that required to achieve the approved postmining land use.

(4) For areas to be developed for industrial, commercial, or residential use less than 2 years after regrading is completed, the vegetative ground cover shall not be less than that required to control erosion.

(5) For areas previously disturbed by mining that were not reclaimed to the requirements of this subchapter and that are remined or otherwise redisturbed by surface coal mining operations, as a minimum, the vegetative ground cover shall be not less than the ground cover existing before redisturbance and shall be adequate to control erosion.

(c)(1) The period of extended responsibility for successful revegetation shall begin after the last year of augmented seeding, fertilizing, irrigation, or other work, excluding husbandry practices that are approved by the regulatory authority in accordance with paragraph (c)(4) of this section.

(2) In areas of more than 26.0 inches of annual average precipitation, the period of responsibility shall continue for a period of not less than:

(i) Five full years, except as provided in paragraph (c)(2)(ii) of this section. The vegetation parameters identified in paragraph (b) of this section for grazing land, pasture land, or cropland shall equal or exceed the approved success standard during the growing season of any 2 years of the responsibility period, except the first year. Areas approved for the other uses identified in paragraph (b) of this section shall equal or exceed the applicable success standard during the growing season of the last year of the responsibility period.

(ii) Two full years for lands eligible for remining included in a permit for which a finding has been made under § 773.15(m) of this chapter. To the extent that the success standards are established by paragraph (b)(5) of this section, the lands must equal or exceed the standards during the growing season of the last year of the responsibility period.

(3) In areas of 26.0 inches or less average annual precipitation, the period of responsibility shall continue for a period of not less than:

(i) Ten full years, except as provided in paragraph (c)(3)(ii) in this section. The vegetation parameters identified in paragraph (b) of this section for grazing land, pasture land, or cropland shall equal or exceed the approved success standard during the growing season of any two years after year six of the responsibility period. Areas approved for the other uses identified in paragraph (b) of this section shall equal or exceed the applicable success standard during the growing season of the last year of the responsibility period.

(ii) Five full years for lands eligible for remining included in a permit for which a finding has been made under § 773.15(m) of this chapter. To the extent that the success standards are established by paragraph (b)(5) of this section, the lands must equal or exceed the standards during the growing seasons of the last two consecutive years of the responsibility period.

(4) The regulatory authority may approve selective husbandry practices, excluding augmented seeding, fertilization, or irrigation, provided it obtains prior approval from the Director in accordance with § 732.17 of this chapter that the practices are normal husbandry practices, without extending the period of responsibility for revegetation success and bond liability, if such practices can be expected to continue as part of the postmining land use or if discontinuance of the practices after the liability period expires will not reduce the probability of permanent revegetation success. Approved practices shall be normal husbandry practices within the region for unmined lands having land uses similar to the approved postmining land use of the disturbed area, including such practices as disease, pest, and vermin control; and any pruning, reseeding, and transplanting specifically necessitated by such actions.

§ 816.131 Cessation of operations: Temporary.

(a) Each person who conducts surface mining activities shall effectively secure surface facilities in areas in which there are no current operations, but in which operations are to be resumed under an approved permit. Temporary abandonment shall not relieve a person of their obligation to comply with any provisions of the approved permit.

(b) Before temporary cessation of mining and reclamation operations for a period of thirty days or more, or as soon as it is known that a temporary cessation will extend beyond 30 days, persons who conduct surface mining activities shall submit to the regulatory authority a notice of intention to cease or abandon mining and reclamation operations. This notice shall include a statement of the exact number of acres which will have been affected in the permit area, prior to such temporary cessation, the extent and kind of reclamation of those areas which will have been accomplished, and identification of the backfilling, regrading, revegetation, environmental monitoring, and water treatment activities that will continue during the temporary cessation.

§ 816.132 Cessation of operations: Permanent.

(a) Persons who cease surface mining activities permanently shall close or backfill or otherwise permanently reclaim all affected areas, in accordance with this chapter and the permit approved by the regulatory authority.

(b) All underground openings, equipment, structures, or other facilities not required for monitoring, unless approved by the regulatory authority as suitable for the postmining land use or environmental monitoring, shall be removed and the affected land reclaimed.

§ 816.133 Postmining land use.

(a) *General.* All disturbed areas shall be restored in a timely manner to conditions that are capable of supporting—

(1) The uses they were capable of supporting before any mining; or

(2) Higher or better uses.

(b) *Determining premining uses of land.* The premining uses of land to which the postmining land use is compared shall be those uses which the land previously supported, if the land has not been previously mined and has been properly managed. The postmining land use for land that has been previously mined and not reclaimed shall be judged on the basis of the land use that existed prior to any mining: *Provided that,* if the land cannot be reclaimed to the land use that existed prior to any mining because of the previously mined condition, the postmining land use shall be judged on the basis of the highest and best use that can be achieved which is compatible with surrounding areas and does not require the disturbance of areas previously unaffected by mining.

(c) *Criteria for alternative postmining land uses.* Higher or better uses may be approved by the regulatory authority as alternative postmining land uses after consultation with the landowner or the land management agency having jurisdiction over the lands, if the proposed uses meet the following criteria:

(1) There is a reasonable likelihood for achievement of the use.

(2) The use does not present any actual or probable hazard to public health or safety, or threat of water diminution or pollution.

(3) The use will not—

(i) Be impractical or unreasonable;

(ii) Be inconsistent with applicable land use policies or plans;

(iii) Involve unreasonable delay in implementation; or

(iv) Cause or contribute to violation of Federal, State, or local law.

(d) *Approximate original contour: Criteria for variance.* Surface coal mining operations that meet the requirements of this paragraph may be conducted under a variance from the requirement to restore disturbed areas to their approximate original contour, if the following requirements are satisfied:

(1) The regulatory authority grants the variance under a permit issued in accordance with § 785.16 of this chapter.

(2) The alternative postmining land use requirements of paragraph (c) of this section are met.

(3) All applicable requirements of the Act and the regulatory program, other than the requirement to restore disturbed areas to their approximate original contour, are met.

(4) After consultation with the appropriate land use planning agencies, if any, the potential use is shown to

constitute an equal or better economic or public use.

(5) The proposed use is designed and certified by a qualified registered professional engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site.

(6) After approval, where required, of the appropriate State environmental agencies, the watershed of the permit and adjacent areas is shown to be improved.

(7) The highwall is completely backfilled with spoil material, in a manner which results in a static factor of safety of at least 1.3, using standard geotechnical analysis.

(8) Only the amount of spoil as is necessary to achieve the postmining land use, ensure the stability of spoil retained on the bench, and meet all other requirements of the Act and this chapter is placed off the mine bench. All spoil not retained on the bench shall be placed in accordance with §§ 816.71–816.74 of this chapter.

(9) The surface landowner of the permit area has knowingly requested, in writing, that a variance be granted, so as to render the land, after reclamation, suitable for an industrial, commercial, residential, or public use (including recreational facilities).

(10) Federal, State, and local government agencies with an interest in the proposed land use have an adequate period in which to review and comment on the proposed use.

§ 816.150 Roads: general.

(a) *Road classification system.* (1) Each road, as defined in § 701.5 of this chapter, shall be classified as either a primary road or an ancillary road.

(2) A primary road is any road which is—

(i) Used for transporting coal or spoil;

(ii) Frequently used for access or other purposes for a period in excess of six months; or

(iii) To be retained for an approved postmining land use.

(3) An ancillary road is any road not classified as a primary road.

(b) *Performance standards.* Each road shall be located, designed, constructed, reconstructed, used, maintained, and reclaimed so as to:

(1) Control or prevent erosion, siltation, and the air pollution attendant to erosion, including road dust as well as dust occurring on other exposed surfaces, by measures such as vegetating, watering, using chemical or other dust suppressants, or otherwise stabilizing all exposed surfaces in accordance with current, prudent engineering practices;

(2) Control or prevent damage to fish, wildlife, or their habitat and related environmental values;

(3) Control or prevent additional contributions of suspended solids to stream flow or runoff outside the permit area;

(4) Neither cause nor contribute to, directly or indirectly, the violation of State or Federal water quality standards applicable to receiving waters;

(5) Refrain from seriously altering the normal flow of water in streambeds or drainage channels;

(6) Prevent or control damage to public or private property, including the prevention or mitigation of adverse effects on lands within the boundaries of units of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including designated study rivers, and National Recreation Areas designated by Act of Congress;

(7) Use nonacid- and nontoxic-forming substances in road surfacing.

(c) *Design and construction limits and establishment of design criteria.* To ensure environmental protection appropriate for their planned duration and use, including consideration of the type and size of equipment used, the design and construction or reconstruction of roads shall incorporate appropriate limits for grade, width, surface materials, surface drainage control, culvert placement, and culvert size, in accordance with current, prudent engineering practices, and any necessary design criteria established by the regulatory authority.

(d) *Location.* (1) No part of any road shall be located in the channel of an intermittent or perennial stream unless specifically approved by the regulatory authority in accordance with applicable §§ 816.41 through 816.43 and 816.57 of this chapter.

(2) Roads shall be located to minimize downstream sedimentation and flooding.

(e) *Maintenance.* (1) A road shall be maintained to meet the performance standards of this part and any additional criteria specified by the regulatory authority.

(2) A road damaged by a catastrophic event, such as a flood or earthquake, shall be repaired as soon as is practicable after the damage has occurred.

(f) *Reclamation.* A road not to be retained under an approved postmining land use shall be reclaimed in accordance with the approved reclamation plan as soon as practicable after it is no longer needed for mining and reclamation operations. This reclamation shall include:

(1) Closing the road to traffic;

(2) Removing all bridges and culverts unless approved as part of the postmining land use;

(3) Removing or otherwise disposing of road-surfacing materials that are incompatible with the postmining land use and revegetation requirements;

(4) Reshaping cut and fill slopes as necessary to be compatible with the postmining land use and to complement the natural drainage pattern of the surrounding terrain;

(5) Protecting the natural drainage patterns by installing dikes or cross drains as necessary to control surface runoff and erosion; and

(6) Scarifying or ripping the roadbed; replacing topsoil or substitute material, and revegetating disturbed surfaces in accordance with §§ 816.22 and 816.111 through 816.116 of this chapter.

§ 816.151 Primary roads.

Primary roads shall meet the requirements of section 816.150 and the additional requirements of this section.

(a) *Certification.* The construction or reconstruction of primary roads shall be certified in a report to the regulatory authority by a qualified registered professional engineer, or in any State which authorizes land surveyors to certify the construction or reconstruction of primary roads, a qualified registered professional land surveyor with experience in the design and construction of roads. The report shall indicate that the primary road has been constructed or reconstructed as designed and in accordance with the approved plan.

(b) *Safety Factor.* Each primary road embankment shall have a minimum static factor of 1.3 or meet the requirements established under § 780.37(c) of this chapter.

(c) *Location.* (1) To minimize erosion, a primary road shall be located, insofar as is practicable, on the most stable available surface.

(2) Fords or perennial or intermittent streams by primary roads are prohibited unless they are specifically approved by the regulatory authority as temporary routes during periods of road construction.

(d) *Drainage control.* In accordance with the approved plan—

(1) Each primary road shall be constructed or reconstructed, and maintained to have adequate drainage control, using structures such as, but not limited to bridges, ditches, cross drains, and ditch relief drains. The drainage control system shall be designed to safely pass the peak runoff from a 10-

year, 6-hour precipitation event, or greater event as specified by the regulatory authority;

(2) Drainage pipes and culverts shall be installed as designed, and maintained in a free and operating condition and to prevent or control erosion at inlets and outlets;

(3) Drainage ditches shall be constructed and maintained to prevent uncontrolled drainage over the road surface and embankment;

(4) Culverts shall be installed and maintained to sustain the vertical soil pressure, the passive resistance of the foundation, and the weight of vehicles using the road;

(5) Natural stream channels shall not be altered or relocated without the prior approval of the regulatory authority in accordance with applicable § 816.41 through 816.43 and 816.57 of this chapter; and

(6) Except as provided in paragraph (c)(2) of this section, structures for perennial or intermittent stream channel crossings shall be made using bridges, culverts, low-water crossings, or other structures designed, constructed, and maintained using current, prudent engineering practices. The regulatory authority shall ensure that low-water crossings are designed, constructed, and maintained to prevent erosion of the structure or streambed and additional contributions of suspended solids to steamflow.

(e) *Surfacing.* Primary roads shall be surfaced with material approved by the regulatory authority as being sufficiently durable for the anticipated volume of traffic and the weight and speed of vehicles using the road.

§ 816.180 Utility installations.

All surface coal mining operations shall be conducted in a manner which minimizes damage, destruction, or disruption of services provided by oil, gas, and water wells; oil, gas, and coal-slurry pipelines; railroads; electric and telephone lines; and water and sewage lines which pass over, under, or through the permit area, unless otherwise approved by the owner of those facilities and the regulatory authority.

§ 816.181 Support facilities.

(a) Support facilities shall be operated in accordance with a permit issued for the mine or coal preparation operation to which it is incident or from which its operation results.

(b) In addition to the other provisions of this part, support facilities shall be located, maintained, and used in a manner that—

(1) Prevents or controls erosion and siltation, water pollution, and damage to public or private property; and

(2) To the extent possible using the best technology currently available—

(i) Minimizes damage to fish, wildlife, and related environmental values; and

(ii) Minimizes additional contributions of suspended solids to streamflow or runoff outside the permit area. Any such contributions shall not be in excess of limitations of State or Federal law.

§ 816.200 Interpretative rules related to general performance standards.

The following interpretations of rules promulgated in part 816 of this chapter have been adopted by the Office of Surface Mining Reclamation and Enforcement.

(a)–(b) [Reserved]

(c) *Interpretation of § 816.22(e)—Topsoil Removal.* (1) Results of physical and chemical analyses of overburden and topsoil to demonstrate that the resulting soil medium is equal to or more suitable for sustaining revegetation than the available topsoil, provided that trials, and tests are certified by an approved laboratory in accordance with 30 CFR 816.22(e)(1)(ii), may be obtained from any one or a combination of the following sources:

(i) U.S. Department of Agriculture Soil Conservation Service published data based on established soil series;

(ii) U.S. Department of Agriculture Soil Conservation Service Technical Guides;

(iii) State agricultural agency, university, Tennessee Valley Authority, Bureau of Land Management or U.S. Department of Agriculture Forest Service published data based on soil series properties and behavior, or

(iv) Results of physical and chemical analyses, field site trials, or greenhouse tests of the topsoil and overburden materials (soil series) from the permit area.

(2) If the operator demonstrates through soil survey or other data that the topsoil and unconsolidated material are insufficient and substitute materials will be used, only the substitute materials must be analyzed in accordance with 30 CFR 816.22(e)(1)(i).

■ 13. Revise part 817 to read as follows:

PART 817—PERMANENT PROGRAM PERFORMANCE STANDARDS—UNDERGROUND MINING ACTIVITIES

Sec.

817.1 Scope.
817.2 Objectives.
817.10 Information collection.
817.11 Signs and markers.
817.13 Casing and sealing of exposed underground openings: General requirements.
817.14 Casing and sealing of underground openings: Temporary.
817.15 Casing and sealing of underground openings: Permanent.
817.22 Topsoil and subsoil.
817.41 Hydrologic-balance protection.
817.42 Hydrologic balance: Water quality standards and effluent limitations.
817.43 Diversions.
817.45 Hydrologic balance: Sediment control measures.
817.46 Hydrologic balance: Siltation structures.
817.47 Hydrologic balance: Discharge structures.
817.49 Impoundments.
817.56 Postmining rehabilitation of sedimentation ponds, diversions, impoundments, and treatment facilities.
817.57 Hydrologic balance: Stream buffer zones.
817.59 Coal recovery.
817.61 Use of explosives: General requirements.
817.62 Use of explosives: Preblasting survey.
817.64 Use of explosives: General performance standards.
817.66 Use of explosives: Blasting signs, warnings, and access controls.
817.67 Use of explosives: Control of adverse effects.
817.68 Use of explosives: Records of blasting operations.
817.71 Disposal of excess spoil: General requirements.
817.72 Disposal of excess spoil: Valley fill/head-of-hollow fills.
817.73 Disposal of excess spoil: Durable rock fills.
817.74 Disposal of excess spoil: Preexisting benches.
817.81 Coal mine waste: General requirements.
817.83 Coal mine waste: Refuse piles.
817.84 Coal mine waste: Impounding structures.
817.87 Coal mine waste: Burning and burned waste utilization.
817.89 Disposal of noncoal mine wastes.
817.95 Stabilization of surface areas.
817.97 Protection of fish, wildlife and related environmental values.
817.99 Slides and other damage.
817.100 Contemporaneous reclamation.
817.102 Backfilling and grading: General requirements.
817.106 Backfilling and grading: Previously mined areas.
817.107 Backfilling and grading: Steep slopes.
817.111 Revegetation: General requirements.
817.113 Revegetation: Timing.
817.114 Revegetation: Mulching and other soil stabilizing practices.
817.116 Revegetation: Standards for success.
817.121 Subsidence control.
817.122 Subsidence control: Public notice.
817.131 Cessation of operations: Temporary.
817.132 Cessation of operations: Permanent.

817.133 Postmining land use.
817.150 Roads: General.
817.151 Primary roads.
817.180 Utility installations.
817.181 Support facilities.
817.200 Interpretative rules related to general performance standards.

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

§ 817.1 Scope.

This part sets forth the minimum environmental protection performance standards to be adopted and implemented under regulatory programs for underground mining activities.

§ 817.2 Objectives.

This part is intended to ensure that all underground mining activities are conducted in a manner which preserves and enhances environmental and other values in accordance with the Act.

§ 817.10 Information collection.

(a) The collections of information contained in part 817 have been approved by Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1029–0048. The information will be used to meet the requirements of 30 U.S.C. 1211, 1251, 1266, and 1309a which provide, among other things, that permittees conducting underground coal mining operations will meet the applicable performance standards of the Act. This information will be used by the regulatory authority in monitoring and inspecting underground mining activities. The obligation to respond is required to obtain a benefit.

(b) Public reporting burden for this information is estimated to average 4 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

§ 817.11 Signs and markers.

(a) *Specifications.* Signs and markers required under this part shall—

(1) Be posted, maintained, and removed by the person who conducts the underground mining activities;

(2) Be of a uniform design throughout the activities that can be easily seen and read;

(3) Be made of durable material; and

(4) Conform to local laws and regulations.

(b) *Duration of maintenance.* Signs and markers shall be maintained during all activities to which they pertain.

(c) *Mine and permit identification signs.* (1) Identification signs shall be displayed at each point of access from public roads to areas of surface operations and facilities on permit areas for underground mining activities.

(2) Signs will show the name, business address, and telephone number of the person who conducts underground mining activities and the identification number of the current regulatory program permit authorizing underground mining activities.

(3) Signs shall be retained and maintained until after the release of all bonds for the permit area.

(d) *Perimeter markers.* Each person who conducts underground mining activities shall clearly mark the perimeter of all areas affected by surface operations or facilities before beginning mining activities.

(e) *Buffer zone markers.* Buffer zones required by § 817.57 shall be clearly marked to prevent disturbance by surface operations and facilities.

(f) *Topsoil markers.* Where topsoil or other vegetation-supporting material is segregated and stockpiled as required under § 817.22, the stockpiled material shall be clearly marked.

§ 817.13 Casing and sealing of exposed underground openings: General requirements.

Each exploration hole, other drillhole or borehole, shaft, well, or other exposed underground opening shall be cased, lined, or otherwise managed as approved by the regulatory authority to prevent acid or other toxic drainage from entering ground and surface waters, to minimize disturbance to the prevailing hydrologic balance and to ensure the safety of people, livestock, fish and wildlife, and machinery in the permit area and adjacent area. Each exploration hole, drill hole or borehole or well that is uncovered or exposed by mining activities within the permit area shall be permanently closed, unless approved for water monitoring or otherwise managed in a manner approved by the regulatory authority. Use of a drilled hole or monitoring well as a water well must meet the provisions of § 817.41 of this part. This section does not apply to holes drilled and used for blasting, in the area affected by surface operations.

§ 817.14 Casing and sealing of underground openings: Temporary.

(a) Each mine entry which is temporarily inactive, but has a further projected useful service under the approved permit application, shall be protected by barricades or other covering devices, fenced, and posted with signs, to prevent access into the entry and to identify the hazardous nature of the opening. These devices shall be periodically inspected and maintained in good operating condition by the person who conducts the underground mining activities.

(b) Each exploration hole, other drill hole or borehole, shaft, well, and other exposed underground opening which has been identified in the approved permit application for use to return underground development waste, coal processing waste or water to underground workings, or to be used to monitor ground water conditions, shall be temporarily sealed until actual use.

§ 817.15 Casing and sealing of underground openings: Permanent.

When no longer needed for monitoring or other use approved by the regulatory authority upon a finding of no adverse environmental or health and safety effects, or unless approved for transfer as a water well under § 817.41, each shaft, drift, adit, tunnel, exploratory hole, entryway or other opening to the surface from underground shall be capped, sealed, backfilled, or otherwise properly managed, as required by the regulatory authority in accordance with § 817.13 and consistent with 30 CFR 75.1711. Permanent closure measures shall be designed to prevent access to the mine workings by people, livestock, fish and wildlife, machinery and to keep acid or other toxic drainage from entering ground or surface waters.

§ 817.22 Topsoil and subsoil.

(a) *Removal.* (1)(i) All topsoil shall be removed as a separate layer from the area to be disturbed, and segregated.

(ii) Where the topsoil is of insufficient quantity or of poor quality for sustaining vegetation, the materials approved by the regulatory authority in accordance with paragraph (b) of this section shall be removed as a separate layer from the area to be disturbed, and segregated.

(2) If topsoil is less than 6 inches thick, the operator may remove the topsoil and the unconsolidated materials immediately below the topsoil and treat the mixture as topsoil.

(3) The regulatory authority may choose not to require the removal of topsoil for minor disturbances which—

(i) Occur at the site of small structures, such as power poles, signs, or fence lines; or

(ii) Will not destroy the existing vegetation and will not cause erosion.

(4) *Timing.* All materials to be removed under this section shall be removed after the vegetative cover that would interfere with its salvage is cleared from the area to be disturbed, but before any drilling, blasting, mining, or other surface disturbance takes place.

(b) *Substitutes and supplements.* Selected overburden materials may be

substituted for, or used as a supplement to, topsoil if the operator demonstrates to the regulatory authority that the resulting soil medium is equal to, or more suitable for sustaining vegetation than, the existing topsoil, and the resulting soil medium is the best available in the permit area to support revegetation.

(c) *Storage.* (1) Materials removed under Paragraph (a) of this section shall be segregated and stockpiled when it is impractical to redistribute such materials promptly on regraded areas.

(2) Stockpiled materials shall—

(i) Be selectively placed on a stable site within the permit area;

(ii) Be protected from contaminants and unnecessary compaction that would interfere with revegetation;

(iii) Be protected from wind and water erosion through prompt establishment and maintenance of an effective, quick growing vegetative cover or through other measures approved by the regulatory authority; and

(iv) Not be moved until required for redistribution unless approved by the regulatory authority.

(3) Where long-term surface disturbances will result from facilities such as support facilities and preparation plants and where stockpiling of materials removed under paragraph (a)(1) of this section would be detrimental to the quality or quantity of those materials, the regulatory authority may approve the temporary distribution of the soil materials so removed to an approved site within the permit area to enhance the current use of that site until needed for later reclamation, provided that—

(i) Such action will not permanently diminish the capability of the topsoil of the host site; and

(ii) The material will be retained in a condition more suitable for redistribution than if stockpiled.

(d) *Redistribution.* (1) Topsoil materials and topsoil substitutes and supplements removed under paragraphs (a) and (b) of this section shall be redistributed in a manner that—

(i) Achieves an approximately uniform, stable thickness when consistent with the approved postmining land use, contours, and surface-water drainage systems. Soil thickness may also be varied to the extent such variations help meet the specific revegetation goals identified in the permit;

(ii) Prevents excess compaction of the materials; and

(iii) Protects the materials from wind and water erosion before and after seeding and planting.

(2) Before redistribution of the material removed under paragraph (a) of this section, the regraded land shall be treated if necessary to reduce potential slippage of the redistributed material and to promote root penetration. If no harm will be caused to the redistributed material and reestablished vegetation, such treatment may be conducted after such material is replaced.

(3) The regulatory authority may choose not to require the redistribution of topsoil or topsoil substitutes on the approved postmining embankments of permanent impoundments or of roads if it determines that—

(i) Placement of topsoil or topsoil substitutes on such embankments is inconsistent with the requirement to use the best technology currently available to prevent sedimentation, and

(ii) Such embankments will be otherwise stabilized.

(4) *Nutrients and soil amendments.* Nutrients and soil amendments shall be applied to the initially redistributed material when necessary to establish the vegetative cover.

(e) *Subsoil segregation.* The regulatory authority may require that the B horizon, C horizon, or other underlying strata, or portions thereof, be removed and segregated, stockpiled, and redistributed as subsoil in accordance with the requirements of paragraphs (c) and (d) of this section if it finds that such subsoil layers are necessary to comply with the revegetation requirements of §§ 817.111, 817.113, 817.114, and 817.116 of this chapter.

§ 817.41 Hydrologic-balance protection.

(a) *General.* All underground mining and reclamation activities shall be conducted to minimize disturbance of the hydrologic balance within the permit and adjacent areas, to prevent material damage to the hydrologic balance outside the permit area, and to support approved postmining land uses in accordance with the terms and conditions of the approved permit and the performance standards of this part. The regulatory authority may require additional preventative, remedial, or monitoring measures to assure that material damage to the hydrologic balance outside the permit area is prevented. Mining and reclamation practices that minimize water pollution and changes in flow shall be used in preference to water treatment.

(b) *Ground-water protection.* In order to protect the hydrologic balance underground mining activities shall be conducted according to the plan approved under § 784.14(g) of this chapter and the following.

(1) Ground-water quality shall be protected by handling earth materials and runoff in a manner that minimizes acidic, toxic, or other harmful infiltration to ground-water systems and by managing excavations and other disturbances to prevent or control the discharge of pollutants into the ground water.

(c) *Ground-water monitoring.* (1) Ground-water monitoring shall be conducted according to the ground-water monitoring plan approved under § 784.14(h) of this chapter. The regulatory authority may require additional monitoring when necessary.

(2) Ground-water monitoring data shall be submitted every 3 months to the regulatory authority or more frequently as prescribed by the regulatory authority. Monitoring reports shall include analytical results from each sample taken during the reporting period. When the analysis of any ground-water sample indicates noncompliance with the permit conditions, then the operator shall promptly notify the regulatory authority and immediately take the actions provided for in §§ 773.17(e) and 784.14(g) of this chapter.

(3) Ground-water monitoring shall proceed through mining and continue during reclamation until bond release. Consistent with the procedures of § 774.13 of this chapter, the regulatory authority may modify the monitoring requirements including the parameters covered and the sampling frequency if the operator demonstrates, using the monitoring data obtained under this paragraph, that—

(i) The operation has minimized disturbance to the prevailing hydrologic balance in the permit and adjacent areas and prevented material damage to the hydrologic balance outside the permit area; water quantity and quality are suitable to support approved postmining land uses; or

(ii) Monitoring is no longer necessary to achieve the purposes set forth in the monitoring plan approved under § 784.14(h) of this chapter.

(4) Equipment, structures, and other devices used in conjunction with monitoring the quality and quantity of ground water onsite and offsite shall be properly installed, maintained, and operated and shall be removed by the operator when no longer needed.

(d) *Surface-water protection.* In order to protect the hydrologic balance, underground mining activities shall be conducted according to the plan approved under § 784.14(g) of this chapter, and the following:

(1) Surface-water quality shall be protected by handling earth materials,

ground-water discharges, and runoff in a manner that minimizes the formation of acidic or toxic drainage; prevents, to the extent possible using the best technology currently available, additional contribution of suspended solids to streamflow outside the permit area; and otherwise prevent water pollution. If drainage control, restabilization and revegetation of disturbed areas, diversion of runoff, mulching, or other reclamation and remedial practices are not adequate to meet the requirements of this section and § 817.42, the operator shall use and maintain the necessary water-treatment facilities or water quality controls.

(2) Surface-water quantity and flow rates shall be protected by handling earth materials and runoff in accordance with the steps outlined in the plan approved under § 784.14(g) of this chapter.

(e) *Surface-water monitoring.* (1) Surface-water monitoring shall be conducted according to the surface-water monitoring plan approved under § 784.14(i) of this chapter. The regulatory authority may require additional monitoring when necessary.

(2) Surface-water monitoring data shall be submitted every 3 months to the regulatory authority or more frequently as prescribed by the regulatory authority. Monitoring reports shall include analytical results from each sample taken during the reporting period. When the analysis of any surface-water sample indicates noncompliance with the permit conditions, the operator shall promptly notify the regulatory authority and immediately take the actions provided for in §§ 773.17(e) and 784.14(g) of this chapter. The reporting requirements of this paragraph do not exempt the operator from meeting any National Pollutant Discharge Elimination System (NPDES) reporting requirements.

(3) Surface-water monitoring shall proceed through mining and continue during reclamation until bond release. Consistent with § 774.13 of this chapter, the regulatory authority may modify the monitoring requirements, except those required by the NPDES permitting authority, including the parameters covered and sampling frequency if the operator demonstrates, using the monitoring data obtained under this paragraph, that—

(i) The operation has minimized disturbance to the hydrologic balance in the permit and adjacent areas and prevented material damage to the hydrologic balance outside the permit area; water quantity and quality are suitable to support approved postmining land uses; and

(ii) Monitoring is no longer necessary to achieve the purposes set forth in the monitoring plan approved under § 784.14(i) of this chapter.

(4) Equipment, structures, and other devices used in conjunction with monitoring the quality and quantity of surface water onsite and offsite shall be properly installed, maintained, and operated and shall be removed by the operator when no longer needed.

(f) *Acid- and toxic-forming materials.* (1) Drainage from acid- and toxic-forming materials and underground development waste into surface water and ground water shall be avoided by—

(i) Identifying and burying and/or treating, when necessary, materials which may adversely affect water quality, or be detrimental to vegetation or to public health and safety if not buried and/or treated, and

(ii) Storing materials in a manner that will protect surface water and ground water by preventing erosion, the formation of polluted runoff, and the infiltration of polluted water. Storage shall be limited to the period until burial and/or treatment first become feasible, and so long as storage will not result in any risk of water pollution or other environmental damage.

(2) Storage, burial or treatment practices shall be consistent with other material handling and disposal provisions of this chapter.

(g) *Transfer of wells.* Before final release of bond, exploratory or monitoring wells shall be sealed in a safe and environmentally sound manner in accordance with §§ 817.13 and 817.15. With the prior approval of the regulatory authority, wells may be transferred to another party for further use. However, at a minimum, the conditions of such transfer shall comply with State and local laws and the permittee shall remain responsible for the proper management of the well until bond release in accordance with §§ 817.13 to 817.15.

(h) *Discharges into an underground mine.* (1) Discharges into an underground mine are prohibited, unless specifically approved by the regulatory authority after a demonstration that the discharge will—

(i) Minimize disturbance to the hydrologic balance on the permit area, prevent material damage outside the permit area and otherwise eliminate public hazards resulting from underground mining activities;

(ii) Not result in a violation of applicable water quality standards or effluent limitations;

(iii) Be at a known rate and quality which shall meet the effluent limitations of § 817.42 for pH and total suspended solids, except that the pH and total suspended solids limitations may be exceeded, if approved by the regulatory authority; and

(iv) Meet with the approval of the Mine Safety and Health Administration.

(2) Discharges shall be limited to the following:

(i) water;

(ii) Coal-processing waste;

(iii) Fly ash from a coal-fired facility;

(iv) Sludge from an acid-mine-drainage treatment facility;

(v) Flue-gas desulfurization sludge;

(vi) Inert materials used for stabilizing underground mines; and

(vii) Underground mine development wastes.

(3) Water from one underground mine may be diverted into other underground workings according to the requirements of this section.

(i) *Gravity discharges from underground mines.* (1) Surface entries and accesses to underground workings shall be located and managed to prevent or control gravity discharge of water from the mine. Gravity discharges of water from an underground mine, other than a drift mine subject to paragraph (i)(2) of this section, may be allowed by the regulatory authority if it is demonstrated that the untreated or treated discharge complies with the performance standards of this part and any additional NPDES permit requirements.

(2) Notwithstanding anything to the contrary in paragraph (i)(1) of this section, the surface entries and accesses of drift mines first used after the implementation of a State, Federal, or Federal Lands Program and located in acid-producing or iron-producing coal seams shall be located in such a manner as to prevent any gravity discharge from the mine.

(j) *Drinking, domestic or residential water supply.* The permittee must promptly replace any drinking, domestic or residential water supply that is contaminated, diminished or interrupted by underground mining activities conducted after October 24, 1992, if the affected well or spring was in existence before the date the regulatory authority received the permit application for the activities causing the loss, contamination or interruption. The baseline hydrologic information required in §§ 780.21 and 784.14 of this chapter and the geologic information concerning baseline hydrologic conditions required in §§ 780.21 and 784.22 of this chapter will be used to determine the impact of mining activities upon the water supply.

§ 817.42 Hydrologic balance: Water quality standards and effluent limitations.

Discharges of water from areas disturbed by underground mining activities shall be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 CFR part 434.

§ 817.43 Diversions.

(a) *General requirements.* (1) With the approval of the regulatory authority, any flow from mined areas abandoned before May 3, 1978, and any flow from undisturbed areas or reclaimed areas, after meeting the criteria of § 817.46 for siltation structure removal, may be diverted from disturbed areas by means of temporary or permanent diversions. All diversions shall be designed to minimize adverse impacts to the hydrologic balance within the permit and adjacent areas, to prevent material damage outside the permit area and to assure the safety of the public. Diversions shall not be used to divert water into underground mines without approval of the regulatory authority in accordance with § 817.41(h).

(2) The diversion and its appurtenant structures shall be designed, located, constructed, and maintained to—

(i) Be stable;

(ii) Provide protection against flooding and resultant damage to life and property;

(iii) Prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow outside the permit area; and

(iv) Comply with all applicable local, State, and Federal laws and regulations.

(3) Temporary diversions shall be removed promptly when no longer needed to achieve the purpose for which they were authorized. The land disturbed by the removal process shall be restored in accordance with this part. Before diversions are removed, downstream water-treatment facilities previously protected by the diversion shall be modified or removed, as necessary, to prevent overtopping or failure of the facilities. This requirement shall not relieve the operator from maintaining water-treatment facilities as otherwise required. A permanent diversion or a stream channel reclaimed after the removal of a temporary diversion shall be designed and constructed so as to restore or approximate the premining characteristics of the original stream channel including the natural riparian vegetation to promote the recovery and the enhancement of the aquatic habitat.

(4) The regulatory authority may specify additional design criteria for diversions to meet the requirements of this section.

(b) *Diversion of perennial and intermittent streams.* (1) Diversion of perennial and intermittent streams within the permit area may be approved by the regulatory authority after making the finding relating to stream buffer zones called for in 30 CFR 817.57 that the diversions will not adversely affect the water quantity and quality and related environmental resources of the stream.

(2) The design capacity of channels for temporary and permanent stream channel diversions shall be at least equal to the capacity of the unmodified stream channel immediately upstream and downstream from the diversion.

(3) The requirements of paragraph (a)(2)(ii) of this section shall be met when the temporary and permanent diversions for perennial and intermittent streams are designed so that the combination of channel, bank and flood-plain configuration is adequate to pass safely the peak runoff of a 10-year, 6-hour precipitation event for a temporary diversion and a 100-year, 6-hour precipitation event for a permanent diversion.

(4) The design and construction of all stream channel diversions of perennial and intermittent streams shall be certified by a qualified registered professional engineer as meeting the performance standards of this part and any design criteria set by the regulatory authority.

(c) *Diversion of miscellaneous flows.* (1) Miscellaneous flows, which consist of all flows except for perennial and intermittent streams, may be diverted away from disturbed areas if required or approved by the regulatory authority. Miscellaneous flows shall include ground-water discharges and ephemeral streams.

(2) The design, location, construction, maintenance, and removal of diversions of miscellaneous flows shall meet all of the performance standards set forth in paragraph (a) of this section.

(3) The requirements of paragraph (a)(2)(ii) of this section shall be met when the temporary and permanent diversions for miscellaneous flows are designed so that the combination of channel, bank and flood-plain configuration is adequate to pass safely the peak runoff of a 2-year, 6-hour precipitation event for a temporary diversion and a 10-year, 6-hour precipitation event for a permanent diversion.

§ 817.45 Hydrologic balance: Sediment control measures.

(a) Appropriate sediment control measures shall be designed, constructed, and maintained using the best technology currently available to:

(1) Prevent, to the extent possible, additional contributions of sediment to stream flow or to runoff outside the permit area,

(2) Meet the more stringent of applicable State or Federal effluent limitations,

(3) Minimize erosion to the extent possible.

(b) Sediment control measures include practices carried out within and adjacent to the disturbed area. The sedimentation storage capacity of practices in and downstream from the disturbed areas shall reflect the degree to which successful mining and reclamation techniques are applied to reduce erosion and control sediment. Sediment control measures consist of the utilization of proper mining and reclamation methods and sediment control practices, singly or in combination. Sediment control methods include but are not limited to—

(1) Disturbing the smallest practicable area at any one time during the mining operation through progressive backfilling, grading, and prompt revegetation as required in § 817.111(b);

(2) Stabilizing the backfilled material to promote a reduction of the rate and volume of runoff in accordance with the requirements of § 817.102;

(3) Retaining sediment within disturbed areas;

(4) Diverting runoff away from disturbed areas;

(5) Diverting runoff using protected channels or pipes through disturbed areas so as not to cause additional erosion;

(6) Using straw dikes, riprap, check dams, mulches, vegetative sediment filters, dugout ponds, and other measures that reduce overland flow velocity, reduce runoff volume, or trap sediment;

(7) Treating with chemicals; and

(8) Treating mine drainage in underground sumps.

§ 817.46 Hydrologic balance: Siltation structures.

(a) For the purposes of this section only, *disturbed areas* shall not include those areas—

(1) In which the only surface mining activities include diversion ditches, siltation structures, or roads that are designed, constructed and maintained in accordance with this part; and

(2) For which the upstream area is not otherwise distributed by the operator.

(b) *General requirements.* (1) Additional contributions of suspended solids and sediment to streamflow or runoff outside the permit area shall be prevented to the extent possible using the best technology currently available.

(2) All surface drainage from the disturbed area shall be passed through a siltation structure before leaving the permit area, except as provided in paragraph (b)(5) or (e) of this section. The requirements of this paragraph are suspended effective December 22, 1986, per court order.

(3) Siltation structures for an area shall be constructed before beginning any underground mining activities in that area, and upon construction shall be certified by a qualified registered professional engineer, or, in any State which authorizes land surveyors to prepare and certify plans in accordance with § 784.16(a) of this chapter, a qualified registered professional land surveyor, to be constructed as designed and as approved in the reclamation plan.

(4) Any siltation structure which impounds water shall be designed, constructed and maintained in accordance with § 817.49 of this chapter.

(5) Siltation structures shall be maintained until removal is authorized by the regulatory authority and the disturbed area has been stabilized and revegetated. In no case shall the structure be removed sooner than 2 years after the last augmented seeding.

(6) When the siltation structure is removed, the land on which the siltation structure was located shall be regraded and revegetated in accordance with the reclamation plan and §§ 817.111 through 817.116 of this chapter. Sedimentation ponds approved by the regulatory authority for retention as permanent impoundments may be exempted from this requirement.

(7) Any point-source discharge of water from underground workings to surface waters which does not meet the effluent limitations of § 817.42 shall be passed through a siltation structure before leaving the permit area.

(c) *Sedimentation ponds.* (1) Sedimentation ponds, when used, shall—

(i) Be used individually or in series;

(ii) Be located as near as possible to the distrubed area and out of perennial streams unless approved by the regulatory authority; and

(iii) Be designed, constructed, and maintained to—

(A) Provide adequate sediment storage volume;

(B) Provide adequate detention time to allow the effluent from the ponds to meet State and Federal effluent limitations;

(C) Contain or treat the 10-year, 24-hour precipitation event (''design event'') unless a lesser design event is approved by the regulatory authority based on terrain, climate, other site-specific conditions and on a demonstration by the operator that the effluent limitations of § 817.42 will be met;

(D) Provide a nonclogging dewatering device adequate to maintain the detention time required under paragraph (c)(1)(iii)(B) of this section;

(E) Minimize, to the extent possible, short circuiting;

(F) Provide periodic sediment removal sufficient to maintain adequate volume for the design event;

(G) Ensure against excessive settlement;

(H) Be free of sod, large roots, frozen soil, and acid- or toxic-forming coal-processing waste; and

(I) Be compacted properly.

(2) *Spillways.* A sedimentation pond shall include either a combination of principal and emergency spillways or single spillway configured as specified in § 817.49(a)(9).

(d) *Other treatment facilities.* (1) Other treatment facilities shall be designed to treat the 10-year, 24-hour precipitation even unless a lesser design event is approved by the regulatory authority based on terrain, climate, other site-specific conditions and a demonstration by the operator that the effluent limitations of § 817.42 will met.

(2) Other treatment facilities shall be designed in accordance with the applicable requirements of paragraph (c) of this section.

(e) *Exemptions.* Exemptions to the requirements of this section may be granted if—

(1) The disturbed drainage area within the total disturbed area is small; and

(2) The operator demonstrates that siltation structures and alternate sediment control measures are not necessary for drainage from the disturbed drainage areas to meet the effluent limitations under § 817.42 and the applicable State and Federal water quality standards for the receiving waters.

§ 817.47 Hydrologic balance: Discharge structures.

Discharge from sedimentation ponds, permanent and temporary impoundments, coal processing waste dams and embankments, and diversions shall be controlled, by energy dissipators, riprap channels, and other devices, where necessary, to reduce erosion, to prevent deepening or enlargement of stream channels, and to minimize disturbance of the hydrologic balance. Discharge structures shall be designed according to standard engineering design procedures.

§ 817.49 Impoundments.

(a) *General requirements.* The requirements of this paragraph apply to both temporary and permanent impoundments.

(1) Impoundments meeting the Class B or C criteria for dams in the U.S. Department of Agriculture, Soil Conservation Service Technical Release No. 60 (210–VI–TR60, Oct. 1985), ''Earth Dams and Reservoirs,'' shall comply with the, ''Minimum Emergency Spillway Hydrologic Criteria,'' table in TR–60 and the requirements of this section. The technical release is hereby incorporated by reference. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161, order No. PB 87–157509–AS. Copies can be inspected at the OSM Headquarters Office, Office of Surface Mining Reclamation and Enforcement, Administrative Record, 1951 Constitution Avenue NW., Washington, DC or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(2) An impoundment meeting the size or other criteria of § 77.216(a) of this title shall comply with the requirements of § 77.216 of this title and this section.

(3) *Design certification.* The design of impoundments shall be certified in accordance with § 784.16(a) of this chapter as designed to meet the requirements of this part using current, prudent, engineering practices and any design criteria established by the regulatory authority. The qualified, registered, professional engineer or qualified, registered, professional, land surveyor shall be experienced in the design and construction or impoundments.

(4) *Stability.* (i) An Impoundment meeting the SCS Class B or C criteria for dams in TR–60, or the size or other criteria of § 77.216(a) of this title shall have a minimum static safety factor of 1.5 for a normal pool with steady state seepage saturation conditions, and a seismic safety factor of at least 1.2.

(ii) Impoundments not included in paragraph (a)(4)(i) of this section, except

for a coal mine waste impounding structure, shall have a minimum static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions or meet the requirements of § 784.16(c)(3).

(5) *Freeboard.* Impoundments shall have adequate freeboard to resist overtopping by waves and by sudden increases in storage volume. Impoundments meeting the SCS Class B or C criteria for dams in TR–60 shall comply with the freeboard hydrograph criteria in the ''Minimum Emergency Spillway Hydrologic Criteria'' table in TR–60.

(6) *Foundation.* (i) Foundations and abutments for an impounding structure shall be stable during all phases of construction and operation and shall be designed based on adequate and accurate information on the foundation conditions. For an impoundment meeting the SCS Class B or C criteria for dams in TR–60, or the size or other criteria of § 77.216(a) of this title, foundation investigation, as well as any necessary laboratory testing of foundation material, shall be performed to determine the design requirements for foundation stability.

(ii) All vegetative and organic materials shall be removed and foundations excavated and prepared to resist failure. Cutoff trenches shall be installed if necessary to ensure stability.

(7) Slope protection shall be provided to protect against surface erosion at the site and protect against sudden drawdown.

(8) Faces of embankments and surrounding areas shall be vegetated, except that faces where water is impounded may be riprapped or otherwise stabilized in accordance with accepted design practices.

(9) *Spillways.* An impoundment shall include either a combination of principal and emergency spillways or a single spillway configured as specified in paragraph (a)(9)(i) of this section, designed and constructed to safely pass the applicable design precipitation event specified in paragraph (a)(9)(ii) of this section, except as set forth in paragraph (c)(2) of this section.

(i) The regulatory authority may approve a single open-channel spillway that is:

(A) Of nonerodible construction and designed to carry sustained flows; or

(B) Earth- or grass-lined and designed to carry short-term, infrequent flows at non-erosive velocities where sustained flows are not expected.

(ii) Except as specified in paragraph (c)(2) of this section, the required design precipitation event for an impoundment meeting the spillway requirements of paragraph (a)(9) of this section is:

(A) For an impoundment meeting the SCS Class B or C criteria for dams in TR–60, the emergency spillway hydrograph criteria in the ''Minimum Emergency Spillway Hydrologic Criteria'' table in TR–60, or greater event as specified by the regulatory authority.

(B) For an impoundment meeting or exceeding the size or other criteria of § 77.216(a) of this title, a 100-year 6-hour event, or greater event as specified by the regulatory authority.

(C) For an impoundment not included in paragraph (a)(9)(ii) (A) and (B) of this section, a 25-year 6-hour event, or greater event as specified by the regulatory authority.

(10) The vertical portion of any remaining highwall shall be located far enough below the low-water line along the full extent of highwall to provide adequate safety and access for the proposed water users.

(11) *Inspections.* Except as provided in paragraph (a)(11)(iv) of this section, a qualified registered professional engineer or other qualified professional specialist under the direction of a professional engineer, shall inspect each impoundment as provided in paragraph (a)(11)(i) of this section. The professional engineer or specialist shall be experienced in the construction of impoundments.

(i) Inspections shall be made regularly during construction, upon completion of construction, and at least yearly until removal of the structure or release of the performance bond.

(ii) The qualified registered professional engineer, or qualified registered professional land surveyor as specified in paragraph (a)(11)(iv) of this section, shall promptly after each inspection required in paragraph (a)(11)(i) of this section provide to the regulatory authority a certified report that the impoundment has been constructed and/or maintained as designed and in accordance with the approved plan and this chapter. The report shall include discussion of any appearance of instability, structural weakness or other hazardous condition, depth and elevation of any impounded waters, existing storage capacity, any existing or required monitoring procedures and instrumentation, and any other aspects of the structure affecting stability.

(iii) A copy of the report shall be retained at or near the minesite.

(iv) In any State which authorizes land surveyors to prepare and certify plans in accordance with § 784.16(a) of this chapter, a qualified registered professional land surveyor may inspect any temporary or permanent impoundment that does not meet the SCS Class B or C criteria for dams in TR–60, or the size or other criteria of § 77.216(a) of this title and certify and submit the report required by paragraph (a)(11)(ii) of this section, except that all coal mine waste impounding structures covered by § 817.84 of this chapter shall be certified by a qualified registered professional engineer. The professional land surveyor shall be experienced in the construction of impoundments.

(12) Impoundments meeting the SCS Class B or C criteria for dams in TR–60, or the size or other criteria of § 77.216 of this title must be examined in accordance with § 77.216–3 of this title. Impoundments not meeting the SCS Class B or C Criteria for dams in TR–60, or subject to § 77.216 of this title, shall be examined at least quarterly. A qualified person designated by the operator shall examine impoundments for the appearance of structural weakness and other hazardous conditions.

(13) *Emergency procedures.* If any examination or inspection discloses that a potential hazard exists, the person who examined the impoundment shall promptly inform the regulatory authority of the finding and of the emergency procedures formulated for public protection and remedial action. If adequate procedures cannot be formulated or implemented, the regulatory authority shall be notified immediately. The regulatory authority shall then notify the appropriate agencies that other emergency procedures are required to protect the public.

(b) *Permanent impoundments.* A permanent impoundment of water may be created, if authorized by the regulatory authority in the approved permit based upon the following demonstration:

(1) The size and configuration of such impoundment will be adequate for its intended purposes.

(2) The quality of impounded water will be suitable on a permanent basis for its intended use and, after reclamation, will meet applicable State and Federal water quality standards, and discharges from the impoundment will meet applicable effluent limitations and will not degrade the quality of receiving water below applicable State and Federal water quality standards.

(3) The water level will be sufficiently stable and be capable of supporting the intended use.

(4) Final grading will provide for adequate safety and access for proposed water users.

(5) The impoundment will not result in the diminution of the quality and quantity of water utilized by adjacent or surrounding landowners for agricultural, industrial, recreational, or domestic uses.

(6) The impoundment will be suitable for the approved postmining land use.

(c) *Temporary impoundments.* (1) The regulatory authority may authorize the construction of temporary impoundments as part of underground mining activities.

(2) In lieu of meeting the requirements in paragraph (a)(9)(i) of this section, the regulatory authority may approve an impoundment that relies primarily on storage to control the runoff from the design precipitation event when it is demonstrated by the operator and certified by a qualified registered professional engineer or qualified registered professional land surveyor in accordance with § 784.16(a) of this chapter that the impoundment will safely control the design precipitation event, the water from which shall be safely removed in accordance with current, prudent, engineering practices. Such an impoundment shall be located where failure would not be expected to cause loss of life or serious property damage, except where:

(i) Impoundments meeting the SCS Class B or C criteria for dams in TR–60, or the size or other criteria of § 77.216(a) of this title shall be designed to control the precipitation of the probable maximum precipitation of a 6-hour event, or greater event specified by the regulatory authority.

(ii) Impoundments not included in paragraph (c)(2)(i) of this section shall be designed to control the precipitation of the 100-year 6-hour event, or greater event specified by the regulatory authority.

§ 817.56 Postmining rehabilitation of sedimentation ponds, diversions, impoundments, and treatment facilities.

Before abandoning a permit area or seeking bond release, the operator shall ensure that all temporary structures are removed and reclaimed, and that all permanent sedimentation ponds, diversions, impoundments, and treatment facilities meet the requirements of this chapter for permanent structures, have been maintained properly, and meet the requirements of the approved reclamation plan for permanent structures and impoundments. The operator shall renovate such structures if necessary to meet the requirements of this chapter and to conform to the approved reclamation plan.

§ 817.57 Hydrologic balance: Stream buffer zones.

(a) No land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by underground mining activities, unless the regulatory authority specifically authorizes underground mining activities closer to, or through, such a stream. The regulatory authority may authorize such activities only upon finding that—

(1) Underground mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards and will not adversely affect the water quantity and quality or other environmental resources of the stream; and

(2) If there will be a temporary or permanent stream-channel diversion, it will comply with § 817.43.

(b) The area not to be disturbed shall be designated as a buffer zone, and the operator shall mark it as specified in § 817.11.

§ 817.59 Coal recovery.

Underground mining activities shall be conducted so as to maximize the utilization and conservation of the coal, while utilizing the best technology currently available to maintain environmental integrity, so that reaffecting the land in the future through surface coal mining operations is minimized.

§ 817.61 Use of explosives: General requirements.

(a) Sections 817.61–817.68 apply to surface blasting activities incident to underground coal mining, including, but not limited to, initial rounds of slopes and shafts.

(b) Each operator shall comply with all applicable State and Federal laws and regulations in the use of explosives.

(c) *Blasters.* (1) No later than 12 months after the blaster certification program for a State required by part 850 of this chapter has been approved under the procedures of subchapter C of this chapter, all surface blasting operations incident to underground mining in that State shall be conducted under the direction of a certified blaster. Before that time, all such blasting operations in that State shall be conducted by competent, experienced persons who understand the hazards involved.

(2) Certificates of blaster certification shall be carried by blasters or shall be on file at the permit area during blasting operations.

(3) A blaster and at least one other person shall be present at the firing of a blast.

(4) Any blaster who is responsible for conducting blasting operations at a blasting site shall:

(i) Be familiar with the site-specific performance standards; and

(ii) Give direction and on-the-job training to persons who are not certified and who are assigned to the blasting crew or assist in the use of explosives.

(d) *Blast design.* (1) An anticipated blast design shall be submitted if blasting operations will be conducted within—

(i) 1,000 feet of any building used as a dwelling, public building, school, church or community or institutional building; or

(ii) 500 feet of active or abandoned underground mines.

(2) The blast design may be presented as part of a permit application or at a time, before the blast, approved by the regulatory authority.

(3) The blast design shall contain sketches of the drill patterns, delay periods, and decking and shall indicate the type and amount of explosives to be used, critical dimensions, and the location and general description of structures to be protected, as well as a discussion of design factors to be used, which protect the public and meet the applicable airblast, flyrock, and ground-vibration standards in § 817.67.

(4) The blast design shall be prepared and signed by a certified blaster.

(5) The regulatory authority may require changes to the design submitted.

§ 817.62 Use of explosives: Preblasting survey.

(a) At least 30 days before initiation of blasting, the operator shall notify, in writing, all residents or owners of dwellings or other structures located within ½ mile of the permit area how to request a preblasting survey.

(b) A resident or owner of a dwelling or structure within ½ mile of any part of the permit area may request a preblasting survey. This request shall be made, in writing, directly to the operator or to the regulatory authority, who shall promptly notify the operator. The operator shall promptly conduct a preblasting survey of the dwelling or structure and promptly prepare a written report of the survey. An updated survey of any additions, modifications, or renovations shall be performed by the operator if requested by the resident or owner.

(c) The operator shall determine the condition of the dwelling or structure and shall document any preblasting damage and other physical factors that could reasonably be affected by the blasting. Structures such as pipelines, cables, transmission lines, and cisterns,

wells, and other water systems warrant special attention; however, the assessment of these structures may be limited to surface conditions and other readily available data.

(d) The written report of the survey shall be signed by the person who conducted the survey. Copies of the report shall be promptly provided to the regulatory authority and to the person requesting the survey. If the person requesting the survey disagrees with the contents and/or recommendations contained therein, he or she may submit to both the operator and the regulatory authority a detailed description of the specific areas of disagreement.

(e) Any surveys requested more than 10 days before the planned initiation of blasting shall be completed by the operator before the initiation of blasting.

§ 817.64 Use of explosives: General performance standards.

(a) The operator shall notify, in writing, residents within ½ mile of the blasting site and local governments of the proposed times and locations of blasting operations. Such notice of times that blasting is to be conducted may be announced weekly, but in no case less than 24 hours before blasting will occur.

(b) Unscheduled blasts may be conducted only where public or operator health and safety so requires and for emergency blasting actions. When an operator conducts an unscheduled surface blast incidental to underground coal mining operations, the operator, using audible signals, shall notify residents within ½ mile of the blasting site and document the reason in accordance with § 817.68(p).

(c) All blasting shall be conducted between sunrise and sunset unless nighttime blasting is approved by the regulatory authority based upon a showing by the operator that the public will be protected from adverse noise and other impacts. The regulatory authority may specify more restrictive time periods for blasting.

§ 817.66 Use of explosives: Blasting signs, warnings, and access control.

(a) *Blasting signs.* Blasting signs shall meet the specifications of § 817.11. The operator shall—

(1) Conspicuously place signs reading ''Blasting Area'' along the edge of any blasting area that comes within 100 feet of any public-road right-of-way, and at the point where any other road provides access to the blasting area; and

(2) At all entrances to the permit area from public roads or highways, place conspicuous signs which state ''Warning! Explosives in Use,'' which clearly list and describe the meaning of the audible blast warning and all-clear signals that are in use, and which explain the marking of blasting areas and charged holes awaiting firing within the permit area.

(b) *Warnings.* Warning and all-clear signals of different character or pattern that are audible within a range of ½ mile from the point of the blast shall be given. Each person within the permit area and each person who resides or regularly works within ½ mile of the permit area shall be notified of the meaning of the signals in the blasting notification required in § 817.64(a).

(c) *Access control.* Access within the blasting areas shall be controlled to prevent presence of livestock or unauthorized persons during blasting and until an authorized representative of the operator has reasonably determined that—

(1) No unusual hazards, such as imminent slides or undetonated charges, exist; and

(2) Access to and travel within the blasting area can be safely resumed.

§ 817.67 Use of explosives: Control of adverse effects.

(a) *General requirements.* Blasting shall be conducted to prevent injury to persons, damage to public or private property outside the permit area, adverse impacts on any underground mine, and change in the course, channel, or availability of surface or ground water outside the permit area.

(b) *Airblast*—(1) *Limits.* (i) Airblast shall not exceed the maximum limits listed below at the location of any dwelling, public building, school, church, or community or institutional building outside the permit area, except as provided in paragraph (e) of this section.

Lower frequency limit of measuring system, in Hz (±3 dB)	Maximum level, in dB
0.1 Hz or lower—flat response [1]	134 peak.
2 Hz or lower—flat response	133 peak.
6 Hz or lower—flat response	129 peak.
C-weighted—slow response [1]	105 peak dBC.

[1] Only when approved by the regulatory authority.

(ii) If necessary to prevent damage, the regulatory authority may specify lower maximum allowable airblast levels than those of paragraph (b)(1)(i) of this section for use in the vicinity of a specific blasting operation.

(2) *Monitoring.* (i) The operator shall conduct periodic monitoring to ensure compliance with the airblast standards. The regulatory authority may require airblast measurement of any or all blasts and may specify the locations at which such measurements are taken.

(ii) The measuring systems used shall have an upper-end flat-frequency response of at least 200 Hz.

(c) *Flyrock.* Flyrock travelling in the air or along the ground shall not be cast from the blasting site—

(1) More than one-half the distance to the nearest dwelling or other occupied structure;

(2) Beyond the area of control required under § 817.66(c); or

(3) Beyond the permit boundary.

(d) *Ground vibration*—(1) *General.* In all blasting operations, except as otherwise authorized in paragraph (e) of this section, the maximum ground vibration shall not exceed the values approved by the regulatory authority. The maximum ground vibration for protected structures listed in paragraph (d)(2)(i) of this section shall be established in accordance with either the maximum peak-particle-velocity limits of paragraph (d)(2), the scaled-distance equation of paragraph (d)(3), the blasting-level chart of paragraph (d)(4) of this section, or by the regulatory authority under paragraph (d)(5) of this section. All structures in the vicinity of the blasting area, not listed in paragraph (d)(2)(i) of this section, such as water towers, pipelines and other utilities, tunnels, dams, impoundments, and underground mines shall be protected from damage by establishment of a maximum allowable limit on the ground vibration, submitted by the operator and approved by the regulatory authority before the initiation of blasting.

(2) *Maximum peak-particle velocity.* (i) The maximum ground vibration shall not exceed the following limits at the location of any dwelling, public building, school, church, or community or institutional building outside the permit area:

Distance (*D*), from the blasting site, in feet	Maximum allowable peak particle velocity (*V* max) for ground vibration, in inches/second [1]	Scaled-distance factor to be applied without seismic monitoring [2] (Ds)
0 to 300	1.25	50
301 to 5,000	1.00	55
5,001 and beyond	0.75	65

[1] Ground vibration shall be measured as the particle velocity. Particle velocity shall be recorded in three mutually perpendicular directions. The maximum allowable peak particle velocity shall apply to each of the three measurements.

[2] Applicable to the scaled-distance equation of Paragraph (d)(3)(i) of this section.

(ii) A seismographic record shall be provided for each blast.

(3) *Scaled-distance equation.* (i) An operator may use the scaled-distance equation, $W = (D/Ds)^2$, to determine the allowable charge weight of explosives to be detonated in any 8-millisecond period, without seismic monitoring; where W = the maximum weight of explosives, in pounds; D = the distance, in feet, from the blasting site to the nearest protected structure; and Ds = the scaled-distance factor, which may initially be approved by the regulatory authority using the values for scaled-distance factor listed in paragraph (d)(2)(i) of this section.

(ii) The development of a modified scaled-distance factor may be authorized by the regulatory authority on receipt of a written request by the operator, supported by seismographic records of blasting at the minesite. The modified scaled-distance factor shall be determined such that the particle velocity of the predicted ground vibration will not exceed the prescribed maximum allowable peak particle velocity of paragraph (d)(2)(i) of this section, at a 95-percent confidence level.

(4) *Blasting-level chart.* (i) An operator may use the ground-vibration limits in Figure 1 to determine the maximum allowable ground vibration.

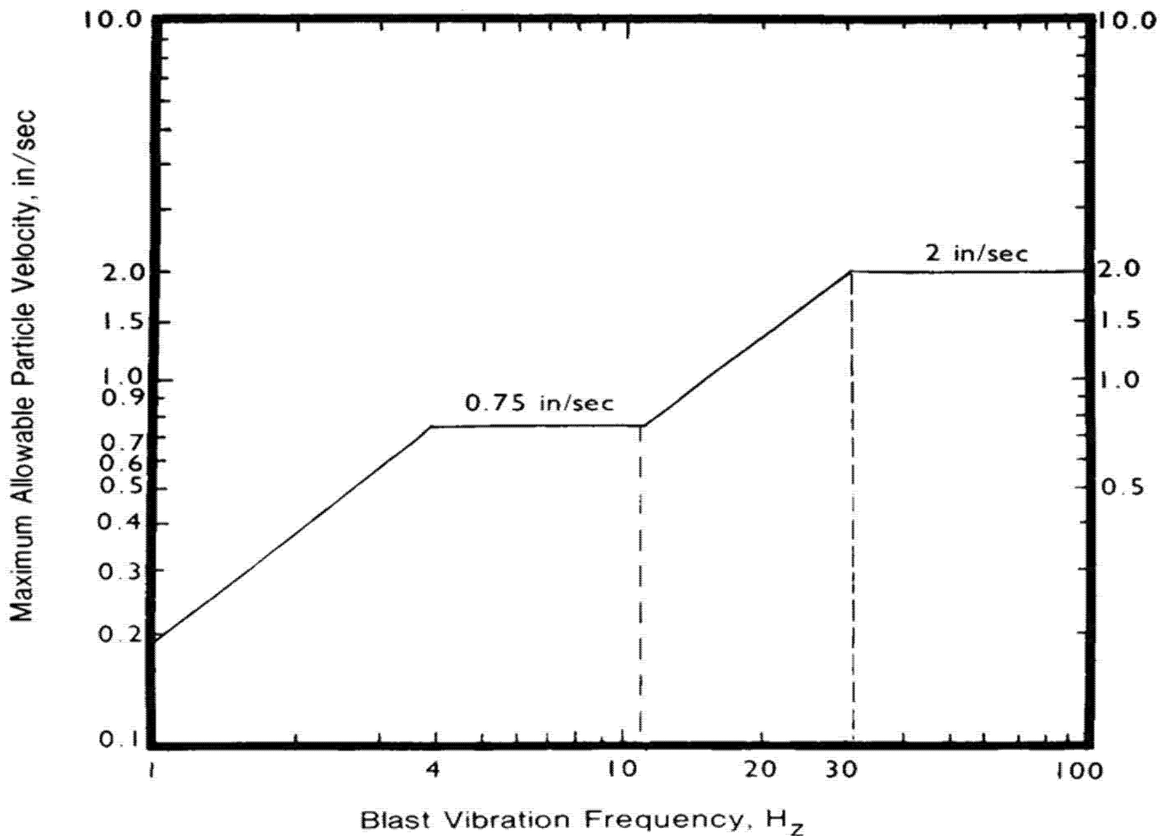


Figure 1. Alternative blasting level criteria.
(Source: Modified from figure B-1, Bureau of Mines RI 8507)

(ii) If the Figure 1 limits are used, a seismographic record including both particle velocity and vibration-frequency levels shall be provided for each blast. The method for the analysis of the predominant frequency contained in the blasting records shall be approved by the regulatory authority before application of this alternative blasting criterion.

(5) The maximum allowable ground vibration shall be reduced by the regulatory authority beyond the limits otherwise provided by this section, if

determined necessary to provide damage protection.

(6) The regulatory authority may require an operator to conduct seismic monitoring of any or all blasts and may specify the location at which the measurements are taken and the degree of detail necessary in the measurement.

(e) The maximum airblast and ground-vibration standards of paragraphs (b) and (d) of this section shall not apply at the following locations:

(1) At structures owned by the permittee and not leased to another person,

(2) At structures owned by the permittee and leased to another person, if a written waiver by the lessee is submitted to the regulatory authority before blasting.

§ 817.68 Use of explosives: Records of blasting operations.

The operator shall retain a record of all blasts for at least 3 years. Upon request, copies of these records shall be made available to the regulatory authority and to the public for inspection. Such records shall contain the following data:

(a) Name of the operator conducting the blast.

(b) Location, date, and time of the blast.

(c) Name, signature, and certification number of the blaster conducting the blast.

(d) Identification, direction, and distance, in feet, from the nearest blast hole to the nearest dwelling, public building, school, church, community or institutional building outside the permit area, except those described in § 817.67 (e).

(e) Weather conditions, including those which may cause possible adverse blasting effects.

(f) Type of material blasted.

(g) Sketches of the blast pattern including number of holes, burden, spacing, decks, and delay pattern.

(h) Diameter and depth of holes.

(i) Types of explosives used.

(j) Total weight of explosives used per hole.

(k) The maximum weight of explosives detonated in an 8-millisecond period.

(l) Initiation system.

(m) Type and length of stemming.

(n) Mats or other protections used.

(o) Seismographic and airblast records, if required, which shall include—

(1) Type of instrument, sensitivity, and calibration signal or certification of annual calibration;

(2) Exact location of instrument and the date, time, and distance from the blast;

(3) Name of the person and firm taking the reading;

(4) Name of the person and firm analyzing the seismographic record; and

(5) The vibration and/or airblast level recorded.

(p) Reasons and conditions for each unscheduled blast.

§ 817.71 Disposal of excess spoil: General requirements.

(a) *General.* Excess spoil shall be placed in designated disposal areas within the permit area, in a controlled manner to—

(1) Minimize the adverse effects of leachate and surface water runoff from the fill on surface and ground waters;

(2) Ensure mass stability and prevent mass movement during and after construction; and

(3) Ensure that the final fill is suitable for reclamation and revegetation compatible with the natural surroundings and the approved postmining land use.

(b) *Design certification.* (1) The fill and appurtenant structures shall be designed using current, prudent engineering practices and shall meet any design criteria established by the regulatory authority. A qualified registered professional engineer experienced in the design of earth and rock fills shall certify the design of the fill and appurtenant structures.

(2) The fill shall be designed to attain a minimum long-term static safety factor of 1.5. The foundation and abutments of the fill must be stable under all conditions of construction.

(c) *Location.* The disposal area shall be located on the most moderately sloping and naturally stable areas available, as approved by the regulatory authority, and shall be placed, where possible, upon or above a natural terrace, bench, or berm, if such placement provides additional stability and prevents mass movement.

(d) *Foundation.* (1) Sufficient foundation investigations, as well as any necessary laboratory testing of foundation material, shall be performed in order to determine the design requirements for foundation stability. The analyses of foundation conditions shall take into consideration the effect of underground mine workings, if any, upon the stability of the fill and appurtenant structures.

(2) When the slope in the disposal area is in excess of 2.8h:lv (36 percent), or such lesser slope as may be designated by the regulatory authority based on local conditions, keyway cuts (excavations to stable bedrock) or rock toe buttresses shall be constructed to ensure stability of the fill. Where the toe of the spoil rests on a downslope, stability analyses shall be performed in accordance with § 784.19 of this chapter to determine the size of rock toe buttresses and keyway cuts.

(e) *Placement of excess spoil.* (1) All vegetative and organic materials shall be removed from the disposal area prior to placement of excess spoil. Topsoil shall be removed, segregated and stored or redistributed in accordance with § 817.22. If approved by the regulatory authority, organic material may be used as mulch or may be included in the topsoil to control erosion, promote growth of vegetation or increase the moisture retention of the soil.

(2) Excess spoil shall be transported and placed in a controlled manner in horizontal lifts not exceeding 4 feet in thickness; concurrently compacted as necessary to ensure mass stability and to prevent mass movement during and after construction; graded so that surface and subsurface drainage is compatible with the natural surroundings; and covered with topsoil or substitute material in accordance with § 817.22 of this chapter. The regulatory authority may approve a design which incorporates placement of excess spoil in horizontal lifts other than 4 feet in thickness when it is demonstrated by the operator and certified by a qualified registered professional engineer that the design will ensure the stability of the fill and will meet all other applicable requirements.

(3) The final configuration of the fill shall be suitable for the approved postmining land use. Terraces may be constructed on the outslope of the fill if required for stability, control of erosion, to conserve soil moisture, or to facilitate the approved postmining land use. The grade of the outslope between terrace benches shall not be steeper than 2h:lv (50 percent).

(4) No permanent impoundments are allowed on the completed fill. Small depressions may be allowed by the regulatory authority if they are needed to retain moisture, minimize erosion, create and enhance wildlife habitat, or assist revegetation; and if they are not incompatible with the stability of the fill.

(5) Excess spoil that is acid- or toxic-forming or combustible shall be adequately covered with nonacid, nontoxic and noncombustible material, or treated, to control the impact on surface and ground water in accordance with § 817.41, to prevent sustained combustion, and to minimize adverse

effects on plant growth and the approved postmining land use.

(f) *Drainage control.* (1) If the disposal area contains springs, natural or manmade water courses, or wet weather seeps, the fill design shall include diversions and underdrains as necessary to control erosion, prevent water infiltration into the fill, and ensure stability.

(2) Diversions shall comply with the requirements of § 817.43.

(3) Underdrains shall consist of durable rock or pipe, be designed and constructed using current, prudent engineering practices and meet any design criteria established by the regulatory authority. The underdrain system shall be designed to carry the anticipated seepage of water due to rainfall away from the excess spoil fill and from seeps and springs in the foundation of the disposal area and shall be protected from piping and contamination by an adequate filter. Rock underdrains shall be constructed of durable, nonacid-, nontoxic-forming rock (*e.g.,* natural sand and gravel, sandstone, limestone, or other durable rock) that does not slake in water or degrade to soil materials, and which is free of coal, clay or other nondurable material. Perforated pipe underdrains shall be corrosion resistant and shall have characteristics consistent with the long-term life of the fill.

(g) *Surface area stabilization.* Slope protection shall be provided to minimize surface erosion at the site. All disturbed areas, including diversion channels that are not riprapped or otherwise protected, shall be revegetated upon completion of construction.

(h) *Inspections.* A qualified registered professional engineer or other qualified professional specialist under the direction of the professional engineer, shall periodically inspect the fill during construction. The professional engineer or specialist shall be experienced in the construction of earth and rock fills.

(1) Such inspections shall be made at least quarterly throughout construction and during critical construction periods. Critical construction periods shall include at a minimum: (i) Foundation preparation, including the removal of all organic material and topsoil; (ii) placement of underdrains and protective filter systems; (iii) installation of final surface drainage systems; and (iv) the final graded and revegetated fill. Regular inspections by the engineer or specialist shall also be conducted during placement and compaction of fill materials.

(2) The qualified registered professional engineer shall provide a certified report to the regulatory authority promptly after each inspection that the fill has been constructed and maintained as designed and in accordance with the approved plan and this chapter. The report shall include appearances of instability, structural weakness, and other hazardous conditions.

(3)(i) The certified report on the drainage system and protective filters shall include color photographs taken during and after construction, but before underdrains are covered with excess spoil. If the underdrain system is constructed in phases, each phase shall be certified separately.

(ii) Where excess durable rock spoil is placed in single or multiple lifts such that the underdrain system is constructed simultaneously with excess spoil placement by the natural segregation of dumped materials, in accordance with § 817.73, color photographs shall be taken of the underdrain as the underdrain system is being formed.

(iii) The photographs accompanying each certified report shall be taken in adequate size and number with enough terrain or other physical features of the site shown to provide a relative scale to the photographs and to specifically and clearly identify the site.

(4) A copy of each inspection report shall be retained at or near the mine site.

(i) *Coal mine waste.* Coal mine waste may be disposed of in excess spoil fills if approved by the regulatory authority and, if such waste is—

(1) Placed in accordance with § 817.83;

(2) Nontoxic and nonacid forming; and

(3) Of the proper characteristics to be consistent with the design stability of the fill.

(j) *Underground disposal.* Excess spoil may be disposed of in underground mine workings, but only in accordance with a plan approved by the regulatory authority and MSHA under § 784.25 of this chapter.

(k) *Face-up operations.* Spoil resulting from face-up operations for underground coal mine development may be placed at drift entries as part of a cut and fill structure, if the structure is less than 400 feet in horizontal length, and designed in accordance with § 817.71.

§ 817.72 Disposal of excess spoil: Valley fill/head-of-hollow fills.

Valley fills and head-of-hollow fills shall meet the requirements of § 817.71 and the additional requirements of this section.

(a) *Drainage control.* (1) The top surface of the completed fill shall be graded such that the final slope after settlement will be toward properly designed drainage channels. Uncontrolled surface drainage may not be directed over the outslope of the fill.

(2) Runoff from areas above the fill and runoff from the surface of the fill shall be diverted into stabilized diversion channels designed to meet the requirements of § 817.43 and to safely pass the runoff from a 100-year, 6-hour precipitation event.

(b) *Rock-core chimney drains.* A rock-core chimney drain may be used in a head-of-hollow fill, instead of the underdrain and surface diversion system normally required, as long as the fill is not located in an area containing intermittent or perennial streams. A rock-core chimney drain may be used in a valley fill if the fill does not exceed 250,000 cubic yards of material and upstream drainage is diverted around the fill. The alternative rock-core chimney drain system shall be incorporated into the design and construction of the fill as follows:

(1) The fill shall have, along the vertical projection of the main buried stream channel or rill, a vertical core of durable rock at least 16 feet thick which shall extend from the toe of the fill to the head of the fill, and from the base of the fill to the surface of the fill. A system of lateral rock underdrains shall connect this rock core to each area of potential drainage or seepage in the disposal area. The underdrain system and rock core shall be designed to carry the anticipated seepage of water due to rainfall away from the excess spoil fill and from seeps and springs in the foundation of the disposal area. Rocks used in the rock core and underdrains shall meet the requirements of § 817.71(f).

(2) A filter system to ensure the proper long-term functioning of the rock core shall be designed and constructed using current, prudent engineering practices.

(3) Grading may drain surface water away from the outslope of the fill and toward the rock core. In no case, however, may intermittent or perennial streams be diverted into the rock core. The maximum slope of the top of the fill shall be 33h:lv (3 percent). A drainage pocket may be maintained at the head of the fill during and after construction, to intercept surface runoff and discharge the runoff through or over the rock drain, if stability of the fill is not impaired. In no case shall this pocket or sump have a potential capacity for impounding more than 10,000 cubic feet of water. Terraces on the fill shall be

graded with a 3 to 5 percent grade toward the fill and a 1 percent slope toward the rock core.

§ 817.73 Disposal of excess spoil: Durable rock fills.

The regulatory authority may approve the alternative method of disposal of excess durable rock spoil by gravity placement in single or multiple lifts, provided the following conditions are met:

(a) Except as provided in this section, the requirements of § 817.71 are met.

(b) The excess spoil consists of at least 80 percent, by volume, durable, nonacid- and nontoxic-forming rock (*e.g.,* sandstone or limestone) that does not slake in water and will not degrade to soil material. Where used, noncemented clay shale, clay spoil, soil or other nondurable excess spoil material shall be mixed with excess durable rock spoil in a controlled manner such that no more than 20 percent of the fill volume, as determined by tests performed by a registered engineer and approved by the regulatory authority, is not durable rock.

(c) A qualified registered professional engineer certifies that the design will ensure the stability of the fill and meet all other applicable requirements.

(d) The fill is designed to attain a minimum long-term static safety factor of 1.5, and an earthquake safety factor of 1.1.

(e) The underdrain system may be constructed simultaneously with excess spoil placement by the natural segregation of dumped materials, provided the resulting underdrain system is capable of carrying anticipated seepage of water due to rainfall away from the excess spoil fill and from seeps and springs in the foundation of the disposal area and the other requirements for drainage control are met.

(f) Surface water runoff from areas adjacent to and above the fill is not allowed to flow onto the fill and is diverted into stabilized diversion channels designed to meet the requirements of § 817.43 and to safely pass the runoff from a 100-year, 6-hour precipitation event.

§ 817.74 Disposal of excess spoil: Preexisting benches.

(a) The regulatory authority may approve the disposal of excess spoil through placement on a preexisting bench if the affected portion of the preexisting bench is permitted and the standards set forth in § 817.102 (c), (e) through (h), and (j), and the requirements of this section are met.

(b) All vegetation and organic materials shall be removed from the affected portion of the preexisting bench prior to placement of the excess spoil. Any available topsoil on the bench shall be removed, stored and redistributed in accordance with § 817.22 of this part. Substitute or supplemental materials may be used in accordance with § 817.22(b) of this part.

(c) The fill shall be designed and constructed using current, prudent engineering practices. The design will be certified by a registered professional engineer. The spoil shall be placed on the solid portion of the bench in a controlled manner and concurrently compacted as necessary to attain a long term static safety factor of 1.3 for all portions of the fill. Any spoil deposited on any fill portion of the bench will be treated as excess spoil fill under § 817.71.

(d) The preexisting bench shall be backfilled and graded to—

(1) Achieve the most moderate slope possible which does not exceed the angle of repose;

(2) Eliminate the highwall to the maximum extent technically practical;

(3) Minimize erosion and water pollution both on and off the site; and

(4) If the disposal area contains springs, natural or manmade water courses, or wet weather seeps, the fill design shall include diversions and underdrains as necessary to control erosion, prevent water infiltration into the fill, and ensure stability.

(e) All disturbed areas, including diversion channels that are not riprapped or otherwise protected, shall be revegetated upon completion of construction.

(f) Permanent impoundments may not be constructed on preexisting benches backfilled with excess spoil under this regulation.

(g) Final configuration of the backfill must be compatible with the natural drainage patterns and the surrounding area, and support the approved postmining land use.

(h) Disposal of excess spoil from an upper actively mined bench to a lower preexisting bench by means of gravity transport may be approved by the regulatory authority provided that—

(1) The gravity transport courses are determined on a site-specific basis by the operator as part of the permit application and approved by the regulatory authority to minimize hazards to health and safety and to ensure that damage will be minimized between the benches, outside the set course, and downslope of the lower bench should excess spoil accidentally move;

(2) All gravity transported excess spoil, including that excess spoil immediately below the gravity transport courses and any preexisting spoil that is disturbed, is rehandled and placed in horizontal lifts in a controlled manner, concurrently compacted as necessary to ensure mass stability and to prevent mass movement, and graded to allow surface and subsurface drainage to be compatible with the natural surroundings and to ensure a minimum long-term static safety factor of 1.3. Excess spoil on the bench prior to the current mining operation that is not disturbed need not be rehandled except where necessary to ensure stability of the fill;

(3) A safety berm is constructed on the solid portion of the lower bench prior to gravity transport of the excess spoil. Where there is insufficient material on the lower bench to construct a safety berm, only that amount of excess spoil necessary for the construction of the berm may be gravity transported to the lower bench prior to construction of the berm;

(4) Excess spoil shall not be allowed on the downslope below the upper bench except on designated gravity transport courses properly prepared according to § 817.22. Upon completion of the fill, no excess spoil shall be allowed to remain on the designated gravity transport course between the two benches and each transport course shall be reclaimed in accordance with the requirements of this part.

§ 817.81 Coal mine waste: General requirements.

(a) *General.* All coal mine waste disposed of in an area other than the mine workings or excavations shall be placed in new or existing disposal areas within a permit area, which are approved by the regulatory authority for this purpose. Coal mine waste shall be hauled or conveyed and placed for final placement in a controlled manner to—

(1) Minimize adverse effects of leachate and surface-water runoff on surface and ground water quality and quantity;

(2) Ensure mass stability and prevent mass movement during and after construction;

(3) Ensure that the final disposal facility is suitable for reclamation and revegetation compatible with the natural surroundings and the approved postmining land use;

(4) Not create a public hazard; and

(5) Prevent combustion.

(b) Coal mine waste materials from activities located outside a permit area may be disposed of in the permit area only if approved by the regulatory authority. Approval shall be based upon a showing that such disposal will be in

accordance with the standards of this section.

(c) *Design certification.* (1) The disposal facility shall be designed using current, prudent engineering practices and shall meet any design criteria established by the regulatory authority. A qualified registered professional engineer, experienced in the design of similar earth and waste structures, shall certify the design of the disposal facility.

(2) The disposal facility shall be designed to attain a minimum long-term static safety factor of 1.5. The foundation and abutments must be stable under all conditions of construction.

(d) *Foundation.* Sufficient foundation investigations, as well as any necessary laboratory testing of foundation material, shall be performed in order to determine the design requirements for foundation stability. The analyses of the foundation conditions shall take into consideration the effect of underground mine workings, if any, upon the stability of the disposal facility.

(e) *Emergency procedures.* If any examination or inspection discloses that a potential hazard exists, the regulatory authority shall be informed promptly of the finding and of the emergency procedures formulated for public protection and remedial action. If adequate procedures cannot be formulated or implemented, the regulatory authority shall be notified immediately. The regulatory authority shall then notify the appropriate agencies that other emergency procedures are required to protect the public.

(f) *Underground disposal.* Coal mine waste may be disposed of in underground mine workings, but only in accordance with a plan approved by the regulatory authority and MSHA under § 784.25 of this chapter.

§ 817.83 Coal mine waste: Refuse piles.

Refuse piles shall meet the requirements of § 817.81, the additional requirements of this section, and the requirements of §§ 77.214 and 77.215 of this title.

(a) *Drainage control.* (1) If the disposal area contains springs, natural or manmade water courses, or wet weather seeps, the design shall include diversions and underdrains as necessary to control erosion, prevent water infiltration into the disposal facility and ensure stability.

(2) Uncontrolled surface drainage may not be diverted over the outslope of the refuse pile. Runoff from areas above the refuse pile and runoff from the surface of the refuse pile shall be diverted into stabilized diversion channels designed to meet the requirements of § 817.43 to safely pass the runoff from a 100-year, 6-hour precipitation event. Runoff diverted from undisturbed areas need not be commingled with runoff from the surface of the refuse pile.

(3) Underdrains shall comply with the requirements of § 817.71(f)(3).

(b) *Surface area stabilization.* Slope protection shall be provided to minimize surface erosion at the site. All disturbed areas, including diversion channels that are not riprapped or otherwise protected, shall be revegetated upon completion of construction.

(c) *Placement.* (1) All vegetative and organic materials shall be removed from the disposal area prior to placement of coal mine waste. Topsoil shall be removed, segregated and stored or redistributed in accordance with § 817.22. If approved by the regulatory authority, organic material may be used as mulch or may be included in the topsoil to control erosion, promote growth of vegetation or increase the moisture retention of the soil.

(2) The final configuration of the refuse pile shall be suitable for the approved postmining land use. Terraces may be constructed on the outslope of the refuse pile if required for stability, control of erosion, conservation of soil moisture, or facilitation of the approved postmining land use. The grade of the outslope between terrace benches shall not be steeper than 2h:1v (50 percent).

(3) No permanent impoundments shall be allowed on the completed refuse pile. Small depressions may be allowed by the regulatory authority if they are needed to retain moisture, minimize erosion, create and enhance wildlife habitat, or assist revegetation, and if they are not incompatible with stability of the refuse pile.

(4) Following final grading of the refuse pile, the coal mine waste shall be covered with a minimum of 4 feet of the best available, nontoxic and noncombustible material, in a manner that does not impede drainage from the underdrains. The regulatory authority may allow less than 4 feet of cover material based on physical and chemical analyses which show that the requirements of §§ 817.111 through 817.116 will be met.

(d) *Inspections.* A qualified registered professional engineer, or other qualified professional specialist under the direction of the professional engineer, shall inspect the refuse pile during construction. The professional engineer or specialist shall be experienced in the construction of similar earth and waste structures.

(1) Such inspection shall be made at least quarterly throughout construction and during critical construction periods. Critical construction periods shall include at a minimum: (i) Foundation preparation including the removal of all organic material and topsoil; (ii) placement of underdrains and protective filter systems; (iii) installation of final surface drainage systems; and (iv) the final graded and revegetated facility. Regular inspections by the engineer or specialist shall also be conducted during placement and compaction of coal mine waste materials. More frequent inspections shall be conducted if a danger of harm exists to the public health and safety or the environment. Inspections shall continue until the refuse pile has been finally graded and revegetated or until a later time as required by the regulatory authority.

(2) The qualified registered professional engineer shall provide a certified report to the regulatory authority promptly after each inspection that the refuse pile has been constructed and maintained as designed and in accordance with the approved plan and this chapter. The report shall include appearances of instability, structural weakness, and other hazardous conditions.

(3) The certified report on the drainage system and protective filters shall include color photographs taken during and after construction, but before underdrains are covered with coal mine waste. If the underdrain system is constructed in phases, each phase shall be certified separately. The photographs accompanying each certified report shall be taken in adequate size and number with enough terrain or other physical features of the site shown to provide a relative scale to the photographs and to specifically and clearly identify the site.

(4) A copy of each inspection report shall be retained at or near the minesite.

§ 817.84 Coal mine waste: Impounding structures.

New and existing impounding structures constructed of coal mine waste or intended to impound coal mine waste shall meet the requirements of § 817.81.

(a) Coal mine waste shall not be used for construction of impounding structures unless it has been demonstrated to the regulatory authority that the stability of such a structure conforms to the requirements of this part and the use of coal mine waste will not have a detrimental effect on downstream water quality or the environment due to acid seepage

through the impounding structure. The stability of the structure and the potential impact of acid mine seepage through the impounding structure and shall be discussed in detail in the design plan submitted to the regulatory authority in accordance with § 780.25 of this chapter.

(b)(1) Each impounding structure constructed of coal mine waste or intended to impound coal mine waste shall be designed, constructed and maintained in accordance with § 817.49 (a) and (c). Such structures may not be retained permanently as part of the approved postmining land use.

(2) Each impounding structure constructed of coal mine waste or intended to impound coal mine waste that meets the criteria of § 77.216(a) of this title shall have sufficient spillway capacity to safely pass, adequate storage capacity to safely contain, or a combination of storage capacity and spillway capacity to safely control, the probable maximum precipitation of a 6-hour precipitation event, or greater event as specified by the regulatory authority.

(c) Spillways and outlet works shall be designed to provide adequate protection against erosion and corrosion. Inlets shall be protected against blockage.

(d) *Drainage control.* Runoff from areas above the disposal facility or runoff from the surface of the facility that may cause instability or erosion of the impounding structure shall be diverted into stabilized diversion channels designed to meet the requirements of § 817.43 and designed to safely pass the runoff from a 100-year, 6-hour design precipitation event.

(e) Impounding structures constructed of or impounding coal mine waste shall be designed so that at least 90 percent of the water stored during the design precipitation event can be removed within a 10-day period.

(f) For an impounding structure constructed of or impounding coal mine waste, at least 90 percent of the water stored during the design precipitation event shall be removed within the 10-day period following the design precipitation event.

§ 817.87 Coal mine waste: Burning and burned waste utilization.

(a) Coal mine waste fires shall be extinguished by the person who conducts the surface mining activities, in accordance with a plan approved by the regulatory authority and the Mine Safety and Health Administration. The plan shall contain, at a minimum, provisions to ensure that only those persons authorized by the operator, and who have an understanding of the procedures to be used, shall be involved in the extinguishing operations.

(b) No burning or unburned coal mine waste shall be removed from a permitted disposal area without a removal plan approved by the regulatory authority. Consideration shall be given to potential hazards to persons working or living in the vicinity of the structure.

§ 817.89 Disposal of noncoal mine wastes.

(a) Noncoal mine wastes including, but not limited to grease, lubricants, paints, flammable liquids, garbage, abandoned mining machinery, lumber and other combustible materials generated during mining activities shall be placed and stored in a controlled manner in a designated portion of the permit area. Placement and storage shall ensure that leachate and surface runoff do not degrade surface or ground water, that fires are prevented, and that the area remains stable and suitable for reclamation and revegetation compatible with the natural surroundings.

(b) Final disposal of noncoal mine wastes shall be in a designated disposal site in the permit area or a State-approved solid waste disposal area. Disposal sites in the permit area shall be designed and constructed to ensure that leachate and drainage from the noncoal mine waste area does not degrade surface or underground water. Wastes shall be routinely compacted and covered to prevent combustion and wind-borne waste. When the disposal is completed, a minimum of 2 feet of soil cover shall be placed over the site, slopes stabilized, and revegetation accomplished in accordance with §§ 817.111 through 817.116. Operation of the disposal site shall be conducted in accordance with all local, State, and Federal requirements.

(c) At no time shall any noncoal mine waste be deposited in a refuse pile or impounding structure, nor shall any excavation for a noncoal mine waste disposal site be located within 8 feet of any coal outcrop or coal storage area.

§ 817.95 Stabilization of surface areas.

(a) All exposed surface areas shall be protected and stabilized to effectively control erosion and air pollution attendant to erosion.

(b) Rills and gullies which form in areas that have been regraded and topsoiled and which either (1) disrupt the approved postmining land use or the reestablishment of the vegetative cover, or (2) cause or contribute to a violation of water quality standards for receiving streams; shall be filled, regraded, or otherwise stabilized; topsoil shall be replaced; and the areas shall be reseeded or replanted.

§ 817.97 Protection of fish, wildlife, and related environmental values.

(a) The operator shall, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish, wildlife, and related environmental values and shall achieve enhancement of such resources where practicable.

(b) *Endangered and threatened species.* No underground mining activity shall be conducted which is likely to jeopardize the continued existence of endangered or threatened species listed by the Secretary or which is likely to result in the destruction or adverse modification of designated critical habitats of such species in violation of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). The operator shall promptly report to the regulatory authority any State- or federally-listed endangered or threatened species within the permit area of which the operator becomes aware. Upon notification, the regulatory authority shall consult with appropriate State and Federal fish and wildlife agencies and, after consultation, shall identify whether, and under what conditions, the operator may proceed.

(c) *Bald and golden eagles.* No underground mining activity shall be conducted in a manner which would result in the unlawful taking of a bald or golden eagle, its nest, or any of its eggs. The operator shall promptly report to the regulatory authority any golden or bald eagle nest within the permit area of which the operator becomes aware. Upon notification, the regulatory authority shall consult with the U.S. Fish and Wildlife Service and also, where appropriate, the State fish and wildlife agency and, after consultation, shall identify whether, and under what conditions, the operator may proceed.

(d) Nothing in this chapter shall authorize the taking of an endangered or threatened species or a bald or golden eagle, its nest, or any of its eggs in violation of the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.,* or the Bald Eagle Protection Act, as amended, 16 U.S.C. 668 *et seq.*

(e) Each operator shall, to the extent possible using the best technology currently available—

(1) Ensure that electric powerlines and other transmission facilities used for, or incidental to, underground mining activities on the permit area are designed and constructed to minimize electrocution hazards to raptors, except where the regulatory authority

determines that such requirements are unnecessary;

(2) Locate and operate haul and access roads so as to avoid or minimize impacts on important fish and wildlife species or other species protected by State or Federal law;

(3) Design fences, overland conveyors, and other potential barriers to permit passage for large mammals except where the regulatory authority determines that such requirements are unnecessary; and

(4) Fence, cover, or use other appropriate methods to exclude wildlife from ponds which contain hazardous concentrations of toxic-forming materials.

(f) *Wetlands and habitats of unusually high value for fish and wildlife.* The operator conducting underground mining activities shall avoid disturbances to, enhance where practicable, restore, or replace, wetlands, and riparian vegetation along rivers and streams and bordering ponds and lakes. Underground mining activities shall avoid disturbances to, enhance where practicable, or restore, habitats of unusually high value for fish and wildlife.

(g) Where fish and wildlife habitat is to be a postmining land use, the plant species to be used on reclaimed areas shall be selected on the basis of the following criteria:

(1) Their proven nutritional value for fish or wildlife.

(2) Their use as cover for fish or wildlife.

(3) Their ability to support and enhance fish or wildlife habitat after the release of performance bonds. The selected plants shall be grouped and distributed in a manner which optimizes edge effect, cover, and other benefits to fish and wildlife.

(h) Where cropland is to be the postmining land use, and where appropriate for wildlife- and crop-management practices, the operator shall intersperse the fields with trees, hedges, or fence rows throughout the harvested area to break up large blocks of monoculture and to diversify habitat types for birds and other animals.

(i) Where residential, public service, or industrial uses are to be the postmining land use, and where consistent with the approved postmining land use, the operator shall intersperse reclaimed lands with greenbelts utilizing species of grass, shrubs, and trees useful as food and cover for wildlife.

§ 817.99 Slides and other damage.

At any time a slide occurs which may have a potential adverse effect on public, property, health, safety, or the environment, the person who conducts the underground mining activities shall notify the regulatory authority by the fastest available means and comply with any remedial measures required by the regulatory authority.

§ 817.100 Contemporaneous reclamation.

Reclamation efforts, including but not limited to backfilling, grading, topsoil replacement, and revegetation, on all areas affected by surface impacts incident to an underground coal mine shall occur as contemporaneously as practicable with mining operations, except when such mining operations are conducted in accordance with a variance for concurrent surface and underground mining activities issued under § 785.18 of this chapter. The regulatory authority may establish schedules that define contemporaneous reclamation.

§ 817.102 Backfilling and grading: General requirements.

(a) Disturbed areas shall be backfilled and graded to—

(1) Achieve the approximate original contour, except as provided in paragraph (k) of this section;

(2) Eliminate all highwalls, spoil piles, and depressions, except as provided in paragraph (h) (small depressions) and in paragraph (k)(2) (previously mined highwalls) of this section;

(3) Achieve a postmining slope that does not exceed either the angle of repose or such lesser slope as is necessary to achieve a minimum long-term static safety factor of 1.3 and to prevent slides;

(4) Minimize erosion and water pollution both on and off the site; and

(5) Support the approved postmining land use.

(b) Spoil, except as provided in paragraph (l) of this section, and except excess spoil disposed of in accordance with §§ 817.71 through 817.74, shall be returned to the mined-out surface area.

(c) Spoil and waste materials shall be compacted where advisable to ensure stability or to prevent leaching of toxic materials.

(d) Spoil may be placed on the area outside the mined-out surface area in nonsteep slope areas to restore the approximate original contour by blending the spoil into the surrounding terrain if the following requirements are met:

(1) All vegetative and organic material shall be removed from the area.

(2) The topsoil on the area shall be removed, segregated, stored, and redistributed in accordance with § 817.22.

(3) The spoil shall be backfilled and graded on the area in accordance with the requirements of this section.

(e) Disposal of coal processing waste and underground development waste in the mined-out surface area shall be in accordance with §§ 817.81 and 817.83, except that a long-term static safety factor of 1.3 shall be achieved.

(f) Exposed coal seams, acid- and toxic-forming materials, and combustible materials exposed, used, or produced during mining shall be adequately covered with nontoxic and noncombustible materials, or treated, to control the impact on surface and ground water in accordance with § 817.41, to prevent sustained combustion, and to minimize adverse effects on plant growth and the approved postmining land use.

(g) Cut-and-fill terraces may be allowed by the regulatory authority where—

(1) Needed to conserve soil moisture, ensure stability, and control erosion on final-graded slopes, if the terraces are compatible with the approved postmining land use; or

(2) Specialized grading, foundation conditions, or roads are required for the approved postmining land use, in which case the final grading may include a terrace of adequate width to ensure the safety, stability, and erosion control necessary to implement the postmining land-use plan.

(h) Small depressions may be constructed if they are needed to retain moisture, minimize erosion, create and enhance wildlife habitat, or assist revegetation.

(i) Permanent impoundments may be approved if they meet the requirements of §§ 817.49 and 817.56 and if they are suitable for the approved postmining land use.

(j) Preparation of final-graded surfaces shall be conducted in a manner that minimizes erosion and provides a surface for replacement of topsoil that will minimize slippage.

(k) The postmining slope may vary from the approximate original contour when approval is obtained from the regulatory authority for—

(1) A variance from approximate original contour requirements in accordance with § 785.16 of this chapter; or

(2) Incomplete elimination of highwalls in previously mined areas in accordance with § 817.106.

(l) Regrading of settled and revegetated fills to achieve approximate original contour at the conclusion of underground mining activities shall not be required if the conditions of

paragraph (l)(1) or (l)(2) of this section are met.

(1)(i) Settled and revegetated fills shall be composed of spoil or non-acid- or non-toxic-forming underground development waste.

(ii) The spoil or underground development waste shall not be located so as to be detrimental to the environment, to the health and safety of the public, or to the approved postmining land use.

(iii) Stability of the spoil or underground development waste shall be demonstrated through standard geotechnical analysis to be consistent with backfilling and grading requirements for material on the solid bench (1.3 static safety factor) or excess spoil requirements for material not placed on a solid bench (1.5 static safety factor).

(iv) The surface of the spoil or underground development waste shall be vegetated according to § 817.116, and surface runoff shall be controlled in accordance with § 817.43.

(2) If it is determined by the regulatory authority that disturbance of the existing spoil or underground development waste would increase environmental harm or adversely affect the health and safety of the public, the regulatory authority may allow the existing spoil or underground development waste pile to remain in place. The regulatory authority may require stabilization of such spoil or underground development waste in accordance with the requirements of paragraphs (l)(1)(i) through (l)(1)(iv) of this section.

§ 817.106 Backfilling and grading: Previously mined areas.

(a) Remining operations on previously mined areas that contain a preexisting highwall shall comply with the requirements of §§ 817.102 through 817.107 of this chapter, except as provided in this section.

(b) The requirements of § 817.102(a) (1) and (2) requiring that elimination of highwalls shall not apply to remining operations where the volume of all reasonably available spoil is demonstrated in writing to the regulatory authority to be insufficient to completely backfill the reaffected or enlarged highwall. The highwall shall be eliminated to the maximum extent technically practical in accordance with the following criteria:

(1) All spoil generated by the remining operation and any other reasonably available spoil shall be used to backfill the area. Reasonably available spoil in the immediate vicinity of the remining operation shall be included within the permit area.

(2) The backfill shall be graded to a slope which is compatible with the approved postmining land use and which provides adequate drainage and long-term stability.

(3) Any highwall remnant shall be stable and not pose a hazard to the public health and safety or to the environment. The operator shall demonstrate, to the satisfaction of the regulatory authority, that the highwall remnant is stable.

(4) Spoil placed on the outslope during previous mining operations shall not be disturbed if such disturbances will cause instability of the remaining spoil or otherwise increase the hazard to the public health and safety or to the environment.

§ 817.107 Backfilling and grading: Steep slopes.

(a) Underground mining activities on steep slopes shall be conducted so as to meet the requirements of §§ 817.102–817.106 and the requirements of this section.

(b) The following materials shall not be placed on the downslope:

(1) Spoil.

(2) Waste materials of any type.

(3) Debris, including that from clearing and grubbing.

(4) Abandoned or disabled equipment.

(c) Land above the highwall shall not be disturbed unless the regulatory authority finds that this disturbance will facilitate compliance with the environmental protection standards of this subchapter and the disturbance is limited to that necessary to facilitate compliance.

(d) Woody materials shall not be buried in the backfilled area unless the regulatory authority determines that the proposed method for placing woody material within the backfill will not deteriorate the stable condition of the backfilled area.

§ 817.111 Revegetation: General requirements.

(a) The permittee shall establish on regraded areas and on all other disturbed areas except water areas and surface areas of roads that are approved as part of the postmining land use, as vegetative cover that is in accordance with the approved permit and reclamation plan and that is—

(1) Diverse, effective, and permanent;

(2) Comprised of species native to the area, or of introduced species where desirable and necessary to achieve the approved postmining land use and approved by the regulatory authority;

(3) At least equal in extent of cover to the natural vegetation of the area; and

(4) Capable of stabilizing the soil surface from erosion.

(b) The reestablished plant species shall—

(1) Be compatible with the approved postmining land use;

(2) Have the same seasonal characteristics of growth as the original vegetation;

(3) Be capable of self-regeneration and plant succession;

(4) Be compatible with the plant and animal species of the area; and

(5) Meet the requirements of applicable State and Federal seed, poisonous and noxious plant, and introduced species laws or regulations.

(c) The regulatory authority may grant exception to the requirements of paragraphs (b) (2) and (3) of this section when the species are necessary to achieve a quick-growing, temporary, stabilizing cover, and measures to establish permanent vegetation are included in the approved permit and reclamation plan.

(d) When the regulatory authority approves a cropland postmining land use, the regulatory authority may grant exceptions to the requirements of paragraphs (a) (1), (3), (b) (2), and (3) of this section. The requirements of part 823 of this chapter apply to areas identified as prime farmland.

§ 817.113 Revegetation: Timing.

Disturbed areas shall be planted during the first normal period for favorable planting conditions after replacement of the plant-growth medium. The normal period for favorable planting is that planting time generally accepted locally for the type of plant materials selected.

§ 817.114 Revegetation: Mulching and other soil stabilizing practices.

Suitable mulch and other soil stabilizing practices shall be used on all areas that have been regraded and covered by topsoil or topsoil substitutes. The regulatory authority may waive this requirement if seasonal, soil, or slope factors result in a condition where mulch and other soil stabilizing practices are not necessary to control erosion and to promptly establish an effective vegetative cover.

§ 817.116 Revegetation: Standards for success.

(a) Success of revegetation shall be judged on the effectiveness of the vegetation for the approved postmining land use, the extent of cover compared to the cover occurring in natural vegetation of the area, and the general requirements of § 817.111.

(1) Standards for success and statistically valid sampling techniques for measuring success shall be selected by the regulatory authority, described in writing, and made available to the public.

(2) Standards for success shall include criteria representative of unmined lands in the area being reclaimed to evaluate the appropriate vegetation parameters of ground cover, production, or stocking. Ground cover, production, or stocking shall be considered equal to the approved success standard when they are not less than 90 percent of the success standard. The sampling techniques for measuring success shall use a 90-percent statistical confidence interval (*i.e.,* a one-sided test with a 0.10 alpha error).

(b) Standards for success shall be applied in accordance with the approved postmining land use and, at a minimum, the following conditions:

(1) For areas developed for use as grazing land or pasture land, the ground cover and production of living plants on the revegetated area shall be at least equal to that of a reference area or such other success standards approved by the regulatory authority.

(2) For areas developed for use as cropland, crop production on the revegetated area shall be at least equal to that of a reference area or such other success standards approved by the regulatory authority.

(3) For areas to be developed for fish and wildlife habitat, recreation, undeveloped land, or forest products, success of vegetation shall be determined on the basis of tree and shrub stocking and vegetative ground cover. Such parameters are described as follows:

(i) Minimum stocking and planting arrangements shall be specified by the regulatory authority on the basis of local and regional conditions and after consultation with and approval by the State agencies responsible for the administration of forestry and wildlife programs. Consultation and approval may occur on either a programwide or a permit-specific basis.

(ii) Trees and shrubs that will be used in determining the success of stocking and the adequacy of the plant arrangement shall have utility for the approved postmining land use. Trees and shrubs counted in determining such success shall be healthy and have been in place for not less than two growing seasons. At the time of bond release, at least 80 percent of the trees and shrubs used to determine such success shall have been in place for 60 percent of the applicable minimum period of responsibility. The requirements of this section apply to trees and shrubs that have been seeded or transplanted and can be met when records of woody vegetation planted show that no woody plants were planted during the last two growing seasons of the responsibility period and, if any replanting of woody plants took place during the responsibility period, the total number planted during the last 60 percent of that period is less than 20 percent of the total number of woody plants required. Any replanting must be by means of transplants to allow for adequate accounting of plant stocking. This final accounting may include volunteer trees and shrubs of approved species. Volunteer trees and shrubs of approved species shall be deemed equivalent to planted specimens two years of age or older and can be counted towards success. Suckers on shrubby vegetation can be counted as volunteer plants when it is evident the shrub community is vigorous and expanding.

(iii) Vegetative ground cover shall not be less than that required to achieve the approved postmining land use.

(4) For areas to be developed for industrial, commercial, or residential use less than 2 years after regrading is completed, the vegetative ground cover shall not be less than that required to control erosion.

(5) For areas previously disturbed by mining that were not reclaimed to the requirements of this subchapter and that are remined or otherwise redisturbed by surface coal mining operations, as a minimum, the vegetative ground cover shall be not less than the ground cover existing before redisturbance and shall be adequate to control erosion.

(c)(1) The period of extended responsibility for successful revegetation shall begin after the last year of augmented seeding, fertilizing, irrigation, or other work, excluding husbandry practices that are approved by the regulatory authority in accordance with paragraph (c)(4) of this section.

(2) In areas of more than 26.0 inches of annual average precipitation, the period of responsibility shall continue for a period of not less than:

(i) Five full years, except as provided in paragraph (c)(2)(ii) of this section. The vegetation parameters identified in paragraph (b) of this section for grazing land, pasture land, or cropland shall equal or exceed the approved success standard during the growing season of any 2 years of the responsibility period, except the first year. Areas approved for the other uses identified in paragraph (b) of this section shall equal or exceed the applicable success standard during the growing season of the last year of the responsibility period.

(ii) Two full years for lands eligible for remining included in a permit for which a finding has been made under § 773.15(m) of this chapter. To the extent that the success standards are established by paragraph (b)(5) of this section, the lands must equal or exceed the standards during the growing season of the last year of the responsibility period.

(3) In areas of 26.0 inches or less average annual precipitation, the period of responsibility shall continue for a period of not less than:

(i) Ten full years, except as provided in paragraph (c)(3)(ii) in this section. The vegetation parameters identified in paragraph (b) of this section for grazing land, pasture land, or cropland shall equal or exceed the approved success standard during the growing season of any two years after year six of the responsibility period. Areas approved for the other uses identified in paragraph (b) of this section shall equal or exceed the applicable success standard during the growing season of the last year of the responsibility period.

(ii) Five full years for lands eligible for remining included in a permit for which a finding has been made under § 773.15(m) of this chapter. To the extent that the success standards are established by paragraph (b)(5) of this section, the lands must equal or exceed the standards during the growing seasons of the last two consecutive years of the responsibility period.

(4) The regulatory authority may approve selective husbandry practices, excluding augmented seeding, fertilization, or irrigation, provided it obtains prior approval from the Director in accordance with § 732.17 of this chapter that the practices are normal husbandry practices, without extending the period of responsibility for revegetation success and bond liability, if such practices can be expected to continue as part of the postmining land use or if discontinuance of the practices after the liability period expires will not reduce the probability of permanent revegetation success. Approved practices shall be normal husbandry practices within the region for unmined lands having land uses similar to the approved postmining land use of the disturbed area, including such practices as disease, pest, and vermin control; and any pruning, reseeding, and transplanting specifically necessitated by such actions.

§ 817.121 Subsidence control.

(a) *Measures to prevent or minimize damage.* (1) The permittee must either

adopt measures consistent with known technology that prevent subsidence from causing material damage to the extent technologically and economically feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of surface lands or adopt mining technology that provides for planned subsidence in a predictable and controlled manner.

(2) If a permittee employs mining technology that provides for planned subsidence in a predictable and controlled manner, the permittee must take necessary and prudent measures, consistent with the mining method employed, to minimize material damage to the extent technologically and economically feasible to non-commercial buildings and occupied residential dwellings and structures related thereto except that measures required to minimize material damage to such structures are not required if:

(i) The permittee has the written consent of their owners or

(ii) Unless the anticipated damage would constitute a threat to health or safety, the costs of such measures exceed the anticipated costs of repair.

(3) Nothing in this part prohibits the standard method of room-and-pillar mining.

(b) The operator shall comply with all provisions of the approved subsidence control plan prepared pursuant to § 784.20 of this chapter.

(c) *Repair of damage*—(1) *Repair of damage to surface lands.* The permittee must correct any material damage resulting from subsidence caused to surface lands, to the extent technologically and economically feasible, by restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses that it was capable of supporting before subsidence damage.

(2) *Repair or compensation for damage to non-commercial buildings and dwellings and related structures.* The permittee must promptly repair, or compensate the owner for, material damage resulting from subsidence caused to any non-commercial building or occupied residential dwelling or structure related thereto that existed at the time of mining. If repair option is selected, the permittee must fully rehabilitate, restore or replace the damaged structure. If compensation is selected, the permittee must compensate the owner of the damaged structure for the full amount of the decrease in value resulting from the subsidence-related damage. The permittee may provide compensation by the purchase, before mining, of a non-cancelable premium-prepaid insurance policy. The requirements of this paragraph apply only to subsidence-related damage caused by underground mining activities conducted after October 24, 1992.

(3) *Repair or compensation for damage to other structures.* The permittee must, to the extent required under applicable provisions of State law, either correct material damage resulting from subsidence caused to any structures or facilities not protected by paragraph (c)(2) of this section by repairing the damage or compensate the owner of the structures or facilities for the full amount of the decrease in value resulting from the subsidence. Repair of damage includes rehabilitation, restoration, or replacement of damaged structures or facilities. Compensation may be accomplished by the purchase before mining of a non-cancelable premium-prepaid insurance policy.

(4) *Rebuttable presumption of causation by subsidence*—(i) *Rebuttable presumption of causation for damage within angle of draw.* If damage to any non-commercial building or occupied residential dwelling or structure related thereto occurs as a result of earth movement within an area determined by projecting a specified angle of draw from the outermost boundary of any underground mine workings to the surface of the land, a rebuttable presumption exists that the permittee caused the damage. The presumption will normally apply to a 30-degree angle of draw. A State regulatory authority may amend its program to apply the presumption to a different angle of draw if the regulatory authority shows in writing that the angle has a more reasonable basis than the 30-degree angle of draw, based on geotechnical analysis of the factors affecting potential surface impacts of underground coal mining operations in the State.

(ii) *Approval of site-specific angle of draw.* A permittee or permit applicant may request that the presumption apply to an angle of draw different from that established in the regulatory program. The regulatory authority may approve application of the presumption to a site-specific angle of draw different than that contained in the State or Federal program based on a site-specific analysis submitted by an applicant. To establish a site-specific angle of draw, an applicant must demonstrate and the regulatory authority must determine in writing that the proposed angle of draw has a more reasonable basis than the standard set forth in the State or Federal program, based on a site-specific geotechnical analysis of the potential surface impacts of the mining operation.

(iii) *No presumption where access for pre-subsidence survey is denied.* If the permittee was denied access to the land or property for the purpose of conducting the pre-subsidence survey in accordance with § 784.20(a) of this chapter, no rebuttable presumption will exist.

(iv) *Rebuttal of presumption.* The presumption will be rebutted if, for example, the evidence establishes that: The damage predated the mining in question; the damage was proximately caused by some other factor or factors and was not proximately caused by subsidence; or the damage occurred outside the surface area within which subsidence was actually caused by the mining in question.

(v) *Information to be considered in determination of causation.* In any determination whether damage to protected structures was caused by subsidence from underground mining, all relevant and reasonably available information will be considered by the regulatory authority.

(5) *Adjustment of bond amount for subsidence damage.* When subsidence-related material damage to land, structures or facilities protected under paragraphs (c)(1) through (c)(3) of this section occurs, or when contamination, diminution, or interruption to a water supply protected under § 817.41 (j) occurs, the regulatory authority must require the permittee to obtain additional performance bond in the amount of the estimated cost of the repairs if the permittee will be repairing, or in the amount of the decrease in value if the permittee will be compensating the owner, or in the amount of the estimated cost to replace the protected water supply if the permittee will be replacing the water supply, until the repair, compensation, or replacement is completed. If repair, compensation, or replacement is completed within 90 days of the occurrence of damage, no additional bond is required. The regulatory authority may extend the 90-day time frame, but not to exceed one year, if the permittee demonstrates and the regulatory authority finds in writing that subsidence is not complete, that not all probable subsidence-related material damage has occurred to lands or protected structures, or that not all reasonably anticipated changes have occurred affecting the protected water supply, and that therefore it would be unreasonable to complete within 90 days the repair of the subsidence-related material damage to lands or protected structures, or the replacement of protected water supply.

(d) Underground mining activities shall not be conducted beneath or adjacent to (1) public buildings and facilities; (2) churches, schools, and hospitals; or (3) impoundments with a storage capacity of 20 acre-feet or more or bodies of water with a volume of 20 acre-feet or more, unless the subsidence control plan demonstrates that subsidence will not cause material damage to, or reduce the reasonably foreseeable use of, such features or facilities. If the regulatory authority determines that it is necessary in order to minimize the potential for material damage to the features or facilities described above or to any aquifer or body of water that serves as a significant water source for any public water supply system, it may limit the percentage of coal extracted under or adjacent thereto.

(e) If subsidence causes material damage to any of the features or facilities covered by paragraph (d) of this section, the regulatory authority may suspend mining under or adjacent to such features or facilities until the subsidence control plan is modified to ensure prevention of further material damage to such features or facilities.

(f) The regulatory authority shall suspend underground mining activities under urbanized areas, cities, towns, and communities, and adjacent to industrial or commercial buildings, major impoundments, or perennial streams, if imminent danger is found to inhabitants of the urbanized areas, cities, towns, or communities.

(g) Within a schedule approved by the regulatory authority, the operator shall submit a detailed plan of the underground workings. The detailed plan shall include maps and descriptions, as appropriate, of significant features of the underground mine, including the size, configuration, and approximate location of pillars and entries, extraction ratios, measure taken to prevent or minimize subsidence and related damage, areas of full extraction, and other information required by the regulatory authority. Upon request of the operator, information submitted with the detailed plan may be held as confidential, in accordance with the requirements of § 773.6(d) of this chapter.

§ 817.122 Subsidence control: Public notice.

At least 6 months prior to mining, or within that period if approved by the regulatory authority, the underground mine operator shall mail a notification to all owners and occupants of surface property and structures above the underground workings. The notification shall include, at a minimum, identification of specific areas in which mining will take place, dates that specific areas will be undermined, and the location or locations where the operator's subsidence control plan may be examined.

§ 817.131 Cessation of operations: Temporary.

(a) Each person who conducts underground mining activities shall effectively support and maintain all surface access openings to underground operations, and secure surface facilities in areas in which there are no current operations, but operations are to be resumed under an approved permit. Temporary abandonment shall not relieve a person of his or her obligation to comply with any provisions of the approved permit.

(b) Before temporary cessation of mining and reclamation operations for a period of thirty days or more, or as soon as it is known that a temporary cessation will extend beyond 30 days, each person who conducts underground mining activities shall submit to the regulatory authority a notice of intention to cease or abandon operations. This notice shall include a statement of the exact number of surface acres and the horizontal and vertical extent of sub-surface strata which have been in the permit area prior to cessation or abandonment, the extent and kind of reclamation of surface area which will have been accomplished, and identification of the backfilling, regrading, revegetation, environmental monitoring, underground opening closures and water treatment activities that will continue during the temporary cessation.

§ 817.132 Cessation of operations: Permanent.

(a) The person who conducts underground mining activities shall close or backfill or otherwise permanently reclaim all affected areas, in accordance with this chapter and according to the permit approved by the regulatory authority.

(b) All surface equipment, structures, or other facilities not required for continued underground mining activities and monitoring, unless approved as suitable for the postmining land use or environmental monitoring, shall be removed and the affected lands reclaimed.

§ 817.133 Postmining land use.

(a) *General.* All disturbed areas shall be restored in a timely manner to conditions that are capable of supporting—

(1) The uses they were capable of supporting before any mining; or

(2) Higher or better uses.

(b) *Determining premining uses of land.* The premining uses of land to which the postmining land use is compared shall be those uses which the land previously supported, if the land has not been previously mined and has been properly managed. The postmining land use for land that has been previously mined and not reclaimed shall be judged on the basis of the land use that existed prior to any mining: *Provided that,* if the land cannot be reclaimed to the land use that existed prior to any mining because of the previously mined condition, the postmining land use shall be judged on the basis of the highest and best use that can be achieved which is compatible with surrounding areas and does not require the disturbance of areas previously unaffected by mining.

(c) *Criteria for alternative postmining land uses.* Higher or better uses may be approved by the regulatory authority as alternative postmining land uses after consultation with the landowner or the land management agency having jurisdiction over the lands, if the proposed uses meet the following criteria:

(1) There is a reasonable likelihood for achievement of the use.

(2) The use does not present any actual or probable hazard to public health and safety, or threat of water diminution or pollution.

(3) The use will not—

(i) Be impractical or unreasonable;

(ii) Be inconsistent with applicable land use policies or plans;

(iii) Involve unreasonable delay in implementation; or

(iv) Cause or contribute to violation of Federal, State, or local law.

(d) *Approximate original contour: Criteria for variance.* Surface coal mining operations that meet the requirements of this paragraph may be conducted under a variance from the requirement to restore disturbed areas to their approximate original contour, if the following requirements are satisfied:

(1) The regulatory authority grants the variance under a permit issued in accordance with § 785.16 of this chapter.

(2) The alternative postmining land use requirements of paragraph (c) of this section are met.

(3) All applicable requirements of the Act and the regulatory program, other than the requirement to restore disturbed areas to their approximate original contour, are met.

(4) After consultation with the appropriate land use planning agencies,

if any, the potential use is shown to constitute an equal or better economic or public use.

(5) The proposed use is designed and certified by a qualified registered professional engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site.

(6) After approval, where required, of the appropriate State environmental agencies, the watershed of the permit and adjacent areas is shown to be improved.

(7) The highwall is completely backfilled with spoil material, in a manner which results in a static factor of safety of at least 1.3, using standard geotechnical analysis.

(8) Only the amount of spoil as is necessary to achieve the postmining land use, ensure the stability of spoil retained on the bench, and meet all other requirements of the Act and this chapter is placed off the mine bench. All spoil not retained on the bench shall be placed in accordance with §§ 817.71 through 817.74 of this chapter.

(9) The surface landowner of the permit area has knowingly requested, in writing, that a variance be granted, so as to render the land, after reclamation, suitable for an industrial, commercial, residential, or public use (including recreational facilities).

(10) Federal, State, and local government agencies with an interest in the proposed land use have an adequate period in which to review and comment on the proposed use.

§ 817.150 Roads: General.

(a) *Road classification system.* (1) Each road, as defined in § 701.5 of this chapter, shall be classified as either a primary road or an ancillary road.

(2) A primary road is any road which is—

(i) Used for transporting coal or spoil;

(ii) Frequently used for access or other purposes for a period in excess of six months; or

(iii) To be retained for an approval postmining land use.

(3) An ancillary road is any road not classified as a primary road

(b) *Performance standards.* Each road shall be located, designed, constructed, reconstructed, used, maintained, and reclaimed so as to:

(1) Control or prevent erosion, siltation, and the air pollution attendant to erosion, including road dust and dust occurring on other exposed surfaces, by measures such as vegetating, watering, using chemical or other dust suppressants, or otherwise stabilizing all exposed surfaces in accordance with current, prudent engineering practices;

(2) Control or prevent damage to fish, wildlife, or otheir habitat and related environmental values;

(3) Control or prevent additional contributions of suspended solids to streamflow or runoff outside the permit area;

(4) Neither cause nor contribute to, directly or indirectly, the violation of State or Federal water quality standard applicable to receiving waters;

(5) Refrain from seriously altering the normal flow of water in streambeds or drainage channels;

(6) Prevent or control damage to public or private property, including the prevention or mitigation of adverse effects on lands within the boundaries of units of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including designated study rivers, and National Recreation Areas designated by Act of Congress; and

(7) Use nonacid- and nontoxic-forming substances in road surfacing.

(c) *Design and construction limits and establishment of design criteria.* To ensure environmental protection appropriate for their planned duration and use, including consideration of the type and size of equipment used, the design and construction or reconstruction of roads shall incorporate appropriate limits for grade, width, surface materials, surface drainage control, culvert placement, and culvert size, in accordance with current, prudent engineering practices, and any necessary design criteria established by the regulatory authority.

(d) *Location.* (1) No part of any road shall be located in the channel of an intermittent or perennial stream unless specifically approved by the regulatory authority in accordance with applicable §§ 817.41 through 817.43 and 817.57 of this chapter.

(2) Roads shall be located to minimize downstream sedimentation and flooding.

(e) *Maintenance.* (1) A road shall be maintained to meet the performance standards of this part and any additional criteria specified by the regulatory authority;

(2) A road damaged by a catastrophic event, such as a flood or earthquake, shall be repaired as soon as is practicable after the damage has occurred.

(f) *Reclamation.* A road not to be retained under an approved postmining land use shall be reclaimed in accordance with the approved reclamation plan as soon as practicable after it is no longer needed for mining and reclamation operations. This reclamation shall include:

(1) Closing the road to traffic;

(2) Removing all bridges and culverts unless approved as part of the postmining land use;

(3) Removing or otherwise disposing of road-surfacing materials that are incompatible with the postmining land use and revegetation requirements;

(4) Reshaping cut and fill slopes as necessary to be compatible with the postmining land use and to complement the natural drainage pattern of the surrounding terrain;

(5) Protecting the natural drainage patterns by installing dikes or cross drains as necessary to control surface runoff and erosion; and

(6) Scarifying or ripping the roadbed, replacing topsoil or substitute material and revegetating disturbed surfaces in accordance with §§ 817.22 and 817.111 through 817.116 of this chapter.

§ 817.151 Primary roads.

Primary roads shall meet the requirements of § 817.150 and the additional requirements of this section.

(a) *Certification.* The construction or reconstruction of primary roads shall be certified in a report to the regulatory authority by a qualified registered professional engineer, or in any State which authorizes land surveyors to certify the construction or reconstruction of primary roads, a qualified registered professional land surveyor, with experience in the design and construction of roads. The report shall indicate that the primary road has been constructed or reconstructed as designed and in accordance with the approved plan.

(b) *Safety factor.* Each primary road embankment shall have a minimum static factor of 1.3 or meet the requirements established under § 784.24(c).

(c) *Location.* (1) To minimize erosion, a primary road shall be located, insofar as is practicable, on the most stable available surface.

(2) Fords of perennial or intermittent streams by primary roads are prohibited unless they are specifically approved by the regulatory authority as temporary routes during periods of road construction.

(d) *Drainage control.* In accordance with the approved plan—

(1) Each primary road shall be constructed or reconstructed, and maintained to have adequate drainage control, using structures such as, but not limited to bridges, ditches, cross drains, and ditch relief drains. The drainage control system shall be designed to safely pass the peak runoff from a 10-

year, 6-hour precipitation event, or greater event as specified by the regulatory authority;

(2) Drainage pipes and culverts shall be installed as designed, and maintained in a free and operating condition and to prevent or control erosion at inlets and outlets;

(3) Drainage ditches shall be constructed and maintained to prevent uncontrolled drainage over the road surface and embankment;

(4) Culverts shall be installed and maintained to sustain the vertical soil pressure, the passive resistance of the foundation, and the weight of vehicles using the road;

(5) Natural stream channels shall not be altered or relocated without the prior approval of the regulatory authority in accordance with applicable §§ 816.41 through 816.43 and 816.57 of this chapter; and

(6) Except as provided in paragraph (c)(2) of this section, structures for perennial or intermittent stream channel crossings shall be made using bridges, culverts, low-water crossings, or other structures designed, constructed, and maintained using current, prudent engineering practices. The regulatory authority shall ensure that low-water crossings are designed, constructed, and maintained to prevent erosion of the structure or streambed and additional contributions of suspended solids to streamflow.

(e) *Surfacing.* Primary roads shall be surfaced with material approved by the regulatory authority as being sufficiently durable for the anticipated volume of traffic and the weight and speed of vehicles using the road.

§ 817.180 Utility installations.

All underground mining activities shall be conducted in a manner which minimizes damage, destruction, or disruption of services provided by oil, gas, and water wells; oil, gas, and coal-slurry pipelines, railroads; electric and telephone lines; and water and sewage lines which pass over, under, or through the permit area, unless otherwise approved by the owner of those facilities and the regulatory authority.

§ 817.181 Support facilities.

(a) Support facilities shall be operated in accordance with a permit issued for the mine or coal preparation plant to which it is incident or from which its operation results.

(b) In addition to the other provisions of this part, support facilities shall be located, maintained, and used in a manner that—

(1) Prevents or controls erosion and siltation, water pollution, and damage to public or private property; and

(2) To the extent possible using the best technology currently available—

(i) Minimizes damage to fish, wildlife, and related environmental values; and

(ii) Minimizes additional contributions of suspended solids to streamflow or runoff outside the permit area. Any such contributions shall not be in excess of limitations of State or Federal law.

§ 817.200 Interpretative rules related to general performance standards.

The following interpretations of rules promulgated in part 817 of this chapter have been adopted by the Office of Surface Mining Reclamation and Enforcement.

(a)–(b) [Reserved]

(c) *Interpretation of § 816.22(e)—Topsoil Removal.* (1) Results of physical and chemical analyses of overburden and topsoil to demonstrate that the resulting soil medium is equal to or more suitable for sustaining revegetation than the available topsoil, provided that trials, and tests are certified by an approved laboratory in accordance with 30 CFR 816.22(e)(1)(ii), may be obtained from any one or a combination of the following sources:

(i) U.S. Department of Agriculture Soil Conservation Service published data based on established soil series;

(ii) U.S. Department of Agriculture Soil Conservation Service Technical Guides;

(iii) State agricultural agency, university, Tennessee Valley Authority, Bureau of Land Management or U.S. Department of Agriculture Forest Service published data based on soil series properties and behavior, or

(iv) Results of physical and chemical analyses, field site trials, or greenhouse tests of the topsoil and overburden materials (soil series) from the permit area.

(2) If the operator demonstrates through soil survey or other data that the topsoil and unconsolidated material are insufficient and substitute materials will be used, only the substitute materials must be analyzed in accordance with 30 CFR 816.22(e)(1)(i).

(d) *Interpretation of § 817.133: Postmining land use.* (1) The requirements of 30 CFR 784.15(a)(2), for approval of an alternative postmining land use, may be met by requesting approval through the permit revision procedures of 30 CFR 774.13 rather than requesting such approval through the permit application. The original permit application, however, must demonstrate that the land will be returned to its premining land use capability as required by 30 CFR 817.133(a).

An application for a permit revision of this type, (i) must be submitted in accordance with the filing deadlines of 30 CFR 774.13, (ii) shall constitute a significant alteration from the mining operations contemplated by the original permit, and (iii) shall be subject to the requirements of 30 CFR part 773 and 775.

(2) [Reserved]

■ 14. Revise part 824 to read as follows:

PART 824—SPECIAL PERMANENT PROGRAM PERFORMANCE STANDARDS—MOUNTAINTOP REMOVAL

Sec.

824.1 Scope.
824.2 Objectives.
824.11 Mountaintop removal: Performance standards.

Authority: Secs. 102, 201, 501, 503, 504, 506, 508, 510, 515, 517, 701 Pub. L. 95–87, 91 Stat. 448, 449, 467, 470, 471, 474, 478, 480, 486, 498, 516 (30 U.S.C. 1202, 1211, 1251, 1253, 1254, 1256, 1258, 1260, 1265, 1267, 1291).

§ 824.1 Scope.

This part sets forth special environmental protection performance, reclamation, and design standards for surface coal mining activities constituting mountaintop removal mining.

§ 824.2 Objectives.

The objectives of this part are to—

(a) Enhance coal recovery;

(b) Reclaim the land to equal or higher postmining use; and

(c) Protect and enhance environmental and other values protected under the Act and this chapter.

§ 824.11 Mountaintop removal: Performance standards.

(a) Under an approved regulatory program, surface coal mining activities may be conducted under a variance from the requirement of this subchapter for restoring affected areas to their approximate original contour, if—

(1) The regulatory authority grants the variance under a permit, in accordance with 30 CFR 785.14;

(2) The activities involve the mining of an entire coal seam running through the upper fraction of a mountain, ridge, or hill, by removing all of the overburden and creating a level plateau or gently rolling contour with no highwalls remaining;

(3) An industrial, commercial, agricultural, residential, or public facility (including recreational facilities)

use is proposed and approved for the affected land;

(4) The alternative land use requirements of § 816.133(a) through (c) of this chapter are met;

(5) All applicable requirements of this subchapter and the regulatory program, other than the requirement to restore affected areas to their approximate original contour, are met;

(6) An outcrop barrier of sufficient width, consisting of the toe of the lowest coal seam, and its associated overburden, are retained to prevent slides and erosion, except that the regulatory authority may permit an exemption to the retention of the coal barrier requirement if the following conditions are satisfied:

(i) The proposed mine site was mined prior to May 3, 1978, and the toe of the lowest seam has been removed; or

(ii) A coal barrier adjacent to a head-of-hollow fill may be removed after the elevation of a head-of-hollow fill attains the elevation of the coal barrier if the head-of-hollow fill provides the stability otherwise ensured by the retention of a coal barrier;

(7) The final graded slopes on the mined area are less than 1*v*:5*h,* so as to create a level plateau or gently rolling configuration, and the outslopes of the plateau do not exceed 1*v*:2*h* except where engineering data substantiates, and the regulatory authority finds, in writing, and includes in the permit under 30 CFR 785.14, that a minimum static safety factor of 1.5 will be attained;

(8) The resulting level or gently rolling contour is graded to drain inward from the outslope, except at specified points where it drains over the outslope in stable and protected channels. The drainage shall not be through or over a valley or head-of-hollow fill.

(9) Natural watercourses below the lowest coal seam mined are not damaged;

(10) All waste and acid-forming or toxic-forming materials, including the strata immediately below the coal seam, are covered with non-toxic spoil to prevent pollution and achieve the approved postmining land use; and

(11) Spoil is placed on the mountaintop bench as necessary to achieve the postmining land use approved under paragraphs (a)(3) and (a)(4) of this section. All excess spoil material not retained on the mountaintop shall be placed in accordance with 30 CFR 816.41 and 816.43 and 816.71 through 816.74.

■ 15. Revise part 827 to read as follows:

PART 827—PERMANENT PROGRAM PERFORMANCE STANDARDS—COAL PREPARATION PLANTS NOT LOCATED WITHIN THE PERMIT AREA OF A MINE

Sec.
827.1 Scope.
827.11 General requirements.
827.12 Coal preparation plants: Performance standards.
827.13 Coal preparation plants: Interim performance standards.

Authority: 30 U.S.C. 1201 *et seq.,* and Pub. L. 100–34.

§ 827.1 Scope.

This part sets forth requirements for coal preparation plants operated in connection with a coal mine but outside the permit area for a specific mine.

§ 827.11 General requirements.

Each person who operates a coal preparation plant subject to this part shall obtain a permit in accordance with § 785.21 of this chapter, obtain a bond in accordance with subchapter J of this chapter, and operate that plant in accordance with the requirements of this part.

§ 827.12 Coal preparation plants: Performance standards.

Except as provided in § 827.13 of this part, the construction, operation, maintenance, modification, reclamation, and removal activities at coal preparation plants shall comply with the following:

(a) Signs and markers for the coal preparation plant, coal processing waste disposal area, and water-treatment facilities shall comply with § 816.11 of this chapter.

(b) Any stream channel diversion shall comply with § 816.43 of this chapter.

(c) Drainage from any disturbed area related to the coal preparation plant shall comply with §§ 816.45 through 816.47 of this chapter, and all discharges from these areas shall meet the requirements of §§ 816.41 and 816.42 of this chapter and any other applicable State or Federal law.

(d) Permanent impoundments associated with coal preparation plants shall meet the requirements of §§ 816.49 and 816.56 of this chapter. Dams constructed of, or impounding, coal processing waste shall comply with § 816.84 of this chapter.

(e) Disposal of coal processing waste, noncoal mine waste, and excess spoil shall comply with §§ 816.81, 816.83, 816.84, 816.87, 816.89, and 816.71 through 816.74 of this chapter, respectively.

(f) Fish, wildlife, and related environmental values shall be protection in accordance with § 816.97 of this chapter.

(g) Support facilities related to the coal preparation plant shall comply with § 816.181 of this chapter.

(h) Roads shall comply with §§ 816.150 and 816.151 of this chapter.

(i) Cessation of operations shall be in accordance with §§ 816.131 and 816.132 of this chapter.

(j) Erosion and air pollution attendant to erosion shall be controlled in accordance with § 816.95 of this chapter.

(k) Adverse effects upon, or resulting from, nearby underground coal mining activities shall be minimized by appropriate measures including, but not limited to, compliance with § 816.79 of this chapter.

(l) Reclamation shall follow proper topsoil handling, backfilling and grading, revegetation, and postmining land use procedures in accordance with §§ 816.22, 816.100. 816.102, 816.104, 816.106, 816.111, 816.113, 816.114, 816.116, and 816.133 of this chapter, respectively.

§ 827.13 Coal preparation plants: Interim performance standards.

(a) Persons operating or who have operated coal preparation plants after July 6, 1984, which were not subject to this chapter before July 6, 1984, shall comply with the applicable interim or permanent program performance standards of the State in which such plants are located, as follows:

(1) If located in a State in which either interim or permanent program performance standards apply to such plants, the applicable program standards of the State program shall apply;

(2) If located in a State with a State program which must be amended in order to regulate such plants, the interim program performance standards in subchapter B of this chapter shall apply; and

(3) If located in a State with a Federal program, all such plants shall be subject to the interim program performance standards in subchapter B of this chapter.

(b) After a person described in paragraph (a) of this section obtains a permit to operate a coal preparation plant, the performance standards specified in § 827.12 shall be applicable to the operation of that plant instead of those specified in paragraph (a) of this section.

Dated: October 26, 2017.

Katharine S. MacGregor,

Acting Assistant Secretary, Land and Minerals Management.

[FR Doc. 2017–24307 Filed 11–16–17; 8:45 am]

BILLING CODE 4310–05–P

FEDERAL REGISTER

Vol. 82 Friday,
No. 221 November 17, 2017

Part IV

The President

Proclamation 9674—Commemoration of the 50th Anniversary of the Vietnam War

Federal Register
Vol. 82, No. 221
Friday, November 17, 2017

Presidential Documents

Title 3—

The President

Proclamation 9674 of November 10, 2017

Commemoration of the 50th Anniversary of the Vietnam War

By the President of the United States of America

A Proclamation

Today, I lead our Nation in somber reflection as we continue the 13-year Commemoration of the 50th Anniversary of the Vietnam War that began in 2012. We salute our brave Vietnam veterans who, in service to our Nation and in defense of liberty, fought gallantly against the spread of communism and defended the freedom of the Vietnamese people.

Fifty years ago, in 1967, nearly 500,000 American troops served in South Vietnam, along with approximately 850,000 troops of our allies. Today, during Veterans and Military Families Month and as the Federal Government observes Veterans Day, I am in Vietnam alongside business and political leaders to advance the interests of America, and to promote peace and stability in this region and around the world. I cherish this opportunity to recall, with humility, the sacrifices our veterans made for our freedom and our Nation's strength.

During this Commemoration of the 50th Anniversary of the Vietnam War, we embrace our responsibility to help our Vietnam veterans and their families heal from the heavy toll of war. We remember the more than 58,000 whose names are memorialized on a black granite wall in our Nation's capital for having borne the heaviest cost of war. We also pay tribute to the brave patriots who suffered as prisoners of war, and we stand steadfast in our commitment not to rest until we account for the 1,253 heroes who have not yet returned to American soil.

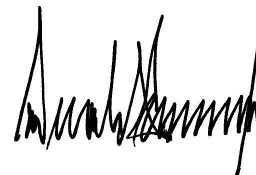
To ensure the sacrifices of the 9 million heroes who served during this difficult chapter of our country's history are remembered for generations to come, I signed into law the Vietnam War Veterans Recognition Act of 2017, designating March 29 of each year as National Vietnam War Veterans Day. Throughout this Commemoration of the 50th Anniversary of the Vietnam War, and every March 29 thereafter, we will honor all those who answered our Nation's call to duty. We vow to never again confuse personal disapproval of war with prejudice against those who honorably wear the uniform of our Armed Forces. With conviction, our Nation pledges our enduring respect, our continuing care, and our everlasting commitment to all Vietnam veterans.

We applaud the thousands of local, State, and national organizations, businesses, and governmental entities that have already partnered with the Federal Government in the Commemoration of the 50th Anniversary of the Vietnam War. Because of their remarkable leadership and dedication, countless Vietnam veterans and their families have been personally and publicly thanked and honored in ceremonies in towns and cities throughout our country. During my Administration, I promise to continue coordinated efforts to recognize all veterans of the Vietnam War for their service and sacrifice, and to provide them with the heartfelt acknowledgement and gratitude that they and their families so richly deserve.

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 confirm the commitment of this Nation to the Commemoration of the 50th Anniversary of the Vietnam War, which began on Memorial Day, 2012 and will continue through Veterans

Day, 2025. I call upon all Americans to offer each of our Vietnam veterans and their families a thank you on behalf of the Nation, both privately and during public ceremonies and programs across our country.

IN WITNESS WHEREOF, I have hereunto set my hand this tenth day of November, 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.



[FR Doc. 2017–25164
Filed 11–16–17; 11:15 am]
Billing code 3295–F8–P

Reader Aids

Federal Register

Vol. 82, No. 221

Friday, November 17, 2017

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations

General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6050**
Public Laws Update Service (numbers, dates, etc.)	**741–6043**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.fdsys.gov.**

Federal Register information and research tools, including Public Inspection List, indexes, and Code of Federal Regulations are located at: **www.ofr.gov.**

E-mail

FEDREGTOC (Daily Federal Register Table of Contents Electronic Mailing List) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new**, enter your email address, then follow the instructions to join, leave, or manage your subscription.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html** and select *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

CFR Checklist. Effective January 1, 2009, the CFR Checklist no longer appears in the Federal Register. This information can be found online at **http://bookstore.gpo.gov/.**

FEDERAL REGISTER PAGES AND DATE, NOVEMBER

50491–50798 1
50799–51148 2
51149–51332 3
51333–51548 6
51549–51752 7
51735–51972 8
51973–52172 9
52173–52642 13
52643–52822 14
52823–53396 15
53397–54288 16
54289–55026 17

CFR PARTS AFFECTED DURING NOVEMBER

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

2 CFR

Ch. IX 50491

3 CFR

Proclamations:

9665 51535
9666 51537
9667 51539
9668 51541
9669 51543
9670 51547
9671 51965
9672 52641
9673 52821
9674 55025

Administrative Orders:

Notices:
Notice of October 31, 2017 50799
Notice of November 6, 2017 51967
Notice of November 6, 2017 51969
Notice of November 6, 2017 51971

4 CFR

81 51753

5 CFR

532 50801
Ch. XXIII 50491
5601 50493
9801 51333

Proposed Rules:

890 51170

7 CFR

1 51149
205 52643
301 50801
905 53397
4279 50802

Proposed Rules:

340 51582
3419 52250

10 CFR

2 52823
9 52823
40 52823
50 52823
61 52823
71 52823
73 52823
110 52823
Ch. II 50491
Ch. III 50491
Ch. X 50491

Proposed Rules:

30 51363
50 52862
52 52862
431 50844

11 CFR

Proposed Rules:

110 52863

12 CFR

34 51973
204 51754
209 52173
213 51975
226 .... 51973, 51977
1013 51975
1026 .... 51973, 51977
1041 54472

13 CFR

107 52174

14 CFR

21 .... 51549, 51550, 52826
25 .... 50496, 50500, 50502
33 53400
39 .... 51335, 51338, 51340, 51552, 51979, 52644, 52827, 52830, 52832, 52835, 52838, 52840, 52844
71 .... 50502, 50503, 50504, 50505, 50506, 50508, 50509, 50510, 51342, 51756
73 51344
95 51981

Proposed Rules:

Ch. I 51178
21 53432
25 50581
27 50583
29 50583
39 .... 50847, 50849, 51170, 51172, 51175, 51364, 51367, 51583, 51782, 52015, 52022, 52676, 54302, 54304
71 .... 50593, 50594, 50596
Ch. II 51178
Ch. III 51178

15 CFR

740 .... 50511, 51983
746 51983

Proposed Rules:

801 52863

16 CFR

314 52846

Proposed Rules:

305 52024

17 CFR

Proposed Rules:

229 50988
230 50988

232....50988
239....50988
240....50988
249....50988
270....50988
274....50988
275....50988

18 CFR

35....53403
Ch. I....50517
1301....51757, 52647

19 CFR

24....50523
111....50523

20 CFR

1011....52186

21 CFR

1....51345
73....51554
117....51345
507....51345
573....52207
862....51558
866....50530, 51560, 51567, 52647
876....52649
1271....54289, 54290
1308....51154
Proposed Rules:
11....52036
73....52037
101....52036
170....53433
570....53433
573....50598
880....51585

23 CFR

Proposed Rules:
Ch. I....51178
490....51786
Ch. II....51178
Ch. III....51178

25 CFR

Ch. I....50532
Ch. II....50532
Ch. III....50532
Ch. V....50532
Ch. VI....50532
Ch. VII....50532
Proposed Rules:
514....52253

26 CFR

1....52848

29 CFR

1926....51986
4022....52848

30 CFR

Ch. II....50532
Ch. IV....50532
Ch. V....50532
Ch. VII....50532
700....54924
701....54924
773....54924
774....54924
777....54924
779....54924
780....54924
783....54924
784....54924
785....54924
800....54924
816....54924
817....54924
824....54924
827....54924
917....53411
943....54292
Ch. XII....50532

31 CFR

515....51998
543....52209
1010....51758

33 CFR

100....50575, 51765, 53414
117....50577, 51158, 51766, 52004, 52005, 52210
165....50578, 51347, 51767, 52005, 52007, 52210, 52212, 53418, 53421
334....53422
Proposed Rules:
110....54307
117....52678
165....52680
334....53438, 53440

34 CFR

681....53373

36 CFR

Ch. I....50532
Ch. II....50580
Proposed Rules:
13....52868

37 CFR

1....52780
41....52780
42....51570, 52780
201....52213, 52221
202....52224
Proposed Rules:
201....51369, 52258
202....51369, 52258
381....51589

38 CFR

4....50802
17....51770
21....54295
61....51158
62....51158

40 CFR

Ch. I....51160
52....50580, 50807, 50811, 50814, 51349, 51575, 52651, 52655, 52664, 52667, 54298, 54299, 54300
61....52667
62....51350, 52667
70....52667
81....54232
97....50580
180....51351, 51355, 52669, 53423
372....52674
Proposed Rules:
52....50851, 50853, 51178, 51594, 52259, 52682, 52683, 54307, 54309
60....51787, 51788, 51794
62....51380
63....51380
1037....53442
1068....53442

41 CFR

Ch. 109....50491

42 CFR

405....52976
410....52976
413....50738
414....50738, 52356, 52976, 53568
416....52356
419....52356
424....52976
425....52976
484....51676
Proposed Rules:
71....54314
73....54314
84....54315

43 CFR

Subtitle A....50532
Subtitle B....50532

45 CFR

Proposed Rules:
147....51052
153....51052
154....51052
155....51052
156....51052
157....51052
158....51052

46 CFR

Proposed Rules:
Ch. II....51178

47 CFR

2....50820
15....50820
18....50820
73....50820, 51178, 54301
74....50820
78....50820
80....50820
87....50820
90....50820
101....50820
Proposed Rules:
1....50598
25....52864
54....51180

48 CFR

Ch. 1....51526
1....51527, 51773
4....51527, 51773
9....51527, 51773
17....51527, 51773
22....51358, 51527, 51773
42....51526, 51773
52....51358, 51527, 51773
Ch. 9....50491
1009....53426
1052....53426
Proposed Rules:
Ch. 12....51178

49 CFR

40....52229
Proposed Rules:
Ch. I....51178
Ch. II....51178
Ch. III....51178
Ch. V....51178
Ch. VI....51178
Ch. VII....51178
Ch. VIII....51178
Ch. X....51178
Ch. XI....51178

50 CFR

Ch. I....50532
20....51538
32....51940, 52009
36....52009
300....52849
Ch. IV....50532
622....50839, 51577, 51777, 52248
648....51578, 51778, 52249, 52675, 52851, 53430
660....51166
679....51168, 52011
680....52011
Proposed Rules:
Ch. I....51382
17....50606, 52262
224....51186
226....51186
300....52700
648....51492, 51594
660....51381
697....52871

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List November 6, 2017

Public Laws Electronic Notification Service (PENS)

PENS is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

Note: This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.