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Contents

Federal Register

Vol. 79, No. 240

Monday, December 15, 2014

Agency for Toxic Substances and Disease Registry
NOTICES
Draft Toxicological Profiles, 74093–74094

Agriculture Department
See Commodity Credit Corporation
See Farm Service Agency
See Rural Housing Service

Arts and Humanities, National Foundation
See National Foundation on the Arts and the Humanities

Bureau of Consumer Financial Protection
PROPOSED RULES
2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 74176–74305
NOTICES
Fair Credit Reporting Act Disclosures, 74068–74069

Centers for Disease Control and Prevention
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 74094–74101

Children and Families Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 74101

Coast Guard
RULES
Drawbridge Operations:
Cheesequake Creek, Morgan, NJ, 74025
Safety Zones:
David Beahm, Hudson River, New York, NY, 74030–74031
Kent Narrows Drawbridge Repairs, Kent Island Narrows, Queen Anne's County, MD, 74025–74028
Reduced Visibility, Sector St. Petersburg Captain of the Port Zone, FL, 74028–74030
PROPOSED RULES
Safety Zones:
City of Valdez July 4th Fireworks Display, Port Valdez, Valdez, AK, 74044–74046

Commerce Department
See Foreign-Trade Zones Board
See International Trade Administration
See National Oceanic and Atmospheric Administration
See Patent and Trademark Office

Commodity Credit Corporation
RULES
Noninsured Crop Disaster Assistance Program, 74562–74583

Corporation for National and Community Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 74069–74071

Defense Department
RULES
Federal Acquisition Regulations:
Establishing a Minimum Wage for Contractors, 74544–74553
Federal Acquisition Circular, 74554
Federal Acquisition Circular 2005–79; Introduction, 74544
Prohibition on Contracting with Inverted Domestic Corporations, 74554–74557
PROPOSED RULES
Federal Acquisition Regulations:
Prohibition on Contracting with Inverted Domestic Corporations—Representation and Notification, 74558–74559

Education Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Teacher Cancellation Low Income Directory, 74071
Applications for New Awards:
State Personnel Development Grants Program, 74071–74079

Energy Department
See Federal Energy Regulatory Commission
RULES
Energy Conservation Program:
Energy Conservation Standards for Commercial Clothes Washers, 74492–74541

Environmental Protection Agency
PROPOSED RULES
Air Quality State Implementation Plans; Approvals and Promulgations:
New York; Infrastructure for the 2008 Lead National Ambient Air Quality Standard, 74046–74054
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Technical Assistance Needs Assessments at Superfund Remedial or Removal Sites, 74081–74082
Meetings:
IRIS Bimonthly Public Science Meeting Calendar for 2015, 74082–74084
Senior Executive Service Performance Review Board; Membership, 74084–74085

Executive Office of the President
See Trade Representative, Office of United States

Farm Service Agency
RULES
Noninsured Crop Disaster Assistance Program, 74562–74583

Federal Aviation Administration
RULES
Restricted Area Boundary Descriptions; Amendments:
Cape Canaveral, FL, 74016–74018

PROPOSED RULES
Airworthiness Directives:
Airbus Airplanes, 74035–74037
Sikorsky Aircraft Corporation (Type Certificate Previously held by Schweizer Aircraft Corporation) Helicopters, 74037–74038
The Boeing Company Airplanes, 74032–74035, 74038–74042
Establishment of Class E Airspace:
Hazen, NV, 74042–74043

Federal Communications Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 74085–74087
Special Access Data Collection; Deadline Extension, 74087–74088

Federal Energy Regulatory Commission
NOTICES
Combined Filings, 74079–74081

Federal Highway Administration
NOTICES
Federal Agency Actions:
California Highways, 74157–74158

Federal Motor Carrier Safety Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Generic Clearance of Customer Satisfaction Surveys, 74158–74159
Qualification of Drivers; Exemption Applications:
Diabetes Mellitus, 74159–74168
Epilepsy and Seizure Disorders, 74170–74173
Vision, 74168–74170

Federal Reserve System
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 74088–74091
Formations of, Acquisitions by, and Mergers of Bank Holding Companies, 74091

Financial Crimes Enforcement Network
PROPOSED RULES
Special Measures Against PJSC Trustbank, Formerly Known as Infobank; Withdrawal, 74043

Fiscal Service
RULES
Retirement Savings Bonds, 74023–74025

Fish and Wildlife Service
NOTICES
Environmental Impact Statements; Availability, etc.:
Counties of Yuba and Sutter, CA, 74107–74111

Food and Drug Administration
RULES
New Animal Drugs:
Changes of Sponsor; Withdrawals, 74018–74021
Oxytetracycline; Oral Dosage; Withdrawals, 74021

Foreign-Trade Zones Board
NOTICES
Production Activity Authorizations:
Neolpharma, Inc., Foreign-Trade Zone 7, Mayaguez, PR, 74063
Production Authority Approvals:
Mitsubishi Rayon Carbon Fiber and Composites, Inc., Foreign-Trade Zone 143, Sacramento, CA, 74063
Toray Carbon Fibers America, Inc., Foreign-Trade Zone 83, Decatur, AL, 74063

General Services Administration
RULES
Federal Acquisition Regulations:
Establishing a Minimum Wage for Contractors, 74544–74553
Federal Acquisition Circular, 74554
Federal Acquisition Circular 2005–79; Introduction, 74544
Prohibition on Contracting with Inverted Domestic Corporations, 74554–74557
PROPOSED RULES
Federal Acquisition Regulations:
Prohibition on Contracting with Inverted Domestic Corporations—Representation and Notification, 74558–74559

Health and Human Services Department
See Agency for Toxic Substances and Disease Registry
See Centers for Disease Control and Prevention
See Children and Families Administration
See Food and Drug Administration
See National Institutes of Health
NOTICES
Findings of Research Misconduct, 74091–74093

Homeland Security Department
See Coast Guard

Housing and Urban Development Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Energy Efficient Mortgages, 74103
Pre-Purchase Homeownership Counseling Demonstration and Impact Evaluation, 74105–74107
Protection and Enhancement of Environmental Quality, 74105
Self-Help Homeownership Opportunity Program, 74104–74105
Funding Availability:
HOPE VI Main Street Grant Program, 74107

Interior Department
See Fish and Wildlife Service
See Land Management Bureau
See National Park Service

International Trade Administration
NOTICES
Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
Calcium Hypochlorite from the People's Republic of China, 74064–74065
Determinations of Sales at Less Than Fair Value:
Calcium Hypochlorite from the People's Republic of China, 74065–74067

Limitations of Duty-free Imports:
Apparel Articles Assembled in Haiti under the Haitian Hemispheric Opportunity Through Partnership for Encouragement, 74067–74068

International Trade Commission
NOTICES
Investigations; Determinations, Modifications, and Rulings, etc.:
Certain Lithium Silicate Materials and Products Containing the Same, 74113

Labor Department
See Occupational Safety and Health Administration

Land Management Bureau
NOTICES
Closures:
Target Shooting Public Safety Closure on the Lake Mountains in Utah County, UT, 74111–74112

National Aeronautics and Space Administration
RULES
Federal Acquisition Regulations:
Establishing a Minimum Wage for Contractors, 74544–74553
Federal Acquisition Circular, 74554
Federal Acquisition Circular 2005–79; Introduction, 74544
Prohibition on Contracting with Inverted Domestic Corporations, 74554–74557
PROPOSED RULES
Federal Acquisition Regulations:
Prohibition on Contracting with Inverted Domestic Corporations-Representation and Notification, 74558–74559

National Council on Disability
NOTICES
Meetings; Sunshine Act, 74115

National Foundation on the Arts and the Humanities
NOTICES
Meetings:
Humanities Panel, 74115–74116

National Highway Traffic Safety Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 74173–74174

National Institutes of Health
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Evaluation of the NIH Academic Research Enhancement Award, 74101–74102
Requests for Nominations:
National Institute of Neurological Disorders and Stroke, Interagency Pain Research Coordinating Committee, 74102–74103

National Labor Relations Board
RULES
Representation; Case Procedures, 74308–74490
NOTICES
Members of Performance Review Boards, 74116

National Oceanic and Atmospheric Administration
PROPOSED RULES
Fisheries of the Exclusive Economic Zone Off Alaska:
Allocating Bering Sea and Aleutian Islands King and Tanner Crab Fishery Resources, 74058–74062
Fisheries of the Northeastern United States:
Northeast Region Standardized Bycatch Reporting Methodology Omnibus Amendment, 74056–74058

National Park Service
NOTICES
Eligible and Ineligible Lands for Consideration as Wilderness Areas; Assessments:
Big Cypress National Preserve, 74112–74113

Occupational Safety and Health Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Occupational Exposure to Hazardous Chemicals in Laboratories, 74113–74115

Office of United States Trade Representative
See Trade Representative, Office of United States

Patent and Trademark Office
NOTICES
Meetings:
Trade Secret Topics, 74068

Pension Benefit Guaranty Corporation
RULES
Allocation of Assets in Single-Employer Plans:
Benefits Payable in Terminated Single-Employer Plans; Interest Assumptions for Valuing and Paying Benefits, 74021–74023

Personnel Management Office
PROPOSED RULES
Federal Employees Health Benefits Program:
Plan Performance Assessment System, 74054–74056
NOTICES
Excepted Service:
Consolidated Listing of Schedules A, B, and C Exceptions, 74116–74142
Requests for Nominations:
Multi-State Plan Program Advisory Board, 74142

Public Debt Bureau
See Fiscal Service

Rural Housing Service
RULES
Direct Single Family Housing Loans and Grants, 74015–74016

Securities and Exchange Commission
NOTICES
Self-Regulatory Organizations; Proposed Rule Changes:
EDGA Exchange, Inc., 74144–74147
EDGX Exchange, Inc., 74147–74150
NASDAQ Stock Market LLC, 74150–74152
NYSE Arca, Inc., 74143–74144
NYSE MKT LLC, 74152–74153

Small Business Administration
NOTICES
Exemptions:
Midwest Mezzanine Fund V SBIC, LP, 74153–74154

Social Security Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 74154–74155

State Department
NOTICES
Culturally Significant Objects Imported for Exhibition:
Bjork, 74156
Kuba Textiles: Geometry in Form, Space, and Time, 74155
Piero di Cosimo: The Poetry of Painting in Renaissance Florence, 74155
The Habsburgs: Rarely Seen Artworks from Europe's Greatest Dynasty, 74156
Visiting Masterpiece: Gustav Klimt's Adam and Eve, 74156

Toxic Substances and Disease Registry Agency
See Agency for Toxic Substances and Disease Registry

Trade Representative, Office of United States
NOTICES
Determinations under the African Growth and Opportunity Act, 74156–74157

Transportation Department
See Federal Aviation Administration
See Federal Highway Administration
See Federal Motor Carrier Safety Administration
See National Highway Traffic Safety Administration

Treasury Department
See Financial Crimes Enforcement Network
See Fiscal Service

Veterans Affairs Department
NOTICES
Meetings:
Advisory Committee on Disability Compensation, 74174

Separate Parts In This Issue

Part II
Bureau of Consumer Financial Protection, 74176–74305

Part III
National Labor Relations Board, 74308–74490

Part IV
Energy Department, 74492–74541

Part V
Defense Department, 74544–74559
General Services Administration, 74544–74559
National Aeronautics and Space Administration, 74544–74559

Part VI
Agriculture Department, Commodity Credit Corporation, 74562–74583
Agriculture Department, Farm Service Agency, 74562–74583

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

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CFR PARTS AFFECTED IN THIS ISSUE

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

7 CFR
718 74561
1412 74561
1416 74561
1437 74561
3550 74015

10 CFR
431 74491

12 CFR
Proposed Rules:
1024 74175
1026 74175

14 CFR
73 74016
Proposed Rules:
39 (4 documents) 74032, 74035, 74037, 74038
71 74042

21 CFR
510 74018
520 (2 documents) 74018, 74021
522 74018
558 74018

29 CFR
101 74308
102 74308
103 74308
4022 74021
4044 74021

31 CFR
347 74023
Proposed Rules:
1010 74043

33 CFR
117 74025
165 (3 documents) 74025, 74028, 74030
Proposed Rules:
165 74044

40 CFR
Proposed Rules:
52 74046

48 CFR
Ch. 1 (2 documents) 74544, 74554
1 74544
9 74554
22 74544
52 (2 documents) 74544, 74554
Proposed Rules:
52 74558
1609 74054
1615 74054
1632 74054
1652 74054

50 CFR
Proposed Rules:
648 74056
680 74058

Rules and Regulations

Federal Register

Vol. 79, No. 240

Monday, December 15, 2014

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

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

DEPARTMENT OF AGRICULTURE

Rural Housing Service

7 CFR Part 3550

RIN 0575–AD01

Direct Single Family Housing Loans and Grants

AGENCY: Rural Housing Service, USDA.

ACTION: Final rule.

SUMMARY: The Rural Housing Service (RHS) is amending its regulation by changing the definition of ''rural'' or ''rural area.'' This change is a direct result of legislation passed under the Agricultural Act of 2014 (2014 Farm Bill) P.L. 113–79 in which the definition of ''rural'' and ''rural area'' was amended. No comments are being accepted for this final rule as this change has been mandated through a statutory requirement.

DATES: This rule will become effective January 14, 2015.

FOR FURTHER INFORMATION CONTACT: Shantelle Gordon, Program Analyst, Loan Origination Branch, Single Family Housing Direct Loan Division, Rural Housing Service, Stop 0783, 1400 Independence Avenue SW., Washington, DC 20250–0783, Telephone: 202–205–9567.

SUPPLEMENTARY INFORMATION:

Statutory Authority

Title V, Section 1480 of the Housing Act authorizes the Secretary of Agriculture to promulgate rules and regulations as deemed necessary to carry out the purpose of that title.

Executive Order 12866—Classification

This rule has been determined to be not significant and was not reviewed by the Office of Management and Budget (OMB) under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. In accordance with that Executive Order: (1) All State and local laws and regulations that are in conflict with this rule will be preempted; (2) No retroactive effect will be given to this rule; and (3) Administrative proceedings in accordance with the regulations of the National Appeals Division of USDA at 7 CFR part 11 must be exhausted before bringing suit in court challenging action taken under this rule unless those regulations specifically allow bringing suit at an earlier time.

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). The undersigned has determined and certified by signature of this document that this rule will not have a significant economic impact on a substantial number of small entities. There will be no significant information collection or regulatory requirements imposed on small entities under this rule.

Paperwork Reduction Act of 1995

In accordance with the Paperwork Reduction Act of 1995, the information collection activities associated with this rule are covered under OMB Number: 0575–0172. This rule contains no new reporting or recordkeeping requirements that would require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1501 *et seq.,* establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, RHS generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, or tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires RHS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for state, local, and tribal Governments or the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Environmental Impact Statement

This document has been reviewed in accordance with 7 CFR part 1940, subpart G, ''Environmental Program.'' It is the determination of RHS that this action does not constitute a major Federal action significantly affecting the quality of the human environment, and in accordance with the National Environmental Policy Act of 1969, Pub. L. 91–190, an Environmental Impact Statement is not required.

Programs Affected

The program affected by this rule is listed in the Catalog of Federal Domestic Assistance as 10.410, Very Low to Moderate Income Housing Loans.

Executive Order 12372—Intergovernmental Review of Federal Programs

For the reasons set forth in the final rule published at 7 CFR part 3015, subpart V, and the related notice (48 FR 29115), these programs are not subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials.

E-Government Act Compliance

The RHS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments

This executive order imposes requirements on RHS in the development of regulatory policies that have tribal implications or preempt tribal laws. RHS has determined that this final rule does not have a substantial direct effect on one or more Indian tribe(s) or on either the

relationship or the distribution of powers and responsibilities between the Federal Government and the Indian tribes. Thus, this rule is not subject to the requirements of Executive Order 13175.

Executive Order 13132—Federalism

The policies contained in this rule do not have any substantial direct effect on States, the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Nor does this rule impose substantial direct compliance costs on State and local Governments. Therefore, consultation with the States is not required.

Non-Discrimination Statement

USDA prohibits discrimination in all its programs and activities on the basis of race, color, national origin, age, disability, and where applicable, sex, marital status, familial status, parental status, religion, sexual orientation, political beliefs, genetic information, reprisal, or because all or part of an individual's income is derived from any public assistance program. (Not all prohibited bases apply to all programs.)

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Individuals who are deaf, hard of hearing or have speech disabilities may contact USDA through the Federal Relay Service at (800) 877–8339 or (877) 845–6136 (in Spanish). ''USDA is an equal opportunity provider, employer and lender.''

Persons with disabilities who require alternative means for communication of program information (*e.g.* Braille, large print, audiotape, etc.) should contact USDA TARTET Center at (202) 720–2600 (voice and TDD).

Background

When the Agricultural Act of 2014 (2014 Farm Bill) (P.L. 113–79) was passed on February 7, 2014, Section 6208 of the Farm Bill amended language to Section 520 of the Housing Act of 1949 (42 U.S.C. 1490) to include language that an area deemed rural prior to October 1, 1990, and later determined not to be rural after the 1990, 2000, or 2010 census, and any area deemed rural anytime between January 1, 2000, and December 31, 2010, will retain eligibility until the receipt of the 2020 census data if the area has a population in excess of 10,000 but not in excess of 35,000, is rural in character, and has a serious lack of mortgage credit. To ensure that 7 CFR part 3550 is in line with the revised provisions, RHS will revise its definition of ''rural area'' in 7 CFR 3550.10 to include the new language to the Housing Act of 1949, as amended.

List of Subjects in 7 CFR Part 3550

Administrative practice and procedure, Conflict of interests, Environmental impact statements, Equal credit opportunity, Fair housing, Accounting, Housing, Loan programs-Housing and community development, Low and moderate income housing, Manufactured homes, Reporting and recordkeeping requirements, Rural areas, Subsidies.

For the reasons stated in the preamble, chapter XXXV, Title 7 of the Code of Federal Regulations, is amended as follows:

PART 3550—DIRECT SINGLE FAMILY HOUSING LOANS AND GRANTS

■ 1. The authority citation for part 3550 continues to read as follows:

Authority: 5 U.S.C. 301; 42 U.S.C. 1480.

Subpart A—General

■ 2. In § 3550.10 revise the definition of ''Rural area'' to read as follows:

§ 3550.10 Definitions.

* * * * *

Rural area. A rural area is:

(a) Open country or any town, village, city, or place, including the immediate adjacent densely settled area, which is not part of or associated with an urban area and which:

(1) Has a population not in excess of 2,500 inhabitants; or

(2) Has a population in excess of 2,500 but not in excess of 10,000 if it is rural in character; or

(3) Has a population in excess of 10,000 but not in excess of 20,000, and—

(i) Is not contained within a Metropolitan Statistical Area; and

(ii) Has a serious lack of mortgage credit for lower and moderate-income families as determined by the Secretary of Agriculture and the Secretary of Housing and Urban Development.

(b) Any area classified as ''rural'' or a ''rural area'' prior to October 1, 1990, and determined not to be ''rural'' or a ''rural area'' as a result of data received from or after the 1990, 2000, or 2010 decennial census, and any area deemed to be a ''rural area'' at any time during the period beginning January 1, 2000, and ending December 31, 2010, shall continue to be so classified until the receipt of data from the decennial census in the year 2020, if such area has a population in excess of 10,000 but not in excess of 35,000, is rural in character, and has a serious lack of mortgage credit for lower and moderate-income families.

* * * * *

Dated: October 28, 2014.

Tony Hernandez,

Administrator, Rural Housing Service.

[FR Doc. 2014–29281 Filed 12–12–14; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 73

[Docket No. FAA–2014–0875; Airspace Docket No. 14–ASO–13]

RIN 2120–AA66

Amendment of Restricted Area Boundary Descriptions; Cape Canaveral, FL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; technical amendment.

SUMMARY: This action makes minor adjustments to the boundary descriptions of restricted areas R–2932, R–2933, R–2934 and R–2935 at Cape Canaveral, FL. The changes are required based on more accurate digital plotting of points that revealed minor mismatches between adjacent boundaries. The R–2933 description is also amended to remove exclusionary wording that no longer applies.

DATES: Effective date 0901 UTC, March 5, 2015.

FOR FURTHER INFORMATION CONTACT: Paul Gallant, Airspace Policy and Regulations Group, AJV–11, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Background

The introduction of more accurate digital plotting of airspace boundaries for aeronautical charting revealed minor mismatches in airspace boundaries adjacent to restricted areas R–2932,

R–2933, R–2934 and R–2935 at Cape Canaveral, FL. This action adjusts certain coordinates in the descriptions of the above restricted areas to reflect more accurate data.

In addition, this action removes obsolete wording from the description of restricted area R–2933, Cape Canaveral, Fl. When R–2933 was established in 1988 (53 FR 6796, March 3, 1988), another restricted area, R–2931, partially extended into R–2933. Accordingly, an exclusion was inserted in the R–2933 boundary description, which read as follows: ''excluding the area within a 2-statute mile radius circle centered at lat. 28°27′54″ N., long. 89°32′02″ W., from 5,000 feet MSL to and including 15,000 feet MSL.'' Restricted area R–2931 was later removed when the using agency informed the FAA it was no longer needed. However, when R–2933 was amended to remove the exclusion, only the words ''excluding the area within a 2-statute mile radius circle centered at lat. 28°27′54″ N., long. 89°32′02″ W.'' were actually removed, and the words ''from 5,000 feet MSL to and including 15,000 feet MSL'' were inadvertently retained in the boundary description. This action removes the unnecessary wording from the R–2933 description.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 73 to make minor updates to certain latitude/longitude coordinates in the descriptions of restricted areas R–2932, R–2933, R–2934 and R–2935 at Cape Canaveral, FL. The changes are based on more accurate digital plotting of the points which revealed several slight mismatches between adjacent boundaries. R–2933 is also amended to remove wording that no longer applies. The specific restricted area boundary changes are listed below:

R–2932: The point ''lat. 28°41′41″ N., long. 80°34′59″ W.'' is replaced with ''28°41′33″ N., long. 80°35′25″ W.;'' and the point ''28°25′01″ N., long. 80°30′29″ W.'' is replaced with 28°24′31″ N., long. 80°29′52″ W.'' These points are changed to match the adjacent boundary of warning area W–497A and W–497B.

R–2933: The point ''28°41′41″ N., long. 80°34′59″ W.'' is replaced with ''28°41′33″ N., long. 80°35′25″ W.'' to match warning area W–497A; and the point ''28°25′01″ N., long.80°30′29″ W.'' is replaced with ''28°24′31″ N., long. 80°29′52″ W.'' to match the boundaries of warning areas W–497A and W–497B.

In addition, this action removes the words ''from 5,000 feet MSL to and including 15,000 feet MSL'' from the boundary description in the regulatory text for restricted area R–2933. As described above, the airspace exclusion no longer exists.

R–2934: The point ''28°51′16″ N., long. 80°42′19″ W.'' is replaced with ''28°51′16″ N., long. 80°42′29″ W.'' to more accurately meet a point 3 nautical miles from the shoreline. The point ''28°41′41″ N., long. 80°34′59″ W.'' is replaced with ''28°41′33″ N., long. 80°35′25″ W.'' to match the boundary of warning area W–497A.

R–2935: The point ''28°58′01″ N., long. 80°46′59″ W.'' is replaced with 28°58′02″ N., long. 80°46′58″ W.;'' to intersect a point 3 nautical miles from the shoreline. The point ''28°51′16″ N., long. 80°42′19″ W.'' is replaced with ''28°51′16″ N., long. 80°42′29″ W.'' and the point ''28°25′01″ N., long. 80°30′29″ W.'' is replaced with ''28°24′31″ N., long. 80°29′52″ W.'' to match warning areas W–497A and W–497B. The point ''28°19′01″ N., long. 80°33′29″ W.'' is replaced with 28°19′01″ N., long. 80°33′00″ W.'' to intersect a point 3 nautical miles from the shoreline.

This amendment consists of minor editorial changes to update existing restricted area boundaries with more accurate digital information and remove obsolete wording. It does not affect the location, designated altitudes, or activities conducted within the restricted areas; therefore, notice and public procedure under 5 U.S.C. 553(b) are unnecessary.

The FAA has determined that this action only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it makes minor editorial changes to the descriptions of Restricted areas at Cape Canaveral, FL, providing more accurate coordinates and removing obsolete wording.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with 311d, FAA Order 1050.1E, Environmental Impacts: Policies and Procedures. This airspace action is a minor editorial change to the descriptions of restricted areas R–2932, R–2933, R–2934 and R–2935, at Cape Canaveral, FL, to reflect more accurate digital plotting of latitude/longitude coordinates and to remove exclusionary language that is no longer required in R–2933. It does not alter the location, altitudes, or activities conducted within the airspace; therefore, it is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exists that warrant preparation of an environmental assessment.

List of Subjects in 14 CFR Part 73

Airspace, Prohibited areas, Restricted areas.

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73, as follows:

PART 73—SPECIAL USE AIRSPACE

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

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 73.29 [Amended]

■ 2. Section 73.29 is amended as follows:

* * * * *

R–2932 Cape Canaveral, FL [Amended]

By removing the current boundaries and adding the following:

Boundaries. Beginning at lat. 28°39′21″ N., long. 80°42′39″ W.; to lat. 28°41′33″ N., long. 80°35′25″ W.; thence 3 NM from and parallel to the shoreline; to lat. 28°24′31″ N., long. 80°29′52″ W.; to lat. 28°25′01″ N., long. 80°37′59″ W.; to lat. 28°34′01″ N., long. 80°39′29″ W.; to the point of beginning.

R–2933 Cape Canaveral, FL [Amended]

By removing the current boundaries and adding the following:

Boundaries. Beginning at lat. 28°39′21″ N., long. 80°42′39″ W.; to lat. 28°41′33″ N., long. 80°35′25″ W.; thence 3 NM from and parallel to the shoreline; to lat. 28°24′31″ N., long. 80°29′52″ W.; to lat. 28°25′01″ N., long. 80°37′59″ W.; to lat. 28°34′01″ N., long. 80°39′29″ W.; to the point of beginning.

R–2934 Cape Canaveral, FL [Amended]

By removing the current boundaries and adding the following:

Boundaries. Beginning at lat. 28°49′11″ N., long. 80°50′44″ W.; to lat. 28°51′16″ N., long. 80°47′14″ W.; to lat. 28°51′16″ N., long. 80°42′29″ W.; thence 3 NM from and parallel to the shoreline; to lat. 28°41′33″ N., long. 80°35′25″ W.; to lat. 28°39′21″ N., long. 80°42′39″ W.; to lat. 28°34′01″ N., long. 80°39′29″ W.; to lat. 28°25′01″ N., long. 80°37′59″ W.; to lat. 28°25′01″ N., long. 80°41′44″ W.; to lat. 28°31′21″ N., long. 80°43′49″ W.; to lat. 28°38′01″ N., long. 80°47′01″ W.; to the point of beginning, excluding that airspace below 1,200 feet AGL west of a line from lat. 28°31′21″ N., long. 80°43′49″ W.; to lat. 28°28′41″ N., long. 80°40′29″ W.; to lat. 28°25′01″ N., long. 80°40′29″ W.

R–2935 Cape Canaveral, FL [Amended]

By removing the current boundaries and adding the following:

Boundaries. Beginning at lat. 28°47′21″ N., long. 81°04′59″ W.; to lat. 28°58′02″ N., long. 80°46′58″ W.; thence 3 NM from and parallel to the shoreline; to lat. 28°51′16″ N., long. 80°42′29″ W.; to lat. 28°51′16″ N., long. 80°47′14″ W.; to lat. 28°49′11″ N., long. 80°50′44″ W.; to lat. 28°38′01″ N., long. 80°47′01″ W.; to lat. 28°31′21″ N., long. 80°43′49″ W.; to lat. 28°25′01″ N., long. 80°41′44″ W.; to lat. 28°24′31″ N., long. 80°29′52″ W.; thence 3 NM from and parallel to the shoreline; to lat. 28°19′01″ N., long. 80°33′00″ W.; to lat. 28°19′01″ N., long. 80°46′29″ W.; to the point of beginning.

Issued in Washington, DC, on December 9, 2014.

Gary A. Norek,

Manager, Airspace Policy and Regulations Group.

[FR Doc. 2014–29268 Filed 12–12–14; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 510, 520, 522, and 558

[Docket No. FDA–2014–N–0002]

New Animal Drugs; Approval of New Animal Drug Applications; Change of Sponsor; Withdrawal of Approval of New Animal Drug Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule, technical amendment.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval actions for new animal drug applications (NADAs) and abbreviated new animal drug applications (ANADAs) during September and October 2014. FDA is also informing the public of the availability of summaries of the basis of approval and of environmental review documents, where applicable. The animal drug regulations are also being amended to reflect a change of sponsorship of six NADAs and four ANADAs, the voluntary withdrawal of approval of an ANADA, and a correcting amendment.

DATES: This rule is effective December 15, 2014, except for the amendment to 21 CFR 520.1660d, which is effective December 26, 2014.

FOR FURTHER INFORMATION CONTACT: George K. Haibel, Center for Veterinary Medicine (HFV–6), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–276–9019, *george.haibel@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: FDA is amending the animal drug regulations to reflect approval actions for NADAs and ANADAs during September and October 2014, as listed in table 1. In addition, FDA is informing the public of the availability, where applicable, of documentation of environmental review required under the National Environmental Policy Act (NEPA) and, for actions requiring review of safety or effectiveness data, summaries of the basis of approval (FOI Summaries) under the Freedom of Information Act (FOIA). These public documents may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday. Persons with access to the Internet may obtain these documents at the CVM FOIA Electronic Reading Room: *http://www.fda.gov/AboutFDA/CentersOffices/OfficeofFoods/CVM/CVMFOIAElectronicReadingRoom/default.htm.* Marketing exclusivity and patent information may be accessed in FDA's publication, Approved Animal Drug Products Online (Green Book) at: *http://www.fda.gov/AnimalVeterinary/Products/ApprovedAnimalDrugProducts/default.htm.*

In addition, Lloyd, Inc., 604 W. Thomas Ave., Shenandoah, IA 51601, has transferred ownership of, and all rights and interest in, the following approved applications to Akorn Animal Health, Inc., 1925 West Field Ct., Suite 300, Lake Forest, IL 60045.

File No.	Product name	21 CFR cite
139–236	ANASED (xylazine hydrochloride) Injectable Solution	522.2662
140–866	YOBINE (yohimbine hydrochloride) Injectable Solution	522.2670
140–994	TOLAZINE (tolazine hydrochloride) Injectable Solution	522.2474
200–055	VETAKET (ketamine hydrochloride) Injectable Solution	522.1222
200–332	BUTORPHIC (butorphanol tartrate) Injectable Solution	522.246

Bioniche Animal Health USA, Inc., 119 Rowe Rd., Athens, GA 30601, has transferred ownership of, and all rights and interest in, the following approved applications to Vétoquinol USA, Inc., 4250 N. Sylvania Ave., Fort Worth, TX 76137.

File No.	Product name	21 CFR cite
141–431	FOLLTROPIN (follicle stimulating hormone) Injection	522.1002
200–266	BUTEQUINE (phenylbutazone) Paste	520.1720c
200–432	NEXHA (hyaluronate sodium) Injection	522.1145

In addition, Veterinary Service, Inc. 4100 Bangs Ave., Modesto, CA 95356, has transferred ownership of, and all rights and interest in, NADA 065–252 for STREP–SOL (streptomycin sulfate) Oral Solution to Huvepharma AD, 5th Floor, 3A Nikolay Haitov Str., 1113 Sofia, Bulgaria.

Also, Elanco Animal Health, Inc., A Division of Eli Lilly & Co., Lilly Corporate Center, Indianapolis, IN 46285, has transferred ownership of, and all rights and interest in, NADA 141–272 for RECONCILE (fluoxetine hydrochloride) Chewable Tablets to Nexcyon Pharmaceuticals, Inc., 644 West Washington Ave., Madison, WI 53703.

At this time, the regulations are being amended to reflect these changes of sponsorship. Following these changes of sponsorship, Akorn Animal Health, Inc., Nexcyon Pharmaceuticals, Inc., and Vétoquinol USA, Inc. will now be the sponsors of an approved application while Bioniche Animal Health USA, Inc. and Veterinary Service, Inc. will no longer be the sponsors of an approved application. Accordingly, 21 CFR 510.600(c) is being amended to reflect these changes.

FDA is also amending the regulations at 21 CFR 558.76 to remove a limitation on the concentrations of bacitracin methylene disalicyclate Type A medicated articles that can be used to manufacture medicated feed for quail. In addition, FDA is removing reserved 21 CFR 558.105 for which there is no entry. These actions are being taken to improve the accuracy of the regulations.

Also, Vétoquinol N.-A., Inc., 2000 chemin Georges, Lavaltrie (PQ), Canada, J5T 3S5, has requested that FDA withdraw approval of ANADA 200–305 for Oxytetracycline Hydrochloride Soluble Powder because the product is no longer manufactured or marketed. Note this ANADA was identified as being affected by guidance for industry (GFI) #213, ''New Animal Drugs and New Animal Drug Combination Products Administered in or on Medicated Feed or Drinking Water of Food-Producing Animals: Recommendations for Drug Sponsors for Voluntarily Aligning Product Use Conditions with GFI #209,'' December 2013.

Elsewhere in this issue of the **Federal Register**, FDA gave notice that approval of ANADA 200–305, and all supplements and amendments thereto, is withdrawn, effective December 26, 2014. As provided in the regulatory text of this document, the animal drug regulations are amended to reflect this voluntary withdrawal of approval.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

TABLE 1—ORIGINAL AND SUPPLEMENTAL NADAS AND ANADAS APPROVED DURING SEPTEMBER AND OCTOBER 2014

NADA/ ANADA	Sponsor	New animal drug product name	Action	21 CFR sections	FOIA summary	NEPA review
141–244	Zoetis Inc., 333 Portage St., Kalamazoo, MI 49007.	DRAXXIN (tulathromycin) Injectable Solution.	Supplemental approval for treatment of bovine respiratory disease (BRD) in suckling calves, dairy calves, and veal calves.	522.2630	yes	CE[1 2]
141–430×[3]	Phibro Animal Health Corp., GlenPointe Centre East, 3d Floor, 300 Frank W. Burr Blvd., suite 21, Teaneck, NJ 07666.	STAFAC (virginiamycin) plus COBAN (monensin) combination drug Type C medicated feeds.	Original approval for prevention of coccidiosis and necrotic enteritis in broiler chickens.	558.355	yes	CE[1 4]
200–522	Putney, Inc., One Monument Sq., suite 400, Portland, ME 04101.	Carprofen Sterile Injectable Solution.	Original approval as a generic copy of NADA 141–199.	522.304	yes	CE[1 5]
200–540	Putney, Inc., One Monument Sq., suite 400, Portland, ME 04101.	Meloxicam (meloxicam) Solution for Injection.	Original approval as a generic copy of NADA 141–219.	522.1367	yes	CE[1 5]
200–581	Cross Vetpharm Group Ltd., Broomhill Rd., Tallaght, Dublin 24, Ireland.	FLUNAZINE (flunixin meglumine) Equine Paste.	Original approval as a generic copy of NADA 137–409.	520.970	yes	CE[1 5]

[1] The Agency has determined that this action is categorically excluded (CE) from the requirement to submit an environmental assessment or an environmental impact statement because it is of a type that does not have a significant effect on the human environment.
[2] CE granted under 21 CFR 25.33(d)(5).
[3] This application is affected by GFI #213, ''New Animal Drugs and New Animal Drug Combination Products Administered in or on Medicated Feed or Drinking Water of Food-Producing Animals: Recommendations for Drug Sponsors for Voluntarily Aligning Product Use Conditions with GFI #209'', December 2013.
[4] CE granted under 21 CFR 25.33(a)(2).
[5] CE granted under 21 CFR 25.33(a)(1).

List of Subjects

21 CFR Part 510

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

21 CFR Parts 520 and 522

Animal drugs.

21 CFR Part 558

Animal drugs, Animal feeds.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 510, 520, 522, and 558 are amended as follows:

PART 510—NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 510 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 360b, 371, 379e.

■ 2. In § 510.600, in the table in paragraph (c)(1), remove the entries for ''Bioniche Animal Health USA, Inc.'' and ''Veterinary Service, Inc.'' and

alphabetically add entries for ''Akorn Animal Health, Inc.'', ''Nexcyon Pharmaceuticals, Inc.'', and ''Vétoquinol USA, Inc.''; and in the table in paragraph (c)(2), remove the entries for ''033008'' and ''064847'' and numerically add entries for ''017030'', ''050929'', and ''053599'' to read as follows:

§ 510.600 Names, addresses, and drug labeler codes of sponsors of approved applications.

* * * * *

(c) * * *

(1) * * *

Firm name and address	Drug labeler code
* * * * *	
Akorn Animal Health, Inc., 1925 West Field Ct., suite 300, Lake Forest, IL 60045	053599
* * * * *	
Nexcyon Pharmaceuticals, Inc., 644 West Washington Ave., Madison, WI 53719 ..	050929
* * * * *	
Vétoquinol USA, Inc., 4250 N. Sylvania Ave., Fort Worth, TX 76137	017030
* * * * *	

(2) * * *

Drug labeler code	Firm name and address
* * * * *	
017030	Vétoquinol USA, Inc., 4250 N. Sylvania Ave., Fort Worth, TX 76137.
* * * * *	
050929	Nexcyon Pharmaceuticals, Inc., 644 West Washington Ave., Madison, WI 53719.
* * * * *	
053599	Akorn Animal Health, Inc., 1925 West Field Ct., suite 300, Lake Forest, IL 60045.
* * * * *	

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

■ 3. The authority citation for 21 CFR part 520 continues to read as follows:

Authority: 21 U.S.C. 360b.

■ 4. In § 520.970, revise paragraphs (b) and (c)(1) to read as follows:

§ 520.970 Flunixin.

* * * * *

(b) *Sponsors.* See sponsors in § 510.600(c) of this chapter for use as in paragraph (c) of this section.

(1) No. 000061 for use of products described in paragraph (a).

(2) No. 061623 for use of the product described in paragraph (a)(2).

(c) * * *

(1) *Amount.* 0.5 mg per pound of body weight per day for up to 5 days.

* * * * *

§ 520.980 [Amended]

5. In paragraph (b) of § 520.980, remove ''000986'' and in its place add ''050929''.

§ 520.1660d [Amended]

■ 6. In § 520.1660d, remove paragraph (b)(8); and in paragraphs (d)(1)(ii)(A)(*3*), (d)(1)(ii)(B)(*3*), (d)(1)(ii)(C)(*3*), and (d)(1)(iii)(C), remove ''059320,''.

§ 520.1720c [Amended]

■ 7. In paragraph (b)(2) of § 520.1720c, remove ''064847'' and in its place add ''017030''.

§ 520.2158 [Amended]

■ 8. In paragraph (b) of § 520.2158, remove ''033008'' and in its place add ''016592''.

PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

■ 9. The authority citation for 21 CFR part 522 continues to read as follows:

Authority: 21 U.S.C. 360b.

§ 522.246 [Amended]

■ 10. In paragraph (b)(3) of § 522.246, remove ''061690'' and in its place add ''053599''.

■ 11. In § 522.304, revise paragraph (b) to read as follows:

§ 522.304 Carprofen.

* * * * *

(b) *Sponsors.* See Nos. 026637, 054771, and 055529 in § 510.600(c) of this chapter.

* * * * *

§ 522.1002 [Amended]

■ 12. In paragraph (c)(2) of § 522.1002, remove ''064847'' and in its place add ''017030''.

§ 522.1145 [Amended]

■ 13. In paragraph (e)(2)(ii) of § 522.1145, remove ''064847'' and in its place add ''017030''.

■ 14. In § 522.1222, revise paragraph (b) to read as follows:

§ 522.1222 Ketamine.

* * * * *

(b) *Sponsors.* See Nos. 000859, 026637, 053599, 054628, 054771, and 063286 in § 510.600(c) of this chapter.

* * * * *

■ 15. In § 522.1367, revise paragraph (b) to read as follows:

§ 522.1367 Meloxicam.

* * * * *

(b) *Sponsors.* See Nos. 000010, 016729, 026637, and 055529 in § 510.600(c) of this chapter.

* * * * *

§ 522.2474 [Amended]

■ 16. In paragraph (b) of § 522.2474, remove ''061690'' and in its place add ''053599''.

■ 17. In § 522.2630, revise paragraph (d)(1) to read as follows:

§ 522.2630 Tulathromycin.

* * * * *

(d) * * *

(1) *Cattle*—(i) *Amount.* 2.5 mg per kilogram (/kg) body weight as a single subcutaneous injection in the neck.

(ii) *Indications for use*—(A) *Beef and non-lactating dairy cattle; suckling calves, dairy calves, and veal calves:* For the treatment of bovine respiratory disease (BRD) associated with *Mannheimia haemolytica, Pasteurella multocida, Histophilus somni,* and *Mycoplasma bovis;*

(B) *Beef and non-lactating dairy cattle:* For the control of respiratory disease in cattle at high risk of developing BRD associated with *M. haemolytica, P. multocida, H. somni,* and *M. bovis.* For the treatment of infectious bovine keratoconjunctivitis associated with *Moraxella bovis.* For the treatment of bovine foot rot (interdigital necrobacillosis) associated with *Fusobacterium necrophorum* and *Porphyromonas levii.*

(iii) *Limitations.* Cattle intended for human consumption must not be slaughtered within 18 days from the last treatment. Do not use in female dairy cattle 20 months of age or older. Federal law restricts this drug to use by or on the order of a licensed veterinarian.

* * * * *

§ 522.2662 [Amended]

■ 18. In paragraph (b)(4) of § 522.2662, remove ''061690'' and in its place add ''053599''.

■ 19. Revise § 522.2670 to read as follows:

§ 522.2670 Yohimbine.

(a) *Specifications.* Each milliliter (mL) of solution contains 2 or 5 milligrams (mg) of yohimbine (as hydrochloride).

(b) *Sponsors.* See sponsors in § 510.600(c) of this chapter for use as in paragraph (c) of this section.

(1) No. 053599 for use of in 2 mg/mL solution as in paragraph (c)(1) of this section.

(2) No. 053923 for use of in 5 mg/mL solution as in paragraph (c)(2) of this section.

(c) *Conditions of use*—(1) *Dogs*—(i) *Amount.* Administer 0.05 mg per pound (0.11 mg per kilogram) of body weight by intravenous injection.

(ii) *Indications for use.* To reverse the effects of xylazine in dogs.

(iii) *Limitations.* Not for use in food-producing animals. Federal law restricts this drug to use by or on the order of a licensed veterinarian.

(2) *Deer and elk*—(i) *Amount.* Administer 0.2 to 0.3 mg per kilogram of body weight by intravenous injection.

(ii) *Indications for use.* A s an antagonist to xylazine sedation in free ranging or confined members of the family Cervidae (deer and elk).

(iii) *Limitations.* Do not use in domestic food-producing animals. Do not use for 30 days before or during hunting season. Federal law restricts this drug to use by or on the order of a licensed veterinarian.

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

■ 20. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: 21 U.S.C. 360b, 371.

§ 558.76 [Amended]

■ 21. In § 558.76, in paragraph (d)(1)(x), in the entry for ''Quail'', in the ''Limitations'' column, remove the first sentence.

§ 558.105 [Removed]

■ 22. Remove reserved § 558.105.

■ 23. In § 558.355, add paragraph (f)(1)(xxxi) to read as follows:

§ 558.355 Monensin.

* * * * *

(f) * * *

(1) * * *

(xxxi) *Amount per ton.* Monensin, 90 to 110 grams; plus virginiamycin, 20 grams.

(*a*) *Indications for use.* Broiler chickens: As an aid in the prevention of coccidiosis caused by *E. necatrix, E. tenella, E. acervulina, E. brunetti, E. mivati,* and *E. maxima;* and for prevention of necrotic enteritis caused by *Clostridium perfringens* susceptible to virginiamycin.

(*b*) *Limitations.* Feed continuously as sole ration. Do not feed to laying chickens. See paragraph (d) of this section. As monensin provided by No. 000986; virginiamycin as provided by No. 066104 in § 510.600(c) of this chapter.

* * * * *

Dated: December 9, 2014.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. 2014–29249 Filed 12–12–14; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

[Docket No. FDA–2014–N–0002]

Oral Dosage Form New Animal Drugs; Withdrawal of Approval of New Animal Drug Application; Oxytetracycline

AGENCY: Food and Drug Administration, HHS.

ACTION: Notification of withdrawal of approval.

SUMMARY: The Food and Drug Administration (FDA) is withdrawing approval of an abbreviated new animal drug application (ANADA) for an oxytetracycline soluble powder used to make medicated drinking water for livestock and poultry. This action is being taken at the sponsor's request because this product is no longer manufactured or marketed.

DATES: Withdrawal of approval is effective December 26, 2014.

FOR FURTHER INFORMATION CONTACT: Sujaya Dessai, Center for Veterinary Medicine (HFV–212), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–276–9075, *sujaya.dessai@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Vétoquinol N.-A., Inc., 2000 chemin Georges, Lavaltrie (PQ), Canada, J5T 3S5 has requested that FDA withdraw approval of ANADA 200–305 for Oxytetracycline Hydrochloride Soluble Powder because the product is no longer manufactured or marketed. Note this ANADA was identified as being affected by guidance for industry (GFI) #213, ''New Animal Drugs and New Animal Drug Combination Products Administered in or on Medicated Feed or Drinking Water of Food-Producing Animals: Recommendations for Drug Sponsors for Voluntarily Aligning Product Use Conditions with GFI #209'', December 2013.

Therefore, under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, and in accordance with § 514.116 *Notice of withdrawal of approval of application* (21 CFR 514.116), notice is given that approval of ANADA 200–305, and all supplements and amendments thereto, is hereby withdrawn, effective December 26, 2014.

Elsewhere in this issue of the **Federal Register**, FDA is amending the animal drug regulations to reflect the voluntary withdrawal of approval of this application.

Dated: December 9, 2014.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. 2014–29248 Filed 12–12–14; 8:45 am]

BILLING CODE 4164–01–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 4022 and 4044

Allocation of Assets in Single-Employer Plans; Benefits Payable in Terminated Single-Employer Plans; Interest Assumptions for Valuing and Paying Benefits

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This final rule amends the Pension Benefit Guaranty Corporation's regulations on Benefits Payable in Terminated Single-Employer Plans and Allocation of Assets in Single-Employer Plans to prescribe interest assumptions under the benefit payments regulation for valuation dates in January 2015 and interest assumptions under the asset allocation regulation for valuation dates in the first quarter of 2015. The interest assumptions are used for valuing and paying benefits under terminating single-employer plans covered by the pension insurance system administered by PBGC.

DATES: Effective January 1, 2015.

FOR FURTHER INFORMATION CONTACT: Catherine B. Klion (*Klion.Catherine@PBGC.gov*), Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington, DC 20005, 202–326–4024. (TTY/TDD users may call the Federal relay service toll free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: PBGC's regulations on Allocation of Assets in Single-Employer Plans (29 CFR part 4044) and Benefits Payable in Terminated Single-Employer Plans (29 CFR part 4022) prescribe actuarial

assumptions—including interest assumptions—for valuing and paying plan benefits under terminating single-employer plans covered by title IV of the Employee Retirement Income Security Act of 1974. The interest assumptions in the regulations are also published on PBGC's Web site (*http://www.pbgc.gov*).

The interest assumptions in Appendix B to Part 4044 are used to value benefits for allocation purposes under ERISA section 4044. PBGC uses the interest assumptions in Appendix B to Part 4022 to determine whether a benefit is payable as a lump sum and to determine the amount to pay. Appendix C to Part 4022 contains interest assumptions for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using PBGC's historical methodology. Currently, the rates in Appendices B and C of the benefit payment regulation are the same.

The interest assumptions are intended to reflect current conditions in the financial and annuity markets. Assumptions under the asset allocation regulation are updated quarterly; assumptions under the benefit payments regulation are updated monthly. This final rule updates the benefit payments interest assumptions for January 2015 and updates the asset allocation interest assumptions for the first quarter (January through March) of 2015.

The first quarter 2015 interest assumptions under the allocation regulation will be 2.89 percent for the first 20 years following the valuation date and 3.12 percent thereafter. In comparison with the interest assumptions in effect for the fourth quarter of 2014, these interest assumptions represent no change in the select period, (the period during which the select rate (the initial rate) applies), a decrease of 0.21 percent in the select rate, and a decrease of 0.17 percent in the ultimate rate (the final rate).

The January 2015 interest assumptions under the benefit payments regulation will be 1.00 percent for the period during which a benefit is in pay status and 4.00 percent during any years preceding the benefit's placement in pay status. In comparison with the interest assumptions in effect for December 2014, these interest assumptions are unchanged.

PBGC has determined that notice and public comment on this amendment are impracticable and contrary to the public interest. This finding is based on the need to determine and issue new interest assumptions promptly so that the assumptions can reflect current market conditions as accurately as possible.

Because of the need to provide immediate guidance for the valuation and payment of benefits under plans with valuation dates during January 2015, PBGC finds that good cause exists for making the assumptions set forth in this amendment effective less than 30 days after publication.

PBGC has determined that this action is not a ''significant regulatory action'' under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601(2).

List of Subjects

29 CFR Part 4022

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 4044

Employee benefit plans, Pension insurance, Pensions.

In consideration of the foregoing, 29 CFR parts 4022 and 4044 are amended as follows:

PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE–EMPLOYER PLANS

■ 1. The authority citation for part 4022 continues to read as follows:

Authority: 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

■ 2. In appendix B to part 4022, Rate Set 255, as set forth below, is added to the table.

Appendix B to Part 4022—Lump Sum Interest Rates For PBGC Payments

* * * * *

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
*	*		*	*	*	*	*	
255	1–1–15	2–1–15	1.00	4.00	4.00	4.00	7	8

■ 3. In appendix C to part 4022, Rate Set 255, as set forth below, is added to the table.

Appendix C to Part 4022—Lump Sum Interest Rates For Private-Sector Payments

* * * * *

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
*	*	*	*	*	*	*	*	
255	1–1–15	2–1–15	1.00	4.00	4.00	4.00	7	8

PART 4044—ALLOCATION OF ASSETS IN SINGLE–EMPLOYER PLANS

■ 4. The authority citation for part 4044 continues to read as follows:

Authority: 29 U.S.C. 1301(a), 1302(b)(3), 1341, 1344, 1362.

■ 5. In appendix B to part 4044, a new entry for January—March 2015, as set forth below, is added to the table.

Appendix B to Part 4044—Interest Rates Used to Value Benefits

* * * * *

For valuation dates occurring in the month—	The values of i_t are:					
	i_t	for t =	i_t	for t =	i_t	for t =
* * *	*		*		*	*
January–March 2015	0.0289	1–20	0.0312	>20	N/A	N/A

Issued in Washington, DC, on this 10th day of December 2014.

Judith Starr,

General Counsel, Pension Benefit Guaranty Corporation.

[FR Doc. 2014–29382 Filed 12–12–14; 8:45 am]

BILLING CODE 7709–02–P

DEPARTMENT OF THE TREASURY

Fiscal Service

31 CFR Part 347

RIN 1530–AA08

Regulations Governing Retirement Savings Bonds

AGENCY: Bureau of the Fiscal Service, Fiscal Service, Treasury.

ACTION: Final rule.

SUMMARY: The United States Department of the Treasury, Bureau of the Fiscal Service, offers a new nonmarketable, electronic retirement savings bond for Treasury's new retirement savings program. The bonds will be issued to a designated custodian for Roth individual retirement accounts established under Treasury's program. This new savings bond is only available to participants in the retirement savings program and will protect the principal contributed while earning interest at a rate previously available only to federal employees invested in the Government Securities Investment Fund (G Fund) of their Thrift Savings Plan.

DATES: This final rule is effective December 15, 2014.

ADDRESSES: You can download this Final Rule at the following Internet addresses: *http://www.gpo.gov;* or *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT:

Technical information: Kimberly Reese, Program Manager, 304–480–7929 or *kimberly.reese@fiscal.treasury.gov.*

Legal information: David T. Copenhaver, Deputy Chief Counsel, 304–480–8692 or *david.copenhaver@fiscal.treasury.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Secretary of the Treasury is authorized under Chapter 31 of Title 31, United States Code, to issue United States obligations and offer them for sale under such terms and conditions as the Secretary may prescribe. On January 29, 2014, the President of the United States issued a Presidential Memorandum directing the Secretary to develop a new retirement savings security focused on reaching new and small-dollar savers. In response, the Secretary is offering electronic retirement savings bonds for Treasury's retirement savings program.

This new retirement savings program allows individuals to establish Roth individual retirement accounts (Roth IRAs) with Treasury's designated custodian. These accounts will allow savers to begin investing for retirement with no start-up costs and no fees. Participants in the program can continue to make periodic electronic contributions in any amount to their account.

Amounts contributed by participants in the program will be invested exclusively in Treasury's new retirement savings bonds. The designated custodian for the program will purchase and hold these new bonds for the benefit of the participants. This new savings bond is only available to participants in Treasury's new retirement savings program and will protect the principal contributed while earning interest at a rate previously available only to federal employees invested in the Government Securities Investment Fund (G Fund) of their Thrift Savings Plan.

Individuals can continue to participate in the program until their account balance reaches $15,000 or until they have participated in the program for 30 years, whichever occurs first. At any time, participants can transfer their balance to a commercial financial services provider to take advantage of the broad array of retirement products available in the marketplace. Because the accounts offered through the program are Roth IRAs, participants also have the flexibility to withdraw their contributions at any time without a penalty. Participants can keep their account and can continue investing in the retirement savings bond even if they change jobs.

With the retirement savings bond and Treasury's retirement savings program, American families can begin to build for their retirement. Treasury's program serves as a stepping stone to the broader array of retirement products available in today's marketplace. This rule establishes the terms and conditions of the retirement savings bonds.

II. Procedural Requirements

A. Administrative Procedure Act (APA)

Because this rule relates to United States securities, which are contracts between Treasury and the owner of the security, this rule falls within the contract exception to the APA at 5 U.S.C. 553(a)(2). As a result, the notice, public comment, and delayed effective date provisions of the APA are inapplicable to this rule.

B. Congressional Review Act (CRA)

This rule is not a major rule pursuant to the CRA, 5 U.S.C. 801 *et seq.* It is not expected to lead to any of the results listed in 5 U.S.C. 804(2). This rule may take immediate effect after we submit a copy of it to Congress and the Comptroller General.

C. Paperwork Reduction Act (PRA)

There is no new collection of information contained in this final rule that would be subject to the PRA, 44 U.S.C. 3501 *et seq.* Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number.

D. Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* do not apply to this rule because, pursuant to 5 U.S.C. 553(a)(2), it is not required to be issued with notice and opportunity for public comment.

E. Executive Order 12866

This rule is not a significant regulatory action pursuant to Executive Order 12866.

List of Subjects in 31 CFR Part 347

Government securities, Savings bonds.

Accordingly, for the reasons set out in the preamble, amend 31 CFR Chapter II, Subchapter A, by adding part 347 to read as follows:

PART 347—REGULATIONS GOVERNING RETIREMENT SAVINGS BONDS

Subpart A—General Information

Sec.
347.0 Offering of securities.
347.1 Applicability.
347.2 Official agencies.
347.3 Definitions.

Subpart B—Registration

347.10 Authorized form of registration.
347.11 Crediting of retirement savings bonds.

Subpart C—Limitations on Additions

347.20 Annual additions to a retirement savings bond.
347.21 Individual additions to a retirement savings bond.

Subpart D—General Provisions for Payment

347.30 Payment (redemption).

Subpart E—Interest

347.40 Computation of interest.
347.41 Maturity.

Subpart F—Miscellaneous

347.50 Waiver of regulations.
347.51 Additional requirements; bond of indemnity.
347.52 Supplements, amendments, or revisions.

Authority: 5 U.S.C. 301; 12 U.S.C. 90; 31 U.S.C. 3105.

Subpart A—General Information

§ 347.0 Offering of securities.

The Secretary of the Treasury, under the authority of Title 31, Chapter 31, offers retirement savings bonds to the designated Roth IRA custodian for Treasury's retirement savings program. The bonds will be issued to and held by the designated custodian, on behalf of participants in Treasury's program. The current offer is effective on the publication date of this rule. This offering will continue until terminated by the Secretary. Treasury's Fiscal Assistant Secretary is authorized to act on behalf of the Secretary on all matters contained in these regulations.

§ 347.1 Applicability.

The regulations in this part apply to retirement savings bonds issued to the designated Roth IRA custodian for Treasury's retirement savings program on behalf of program participants.

§ 347.2 Official agencies.

(a) The Bureau of the Fiscal Service of the Department of the Treasury is responsible for administering Treasury's retirement savings program and issuing the retirement savings bonds to the designated Roth IRA custodian.

(b) Communications concerning transactions related to an Individual's Roth IRA should be addressed to the designated Roth IRA custodian.

§ 347.3 Definitions.

(a) *Retirement savings bond,* as used in this part, means an interest bearing electronic United States savings bond issued to the designated Roth IRA custodian.

(b) *Designated Roth IRA custodian, designated custodian, or custodian* means the entity designated by the Bureau of the Fiscal Service to act as the custodian for Roth IRA accounts opened on behalf of program participants in Treasury's retirement savings program.

(c) *Individual* means a person eligible to contribute to a Roth IRA under 26 U.S.C. 408A.

(d) *Program participant* means an individual who has established a Roth IRA with the designated Roth IRA custodian.

(e) *Roth IRA* means an individual retirement account defined under 26 U.S.C. 408A.

(f) *Treasury* means the United States Department of the Treasury.

(g) *Secretary* means the Secretary of the Treasury.

Subpart B—Registration

§ 347.10 Authorized form of registration.

(a) Retirement savings bonds are issued to the designated Roth IRA custodian for Treasury's retirement savings program. No other registrations are permitted.

(b) In the event Treasury designates a successor designated Roth IRA custodian, retirement savings bonds held by the predecessor custodian will be reissued to the successor custodian.

§ 347.11 Crediting of retirement savings bonds.

Each retirement savings bond issued to the designated Roth IRA custodian must be credited to a single individual retirement account established through Treasury's retirement savings program with the custodian.

Subpart C—Limitations on Additions

§ 347.20 Annual additions to a retirement savings bond.

The amount that may be initially contributed or added to a retirement savings bond in a calendar year by the designated Roth IRA custodian on behalf of any program participant is limited to the annual Roth IRA contribution limits provided in 26 CFR 1.408A–3. The total value of a retirement savings bond that may be held by the designated Roth IRA custodian on behalf of any program participant shall not exceed $15,000.00.

§ 347.21 Individual additions to a retirement savings bond.

The Commissioner of the Fiscal Service, as designee of the Secretary of the Treasury, is authorized to establish minimum amounts for initial and additional contributions to a retirement savings bond.

Subpart D—General Provisions for Payment

§ 347.30 Payment (redemption).

Payment of retirement savings bonds will be made to the designated Roth IRA custodian upon the custodian's submission of a request for redemption to the Bureau of the Fiscal Service. The custodian shall request the redemption of all retirement savings bonds at their respective maturity. The custodian shall request the partial redemption of bonds held on behalf of program participants upon the request of an individual entitled to amounts in the Roth IRA. Retirement savings bond redemptions will be rounded to the nearest one cent.

Subpart E—Interest

§ 347.40 Computation of interest.

Retirement savings bonds earn interest at the same annual percentage rate as securities issued to the Government Securities Investment Fund (G Fund) in the Thrift Savings Plan for federal employees. The Secretary of the Treasury calculates the G Fund interest rate pursuant to 5 U.S.C. 8438(e)(2). The retirement savings bond interest rate compounds daily at 1/360 of the annual percentage rate. Retirement savings bonds will cease to bear interest on the date of their maturity.

§ 347.41 Maturity.

The maturity date for retirement savings bonds is indeterminate and may

be different for each bond issued, but shall not exceed the sum of an original maturity period of 20 years and an extended maturity period of 10 years. The retirement savings bond purchased by the designated Roth IRA custodian on behalf of a program participant will mature at the earlier of 30 years from the date the bond is first issued to the custodian on behalf of the program participant or when the total value of the bond held on behalf of the program participant reaches $15,000.00. The designated Roth IRA custodian will submit a request for redemption of retirement savings bonds upon maturity.

Subpart F—Miscellaneous

§ 347.50 Waiver of regulations.

The Commissioner of the Fiscal Service, as designee of the Secretary of the Treasury, may waive or modify any provision or provisions of the regulations in this part. He or she may do so in any particular case or class of cases for the convenience of the United States or in order to relieve any person or persons of unnecessary hardship:

(a) If such action would not be inconsistent with law or equity;

(b) If it does not impair any material existing rights; and

(c) If he or she is satisfied that such action would not subject the United States to any substantial expense or liability.

§ 347.51 Additional requirements; bond of indemnity.

The Commissioner of the Fiscal Service, as designee of the Secretary of the Treasury, may require:

(a) Such additional evidence to support a requested action as he or she may consider necessary or advisable; or

(b) A bond of indemnity, with or without surety, in any case in which he or she may consider such a bond necessary for the protection of the interests of the United States.

§ 347.52 Supplements, amendments, or revisions.

The Secretary of the Treasury may at any time, or from time to time, prescribe additional, supplemental, amendatory, or revised rules and regulations governing United States retirement savings bonds.

Dated: December 9, 2014.

David A. Lebryk,

Fiscal Assistant Secretary.

[FR Doc. 2014–29334 Filed 12–12–14; 8:45 am]

BILLING CODE 4810–AS–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2014–1024]

Drawbridge Operation Regulations; Cheesequake Creek, Morgan, NJ

AGENCY: Coast Guard, DHS.

ACTION: Notice of deviation from drawbridge regulation.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating schedule that governs the operation of the New Jersey Transit Rail Operations (NJTRO) railroad bridge across Cheesequake Creek, mile 0.2, at Morgan, New Jersey. This deviation is necessary to allow the bridge owner to perform structural repairs at the bridge. This deviation allows the bridge to remain closed on nine consecutive weekends.

DATES: This deviation is effective from 6 a.m. on January 10, 2015 through 7 p.m. on March 8, 2015.

ADDRESSES: The docket for this deviation, [USCG–2014–1024] is available at *http://www.regulations.gov.* Type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this deviation. You may also visit the Docket Management Facility in Room W12–140, on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary deviation, call or email Mr. Joe M. Arca, Project Officer, First Coast Guard District, telephone (212) 514–4336, *joe.m.arca@uscg.mil.* If you have questions on viewing the docket, call Cheryl Collins, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION: The NJTRO railroad bridge across Cheesequake Creek, mile 0.2, at Morgan, New Jersey, has a vertical clearance in the closed position of 3 feet at mean high water and 8 feet at mean low water. The existing bridge operating regulations are found at 33 CFR 117.709(b).

The waterway is transited by seasonal recreational vessels of various sizes.

The bridge owner, New Jersey Transit Rail Operations, requested a temporary deviation from the normal operating schedule to facilitate structural repairs at the bridge.

Under this temporary deviation the NJTRO railroad bridge shall remain in the closed position for nine consecutive weekends from 6 a.m. on Saturday through 7 p.m. on Sunday on the following dates: January 10 and 11, January 17 and 18, January 24 and 25, January 31 and February 1, February 7 and 8, February 14 and 15, February 21 and 22, February 28 and March 1, March 7 and March 8, 2015.

The draw shall maintain its normal operating schedule at all other times.

There are no alternate routes for vessel traffic; however, vessels that can pass under the closed draws during this closure may do so at all times. The bridge may be opened in the event of an emergency.

The Coast Guard will inform the users of the waterways through our Local and Broadcast Notice to Mariners of the change in operating schedule for the bridges so that vessels can arrange their transits to minimize any impact caused by the temporary deviation.

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

Dated: December 1, 2014.

C.J. Bisignano,

Supervisory Bridge Management Specialist, First Coast Guard District.

[FR Doc. 2014–29367 Filed 12–12–14; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2014–0898]

RIN 1625–AA00

Safety Zone; Kent Narrows Draw Bridge Repairs, Kent Island Narrows; Queen Anne's County, MD

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone encompassing certain waters of Kent Island Narrows in Queen Anne's County, MD. This action is necessary to provide for the safety of mariners and their vessels on navigable waters during bridge repairs at the Kent Narrows (MD–18B) Draw Bridge. This action is

intended to restrict vessel traffic movement to protect mariners from potential safety hazards associated with the bridge project scheduled to occur in the federal navigation channel between December 15, 2014 and February 16, 2015. Entry into this zone is prohibited unless specifically authorized by the Captain of the Port Baltimore or his designated representative.

DATES: This rule is effective from 6 a.m. on December 15, 2014 to 6 a.m. on February 16, 2015.

ADDRESSES: Documents mentioned in this preamble are part of docket [USCG–2014–0898]. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Mr. Ronald Houck, U.S. Coast Guard Sector Baltimore, MD; telephone 410–576–2674, email *Ronald.L.Houck@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Cheryl Collins, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking

A. Regulatory History and Information

On October 28, 2014, we published a notice of proposed rulemaking (NPRM) entitled ''Safety Zone, Kent Narrows Draw Bridge Repairs, Kent Island Narrows; Queen Anne's County, MD'' in the **Federal Register** (79 FR 64157). We received no comments on the proposed rule. No public meeting was requested, and none was held. The bridge operation regulations for Kent Island Narrows listed in 33 CFR 117.561 do not apply to this rule.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Event planners did not provide the Coast Guard adequate advance notice of the event to allow 30 days after publication with an appropriate period for public comment. Notice for this event was submitted to the Fifth Coast Guard District via letter on September 22, 2014. Details for this event were not received by the Captain of the Port Baltimore until September 30, 2014.

B. Basis and Purpose

The legal basis and authorities for this rule are found in 33 U.S.C. 1231, 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; and Department of Homeland Security Delegation No. 0170.1, which collectively authorize the Coast Guard to propose, establish, and define regulatory safety zones. The purpose of this safety zone is to protect public boaters and their vessels from potential safety hazards associated with repairs conducted at the Kent Narrows (MD–18B) Draw Bridge.

C. Discussion of Comments, Changes and the Final Rule

The Coast Guard received no comments in response to the NPRM. No public meeting was requested and none was held. Accordingly, the regulatory text mirrors the proposed text published in the NPRM.

D. Regulatory Analyses

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

1. Regulatory Planning and Review

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

Although this regulation will restrict access to this area, the effect of this proposed rule will not be significant because: (i) The Coast Guard will give advance notification via maritime advisories so mariners can adjust their plans accordingly, and (ii) although the safety zone will apply to the entire width of the federal navigation channel, it does not restrict the entire width of Kent Island Narrows. Accordingly, vessel traffic not constrained by draft or height may be able to transit safely around the safety zone.

2. Impact on Small Entities

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

This rule may affect the following entities, some of which may be small entities: The owners or operators of vessels intending to operate, transit through or anchor within the safety zone during the enforcement period.

This safety zone will not have a significant economic impact on a substantial number of small entities for the reasons stated under paragraph D.1., Regulatory Planning and Review.

3. Assistance for Small Entities

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

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

4. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

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

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children

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

11. Indian Tribal Governments

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

12. Energy Effects

This action is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

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

14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves establishing a temporary safety zone in the Kent Island Narrows to maintain public safety during repairs to the Kent Narrows (MD–18B) Draw Bridge. This action is necessary to protect persons and property during the project. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T05–0898 to read as follows:

§ 165.T05–0898 Safety Zone; Kent Narrows Draw Bridge Repairs, Kent Island Narrows; Queen Anne's County, MD.

(a) *Location.* The following area is a safety zone:

(1) All waters of Kent Island Narrows, within an area bounded by the following points: From position latitude 38°58′14.5″ N, longitude 076°14′50.2″ W; thence easterly to position latitude 38°58′14.1″ N, longitude 076°14′48.4″ W; thence southerly to position latitude 38°58′12.3″ N, longitude 076°14′49.0″ W; thence westerly to position latitude 38°58′12.8″ N, longitude 076°14′50.8″ W; thence northerly to point of origin at position latitude 38°58′14.5″ N, longitude 076°14′50.2″ W, located in Queen Anne's County, Maryland. All coordinates refer to datum NAD 1983.

(b) *Regulations.* The general safety zone regulations found in 33 CFR 165.23 apply to the safety zone created by this temporary section, § 165.T05–0898.

(1) All persons are required to comply with the general regulations governing safety zones found in 33 CFR 165.23.

(2) With the exception of Maryland State Highways Administration support vessels, entry into or remaining in this zone is prohibited unless authorized by the Coast Guard Captain of the Port Baltimore. All vessels underway within this safety zone at the time it is implemented are to depart the zone.

(3) Persons desiring to transit the area of the safety zone must first obtain authorization from the Captain of the Port Baltimore or his designated representative. To seek permission to transit the area, the Captain of the Port Baltimore and his designated representatives can be contacted at telephone number 410–576–2693 or on Marine Band Radio VHF–FM channel 16 (156.8 MHz). The Coast Guard vessels enforcing this section can be contacted on Marine Band Radio VHF–FM channel 16 (156.8 MHz). Upon being hailed by a U.S. Coast Guard vessel, or other Federal, State, or local agency vessel, by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed. If permission is granted, all persons and vessels must comply with the instructions of the Captain of the Port Baltimore or his designated representative and proceed as directed while within the zone.

(4) *Enforcement.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the zone by Federal, State, and local agencies.

(c) *Definitions.* As used in this section:

Captain of the Port Baltimore means the Commander, U.S. Coast Guard Sector Baltimore, Maryland.

Designated representative means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port Baltimore to assist in enforcing the safety zone described in paragraph (a) of this section.

Maryland State Highways Administration Support Vessels means all vessels engaged in bridge work under the auspices of the Maryland State Highways Administration's authorization for repairs to the Kent Narrows (MD–18B) Draw Bridge across Kent Island Narrows in Queen Anne's County, Maryland.

(d) *Enforcement period.* This section will be enforced from 6 a.m. on December 15, 2014 to 6 a.m. on February 16, 2015.

Dated: December 3, 2014.

M.M. Dean,

Commander, U.S. Coast Guard, Acting Captain of the Port Baltimore.

[FR Doc. 2014–29371 Filed 12–12–14; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2014–1013]

RIN 1625–AA00

Safety Zone; Reduced Visibility, Sector St. Petersburg Captain of the Port Zone, FL

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing temporary safety zones for all of Tampa Bay during periods of reduced visibility. The safety zones will be enforced when visibility falls below one nautical mile. Tampa Bay will be categorized into seven zones in order to close only the affected areas of Tampa Bay. Heavy fog affects Tampa Bay an average of 22 days annually, mainly between the months of November through March. These safety zones are necessary to protect commercial traffic from the hazards resulting from reduced visibility. Entering, transiting within, or transiting through this safety zone is prohibited unless authorized by the Captain of the Port St. Petersburg or a designated representative.

DATES: This rule is effective without actual notice from December 15, 2014 until March 31, 2015. For purposes of enforcement, actual notice will be used from the date the rule was signed, November 26, 2014, until December 15, 2014. The rule will be enforced when visibility is reduced below one nautical mile in affected zones.

ADDRESSES: Documents mentioned in this preamble are part of docket USCG–2014–1013. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary final rule, call or email Lieutenant Omar La Torre Reyes, Sector St. Petersburg Prevention Department, Coast Guard; telephone (813) 228–2191, email *Omar.LaTorreReyes@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Cheryl Collins, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking

A. Regulatory History and Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because Tampa Bay has recently experienced periods of reduced visibility that present a hazard to vessels and people in the port. In 1980, during a period of reduced visibility, the MV Summit Venture allided with the Sunshine Skyway Bridge resulting in the death of 35 people. This rule seeks to avoid such incidents by prohibiting vessel movements when visibility is reduced to less than 1 nautical mile. Any delay in the effective date of this rule would be contrary to public interest as immediate action is needed to protect the public from hazards associated with reduced visibility.

For the same reason discussed above, under 5 U.S.C. 553(d)(3) the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**.

The legal basis for the rule is the Coast Guard's authority to establish regulated navigation areas and limited access areas: 33 U.S.C. 1225, 1231; 33 CFR 1.05–1, 6.04–1; Department of Homeland Security Delegation No. 0170.1.

B. Discussion of the Temporary Final Rule

The Coast Guard is establishing a temporary safety zone for all of Tampa Bay for the purpose of closing Tampa Bay's navigable waterways or sections of Tampa Bay's waterways when visibility is reduced below one nautical mile due to fog and other inclement weather conditions.

Persons and vessels are prohibited from entering, transiting through, anchoring in, or getting underway within the safety zone unless authorized by the Captain of the Port St. Petersburg or a designated representative. Persons and vessels desiring to enter, transit within, transit through, or anchor in the safety zone may contact the Captain of the Port St. Petersburg by telephone at (727) 824–7506, or a designated representative via VHF radio on channel 16, to request authorization. If authorization to enter, transit through, anchor in, or remain within the safety zone is granted by the Captain of the Port St. Petersburg or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the Captain of the Port St. Petersburg or a designated representative. The Coast Guard will provide notice of the safety zone by Broadcast Notice to Mariners and on-scene designated representatives.

C. Regulatory Analyses

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

1. Regulatory Planning and Review

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

This rule does not have a significant economic impact due to the fact that the zones will only be in effect during the time period necessary for visibility to improve to greater than one nautical mile.

2. Impact on Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered the impact of this rule on small entities. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

3. Assistance for Small Entities

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

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

4. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

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

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children

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

11. Indian Tribal Governments

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

12. Energy Effects

This action is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

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

14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Commandant Instruction. This rule involves establishing a temporary safety zone.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add a temporary § 165.T07–1013 to read as follows:

§ 165.T07–1013 Safety Zone; Reduced Visibility, Sector St. Petersburg Captain of the Port Zone, FL

(a) *Regulated Areas.* When directed by the COTP, the following areas are established as safety zones:

(1) Zone 1 (Interbay) means all navigable waters within a box marked by the following coordinates: 27°52′56″ N, 82°29′44″ W; thence to 27°52′50″ N, 82°23′41″ W; thence to 27°57′27″ N, 82°23′50″ W thence to 27°57′19″ N, 82°29′39″ W. This encompasses all navigable waterways north of Hillsborough Cut ''C'' Channel LB ''25'' (LLNR 23445) & ''26'' (LLNR 23450).

(2) Zone 2 (East Tampa/Big Bend) means all navigable waters within a box marked by the following coordinates: 27°52′50″ N, 82°23′41″ W; thence to 27°46′36″ N; 82°24′04″ W; thence to 27°46′29″ N, 82°31′21″ W; thence to 27°52′59″ N, 82°31′24″ W. This zone encompasses all navigable waterways between Hillsborough Cut ''C'' Channel LB ''25'' (LLNR 23445) & ''26'' (LLNR 23450) to Cut ''6F'' (LLNR 22830) Channel.

(3) Zone 3 (Old Tampa Bay) means all navigable waters within a box marked by the following coordinates: 27°46′29″ N, 82°31′21″ W; 28°01′58″ N, 82°31′39″ W; thence to 28°02′01″ N, 82°43′20″ W; thence to 27°46′15″ N, 82°43′24″ W. This zone encompasses all navigable waterways between all of Old Tampa Bay to Cut ''6F'' (LLNR 22830) Channel.

(4) Zone 4 (Middle Tampa Bay) means all navigable waters within a box marked by the following coordinates: 27°46′34″ N, 82°34′04″ W; thence to 27°38′40″ N, 82°31′54″ W; thence to 27°44′38″ N, 82°40′44″ W; thence to 27°46′15″ N, 82°40′46″ W. This zone encompasses all navigable waterways between Cut ''6F'' (LLNR 22830) Channel to Tampa Bay ''1C'' (LLNR 22590).

(5) Zone 5 (Lower Tampa Bay/Manatee) means all navigable waters within a box marked by the following coordinates: 27°44′33″ N, 82°40′37″ W; thence to 27°58′59″ N, 82°40′34″ W; thence to 27°36′18″ N, 82°38′57″ W; thence to 27°34′10″ N, 82°34′50″ W; thence to 27°37′56″ N, 82°31′15″ W. This zone encompasses all navigable waterways between Tampa Bay ''1C'' (LLNR 22590) to Sunshine Skyway Bridge.

(6) Zone 6 (Mullet Key) means all navigable waters within a box marked by the following coordinates: 27°38′59″ N, 82°40′35″ W; thence to 27°36′44″ N, 82°44′13″ W; thence to 27°32′20″ N, 82°44′37″ W; thence to 27°31′18″ N, 82°38′59″ W; thence to 27°34′09″ N, 82°34′53″ W; thence to 27°36′15″ N, 82°39′00″ W. This zone encompasses all navigable waterways between the Sunshine Skyway Bridge to Mullet Key Channel LB ''21'' (LLNR 22365) & ''22'' (LLNR 22370).

(7) Zone 7 (Egmont Entrance) means all navigable waters within the area encompassed by the following coordinates: 27°36′27″ N, 82°44′14″ W; thence to 27°39′46″ N, 82°44′45″ W; thence to 27°39′36″ N, 83°05′10″ W; thence to 27°32′29″ N, 83°04′50″ W; thence to 27°32′21″ N, 82°44′42″ W. This zone includes the fairway anchorages.

(b) *Definition.* As used in this section:

Captain of the Port (COTP) for the purpose of this section means the Commanding Officer of Coast Guard Sector St. Petersburg.

Captain of the Port St. Petersburg Zone as defined in 33 CFR 3.35–35.

(c) *Regulations.* (1) Vessels shall not commence an inbound transit, shift, or outbound transit when the safety zones are in effect for visibility less than one nautical mile due to fog or inclement weather.

(2) The COTP may open or close Tampa Bay or specific zones described in the regulated areas section of this chapter.

(3) The Coast Guard will provide notice of the regulated area via Broadcast Notice to Mariners.

(d) *Enforcement Date.* This rule is effective from the date this temporary final rule is signed by the Captain of the Port until March 31, 2015 and will be enforced when visibility is reduced to less than one nautical mile.

Dated: November 26, 2014.

G.D. Case,

Captain, U.S. Coast Guard, Captain of the Port, St. Petersburg.

[FR Doc. 2014–29357 Filed 12–12–14; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2014–0985]

Safety Zone; David Beahm; Hudson River, New York, NY

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce a safety zone in the Captain of the Port (COTP) New York Zone on the specified date and time. This action is necessary to ensure the safety of vessels and spectators from hazards associated with fireworks displays. During the enforcement period, no person or vessel may enter the safety zone without permission from the COTP or a designated representative.

DATES: The regulation for the safety zone described in 33 CFR 165.160 will be enforced on December 18, 2014 from 6:30 p.m. to 7:45 p.m.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or email Lieutenant Douglas Neumann, Coast Guard; telephone 718–354–4154, email *Douglas.W.Neumann@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the safety zone listed in 33 CFR 165.160 on the specified date and time as indicated in the Table below. This regulation was published in the **Federal Register** on November 9, 2011 (76 FR 69614).

TABLE

1. David Beahm Fireworks, Jersey City, Hudson River Safety Zone, 33 CFR 165.160(5.11).	• Launch Site: A barge located in approximate position 40°42′37.3″ N 074°01′41.6″ W (NAD 1983), approximately 420 yards east of Morris Canal Little Basin. This Safety Zone is a 360-yard radius from the barge. • Date: December 18, 2014. • Time: 06:30 p.m.–07:45 p.m.

Under the provisions of 33 CFR 165.160, No persons or vessels will be allowed to enter into, transit through, or anchor in the safety zone without the permission of the COTP or a designated representative. Vessels wishing to transit through the safety zone may contact a designated representative via VHF channel 13 or 16 to request permission. Vessels may transit outside the safety zone but may not anchor, block, loiter in, or impede the transit of

other vessels. The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

This notice is issued under authority of 33 CFR 165.160(a) and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register**, the Coast Guard will provide mariners with advanced notification of enforcement periods via the Local Notice to Mariners and marine information broadcasts. If the COTP determines that the safety zone need not be enforced for the full duration stated in this notice, a Broadcast Notice to Mariners may be used to grant general permission to enter the safety zone.

Dated: November 19, 2014.

G. Loebl,

Captain, U.S. Coast Guard, Captain of the Port New York.

[FR Doc. 2014–29359 Filed 12–12–14; 8:45 am]

BILLING CODE 9110–04–P

Proposed Rules

Federal Register

Vol. 79, No. 240

Monday, December 15, 2014

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–2014–0923; Directorate Identifier 2014–NM–176–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 737–700, –800, and –900ER series airplanes. This proposed AD was prompted by reports of troughs in the skin along the chem-mill pocket edges of certain fuselage crown skin panel assemblies. This proposed AD would require repetitive inspections to detect cracking in the crown skin panel assembly. This proposed AD would also provide optional terminating action for the repetitive inspections. We are proposing this AD to detect and correct cracking from troughs in the chem-mill pocket edges, which could lead to rapid decompression of the airplane.

DATES: We must receive comments on this proposed AD by January 29, 2015.

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 proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

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–2014–0923; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Haytham Alaidy, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6573; fax: 425–917–6590; email: *haytham.alaidy@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–2014–0923; Directorate Identifier 2014–NM–176–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

Some section 43, 44, and 46 fuselage crown skin panel assemblies may contain troughs in the skin along the chem-mill pocket edges. The troughs are caused during production rework by the automated laser trace process for cutting maskant. The laser disrupted the bond surface and allowed the chemical milling solution to penetrate through, causing a 0.003- to 0.007-inch-deep trough in the skin. The discrepancy was discovered when an operator reported finding troughs around the perimeter of all chem-mill pockets on one crown skin panel assembly. If skin panel assemblies with troughs are not replaced, cracking can occur at the trough locations, which, if not repaired, could result in rapid decompression of the airplane.

Relevant Service Information

We reviewed Boeing Special Attention Service Bulletin 737–53–1334, dated August 4, 2014. 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–2014–0923.

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 accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between this Proposed AD and the Service Information.''

The phrase ''related investigative actions'' is used in this proposed AD. ''Related investigative actions'' are follow-on actions that (1) are related to the primary actions, and (2) further investigate the nature of any condition found. Related investigative actions in an AD could include, for example, inspections.

The phrase ''corrective actions'' is used in this proposed AD. ''Corrective

actions'' are actions that correct or address any condition found. Corrective actions in an AD could include, for example, repairs.

Explanation of ''RC'' Steps in Service Information

The FAA worked in conjunction with industry, under the Airworthiness Directives Implementation Aviation Rulemaking Committee (AD ARC), to enhance the AD system. One enhancement was a new process for annotating which steps in the service information are required for compliance with an AD. Differentiating these steps from other tasks in the service information is expected to improve an owner's/operator's understanding of crucial AD requirements and help provide consistent judgment in AD compliance. The actions specified in the service information described previously include steps that are labeled as RC (required for compliance) because these steps have a direct effect on detecting, preventing, resolving, or eliminating an identified unsafe condition.

As noted in the specified service information, steps labeled as RC must be done to comply with the proposed AD. However, steps that are not labeled as RC are recommended. Those steps that are not labeled as RC may be deviated from, done as part of other actions, or done using accepted methods different from those identified in the service information without obtaining approval of an alternative method of compliance (AMOC), provided the steps labeled as RC can be done and the airplane can be put back in a serviceable condition. Any substitutions or changes to steps labeled as RC will require approval of an AMOC.

Differences Between This Proposed AD and the Service Information

Boeing Special Attention Service Bulletin 737–53–1334, dated August 4, 2014, specifies to contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions in one of the following ways:

- In accordance with a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) whom we have authorized to make those findings.

Costs of Compliance

We estimate that this proposed AD affects 1 airplane of U.S. registry. We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS: REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Medium frequency eddy current Inspections.	270 work-hours × $85 per hour = $22,950 per inspection cycle.	$0	$22,950 per inspection cycle.	22,950 per inspection cycle.

ESTIMATED COSTS: OPTIONAL ACTIONS

Action	Labor cost	Parts cost	Cost per product
Terminating action (inspection for troughs)	218 work-hours × $85 per hour = $18,530	Unknown	$18,530

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

According to the manufacturer, some 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.

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB control number. The control number for the collection of information required by this AD is 2120–0056. The paperwork cost associated with this AD has been detailed in the Costs of Compliance section of this document and includes time for reviewing instructions, as well as completing and reviewing the collection of information. Therefore, all reporting associated with this AD is mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at 800 Independence Ave. SW., Washington, DC 20591, ATTN: Information Collection Clearance Officer, AES–200.

Authority for This Rulemaking

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

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

Regulatory Findings

We determined that this 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–2014–0923; Directorate Identifier 2014–NM–176–AD.

(a) Comments Due Date

We must receive comments by January 29, 2015.

(b) Affected ADs

None.

(c) Applicability

(1) This AD applies to The Boeing Company Model 737–700, –800, and –900ER series airplanes, certificated in any category, as identified in Boeing Special Attention Service Bulletin 737–53–1334, dated August 4, 2014.

(2) For airplanes identified as Group 7 in Boeing Special Attention Service Bulletin 737–53–1334, dated August 4, 2014, no work is required by this AD.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by reports of troughs in the skin along the chem-mill pocket edges of certain fuselage crown skin panel assemblies. We are issuing this AD to detect and correct troughs in the chem-mill pocket edges, which could lead to cracking at the trough locations, and consequent rapid decompression of the airplane.

(f) Compliance

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

(g) Inspections

At the applicable time specified in paragraph 1.E., ''Compliance,'' of Boeing Special Attention Service Bulletin 737–53–1334, dated August 4, 2014, except as required by paragraph (h) of this AD: Do external medium frequency eddy current inspections to detect cracking in higher- and lower-stress locations of the crown skin panel assembly, in accordance with Boeing Special Attention Service Bulletin 737–53–1334, dated August 4, 2014. Repeat the inspections thereafter at the applicable time specified in paragraph 1.E., ''Compliance,'' of Boeing Special Attention Service Bulletin 737–53–1334, dated August 4, 2014. Accomplishment of the actions specified in paragraph (j) of this AD terminates the requirements of paragraph (g) of this AD.

(h) Exception to Service Information Specifications

Where Boeing Special Attention Service Bulletin 737–53–1334, dated August 4, 2014, specifies a compliance time ''after the original issue date of this service bulletin,'' this AD requires compliance within the specified compliance time after the effective date of this AD.

(i) Crack Repair

If any crack is found during any inspection required by paragraph (g) of this AD, repair before further flight using a method approved in accordance with the procedures specified in paragraph (j) of this AD.

(j) Optional Terminating Action

The actions specified in paragraph (g) of this AD may be terminated by accomplishment of a part mark inspection of the crown skin panel assembly in accordance with Part 5 of Work Package 2 of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1334, dated August 4, 2014, and the applicable actions specified in paragraphs (j)(1) and (j)(2) of this AD.

(1) If ''Condition 5,'' as defined in Boeing Special Attention Service Bulletin 737–53–1334, dated August 4, 2014, is found, corrective actions must be done before further flight using a method approved in accordance with the procedures specified in paragraph (l) of this AD.

(2) If ''Condition 6'', as defined in Boeing Special Attention Service Bulletin 737–53–1334, dated August 4, 2014, is found, the actions specified in paragraphs (j)(2)(i) and (j)(2)(ii) of this AD must be done at the applicable specified time.

(i) A report of the findings, including the inspection results (discrepant part number of panel assembly), the airplane serial number, and the manufacturing order code as defined in Appendix C of Boeing Special Attention Service Bulletin 737–53–1334, dated August 4, 2014, must be submitted to *https://www.myboeingfleet.com* before further flight.

(ii) An internal detailed inspection for troughs must be done before further flight in accordance with Boeing Special Attention Service Bulletin 737–53–1334, dated August 4, 2014, and any skin panel assembly with a trough must be replaced before further flight using a method approved in accordance with the procedures specified in paragraph (l) of this AD.

(k) Paperwork Reduction Act Burden Statement

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(l) Alternative Methods of Compliance (AMOCs)

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

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

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

(4) If the service information contains steps that are labeled as RC (Required for Compliance), those steps must be done to comply with this AD; any steps that are not labeled as RC are recommended. Those steps that are not labeled as RC may be deviated from, done as part of other actions, or done using accepted methods different from those identified in the specified service information without obtaining approval of an AMOC, provided the steps labeled as RC can be done and the airplane can be put back in a serviceable condition. Any substitutions or

changes to steps labeled as RC require approval of an AMOC.

(m) Related Information

(1) For more information about this AD, contact Haytham Alaidy, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6573; fax: 425–917–6590; email: *Haytham.alaidy@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on December 3, 2014.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2014–29234 Filed 12–12–14; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2014–0922; Directorate Identifier 2014–NM–156–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus 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 Airbus Model A319 and A320 series airplanes. This proposed AD was prompted by a report that fatigue cracking could appear at certain fastener locations in the longeron area below the emergency exit cut-outs. This proposed AD is intended to complete certain mandated programs intended to support the airplane reaching its limit of validity (LOV) of the engineering data that support the established structural maintenance program. This proposed AD would require modification of eight fastener locations in the longeron area below the emergency exit cut-outs on the left-hand (LH) and right-hand (RH) sides. We are proposing this AD to detect and correct cracking at certain fastener locations in the longeron area below the emergency exit cut-outs, which could lead to failure of the fasteners and reduced structural integrity of the airplane.

DATES: We must receive comments on this proposed AD by January 29, 2015.

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: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Airbus, Airworthiness Office—EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

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–2014–0922; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket 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: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1405; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

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–2014–0922; Directorate Identifier 2014–NM–156–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD 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 proposed AD.

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2014–0176, dated July 25, 2014 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition on certain Model A319 and Model A320 series airplanes. The MCAI states:

> During the A320 fatigue test campaign for Extended Service Goal (ESG), it was determined that fatigue damage could appear at certain fastener locations on the longeron [area] below the emergency exit cut-outs, on the left-hand (LH) and right-hand (RH) sides of the fuselage.
>
> This condition, if not detected and corrected, could affect the structural integrity of the aeroplane.
>
> To address this potential unsafe condition, Airbus developed a modification, which has been published through Airbus Service Bulletin (SB) A320–53–1265 for in-service application to allow aeroplanes to operate up to the new ESG limit.
>
> For the reasons described above, this [EASA] AD requires modification (cold working) of 8 fastener locations in the Longeron area (Stringer 20A) below the emergency exit cut-outs on the LH and RH sides.

As described in FAA Advisory Circular 120–104 (*http://www.faa.gov/documentLibrary/media/Advisory_Circular/120-104.pdf*), several programs have been developed to support initiatives that will ensure the continued airworthiness of aging airplane structure. The last element of those initiatives is the requirement to establish an LOV of the engineering data that support the structural maintenance program under 14 CFR 26.21. This proposed AD is the result of an assessment of the previously established programs by DAH during the process of establishing the LOV for Airbus Model A319 and A320 series airplanes. The

actions specified in this proposed AD are necessary to complete certain programs to ensure the continued airworthiness of aging airplane structure and to support an airplane reaching its LOV.

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–2014–0922.

Relevant Service Information

Airbus has issued Service Bulletin A320–53–1265, Revision 1, dated July 2, 2013. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

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 48 airplanes of U.S. registry.

We also estimate that it would take about 12 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost $0 per product. Based on these figures, we estimate the cost of this proposed AD on U.S. operators to be $48,960, or $1,020 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

We determined that this 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):

Airbus: Docket No. FAA–2014–0922; Directorate Identifier 2014–NM–156–AD.

(a) Comments Due Date

We must receive comments by January 29, 2015.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus airplanes identified in paragraphs (c)(1) and (c)(2) of this AD, certificated in any category, all manufacturer serial numbers, except those on which Airbus modification (mod) 152637 or mod 32208 has been embodied in production.

(1) Airbus Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes.

(2) Airbus Model A320–211, –212, –214, –231, –232, and –233 airplanes.

(d) Subject

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

(e) Reason

This AD was prompted by a report that fatigue cracking could appear at certain fastener locations in the longeron area below the emergency exit cut-outs. We are issuing this AD to detect and correct cracking at certain fastener locations on the longeron, which could lead to failure of the fasteners and reduced structural integrity of the airplane.

(f) Compliance

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

(g) Modification of Fastener Locations

Before the accumulation of 48,000 total flight cycles or 96,000 total flight hours, whichever occurs first since the airplane's first flight, modify the 8 fastener locations in the longeron area (stringer 20A) below the emergency exit cut-outs on both right-hand and left-hand sides, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–53–1265, Revision 01, dated July 2, 2013.

(h) Credit for Previous Actions

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 Airbus Service Bulletin A320–53–1265, dated January 2, 2013, which is not incorporated by reference in this AD.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, International Branch, ANM–116, Transport Airplane Directorate ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1405; fax 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov*. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) Contacting the Manufacturer: For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–

116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(j) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) European Aviation Safety Agency Airworthiness Directive 2014–0176, dated July 25, 2014, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2014–0922.

(2) For service information identified in this AD, contact Airbus, Airworthiness Office—EAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.* You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on December 3, 2014.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2014–29233 Filed 12–12–14; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2014–1020; Directorate Identifier 2013–SW–078–AD]

RIN 2120–AA64

Airworthiness Directives; Sikorsky Aircraft Corporation (Type Certificate Previously Held by Schweizer Aircraft Corporation) Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for Sikorsky Aircraft Corporation (type certificate previously held by Schweizer Aircraft) (Sikorsky) Model 269D and Model 269D Configuration A helicopters. This proposed AD would require reducing the life limit of the ring gear carrier assembly. This proposed AD is prompted by cracks in the ring gear carrier assembly. The proposed actions are intended to reduce the life of the ring gear carrier assembly to prevent failure of the main rotor transmission, loss of engine power to the main rotor, and subsequent loss of control of the helicopter.

DATES: We must receive comments on this proposed AD by February 13, 2015.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Docket:* Go to *http://www.regulations.gov.* Follow the online instructions for sending your comments electronically.
- *Fax:* 202–493–2251.
- *Mail:* Send comments to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to the ''Mail'' address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the Docket Operations Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the economic 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 service information identified in this proposed AD, contact Sikorsky Aircraft Corporation, Customer Service Engineering, 124 Quarry Road, Trumbull, CT 06611; telephone 1–800–Winged–S or 203–416–4299; email *sikorskywcs@sikorsky.com.* You may review the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

FOR FURTHER INFORMATION CONTACT: Norman Perenson, Aviation Safety Engineer, New York Aircraft Certification Office, Propulsion & Services Branch, FAA, 1600 Stewart Ave., Westbury, New York; telephone (516) 228–7337; email *Norman.Perenson@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time.

We will file in the docket all comments that we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. We may change this proposal in light of the comments we receive.

Discussion

We propose to adopt a new AD for Sikorsky Model 269D and Model 269D Configuration A helicopters with a certain part-numbered ring carrier assembly installed. This proposed AD would require reducing the life limit of the ring carrier assembly from 6,000 hours time-in-service (TIS) to 5,000 hours TIS by revising the Airworthiness Limitations Section of the applicable maintenance manual and by removing from service any ring carrier assembly that exceeded the new life limit. This proposed AD is prompted by the discovery of a crack in the ring gear carrier assembly discovered during unscheduled maintenance after black discoloration of the main transmission oil was observed. The crack extended around the entire circumference of the flange and intersected some of the bolt holes but did not propagate ''bolt hole to bolt hole.'' A metallurgical evaluation determined that fretting caused multiple origin fatigue cracking on the ring gear carrier assembly. The proposed actions to reduce the life of the ring gear carrier assembly are intended to prevent failure of the main rotor transmission, loss of engine power to the main rotor, and subsequent loss of control of the helicopter.

FAA's Determination

We are proposing this AD because we evaluated all known relevant information and determined that an unsafe condition exists and is likely to exist or develop on other helicopters of the same type design.

Related Service Information

Sikorsky issued 269D Helicopter Alert Service Bulletin No. ASB DB–040A,

Revision A, dated December 4, 2012, to implement a reduction in service life of the ring gear carrier assembly, part number (P/N) 269A5194, from 6,000 flight hours to 5,000 flight hours.

Proposed AD Requirements

This proposed AD would require reducing the life limit of the ring gear carrier assembly, P/N 269A5194, from 6,000 hours TIS to 5,000 hours TIS by revising the Airworthiness Limitations section of the applicable maintenance manual. This proposed AD would also require replacing each ring gear carrier assembly with an airworthy ring gear carrier assembly on or before reaching 5,000 hours TIS.

Costs of Compliance

We estimate that this proposed AD would affect 16 helicopters of U.S. Registry.

We estimate a minimal cost to change the life limit of the ring gear. If required, we estimate it would take 27.5 hours to replace a ring gear carrier assembly at $85 per work hour. Required parts would cost $7,591 for a total of $9,929 per helicopter.

Authority for This Rulemaking

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

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

Regulatory Findings

We determined that this 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, 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 to the extent that it justifies making a regulatory distinction; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

List of Subjects in 14 CFR Part 39

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

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. Amend § 39.13 by adding the following new airworthiness directive (AD):

Sikorsky Aircraft Corporation (Type Certificate Previously Held By Schweizer Aircraft Corporation): Docket No. FAA–2014–1020; Directorate Identifier 2013–SW–078–AD.

(a) Applicability

This AD applies to Sikorsky Aircraft Corporation Model 269D and Model 269D Configuration A helicopters with ring gear carrier assembly, part number (P/N) 269A5194, installed, certificated in any category.

(b) Unsafe Condition

This AD defines the unsafe condition as a fatigue crack in a ring gear carrier assembly. This condition could result in failure of the main rotor transmission, loss of engine power to the main rotor, and subsequent loss of control of the helicopter.

(c) Comments Due Date

We must receive comments by February 13, 2015.

(d) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(e) Required Actions

Before further flight:

(1) Revise the Airworthiness Limitations Section of the applicable maintenance manual by reducing the life limit of the ring gear carrier assembly, P/N 269A5194, from 6,000 hours time-in-service (TIS) to 5,000 hours TIS.

(2) Remove from service any ring gear carrier assembly, P/N 269A5194, with 5,000 or more hours TIS.

(f) Alternative Methods of Compliance (AMOC)

(1) The Manager, New York Aircraft Certification Office, FAA, may approve AMOCs for this AD. Send your proposal to: Norman Perenson, Aviation Safety Engineer, New York Aircraft Certification Office, Propulsion & Services Branch, FAA, 1600 Stewart Ave., Westbury, New York; telephone (516) 228–7337; email *Norman.Perenson@faa.gov.*

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

(g) Additional Information

Sikorsky 269D Helicopter Alert Service Bulletin No. ASB DB–040A, Revision A, dated December 4, 2012, which is not incorporated by reference, contains additional information about the subject of this AD. For service information identified in this AD, contact Sikorsky Aircraft Corporation, Customer Service Engineering, 124 Quarry Road, Trumbull, CT 06611; telephone 1–800–Winged–S or 203–416–4299; email *sikorskywcs@sikorsky.com.* You may review a copy of information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

(h) Subject

Joint Aircraft Service Component (JASC) Code: 6300 Main Rotor Drive System.

Issued in Fort Worth, Texas, on December 8, 2014.

Lance T. Gant,

Acting Directorate Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2014–29260 Filed 12–12–14; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2014–0921; Directorate Identifier 2014–NM–073–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 supersede Airworthiness Directive (AD) 2013–14–05, which applies to certain The Boeing Company Model 747–400 and 747–400F series airplanes. AD 2013–14–05 currently requires repetitive inspections of the longeron extension fittings for cracking, and related investigative and corrective actions if necessary. AD 2013–14–05 also provides optional terminating action for the repetitive inspections. Since we issued AD 2013–14–05, we determined that more work is necessary on airplanes on which a terminating action (permanent repair, longeron extension fitting replacement, or modification) was accomplished. This proposed AD would continue to require the requirements of AD 2013–14–05, and would add new repetitive high frequency eddy current (HFEC) inspections of any modified, repaired, or replaced longeron extension fitting for cracking, and applicable related investigative and corrective actions if necessary. We are proposing this AD to detect and correct cracks in the longeron extension fittings, which can become large and adversely affect the structural integrity of the airplane.

DATES: We must receive comments on this proposed AD by January 29, 2015.

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 proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

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–2014–0921; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Nathan Weigand, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6428; fax: 425–917–6590; email: *Nathan.P.Weigand@faa.gov.*

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–2014–0921; Directorate Identifier 2014–NM–073–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

On June 25, 2013, we issued AD 2013–14–05, Amendment 39–17510 (78 FR 43763, July 22, 2013), for certain the Boeing Company Model 747–400 and 747–400F series airplanes. AD 2013–14–05 requires repetitive inspections of the longeron extension fittings for cracking, and related investigative and corrective actions if necessary. AD 2013–14–05 also provides for optional terminating action for the repetitive inspections. AD 2013–14–05 resulted from reports of cracking in the outboard flange of the longeron extension fittings, which attach to the wing-to-body fairing support frame. We issued AD 2013–14–05 to detect and correct cracks in the longeron extension fittings, which can become large and adversely affect the structural integrity of the airplane.

Actions Since AD 2013–14–05, Amendment 39–17510 (78 FR 43763, July 22, 2013) Was Issued

Since we issued AD 2013–14–05, Amendment 39–17510 (78 FR 43763, July 22, 2013), we determined that more work is necessary on airplanes that accomplished a permanent repair, longeron extension fitting replacement, or preventive modification (the terminating actions specified in AD 2013–14–05).

Relevant Service Information

We reviewed Boeing Alert Service Bulletin 747–53A2860, Revision 1, dated March 18, 2014. For information on the procedures and compliance times, see this service information at *http://www.regulations.gov* by searching for Docket No. FAA–2014–0921.

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

Although this proposed AD does not explicitly restate the requirements of AD 2013–14–05, Amendment 39–17510 (78 FR 43763, July 22, 2013), this proposed AD would retain all of the requirements of AD 2013–14–05. Those requirements are referenced in the service information identified previously, which, in turn, is referenced in paragraphs (g), (h)(1), and (j) of this proposed AD. This proposed AD would require additional repetitive HFEC inspections of the left and right longeron extension fittings for cracking, and applicable related investigative and corrective actions, for airplanes that have previously accomplished a permanent repair, longeron extension fitting replacement, or preventive modification, as identified in Boeing Alert Service Bulletin 747–53A2860, dated December 4, 2012.

The phrase ''related investigative actions'' is used in this proposed AD. ''Related investigative actions'' are follow-on actions that (1) are related to the primary actions, and (2) further investigate the nature of any condition found. Related investigative actions in an AD could include, for example, inspections.

The phrase ''corrective actions'' is used in this proposed AD. ''Corrective actions'' are actions that correct or

address any condition found. Corrective actions in an AD could include, for example, repairs.

Differences Between This Proposed AD and the Service Information

Boeing Alert Service Bulletin 747–53A2860, Revision 1, dated March 18, 2014, specifies to contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions in one of the following ways:

- In accordance with a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) whom we have authorized to make those findings.

Clarification of Terminating Actions for Certain Inspections

Paragraph (h)(1) of this proposed AD specifies that if the terminating action is done ''before the effective date of this AD'' in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2860, dated December 4, 2012, it terminates the inspections in paragraph (g) of this proposed AD. In paragraph (h)(2) of this proposed AD we specify that the terminating action if done ''on or after the effective date of this AD'' must be done in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2860, Revision 1, dated March 18, 2014, except as required by paragraph (k)(2) of this AD.

Costs of Compliance

We estimate that this proposed AD affects 41 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
HFEC inspection [retained action from AD 2013-14-05, Amendment 39-17510 (78 FR 43763, July 22, 2013)].	32 work-hours × $85 per hour = $2,720 per inspection cycle.	$0	$2,720 per inspection cycle.	$111,520 per inspection cycle.
Terminating action for certain inspections [retained action from AD 2013-14-05, Amendment 39-17510 (78 FR 43763, July 22, 2013)].	479 work-hours × $85 per hour = $40,715.	0	$40,715	$1,669,315.
HFEC inspection [new action]	32 work-hours × $85 per hour = $2,720 per inspection cycle.	0	$2,720 per inspection cycle.	$111,520 per inspection cycle.

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replacement	464 work-hours × $85 per hour = $39,440	$0	$39,440

According to the manufacturer, some 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.

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2013–14–05, Amendment 39–17510 (78 FR 43763, July 22, 2013), and adding the following new AD:

The Boeing Company: Docket No. FAA–2014–0921; Directorate Identifier 2014–NM–073–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by January 29, 2015.

(b) Affected ADs

This AD replaces AD 2013–14–05, Amendment 39–17510 (78 FR 43763, July 22, 2013).

(c) Applicability

This AD applies to The Boeing Company Model 747–400 and –400F series airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin 747–53A2860, Revision 1, dated March 18, 2014.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by reports of cracking in the outboard flange of the longeron extension fittings, and we determined that more work is necessary on airplanes on which a permanent repair, longeron extension fitting replacement, or modification was accomplished, as required by AD 2013–14–05, Amendment 39–17510 (78 FR 43763, July 22, 2013) could crack. We are issuing this AD to detect and correct cracks in the longeron extension fittings, which can become large and adversely affect the structural integrity of the airplane.

(f) Compliance

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

(g) Repetitive Inspections

At the applicable time specified in table 1 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2860, Revision 1, dated March 18, 2014: Do surface high frequency eddy current (HFEC) inspections for cracking of the left and right longeron extension fittings, and all applicable corrective actions, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2860, Revision 1, dated March 18, 2014, except as required by paragraph (k)(2) of this AD. Do all applicable corrective actions at the applicable time specified in table 1 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2860, Revision 1, dated March 18, 2014. If no cracking is found, repeat the inspection thereafter at the intervals specified in table 1 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2860, Revision 1, dated March 18, 2014, until a terminating action specified in paragraph (h) of this AD is done.

(h) Terminating Actions for the Inspections Required by Paragraph (g) of This AD

(1) Doing the permanent repair, longeron extension fitting replacement, or preventative modification before the effective date of this AD, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2860, dated December 4, 2012, terminates the repetitive inspections required by paragraph (g) of this AD. Boeing Alert Service Bulletin 747–53A2860, dated December 4, 2012, was incorporated by reference in AD 2013–14–05, Amendment 39–17510 (78 FR 43763, July 22, 2013). After accomplishing the actions specified in this paragraph, the actions specified in paragraph (i) of this AD must be done at the times specified in paragraph (i) of this AD.

(2) Doing the repair (PART 4 of Boeing Alert Service Bulletin 747–53A2860, Revision 1, dated March 18, 2014), longeron extension fitting replacement, or modification on or after the effective date of this AD, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2860, Revision 1, dated March 18, 2014, except as required by paragraph (k)(2) of this AD, terminates the repetitive inspection requirements of paragraph (g) of this AD. After accomplishing the actions specified in this paragraph, the actions specified in paragraph (i) of this AD must be done at the times specified in paragraph (i) of this AD.

(i) Post-Modification/Repair/Replacement Inspections

For airplanes on which any action identified in paragraph (h) of this AD has been accomplished (including if done as a corrective action required by paragraph (g) or (j) of this AD): At the applicable time specified in table 3 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2860, Revision 1, dated March 18, 2014, except as required by paragraph (k)(1) of this AD, do a HFEC inspection of the left and right longeron extension fittings for cracking, as applicable, and do all applicable corrective actions, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2860, Revision 1, dated March 18, 2014. Do all applicable corrective actions at the applicable time specified in table 3 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2860, Revision 1, dated March 18, 2014, except as required by paragraph (k)(2) of this AD. If no cracking is found, repeat the inspection thereafter at the interval specified in table 3 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2860, Revision 1, dated March 18, 2014.

(j) Inspection of Temporary Repair and Corrective Actions

For airplanes on which a temporary repair as specified in Boeing Alert Service Bulletin 747–53A2860 has been done: At the times specified in table 2 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2860, Revision 1, dated March 18, 2014, do a surface HFEC inspection of the temporary repair of the longeron extension fittings for cracking, and do all applicable corrective actions, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2860, Revision 1, dated March 18, 2014, except as required by paragraph (k)(2) of this AD. Do all applicable corrective actions before further flight.

(k) Exceptions to the Service Information

(1) Where Boeing Alert Service Bulletin 747–53A2860, Revision 1, dated March 18, 2014, specifies a compliance time ''after the Revision 1 date of this service bulletin,'' this AD requires compliance within the specified compliance time after the effective date of this AD.

(2) Where Boeing Alert Service Bulletin 747–53A2860, Revision 1, dated March 18, 2014, specifies to contact Boeing for repair information: Before further flight, repair using a method approved in accordance with the procedures specified in paragraph (m) of this AD.

(l) Credit for Previous Actions

This paragraph provides credit for the actions specified in paragraphs (g) and (j) of this AD, if those actions were performed before the effective date of this AD using Boeing Alert Service Bulletin 747–53A2860, dated December 4, 2012, which was incorporated by reference in AD 2013–14–05, Amendment 39–17510 (78 FR 43763, July 22, 2013).

(m) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in paragraph (m)(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 required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) AMOCs approved previously for AD 2013–14–05, Amendment 39–17510 (78 FR 43763, July 22, 2013), are approved as AMOCs for the corresponding provisions of paragraphs (g), (h), and (j) of this AD.

(n) Related Information

(1) For more information about this AD, contact Nathan Weigand, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6428; fax: 425–917–6590; email: *Nathan.P.Weigand@faa.gov*.

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com*. You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on December 5, 2014.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2014–29232 Filed 12–12–14; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2014–0869; Airspace Docket No. 14–AWP–6]

Proposed Establishment of Class E Airspace; Hazen, NV

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E airspace at the Hazen VHF Omni-Directional Radio Range Tactical Air Navigation Aid (VORTAC), Hazen, NV, to facilitate vectoring of Instrument Flight Rules (IFR) aircraft under control of Oakland Air Route Traffic Control Center (ARTCC). The FAA is proposing this action to enhance the safety and management of aircraft operations within the National Airspace System.

DATES: Comments must be received on or before January 29, 2015.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590; telephone (202) 366–9826. You must identify FAA Docket No. FAA–2014–0869; Airspace Docket No. 14–AWP–6, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Steve Haga, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue SW., Renton, WA 98057; telephone (425) 203–4563.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2014–0869 and Airspace Docket No. 14–AWP–6) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov*.

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2014–0869 and Airspace Docket No. 14–AWP–6''. The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/*.

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 1601 Lind Avenue SW., Renton, WA 98057.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) Part 71 by establishing Class E en route domestic airspace extending upward from 1,200 feet above the surface at the Hazen VORTAC navigation aid, Hazen, NV. This action would contain aircraft while in IFR conditions under control of Oakland ARTCC by vectoring aircraft from en route airspace to terminal areas.

Class E airspace designations are published in paragraph 6006, of FAA Order 7400.9Y, dated August 6, 2014, and effective September 15, 2014, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in this Order.

The FAA has determined this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1,

Section 106, describes the authority for the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would establish controlled airspace at the Hazen VORTAC, Hazen, NV.

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9Y, Airspace Designations and Reporting Points, dated August 6, 2014, and effective September 15, 2014 is amended as follows:

Paragraph 6006 En Route Domestic Airspace Areas.

* * * * *

AWP NV E6 Hazen, NV [New]

Hazen VORTAC, NV
(Lat. 39°30′59″ N., long. 118°59′52″ W.)

That airspace extending upward from 1,200 feet above the surface within an area bounded by a line beginning at lat. 40°05′00″ N., long. 120°00′00″ W.; to lat. 40°27′51″ N., long. 119°37′10″ W.; to lat. 40°04′38″ N., long. 118°49′42″ W.; to lat. 39°39′28″ N., long. 117°59′55″ W.; to lat. 39°41′00″ N., long. 119°00′00″ W.; thence to the point of beginning.

Issued in Seattle, Washington, on December 8, 2014.

Clark Desing,

Manager, Operations Support Group, Western Service Center.

[FR Doc. 2014–29270 Filed 12–12–14; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Part 1010

RIN 1506—AA67

Financial Crimes Enforcement Network; Withdrawal of the Proposed Rule Against PJSC Trustbank, Formerly Known as Infobank

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

ACTION: Withdrawal of the proposed rulemaking.

SUMMARY: This document withdraws FinCEN's August 24, 2004 proposed rule proposing imposition of the fifth special measure against PJSC Trustbank, formerly known as Infobank (''Trustbank''), as a financial institution of primary money laundering concern, pursuant to the authority contained in the Bank Secrecy Act.

DATES: As of December 15, 2014, the proposed rule published August 24, 2004, at 69 FR 51973, is withdrawn.

FOR FURTHER INFORMATION CONTACT: The FinCEN Resource Center at (800) 767–2825.

SUPPLEMENTARY INFORMATION:

I. Background

The Bank Secrecy Act (''BSA''), codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5314 and 5316–5332, promotes the prevention, detection, and prosecution of money laundering, tax evasion, the financing of terrorism, and other financial crimes. Regulations implementing the BSA appear at 31 CFR Chapter X. The authority of the Secretary of the Treasury (''the Secretary'') to administer the BSA and its implementing regulations has been delegated to the Director of FinCEN.

Section 5318A of the BSA grants the Secretary authority, upon finding that reasonable grounds exist for concluding that a foreign jurisdiction, foreign financial institution, class of international transactions, or type of account is of ''primary money laundering concern,'' to require domestic financial institutions and domestic financial agencies to take certain ''special measures'' against the primary money laundering concern.

II. The Finding, Notice of Proposed Rulemaking, and Subsequent Developments

A. The Notice of Finding and Notice of Proposed Rulemaking

Based upon review and analysis of relevant information, consultations with relevant Federal agencies and departments, and after consideration of the factors enumerated in section 311, the Director of FinCEN found that reasonable grounds existed for concluding that Trustbank was a financial institution of primary money laundering concern. FinCEN published a proposed rule proposing the imposition of the fifth special measure on August 24, 2004, pursuant to the authority under 31 U.S.C. 5318A.[1]

B. Subsequent Developments

Since FinCEN's notice of proposed rulemaking, material facts regarding the circumstances of the proposed rulemaking and the basis of the finding of primary money laundering concern have changed. Based on the totality of the current circumstances and available facts, FinCEN concludes that it is no longer appropriate to maintain its finding that Trustbank represents a primary money laundering concern, and FinCEN will therefore not proceed with the rule proposed on August 24, 2004.

III. Withdrawal of the Proposed Rule

For the reasons set forth above, FinCEN hereby withdraws the August 24, 2004 proposed rule proposing the imposition of the fifth special measure authorized by 31 U.S.C. 5318A(B)(5) regarding Trustbank.

Dated: December 8, 2014.

Jennifer Shasky Calvery,

Director, Financial Crimes Enforcement Network.

[FR Doc. 2014–29339 Filed 12–12–14; 8:45 am]

BILLING CODE 4810–02–P

[1] *See* 69 FR 51973 (Aug. 24, 2004) (RIN 1506–AA67).

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2014–0668]

RIN 1625–AA00

Safety Zone; City of Valdez July 4th Fireworks Display, Port Valdez; Valdez, AK

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a permanent safety zone on the navigable waters of Port Valdez, Valdez, Alaska, in the vicinity of the Valdez Spit. The proposed safety zone is necessary to protect persons and vessels from the hazards associated with the annual City of Valdez July 4th Fireworks Display event. This rule is intended to restrict vessels from a portion of the navigable waters of Port Valdez, in the immediate vicinity of the fireworks launch platforms, before, during, and immediately after the fireworks event.

DATES: Comments and related material must be received by the Coast Guard on or before March 16, 2015.

ADDRESSES: You may submit comments identified by docket number using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail or Delivery:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Deliveries accepted between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for further instructions on submitting comments. To avoid duplication, please use only one of these three methods.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Lieutenant Commander Jason A. Smilie, Chief of Waterways Management Division, U.S. Coast Guard Marine Safety Unit Valdez; telephone (907) 835–7223, email *Jason.A.Smilie@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Cheryl Collins, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

COTP Captain of the Port
DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking

A. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

1. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online at *http://www.regulations.gov,* or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* type the docket number USCG–2014–0668 in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Submit a Comment'' on the line associated with this rulemaking.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8.5 by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

2. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number USCG–2014–0668 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

3. Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

4. Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one, using one of the methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

B. Regulatory History and Information

The Coast Guard began issuing temporary final rules establishing safety zones during the Valdez July 4th Fireworks Display. These temporary safety zones were established for each year's event beginning in 2010. The Coast Guard received no comments or concerns from the public when the temporary safety zones were in place. This Notice of Proposed Rulemaking proposes to permanently establish a safety zone of the exact same size and position as that which were established under the temporary final rules since 2010.

C. Basis and Purpose

(a) The legal basis for the rule is the Coast Guard's authority to establish limited access areas: 33 U.S.C 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

(b) The purpose of this rule is to enhance the safety for spectators and mariners attending a community event that involves a relatively large fireworks display. The Coast Guard anticipates that a large number of spectators will congregate around the launch position during the display. The Captain of the Port Prince William Sound has determined that the fireworks launched near a gathering of watercrafts may pose a significant risk to public safety and property. Such hazards include premature and accidental detonations, falling and burning debris, and vessels operating in close proximity to each other. The safety zone is necessary to provide for the safety of persons and vessels attending the event in the navigable waters in the vicinity of the fireworks launch site.

D. Discussion of Proposed Rule

The Coast Guard proposes to establish a permanent safety zone on the navigable waters of Port Valdez, within a 200 yard radius of the location where the fireworks will be launched on the Valdez Spit for the City of Valdez July 4th Fireworks Display. The proposed safety zone is necessary to ensure the safety of spectators and vessels from hazards associated with fireworks displays. The fireworks displays are expected to occur between 10:00 p.m. and 11:00 p.m. In order to coordinate the safe movement of vessels within the area and to ensure that the area is clear of unauthorized persons and vessels before, during, and immediately after the fireworks launch, this zone will be enforced from 9:30 p.m. to 11:30 p.m. Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port Prince William Sound or the designated representative. Vessels will be able to transit the surrounding area and may be authorized to transit through the proposed safety zone with the permission of the COTP or the designated representative. Before activating the zone we will notify mariners by appropriate means including but not limited to Local Notice to Mariners and Broadcast Notice to Mariners.

This rule is being proposed to provide for the safety of life on the navigable waters during the fireworks display event, and to give the public the opportunity to comment on the proposed safety zone location, size, and length of time the zone will be activated.

D. Regulatory Analyses

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

1. Regulatory Planning and Review

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. The Coast Guard's enforcement of the proposed safety zone will be of short duration, approximately two hours. Furthermore, vessels may be authorized to transit through the proposed safety zones with the permission of the Captain of the Port Prince William Sound, Alaska.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This proposed rule may affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit, anchor, or fish in a portion of Port Valdez in the vicinity of the Valdez Spit during the period of enforcement of the proposed safety zone.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons; this rule will be enforced for only two hours and vessel traffic will be able to navigate safely around the proposed safety zone. Before and during the enforcement period, we will also issue maritime advisories widely available to the mariners that transit Port Valdez and Prince William Sound.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the FOR **FURTHER INFORMATION CONTACT**, section above. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

4. Collection of Information

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

5. Federalism

A rule has implications for Federalism under Executive Order 13132. Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and determined that this rule does not have implications for Federalism.

6. Protest Activities

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

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children From Environmental Health Risks

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

11. Indian Tribal Governments

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

12. Energy Effects

This proposed rule is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

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

14. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves the establishment of a permanent safety zone on the navigable waters of Port Valdez, in the vicinity of the Valdez Spit. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. A preliminary environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapter 701; 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Public Law 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T17–0668 to read as follows:

§ 165.T17–0668 Safety Zone; City of Valdez July 4th Fireworks, Port Valdez; Valdez, AK.

(a) *Regulated area.* The following area is a permanent safety zone: All navigable waters of Port Valdez within a 200-yard radius from a position of 61°07′22″ N and 146°21′10″ W. This includes the entrance to the Valdez small boat harbor.

(b) *Effective date.* This rule will be effective from 9:30 p.m. until 11:30 p.m. on July 4th of each year, or during the same timeframe on specified rain dates of July 5th through July 8th of each year.

(c) *Definitions.* The following definitions apply to this section:

(1) The term ''designated representative'' means any Coast Guard commissioned, warrant or petty officer of the U.S. Coast Guard who has been designated by the Captain of the Port (COTP), Prince William Sound, to act on his or her behalf.

(2) The term ''official patrol vessel'' may consist of any Coast Guard, Coast Guard Auxiliary, state, or local law enforcement vessels assigned or approved by the COTP, Prince William Sound.

(d) *Regulations.* (1) The general regulations contained in 33 CFR 165.23, as well as the following regulations, apply.

(2) The safety zone is closed to all vessel traffic, except as may be permitted by the COTP or the designated representative during periods of enforcement.

(3) All persons and vessels shall comply with the instructions of the COTP or the designated representative. Upon being hailed by a U.S. Coast Guard vessel or other official patrol vessel by siren, radio, flashing light or other means, the operator of the vessel shall proceed as directed.

(4) Vessel operators desiring to enter or operate within the regulated area may request permission from the COTP via VHF Channel 16 or (907) 835–7205 (Prince William Sound Vessel Traffic Center) to request permission to do so.

(5) The Coast Guard will issue a broadcast notice to mariners to advise mariners of the safety zone before and during the event.

(6) The COTP may be aided by other Federal, state, borough and local law enforcement officials in the enforcement of this section.

Dated: December 9, 2014.

M.R. Franklin,

Lieutenant Commander, U.S. Coast Guard, Acting, Captain of the Port Prince William Sound, Alaska.

[FR Doc. 2014–29229 Filed 12–12–14; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R02–OAR–2014–0683, FRL–9920–40–Region 2]

Approval and Promulgation of Implementation Plans; New York; Infrastructure SIP for the 2008 Lead NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve certain elements of New York's State Implementation Plan (SIP) revision submitted to demonstrate that the State meets the requirements of section 110(a)(1) and (2) of the Clean Air Act (CAA) for the 2008 National Ambient Air Quality Standard (NAAQS) for lead (Pb). Section 110(a) of the CAA requires

that each state adopt and submit a SIP for the implementation, maintenance and enforcement of each NAAQS promulgated by the EPA and is commonly referred to as an infrastructure SIP.

DATES: Comments must be received on or before January 14, 2015.

ADDRESSES: Submit your comments, identified by Docket ID number EPA–R02–OAR–2014–0683, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: Ruvo.Richard@epa.gov.*
- *Fax:* 212–637–3901.
- *Mail:* Richard Ruvo, Chief, Air Programs Branch, Environmental Protection Agency, Region 2 Office, 290 Broadway, 25th Floor, New York, New York 10007–1866.
- *Hand Delivery:* Richard Ruvo, Chief, Air Programs Branch, Environmental Protection Agency, Region 2 Office, 290 Broadway, 25th Floor, New York, New York 10007–1866. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:00 excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R02–OAR–2014–0683. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 2 Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007–1866. EPA requests, if at all possible, that you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:30 a.m. to 4:00 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Kirk Wieber at telephone number: (212) 637–3381, email address: *Wieber.Kirk@epa.gov,* fax number: (212) 637–3901, or the above EPA, Region 2 address.

SUPPLEMENTARY INFORMATION:

I. What action is EPA proposing?
II. What is the background information?
III. What elements are required under section 110(a)(1) and (2)?
IV. What is EPA's approach to the review of infrastructure SIP submissions?
V. What did New York submit?
VI. How has the State addressed the elements of the section 110(a)(1) and (2) ''infrastructure'' provisions?
VII. What is the impact of the June 2014 Supreme Court Green House Gas decision on New York's infrastructure SIP for the 2008 Pb NAAQS?
VIII. What action is EPA taking?
IX. Statutory and Executive Order Reviews

I. What action is EPA proposing?

EPA is proposing to approve certain elements of the State of New York Infrastructure SIP as meeting the section 110(a) infrastructure requirements of the Clean Air Act (CAA) for the 2008 lead (Pb) National Ambient Air Quality Standard (NAAQS or standard). As explained below, the State has the necessary infrastructure, resources, and general authority to implement the 2008 Pb standard.

II. What is the background information?

On November 12, 2008, EPA promulgated a new, rolling 3 month average NAAQS for Pb (2008 Pb NAAQS). See 73 FR 66964.[1] The 2008 Pb NAAQS is 0.15 micrograms per cubic meter of air (μg/m^3) maximum (not-to-be-exceeded). In the same action EPA revised the secondary Pb NAAQS to be identical in all respects to the revised primary standard, *i.e.,* 0.15 μg/m^3.

Section 110(a)(1) provides the procedural and timing requirements for State Implementation Plans (SIPs). Section 110(a)(2) lists specific elements that states must meet for SIP requirements related to a newly established or revised NAAQS. Sections 110(a)(1) and (2) of the CAA require, in part, that states submit to EPA plans to implement, maintain and enforce each of the NAAQS promulgated by EPA. By statute, SIPs meeting the requirements of section 110(a)(1) and (2) are to be submitted by states within three years after promulgation of a new or revised standard. These SIPs are commonly called infrastructure SIPs. Based on the October 15, 2008 date of signature, infrastructure SIPs for the 2008 Pb NAAQS were due on October 15, 2011.

III. What elements are required under section 110(a)(1) and (2)?

The infrastructure requirements are listed in EPA's October 2, 2007, memorandum entitled ''Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards'' and September 25, 2009, memorandum entitled ''Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 2006 24-Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards.'' In addition, there were two memorandums referenced: One dated October 14, 2011, ''Guidance on Infrastructure State Implementation Plan (SIP) Elements Required Under Sections 110(a)(1) and 110(a)(2) for the 2008 Lead (Pb) National Ambient Air Quality Standards (NAAQS)'' and the other dated September 13, 2013, in which EPA released new guidance entitled ''Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1)

[1] Final rule signed October 15, 2008. The 1978 lead standard (1.5 μg/m3 as a quarterly average) remains in effect until one year after an area is designated for the 2008 standard, except that in areas designated nonattainment for the 1978 lead standard, the 1978 standard remains in effect until implementation plans to attain or maintain the 2008 standard are approved.

and 110(a)(2).'' [2] This new guidance (2013 Guidance) addresses the 2008 ozone, 2010 NO_2, 2010 SO_2, and 2012 $PM_{2.5}$ NAAQS, as well as infrastructure SIPs for new or revised NAAQS promulgated in the future. The 14 elements required to be addressed are as follows: (1) Emission limits and other control measures; (2) ambient air quality monitoring/data system; (3) program for enforcement of control measures; (4) interstate transport; (5) adequate resources; (6) stationary source monitoring system; (7) emergency power; (8) future SIP revisions; (9) consultation with government officials; (10) public notification; (11) prevention of significant deterioration (PSD) and visibility protection; (12) air quality modeling/data; (13) permitting fees; and (14) consultation/participation by affected local entities.

Two elements identified in section 110(a)(2) are not governed by the 3 year submission deadline of section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within 3 years after promulgation of a new or revised NAAQS, but rather are due at the time that the nonattainment area plan requirements are due pursuant to section 172. See 77 FR 46354 (August 3, 2012); 77 FR 60308 (October 3, 2012, footnote 1). These requirements are: (1) Submissions required by section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D title I of the CAA, and (2) submissions required by section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, title I of the CAA. As a result, this action does not address the nonattainment planning requirements related to section 110(a)(2)(C) or 110(a)(2)(I).

IV. What is EPA's approach to the review of infrastructure SIP submissions?

EPA is acting upon the SIP submission from New York State that addresses the infrastructure requirements of CAA sections 110(a)(1) and 110(a)(2) for the 2008 Pb NAAQS. The requirement for states to make a SIP submission of this type arises out of CAA section 110(a)(1). Pursuant to section 110(a)(1), states must make SIP submissions ''within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof),'' and these SIP submissions are to provide for the ''implementation, maintenance, and enforcement'' of such NAAQS. The statute directly imposes on states the duty to make these SIP submissions, and the requirement to make the submissions is not conditioned upon EPA's taking any action other than promulgating a new or revised NAAQS. Section 110(a)(2) includes a list of specific elements that ''[e]ach such plan'' submission must address.

EPA has historically referred to these SIP submissions made for the purpose of satisfying the requirements of CAA sections 110(a)(1) and 110(a)(2) as ''infrastructure SIP'' submissions. Although the term ''infrastructure SIP'' does not appear in the CAA, EPA uses the term to distinguish this particular type of SIP submission from submissions that are intended to satisfy other SIP requirements under the CAA, such as ''nonattainment SIP'' or ''attainment plan SIP'' submissions to address the nonattainment planning requirements of part D of title I of the CAA, ''regional haze SIP'' submissions required by EPA rule to address the visibility protection requirements of CAA section 169A, and nonattainment new source review permit program submissions to address the permit requirements of CAA, title I, part D.

Section 110(a)(1) addresses the timing and general requirements for infrastructure SIP submissions, and section 110(a)(2) provides more details concerning the required contents of these submissions. The list of required elements provided in section 110(a)(2) contains a wide variety of provisions, some of which pertain to required legal authority, some of which pertain to required substantive program provisions, and some of which pertain to requirements for both authority and substantive program provisions.[3] EPA therefore believes that while the timing requirement in section 110(a)(1) is unambiguous, some of the other statutory provisions are ambiguous. In particular, EPA believes that the list of required elements for infrastructure SIP submissions provided in section 110(a)(2) contains ambiguities concerning what is required for inclusion in an infrastructure SIP submission.

The following examples of ambiguities illustrate the need for EPA to interpret some section 110(a)(1) and section 110(a)(2) requirements with respect to infrastructure SIP submissions for a given new or revised NAAQS. One example of ambiguity is that section 110(a)(2) requires that ''each'' SIP submission must meet the list of requirements therein, while EPA has long noted that this literal reading of the statute is internally inconsistent and would create a conflict with the nonattainment provisions in part D of title I of the CAA, which specifically address nonattainment SIP requirements.[4] Section 110(a)(2)(I) pertains to nonattainment SIP requirements and part D addresses when attainment plan SIP submissions to address nonattainment area requirements are due. For example, section 172(b) requires EPA to establish a schedule for submission of such plans for certain pollutants when the Administrator promulgates the designation of an area as nonattainment, and section 107(d)(1)(B) allows up to two years, or in some cases three years, for such designations to be promulgated.[5] This ambiguity illustrates that rather than apply all the stated requirements of section 110(a)(2) in a strict literal sense, EPA must determine which provisions of section 110(a)(2) are applicable for a particular infrastructure SIP submission.

Another example of ambiguity within sections 110(a)(1) and 110(a)(2) with respect to infrastructure SIPs pertains to whether states must meet all of the infrastructure SIP requirements in a single SIP submission, and whether EPA must act upon such SIP submission in a single action. Although section 110(a)(1) directs states to submit ''a plan'' to meet these requirements, EPA interprets the CAA to allow states to make multiple SIP submissions

[2] ''Guidance on Infrastructure State Implementation Plan (SIP) Elements Required Under Sections 110(a)(1) and 110(a)(2) for the 2008 Lead (Pb) National Ambient Air Quality Standards (NAAQS)'' can be found at: *http://www.epa.gov/airquality/lead/pdfs/20111014infrastructure.pdf.* ''Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2)'' can be found at: *http://www.epa.gov/airquality/urbanair/sipstatus/infrastructure.html.*

[3] For example: Section 110(a)(2)(E)(i) provides that states must provide assurances that they have adequate legal authority under state and local law to carry out the SIP; section 110(a)(2)(C) provides that states must have a SIP-approved program to address certain sources as required by part C of title I of the CAA; and section 110(a)(2)(G) provides that states must have legal authority to address emergencies as well as contingency plans that are triggered in the event of such emergencies.

[4] See, *e.g.,* ''Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_X SIP Call; Final Rule,'' 70 FR 25162, at 25163–65 (May 12, 2005) (explaining relationship between timing requirement of section 110(a)(2)(D) versus section 110(a)(2)(I)).

[5] EPA notes that this ambiguity within section 110(a)(2) is heightened by the fact that various subparts of part D set specific dates for submission of certain types of SIP submissions in designated nonattainment areas for various pollutants. Note, *e.g.,* that section 182(a)(1) provides specific dates for submission of emissions inventories for the ozone NAAQS. Some of these specific dates are necessarily later than three years after promulgation of the new or revised NAAQS.

separately addressing infrastructure SIP elements for the same NAAQS. If states elect to make such multiple SIP submissions to meet the infrastructure SIP requirements, EPA can elect to act on such submissions either individually or in a larger combined action.[6] Similarly, EPA interprets the CAA to allow it to take action on the individual parts of one larger, comprehensive infrastructure SIP submission for a given NAAQS without concurrent action on the entire submission. For example, EPA has sometimes elected to act at different times on various elements and sub-elements of the same infrastructure SIP submission.[7]

Ambiguities within sections 110(a)(1) and 110(a)(2) may also arise with respect to infrastructure SIP submission requirements for different NAAQS. Thus, EPA notes that not every element of section 110(a)(2) would be relevant, or as relevant, or relevant in the same way, for each new or revised NAAQS. The states' attendant infrastructure SIP submissions for each NAAQS therefore could be different. The monitoring requirements that a state might need to meet in its infrastructure SIP submission for purposes of section 110(a)(2)(B) could be very different for different pollutants, for example, because the content and scope of a state's infrastructure SIP submission to meet this element might be very different for an entirely new NAAQS than for a minor revision to an existing NAAQS.[8]

EPA notes that interpretation of section 110(a)(2) is also necessary when EPA reviews other types of SIP submissions required under the CAA. Therefore, as with infrastructure SIP submissions, EPA also has to identify and interpret the relevant elements of section 110(a)(2) that logically apply to these other types of SIP submissions. For example, section 172(c)(7) requires that attainment plan SIP submissions required by part D have to meet the ''applicable requirements'' of section 110(a)(2). Thus, for example, attainment plan SIP submissions must meet the requirements of section 110(a)(2)(A) regarding enforceable emission limits and control measures and section 110(a)(2)(E)(i) regarding air agency resources and authority. By contrast, it is clear that attainment plan SIP submissions required by part D would not need to meet the portion of section 110(a)(2)(C) that pertains to the PSD program required in part C of title I of the CAA, because PSD does not apply to a pollutant for which an area is designated nonattainment and thus subject to part D planning requirements. As this example illustrates, each type of SIP submission may implicate some elements of section 110(a)(2) but not others.

Given the potential for ambiguity in some of the statutory language of section 110(a)(1) and section 110(a)(2), EPA believes that it is appropriate to interpret the ambiguous portions of section 110(a)(1) and section 110(a)(2) in the context of acting on a particular SIP submission. In other words, EPA assumes that Congress could not have intended that each and every SIP submission, regardless of the NAAQS in question or the history of SIP development for the relevant pollutant, would meet each of the requirements, or meet each of them in the same way. Therefore, EPA has adopted an approach under which it reviews infrastructure SIP submissions against the list of elements in section 110(a)(2), but only to the extent each element applies for that particular NAAQS.

Historically, EPA has elected to use guidance documents to make recommendations to states for infrastructure SIPs, in some cases conveying needed interpretations on newly arising issues and in some cases conveying interpretations that have already been developed and applied to individual SIP submissions for particular elements.[9] EPA most recently issued guidance for infrastructure SIPs on September 13, 2013 (2013 Guidance).[10] EPA developed this document to provide states with up-to-date guidance for infrastructure SIPs for any new or revised NAAQS. Within this guidance, EPA describes the duty of states to make infrastructure SIP submissions to meet basic structural SIP requirements within three years of promulgation of a new or revised NAAQS. EPA also made recommendations about many specific subsections of section 110(a)(2) that are relevant in the context of infrastructure SIP submissions.[11] The guidance also discusses the substantively important issues that are germane to certain subsections of section 110(a)(2). Significantly, EPA interprets sections 110(a)(1) and 110(a)(2) such that infrastructure SIP submissions need to address certain issues and need not address others. Accordingly, EPA reviews each infrastructure SIP submission for compliance with the applicable statutory provisions of section 110(a)(2), as appropriate.

As an example, section 110(a)(2)(E)(ii) is a required element of section 110(a)(2) for infrastructure SIP submissions. Under this element, a state must meet the substantive requirements of section 128, which pertain to state boards that approve permits or enforcement orders and heads of executive agencies with similar powers. Thus, EPA reviews infrastructure SIP submissions to ensure that the state's SIP appropriately addresses the requirements of section 110(a)(2)(E)(ii) and section 128. The 2013 Guidance explains EPA's interpretation that there may be a variety of ways by which states can appropriately address these substantive statutory requirements, depending on the structure of an individual state's permitting or enforcement program (*e.g.,* whether permits and enforcement orders are

[6] See, *e.g.,* ''Approval and Promulgation of Implementation Plans; New Mexico; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR) Permitting,'' 78 FR 4339 (January 22, 2013) (EPA's final action approving the structural PSD elements of the New Mexico SIP submitted by the State separately to meet the requirements of EPA's 2008 $PM_{2.5}$ NSR rule), and ''Approval and Promulgation of Air Quality Implementation Plans; New Mexico; Infrastructure and Interstate Transport Requirements for the 2006 $PM_{2.5}$ NAAQS,'' (78 FR 4337) (January 22, 2013) (EPA's final action on the infrastructure SIP for the 2006 $PM_{2.5}$ NAAQS).

[7] On December 14, 2007, the State of Tennessee, through the Tennessee Department of Environment and Conservation, made a SIP revision to EPA demonstrating that the State meets the requirements of sections 110(a)(1) and (2). EPA proposed action for infrastructure SIP elements (C) and (J) on January 23, 2012 (77 FR 3213) and took final action on March 14, 2012 (77 FR 14976). On April 16, 2012 (77 FR 22533) and July 23, 2012 (77 FR 42997), EPA took separate proposed and final actions on all other section 110(a)(2) infrastructure SIP elements of Tennessee's December 14, 2007 submittal.

[8] For example, implementation of the 1997 $PM_{2.5}$ NAAQS required the deployment of a system of new monitors to measure ambient levels of that new indicator species for the new NAAQS.

[9] EPA notes, however, that nothing in the CAA requires EPA to provide guidance or to promulgate regulations for infrastructure SIP submissions. The CAA directly applies to states and requires the submission of infrastructure SIP submissions, regardless of whether or not EPA provides guidance or regulations pertaining to such submissions. EPA elects to issue such guidance in order to assist states, as appropriate.

[10] ''Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2),'' Memorandum from Stephen D. Page, September 13, 2013.

[11] EPA's September 13, 2013, guidance did not make recommendations with respect to infrastructure SIP submissions to address section 110(a)(2)(D)(i)(I). EPA issued the guidance shortly after the U.S. Supreme Court agreed to review the D.C. Circuit decision in *EME Homer City,* 696 F.3d7 (D.C. Cir. 2012) which had interpreted the requirements of section 110(a)(2)(D)(i)(I). In light of the uncertainty created by ongoing litigation, EPA elected not to provide additional guidance on the requirements of section 110(a)(2)(D)(i)(I) at that time. As the guidance is neither binding nor required by statute, whether EPA elects to provide guidance on a particular section has no impact on a state's CAA obligations.

approved by a multi-member board or by a head of an executive agency). However they are addressed by the state, the substantive requirements of section 128 are necessarily included in EPA's evaluation of infrastructure SIP submissions because section 110(a)(2)(E)(ii) explicitly requires that the state satisfy the provisions of section 128.

As another example, EPA's review of infrastructure SIP submissions with respect to the PSD program requirements in sections 110(a)(2)(C), (D)(i)(II), and (J) focuses upon the structural PSD program requirements contained in part C and EPA's PSD regulations. Structural PSD program requirements include provisions necessary for the PSD program to address all regulated sources and New Source Review (NSR) pollutants. By contrast, structural PSD program requirements do not include provisions that are not required under EPA's regulations at 40 CFR 51.166 but are merely available as an option for the state, such as the option to provide grandfathering of complete permit applications with respect to the 2008 Pb NAAQS. Accordingly, the latter optional provisions are types of provisions EPA considers irrelevant in the context of an infrastructure SIP action.

For other section 110(a)(2) elements, however, EPA's review of a state's infrastructure SIP submission focuses on assuring that the state's SIP meets basic structural requirements. For example, section 110(a)(2)(C) includes, *inter alia,* the requirement that states have a program to regulate minor new sources. Thus, EPA evaluates whether the state has an EPA-approved minor new source review program and whether the program addresses the pollutants relevant to that NAAQS. In the context of acting on an infrastructure SIP submission, however, EPA does not think it is necessary to conduct a review of each and every provision of a state's existing minor source program (*i.e.,* already in the existing SIP) for compliance with the requirements of the CAA and EPA's regulations that pertain to such programs.

With respect to certain other issues, EPA does not believe that an action on a state's infrastructure SIP submission is necessarily the appropriate type of action in which to address possible deficiencies in a state's existing SIP. These issues include: (i) Existing provisions related to excess emissions from sources during periods of startup, shutdown, or malfunction that may be contrary to the CAA and EPA's policies addressing such excess emissions (''SSM''); (ii) existing provisions related to ''director's variance'' or ''director's discretion'' that may be contrary to the CAA because they purport to allow revisions to SIP-approved emissions limits while limiting public process or not requiring further approval by EPA; and (iii) existing provisions for PSD programs that may be inconsistent with current requirements of EPA's ''Final NSR Improvement Rule,'' 67 FR 80186 (December 31, 2002), as amended by 72 FR 32526 (June 13, 2007) (''NSR Reform''). Thus, EPA believes it may approve an infrastructure SIP submission without scrutinizing the totality of the existing SIP for such potentially deficient provisions and may approve the submission even if it is aware of such existing provisions.[12] It is important to note that EPA's approval of a state's infrastructure SIP submission should not be construed as explicit or implicit re-approval of any existing potentially deficient provisions that relate to the three specific issues just described.

EPA's approach to review of infrastructure SIP submissions is to identify the CAA requirements that are logically applicable to that submission. EPA believes that this approach to the review of a particular infrastructure SIP submission is appropriate, because it would not be reasonable to read the general requirements of section 110(a)(1) and the list of elements in 110(a)(2) as requiring review of each and every provision of a state's existing SIP against all requirements in the CAA and EPA regulations merely for purposes of assuring that the state in question has the basic structural elements for a functioning SIP for a new or revised NAAQS. Because SIPs have grown by accretion over the decades as statutory and regulatory requirements under the CAA have evolved, they may include some outmoded provisions and historical artifacts. These provisions, while not fully up to date, nevertheless may not pose a significant problem for the purposes of ''implementation, maintenance, and enforcement'' of a new or revised NAAQS when EPA evaluates adequacy of the infrastructure SIP submission. EPA believes that a better approach is for states and EPA to focus attention on those elements of section 110(a)(2) of the CAA most likely to warrant a specific SIP revision due to the promulgation of a new or revised NAAQS or other factors.

For example, EPA's 2013 Guidance gives simpler recommendations with respect to carbon monoxide than other NAAQS pollutants to meet the visibility requirements of section 110(a)(2)(D)(i)(II), because carbon monoxide does not affect visibility. As a result, an infrastructure SIP submission for any future new or revised NAAQS for carbon monoxide need only state this fact in order to address the visibility prong of section 110(a)(2)(D)(i)(II). Finally, EPA believes that its approach with respect to infrastructure SIP requirements is based on a reasonable reading of sections 110(a)(1) and 110(a)(2) because the CAA provides other avenues and mechanisms to address specific substantive deficiencies in existing SIPs. These other statutory tools allow EPA to take appropriately tailored action, depending upon the nature and severity of the alleged SIP deficiency. Section 110(k)(5) authorizes EPA to issue a ''SIP call'' whenever the Agency determines that a state's SIP is substantially inadequate to attain or maintain the NAAQS, to mitigate interstate transport, or to otherwise comply with the CAA.[13] Section 110(k)(6) authorizes EPA to correct errors in past actions, such as past approvals of SIP submissions.[14] Significantly, EPA's determination that an action on a state's infrastructure SIP submission is not the appropriate time and place to address all potential existing SIP deficiencies does not preclude EPA's subsequent reliance on provisions in section 110(a)(2) as part of the basis for action to correct those deficiencies at a later time. For example, although it may not be appropriate to require a state to eliminate all existing inappropriate director's discretion provisions in the course of acting on an

[12] By contrast, EPA notes that if a state were to include a new provision in an infrastructure SIP submission that contained a legal deficiency, such as a new exemption for excess emissions during SSM events, then EPA would need to evaluate that provision for compliance against the rubric of applicable CAA requirements in the context of the action on the infrastructure SIP.

[13] For example, EPA issued a SIP call to Utah to address specific existing SIP deficiencies related to the treatment of excess emissions during SSM events. See ''Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revisions,'' 74 FR 21639 (April 18, 2011).

[14] EPA has used this authority to correct errors in past actions on SIP submissions related to PSD programs. See ''Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule,'' 75 FR 82536 (December 30, 2010). EPA has previously used its authority under CAA section 110(k)(6) to remove numerous other SIP provisions that the Agency determined it had approved in error. See, *e.g.,* 61 FR 38664 (July 25, 1996) and 62 FR 34641 (June 27, 1997) (corrections to American Samoa, Arizona, California, Hawaii, and Nevada SIPs); 69 FR 67062 (November 16, 2004) (corrections to California SIP); and 74 FR 57051 (November 3, 2009) (corrections to Arizona and Nevada SIPs).

infrastructure SIP submission, EPA believes that section 110(a)(2)(A) may be among the statutory bases that EPA relies upon in the course of addressing such deficiency in a subsequent action.[15]

V. What did New York submit?

New York's section 110 infrastructure submittal which addressed the 2008 Pb NAAQS was submitted by the New York State Department of Environmental Conservation (NYSDEC) on October 13, 2011. New York's October 13, 2011 section 110 submittal demonstrates how the State, where applicable, has a plan in place that meets the requirements of section 110 for the 2008 Pb NAAQS. This plan references the current New York Air Quality SIP, the New York Codes of Rules and Regulations (NYCRR), the New York Environmental Conservation Law (ECL) and the New York Public Officer's Law (POL). The NYCRR, ECL and POL referenced in the submittal are publicly available. New York's SIP and air pollution control regulations that have been previously approved by EPA and incorporated into the New York SIP can be found at 40 CFR 52.1670 and are posted on the Internet at: *http://www.epa.gov/region02/air/sip/ny_reg.htm.*

VI. How has the State addressed the elements of the section 110(a)(1) and (2) ''infrastructure'' provisions?

EPA compared New York's Infrastructure SIP submittal for the 2008 Pb NAAQS to New York's Infrastructure SIP submittals for the 1997 8-hour ozone, the 1997 and 2006 fine particulate matter ($PM_{2.5}$) and 2010 nitrogen dioxide (NO_2) NAAQS. On June 20, 2013, EPA took final action (see 78 FR 37122) approving certain elements and sub-elements of New York's 1997 8-hour ozone and the 1997 and 2006 $PM_{2.5}$ Infrastructure SIPs. EPA also approved certain elements of New York's 2010 NO_2 Infrastructure SIP on September 12, 2014. Based upon EPA's comparison, EPA has determined that the information provided in New York's 2011 Pb Infrastructure SIP is nearly identical to the information provided in New York's Infrastructure SIP submittals for the 1997 8-hour ozone, 1997 and 2006 $PM_{2.5}$ and NO_2 NAAQS. Infrastructure SIPs for different criteria pollutants can have common aspects which are identical for each NAAQS (*e.g.,* authority to promulgate emission limitations, enforcement, air quality modeling capabilities, adequate personnel, resources and legal authority). The rationale for approving certain elements of New York's Infrastructure SIP for Pb is the same as the rationale for approving those elements of New York's 1997 8-hour ozone, 1997 and 2006 $PM_{2.5}$ and NO_2 Infrastructure SIPs. Since the rationale for approving certain elements of New York's Pb Infrastructure SIP is the same as the rationale for approving certain elements of New York's 1997 8-hour ozone, 1997 and 2006 $PM_{2.5}$, and NO_2 Infrastructure SIPs, EPA is not repeating this evaluation in today's proposal. Instead, the reader is referred to EPA's evaluation of the three SIP submittals (the 1997 8-hour ozone, 1997 and 2006 $PM_{2.5}$ and 2010 NO_2 Infrastructure SIPs) detailed in the following four documents: (1) ''Technical Support Document for EPA's Proposed Rulemaking for the New York's State Implementation Plan Revision: State Implementation Plan Revision For Meeting the Infrastructure Requirements In the Clean Air Act Dated December 13, 2007, October 2, 2008 and March 15, 2010'' (TSD); (2) EPA's proposed approval dated April 30, 2013 (78 FR 25236); and, (3) EPA's June 20, 2013 final rule approving certain elements of New York's Infrastructure SIPs for the 1997 8-hour ozone and the 1997 and 2006 $PM_{2.5}$ NAAQS (78 FR 37122) and (4) EPA's proposed rulemaking on the 2010 NO_2 (May 2, 2014, 79 FR 25066). These documents are available in the electronic docket for this proposed action at *www.regulations.gov.* We are, of course, accepting comments on that rationale as it applies to all elements of our proposed approval of New York's Infrastructure SIP for the Pb NAAQS.

EPA is proposing approval of the following elements and sub-elements of New York's Infrastructure SIP for Pb: 110(a)(2)(A) [Emission limits and other control measures]; 110(a)(2)(B) [Ambient air quality monitoring/data system]; 110(a)(2)(C) [Program for enforcement of control measures, prevention of significant deterioration, and new source review]; 110(a)(2)(D) [Interstate/international transport]; 110(a)(2)(E) [Adequate personnel, funding, and authority]; 110(a)(2)(F) [Stationary source monitoring and reporting]; 110(a)(2)(G) [Emergency episodes]; 110(a)(2)(H) [Future SIP revisions]; 110(a)(2)(J) [Consultation with government official, public notification, PSD, and visibility protection]; 110(a)(2)(K) [Air quality modeling and data]; 110(a)(2)(L) [Permitting fees]; and 110(a)(2)(M) [Consultation/participation by affected local entities].

As stated above, there are certain aspects of the elements of New York's Infrastructure SIP for the 2008 Pb NAAQS that are common to New York's 1997 8-hour ozone, 1997 and 2006 $PM_{2.5}$, and 2010 NO_2 Infrastructure SIPs that EPA approved on June 20, 2013 and therefore EPA is not repeating the rationale for approving the following elements of New York's Infrastructure SIP for the 2010 Pb NAAQS in today's proposal: elements A, E, F, H, J, K, L, and M.

As discussed in the following sections, for those elements of New York's Pb Infrastructure SIP that differ from New York's 1997 8-hour ozone and 1997 and 2006 $PM_{2.5}$ Infrastructure SIPs, and 2010 NO_2 Infrastructure SIP, EPA has reviewed and evaluated the aspects of those elements, namely elements B, C, D and G.

Element B: Ambient air quality monitoring/data system: Section 110(a)(2)(B) requires SIPs to include provisions to provide for establishment and operation of ambient air quality monitors, to monitor, compile and analyze ambient air quality data, and to make these data available to EPA upon request. On December 27, 2010 (75 FR 81126), EPA finalized additional revisions pertaining to where state and local monitoring agencies would be required to conduct Pb monitoring. The new regulations (40 CFR 58.10 and 40 CFR 58.13) replaced the population-oriented monitoring requirement with a requirement to add Pb monitors to urban National Core Monitoring Program (NCore), a multi-pollutant network that integrates several advanced measurement systems for particles, pollutant gases and meteorology. Also, EPA lowered the emission threshold from 1.0 ton(s) per year (tpy) to 0.5 tpy for source-specific monitoring of industrial sources of Pb.

New York addressed EPA's new monitoring requirements when it submitted its Annual Monitoring Network Review Plan (Plan) of 2014 on July 29, 2014. EPA approved this Plan on November 3, 2014. EPA is therefore proposing to determine that New York has met the requirements of section 110(a)(2)(B) of the CAA with respect to the 2008 Pb NAAQS. A copy of New York's 2014 Monitoring Plan and EPA's November 3, 2014 approval letter are in the docket for today's proposal at *www.regulations.gov.*

Element C: Program for enforcement of control measures: Section 110(a)(2)(C) requires states to have a plan that

[15] See, *e.g.,* EPA's disapproval of a SIP submission from Colorado on the grounds that it would have included a director's discretion provision inconsistent with CAA requirements, including section 110(a)(2)(A). See, *e.g.,* 75 FR 42342 at 42344 (July 21, 2010) (proposed disapproval of director's discretion provisions); 76 FR 4540 (Jan. 26, 2011) (final disapproval of such provisions).

includes a program providing for enforcement of all SIP measures and the regulation of the modification and construction of any stationary source, including a program to meet PSD of Air Quality and minor source new source review.

New York's Infrastructure SIP for Pb references the State's PSD and Nonattainment New Source Review (NNSR) permitting requirements contained in 6 NYCRR Part 231, Part 200 and Part 201. EPA approved these rules into the SIP on November 17, 2010 (75 FR 70140). New York's minor source new source review program is regulated under Part 201.

EPA has reviewed and evaluated New York's Infrastructure SIP for the 2008 Pb NAAQS for meeting the requirements of element C. Under Part 231, a major Pb facility is defined as one with annual actual emissions equal to or greater than five tpy. A proposed major Pb facility, or an existing major Pb facility that proposes a modification in excess of the de minimis emission limit (0.6 tpy for Pb), is subject to the relevant program dependent upon its location. A Lowest Achievable Emission Rate (LAER) or Best Available Control Technology (BACT) analysis would result.

The Infrastructure SIP ensures that all applicable PSD requirements that are included in PSD permits are incorporated into title V operating permits, and that all federally-enforceable requirements are applied and enforced. Since Pb is a NAAQS, the PSD provisions of Part 231 are applicable to Pb. For these reasons, EPA concludes that by referencing Part 231, which is part of New York's approved SIP, New York's Infrastructure SIP addresses the PSD requirements of section 110(a)(2)(C) for Pb.

Therefore, EPA proposes to find that the State has adequate authority and regulations to ensure that SIP-approved control measures are enforced. EPA also finds that based on the approval of New York's PSD program, New York has the authority to regulate the construction of new or modified stationary sources to meet the PSD program requirements. EPA is proposing to determine that New York has met the requirements of section 110(a)(2)(C) and (J) of the CAA with respect to the 2008 Pb NAAQS. It should be noted that the PSD provisions of Part 231 address the requirements of section 110(a)(2)(J) as well as section 110(a)(2)(C) and Part 231's applicability on Pb are consistent.

Element D: Interstate transport: Section 110(a)(2)(D) of the Clean Air Act is divided into two subsections, 110(a)(2)(D)(i) and 110(a)(2)(D)(ii). The first of these, 110(a)(2)(D)(i), in turn, contains four ''prongs'' the first two of which appear in 110(a)(2)(D)(i)(I) and the second two of which appear in 110(a)(2)(D)(i)(II). The two prongs in 110(a)(2)(D)(i)(I) prohibit any source or other type of emissions activity within the state from emitting any air pollutants in amounts which will contribute significantly to nonattainment in any other state with respect to any primary or secondary NAAQS (prong 1), or interfere with maintenance by any other state with respect to any primary or secondary NAAQS (prong 2). The two prongs in 110(a)(2)(D)(i)(II) prohibit any source or other type of emissions activity within the state from emitting any air pollutants in amounts which will interfere with measures required to be included in the applicable implementation plan for any other state under part C to prevent significant deterioration of air quality (prong 3) or to protect visibility (prong 4). Subsection 110(a)(2)(D)(ii) addresses interstate and international pollution abatement, and requires SIPs to include provisions insuring compliance with sections 115 and 126 of the CAA, relating to interstate and international pollution abatement.

In this action, EPA is proposing to approve the 110(a)(2)(D) portion of the New York SIP submission and determine that the existing New York SIP contains provisions sufficient to satisfy all of the requirements of 110(a)(2)(D) for the 2008 Pb NAAQS.

The New York SIP contains provisions to address the requirements of 110(a)(2)(D)(i)(I), *i.e.,* prongs 1 and 2 of 110(a)(2)(D)(i), with respect to the Pb NAAQS. In addition, the physical properties of Pb prevent Pb emissions from being transported long distances or from participating in complex atmospheric reactions such as $PM_{2.5}$ or ozone. More specifically, there is a sharp decrease in Pb concentrations, at least in the coarse fraction, as the distance from a Pb source increases. New York conducted a review of their emissions inventory when they made their designation recommendations for the revised Pb NAAQS and a survey of facility data showed no facilities with emissions of 0.5 tons per year (tpy) or greater existed in close proximity to state borders or anywhere within the State of New York. New York State is designated either unclassifiable/attainment or unclassifiable and current air quality data continues to show attainment. Based on New York not having any facilities with emissions of 0.5 tpy or greater existing in close proximity to a state border or anywhere in the State which might impact a neighboring state, transport is not a concern with respect to Pb. EPA is proposing to determine that New York's SIP includes adequate provisions to prohibit sources or other emission activities within the State from emitting Pb in amounts that will contribute significantly to nonattainment or interfere with maintenance by any other state with respect specifically to the Pb NAAQS.

To satisfy section 110(a)(2)(D)(i)(II), New York confirms that new major sources of Pb and major modifications are subject to the State's PSD program (under prong 3). With regard to the requirement of prong 4 (the visibility protection requirement), New York states that sources of Pb are distanced far enough from any federal Class 1 area as to not impact visibility in any significant way. Also, New York states that Pb-related visibility impacts in general are considered to be insignificant. With regard to the applicable requirements for visibility protection of section 110(a)(2)(D)(i)(II)—prong 4, significant impacts from stationary source Pb emissions are expected to be limited to short distances from the source and most, if not all, Pb stationary sources are located at distances from Class I areas such that visibility impacts would be negligible. Although Pb can be a component of coarse and fine particles, Pb generally comprises a small fraction of coarse and fine particles. Furthermore, when evaluating the extent that Pb could impact visibility, Pb-related visibility impacts were found to be insignificant (*e.g.,* less than 0.10%).[16]

With respect to 110(a)(2(D)(ii), New York is not subject to any determinations under sections 126 and 115 of the CAA and there are no violations related to transport of emissions from sources in the State. Based upon EPA's review of the air quality data and the State's submittal, EPA is proposing to determine that the State has met its obligations pursuant to 110(a)(2)(D) with respect to the 2008 Pb NAAQS.

Element G: Emergency episodes: Section 110(a)(2)(G) requires states to provide for authority to address activities causing imminent and substantial endangerment to public health, including contingency plans to implement the emergency episode provisions in their SIPs. Based on EPA's experience to date with the Pb NAAQS and designating Pb nonattainment areas, EPA expects that such an event would

[16] Analysis by Mark Schmidt, OAQPS, ''Ambient Pb's Contribution to Class I Area Visibility Impairment,'' June 17, 2011.

be unlikely, and if it were to occur, would be the result of a malfunction or other emergency situation at a relatively large source of lead.

New York's plan to address air pollution emergencies is stated in articles 3 and 19 of the ECL. To prevent and control these emergency episodes, the State adopted 6 NYCRR Part 207, ''Control Measures for Air Pollution Episode,'' which implements ECL-section 3–0301. Part 207 requires the owner of a ''significant air contamination source'' to submit a proposed episode action plan to the Department of Environmental Conservation's Commissioner, containing detailed steps to be taken by the source owner to reduce air contaminant emissions at each stage of an air pollution episode. The regulation also enables the Commissioner to designate air pollution episodes which trigger the action plan. In October 2009, New York completed a comprehensive revision of its Air Pollution Episode Procedures that involved updating the contact information for the Bureaus of Air Quality Assurance, Stationary Sources, and Air Quality Surveillance, and the Impact Assessment and Meteorology Section, along with local-level emergency contacts. EPA proposes that New York has met the requirements of section 110(a)(2)(G) for Pb.

VII. What is the impact of the June 2014 Supreme Court Green House Gas decision on New York's infrastructure SIP for the 2008 Pb NAAQS?

With respect to Elements C and J, EPA interprets the Clean Air Act to require each state to make an infrastructure SIP submission for a new or revised NAAQS that demonstrates that the air agency has a complete PSD permitting program meeting the current requirements for all regulated NSR pollutants. The requirements of Element D(i)(II) may also be satisfied by demonstrating the air agency has a complete PSD permitting program correctly addressing all regulated NSR pollutants. New York has shown that it currently has a PSD program in place that covers all regulated NSR pollutants, including greenhouse gases (GHGs).

On June 23, 2014, the United States Supreme Court issued a decision addressing the application of PSD permitting requirements to GHG emissions. *Utility Air Regulatory Group* v. *Environmental Protection Agency,* 134 S.Ct. 2427. The Supreme Court said that the EPA may not treat GHGs as an air pollutant for purposes of determining whether a source is a major source required to obtain a PSD permit. The Court also said that the EPA could continue to require that PSD permits, otherwise required based on emissions of pollutants other than GHGs, contain limitations on GHG emissions based on the application of Best Available Control Technology (BACT). In order to act consistently with its understanding of the Court's decision pending further judicial action to effectuate the decision, the EPA is not continuing to apply EPA regulations that would require that SIPs include permitting requirements that the Supreme Court found impermissible. Specifically, EPA is not applying the requirement that a state's SIP-approved PSD program require that sources obtain PSD permits when GHGs are the only pollutant (i) that the source emits or has the potential to emit above the major source thresholds, or (ii) for which there is a significant emissions increase and a significant net emissions increase from a modification (*e.g.,* 40 CFR 51.166(b)(48)(v)). EPA anticipates a need to revise federal PSD rules in light of the Supreme Court opinion. In addition, EPA anticipates that many states will revise their existing SIP-approved PSD programs in light of the Supreme Court's decision. The timing and content of subsequent EPA actions with respect to the EPA regulations and state PSD program approvals are expected to be informed by an additional legal process before the United States District Court for the District of Columbia Circuit. At this juncture, EPA is not expecting states to have revised their PSD programs for purposes of infrastructure SIP submissions and is only evaluating such submissions to assure that the state's program correctly addresses GHGs consistent with the Supreme Court's decision.

At present, EPA has determined the New York SIP is sufficient to satisfy Elements C, D(i)(II), and J with respect to GHGs because the PSD permitting program previously approved by EPA into the SIP continues to require that PSD permits (otherwise required based on emissions of pollutants other than GHGs) contain limitations on GHG emissions based on the application of BACT. Although the approved New York PSD permitting program may currently contain provisions that are no longer necessary in light of the Supreme Court decision, this does not render the infrastructure SIP submission inadequate to satisfy Elements C, D(i)(II), and J. The SIP contains the necessary PSD requirements at this time, and the application of those requirements is not impeded by the presence of other previously-approved provisions regarding the permitting of sources of GHGs that EPA does not consider necessary at this time in light of the Supreme Court decision. Accordingly, the Supreme Court decision does not affect EPA's proposed approval of New York's infrastructure SIP as to the requirements of Elements C, D(i)(II), and J.

VIII. What action is EPA taking?

EPA is proposing to approve New York's submittal as fully meeting the infrastructure requirements for the 2008 primary Pb NAAQS for all section 110(a)(2) elements and sub-elements, as follows: (A), (B), (C), (D), (E), (F), (G), (H), (J), (K), (L), and (M).

EPA is not acting on New York's submittal as it relates to nonattainment provisions, the NSR program required by part D in section 110(a)(2)(C) and the measures for attainment required by section 110(a)(2)(I), as part of the infrastructure SIPs because the State's infrastructure SIP submittal does not include nonattainment requirements and EPA will act on them when, if necessary, they are submitted.

EPA is soliciting public comments on the issues discussed in this proposal. These comments will be considered before EPA takes final action. Interested parties may participate in the Federal rulemaking procedure by submitting written comments to the EPA Regional Office listed in the **ADDRESSES** section of this **Federal Register**, or by submitting comments electronically, by mail, or through hand delivery or courier following the directions in the **ADDRESSES** section of this **Federal Register**.

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (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 EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

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

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

Dated: December 2, 2014.

Judith A. Enck,

Regional Administrator, Region 2.

[FR Doc. 2014–29332 Filed 12–12–14; 8:45 am]

BILLING CODE 6560–50–P

OFFICE OF PERSONNEL MANAGEMENT

48 CFR Parts 1609, 1615, 1632, and 1652

RIN 3206–AN13

Federal Employees Health Benefits Program: FEHB Plan Performance Assessment System

AGENCY: Office of Personnel Management.

ACTION: Notice of proposed rulemaking.

SUMMARY: The United States Office of Personnel Management (OPM) is issuing a proposed rule to amend the system for assessing the annual performance of health plans contracted under the Federal Employees Health Benefits (FEHB) Program. The purpose of this rule is to measure and assess all FEHB plan performance (experience-rated and community-rated) through the use of a common, objective, and quantifiable performance assessment for the 2016 plan year.

DATES: OPM must receive comments on or before January 14, 2015.

ADDRESSES: Send written comments to Wenqiong Fu, Policy Analyst, Planning and Policy Analysis, U.S. Office of Personnel Management, Room 4312, 1900 E Street NW., Washington, DC; or FAX to (202) 606–6010 Attn: Wenqiong Fu. You may also submit comments using the *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Wenqiong Fu, Policy Analyst at (202) 606–0004.

SUPPLEMENTARY INFORMATION:

FEHB Background

The Federal Employees Health Benefits (FEHB) Program was established in 1960 and provides health insurance to over eight million Federal employees, annuitants, and their family members. Chapter 89 of Title 5 United States Code, which authorizes the FEHB Program, allows OPM to contract with health insurance carriers to provide coverage under certain types of plans.

FEHB contracts are either community-rated or experience-rated. In community-rated contracts, the overall premium is based on the carrier's standard rating methodology, taking into account factors in the larger geographic area or ''community.'' In experience-rated contracts, the FEHB carrier considers actual ''experience'' or medical costs of the group of covered lives. The two types of contracts are regulated under different sections of the FEHB Acquisition Regulation (FEHBAR). Premiums are determined according to distinct processes and plan performance is rewarded differently.

Current Performance Assessment System

Under current regulations, performance is assessed for experience-rated plans based on profit analysis factors that are weighted to create a service charge that OPM pays to carriers. For community-rated plans, performance is assessed according to specific elements that can result in a percentage of premium withheld from payment to the carrier. Both of these performance frameworks are under the umbrella of the Federal Acquisition Regulation, which governs contracting government-wide.

In determining the level of the service charge (profit/risk margin) for experience-rated plans, Contracting Officers consider six categories of factors: Contractor performance, contract cost, federal socioeconomic programs, cost control, independent development, and capital investments. OPM Contracting Officers conduct the service charge analysis and rely heavily on the contractor performance factor. Contractor performance is weighted the highest, comprises a significant portion of the total service charge, and involves the largest amount of data.

Community-rated plans have two performance elements that may lead to a percentage of premium being withheld: Customer service and critical contract compliance requirements.

Proposed FEHB Plan Assessment System

To establish a consistent assessment system, create a more objective performance standard, and provide more transparency for enrollees, OPM is developing a framework that will utilize a discrete set of quantifiable measures examining key aspects of contract performance and specific criteria for performance factors which will then be linked to health plan premium disbursements.

This regulation proposes to replace the current methods of plan assessment with a new framework, in which both experience-rated and community-rated plans utilize the same measurement criteria. For experience-rated plans, the performance-based service charge will be administered similarly to the current service charge process. For community-rated plans, the performance adjustment will be administered similarly to the current process using an adjustment to net-to-carrier premium payments made during the first quarter of the following

contract period. OPM proposes the new assessment system will impact service charge and performance adjustment premium disbursements made in 2017.

This proposed regulation includes four measurement categories for both experience-rated and community-rated plans aimed at improving standards of accountability and transparency. The following categories, defined in 48 CFR 1615.404–70, will be applied to both experience-rated and community-rated plans: (1) Clinical Quality, (2) Customer Service, (3) Resource Use, and (4) Contract Oversight.

The new performance assessment structure is incorporated in 48 CFR, Subpart 1615.4, *Contract pricing,* which describes the profit factors and rewards for FEHB plans. Contract requirements will be amended to indicate required performance measures, and the scoring of measures within the assessment system will be based on plan performance relative to FEHB or national benchmarks, or with respect to the Contract Oversight category, the Contracting Officer's judgment. Each year, identified measures will be communicated to FEHB carriers through advance guidance and then incorporated as a part of the contract.

Three of the performance areas, Clinical Quality, Customer Service, and Resource Use, will contain one or more domains that reflect priorities within each area, and each domain will be comprised of one or more performance areas. The fourth category, Contract Oversight, will be based upon the Contracting Officer's evaluation of contractor performance such as audit findings, fraud/waste/abuse, responsiveness to OPM, benefits/network management, contract compliance, technology management, data security, and Federal socio-economic programs.

OPM expects to update the measures over time, and therefore the regulation lists representative examples of the domains and measures within each category. OPM will issue and periodically update technical guidance describing the measures and methods/formulae for performance scoring. FEHB carriers will receive technical guidance updating measures, methods and scoring in advance of their use in the plan assessment process.

Plan performance on Clinical Quality, Customer Service, and Resource Use will be evaluated against national or FEHB benchmarks. OPM's goal is to build on current performance assessment practices so that we can formally link annual evaluations of FEHB plans with profit factors. The proposed measures will rely upon the evaluation of data from sources familiar to FEHB carriers such as:

HEDIS—Healthcare Effectiveness Data and Information Set is a group of clinical measures developed by the National Committee for Quality Assurance (NCQA). HEDIS measures are widely used in U.S. health plan performance systems and have been collected by FEHB for more than ten years.

CAHPS—Consumer Assessment of Healthcare Providers and Systems is a survey of health plan enrollees developed by the Agency for Healthcare Research and Quality (AHRQ). FEHB plans have participated in CAHPS and reported results to OPM since 2000.

Plan administrative data—OPM collects data from health plans for contract oversight purposes. These may include data on financial management; claims payment timeliness; claims records and utilization data; enrollment reconciliation; surveillance for fraud, waste, and abuse; health information technology implementation; data security; and network adequacy.

This regulatory change is intended to promote a comprehensive approach to health plan management by measuring key performance components.

Measurement

The new performance assessment system will begin in 2016. OPM will announce the applicable categories, domains, measures and weights in FEHB Carrier guidance at a later time, well in advance of implementation so that FEHB carriers have the opportunity to provide feedback through established OPM channels. Prior to each contract year, OPM will identify the most recent available benchmarks for each measure which will be used in applying the new weighted guidelines to determine that year's service charge or performance adjustment for FEHB contracts. Following rate negotiations, for both experience-rated plans and community-rated plans, OPM Contracting Officers will inform FEHB plans of the performance scoring results used in determining each plan's service charge or performance adjustment.

Assessing Progress

Specific domains, measures and weights will be provided in future technical guidance. While there will be continuity over time in many of the domains and measures, the plan assessment system must be dynamic to account for: (1) Changes in clinical guidelines and professional standards of care, (2) removal of measures where overall plan performance is at a consistently high level, and (3) the introduction of new measures that are deemed relevant to plan performance.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation affects only health insurance carriers under the Federal Employees Health Benefits Program.

Executive Orders 13563 and 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Orders 13563 and 12866.

Federalism

We have examined this rule in accordance with Executive Order 13132, Federalism, and have determined that this rule will not have any negative impact on the rights, roles and responsibilities of State, local, or tribal governments.

List of Subjects in 48 CFR Parts 1615 and 1609

Government employees, Government procurement, Health insurance.

U.S. Office of Personnel Management.

Katherine Archuleta,

Director.

For the reasons set forth in the preamble, OPM amends chapter 16 of title 48 CFR (FEHBAR) as follows:

PART 1609—CONTRACTOR QUALIFICATIONS

■ 1. The authority citation for part 1609 continues to read as follows:

Authority: 5 U.S.C. 8913; 40 U.S.C. 486(c); 48 CFR 1.301.

Subpart 1609.71—[Removed]

■ 2. Remove subpart 1609.71.

PART 1615—CONTRACTING BY NEGOTIATION

■ 3. The authority citation for part 1615 continues to read as follows:

Authority: 5 U.S.C. 8913; 40 U.S.C. 486(c); 48 CFR 1.301.

■ 4. In section 1615.404–4, paragraph (a) is revised to read as follows:

1615.404–4 Profit.

(a) When the pricing of FEHB Program contracts is determined by cost analysis (experience-rated) or by a combination of cost and price analysis (community-rated), OPM will determine a performance based percentage of the price using a weighted guidelines

structured approach based on the profit analysis factors described in 1615.404–70. For experience-rated plans, OPM will use the performance based percentage so determined to develop the profit or fee prenegotiation objective, which will be the total profit (service charge) negotiated for the contract. For community-rated plans, OPM will use the performance based percentage so determined to develop an adjustment to net-to-carrier premiums, (performance adjustment) to be made during the first quarter of the following contract period.

* * * * *

■ 5. Section 1615.404–70 is revised as follows:

1615.404–70 Profit analysis factors.

(a) OPM Contracting Officers will apply a weighted guidelines method in developing the performance based percentage for FEHB Program contracts. For experience-rated plans, the performance based percentage will be applied to projected incurred claims and allowable administrative expenses. For community-rated plans, the performance based percentage will be applied to subscription income and will be used to calculate a performance adjustment to net-to-carrier premiums, as described at 48 CFR 1632.170(a)(2), to be made during the first quarter of the following contract period. In the context of the factors outlined in FAR 15.404–4(d), OPM will assess performance of FEHB carriers according to four factors.

(1) *Clinical quality.* OPM will consider elements within such domains as preventive care, chronic disease management, medication use, and behavioral health. This factor incorporates elements from the FAR factor ''contractor effort.''

(2) *Customer service.* OPM will consider elements within such domains as communication, access, claims, and member experience/engagement. This factor incorporates elements of the FAR factor ''contractor effort.''

(3) *Resource use.* OPM will consider elements within such domains as utilization management, administrative, and cost trends. This factor incorporates elements of the FAR factors ''contractor effort,'' ''contract cost risk,'' and ''cost control and other past accomplishments.''

(4) *Contract oversight.* OPM will consider an assessment of contract performance in specific areas such as audit findings, fraud/waste/abuse, and responsiveness to OPM, benefits/network management, contract compliance, technology management, data security, and Federal socio-economic programs. This factor could incorporate any of the FAR profit analysis factors listed at 15.404–4(d)(1)(i)–(vi).

(b) The sum of the maximum scores for the profit analysis factors will be 1 percent.

PART 1632—CONTRACT FINANCING

■ 6. The authority citation for part 1632 continues to read as follows:

Authority: 5 U.S.C. 8913; 40 U.S.C. 486(c); 48 CFR 1.301.

■ 7. In section 1632.170, paragraph (a)(2) is revised to read as follows:

1632.170 Recurring premium payments to carriers.

(a) * * *

(2) The difference between one percent and the performance based percentage of the contract price described at 1615.404–4 will be multiplied by the carrier's subscription income for the year of performance and the resulting amount (performance adjustment) will be withheld from the net-to-carrier premium disbursement during the first quarter of the following contract period unless an alternative payment arrangement is made with the carrier's Contracting Officer.

Amounts withheld from a community rated plan's premium disbursement will be deposited into the plan's Contingency Reserve.

* * * * *

PART 1652—CONTRACT CLAUSES

■ 8. The authority citation for part 1652 continues to read as follows:

Authority: 5 U.S.C. 8913; 40 U.S.C. 486(c); 48 CFR 1.301.

■ 9. In section 1652.232–70, revise the introductory text and paragraph (a) and remove paragraph (f).

The revisions read as follows:

1652.232–70 Payments—Community-rated contracts.

As prescribed in 1632.171, the following clause shall be inserted in all community-rated FEHBP contracts:

Payments

(a) OPM will pay to the Carrier, in full settlement of its obligations under this contract, subject to adjustment for error or fraud, the subscription charges received for the plan by the Employees Health Benefits Fund (hereinafter called the Fund) less the amounts set aside by OPM for the Contingency Reserve and for the administrative expenses of OPM, amounts for obligations due pursuant to paragraph (b) of this clause and the performance adjustment described at 1615.404–4, plus any payments made by OPM from the Contingency Reserve.

* * * * *

■ 10. In section 1652.232–71, revise the introductory text and paragraph (a) and remove paragraph (f).

The revisions read as follows:

1652.232–71 Payments—experience-rated contracts.

As prescribed in 1632.172, the following clause shall be inserted in all experience-rated FEHBP contracts:

(a) OPM will pay to the Carrier, in full settlement of its obligations under this contract, subject to adjustment for error or fraud, the subscription charges received for the plan by the Employees Health Benefits Fund (hereinafter called the Fund) less the amounts set aside by OPM for the Contingency Reserve and for the administrative expenses of OPM, amounts for obligations due pursuant to paragraph (b) of this clause, and the performance-based service charge described at 1615.404–4, plus any payments made by OPM from the Contingency Reserve.

* * * * *

[FR Doc. 2014–29224 Filed 12–12–14; 8:45 am]

BILLING CODE 6325–63–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

RIN 0648–BE50

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast Region Standardized Bycatch Reporting Methodology Omnibus Amendment

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

ACTION: Notice of availability of proposed fishery management plan amendment; request for comments.

SUMMARY: NMFS announces that the Mid-Atlantic and New England Fishery Management Councils have submitted an Omnibus Amendment to the Fishery Management Plans of the Northeastern U.S. to establish a Standardized Bycatch Reporting Methodology, incorporating a draft Environmental Assessment and preliminary Regulatory Impact Review, for review and approval by the Secretary of Commerce, and is requesting comments from the public. The Standardized Bycatch Reporting Methodology Omnibus Amendment would establish a standardized bycatch reporting methodology for all 13 Fishery Management Plans in the region, as

required under the Magnuson-Stevens Fishery Conservation and Management Act. The proposed measures include: Bycatch reporting and monitoring mechanisms; analytical techniques and allocation of at-sea fisheries observers; a standardized bycatch reporting methodology performance standard; a review and reporting process; framework adjustment and annual specifications provisions; a prioritization process; and provisions for industry-funded observers and observer set-aside programs.

DATES: Comments must be received on or before February 13, 2015.

ADDRESSES: You may submit comments, identified by NOAA–NMFS–2014–0114, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2014-0114,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- Mail: John K. Bullard, Regional Administrator, NMFS, Greater Atlantic Regional Fisheries Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope: ''Comments on SBRM Amendment.''

Instructions: All comments received are part of the public record and will generally be posted to *www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

NMFS will accept anonymous comments. Attachments to electronic comments will be accepted via Microsoft Word, Microsoft Excel, WordPerfect, or Adobe PDF file formats only.

Copies of the Standardized Bycatch Reporting Methodology (SBRM) Omnibus Amendment, and of the draft Environmental Assessment and preliminary Regulatory Impact Review (EA/RIR), are available from the Mid-Atlantic Fishery Management Council, 800 North State Street, Suite 201, Dover, DE 19901; and from the New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950. The EA/RIR is also accessible via the Internet at: *www.greateratlantic.fisheries.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Douglas Potts, Fishery Policy Analyst, 978–281–9341.

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires that each Regional Fishery Management Council submit any Fishery Management Plan (FMP) amendment it prepares to NMFS for review and approval, disapproval, or partial approval. The Magnuson-Stevens Act also requires that NMFS, upon receiving an FMP amendment, immediately publish notification in the **Federal Register** that the amendment is available for public review and comment. If approved by NMFS, this amendment would establish a comprehensive SBRM that applies to all FMPs developed by the Mid-Atlantic and New England Councils. The amendment would also effect an administrative change to the regulations on framework adjustments.

Background

Section 303(a)(11) of the Magnuson-Stevens Act requires that all FMPs ''establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery.'' In 2004, several conservation organizations challenged the approval of two major FMP amendments in the Region. In ruling on these suits, the U.S. District Court for the District of Columbia found that the FMPs did not clearly establish a SBRM as required by the Magnuson-Stevens Act and remanded the amendments back to the agency to fully develop and establish the required SBRM. In particular, the Court found that the amendments: (1) Failed to fully evaluate reporting methodologies to assess bycatch; (2) did not mandate a SBRM; and (3) failed to respond to potentially important scientific evidence. In response, the Councils worked closely with NMFS to develop, adopt, and implement an omnibus FMP amendment that established a SBRM for all 13 FMPs in the region.

The final rule to implement the SBRM Omnibus Amendment was published in the **Federal Register** on January 28, 2008 (73 FR 4736). Following implementation of the SBRM amendment, a conservation organization challenged the legality of the action (*Oceana* v. *Locke*). The U.S. District Court initially found in favor of the Government on all counts. However, that ruling was appealed by the plaintiffs, and in 2011 the U.S. Court of Appeals issued an opinion that found fault with one element of the amendment—the prioritization process. The Court of Appeals ordered the amendment be vacated and remanded to the agency for further proceedings. The Court of Appeals' decision found that the prioritization process ''grants the Fisheries Service substantial discretion both to invoke and to make allocations according to a non-standardized procedure,'' and, therefore, did not ''establish'' a standardized methodology as required under the Magnuson-Stevens Act. On December 29, 2011, NMFS published a rule in the **Federal Register** (76 FR 81844) removing all regulations implemented by the January 28, 2008, SBRM final rule.

The Councils, in coordination with NMFS, initiated a revised SBRM amendment to build upon the substantial work previously completed to develop the SBRM and to address the limited deficiencies identified by the Court. This amendment covers 13 FMPs, 40 managed species, and 14 types of fishing gear. The purpose of the amendment is to: Explain the methods and processes by which bycatch is currently monitored and assessed for fisheries in the region; determine whether these methods and processes need to be modified and/or supplemented; establish standards of precision for bycatch estimation for these fisheries; and, thereby, document the SBRM established for all fisheries managed through the FMPs of the Northeastern U.S. The amendment also addresses the Appellate Court's concern over NMFS's ''substantial discretion both to invoke and to make allocations according to a non-standardized procedure'' cited in the *Oceana* v. *Locke* decision.

The Omnibus SBRM Amendment would establish an SBRM comprised of seven elements: (1) The methods by which data and information on discards are collected and obtained; (2) the methods by which the data obtained through the mechanisms identified in element 1 are analyzed and utilized to determine the appropriate allocation of at-sea observers; (3) a performance measure by which the effectiveness of the SBRM can be measured, tracked, and utilized to effectively allocate the appropriate number of observer sea days; (4) a process to provide the Councils with periodic reports on discards occurring in fisheries they manage and on the effectiveness of the SBRM; (5) a measure to enable the Councils to make changes to the SBRM through framework adjustments and/or annual specification packages rather than full FMP amendments; (6) a non-discretionary method to determine the available funding for at-sea observers and a formulaic process for prioritizing at-sea observer coverage allocations to match available funding; and (7) to

implement consistent, cross-cutting observer service provider approval and certification procedures and to enable the Councils to implement either a requirement for industry-funded observers or an observer set-aside program through a framework adjustment rather than an FMP amendment.

We are soliciting public comments on the SBRM Omnibus Amendment and its incorporated documents through the end of the comment period stated in this notice of availability. A proposed rule that would implement the revised SBRM Omnibus Amendment will be published in the **Federal Register** for additional public comment, following NMFS's evaluation of the proposed rule under the procedures of the Magnuson-Stevens Act. Public comments on the proposed rule must be received by the end of the comment period provided in this notice of availability of the SBRM Amendment to be considered in the approval/disapproval decision on the amendment. All comments received by February 13, 2015, whether specifically directed to the SBRM Amendment or the proposed rule will be considered in the approval/disapproval decision on the amendment. To be considered, comments must be received by close of business on the last day of the comment period. Comments received after that date will not be considered in the decision to approve or disapprove the revised SBRM Omnibus Amendment, including those postmarked or otherwise transmitted by the last day of the comment period.

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

Dated: December 9, 2014.

Emily H. Menashes,

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

[FR Doc. 2014–29216 Filed 12–12–14; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 680

RIN 0648–BA61

Fisheries of the Exclusive Economic Zone Off Alaska; Allocating Bering Sea and Aleutian Islands King and Tanner Crab Fishery Resources

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

ACTION: Notice of availability of fishery management plan amendment; request for comments.

SUMMARY: The North Pacific Fishery Management Council (Council) submitted Amendment 31 to the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (FMP) to NMFS for review. If approved, Amendment 31 would amend the Bering Sea and Aleutian Islands Crab Rationalization Program (CR Program) within the FMP to: Temporarily expand the eligibility requirements for individuals wishing to acquire C share Quota Share (QS) by transfer; establish minimum participation requirements for C share QS holders to be eligible to receive an annual allocation of Individual Fishing Quota (IFQ); establish minimum participation requirements for C share QS holders to be eligible to retain their C share QS and establish an administrative process for revocation of an individual's C share QS, if he or she fails to satisfy the minimum participation requirements; establish a regulatory mechanism to ensure that three percent of the total allowable catch (TAC) for each CR Program crab fishery is allocated as IFQ to holders of C share QS; and remove the prohibition on leasing C share IFQ. Amendment 31 is necessary to ensure that individuals who hold C shares are active in the CR Program fisheries and to ensure that application deadlines provide adequate time to resolve disputes. This action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act, the FMP, and other applicable law.

DATES: Comments on the amendment must be submitted on or before February 13, 2015.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2010–0265, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2010-0265,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Mail comments to P.O. Box 21668, Juneau, AK 99802–1668.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

Electronic copies of Amendment 31, the Regulatory Impact Review/Initial Regulatory Flexibility Analysis (RIR/IRFA) and the categorical exclusion prepared for this action—as well as the Environmental Impact Statement prepared for the CR Program—may be obtained from *http://www.regulations.gov* or from the Alaska Region Web site at *http://alaskafisheries.noaa.gov.* NMFS determined that this proposed action was categorically excluded from the need to prepare an environmental assessment under the National Environmental Policy Act.

FOR FURTHER INFORMATION CONTACT: Karen Palmigiano, 907–586–7228.

SUPPLEMENTARY INFORMATION: The king and Tanner crab fisheries in the exclusive economic zone of the Bering Sea and Aleutian Islands (BSAI) are managed under the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs FMP (FMP). The FMP was prepared by the North Pacific Fishery Management Council (Council) under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) as amended by the Consolidated Appropriations Act of 2004 (Pub. L. 108–199, section 801). Regulations implementing the FMP, including the CR Program, are primarily located at 50 CFR part 680.

Overview of CR Program and C Shares

The CR Program is a limited access privilege program that allocates the harvest of certain crab fisheries managed under the FMP among harvesters, processors, and coastal communities. Under the CR Program, NMFS issued four types of quota share (QS) to persons based on their qualifying harvest histories in certain BSAI crab fisheries during a specific period of time defined under the CR Program. The four types of QS are catcher vessel owner (CVO), catcher processor owner (CPO), catcher vessel

crew (CVC), and catcher processor crew (CPC). CVC and CPC QS are also known as ''crew shares'' or ''C shares.'' At the beginning of the CR Program, NMFS issued 97 percent of the QS as owner QS, either CVO or CPO, and issued the remaining three percent as C shares, either CVC or CPC.

NMFS issued C shares to individuals holding State of Alaska Commercial Fisheries Entry Commission (CFEC) Interim Use Permits, generally vessel captains, who met specific historic and recent participation requirements in CR Program fisheries. NMFS did not issue C shares to individuals who did not meet both the historic and recent participation criteria. After the initial issuance of C shares, individuals may only acquire C shares through transfer.

Each year, a QS holder submits a timely and complete ''Application for Annual Crab Individual Fishing Quota (IFQ) Permit'' in order to receive an exclusive harvest privilege for a portion of the total allowable catch (TAC) for each CR Program fishery in which the person holds QS. This harvest privilege is conferred as IFQ, and provides the QS holder with an annual allocation of pounds of crab for harvest in a specific CR Program crab fishery during the year in which it was allocated. The size of each annual IFQ allocation is based on the amount of QS held by a person in relation to the total QS pool in a crab fishery. For example, an individual holding C share QS equaling one percent of the C share QS pool in a crab fishery would receive IFQ to harvest one percent of the annual TAC allocated to C share QS in that crab fishery. NMFS issues holders of CVO QS two types of IFQ: Class A IFQ, which must be delivered to a processor holding a matching amount of IPQ, and Class B IFQ, which may be delivered to any registered crab receiver. Current regulations do not require C share IFQ to be matched with IPQ, and C share IFQ may be delivered to any registered crab receiver, similar to Class B CVO IFQ (see § 680.40(2)(b)(iii)).

When initially establishing C shares, the Council intended that individuals holding C shares be active in CR Program fisheries. To ensure active participation, the CR Program requires C shareholders to be onboard the vessel when their C share IFQ is harvested (the ''holder on-board'' requirement) and prohibits C shareholders from leasing their C share IFQ except in the case of a hardship. However, the CR Program exempts a C shareholder from these two requirements if the C shareholder has joined a crab harvesting cooperative and the holder's C share IFQ is converted to cooperative IFQ. The CR Program also includes participation criteria that must be satisfied for an individual to be eligible to receive C share QS by transfer. To receive C share QS by transfer, current regulations require an applicant to meet eligibility requirements at the time of transfer. To meet these eligibility requirements, an individual may submit an Application for BSAI Crab Eligibility to Receive QS/PQS by Transfer in advance of submitting a transfer application, or at the same time as submitting a transfer application. The regulations require that an individual must be a U.S. citizen with (1) at least 150 days of sea time as part of a harvesting crew in any U.S. commercial fishery; and (2) participation in one of the CR Program fisheries in the 365 days prior to the date the transfer application is submitted to NMFS. If NMFS determines that an individual is eligible to receive C share QS by transfer, that individual would be required to submit proof of participation in one of the CR Program fisheries in the 365 days prior to the date of their application to transfer QS if more than 365 days has elapsed between NMFS' determination of eligibility and the submission of the transfer application. (See regulations at § 680.41(c)(2)(C).)

Annually, C share IFQ is assigned based on the individual's underlying QS. In a CR Program fishery, the annual allocation of IFQ assigned to any person (p) is based on the TAC for that crab QS fishery (f) less the allocation to the Western Alaska Community Development Quota (CDQ) Program and the Western Aleutian Islands golden king crab fishery. As expressed in regulations at § 680.40(h), the annual IFQ allocation calculation is as follows:

- IFQ $TAC_f = TAC_f -$ (Western Alaska CDQ Program + Western Aleutian Islands golden king crab fishery)
- $IFQ_{pf} = IFQ\ TAC_f * (QS_{pf}/QS_f)$

Based on these calculations, a person holding one percent of the QS in a CR Program fishery (QS_{pf}) would receive IFQ to harvest one percent of the annual TAC in that CR Program fishery.

Need for Action

At its June 2007 meeting, the Council received public testimony and recommendations from its Advisory Panel advocating for modifications to the participation requirements for acquisition and use of C shares. Participants in the CR Program fisheries raised the following issues:

- At least 750 former crew, who did not receive an initial allocation of C shares but who were active in CR Program fisheries in the five years preceding implementation of the CR Program, are no longer active in CR Program fisheries due to the significant reduction in the number of vessels participating in CR Program fisheries subsequent to implementation of the CR Program.
- The current eligibility requirement for recent participation in one of the CR program crab fisheries prevents acquisition of C shares by individuals formerly active in CR program fisheries but no longer participating in CR Program fisheries due to the significant fleet contraction and resulting loss of crew positions on crab boats.
- Estimates of available information indicate that approximately 40% (97 individuals) of the individuals who received an initial allocation of C share QS (239 individuals) have remained active in the CR program fisheries, while approximately 60% (142 individuals) have not remained active in CR program fisheries.
- The regulations intended to keep C share QS holders active in the fisheries are not working due to the exemptions from these active participation requirements for C shareholders who join a crab harvesting cooperative.

Given this information, the Council determined that the current eligibility requirements for the acquisition of C shares have the effect of preventing some displaced, long-time captains and crew from acquiring C shares and that temporary modifications are necessary to increase the pool of individuals eligible to acquire C shares by transfer. The Council also determined that revisions to the current active participation requirements are necessary to establish reasonable participation requirements for C shareholders and to ensure that all C shareholders remain active in the fisheries. At its April 2008 meeting, the Council took final action which forms the basis for Amendment 31 to the FMP.

The Proposed Actions

Amendment 31 would make several changes to FMP provisions governing the acquisition, use, and retention of quota share established for captain and crew, known as crew quota share or C shares, under the CR Program. Specifically, Amendment 31 would: (1) Temporarily expand the eligibility requirements for individuals wishing to acquire C share QS by transfer; (2) establish minimum participation requirements for C share QS holders to be eligible to receive an annual allocation of IFQ; (3) establish minimum participation requirements for C share QS holders to be eligible to retain their C share QS and establish an

administrative process for revocation of an individual's C share QS if he or she fails to satisfy the minimum participation requirements; (4) establish a regulatory mechanism to ensure that 3 percent of the TAC for each CR Program crab fishery is allocated as IFQ to holders of C share QS; and (5) remove the prohibition on leasing C share IFQ.

Temporary Modifications to Eligibility Criteria for Acquisition of C Share QS by Transfer

Under the status quo, to receive C share QS by transfer a person must be an individual with at least 150 days of sea time in a harvest capacity in a U.S. commercial fishery and have been active as a crewmember in one of the CR Program fisheries in the last 365 days. Under this standard, captains and crew displaced by fleet contraction that have not found a position in one of the CR Program fisheries would not be permitted to acquire C share QS until they participated in a landing. Based on the fleet contraction that occurred at the inception of the CR Program, it is likely that as many as two-thirds of the persons that would have met this standard prior to the implementation of the CR program would not currently meet this standard.

Amendment 31 would modify the recent participation requirements, for a limited time, to include additional eligibility requirements that would be less restrictive than the current requirements. Specifically, in addition to the existing eligibility criteria, Amendment 31 would permit the transfer of C share QS to an individual who is a U.S. citizen with at least 150 days of sea time as part of a harvesting crew in any U.S. commercial fishery and who either (1) received an initial allocation of CVC or CPC QS, or (2) participated in at least one delivery of crab from a fishery in the CR program in three of the five crab fishing years prior to the start of the CR Program, starting with the 2000/2001 crab fishing year through the 2004/2005 crab fishing year.

Under Amendment 31, both initial recipients of C share QS, as well as individuals who participated in CR crab fisheries for three of the five years prior to the start of the CR program, would be eligible to acquire C share QS by transfer. The intended effect of the proposed change is to temporarily expand the pool of individuals eligible to acquire C share QS by transfer to include individuals who were active in the crab fishery immediately prior to implementation of the program, but who do not meet the current recent participation requirement for activity in the 365 days preceding the transfer. Amendment 31 would not remove the current eligibility criteria. Therefore, an individual would be eligible to acquire C share QS under the existing eligibility criteria, as well as the eligibility criteria that would be added to the FMP by Amendment 31. The eligibility criteria added by Amendment 31 would exist only for a period of four years from the effective date of the final rule to implement Amendment 31, if Amendment 31 is approved. After this transitional period, the eligibility criteria added by Amendment 31 would no longer be valid, and the current eligibility criteria would apply to all individuals looking to acquire C share QS by transfer. The proposed changes to the eligibility criteria provide individuals formerly active in CR program fisheries, but who may not have been able to continue active participation in the CR crab fisheries, with an opportunity to acquire C share QS during the period of time under Amendment 31 in which current C share QS holders would be transitioning into compliance with the active participation requirements for C shareholders that also would be imposed by Amendment 31.

The benefit to those receiving eligibility for acquiring C share QS during the transitional period and the effects on the market for C share QS could be influenced by several factors. If C share QS holders are required to be active in the crab fisheries to receive IFQ or if C share QS holders are required to divest after a period of inactivity, which would be required under Amendment 31 as explained in the following sections, the transitional eligibility period could have minimal effects on individuals receiving the eligibility. An individual who becomes eligible to purchase C share QS during the proposed transitional eligibility period would be expected to satisfy participation requirements for C share QS holders and much less likely to purchase C share QS if the individual would not be eligible to receive IFQ or would be required to divest his or her C share QS holdings after a period of inactivity.

Expanded eligibility for C share QS during the transitional period may also have an adverse effect on individuals currently active as captains and crew in the CR Program fisheries. Competition for C share QS may increase with increased demand and, with limited space for crew and captains, individuals may find more competition for jobs. However, individuals who do not currently have a position on a boat may be less interested in obtaining C share QS, and if there are more individuals interested and able to purchase C share QS, this may provide an opportunity for those individuals no longer wanting to remain active in the fishery to sell their shares for a competitive price.

Active Participation Requirements for C Share IFQ and QS

The FMP currently requires individuals who hold C share IFQ to be onboard the vessel harvesting those IFQ. However, if a C share QS holder joins a cooperative, the IFQ from that C share QS are allocated to the cooperative, and the C shareholder is exempt from the holder onboard requirement with respect to those IFQ shares, as well as the current prohibition on leasing C share IFQ. The disparate treatment of individual holders of C share QS who are members of a cooperative versus holders of C share QS who are not members of a cooperative has had several effects, which were not the intention of the Council when creating the CR Program and C shares. First, the exemptions from the holder onboard requirement and the prohibition on leasing C share IFQ for holders of C shares who are members of a cooperative increase the incentive for a C shareholder to join a cooperative and essentially nullify the requirement for the holders of C shares to be onboard a vessel to harvest their IFQ. Since almost all holders of C share QS annually elect to join a cooperative, they do not have to be onboard the vessel while their C share IFQ are harvested and they are not prohibited from leasing their shares within the cooperative under the current requirements. While the Council intended to encourage the formation of cooperatives and the participation of C shareholders as members in cooperatives, the Council expected that C shareholders would remain active participants in the CR program fisheries regardless of whether they were members of a cooperative. Additionally, as active C shareholders retire from captain and crew positions, it can be expected that many may elect to continue to remain members of cooperatives and retain their C share holdings, effectively reducing the number of C shareholders who are actively participating in the fisheries. Lastly, the market for C shares could be less fluid under the current active participation requirements because individuals who retire or exit the fisheries are still able to retain their C shares and benefit from them through cooperative membership. If only active captains and crew are permitted to hold and receive benefits from C shares, it is likely that the market for these shares

will be more active and fluid, since individuals who retire or exit the fisheries would need to transfer their C shares.

Amendment 31 would require individuals holding C share QS to satisfy certain minimum fishery participation requirements in order to (1) receive annual allocations of C share IFQ and (2) maintain their eligibility to hold C share QS. In order to be eligible to receive an allocation of C share IFQ for the 2018/2019 crab fishing year and annually thereafter, Amendment 31 would require a C shareholder to demonstrate that he or she had either (1) participated as crew in at least one delivery of crab in one of the CR Program fisheries in the three crab fishing years preceding the year for which the individual is applying for C share IFQ or, (2) if the individual C share QS holder received an initial allocation of C share QS, participated as crew in at least 30 days of fishing in State of Alaska or Federal Alaska commercial fisheries in the three crab fishing years preceding the year for which the individual is applying for C share IFQ. If Amendment 31 is approved, the first crab fishing year in which the participation requirements for issuance of C share IFQ could be met would be the 2015/2016 crab fishing year. Holders of C shares would be able to provide proof of participation by including an ADF&G fish ticket with their name and/or an affidavit from the vessel owner with their application for IFQ. Similarly, in order for an individual to be eligible to retain C share QS, Amendment 31 would require a C share QS holder to demonstrate that he or she had either (1) participated in at least one delivery of crab in one of the CR Program fisheries during a rolling period of four crab fishing years that would start with the 2015/2016 crab fishing year, or (2) if the individual C share QS holder received an initial allocation of C share QS, participated in at least 30 days of fishing in State of Alaska or Federal Alaska commercial fisheries during a rolling period of four crab fishing years that would start with the 2015/2016 crab fishing year. A C shareholder who satisfies the participation requirement to receive an annual allocation of IFQ would also satisfy the participation requirement to retain their C share QS.

Amendment 31 would authorize NMFS to revoke C share QS held by individuals who are unable to provide proof of participation as described in the preceding paragraph for four successive crab fishing years. Under Amendment 31, NMFS would initiate C share QS revocation proceedings after 4 successive years of inactivity by a C share QS holder. Because the first year for satisfying the C share QS participation criteria is the 2015/2016 crab fishing, NMFS would not initiate a revocation proceeding until July 1, 2019, the start of the fifth crab fishing year following implementation of Amendment 31 if approved. The proposed rule to implement Amendment 31 describes the proposed administrative process that would be established for revocation of C share QS.

The Council's rationale for recommending revocation of C share QS from holders who are inactive in the CR Program fisheries for an extended period is that those C shareholders effectively withhold these shares from other active captains and crew who might wish to develop or expand their C share holdings. The Council recognized that without revocation, the incentive for inactive C shareholders to divest their QS could be rather minor, particularly for individuals who received their C share QS in the initial allocation. For many of these individuals, their relatively small annual IFQ allocations may not catch their attention, and the value of the underlying QS may be overlooked, as has happened with inactive individuals in the Halibut and Sablefish IFQ program. Without the threat of revocation, it is possible that a portion of the C share QS pool would remain stagnant for extended periods of time, which could reduce the size of and activity in the C share QS market.

Amendment 31 would not exempt C shareholders who join a cooperative from the proposed participation requirements to receive C share IFQ or to retain C share QS. Under Amendment 31, all C shareholders, regardless of whether they have joined a cooperative, would be required to meet the proposed participation requirements for receiving C share IFQ and retaining C share QS.

Amendment 31 also would remove the prohibition on leasing C share IFQ, which has been in effect since July 1, 2008. The Council determined that the prohibition on leasing C share IFQ as a measure to ensure active participation would no longer be necessary because under Amendment 31, C shareholders would be required to satisfy specific participation requirements and these participation requirements would apply to all C shareholders even when they are members of a cooperative.

Maintenance of C Share IFQ Allocation at Three Percent of the Annual TAC

Under the CR Program, the Council initially allocated 97 percent of the QS pool to vessel owners as catcher vessel owner (CVO) and catcher processor owner (CPO) QS and the remaining three percent as C share QS. Because the amount of IFQ issued annually is a function of the number of QS units and the annual TAC amount for a given fishery, the annual IFQ allocation should generally reflect the same 97 percent allocation to vessel owners and three percent to vessel crew. For example, if Person Z owns two percent of the 97 percent of vessel owner QS and the TAC is 3,000,000 lbs, then Person Z would receive IFQ for 58,200 lbs, because 97 percent of 3,000,000 lbs is 2,910,000 lbs and two percent of that is 58,200 lbs. This allocation method maintains the intended QS and IFQ percentages originally implemented by the Council. However, the revocation of C share QS proposed by the Council under Amendment 31 could affect the 97 percent/3 percent split, reducing the amount of C share QS to less than 3 percent of the QS pool and consequently the amount of IFQ allocated to C shareholders.

The Council determined that it wanted to ensure that 3 percent of the annual TAC for each crab fishery continues to be allocated to C share QS holders. In order to address this, Amendment 31 would specifically require that 3 percent of the annual TAC for each crab fishery included in the rationalization program be allocated as IFQ to holders of C share QS. This provision would be implemented through a regulation change which is addressed in the proposed rule for Amendment 31. This new provision would maintain the C share IFQ allocation at its intended proportion of the IFQ pool (3 percent).

NMFS is soliciting public comments on proposed Amendment 31 through the end of the comment period (see **DATES**). Public comments on the proposed FMP amendment must be received by the close of the comment period on Amendment 31 to be considered in the approval/disapproval decision on Amendment 31. All comments received by the end of the comment period, whether specifically directed to the FMP amendment or the proposed rule, will be considered in the approval/disapproval decision on Amendment 31. Comments received after the end of the public comment period for Amendment 31, even if received within the comment period for the proposed rule, will not be considered in the approval/disapproval decision on the FMP amendment. To be considered, comments must be received, not just postmarked or otherwise transmitted, by the close of business on the last day of the comment period.

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

Dated: December 9, 2014.

Emily H. Menashes,

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

[FR Doc. 2014–29217 Filed 12–12–14; 8:45 am]

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Notices

Federal Register

Vol. 79, No. 240

Monday, December 15, 2014

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 COMMERCE

Foreign-Trade Zones Board

[B–58–2014]

Foreign-Trade Zone (FTZ) 7—Mayaguez, PR; Authorization of Production Activity, Neolpharma, Inc., Subzone 7O (Pharmaceutical Products); Caguas, PR

On August 12, 2014, the Puerto Rico Industrial Development Company, grantee of FTZ 7, submitted a notification of proposed production activity to the Foreign-Trade Zones (FTZ) Board on behalf of Neolpharma, Inc., located within Subzone 7O, in Caguas, Puerto Rico.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (79 FR 48726–48727, 08–18–2014). The FTZ Board has determined that no further review of the activity is warranted at this time. The production activity described in the notification is authorized, subject to the FTZ Act and the Board's regulations, including Section 400.14.

Dated: December 10, 2014.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2014–29341 Filed 12–12–14; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1956]

Restricted Approval for Production Authority, Foreign-Trade Zone 143, Mitsubishi Rayon Carbon Fiber and Composites, Inc., Subzone 143D (Carbon Fiber); Sacramento, CA

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

WHEREAS, Mitsubishi Rayon Carbon Fiber and Composites, Inc. (formerly Grafil, Inc.) (MRCFC), operator of Subzone 143D, has requested authority to produce polyacrylonitrile (PAN)-based carbon fiber under FTZ procedures within Subzone 143D, at MRCFC's facilities in Sacramento, California (B–54–2012, docketed 07–26–2012);

WHEREAS, notice inviting public comment has been given in the **Federal Register** (77 FR 45575–45576, 8/1/2012 and 79 FR 12150, 3/4/2014) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

WHEREAS, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations would be satisfied, and that the proposal would be in the public interest if subject to the restriction listed below;

NOW, THEREFORE, the Board hereby orders:

The application for production authority under zone procedures within Subzone 143D, at the MRCFC facilities in Sacramento, California, as described in the application and **Federal Register** notice, is approved, subject to the FTZ Act and the Board's regulations, including Section 400.13, and further subject to a restriction that all foreign-status PAN fiber admitted for MRCFC's production activity must be re-exported (entry for U.S. consumption is not authorized).

Signed at Washington, DC, this December 6, 2014.

Paul Piquado,

Assistant Secretary of Commerce for Enforcement and Compliance, Alternate Chairman, Foreign-Trade Zones Board.

[FR Doc. 2014–29343 Filed 12–12–14; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1957]

Restricted Approval for Production Authority, Foreign-Trade Zone 83, Toray Carbon Fibers America, Inc. (Carbon Fiber); Decatur, AL

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

WHEREAS, the Huntsville-Madison County Airport Authority, grantee of FTZ 83, has requested authority on behalf of Toray Carbon Fibers America, Inc. (Toray), to use polyacrylonitrile (PAN) fiber and other inputs to produce carbon fiber and PAN fiber under FTZ procedures at Toray's facility in Decatur, Alabama (B–58–2013, docketed 05–30–2013);

WHEREAS, notice inviting public comment has been given in the **Federal Register** (78 FR 35603–35604, 6/13/2013; and 79 FR 15725, 3/21/2014) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

WHEREAS, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations would be satisfied, and that the proposal would be in the public interest, if subject to the restriction listed below;

NOW, THEREFORE, the Board hereby orders:

The application for production authority under zone procedures at the Toray facility in Decatur, Alabama, as described in the application and **Federal Register** notice, is approved, subject to the FTZ Act and the Board's regulations, including Section 400.13, and further subject to a restriction that all foreign-status PAN fiber admitted for Toray's production activity must be re-exported (entry for U.S. consumption is not authorized).

Signed at Washington, DC, this 6 day of December 2014.

Paul Piquado,

Assistant Secretary of Commerce for Enforcement and Compliance, Alternate Chairman, Foreign-Trade Zones Board.

[FR Doc. 2014–29342 Filed 12–12–14; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–009]

Calcium Hypochlorite From the People's Republic of China: Final Affirmative Countervailing Duty Determination

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

ACTION: Notice.

SUMMARY: The Department of Commerce (''Department'') determines that countervailable subsidies are being provided to producers and exporters of calcium hypochlorite from the People's Republic of China (''PRC''). For information on the estimated subsidy rates, see the ''Suspension of Liquidation'' section of this notice.

DATES: *Effective Date:* December 15, 2014.

FOR FURTHER INFORMATION CONTACT: Katie Marksberry, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone 202.482.7906.

SUPPLEMENTARY INFORMATION:

Background

The petitioner to this investigation is Arch Chemicals Inc. (''Petitioner''). This investigation covers 24 government programs. The Department selected three mandatory respondents; Hubei Dinglong Chemical Co., Ltd. (''Hubei Dinglong''), W&W Marketing Corporation (''W&W Marketing''), and Tianjin Jinbin International Trade Co., Ltd. (''Tianjin Jinbin''). All three mandatory respondents refused to participate in this investigation.

Period of Investigation

The period of investigation for which we are measuring subsidies is January 1, 2012, through December 31, 2012.

Case History

The events that have occurred since the Department published the *Preliminary Determination* on May 27, 2014,[1] are discussed in the Memorandum to Paul Piquado, Assistant Secretary for Enforcement and Compliance, ''Issues and Decision Memorandum for the Final Determination of Calcium Hypochlorite from the People's Republic of China'' (''Decision Memorandum''), which is hereby adopted by this notice.[2]

Scope of the Investigation

The product covered by this investigation is calcium hypochlorite, regardless of form (*e.g.,* powder, tablet (compressed), crystalline (granular), or in liquid solution), whether or not blended with other materials, containing at least 10 percent available chlorine measured by actual weight. The scope also includes bleaching powder and hemibasic calcium hypochlorite. For a complete description of the scope of the investigation, *see* Appendix I to this notice.

Analysis of Subsidy Programs and Comments Received

The subsidy programs under investigation and the issues raised in the case and rebuttal briefs submitted by parties in this investigation are addressed in the Decision Memorandum, dated concurrently with this notice. A list of the issues that parties raised and to which we responded in the Decision Memorandum is attached to this notice as Appendix II. The Decision Memorandum is a public document and is on file electronically *via* ACCESS. In addition, a complete version of the Decision Memorandum can be accessed directly on the Internet at *http://enforcement.trade.gov/frn/index.html.* The signed and the electronic versions of this memorandum are identical in content.

Use of Facts Otherwise Available, Including Adverse Inferences

For purposes of this final determination, we relied on facts available and applied an adverse inference, in accordance with sections 776(a) and (b) of the Tariff Act of 1930, as amended (''the Act''), with regard to (1) the existence of a financial contribution, benefit, and specificity for the alleged subsidy programs and (2) the net subsidy rate assigned to Hubei Dinglong, W&W Marketing, and Tianjin Jinbin. A full discussion of our decision to rely on adverse facts available is presented in the Decision Memorandum under the section ''Use of Facts Otherwise Available and Adverse Inferences.''

Suspension of Liquidation

In accordance with section 705(c)(1)(B)(i) of the Act, we have calculated individual rates for Hubei Dinglong, W&W Marketing, and Tianjin Jinbin. Section 705(c)(5)(A)(i) of the Act states that for companies not individually investigated, we will determine an ''all-others'' rate equal to the weighted average countervailable subsidy rates established for exporters and producers individually investigated, excluding any zero and *de minimis* countervailable rates, and any rates determined entirely under section 776 of the Act. Section 705(c)(5)(A)(ii) of the Act states that if the countervailable subsidy rates for all exporters and producers individually investigated are zero or *de minimis* rates, or are determined entirely under section 776 of the Act, the Department may use any reasonable method to establish an all-others rate for exporters and producers not individually investigated, including averaging the weighted average countervailable subsidy rates determined for the exporters and producers individually investigated. As described above, all of the mandatory respondents' subsidy rates were calculated entirely under section 776 of the Act. Therefore, we have resorted to ''any reasonable method'' to derive the ''all-others'' rate, as described under section 705(c)(5)(A)(ii) of the Act. We are basing the ''all-others'' rate on the rate determined for the mandatory respondents, consistent with section 705(c)(5)(A)(ii) of the Act.[3] This issue is discussed in more detail in Comment 2 of the Decision Memorandum.

We determine the total estimated net countervailable subsidy rates to be:

Producer/exporter	Net subsidy *ad valorem* rate (percent)
Hubei Dinglong Chemical Co., Ltd.	65.85
W&W Marketing Corporation	65.85

[1] See *Calcium Hypochlorite From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination,* 79 FR 30082 (May 27, 2014) (*Preliminary Determination*), and the accompanying Preliminary Decision Memorandum.

[2] On November 24, 2014, Enforcement and Compliance changed the name of Enforcement and Compliance's AD and CVD Centralized Electronic Service System (''IA ACCESS'') to AD and CVD Centralized Electronic Service System (''ACCESS''). The Web site location was changed from *http://iaaccess.trade.gov* to *http://access.trade.gov.* The Final Rule changing the references to the Regulations can be found at 79 FR 69046 (November 20, 2014). Public versions of all business proprietary documents and all public documents are on file electronically via ACCESS. Access to ACCESS is available to registered users at *http://access.trade.gov* and to all parties in the Central Records Unit, Room 7046 of the main Department of Commerce building.

[3] *See, e.g., Certain Potassium Phosphate Salts From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Termination of Critical Circumstances Inquiry,* 75 FR 30375, 30376 (June 1, 2010).

Producer/exporter	Net subsidy *ad valorem* rate (percent)
Tianjin Jinbin International Trade Co., Ltd.	65.85
All Others	65.85

As a result of our *Preliminary Determination,* and pursuant to section 703(d) of the Act, we instructed U.S. Customs and Border Protection (''CBP'') to suspend liquidation of all entries of calcium hypochlorite from the PRC that were entered or withdrawn from warehouse, for consumption on or after May 27, 2014, the date of publication of the *Preliminary Determination* in the **Federal Register**. In accordance with section 703(d) of the Act, we issued instructions to CBP to discontinue the suspension of liquidation for countervailing duty (''CVD'') purposes for subject merchandise entered, or withdrawn from warehouse, on or after September 24, 2014, but to continue the suspension of liquidation of all entries from May 27, 2014, through September 23, 2014.

If the U.S. International Trade Commission (''ITC'') issues a final affirmative injury determination, we will issue a CVD order and reinstate the suspension of liquidation under section 706(a) of the Act and will require a cash deposit of estimated CVDs for such entries of merchandise in the amounts indicated above. If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled.

ITC Notification

In accordance with section 705(d) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all non-privileged and non-proprietary information related to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms it will not disclose such information, either publicly or under an administrative protective order (''APO''), without the written consent of the Assistant Secretary for Enforcement and Compliance.

Return or Destruction of Proprietary Information

In the event that the ITC issues a final negative injury determination, this notice will serve as the only reminder to parties subject to an APO of their responsibility concerning the destruction of proprietary information disclosed under 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 that is subject to sanction.

This determination is published pursuant to sections 705(d) and 777(i) of the Act.

Dated: December 8, 2014.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix I—Scope of the Investigation

The product covered by this investigation is calcium hypochlorite, regardless of form (*e.g.,* powder, tablet (compressed), crystalline (granular), or in liquid solution), whether or not blended with other materials, containing at least 10 percent available chlorine measured by actual weight. The scope also includes bleaching powder and hemibasic calcium hypochlorite.

Calcium hypochlorite has the general chemical formulation $Ca(OCl)_2$, but may also be sold in a more dilute form as bleaching powder with the chemical formulation, $Ca(OCl)_2.CaCl_2.Ca(OH)_2.2H_2O$ or hemibasic calcium hypochlorite with the chemical formula of $2Ca(OCl)_2.Ca(OH)_2$ or $Ca(OCl)_2.0.5Ca(OH)_2$. Calcium hypochlorite has a Chemical Abstract Service (''CAS'') registry number of 7778–54–3, and a U.S. Environmental Protection Agency (''EPA) Pesticide Code (''PC'') Number of 014701. The subject calcium hypochlorite has an International Maritime Dangerous Goods (''IMDG'') code of Class 5.1 UN 1748, 2880, or 2208 or Class 5.1/8 UN 3485, 3486, or 3487.

Calcium hypochlorite is currently classifiable under the subheading 2828.10.0000 of the Harmonized Tariff Schedule of the United States (''HTSUS''). The subheading covers commercial calcium hypochlorite and other calcium hypochlorite. When tableted or blended with other materials, calcium hypochlorite may be entered under other tariff classifications, such as 3808.94.5000 and 3808.99.9500, which cover disinfectants and similar products. While the HTSUS subheadings, the CAS registry number, the U.S. EPA PC number, and the IMDG codes are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Appendix II—Issues and Decision Memorandum

I. Summary
II. Background
A. Case History
B. Period of Investigation
III. Scope Comments
IV. Scope of the Investigation
V. Use of Facts Otherwise Available and Adverse Inferences
A. Selection of the Adverse Facts Available Rate
B. Subsidy Rate Chart
VI. Analysis of Comments
Comment 1: Whether the Department Correctly Denied CPIW/JSCC Voluntary/Mandatory Respondent Status
Comment 2: Whether the Department Correctly Calculated the CVD Rate Applied to CPIW/JSCC

[FR Doc. 2014–29368 Filed 12–12–14; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–008]

Calcium Hypochlorite From the People's Republic of China: Final Determination of Sales at Less Than Fair Value

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

SUMMARY: The Department of Commerce (the ''Department'') determines that calcium hypochlorite from the People's Republic of China (''PRC'') is being, or is likely to be, sold in the United States at less than fair value (''LTFV''), as provided in section 735 of the Tariff Act of 1930, as amended (''the Act''). This investigation's final dumping margin is in the ''Final Determination Margins'' section infra.

DATES: *Effective Date:* December 15, 2014.

FOR FURTHER INFORMATION CONTACT: Emeka Chukwudebe, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–0219.

SUPPLEMENTARY INFORMATION:

Background

On July 25, 2014, the Department published in the **Federal Register** its *Preliminary Determination* [1] of sales at LTFV and postponement of the final determination in the antidumping duty investigation of calcium hypochlorite from the PRC.[2] We invited interested parties to comment on our *Preliminary Determination.* We received no comments. The Department conducted this investigation in accordance with section 731 of the Act.

[1] *See Calcium Hypochlorite From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 79 FR 43393 (July 25, 2014) (''*Preliminary Determination*'').

[2] *See id.*

Period of Investigation

The period of investigation (''POI'') is April 1, 2013, through September 30, 2013. This period corresponds to the two most recent fiscal quarters prior to the month of the filing of the petition, which was December 2013.[3]

Scope Comments

In accordance with the preamble to the Department's regulations, and as noted in the *Initiation,* we set aside a period of time for parties to raise issues regarding product coverage, and encouraged all parties to submit comments within 20 calendar days of publication of the *Initiation.*[4] We received no comments concerning the scope of this investigation.

Scope of the Investigation

The product covered by this investigation is calcium hypochlorite, regardless of form (*e.g.,* powder, tablet (compressed), crystalline (granular), or in liquid solution), whether or not blended with other materials, containing at least 10% available chlorine measured by actual weight. The scope also includes bleaching powder and hemibasic calcium hypochlorite.

Calcium hypochlorite has the general chemical formulation $Ca(OCl)_2$, but may also be sold in a more dilute form as bleaching powder with the chemical formulation, $Ca(OCl)_2.CaCl_2.Ca(OH)_2.2H_2O$ or hemibasic calcium hypochlorite with the chemical formula of $2Ca(OCl)_2.Ca(OH)_2$ or $Ca(OCl)_2.0.5Ca(OH)_2$. Calcium hypochlorite has a Chemical Abstract Service (''CAS'') registry number of 7778–54–3, and a U.S. Environmental Protection Agency (''EPA) Pesticide Code (''PC'') Number of 014701. The subject calcium hypochlorite has an International Maritime Dangerous Goods (''IMDG'') code of Class 5.1 UN 1748, 2880, or 2208 or Class 5.1/8 UN 3485, 3486, or 3487.

Calcium hypochlorite is currently classifiable under the subheading 2828.10.0000 of the Harmonized Tariff Schedule of the United States (''HTSUS''). The subheading covers commercial calcium hypochlorite and other calcium hypochlorite. When tableted or blended with other materials, calcium hypochlorite may be entered under other tariff classifications, such as 3808.94.5000 and 3808.99.9500, which cover disinfectants and similar products. While the HTSUS subheadings, the CAS registry number, the U.S. EPA PC number, and the IMDG codes are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Separate Rate

In the *Preliminary Determination,* we determined that none of the exporters subject to this investigation demonstrated their eligibility for a separate rate and as such are part of the PRC-wide entity.[5] No party commented on this determination. As a result, for this final determination, we are continuing to treat these exporters as part of the PRC-wide entity and subject to the PRC-wide rate.

PRC-Wide Entity

In the *Preliminary Determination,* the Department assigned to the PRC-wide entity a rate of 210.52 percent based upon adverse facts available (''AFA'').[6] Given that the Department did not receive any comments from interested parties, for this final determination, the Department continues to assign an AFA rate of 210.52 percent to the PRC-wide entity, which includes China Petrochemical International (Wuhan) Co., Ltd., Tianjin JinBin International Trade Co., Ltd., and Wuhan Rui Sunny Chemical Co., Ltd.[7]

Combination Rates

In the *Initiation Notice,* the Department stated that it would calculate combination rates for the respondents that are eligible for a separate rate in this investigation.[8] Policy Bulletin 05.1 sets forth this practice.[9] However, for the final determination, we continue to find that all parties subject to this investigation are part of the PRC-wide entity, to which we do not assign a separate combination rate.[10]

Final Determination Margins

The final weighted-average antidumping duty margin percentage is as follows:

Exporter	Weighted-Average margin (%)
PRC-Wide Entity	210.52

Disclosure

Normally, the Department discloses to interested parties the calculations performed within five days after the date of publication of the notice of final determination in the **Federal Register**, in accordance with 19 CFR 351.224(b). However, because there are no changes to our *Preliminary Determination,* and because we continue to apply AFA to each of the mandatory respondents in this investigation, in accordance with section 776 of the Act, there are no final calculations to disclose.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(l)(B) of the Act, the Department will instruct U.S. Customs and Border Protection (''CBP'') to continue to suspend liquidation of all appropriate entries of calcium hypochlorite from the PRC, as described in the ''Scope of the Investigation'' section, which were entered, or withdrawn from warehouse, for consumption on or after July 25, 2014, the date of publication of the *Preliminary Determination* in the **Federal Register**. Further, pursuant to 19 CFR 351.205(d), the Department will instruct CBP to require a cash deposit[11] equal to the estimated amount by which the normal value exceeds the U.S. price, adjusted where appropriate for export subsidies and estimated domestic subsidy pass-through,[12] as follows: (1) The rates for China Petrochemical International (Wuhan) Co., Ltd., Tianjin JinBin International Trade Co., Ltd., and Wuhan Rui Sunny Chemical Co., Ltd. will be the PRC-wide rate we have

[3] *See* 19 CFR 351.204(b)(1).

[4] *See Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27323 (May 19, 1997); *see also Calcium Hypochlorite From the People's Republic of China: Initiation of Countervailing Duty Investigation,* 79 FR 2417 (January 14, 2014) (''*Initiation*'').

[5] *See Preliminary Determination* at 79 FR 43394.

[6] *See Preliminary Determination* and accompanying Preliminary Decision Memorandum at 11–12.

[7] *See id.*

[8] *See Calcium Hypochlorite From the People's Republic of China: Initiation of Antidumping Duty Investigation,* 79 FR 2410, 2414 (January 14, 2014) (''*Initiation Notice*'').

[9] *See* Enforcement and Compliance Policy Bulletin No. 05.1 ''Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries,'' (April 5, 2005) (''Policy Bulletin 05.1''), available on the Department's Web site at *http://enforcement.trade.gov/policy/bull05–1.pdf.*

[10] *Id.*

[11] *See* Modification of Regulations Regarding the Practice of Accepting Bonds During the Provisional Measures Period in Antidumping and Countervailing Duty Investigations, 76 FR 61042 (October 3, 2011).

[12] *See* sections 772(c)(1)(C) and 777A(f) of the Act, respectively. Unlike in administrative reviews, the Department calculates the adjustment for export subsidies in investigations not in the margin calculation program, but in the cash deposit instructions issued to CBP. *See Notice of Final Determination of Sales at Less Than Fair Value, and Negative Determination of Critical Circumstances: Certain Lined Paper Products from India,* 71 FR 45012 (August 8, 2006), and accompanying Issues and Decision Memorandum at Comment 1.

determined in this final determination; (2) if the exporter is not a firm identified in this investigation but the producer is, the rate will be the rate established for the producer of calcium hypochlorite from the PRC; (3) the rate for all other producers or exporters will be 210.52 percent, as discussed in the ''PRC-Wide'' section, above. In this LTFV investigation, with regard to PRC-wide entity, export subsidies constitute 9.62 percent [13] of the final calculated countervailing duty rate in the concurrent countervailing duty investigation, and, thus, we will offset the PRC-wide rate of 210.52 percent by the countervailing duty rate attributable to export subsidies (*i.e.,* 9.62 percent) to calculate the cash deposit rate for this LTFV investigation. These instructions suspending liquidation will remain in effect until further notice.

U.S. International Trade Commission (''ITC'') Notification

In accordance with section 735(d) of the Act, we notified the ITC of our final affirmative determination of sales at LTFV. As the Department's final determination in this proceeding is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will determine, no later than 45 days after our final determination, whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of calcium hypochlorite from the PRC, or sales (or the likelihood of sales) for importation of calcium hypochlorite from the PRC. If the ITC determines that such injury does not exist, we will terminate this proceeding and we will refund or cancel all securities posted. However, if the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess, upon further instruction by the Department, antidumping duties on all imports of calcium hypochlorite from the PRC entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

[13] The following subsidy programs in the final determination of the concurrent countervailing duty investigation are export subsidies: Discounted Loans for Export-Oriented Enterprises (1.06%), Export Credits from China's Export-Import Bank (1.06%), Export Credit Insurance from China Export and Credit Insurance Corporation (Sinosure) (1.06%), Foreign Trade Development Fund (0.55%), Famous Brands Program (0.55%), Provision of Shipping for LTAR (5.34%). *See Calcium Hypochlorite From the People's Republic of China: Final Affirmative Countervailing Duty Determination,* dated concurrently with this notice, and accompanying Issues and Decision Memorandum at 7.

Return or Destruction of Proprietary Information

This notice also serves as a reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). We hereby request, timely written notification of return or destruction of APO materials or conversion to judicial protective order. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This determination is issued and published in accordance with sections 735(d) and 777(i)(l) of the Act.

Dated: December 8, 2014.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2014–29370 Filed 12–12–14; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Limitation of Duty-Free Imports of Apparel Articles Assembled in Haiti Under the Haitian Hemispheric Opportunity Through Partnership for Encouragement Act (HOPE)

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notification of Annual Quantitative Limit on Certain Apparel under HOPE.

SUMMARY: HOPE provides for duty-free treatment for certain apparel articles imported directly from Haiti. One of the preferences under HOPE is known as the ''value-added'' program, which requires that apparel meet a minimum threshold percentage of value added in Haiti, the United States, and/or certain beneficiary countries. The program is subject to a quantitative limitation, which is calculated as a percentage of total apparel imports into the United States for each 12-month annual period. For the annual period from December 20, 2014 through December 19, 2015, the quantity of imports eligible for preferential treatment under the value-added program is 332,915,916 square meters equivalent.

DATES: *Effective Date:* December 20, 2014.

FOR FURTHER INFORMATION CONTACT: Maria Dybczak, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–3651.

SUPPLEMENTARY INFORMATION:

Authority: The Caribbean Basin Recovery Act (''CBERA''), as amended by the Haitian Hemispheric Opportunity Through Partnership for Encouragement Act of 2006 (''HOPE''), Title V of the Tax Relief and Health Care Act of 2006 and the Food, Conservation, and Energy Act of 2008 (''HOPE II''); the Haiti Economic Lift Program Act of 2010 (''HELP''); and implemented by Presidential Proc. No. 8114, 72 FR 13655, 13659 (March 22, 2007), and No. 8596, 75 FR 68153 (November 4, 2010).

HOPE provides for duty-free treatment for certain apparel articles imported directly from Haiti. Section 213A(b)(1)(B) of HOPE outlines the requirements for certain apparel articles to qualify for duty-free treatment under a ''value-added'' program. In order to qualify for duty-free treatment, apparel articles must be wholly assembled, or knit-to-shape, in Haiti from any combination of fabrics, fabric components, components knit-to-shape, and yarns, as long as the sum of the cost or value of materials produced in Haiti or one or more countries, as described in HOPE, or any combination thereof, plus the direct costs of processing operations performed in Haiti or one or more countries, as described in HOPE, or any combination thereof, is not less than an applicable percentage of the declared customs value of such apparel articles. Pursuant to HELP, the applicable percentage for the period December 20, 2014 through December 19, 2015, is 50 percent.

For every twelve month period following the effective date of HOPE, duty-free treatment under the value-added program is subject to a quantitative limitation. HOPE provides that the quantitative limitation will be recalculated for each subsequent 12-month period. Section 213A(b)(1)(C) of HOPE, as amended by HOPE II and HELP, requires that, for the twelve-month period beginning on December 20, 2014, the quantitative limitation for qualifying apparel imported from Haiti under the value-added program will be an amount equivalent to 1.25 percent of the aggregate square meter equivalent of all apparel articles imported into the United States in the most recent 12-month period for which data are available. The aggregate square meters equivalent of all apparel articles imported into the United States is derived from the set of Harmonized System lines listed in the Annex to the World Trade Organization Agreement on Textiles and Clothing (''ATC''), and

the conversion factors for units of measure into square meter equivalents used by the United States in implementing the ATC. For purposes of this notice, the most recent 12-month period for which data are available as of December 20, 2014 is the 12-month period ending on October 31, 2014.

Therefore, for the one-year period beginning on December 20, 2014 and extending through December 19, 2015, the quantity of imports eligible for preferential treatment under the value-added program is 332,915,916 square meters equivalent. Apparel articles entered in excess of these quantities will be subject to otherwise applicable tariffs.

Dated: December 9, 2014.

Joshua Teitelbaum,

Deputy Assistant Secretary for Textiles, Consumer Goods and Materials.

[FR Doc. 2014–29253 Filed 12–12–14; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No.: PTO–C–2014–0047]

Notice of Public Meeting on Trade Secret Topics

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice of symposium.

SUMMARY: The protection of U.S. trade secrets from misappropriation is an Administration priority. As noted in the Administration Strategy on Mitigating the Theft of U.S. Trade Secrets (February 2013), ''trade secret theft threatens American businesses, undermines national security, and places the security of the U.S. economy in jeopardy.'' In pursuit of the goals of the Administration Strategy through information sharing and discussion, the United States Patent and Trademark Office will hold a public symposium on issues relevant to the protection of trade secrets. Topics to be discussed include losses due to trade secret theft and challenges to protecting trade secrets, the intersection of patent and trade secret protection, trade secret issues in civil litigation, trade secret protection in foreign jurisdictions, and proposed responses to the threat of trade secret theft in the U.S.

DATES: The symposium will be held on January 8, 2015. The symposium will begin at 9 a.m. and end at 3 p.m.

ADDRESSES: The symposium will be held at the United States Patent and Trademark Office, Madison Building, 600 Dulany Street, Alexandria, Virginia 22314.

FOR FURTHER INFORMATION CONTACT: For further information regarding the symposium, please contact Michael Smith, Jenny Blank, or Hollis Robinson at the Office of Policy and International Affairs, by telephone at (571) 272–9300, by email at *tradesecrets@uspto.gov,* or by postal mail addressed to: Mail Stop OPIA, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450, ATTN: Michael Smith, Jenny Blank, or Hollis Robinson. Please direct all media inquiries to the Office of the Chief Communications Officer, USPTO, at (571) 272–8400.

SUPPLEMENTARY INFORMATION:

Trade Secret Symposium

Under U.S. law, trade secrets comprise commercially valuable information not generally known or readily ascertainable to the public that are subject to reasonable measures to maintain confidentiality. The protection of U.S. trade secrets from misappropriation is an Administration priority. As stated in the Administration Strategy on Mitigating the Theft of U.S. Trade Secrets (February 2013), ''trade secret theft threatens American businesses, undermines national security, and places the security of the U.S. economy in jeopardy.'' Likewise, increased mobility, globalization, and the anonymous/pseudonymous nature of the internet result in new challenges to protecting trade secrets. In pursuit of the goals of the Administration Strategy through information sharing and discussion, the United States Patent and Trademark Office will hold a public symposium on issues relevant to the protection of trade secrets. Topics to be discussed include losses due to trade secret theft and challenges in protecting trade secrets, the intersection of patent and trade secret protection, trade secret matters that arise in civil litigation, trade secret protection in foreign jurisdictions, and proposed responses to the threat of trade secret theft in the U.S. The symposium will feature panel discussions, and there will be opportunities for attendees to ask questions. It is expected that experts from academia, the legislative and executive branches, the judiciary, private legal practice, and industry will serve as panelists.

Instructions and Information on the Public Symposium

The symposium will be held on January 8, 2015, at the United States Patent and Trademark Office, Madison Building, 600 Dulany Street, Alexandria, Virginia 22314. The symposium will begin at 9 a.m. and end at 3 p.m. The agenda will be available a week before the symposium on the USPTO Web site, *http://www.uspto.gov/*. Registration is available at *http://events.SignUp4.com/tradesecrets.* Attendees may also register at the door one half-hour prior to the beginning of the symposium.

The symposium will be physically accessible to people with disabilities. Individuals requiring accommodation, such as sign language interpretation or other ancillary aids, should communicate their needs to Hollis Robinson at the Office of Policy and International Affairs, by telephone at (571) 272–9300, by email at *hollis.robinson@uspto.gov,* or by postal mail addressed to: Mail Stop OPIA, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450, ATTN: Hollis Robinson, at least seven (7) business days prior to the symposium.

Dated: December 9, 2014.

Michelle K. Lee,

Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the United States Patent and Trademark Office.

[FR Doc. 2014–29350 Filed 12–12–14; 8:45 am]

BILLING CODE 3510–16–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

Fair Credit Reporting Act Disclosures

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice regarding charges for certain disclosures under the Fair Credit Reporting Act.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) announces that the ceiling on allowable charges under section 612(f) of the Fair Credit Reporting Act (FCRA) will increase from $11.50 to $12.00, effective for 2015. The Bureau is required to increase the $8.00 amount referred to in section 612(f)(1)(A)(i) of the FCRA on January 1 of each year, based proportionally on changes in the Consumer Price Index for All Urban Consumers (CPI–U), with fractional changes rounded to the nearest fifty cents. The CPI–U increased 47.66 percent between September 1997, when the FCRA amendments took effect, and September 2014. This increase in the CPI–U, and the requirement that any increase be rounded to the nearest fifty

cents, result in a maximum allowable charge of $12.00.

DATES: Effective January 1, 2015.

FOR FURTHER INFORMATION CONTACT: James Wylie, Counsel, Office of Regulations, at (202) 435–7700.

SUPPLEMENTARY INFORMATION: Section 612(f)(1)(A) of the Fair Credit Reporting Act (FCRA) provides that a consumer reporting agency may charge a consumer a reasonable amount for making a disclosure to the consumer pursuant to section 609 of the FCRA.[1] Section 612(f)(1)(A)(i) of the FCRA provides that, where a consumer reporting agency is permitted to impose a reasonable charge on a consumer for making a disclosure to the consumer pursuant to section 609 of the FCRA, the charge shall not exceed $8.00 and shall be indicated to the consumer before making the disclosure. Section 612(f)(2) of the FCRA states that the Bureau shall increase the $8.00 maximum amount on January 1 of each year, based proportionally on changes in the Consumer Price Index, with fractional changes rounded to the nearest fifty cents.

In 2011, the responsibility for performing this task was transferred from the Federal Trade Commission to the Bureau pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[2] Like the Federal Trade Commission, the Bureau's calculations are based on the CPI–U, which is the most general Consumer Price Index and covers all urban consumers and all items.

Section 211(a)(2) of the FACT Act added a new section 612(a) to the FCRA that gives consumers the right to request free disclosures once every 12 months. The maximum allowable charge established by this notice does not apply to requests made under that provision. The charge does apply when a consumer who orders a file disclosure has already received a free annual disclosure and does not otherwise qualify for an additional free disclosure.

The Bureau is using the $8.00 amount set forth in section 612(f)(1)(A)(i) of the FCRA as the baseline for its calculation of the increase in the ceiling on reasonable charges for certain disclosures made under section 609 of the FCRA. Since the effective date of the amended FCRA was September 30, 1997, the Bureau calculated the proportional increase in the CPI–U from September 1997 to September 2014. The Bureau then determined what modification, if any, from the original base of $8.00 should be made effective for 2015, given the requirement that fractional changes be rounded to the nearest fifty cents.

Between September 1997 and September 2014, the CPI–U increased by 47.66 percent—from an index value of 161.2 in September 1997 to a value of 238.031 in September 2014. An increase of 47.66 percent in the $8.00 base figure would lead to a new figure of $11.81. However, because the statute directs that the resulting figure be rounded to the nearest $0.50, the new maximum allowable charge is $12.00. The Bureau therefore determines that the maximum allowable charge for the year 2015 will be $12.00, effective January 1, 2015.

Dated: December 4, 2014.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

[FR Doc. 2014–29215 Filed 12–12–14; 8:45 am]

BILLING CODE 4810–AM–P

[1] This provision, originally section 612(a), was added to the FCRA in September 1996 and became effective in September 1997. It was relabeled section 612(f) by section 211(a)(1) of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act), Public Law 108–159, which was signed into law on December 4, 2003.

[2] Public Law 111–203, title X, section 1088.

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Proposed Information Collection; Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (CNCS), 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 (PRA95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirement on respondents can be properly assessed.

Currently, CNCS is soliciting comments concerning its proposed renewal of the following proposed Generic Information Collection Request (Generic ICR): ''Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery'' for approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et. seq.*). This collection was developed as part of a Federal Government-wide effort to streamline the process for seeking feedback from the public on service delivery. This notice announces our intent to submit this collection to OMB for approval and solicits comments on specific aspects for the proposed information collection.

Copies of the information collection request can be obtained by contacting the office listed in the Addresses section of this Notice or on *www.regulations.gov.*

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by February 13, 2015.

ADDRESSES: You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) By mail sent to: Corporation for National and Community Service; Attention Amy Borgstrom, Room 10508B; 1201 New York Avenue NW., Washington, DC 20525.

(2) By hand delivery or by courier to the CNCS mailroom at Room 8100 at the mail address given in paragraph (1) above, between 9:00 a.m. and 4:00 p.m. Eastern Time, Monday through Friday, except Federal holidays.

(3) Electronically through *www.regulations.gov.*

Individuals who use a telecommunications device for the deaf (TTY–TDD) may call 1–800–833–3722 between 8:00 a.m. and 8:00 p.m. Eastern Time, Monday through Friday.

Comments submitted in response to this notice may be made available to the public through *www.regulations.gov.* For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information. If you send an email comment, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. Please note that responses to this public comment request containing any routine notice about the confidentiality of the communication will be treated as public comments that may be made available to the public notwithstanding the inclusion of the routine notice.

FOR FURTHER INFORMATION CONTACT: Amy Borgstrom, 202–606–6930, or by email at *aborgstrom@cns.gov.*

SUPPLEMENTARY INFORMATION: CNCS is particularly interested in comments that:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of CNCS, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are expected to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submissions of responses).

Background

CNCS seeks to continue to use this information collection to seek feedback on the agency's service delivery from grantees and other stakeholders.

Current Action

The proposed information collection activity provides a means to garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration'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.

The solicitation of feedback will target areas such as: Timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses will be assessed to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on the Agency's services will be unavailable.

The Agency will only submit a collection for approval under this generic clearance if it meets the following conditions:

• The collections are voluntary;

• The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government;

• The collections are non-controversial and do not raise issues of concern to other Federal agencies;

• Any collection is targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future;

• Personally identifiable information (PII) is collected only to the extent necessary and is not retained;

• Information gathered will be used only internally for general service improvement and program management purposes and is not intended for release outside of the agency;

• Information gathered will not be used for the purpose of substantially informing influential policy decisions; and

• Information gathered will yield qualitative information; the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study.

Feedback collected under this generic clearance provides useful information, but it does 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 to 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.

As a general matter, information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

The information collection will otherwise be used in the same manner as the existing application. CNCS also seeks to continue using the current application until the revised application is approved by OMB. The current application is due to expire on April 30, 2014.

Type of Review: Renewal.

Agency: Corporation for National and Community Service.

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

OMB Number: 3045–0137.

Agency Number: None.

Affected Public: Individuals and Households; Businesses and Organizations; State, Local or Tribal Governments.

Total Respondents: 10,000.

Frequency: Once.

Average Time Per Response: Averages 10 minutes.

Estimated Total Burden Hours: 1,667 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology

and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

All written comments will be available for public inspection on regulations.gov.

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.

Dated: December 10, 2014.

Mary Hyde,

Acting Director, Research and Evaluation.

[FR Doc. 2014–29293 Filed 12–12–14; 8:45 am]

BILLING CODE 6050–28–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2014–ICCD–0160]

Agency Information Collection Activities; Comment Request; Teacher Cancellation Low Income Directory

AGENCY: Department of Education (ED), Federal Student Aid (FSA).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before February 13, 2015.

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2014–ICCD–0160or via postal mail, commercial delivery, or hand delivery. If the regulations.gov site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted; ED will only accept comments during the comment period in this mailbox when the regulations.gov site is not available. 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, Mailstop L–OM–2–2E319, Room 2E103, Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Tammy Gay, 816–268–0432.

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: Teacher Cancellation Low Income Directory.

OMB Control Number: 1845–0077.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 57.

Total Estimated Number of Annual Burden Hours: 6,840.

Abstract: The Teacher Cancellation Low Income (TCLI) Directory is the on-line data repository of elementary and secondary schools and educational service agencies that serve low-income families. State and Territory agencies report these schools to the TCLI Directory. The purpose of the TCLI Directory is to provide a single location for the public to find the list of schools and educational service agencies that are reported. By teaching at one of these schools, recipients of Federal student loans may qualify for loan cancellation as provided under Title I of the Elementary and Secondary Education Act of 1965. Additionally teaching at one of these schools is a requirement for the TEACH Grant program. Institutions of higher education as well as the Department use the TCLI Directory to assist students in determining if the schools they may teach at upon completing their degrees meet the qualifications for receiving the loan cancellations or receiving the TEACH Grant as grant funds.

Dated: December 9, 2014.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2014–29227 Filed 12–12–14; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; State Personnel Development Grants (SPDG) Program

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

ACTION: Notice.

Overview Information: State Personnel Development Grants (SPDG) Program Notice inviting applications for new awards for fiscal year (FY) 2015.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.323A.

DATES:

Applications Available: December 15, 2014.

Deadline for Transmittal of Applications: January 29, 2015.

Deadline for Intergovernmental Review: March 30, 2015.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of this program, authorized by the Individuals with Disabilities Education Act (IDEA), is to assist State educational agencies (SEAs) in reforming and improving their systems for personnel preparation and professional development in early intervention, educational, and transition services in order to improve results for children with disabilities.

Priorities: This notice contains two absolute priorities. Absolute Priority 1 is from the notice of final priorities and definitions for this program, published in the **Federal Register** on August 2,

2012 (77 FR 45944). In accordance with 34 CFR 75.105(b)(2)(iv), Absolute Priority 2 is from sections 651 through 655 of IDEA.

Absolute Priorities: For FY 2015 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, these priorities are absolute priorities. Under 34 CFR 75.105(c)(3), we consider only applications that meet both of these priorities.

These priorities are:

Absolute Priority 1—Effective and Efficient Delivery of Professional Development.

The Assistant Secretary for Special Education and Rehabilitative Services establishes a priority to assist SEAs in reforming and improving their systems for personnel (as that term is defined in section 651(b) of IDEA) preparation and professional development of individuals providing early intervention, educational, and transition services in order to improve results for children with disabilities.

In order to meet this priority, an applicant must demonstrate in the SPDG State Plan it submits as part of its application under section 653(a)(2) of IDEA that its proposed project will—

(1) Use evidence-based (as defined in this notice) professional development practices that will increase implementation of evidence-based practices and result in improved outcomes for children with disabilities;

(2) Provide ongoing assistance to personnel receiving SPDG-supported professional development that supports the implementation of evidence-based practices with fidelity (as defined in this notice); and

(3) Use technology to more efficiently and effectively provide ongoing professional development to personnel, including to personnel in rural areas and to other populations, such as personnel in urban or high-need local educational agencies (LEAs) (as defined in this notice).

Absolute Priority 2—State Personnel Development Grants.

Statutory Requirements. To meet this priority, an applicant must meet the following statutory requirements:

1. *State Personnel Development Plan.*

An applicant must submit a State Personnel Development Plan that identifies and addresses the State and local needs for the personnel preparation and professional development of personnel, as well as individuals who provide direct supplementary aids and services to children with disabilities, and that—

(a) Is designed to enable the State to meet the requirements of section 612(a)(14) and section 635(a)(8) and (9) of IDEA;

(b) Is based on an assessment of State and local needs that identifies critical aspects and areas in need of improvement related to the preparation, ongoing training, and professional development of personnel who serve infants, toddlers, preschoolers, and children with disabilities within the State, including—

(1) Current and anticipated personnel vacancies and shortages; and

(2) The number of preservice and inservice programs;

(c) Is integrated and aligned, to the maximum extent possible, with State plans and activities under the Elementary and Secondary Education Act of 1965, as amended (ESEA); the Rehabilitation Act of 1973, as amended; and the Higher Education Act of 1965, as amended (HEA);

(d) Describes a partnership agreement that is in effect for the period of the grant, which agreement must specify—

(1) The nature and extent of the partnership described in accordance with section 652(b) of IDEA and the respective roles of each member of the partnership, including, if applicable, an individual, entity, or agency other than the SEA that has the responsibility under State law for teacher preparation and certification; and

(2) How the SEA will work with other persons and organizations involved in, and concerned with, the education of children with disabilities, including the respective roles of each of the persons and organizations;

(e) Describes how the strategies and activities the SEA uses to address identified professional development and personnel needs will be coordinated with activities supported with other public resources (including funds provided under Part B and Part C of IDEA and retained for use at the State level for personnel and professional development purposes) and private resources;

(f) Describes how the SEA will align its personnel development plan with the plan and application submitted under sections 1111 and 2112, respectively, of the ESEA;

(g) Describes strategies the SEA will use to address the identified professional development and personnel needs and how such strategies will be implemented, including—

(1) A description of the programs and activities that will provide personnel with the knowledge and skills to meet the needs of, and improve the performance and achievement of, infants, toddlers, preschoolers, and children with disabilities; and

(2) How such strategies will be integrated, to the maximum extent possible, with other activities supported by grants funded under section 662 of IDEA;

(h) Provides an assurance that the SEA will provide technical assistance to LEAs to improve the quality of professional development available to meet the needs of personnel who serve children with disabilities;

(i) Provides an assurance that the SEA will provide technical assistance to entities that provide services to infants and toddlers with disabilities to improve the quality of professional development available to meet the needs of personnel serving those children;

(j) Describes how the SEA will recruit and retain highly qualified teachers and other qualified personnel in geographic areas of greatest need;

(k) Describes the steps the SEA will take to ensure that economically disadvantaged and minority children are not taught at higher rates by teachers who are not highly qualified; and

(l) Describes how the SEA will assess, on a regular basis, the extent to which the strategies implemented have been effective in meeting the performance goals described in section 612(a)(15) of IDEA.

2. *Partnerships.*

Required Partners.

Applicants must establish a partnership with LEAs and other State agencies involved in, or concerned with, the education of children with disabilities, including—

(a) Not less than one institution of higher education; and

(b) The State agencies responsible for administering Part C of IDEA, early education, child care, and vocational rehabilitation programs.

Other Partners.

An SEA must work in partnership with other persons and organizations involved in, and concerned with, the education of children with disabilities, which may include—

(a) The Governor;

(b) Parents of children with disabilities ages birth through 26;

(c) Parents of nondisabled children ages birth through 26;

(d) Individuals with disabilities;

(e) Parent training and information centers or community parent resource centers funded under sections 671 and 672 of IDEA, respectively;

(f) Community-based and other nonprofit organizations involved in the education and employment of individuals with disabilities;

(g) Personnel as defined in section 651(b) of IDEA;

(h) The State advisory panel established under Part B of IDEA;

(i) The State interagency coordinating council established under Part C of IDEA;

(j) Individuals knowledgeable about vocational education;

(k) The State agency for higher education;

(l) Public agencies with jurisdiction in the areas of health, mental health, social services, and juvenile justice;

(m) Other providers of professional development who work with infants, toddlers, preschoolers, and children with disabilities;

(n) Other individuals; and

(o) An individual, entity, or agency as a partner in accordance with section 652(b)(3) of IDEA, if State law assigns responsibility for teacher preparation and certification to an individual, entity, or agency other than the SEA.

3. *Use of Funds.*

(a) Professional Development Activities—Each SEA that receives a grant under this program must use the grant funds to support activities in accordance with the State's Personnel Development Plan, including one or more of the following:

(1) Carrying out programs that provide support to both special education and regular education teachers of children with disabilities and principals, such as programs that—

(i) Provide teacher mentoring, team teaching, reduced class schedules and case loads, and intensive professional development;

(ii) Use standards or assessments for guiding beginning teachers that are consistent with challenging State student academic achievement and functional standards and with the requirements for professional development, as defined in section 9101 of the ESEA; and

(iii) Encourage collaborative and consultative models of providing early intervention, special education, and related services.

(2) Encouraging and supporting the training of special education and regular education teachers and administrators to effectively use and integrate technology—

(i) Into curricula and instruction, including training to improve the ability to collect, manage, and analyze data to improve teaching, decision-making, school improvement efforts, and accountability;

(ii) To enhance learning by children with disabilities; and

(iii) To effectively communicate with parents.

(3) Providing professional development activities that—

(i) Improve the knowledge of special education and regular education teachers concerning—

(A) The academic and developmental or functional needs of students with disabilities; or

(B) Effective instructional strategies, methods, and skills, and the use of State academic content standards and student academic achievement and functional standards, and State assessments, to improve teaching practices and student academic achievement;

(ii) Improve the knowledge of special education and regular education teachers and principals and, in appropriate cases, paraprofessionals, concerning effective instructional practices, and that—

(A) Provide training in how to teach and address the needs of children with different learning styles and children who are limited English proficient;

(B) Involve collaborative groups of teachers, administrators, and, in appropriate cases, related services personnel;

(C) Provide training in methods of—

(I) Positive behavioral interventions and supports to improve student behavior in the classroom;

(II) Scientifically based reading instruction, including early literacy instruction;

(III) Early and appropriate interventions to identify and help children with disabilities;

(IV) Effective instruction for children with low-incidence disabilities;

(V) Successful transitioning to postsecondary opportunities; and

(VI) Classroom-based techniques to assist children prior to referral for special education;

(D) Provide training to enable personnel to work with and involve parents in their child's education, including parents of low-income and limited English proficient children with disabilities;

(E) Provide training for special education personnel and regular education personnel in planning, developing, and implementing effective and appropriate individualized education programs (IEPs); and

(F) Provide training to meet the needs of students with significant health, mobility, or behavioral needs prior to serving those students;

(iii) Train administrators, principals, and other relevant school personnel in conducting effective IEP meetings; and

(iv) Train early intervention, preschool, and related services providers, and other relevant school personnel in conducting effective individualized family service plan (IFSP) meetings.

(4) Developing and implementing initiatives to promote the recruitment and retention of highly qualified special education teachers, particularly initiatives that have proven effective in recruiting and retaining highly qualified teachers, including programs that provide—

(i) Teacher mentoring from exemplary special education teachers, principals, or superintendents;

(ii) Induction and support for special education teachers during their first three years of employment as teachers; or

(iii) Incentives, including financial incentives, to retain special education teachers who have a record of success in helping students with disabilities.

(5) Carrying out programs and activities that are designed to improve the quality of personnel who serve children with disabilities, such as—

(i) Innovative professional development programs (which may be provided through partnerships with institutions of higher education), including programs that train teachers and principals to integrate technology into curricula and instruction to improve teaching, learning, and technology literacy and that are consistent with the definition of professional development in section 9101 of the ESEA; and

(ii) The development and use of proven, cost-effective strategies for the implementation of professional development activities, such as through the use of technology and distance learning.

(6) Carrying out programs and activities that are designed to improve the quality of early intervention personnel, including paraprofessionals and primary referral sources, such as—

(i) Professional development programs to improve the delivery of early intervention services;

(ii) Initiatives to promote the recruitment and retention of early intervention personnel; and

(iii) Interagency activities to ensure that early intervention personnel are adequately prepared and trained.

(b) Other Activities—Each SEA that receives a grant under this program must use the grant funds to support activities in accordance with the State's Personnel Development Plan, including one or more of the following:

(1) Reforming special education and regular education teacher certification (including re-certification) or licensing requirements to ensure that—

(i) Special education and regular education teachers have—

(A) The training and information necessary to address the full range of needs of children with disabilities across disability categories; and

(B) The necessary subject-matter knowledge and teaching skills in the academic subjects that the teachers teach;

(ii) Special education and regular education teacher certification (including re-certification) or licensing requirements are aligned with challenging State academic content standards; and

(iii) Special education and regular education teachers have the subject-matter knowledge and teaching skills, including technology literacy, necessary to help students with disabilities meet challenging State student academic achievement and functional standards.

(2) Programs that establish, expand, or improve alternative routes for State certification of special education teachers for highly qualified individuals with a baccalaureate or master's degree, including mid-career professionals from other occupations, paraprofessionals, and recent college or university graduates with records of academic distinction who demonstrate the potential to become highly effective special education teachers.

(3) Teacher advancement initiatives for special education teachers that promote professional growth and emphasize multiple career paths (such as paths to becoming a career teacher, mentor teacher, or exemplary teacher) and pay differentiation.

(4) Developing and implementing mechanisms to assist LEAs and schools in effectively recruiting and retaining highly qualified special education teachers.

(5) Reforming tenure systems, implementing teacher testing for subject-matter knowledge, and implementing teacher testing for State certification or licensure, consistent with title II of the HEA (20 U.S.C. 1021 *et seq.*).

(6) Funding projects to promote reciprocity of teacher certification or licensing between or among States for special education teachers, except that no reciprocity agreement developed under this absolute priority may lead to the weakening of any State teacher certification or licensing requirement.

(7) Assisting LEAs to serve children with disabilities through the development and use of proven, innovative strategies to deliver intensive professional development programs that are both cost-effective and easily accessible, such as strategies that involve delivery through the use of technology, peer networks, and distance learning.

(8) Developing, or assisting LEAs in developing, merit-based performance systems and strategies that provide differential and bonus pay for special education teachers.

(9) Supporting activities that ensure that teachers are able to use challenging State academic content standards and student academic achievement and functional standards, and State assessments for all children with disabilities, to improve instructional practices and improve the academic achievement of children with disabilities.

(10) When applicable, coordinating with, and expanding centers established under section 2113(c)(18) of the ESEA to benefit special education teachers.

(c) Contracts and Subgrants—An SEA that receives a grant under this program—

(1) Must award contracts or subgrants to LEAs, institutions of higher education, parent training and information centers, or community parent resource centers, as appropriate, to carry out the State Personnel Development Plan; and

(2) May award contracts and subgrants to other public and private entities, including the lead agency under Part C of IDEA, to carry out the State plan.

(d) Use of Funds for Professional Development—An SEA that receives a grant under this program must use—

(1) Not less than 90 percent of the funds the SEA receives under the grant for any fiscal year for the Professional Development Activities described in paragraph (a); and

(2) Not more than 10 percent of the funds the SEA receives under the grant for any fiscal year for the Other Activities described in paragraph (b).

Definitions.

These definitions are from the notice of final priorities and definitions for this program, published in the **Federal Register** on August 2, 2012 (77 FR 45944). We may apply these definitions in any year in which this program is in effect.

Evidence-based refers to practices for which there is strong evidence or moderate evidence of effectiveness.

Fidelity means the delivery of instruction in the way in which it was designed to be delivered.

High-need LEA means, in accordance with section 2102(3) of the ESEA, an LEA—

(a) That serves not fewer than 10,000 children from families with incomes below the poverty line (as that term is defined in section 9101(33) of the ESEA), or for which not less than 20 percent of the children served by the LEA are from families with incomes below the poverty line; and

(b) For which there is (1) a high percentage of teachers not teaching in the academic subjects or grade levels that the teachers were trained to teach, or (2) a high percentage of teachers with emergency, provisional, or temporary certification or licensing.

Program Authority: 20 U.S.C. 1451–1455.

Applicable Regulations: This application notice (also referred to as a notice inviting applications (NIA)) is being published before the Department adopts the Uniform Administrative Requirements, Cost Principles, and Audit Requirements in 2 CFR part 200. We expect to publish interim final regulations that would adopt those requirements before December 26, 2014, and make those regulations effective on that date. Because grants awarded under this NIA will likely be made after the Department adopts the requirements in 2 CFR part 200, we list as applicable regulations both those that are currently effective and those that will be effective at the time the Department makes grants.

The current regulations follow: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 86, 97, 98, and 99. (b) The OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485.

At the time we award grants under this NIA, the following regulations will apply: (a) EDGAR in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99. (b) The OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485, and the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended in 2 CFR part 3474.

Regardless of the timing of publication, the following also applies to this NIA: The notice of final priorities and definitions for this program, published in the **Federal Register** on August 2, 2012 (77 FR 45944).

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: The Administration has requested $41,630,000 for the SPDG Program for FY 2015, of which we intend to use an estimated $9,474,808 for this competition. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2016 from the list of unfunded applicants from this competition.

Estimated Range of Awards: $500,000—$1,750,000 (for the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico). In the case of outlying areas (United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands), awards will be not less than $80,000.

Note: We will set the amount of each award after considering—

(1) The amount of funds available for making the grants;

(2) The relative population of the State or outlying area;

(3) The types of activities proposed by the State or outlying area;

(4) The alignment of proposed activities with section 612(a)(14) of IDEA;

(5) The alignment of proposed activities with State plans and applications submitted under sections 1111 and 2112, respectively, of the ESEA; and

(6) The use, as appropriate, of scientifically based research and instruction.

Estimated Average Size of Awards: $900,000, excluding the outlying areas.

Estimated Number of Awards: 10.

Note: The Department is not bound by any estimates in this notice.

Project Period: Not less than one year and not more than five years.

III. Eligibility Information

1. *Eligible Applicants:* An SEA of one of the 50 States, the District of Columbia, or the Commonwealth of Puerto Rico or an outlying area (United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands).

Note: Public Law 95–134, which permits the consolidation of grants to the outlying areas, does not apply to funds received under this competition.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

3. *Other: General Requirements:* The projects funded under this program must:

(a) Make positive efforts to employ and advance in employment qualified individuals with disabilities (see section 606 of IDEA);

(b) Budget for a three-day Project Directors' meeting in Washington, DC, during each year of the project;

(c) Budget $4,000 annually for support of the State Personnel Development Grants Program Web site currently administered by the University of Oregon (*www.signetwork.org*); and

(d) If a project receiving assistance under this program authority maintains a Web site, include relevant information and documents in a form that meets a government or industry-recognized standard for accessibility.

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet, from the Education Publications Center (ED Pubs), or from the program office.

To obtain a copy via the Internet, use the following address: *www.ed.gov/fund/grant/apply/grantapps/index.html.*

To obtain a copy from ED Pubs, write, fax, or call the following: ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–877–433–7827. FAX: (703) 605–6794. If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *www.EDPubs.gov* or at its email address: *edpubs@inet.ed.gov.*

If you request an application package from ED Pubs, be sure to identify this competition as follows: CFDA Number 84.323A.

To obtain a copy from the program office, contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) by contacting the person or team listed under *Accessible Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit Part III to the equivalent of no more than 100 pages, using the following standards:

- A ''page'' is 8.5″ × 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, reference citations, and captions, as well as all text in charts, tables, figures, graphs, and screen shots.
- Use a font that is either 12 point or larger.
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The page limit and double-spacing requirement do not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the abstract, (follow the guidance provided in the application package for completing the abstract), the table of contents, the list of priority requirements, the resumes, the reference list, the letters of support, or the appendices. However, the page limit and double-spacing requirement do apply to all of Part III, the application narrative, including all text in charts, tables, figures, graphs, and screen shots.

We will reject your application if you exceed the page limit, or if you apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:*

Applications Available: December 15, 2014.

Deadline for Transmittal of Applications: January 29, 2015.

Applications for grants under this competition must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an

accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: March 30, 2015.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and System for Award Management:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the System for Award Management (SAM) (formerly the Central Contractor Registry (CCR)), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one to two business days.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow two to five weeks for your TIN to become active.

The SAM registration process can take approximately seven business days, but may take upwards of several weeks, depending on the completeness and accuracy of the data entered into the SAM database by an entity. Thus, if you think you might want to apply for Federal financial assistance under a program administered by the Department, please allow sufficient time to obtain and register your DUNS number and TIN. We strongly recommend that you register early.

Note: Once your SAM registration is active, you will need to allow 24 to 48 hours for the information to be available in Grants.gov and before you can submit an application through Grants.gov.

If you are currently registered with SAM, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your registration annually. This may take three or more business days.

Information about SAM is available at *www.SAM.gov.* To further assist you with obtaining and registering your DUNS number and TIN in SAM or updating your existing SAM account, we have prepared a SAM.gov Tip Sheet, which you can find at: *http://www2.ed.gov/fund/grant/apply/sam-faqs.html.*

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined at the following Grants.gov Web page: *www.grants.gov/web/grants/register.html.*

7. *Other Submission Requirements:* Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the State Personnel Development Grants Program competition, CFDA number 84.323A, must be submitted electronically using the Governmentwide Grants.gov Apply site at *www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the State Personnel Development Grants Program competition at *www.Grants.gov.* You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.,* search for 84.323, not 84.323A).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *www.G5.gov.*
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- You must upload any narrative sections and all other attachments to your application as files in a PDF (Portable Document) read-only, non-modifiable format. Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only,

non-modifiable PDF or submit a password-protected file, we will not review that material. Additional, detailed information on how to attach files is in the application instructions.

- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by email. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the Grants.gov system;

and

- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Jennifer Coffey, U.S. Department of Education, 400 Maryland Avenue SW., room 4097, Potomac Center Plaza (PCP), Washington, DC 20202–2600. FAX: (202) 245–7617.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier), your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.323A), LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.323A), 550 12th Street, SW., Room 7039, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 and are listed in the application package.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous

award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Additional Review and Selection Process Factors:*

In the past, the Department has had difficulty finding peer reviewers for certain competitions because so many individuals who are eligible to serve as peer reviewers have conflicts of interest. The standing panel requirements under section 682(b) of IDEA also have placed additional constraints on the availability of reviewers. Therefore, the Department has determined that for some discretionary grant competitions, applications may be separated into two or more groups and ranked and selected for funding within specific groups. This procedure will make it easier for the Department to find peer reviewers by ensuring that greater numbers of individuals who are eligible to serve as reviewers for any particular group of applicants will not have conflicts of interest. It also will increase the quality, independence, and fairness of the review process, while permitting panel members to review applications under discretionary grant competitions for which they also have submitted applications. However, if the Department decides to select an equal number of applications in each group for funding, this may result in different cut-off points for fundable applications in each group.

4. *Special Conditions:* Under current 34 CFR 74.14 and 80.12 and, when grants are made under this NIA, 2 CFR 3474.10, the Secretary may impose special conditions and, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable or, when grants are awarded, the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* The goal of the SPDG Program is to reform and improve State systems for personnel preparation and professional development in early intervention, educational, and transition services in order to improve results for children with disabilities. Under the Government Performance and Results Act of 1993 (GPRA), the Department has established a set of performance measures, including long-term measures, that are designed to yield information on various aspects of the effectiveness and quality of the SPDG Program. These measures assess the extent to which:

- Projects use evidence-based professional development practices to support the attainment of identified competencies.
- Participants in SPDG professional development demonstrate improvement in implementation of SPDG-supported practices over time.
- Projects use SPDG professional development funds to provide activities designed to sustain the use of SPDG-supported practices.
- Highly qualified special education teachers, as defined in section 602(10) of IDEA that have participated in SPDG supported special education teacher retention activities remain as special education teachers two years after their initial participation in these activities.

Each grantee funded under this competition must collect and annually report data related to its performance on these measures in the project's annual and final performance report to the Department in accordance with section 653(d) of IDEA and 34 CFR 75.590. Applicants should discuss in the application narrative how they propose to collect performance data for these measures.

5. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, the performance targets in the grantee's approved application. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Jennifer Coffey, U.S. Department of Education, 400 Maryland Avenue SW., room 4097, PCP, Washington, DC 20202–2600. Telephone: (202) 245–6673.

If you use a TDD or a TTY, call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) by

contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue SW., room 5037, PCP, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a TDD or a TTY, call the FRS, toll free, at 1–800–877–8339.

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

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

Dated: December 10, 2014.

Michael K. Yudin,

Acting Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2014–29358 Filed 12–12–14; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1945–004; ER10–1944–003; ER10–2051–004; ER10–1942–011; ER10–2042–016; ER14–2931–001; ER10–1941–006; ER11–3840–004; ER10–2043–004; ER10–2029–006; ER10–2041–004; ER10–2040–004; ER10–2039–004; ER10–1938–011; ER10–2036–005; ER13–1407–003; ER10–1934–010; ER10–1893–010; ER10–1889–003; ER10–1888–006; ER10–1885–006; ER10–1884–006; ER10–1883–006; ER10–1878–006; ER10–1877–003; ER10–1895–003; ER10–1876–006; ER10–1875–006; ER10–1874–002; ER10–1873–006; ER10–1871–004; ER10–1870–003; ER12–1987–004; ER13–1406–002; ER10–1947–006; ER12–2645–001; ER10–1863–003; ER10–1862–010; ER10–1933–002; ER12–2261–004; ER10–1865–006; ER10–1858–003; ER13–1401–002; ER10–2044–004

Applicants: Auburndale Peaker Energy Center, LLC, Bethpage Energy Center 3, LLC, Calpine Bethlehem, LLC, Calpine Construction Finance Co., L.P., Calpine Energy Services, L.P., Calpine Fore River Energy Center, LLC, Calpine Gilroy Cogen, L.P., Calpine Greenleaf, Inc., Calpine Mid-Atlantic Generation, LLC, Calpine Mid-Atlantic Marketing, LLC, Calpine Mid Merit, LLC, Calpine New Jersey Generation, LLC, Calpine Newark, LLC, Calpine Power America—CA, LLC, Calpine Vineland Solar, LLC, CCFC Sutter Energy, LLC, CES Marketing IX, LLC, CES Marketing X, LLC, CPN Bethpage 3rd Turbine, Inc., Creed Energy Center, LLC, Geysers Power Company LLC, Gilroy Energy Center, LLC, Goose Haven Energy Center, LLC, Hermiston Power, LLC, KIAC Partners, Los Esteros Critical Energy Facility LLC, Los Medanos Energy Center, LLC, Mankato Energy Center, LLC, Metcalf Energy Center, LLC, Morgan Energy Center, LLC, Nissequogue Cogen Partners, O.L.S. Energy-Agnews, Inc., Osprey Energy Center, LLC, Otay Mesa Energy Center, LLC, Pastoria Energy Facility L.L.C., Pine Bluff Energy, LLC, Power Contract Financing, L.L.C., RockGen Energy LLC, Russell City Energy Company, LLC, South Point Energy Center, LLC, TBG Cogen Partners, Westbrook Energy Center, LLC, Zion Energy LLC, Delta Energy Center, LLC.

Description: Notification of Change in Status of the Calpine Southeast MBR Sellers.

Filed Date: 12/5/14.

Accession Number: 20141205–5349.

Comments Due: 5 p.m. ET 12/26/14.

Docket Numbers: ER15–599–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) rate filing per 35.13(a)(2)(iii): 2562R2 Kansas Municipal Energy Agency NITSA and NOA to be effective 8/1/2014.

Filed Date: 12/8/14.

Accession Number: 20141208–5139.

Comments Due: 5 p.m. ET 12/29/14.

Docket Numbers: ER15–600–000.

Applicants: ISO New England Inc., New England Power Pool Participants Committee.

Description: § 205(d) rate filing per 35.13(a)(2)(iii): Information Policy Clean-up Changes to be effective 2/9/2015.

Filed Date: 12/8/14.

Accession Number: 20141208–5226.

Comments Due: 5 p.m. ET 12/29/14.

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: December 8, 2014.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2014–29210 Filed 12–12–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC15–43–000.

Applicants: Niagara Generation, LLC.

Description: Amendment to December 1, 2014 Application of Niagara Generation, LLC and NiGen, LLC for Expedited Approval of Intra-Corporate Transfer Under Section 203 of the Federal Power Act.

Filed Date: 12/4/14.

Accession Number: 20141204–5223.

Comments Due: 5 p.m. ET 12/22/14.

Docket Numbers: EC15–45–000.

Applicants: New York Transco, LLC, Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., New York State Electric & Gas Corporation, Rochester Gas & Electric Corporation, Central Hudson Gas & Electric Corporation, Niagara Mohawk Power Corporation.

Description: Application for Approval under Section 203 of the Federal Power Act and Request for Confidential Treatment and Waivers of New York Transco, LLC, et. al.

Filed Date: 12/4/14.

Accession Number: 20141204–5225.

Comments Due: 5 p.m. ET 12/26/14.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG15–21–000.

Applicants: Sierra Solar Greenworks, LLC.

Description: Notice of Self-Certification of EWG Status of Sierra Solar Greenworks, LLC.
Filed Date: 12/4/14.
Accession Number: 20141204–5036.
Comments Due: 5 p.m. ET 12/26/14.

Docket Numbers: EG15–22–000.
Applicants: Rising Tree Wind Farm III LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Rising Tree Wind Farm III LLC.
Filed Date: 12/5/14.
Accession Number: 20141205–5088.
Comments Due: 5 p.m. ET 12/26/14.

Docket Numbers: EG15–23–000.
Applicants: NiGen, LLC.
Description: Self-Certification of EWG of NiGen, LLC.
Filed Date: 12/5/14.
Accession Number: 20141205–5203.
Comments Due: 5 p.m. ET 12/26/14.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2507–004.
Applicants: Westar Energy, Inc.
Description: Notice of Non-Material Change in Status of Westar Energy, Inc.
Filed Date: 12/4/14.
Accession Number: 20141204–5228.
Comments Due: 5 p.m. ET 12/26/14.

Docket Numbers: ER14–1173–003.
Applicants: Duke Energy Carolinas, LLC.
Description: Tariff Amendment per 35.17(b): Amendment to NCEMC SA 210 NITSA Filing to be effective 1/1/2014.
Filed Date: 12/5/14.
Accession Number: 20141205–5191.
Comments Due: 5 p.m. ET 12/26/14.

Docket Numbers: ER14–2372–002.
Applicants: California Independent System Operator Corporation.
Description: Compliance filing per 35: 2014–12–05_OMS_Waiver to be effective N/A.
Filed Date: 12/5/14.
Accession Number: 20141205–5300.
Comments Due: 5 p.m. ET 12/26/14.

Docket Numbers: ER15–582–000.
Applicants: PacifiCorp.
Description: Tariff Withdrawal per 35.15: Termination of BPA Agmt for Work at Hat Rock Mod 2 to be effective 2/15/2015.
Filed Date: 12/4/14.
Accession Number: 20141204–5186.
Comments Due: 5 p.m. ET 12/26/14.

Docket Numbers: ER15–583–000.
Applicants: Pacific Gas and Electric Company.
Description: § 205(d) rate filing per 35.13(a)(2)(iii): Amendment to BART NITSA (Oakland Connector) Filing to be effective 12/5/2014.
Filed Date: 12/4/14.
Accession Number: 20141204–5206.
Comments Due: 5 p.m. ET 12/26/14.

Docket Numbers: ER15–584–000.
Applicants: ISO New England Inc.
Description: Compliance filing per 35: Filing in Response to Order EL11–66–001—CTMEEC Sch. 21 to be effective 11/17/2014.
Filed Date: 12/5/14.
Accession Number: 20141205–5084.
Comments Due: 5 p.m. ET 12/26/14.

Docket Numbers: ER15–585–000.
Applicants: Mesquite Solar 1, LLC.
Description: § 205(d) rate filing per 35.13(a)(2)(iii): Mesquite Solar 1, LLC Inter-Company Shared Facilities Agreement to be effective 12/10/2014.
Filed Date: 12/5/14.
Accession Number: 20141205–5125.
Comments Due: 5 p.m. ET 12/26/14.

Docket Numbers: ER15–586–000.
Applicants: Mesquite Solar 1, LLC.
Description: § 205(d) rate filing per 35.13(a)(2)(iii): Mesquite Solar 1, LLC Inter-Phase Shared Facilities Agreement to be effective 12/10/2014.
Filed Date: 12/5/14.
Accession Number: 20141205–5127.
Comments Due: 5 p.m. ET 12/26/14.

Docket Numbers: ER15–587–000.
Applicants: SEP II, LLC.
Description: § 205(d) rate filing per 35.13(a)(2)(iii): SEP II, LLC Concurrence to Inter-Company Shared Facilities Agreement to be effective 12/10/2014.
Filed Date: 12/5/14.
Accession Number: 20141205–5137.
Comments Due: 5 p.m. ET 12/26/14.

Docket Numbers: ER15–588–000.
Applicants: SEP II, LLC.
Description: § 205(d) rate filing per 35.13(a)(2)(iii): SEP II, LLC Concurrence to Inter-Phase Shared Facilities Agreement to be effective 12/10/2014.
Filed Date: 12/5/14.
Accession Number: 20141205–5157.
Comments Due: 5 p.m. ET 12/26/14.

Docket Numbers: ER15–589–000.
Applicants: Central Maine Power Company.
Description: § 205(d) rate filing per 35.13(a)(2)(iii): Atlantic Wind LLC Engineering & Procurement Agreement to be effective 12/4/2014.
Filed Date: 12/5/14.
Accession Number: 20141205–5159.
Comments Due: 5 p.m. ET 12/26/14.

Docket Numbers: ER15–590–000.
Applicants: ITC Great Plains, LLC.
Description: Tariff Withdrawal per 35.15: Termination of Lease Agreement to be effective 12/31/2014.
Filed Date: 12/5/14.
Accession Number: 20141205–5183.
Comments Due: 5 p.m. ET 12/26/14.

Docket Numbers: ER15–591–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) rate filing per 35.13(a)(2)(iii): Revisions to OA Sec 18.17 Confidentiality Provisions—Real-time Generator Data to be effective 2/5/2015.
Filed Date: 12/5/14.
Accession Number: 20141205–5188.
Comments Due: 5 p.m. ET 12/26/14.

Docket Numbers: ER15–592–000.
Applicants: Duke Energy Indiana, Inc.
Description: Request for Waiver of MISO Tariff Resource Adequacy Requirements of Duke Energy Indiana, Inc.
Filed Date: 12/5/14.
Accession Number: 20141205–5222.
Comments Due: 5 p.m. ET 12/26/14.

Docket Numbers: ER15–593–000.
Applicants: ISO New England Inc., New England Power Pool Participants Committee.
Description: § 205(d) rate filing per 35.13(a)(2)(iii): Rev. to Minimum Cap. Req. in the FAP to be effective 2/5/2015.
Filed Date: 12/5/14.
Accession Number: 20141205–5238.
Comments Due: 5 p.m. ET 12/26/14.

Docket Numbers: ER15–594–000.
Applicants: Central Maine Power Company.
Description: § 205(d) rate filing per 35.13(a)(2)(iii): Executed Interconnection Agreement with ecomaine to be effective 1/1/2015.
Filed Date: 12/5/14.
Accession Number: 20141205–5259.
Comments Due: 5 p.m. ET 12/26/14.

Docket Numbers: ER15–595–000.
Applicants: Covanta Fairfax, Inc.
Description: § 205(d) rate filing per 35.13(a)(2)(iii): Application for Market-Based Rate Authorization to be effective 2/3/2015.
Filed Date: 12/5/14.
Accession Number: 20141205–5270.
Comments Due: 5 p.m. ET 12/26/14.

Docket Numbers: ER15–596–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) rate filing per 35.13(a)(2)(iii): Revisions to OATT Schedule 12-Appendix A re: recent update to RTEP to be effective 3/5/2015.
Filed Date: 12/5/14.
Accession Number: 20141205–5288.
Comments Due: 5 p.m. ET 12/26/14.

Docket Numbers: ER15–597–000.
Applicants: Hess Corporation.
Description: Tariff Withdrawal per 35.15: Cancellation of Hess Corporations FERC Electric Rate Schedule No 1 to be effective 12/6/2014.
Filed Date: 12/5/14.
Accession Number: 20141205–5310.
Comments Due: 5 p.m. ET 12/26/14.

Docket Numbers: ER15–598–000.

Applicants: Southern California Edison Company.

Description: § 205(d) rate filing per 35.13(a)(2)(iii): GIA and Distribution Service Agmt with Cameron Ridge, LLC to be effective 11/25/2014.

Filed Date: 12/8/14.

Accession Number: 20141208–5005.

Comments Due: 5 p.m. ET 12/29/14.

Take notice that the Commission received the following public utility holding company filings:

Docket Numbers: PH15–2–001.

Applicants: Consolidated Edison, Inc.

Description: Consolidated Edison, Inc. submits FERC 65–B Material Change in Facts of Waiver Notification.

Filed Date: 12/4/14.

Accession Number: 20141204–5230.

Comments Due: 5 p.m. ET 12/26/14.

Take notice that the Commission received the following PURPA 210(m)(3) filings:

Docket Numbers: QM14–3–000.

Applicants: Entergy Arkansas, Inc., Entergy Gulf States Louisiana, L.L.C., Entergy Louisiana, LLC, Entergy Mississippi, Inc., Entergy New Orleans, Inc., Entergy Services, Inc., Entergy Texas, Inc.

Description: Response to Deficiency Letter of Entergy Services, Inc., et. al. under QM14–3.

Filed Date: 12/5/14.

Accession Number: 20141205–5322.

Comments Due: 5 p.m. ET 1/2/15.

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: December 8, 2014.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2014–29209 Filed 12–12–14; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–SFUND–2012–0578; FRL–9917–74–OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Technical Assistance Needs Assessments (TANAs) at Superfund Remedial or Removal Sites (NEW)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), ''Technical Assistance Needs Assessments (TANAs) at Superfund Remedial or Removal Sites (NEW)'' (EPA ICR No. 2470.01, OMB Control No. 2050–NEW) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This is a request for approval of a new collection. Public comments were previously requested via the **Federal Register** (77 FR 74002) on December 12, 2012 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 January 14, 2015.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–SFUND–2012–0578, to (1) EPA online using *www.regulations.gov* (our preferred method), by email to *superfund.docket@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: Laura Knudsen, Assessment and Remediation Division, Office of Superfund Remediation and Technology Innovation, Mail Code 5204P, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: 703–603–8861 fax number: 703–603–9102 email address: *knudsen.laura@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: This ICR covers the usage of TANAs with members of the impacted community in order to determine how the community is receiving technical information about a Superfund remedial or removal site; whether the community needs additional assistance in order to understand and respond to site-related technical information; and whether there are organizations in the community that are interested or involved in site-related issues and capable of acting as an appropriate conduit for technical assistance services to the affected community. The TANA will help ensure the community's needs for technical assistance are defined as early in the remedial/removal process as possible and enable meaningful community involvement in the Superfund decision-making process. Additionally, the TANA process produces a blueprint for designing a coordinated effort to meet the community's needs for additional technical assistance while minimizing the overlap of services provided.

Form Numbers: None.

Respondents/affected entities: Individuals.

Respondent's obligation to respond: Voluntary.

Estimated number of respondents: 250 (total).

Frequency of response: Once.

Total estimated burden: 250 hours (per year). Burden is defined at 5 CFR 1320.03(b).

T*otal estimated cost:* $4,900 (per year), includes $0 annualized capital or operation & maintenance costs.

Changes in the Estimates: Not applicable. This is a new information collection.

Courtney Kerwin,

Acting Director, Collection Strategies Division.

[FR Doc. 2014–29261 Filed 12–12–14; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9919–98–ORD]

Announcement of the IRIS Bimonthly Public Science Meeting Calendar for 2015

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of IRIS Bimonthly Public Science Meetings for calendar year 2015.

SUMMARY: EPA's Integrated Risk Information System (IRIS) Program is committed to proactive stakeholder engagement, transparency, and using the best available science in IRIS assessments. In accordance with the increased stakeholder engagement enhancements adopted by the IRIS Program, EPA is announcing a series of public science meetings for calendar year 2015 to obtain public input at specific stages in the process of developing an IRIS assessment.

DATES: The 2015 IRIS Bimonthly Public Science Meetings will be held on the dates specified below. They will generally begin at 9:00 a.m. and end at 5:00 p.m., Eastern Time, or earlier, if comments and discussions have been completed. A two day time period has been reserved for each meeting, but the actual duration will be specified when the agendas are developed for each meeting throughout the year. All future announcements and information about the meetings planned for 2015, and the availability of EPA meeting materials for the chemicals undergoing assessment by the IRIS Program, will be posted on the IRIS Web site (*http://www.epa.gov/iris/publicmeeting/*). In the event there are no materials to be discussed for any of the set meeting dates, a notice canceling the meeting will be posted on the IRIS Web site.

IRIS Bimonthly Public Science Meetings Dates

February 25–26, 2015
April 29–30, 2015
June 17–18, 2015
September 2–3, 2015
October 28–29, 2015
December 16–17, 2015

ADDRESSES: The public meetings announced in this notice will be held at the EPA conference center at One Potomac Yard (South Building), 2777 South Crystal Drive, Arlington, Virginia, 22202. To gain entrance to this EPA building, attendees must register at the security desk in the lobby and present photo identification. In accordance with the Real ID Act, which went into effect on July 2014, driver's license from Alaska, American Samoa, Arizona, Louisiana, Maine, Massachusetts, Minnesota, New York, Oklahoma, and Washington will not be accepted as a photo ID. Detailed information on photo ID requirements are provided on the IRIS public meeting Web site. To promote the broadest possible participation, a webinar and teleconference line will also be available for registered attendees/discussants.

EPA will make every effort to accommodate persons with disabilities. For information on access or services for individuals with disabilities, contact Christine Ross, IRIS Staff, Environmental Protection Agency, National Center for Environmental Assessment, Mail Code: 8601P; telephone: 703–347–8592; facsimile: 703–347–8689; or email: *ross.christine@epa.gov* and include your name and contact information.

FOR FURTHER INFORMATION CONTACT: For general information about IRIS public meetings, please contact Christine Ross, IRIS Staff, Environmental Protection Agency, National Center for Environmental Assessment (NCEA), Mail Code: 8601P; telephone: 703–347–8592; facsimile: 703–347–8689; or email: *ross.christine@epa.gov*. For information regarding the subject matter of a specific meeting, please contact the EPA representative identified on the IRIS public meeting Web site that will be established for each meeting (*http://www.epa.gov/iris/publicmeeting/*).

SUPPLEMENTARY INFORMATION:

I. Information About IRIS

EPA's IRIS Program is a human health assessment program that evaluates quantitative and qualitative risk information on effects that may result from exposure to chemical substances found in the environment. Through the IRIS Program, EPA provides the highest quality science-based human health assessments to support EPA's regulatory activities and decisions to protect public health. The IRIS database contains information for chemical substances that can be used to support the first two steps (hazard identification and dose-response evaluation) of the human health risk assessment process. When supported by available data, IRIS provides health effects information and toxicity values for health effects (including cancer and effects other than cancer). Government and others combine IRIS toxicity values with exposure information to characterize public health risks of chemical substances; this information is then used to support risk management decisions designed to protect public health.

II. IRIS Public Science Meetings Conducted in 2013 and 2014

The IRIS Program began conducting Bimonthly Public Science Meetings in December 2013 and continued through 2014. During this period, a total of five public science meetings were held. These meetings covered 12 chemicals undergoing assessment, including 2 assessments undergoing problem formulation, 8 assessments in the step 1 literature search and evidence table phase, and 2 assessments in the step 4 draft assessment phase as indicated in the following table.

Date	Step	Chemical
December 12–13, 2013	Step 1 Literature Search and Evidence Table	▪ ethyl *tert*-butyl ether (ETBE).
	Step 4 Public Comment Draft	▪ Tert-butyl alcohol (*tert*-butanol).
		▪ hexahydro-1,3,5-trinitro-1,3,5-triazine (RDX).
	▪ ethylene oxide (EtO).	
	▪ benzo[a]pyrene (BaP).	
April 23–24, 2014	Step 1 Literature Search and Evidence Table	▪ hexabromocyclododecane (HBCD).
		▪ diethyl phthalate (DEP).
June 25–27, 2014	Step 1 Literature Search and Evidence Table	▪ inorganic arsenic (iAs).
		▪ hexavalent chromium (Cr(VI)).

Date	Step	Chemical
September 3, 2014	Step 0 Problem Formulation	▪ ethylbenzene. ▪ naphthalene.
October 29–30, 2014	Step 1 Literature Search and Evidence Table	▪ hexavalent chromium (Cr(VI)). ▪ diisononyl phthalate (DINP).

Meeting materials for each of these meetings are available on the IRIS Web site (*http://www.epa.gov/iris/publicmeeting/*). A chemical specific docket has also been established (*http://www.regulations.gov*) where public comments and presentations are available for each of the chemicals discussed at an IRIS public science meeting. In addition, a general IRIS docket (EPA–HQ–ORD–2014–0211) is available at Regulations.gov for comments on cross-cutting issues broadly applicable to IRIS assessments. The IRIS public meeting Web site and chemical specific dockets are intended to provide transparency regarding stakeholder input on IRIS assessments. Posting of public comments and presentations are not an EPA endorsement of, or agreement with, any information or viewpoints presented in the public comments and presentations, nor is it an EPA endorsement of the quality or correctness of such information and viewpoints. In addition, mention of any trade names or commercial products in posted meeting material does not constitute a recommendation by EPA for use.

III. IRIS Public Science Meetings Scheduled for 2015

Public meetings will be held approximately every 2 months beginning on February 25–26, 2015. Materials for the public meetings will begin to be posted on the IRIS Web site (*http://www.epa.gov/iris/publicmeeting/*) in advance of the meeting (generally 2–3 months). The meetings will provide an opportunity for the public to provide input on problem formulation and preliminary materials prior to development of the draft assessment and provide input on drafts of assessments and charges to the peer review panels prior to external peer review. The planned meeting dates for calendar year 2015 are: February 25–26, 2015; April 29–30, 2015; June 17–18, 2015; September 2–3, 2015; October 28–29, 2015; and December 16–17, 2015.

Before an IRIS assessment begins, EPA releases scoping and problem formulation materials which frame the scientific questions and key issues that will be addressed in the assessment. In step 1 of the IRIS process (development of the draft assessment), EPA releases preliminary materials comprised of the draft literature search strategies, describing the processes for identifying and screening scientific literature, and the literature search results, and the preliminary evidence tables and preliminary exposure-response arrays summarizing key characteristics and findings from studies that EPA proposes to consider when identifying hazards and characterizing exposure-response relationships. EPA will hold a public meeting to discuss these materials. In step 4 of the IRIS process (public review and comment/independent expert peer review), EPA releases the draft assessment and draft peer review charge for public comment and also holds a public meeting to discuss these materials.

The IRIS Program believes that public involvement can be most beneficial at the early stages of developing an assessment. Releasing problem formulation materials, the draft literature search strategy, preliminary evidence tables, and preliminary exposure response arrays early will ensure that critical research is not omitted and communicates to the public the body of literature chosen for further evaluation, helping frame major scientific questions and ultimately leading to more efficient production of assessments. Meeting materials provided at the early stage of an assessment, such as preliminary evidence tables, have not been subjected to external peer review, and they do not constitute EPA policy, support an EPA decision or position, or represent any EPA determination. Such materials are being distributed with the sole objective of facilitating a public scientific discussion that is intended to promote the use of the best available science and improve the utility and clarity of IRIS assessments.

IV. Meeting Registration

Individuals planning to attend an IRIS Bimonthly Public Science Meeting must register for each Bimonthly meeting. Registrants are required to provide their name, contact information, company/organization, and to identify the organization they are representing if they are attending on behalf of another organization. Registrants must also indicate whether they would like to participate as an opening discussant on one or more of the key science questions identified by EPA. If a registrant intends to request time on the agenda as an opening discussant they should register no later than 30 days before the meeting. All other participants should register no later than 7 days before the meeting. Details regarding registration procedures (in person, via webinar, or teleconference) for each meeting will be posted on the IRIS Web site (*http://www.epa.gov/iris/publicmeeting/*).

V. Meeting Materials and Meeting Format

The assessment materials and the key science questions that will be discussed at each public science meeting will be posted on the IRIS Web site (*http://www.epa.gov/iris/publicmeeting/*) 2 to 3 months before each meeting. The IRIS Program uses a meeting format intended to promote public discussion. This format emphasizes conversational exchanges over presentations, with slides used mainly to present concepts and data via figures and tables. To provide a reasonable opportunity for all stakeholders to participate in a thoughtful public dialogue on the scientific questions, it is important that comments and visual aids opening discussants intend to use during the meeting be made available to the public prior to the meeting. Therefore, opening discussants are requested to submit these materials to the appropriate chemical docket, and the meeting organizer specified on the IRIS Web site, two weeks in advance of the meeting. Materials submitted to the docket will become available to the public shortly after submission.

VI. Independent Scientific Experts

The IRIS Program has benefited from the scientific discussions and information presented during the 2013 and 2014 Bimonthly Public Science Meetings. In May 2014, the *National Research Council (NRC) 2014 Report on the IRIS Process* was released. The NRC report recommended EPA continue with additional efforts to ensure the full breadth of perspectives are made available to EPA when discussing the IRIS process and specific IRIS assessments. To broaden the input the IRIS Program receives at the Bimonthly Public Science Meetings, EPA has asked the National Research Council to identify additional scientific experts to

participate in the Bimonthly Public Science Meeting discussions. All stakeholders and the public will continue to have the same opportunity to participate as discussants by registering for the meetings under the established procedures. Experts identified by the National Research Council, reviewed for conflict of interest and bias, will participate as discussants in their own capacity to contribute intellectual leadership to discussions on critical scientific questions. The final determination of who serves as an expert participant is made independently by the National Research Council.

VII. How to Submit Materials to the Docket at http://www.regulations.gov

EPA invites the public to submit comments and other relevant information regarding the chemicals discussed at a public science meeting to the appropriate docket number established for each chemical when the agenda for each meeting is released. Such data, information, or comments may be submitted to the appropriate docket by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting materials
- Email: *Docket_ORD@epa.gov*
- Facsimile: 202–566–9744
- Mail: U.S. Environmental Protection Agency, EPA Docket Center [ORD Docket], (Mail Code: 28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460. The telephone number is 202–566–1752. If you provide materials by mail, please submit one unbound original with pages numbered consecutively, and three copies of the materials. For attachments, provide an index, number pages consecutively with the comments, and submit an unbound original and three copies.
- Hand Delivery: The ORD Docket is located in the EPA Headquarters Docket Center, EPA West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is 202–566–1744. Deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. If you provide comments by hand delivery, please submit one unbound original with pages numbered consecutively, and three copies of the comments. For attachments, provide an index, number pages consecutively with the comments, and submit an unbound original and three copies.

It is EPA's policy to include all materials it receives in the public docket without change and to make the materials available online at *http://www.regulations.gov,* including any personal information provided, unless materials include information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. Posting of materials received in the public docket is not an EPA endorsement of, or agreement with, any information or viewpoints presented in the materials, nor is it an EPA endorsement of the quality or correctness of such information and viewpoints. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means that EPA will not know your identity or contact information unless you provide it in the body of your materials. If you send email comments directly to EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the materials that are placed in the public docket and made available on the Internet. If you submit electronic materials, EPA recommends that you include your name and other contact information in the body of your materials and with any disk or CD–ROM you submit. If EPA cannot read your materials due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your materials. Electronic files should avoid the use of special characters and any form of encryption and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at *http://www.regulations.gov* or in hard copy at the ORD Docket in the EPA Headquarters Docket Center.

Dated: December 5, 2014.

Gina Perovich,

Acting Deputy Director, National Center for Environmental Assessment.

[FR Doc. 2014–29191 Filed 12–12–14; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9920–43–OARM]

Senior Executive Service Performance Review Board; Membership

AGENCY: U.S. Environmental Protection Agency.

ACTION: Notice.

SUMMARY: Notice is hereby given of the membership of the U.S. Environmental Protection Agency Performance Review Board for 2014.

FOR FURTHER INFORMATION CONTACT: Karen D. Higginbotham, Director, Executive Resources Division, 3606A, Office of Human Resources, Office of Administration and Resources Management, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460, (202) 564–7287.

SUPPLEMENTARY INFORMATION: Section 4314(c)(1) through (5) of Title 5, U.S.C., requires each agency to establish in accordance with regulations prescribed by the Office of Personnel Management, one or more SES performance review boards. This board shall review and evaluate the initial appraisal of a senior executive's performance by the supervisor, along with any recommendations to the appointment authority relative to the performance of the senior executive.

Members of the 2014 EPA Performance Review Board are:

Richard Albright, Director, Office of Environmental Cleanup, Region 10

Amy Battaglia, Director, Office of Program Accountability and Resources Management, Office of Research and Development

Denise Benjamin-Sirmons, Director, Office of Diversity, Advisory Committee Management and Outreach, Office of Administration and Resources Managment

Jerry Blancato, Director, Office of Science Information Management, Office of Research and Development

David Bloom, Acting Chief Financial Officer, Office of the Chief Financial Officer

Jeanne Brisken, Research Program Manager, Office of Research and Development

Rebecca Clark, Deputy Director, Office of Ground Water and Drinking Water, Office of Water
Barbara A. Cunningham, Deputy Director, Office of Pollution Prevention and Toxics (Management)
Rafael DeLeon, Deputy Director, Office of Site Remediation Enforcement, Office of Enforcement and Compliance Assurance
David Dix, Director, Office of Science Coordination and Policy, Office of Chemical Safety and Pollution Prevention
Alfred P. Dufour, Senior Research Microbiologist, Office of Research and Development
Sarah Dunham, Director, Office of Atmospheric Programs, Office of Air and Radiation
William Early, Deputy Regional Administrator, Region 3
Carl Edlund, Director, Superfund Division, Region 6
Alan Farmer, Director, Resource Conservation and Recovery Act Division, Region 4
John Filippelli, Director, Clean Air and Sustainability Division, Region 2
Karen Flournoy, Director, Water, Wetlands and Pesticides Division, Region 7
Michael Flynn, Director, Office of Radiation and Indoor Air, Office of Air and Radiation
Joyce Frank, Principal Deputy Associate Administrator for Congressional and Intergovernmental Relations, Office of the Administrator
James Giattina, Director, Water Management Division, Region 4
Nanci E. Gelb, Acting Assistant Administrator, Office of Administration and Resources Managment
Velveta Golightly-Howell, Director, Office of Civil Rights, Office of the Administrator
Mark Hague, Acting Deputy Chief Financial Officer, Office of the Chief Financial Officer
Karen D. Higginbotham (Ex-Officio), Director, Executive Resources Division, Office of Human Resources, Office of Administration and Resources Management
W. Barnes Johnson, Director, Office of Resource Conservation and Recovery, Office of Solid Waste and Emergency Response
Richard Karl, Director, Superfund Division, Region 5
Susan Kantrowitz (Ex-Officio), Director, Office of Human Resources, Office of Administration and Resources Management
Michael Kenyon, Assistant Regional Administrator for Administration and Resources Management, Region 1
Jeff Lape, Deputy Director, Office of Science and Technology, Office of Water
David Lloyd, Director, Office of Brownfields and Land Revitalization, Office of Solid Waste and Emergency Response and Compliance Assurance
Robert McKinney, Senior Agency Information Security Officer, Office of Environmental Information
Kevin Minoli, Principal Deputy General Counsel, Office of General Counsel
Rebecca Moser, Deputy Director, Office of Information Collection, Office of Environment Information
Cheryl Newton, Assistant Regional Administrator for Resources Management, Region 5
Jane Nishida, Principal Deputy Assistant Administrator, Office of International and Tribal Affairs
Aracely Nunez-Mattocks, Chief of Staff, Office of the Inspect Office of Inspector General
Michelle Pirzadeh, Deputy Administrator, Region 10
Carol Ann Siciliano, Associate General Counsel, Cross-Cutting Issues, Office of General Counsel
John Reeder, Deputy Chief of Staff, Office of the Administrator
Allyn Stern, Regional Counsel, Region 10, Office of Enforcement and Compliance Assurance
Alexis Strauss-Hacker, Deputy Regional Administrator, Region 9
Kevin Teichman, Senior Science Advisor, Office of Research and Development
Ramona Trovato, Associate Assistant Administrator for Research and Development, Office of Research and Development
Donna Vizian, Acting Principal Deputy Assistant Administrator, Office of Administration and Resources Management
Jeffery Wells, Deputy Director, Office of Information Analysis and Access, Office of Environmental Information
Christopher Zarba, Director, Science Advisory Board Staff Office, Office of the Administrator

Dated: December 3, 2014.

Donna Vizian,

Acting Assistant Administrator, Administration and Resources Management.

[FR Doc. 2014–29422 Filed 12–12–14; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0806]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before February 13, 2015. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *Nicole.Ongele@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele at (202) 418–2991.

SUPPLEMENTARY INFORMATION: *OMB Control Number:* 3060–0806.

Title: Universal Service—Schools and Libraries Universal Service Program, FCC Forms 470 and 471.

Form Numbers: FCC Forms 470 and 471.

Type of Review: Extension of a currently approved collection.

Respondents: Not-for-profit institutions, and state, local or tribal government public institutions.

Number of Respondents and Responses: 82,000 respondents, 82,000 responses.

Estimated Time per Response: 3 hours to fill out FCC Form 470 and 4 hours to fill out the FCC Form 471 plus 0.5 hours for each form for the ten-year recordkeeping requirement.

Frequency of Response: On occasion, annual reporting, and recordkeeping requirements.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C.s 151—154, 201—205, 218—220, 254, 303(r), 403, and 405.

Total Annual Burden: 334,000 hours.

Total Annual Cost: No cost.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no assurance of confidentiality provided to respondents concerning this information collection. If the Commission requests applicants to submit information that the respondents believe is confidential, respondents may request confidential treatment of their information under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: FCC Forms 470 and 471 collect the information the Commission and the Universal Service Administrative Company (USAC) need to administer the schools and libraries universal service mechanism (informally known as the E-rate program), determine if entities are eligible for funding pursuant to the schools and libraries support mechanism, determine the amount of support entities seeking funding are eligible to receive, determine if entities are complying with the Commission's rules, and prevent waste, fraud, and abuse. The forms collect specific information to establish that economically disadvantaged schools and rural schools receive a greater share of E-rate program funding based on the percentage of students eligible in that school district for the national school lunch program (NSLP) (or other acceptable indicators of economic disadvantage determined by the Commission). The student poverty level needed to determine discounts for libraries are based on the NSLP information for the school district nearby. In the *E-rate Modernization Order,* among other things, the Commission took steps to streamline the application process, provide exemptions from competitive bidding, implement a ''district-wide'' discount calculation mechanism, establish budgets for internal broadband connectivity, and extend the document retention period to ten years. FCC Forms 470 and 471 execute these changes for the E-rate application process and enable the Commission to collect data to facilitate measurement of progress towards the adopted performance goals established in the *E-rate Modernization Order.*

In addition, this collection is necessary to allow the Commission to evaluate the extent to which the E-rate program is meeting the statutory objectives specified in section 254(h) of the 1996 Act.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of the Managing Director.

[FR Doc. 2014–29267 Filed 12–12–14; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0687]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before February 13, 2015. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0687.

Title: Access to Telecommunications Equipment and Services by Persons with Disabilities, CC Docket No. 87–124.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Businesses or other for-profit entities.

Number of Respondents and Responses: 1,268 respondents; 22,500,000 responses.

Estimated Time per Response: 1 second (0.000278 hours) to 15 seconds (0.004167 hours).

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in section 710 of the Communications Act of 1934, as amended, 47 U.S.C. 610, and Pub. L. 100–394, the ''Hearing Aid Compatibility Act of 1988,'' 102 Stat. 976, Aug. 16, 1988.

Total Annual Burden: 6,693 hours.

Total Annual Cost: $266,280.

Nature and Extent of Confidentiality: An assurance of confidentiality is not offered because this information collection does not require the collection of personally identifiable information from individuals.

Privacy Impact Assessment: No impact(s).

Needs and Uses: 47 CFR 68.224—Notice of non-hearing aid compatibility. Every non-hearing aid compatible

telephone offered for sale to the public on or after August 17, 1989, whether previously-registered, newly registered or refurbished shall (a) contain in a conspicuous location on the surface of its packaging a statement that the telephone is not hearing aid compatible, or if offered for sale without a surrounding package, shall be affixed with a written statement that the telephone is not hearing aid compatible; and (b) be accompanied by instructions in accordance with 47 CFR 62.218(b)(2).

(a) 47 CFR 68.300—Labeling requirements. As of April 1, 1997, all registered telephones, including cordless telephones, manufactured in the United States (other than for export) or imported for use in the United States, that are hearing aid compatible shall have the letters ''HAC'' permanently affixed. The information collections for both rules contain third party disclosure and labeling requirements. The information is used primarily to inform consumers who purchase and/or use telephone equipment whether the telephone is hearing aid compatible.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of the Managing Director.

[FR Doc. 2014–29266 Filed 12–12–14; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0584]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communication Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number.

No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before February 13, 2015. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *Nicole.Ongele@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele at (202) 418–2991.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0584.

Title: Administration of U.S. Certified Accounting Authorities in Maritime Mobile and Maritime Mobile-Satellite Radio Services, FCC Forms 44 and 45.

Form Nos. FCC Forms 44 and 45.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit organizations.

Number of Respondents and Responses: 19 respondents; 59 responses.

Estimated Time per Response: 1–3 hours.

Frequency of Response: Recordkeeping; on occasion, semi-annual, and annual reporting requirements; and third-party disclosure requirements.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection (IC) is contained in 47 U.S.C. 154(i) and 303(r).

Total Annual Burden: 79 hours.

Total Annual Cost: $285,000.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality. However, respondents may request materials or information submitted to the Commission be withheld from public inspection pursuant to 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission has standards for accounting authorities in the maritime mobile and maritime-satellite radio services under 47 CFR part 3.

The Commission uses these standards to determine the eligibility of applicants for certification as a U.S. accounting authority, to ensure compliance with the maritime mobile and maritime-satellite radio services, and to identify accounting authorities to the International Telecommunications Union (ITU). Respondents are entities seeking certification or those already certified to be accounting authorities.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of the Managing Director.

[FR Doc. 2014–29265 Filed 12–12–14; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[WC Docket No. 05–25 and RM–10593; DA 14–1706]

Special Access Data Collection; Filing Deadline Extended

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Wireline Competition Bureau (Bureau) released an order extending the deadline for responding to the data collection in the Commission's special access proceeding. The extension provides more time for respondents to navigate the procedures for successfully loading the database container which is necessary for respondents to provide much of the numerical-type data sought, *e.g.,* facilities and billing information. In this Order, the Bureau also grants FairPoint's Communications Inc.'s request for limited waiver to the extent consistent with the Order.

DATES: The deadline for responding to the collection for large businesses with more than 1,500 employees is January 29, 2015 and for small businesses with 1,500 or fewer employees is February 27, 2015. The deadline for covered entities required to certify they are not a *Provider, Purchaser,* or entity providing *Best Efforts Business Broadband Internet Access Service* is December 15, 2014.

ADDRESSES: Federal Communications Commission, 445 12th Street SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Christopher Koves, Pricing Policy Division, Wireline Competition Bureau, 202–418–8209 or *Christopher.Koves@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order, WC Docket No. 05–25, RM–10593, DA 14–1706, released November 26, 2014. This document does not contain information collections(s) subject to the Paperwork Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified ''information collection burden[s] for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002. The full text of this document may be downloaded at the following Internet address: *https://apps.fcc.gov/edocs_public/attachmatch/DA-14-1706A1.docx*. The complete text may be purchased from Best Copy and Printing, Inc., 445 12th Street SW., Room CY–B402, Washington, DC 20554. To request alternative formats for persons with disabilities (*e.g.* accessible format documents, sign language, interpreters, CARTS, etc.), send an email to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 or (202) 418–0432 (TTY).

I. Background

On November 26, 2014, the Commission's Wireline Competition Bureau (Bureau) released an order extending the deadline for responding to the mandatory, one-time data collection in the Commission's special access proceeding. The Bureau extended the deadline for responding because of delays in the release of a database container to the public, which is necessary for filers to respond to the collection. Accordingly, for larger businesses with more than 1,500 employees required to provide data and information, the deadline is extended 45 days to January 29, 2015. Other respondents with 1,500 or fewer employees are considered small for purposes of the collection and must file their responses by February 27, 2015. For those entities not providing data and information in response to the collection but that are otherwise required to certify that they are not a covered *Provider, Purchaser* or an entity that provides *Best Efforts Business Broadband Internet Access Services,* the filing deadline remains December 15, 2014 regardless of the entity's size.

The Commission will use the data obtained from the collection for an analysis of the special access market as it considers reforming the pricing rules applicable to incumbent local exchange carriers that are subject to price cap regulation. For more information about the collection and the underlying rulemaking proceeding, see the Commission's Web site, *http://www.fcc.gov/encyclopedia/special-access-data-collection-overview-0*.

Pamela Arluk,

Acting Chief, Pricing Policy Division, Federal Communications Commission.

[FR Doc. 2014–29298 Filed 12–12–14; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

AGENCY: Board of Governors of the Federal Reserve System

SUMMARY: Notice is hereby given of the final approval of proposed information collections by the Board of Governors of the Federal Reserve System (Board) under OMB delegated authority, as per 5 CFR 1320.16 (OMB Regulations on Controlling Paperwork Burdens on the Public). Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the Paperwork Reduction Act Submission, supporting statements and approved collection of information instrument(s) are placed into OMB's public docket files. The Federal Reserve may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Acting Clearance Officer—John Schmidt—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551 202–452–3829. Telecommunications Device for the Deaf (TDD) users may contact 202–263–4869, Board of Governors of the Federal Reserve System, Washington, DC 20551.

OMB Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW., Washington, DC 20503.

Final approval under OMB delegated authority the extension for three years, with revision, of the following reports:

1. *Report title:* The Government Securities Dealers Reports: Weekly Report of Dealer Positions (FR 2004A), Weekly Report of Cumulative Dealer Transactions (FR 2004B), Weekly Report of Dealer Financing and Fails (FR 2004C), Weekly Report of Specific Issues (FR 2004SI), Daily Report of Specific Issues (FR 2004SD), Supplement to the Daily Report of Specific Issues (FR 2004SD ad hoc), and Daily Report of Dealer Activity in Treasury Financing (FR 2004WI), Settlement Cycle Report of Dealer Fails and Transaction Volumes Class A (FR 2004FA), Settlement Cycle Report of Dealer Fails and Transaction Volumes Class B (FR 2004FB), Settlement Cycle Report of Dealer Fails and Transaction Volumes Class C (FR 2004FC), Settlement Cycle Report of Dealer Fails and Transaction Volumes Class A, B, and C (FR 2004FM).

Agency form number: FR 2004.

OMB control number: 7100–0003.

Effective Date: January 7, 2015.

Frequency: Weekly, daily, monthly.

Reporters: Dealers in the U.S. government securities market.

Estimated annual reporting hours: FR 2004A, 3,432 hours; FR 2004B, 4,233 hours; FR 2004C, 3,546 hours; FR 2004SI, 2,517 hours; FR 2004SD, 1,210 hours; FR 2004SD ad hoc, 528 hours; FR 2004WI, 3,520 hours; FR 2004FA, 264 hours; FR 2004FB, 264 hours; FR 2004FC, 264 hours; FR 2004FM, 396 hours.

Estimated average hours per response: FR 2004A, 3.0 hours; FR 2004B, 3.7 hours; FR 2004C, 3.1 hours; FR 2004SI, 2.2 hours; FR 2004SD, 2.2 hours; FR 2004SD ad hoc, 2.0 hours; FR 2004WI, 1.0 hour; FR 2004FA, 1.0 hour; FR 2004FB, 1.0 hour; FR 2004FC, 1.0 hour; FR 2004FM, 1.5 hours.

Number of respondents: 22.

General description of report: This information collection is authorized by sections 2A, 12A(c), 14, and 15 of the Federal Reserve Act (12 U.S.C. 225a, 263c, 353–359, and 391) and is required to obtain or retain the benefit of dealer status. Individual respondent data are regarded as confidential under the Freedom of Information Act (5 U.S.C. 552(b)(4) and (b)(8)).

Abstract: The FR 2004A collects weekly data on dealers' outright positions in Treasury and other marketable debt securities. The FR 2004B collects cumulative weekly data on the volume of transactions made by dealers in the same instruments for which positions are reported on the FR 2004A. The FR 2004C collects weekly

data on the amounts of dealer financing and fails. The FR 2004SI collects weekly data on position, transaction, financing, and fails for the most recently issued on-the-run Treasury securities (the most recently issued Treasury securities for each maturity class). When unusual trading practices occur for a specific security, this information can be collected on a daily basis on the FR 2004SD for either on-the-run Treasury securities or off-the-run Treasury securities. The FR 2004SD ad hoc collects up to 10 ad hoc data items for instances when critical information for additional Treasury market surveillance is required. The FR 2004WI collects daily data on positions in to-be-issued Treasury coupon securities, mainly the trading on a when-issued delivery basis.

Current Actions: On September 24, 2014, the Federal Reserve published a notice in the **Federal Register** (79 FR 57101) requesting public comment for 60 days on the extension, with revision, of the Government Securities Dealers Reports (FR 2004). The comment period for this notice expired on November 24, 2014. The Federal Reserve did not receive any comments. The revisions will be implemented as proposed.

2. *Report title:* Weekly Report of Selected Assets and Liabilities of Domestically Chartered Commercial Banks and U.S. Branches and Agencies of Foreign Banks.

Agency form number: FR 2644.

OMB control number: 7100–0075.

Effective Date: January 7, 2015.

Frequency: Weekly.

Reporters: Domestically chartered commercial banks and U.S. branches and agencies of foreign banks.

Estimated annual reporting hours: 127,400 hours.

Estimated average hours per response: 2.80 hours.

Number of respondents: 875.

General description of report: The FR 2644 is authorized by section 2A and 11(a)(2) of the Federal Reserve Act (12 U.S.C. 225(a) and 248(a)(2)) and by section 7(c)(2) of the International Banking Act (12 U.S.C. 3105(c)(2)) and is voluntary. Individual respondent data are regarded as confidential under the Freedom of Information Act (5 U.S.C. 552(b)(4)).

Abstract: The FR 2644 is the only source of high-frequency data used in the analysis of current banking developments. The FR 2644 collects sample data that are used to estimate universe levels using data from the quarterly commercial bank Consolidated Reports of Condition and Income (FFIEC 031 and 041; OMB No. 7100–0036) and the Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks (FFIEC 002; OMB No. 7100–0032) (Call Reports). Data from the FR 2644, together with data from other sources, are used to construct weekly estimates of bank credit, balance sheet data for the U.S. banking industry, sources and uses of banks' funds, and to analyze banking and monetary developments.

Current Actions: On September 24, 2014, the Federal Reserve published a notice in the **Federal Register** (79 FR 57101) requesting public comment for 60 days on the extension, with revision, of the Weekly Report of Selected Assets and Liabilities of Domestically Chartered Commercial Banks and U.S. Branches and Agencies of Foreign Banks (FR 2644). The comment period for this notice expired on November 24, 2014. The Federal Reserve received a comment letter from a bank regarding the proposed revision to the FR 2644. The commenter expressed the opinion that the effective date of the revision (January 7, 2015) may not be the optimal time to change the report because this would be the beginning of the financial reporting season for banks. The commenter noted that the proposed revisions to the report would require additional work by the respondents for implementation and, because bank staff would be involved in producing year-end reports, the accuracy of the reported data may be compromised. The commenter suggested that the effective date of the revised report should be reconsidered. The Federal Reserve recognizes that respondents have additional reporting responsibilities at the end-of-quarter and end-of-year periods. In the event that respondents anticipate difficulty implementing the changes by the effective date, the Federal Reserve would accept estimated data until actual data becomes available. In addition, Reserve Bank staff would be available to assist respondents with the reporting requirements. After careful consideration of the comment letter and with the estimated reporting option discussed above, the revisions will be implemented as proposed.

Final approval under OMB delegated authority the extension for three years, without revision, of the following reports:

1. *Report title:* Quarterly Savings and Loan Holding Company Report.

Agency form number: FR 2320.

OMB control number: 7100–0345.

Frequency: Quarterly.

Reporters: Top and lower-tier savings and loan holding companies (SLHCs).

Estimated annual reporting hours: 180 hours.

Estimated average hours per response: 2.5 hours.

Number of respondents: 18.

General description of report: This information collection is mandatory pursuant to section 10 of the Home Owners' Loan Act (HOLA), (12 U.S.C. 1467a(b)(2)) as amended by Pub. L. 111–201, § 369(8). Data items C572, C573, and C574 on Schedule H may be protected from disclosure under exemption 4 of the Freedom of Information Act (FOIA) (5 U.S.C. 552(b)(4)). With regard to the remaining data items on Schedule HC, the Federal Reserve has determined that institutions may request confidential treatment for any FR 2320 data item or for all FR 2320 data items, and confidential treatment will be reviewed on a case-by-case basis.

Abstract: The FR 2320 collects select parent only and consolidated balance sheet and income statement financial data and organizational structure data from savings and loan holding companies (SLHCs) exempt from initially filing Federal Reserve regulatory reports. The FR 2320 is used by the Federal Reserve to analyze the overall financial condition of exempt SLHCs to ensure safe and sound operations. These data assist the Federal Reserve in the evaluation of a diversified holding company and in determining whether an institution is in compliance with applicable laws and regulations.

Current Actions: On September 24, 2014, the Federal Reserve published a notice in the **Federal Register** (79 FR 57101) requesting public comment for 60 days on the extension, without revision, for this information collection. The comment period for this notice expired on November 24, 2014. The Federal Reserve did not receive any comments. The information collection will be extended as proposed.

2. *Report title:* Notifications Related to Community Development and Public Welfare Investments of State Member Banks.

Agency form number: FR H–6.

OMB control number: 7100–0278.

Frequency: Event-generated.

Reporters: State member banks.

Estimated annual reporting hours: 182.

Estimated average hours per response: Post Notification, 2 hours; Application (Prior Approval) 5 hours; and Extension of divestiture period, 5 hours.

Number of respondents: Post Notification, 16; Application (Prior Approval), 29; and Extension of divestiture period, 1.

General description of report: This information collection is authorized by the Federal Reserve Act, 12 U.S.C. 338a, and by the Board's Regulation H, 12 CFR 208.22. The obligation of state member banks to make public welfare

investments under both the Reserve Bank post-notice and the Board's prior approval procedure is mandatory. The request for extension of the divestiture period is required to obtain a benefit. Individual respondent data generally are not regarded as confidential. However, a bank that submits confidential proprietary information may request confidential treatment of that information pursuant to section (b)(4) of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(4), and the information will be accorded confidential treatment if the institution can establish the potential for substantial competitive harm under the standards set forth in *National Park & Conservation Ass'n* v. *Morton,* 498 F.2d 765 (DC Cir. 1974). Such a determination would be made on a case-by-case in response to a specific request for disclosure. If examination rations are included in a submission, those will be considered confidential under exemption 8 of the FOIA, 5 U.S.C. 552(b)(8).

Abstract: Regulation H requires state member banks planning to make community development or public welfare investments to comply with the Regulation H notification requirements: (1) If the investment does not require prior Board approval, a written notice must be sent to the appropriate Federal Reserve Bank; (2) if certain criteria are not met, and requires prior Board approval, a request for approval must be sent to the appropriate Federal Reserve Bank; and, (3) if the Board orders divestiture, but the bank cannot divest within the established time limit, a request or requests for extension of the divestiture period must be submitted to the appropriate Federal Reserve Bank.

Current Actions: On September 24, 2014, the Federal Reserve published a notice in the **Federal Register** (79 FR 57101) requesting public comment for 60 days on the extension, without revision, for this information collection. The comment period for this notice expired on November 24, 2014. The Federal Reserve did not receive any comments. The information collection will be extended as proposed.

3. *Report title:* International Applications and Prior Notifications under Subparts A and C of Regulation K.

Agency form number: FR K–1.

OMB control number: 7100–0107.

Frequency: Event-generated.

Reporters: State member banks, national banks, bank holding companies, Edge and agreement corporations, and certain foreign banking organizations.

Annual reporting hours: 1,013 hours.

Estimated average hours per response: Attachments A and B, 11.5 hours; Attachments C through G, 10 hours; Attachments H and I, 15.5 hours; Attachment J, 10 hours; Attachment K, 20 hours.

Number of respondents: 35.

General description of report: This information collection is mandatory (12 U.S.C. 601–604(a), 611–631, 1843(c)(13), 1843(c)(14), and 1844(c)) and is not given confidential treatment. The information submitted in the FR K–1 is considered to be public unless an institution requests confidential treatment for portions of the particular application or notification. Applicants may rely on any Freedom of Information Act (FOIA) exemption, but such requests for confidentiality must contain detailed justifications corresponding to the claimed FOIA exemption. Requests for confidentiality must be evaluated on a case-by-case basis.

Abstract: Subpart A of Regulation K governs the foreign investments and activities of member banks, Edge and agreement corporations, bank holding companies (BHCs), and certain investments by foreign organizations. Subpart C of Regulation K governs investments in export trading companies. The FR K–1 information collection contains eleven attachments for the application and notification requirements embodied in Subparts A and C of Regulation K. The Federal Reserve requires these applications for regulatory and supervisory purposes and to allow the Federal Reserve to fulfill its statutory obligations under the Federal Reserve Act and the Bank Holding Company Act of 1956. The applications are event-generated and provide the Federal Reserve with information necessary to evaluate each of the proposed transactions.

Current Actions: On September 24, 2014, the Federal Reserve published a notice in the **Federal Register** (79 FR 57101) requesting public comment for 60 days on the extension, without revision, for this information collection. The comment period for this notice expired on November 24, 2014. The Federal Reserve did not receive any comments. The information collection will be extended as proposed.

4. *Report title:* International Applications and Prior Notifications Under Subpart B of Regulation K.

Agency form number: FR K–2.

OMB control number: 7100–0284.

Frequency: On occasion.

Reporters: Foreign banks.

Annual reporting hours: 490 hours.

Estimated average hours per response: 35 hours.

Number of respondents: 14.

General description of report: This information collection is mandatory (12 U.S.C. 3105, 3107, and 3108). The applying or notifying organization may request that portions of the information contained in the FR K–2 be afforded confidential treatment. To do so, applicants must demonstrate how the information for which confidentiality is requested would fall within the scope of one or more of the exemptions contained in the Freedom of Information Act. Any such request would have to be evaluated on a case-by-case basis.

Abstract: Foreign banks are required to obtain the prior approval of the Federal Reserve to establish a branch, agency, or representative office; to acquire ownership or control of a commercial lending company in the United States; or to change the status of any existing office in the United States. The Federal Reserve uses the information, in part, to fulfill its statutory obligation to supervise foreign banking organizations with offices in the United States.

Current Actions: On September 24, 2014, the Federal Reserve published a notice in the **Federal Register** (79 FR 57101) requesting public comment for 60 days on the extension, without revision, for this information collection. The comment period for this notice expired on November 24, 2014. The Federal Reserve did not receive any comments. The information collection will be extended as proposed.

5. *Report title:* Application for Prior Approval to Become a Bank Holding Company, or for a Bank Holding Company to Acquire an Additional Bank or Bank Holding Company; Notice for Prior Approval to Become a Bank Holding Company, or for a Bank Holding Company to Acquire an Additional Bank or Bank Holding Company; and Notification for Prior Approval to Engage Directly or Indirectly in Certain Nonbanking Activities.

Agency form numbers: FR Y–3, FR Y–3N, and FR Y–4.

OMB control number: 7100–0121.

Frequency: Event-generated.

Reporters: Corporations seeking to become bank holding companies (BHCs), or BHCs and state chartered banks that are members of the Federal Reserve System.

Annual reporting hours: 11,924 hours.

Estimated average hours per response: FR Y–3, Section 3(a)(1): 49 hours; FR Y–3, Section 3(a)(3) and 3(a)(5): 59.5 hours; FR Y–3N, Sections 3(a)(1), 3(a)(3), and 3(a)(5): 5 hours; FR Y–4, complete notification: 12 hours; FR Y–4,

expedited notification: 5 hours; and FR Y–4, post-consummation: 0.5 hours.

Number of respondents: 279.

General description of reports: The FR Y–3 application and FR Y–3N notification are mandatory (12 U.S.C. 1842(a), 1844(b), and 1843(j)(1)(b)). The FR Y–4 notification is mandatory (12 U.S.C. 1843(j)(1)(b)). These information collections are not given confidential treatment. Applicants may rely on any Freedom of Information Act (FOIA) exemption, but such requests for confidentiality must contain detailed justifications corresponding to the claimed FOIA exemption. Requests for confidentiality must be evaluated on a case-by-case basis.

Abstract: The Federal Reserve requires the submission of these filings for regulatory and supervisory purposes and to allow the Federal Reserve to fulfill its statutory obligations under the Bank Holding Company Act of 1956 (the BHC Act). These filings collect information on proposals by BHCs involving formations, acquisitions, mergers, and nonbanking activities. The Federal Reserve must obtain this information to evaluate each individual transaction with respect to financial and managerial factors, permissibility, competitive effects, net public benefits, and the impact on the convenience and needs of affected communities.

Current Actions: On September 24, 2014, the Federal Reserve published a notice in the **Federal Register** (79 FR 57101) requesting public comment for 60 days on the extension, without revision, for these information collections. The comment period for this notice expired on November 24, 2014. The Federal Reserve did not receive any comments. The information collection will be extended as proposed.

6. *Report title:* Application for a Foreign Organization to Acquire a Bank Holding Company.

Agency form number: FR Y–3F.

OMB control number: 7100–0119.

Frequency: On occasion.

Reporters: Any company organized under the laws of a foreign country seeking to acquire a U.S. subsidiary bank or bank holding company.

Annual reporting hours: 440 hours.

Estimated average hours per response: Initial application, 90 hours; subsequent application, 70 hours.

Number of respondents: Initial application, 1; subsequent application, 5.

General description of report: This information collection is required to obtain or retain a benefit under sections 3(a), 3(c), and 5(a) through 5(c) of the Bank Holding Company Act (12 U.S.C. 1842(a) and (c) and 1844(a) through (c)). The information provided in the application is not confidential unless the applicant specifically requests confidentiality and the Federal Reserve approves the request. The instructions convey the confidentiality requirements to applicants.

Abstract: Under the Bank Holding Company Act (BHCA), submission of this application is required for any company organized under the laws of a foreign country seeking to acquire a U.S. subsidiary bank or bank holding company. Applicants must provide financial and managerial information, discuss the competitive effects of the proposed transaction, and discuss how the proposed transaction would enhance the convenience and needs of the community to be served. The Federal Reserve uses the information, in part, to fulfill its supervisory responsibilities with respect to foreign banking organizations in the United States.

Current Actions: On September 24, 2014, the Federal Reserve published a notice in the **Federal Register** (79 FR 57101) requesting public comment for 60 days on the extension, without revision, for this information collection. The comment period for this notice expired on November 24, 2014. The Federal Reserve did not receive any comments. The information collection will be extended as proposed.

Board of Governors of the Federal Reserve System, December 9, 2014.

Robert deV. Frierson,

Secretary of the Board.

[FR Doc. 2014–29247 Filed 12–12–14; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 9, 2015.

A. Federal Reserve Bank of New York (Ivan Hurwitz, Vice President) 33 Liberty Street, New York, New York 10045–0001:

1. *Sterling Bancorp,* Montebello, New York; to merge with Hudson Valley Holding Corporation, and thereby indirectly acquire Hudson Valley Bank, N.A., both of Yonkers, New York.

Board of Governors of the Federal Reserve System, December 10, 2014.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2014–29250 Filed 12–12–14; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Research Misconduct

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Office of Research Integrity (ORI) has taken final action in the following case:

H. Rosie Xing, Ph.D., University of Chicago: Based on the report of an investigation conducted by the University of Chicago (UC) and additional analysis by ORI in its oversight review, ORI found that Dr. H. Rosie Xing, former Assistant Professor, UC, engaged in research misconduct in research supported by National Cancer Institute (NCI), National Institutes of Health (NIH), grant R01 CA098022.

ORI found that Respondent engaged in research misconduct (42 CFR 93.103–104) by using images that had been among a set of manipulated images produced while at another institution, which had been found to be false by that institution. ORI found that Respondent falsely reported these images in Figures 1D, 2A, and Supplementary Figures 1B

and 1C in *Molecular Cancer Therapeutics* 9:2724–36, 2010. The Respondent does not agree with ORI's finding of research misconduct and asserts that there are extenuating circumstances for her actions.

Specifically, ORI found that Respondent:

1. included falsely labeled immunoblots in Figures 1D and 2A as follows:

a. Figure 1D (lower panel), representing the total ERK levels in extracts from cells exposed to 15 Gy of gamma radiation for 0–120 minutes, by using results from an unrelated experiment for MAPK levels in extracts from cells exposed to 2, 12, or 20 Gy of gamma irradiation for 1, 5, 20, or 60 minutes

b. Figure 2A (KSR1 panel), representing a control Flag-KSR1 immunoblot for extracts of cells transfected with control (TRE), wild-type KSR (KSR–S), or dominant negative inactive KSR (DN–KSR) exposed to no radiation or 5 minutes gamma irradiation, by using results form an unrelated experiment for KSR-transfected cells (KSR–S) irradiated with 0, 2, 5, 20, 15, 20 Gy irradiation

c. Figure 2A (ERK panel), representing a control ERK immunoblot for extracts of cells transfected with control (TRE), wild-type KSR (KSR–S), or dominant negative inactive KSR (DN–KSR) exposed to no radiation or 5 minutes gamma irradiation, by using results from an unrelated experiment for KSR-transfected cells (KSR–S) irradiated with 0, 2, 5, 10, 15, 20 Gy irradiation

2. included falsified images in Figures 1D, 2A, and Supplementary Figures 1B and 1C by duplicating bands within the figures as follows:

a. Figure 1D (top panel) for an immunoblot for p-ERK in A431 cells, by using the same bands to represent cells treated with ionizing radiation for 5 and 10 minutes with the bands for 60 and 90 minutes

b. Figure 2A (top) for an *in vitro* kinase assay for p-GST-Elk-1, by duplicating lanes 2 and 5 to represent the control plasmid (TRE) at 5 minutes post radiation (lane 2) and the dominant negative inactive KSR (DN–KSR) NT lane (lane 5)

c. Supplementary Figure 1B (middle panel) for an *in vitro* kinase assay for p-GST–MEK, by using the same bands to represent cells exposed to 5 and 20 Gy ionizing radiation

d. Supplementary Figure 1C (top panel) for an immunoblot for p-MEK1/2, by using the same bands to represent cells exposed to 2 and 20 Gy ionizing radiation

Dr. Xing has entered into a Voluntary Settlement Agreement (Agreement) and has voluntarily agreed:

(1) that if within three (3) years from the effective date of the Agreement, Respondent receives or applies for U.S. Public Health Service (PHS) support, Respondent agrees to have her PHS-supported research supervised for a period of three (3) years beginning on the date of her employment in which she receives or applies for PHS support, and to notify her employer(s)/institution(s) of the terms of this supervision; Respondent agrees that prior to the submission of an application for PHS support for a research project on which the Respondent's participation is proposed and prior to Respondent's participation in any capacity on PHS-supported research, Respondent shall ensure that a plan for supervision of her duties is submitted to ORI for approval; the supervision plan must be designed to ensure the scientific integrity of Respondent's research; Respondent agrees that she shall not participate in any PHS-supported research until such a supervision plan is submitted to and approved by ORI; Respondent agrees to maintain responsibility for compliance with the agreed upon supervision plan;

(2) that if within three (3) years from the effective date of this Agreement, Respondent receives or applies for PHS support, for a period of three (3) years beginning on the date of her employment in which she receives or applies for PHS support, any institution employing her to work on PHS-supported projects shall submit, in conjunction with each application for PHS funds, or report, manuscript, or abstract involving PHS-supported research in which Respondent is involved, a certification to ORI that the data provided by Respondent are based on actual experiments or are otherwise legitimately derived and that the data, procedures, and methodology are accurately reported in the application, report, manuscript, or abstract; and

(3) to exclude herself voluntarily from serving in any advisory capacity to PHS including, but not limited to, service on any PHS advisory committee, board, and/or peer review committee, or as a consultant for a period of three (3) years beginning on November 13, 2014.

FOR FURTHER INFORMATION CONTACT: Acting Director, Office of Research Integrity, 1101 Wootton Parkway, Suite 750, Rockville, MD 20852, (240) 453–8200.

Donald Wright,

Acting Director, Office of Research Integrity.

[FR Doc. 2014–29295 Filed 12–12–14; 8:45 am]

BILLING CODE 4150–31–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Research Misconduct

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Office of Research Integrity (ORI) has taken final action in the following case:

James P. Warne, Ph.D., University of California San Francisco: Based on an assessment conducted by the University of California San Francisco (UCSF), the Respondent's admission, and additional analysis conducted by ORI in its oversight review, ORI found that Dr. James P. Warne, former Senior Scientist, Diabetes Center, UCSF School of Medicine, engaged in research misconduct in research supported by National Institute of Diabetes and Digestive and Kidney Diseases (NIDDK), National Institutes of Health (NIH), grants DK080427, DK007161, and DK063720.

ORI found that Respondent engaged in research misconduct by falsifying data that were included in the following two (2) publications and two (2) grant applications:

- *Cell Metabolism* 14:791–803, 2011 (hereafter referred to as the ''*Cell Metabolism* paper'')
- *Journal of Neuroscience* 33(29):11972–85, 2013 (hereafter referred to as the ''*Journal of Neuroscience* paper'')
- R01 DK080427–06A1 submitted to NIDDK, NIH
- R01 AA022665–01A1 submitted to the National Institute on Alcohol Abuse and Alcoholism (NIAAA), NIH

ORI found that Respondent falsified data and related text by altering the experimental data to support the experimental hypothesis. Specifically:

1. Respondent fabricated graphs purported to represent the results of ten (10) different ELISA experiments measuring norephinephrin (NE) or leptin levels in wild-type mice, in AGRP knockout mice, or in AGRP RNAi mice and controls that had received brain infusions of alpha-MPT, a tyrosine hydroxylase inhibitor or vehicle and leptin or AGRP in the following figures:

- Figures 2D/E, 3G, and 7C in the *Cell Metabolism* paper
- Figures 6B/C/E, Figure 8C, and Figure 9H in the *Journal of Neuroscience* paper; Figures 6B/C/E of the *Journal of Neuroscience* paper also were included as Figures 5A/C/B in grant application DK080427–06A1, and Figure 8C of the *Journal of Neuroscience* paper also was included as Figure 8C in grant application DK080427–06A1
- Figure 10B in grant application DK080427–06A1

2. Respondent fabricated graphs purported to represent the results of six (6) different quantitative polymerase chain reaction (Q–PCR) experiments measuring mRNA levels in mouse liver from wild-type or AGRP RNAi mice and controls that had received brain infusions of alpha-MPT, a tyrosine hydroxylase inhibitor or vehicle and leptin, AGRP knockout mice injected with ethanol, or wild-type mice injected with ethanol and caffeine in the following figures:

- Figure 2F in the *Cell Metabolism* paper
- Figures 5A, 6F, and 9A in the *Journal of Neuroscience* paper; Figure 5A of the *Journal of Neuroscience* paper also was included as Figure 4A in grant application DK080427–06A1, and Figure 6F of the *Journal of Neuroscience* paper also was included as Figure 7A in grant application DK080427–06A1
- Figure 3B in grant application AA022665–06A1

Dr. Warne has entered into a Voluntary Settlement Agreement (Agreement) and has voluntarily agreed:

(1) to have his research supervised for a period of three (3) years, beginning on November 18, 2014; Respondent agrees that prior to the submission of an application for U.S. Public Health Service (PHS) support for a research project on which the Respondent's participation is proposed and prior to Respondent's participation in any capacity on PHS-supported research, Respondent shall ensure that a plan for supervision of his duties is submitted to ORI for approval; the supervision plan must be designed to ensure the scientific integrity of Respondent's research contribution; Respondent agrees that he shall not participate in any PHS-supported research until such a supervision plan is submitted to and approved by ORI; Respondent agrees to maintain responsibility for compliance with the agreed upon supervision plan;

(2) that for a period of three (3) years, beginning on November 18, 2014, any institution employing him shall submit, in conjunction with each application for PHS funds, or report, manuscript, or abstract involving PHS-supported research in which Respondent is involved, a certification to ORI that the data provided by Respondent are based on actual experiments or are otherwise legitimately derived and that the data, procedures, and methodology are accurately reported in the application, report, manuscript, or abstract;

(3) to exclude himself voluntarily from serving in any advisory capacity to PHS including, but not limited to, service on any PHS advisory committee, board, and/or peer review committee, or as a consultant for a period of three (3) years, beginning on November 18, 2014; and

(4) that as a condition of the Agreement, the senior authors will request retraction or correction of the following papers:

- *Cell Metabolism* 14:791–803, 2011
- *Journal of Neuroscience* 33(29):11972–85, 2013

FOR FURTHER INFORMATION CONTACT: Acting Director, Office of Research Integrity, 1101 Wootton Parkway, Suite 750, Rockville, MD 20852, (240) 453–8200.

Donald Wright,

Acting Director, Office of Research Integrity.

[FR Doc. 2014–29337 Filed 12–12–14; 8:45 am]

BILLING CODE 4150–31–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

[Docket No. ATSDR–2014–0001]

Availability of Draft Toxicological Profiles

AGENCY: Agency for Toxic Substances and Disease Registry (ATSDR), Department of Health and Human Services (DHHS).

ACTION: Notice of availability, and request for comments.

SUMMARY: This notice announces the availability of Set 26 Toxicological Profiles for review and comment. Comments can include additional information or reports on studies about the health effects of Set 26 substances. Although ATSDR considered key studies for each of these substances during the profile development process, this **Federal Register** notice solicits any relevant, additional studies, particularly unpublished data. ATSDR will evaluate the quality and relevance of such data or studies for possible inclusion into the profile. ATSDR remains committed to providing a public comment period for this document as a means to best serve public health and our clients. The Set 26 Toxicological Profiles are available online at *http://www.atsdr.cdc.gov/toxprofiles/index.asp* and *http://www.regulations.gov/#!home,* docket ATSDR–2014–0001.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), § 104(i)(3),[42 U.S.C. 9604(i)(3)], directs the ATSDR administrator to prepare Toxicological Profiles of priority hazardous substances and, as necessary, to revise and publish each updated toxicological profile.

DATES: To be considered, comments on the draft Toxicological Profiles must be received not later than March 16, 2015. Comments received after close of the public comment period will be considered solely at the discretion of ATSDR, based upon what is deemed to be in the best interest of the general public.

ADDRESSES: You may submit comments, identified by docket number ATSDR–2014–0001, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov/#!home.* Follow the instructions for submitting comments.
- *Mail:* Division of Toxicology and Human Health Sciences, 1600 Clifton Rd., NE., MS F57, Atlanta, Ga., 30333.

Instructions: All submissions received must include the agency name and docket number for this notice. All relevant comments will be posted without change. Because all public comments regarding ATSDR Toxicological Profiles are available for public inspection, no confidential business information or other confidential information should be submitted in response to this notice.

FOR FURTHER INFORMATION CONTACT: Ms. Delores Grant, Division of Toxicology and Human Health Sciences, 1600 Clifton Rd., NE., MS F–57, Atlanta, Ga., 30333. Phone: 770–488–3351.

SUPPLEMENTARY INFORMATION: The Comprehensive Environmental Response, Compensation, and Liability Act, as amended (CERCLA or Superfund) (42 U.S.C. 9601 *et seq.*) establishes certain responsibilities for ATSDR and the U.S. Environmental Protection Agency (U.S. EPA) with regard to hazardous substances most commonly found at facilities on the CERCLA National Priorities List (NPL). As part of these responsibilities, the

ATSDR administrator must prepare Toxicological Profiles for substances enumerated on the priority list of hazardous substances. This list identifies 275 hazardous substances which, according to ATSDR and U.S. EPA, pose the most significant potential threat to human health. The availability of the revised priority list of 275 hazardous substances was announced in the **Federal Register** on November 03, 2011 (76 FR 68193). In addition, ATSDR has the authority to prepare Toxicological Profiles for substances not found at sites on the National Priorities List, in an effort to ''. . . establish and maintain inventory of literature, research, and studies on the health effects of toxic substances'' under CERCLA Section 104(i)(1)(B). ATSDR also prepares Toxicological Profiles in response to requests for consultation under section 104(i)(4), and as otherwise necessary to support the site-specific response actions conducted by ATSDR.

Each profile will include an examination, a summary, and an interpretation of available toxicological information and epidemiological evaluations. This information and these data identify the levels of significant human exposure for the substance and for the associated health effects. The profiles must also include a determination of whether adequate information on the health effects of each substance is available (or in the process of development) in order to identify levels of significant human exposure. If adequate information is not available, ATSDR, in cooperation with the National Toxicology Program (NTP), is required to ensure the initiation of a program of research to provide such information.

Set 26 Toxicological Profiles:

Name	CAS
1 Trichloro-ethylene(UPDATE)	79–01–6
2 Tetrachloroethylene (UP-DATE)	127–18–4
3 Hydrogen Sulfide/Car-bonyl Sulfide (UPDATE) ...	7783–06–4 463–58–1
4 Parathion (NEW)	56–38–2

Sascha Chaney,

Acting Director, Office of Policy, Planning and Evaluation, National Center for Environmental Health/Agency for Toxic, Substances and Disease Registry.

[FR Doc. 2014–29258 Filed 12–12–14; 8:45 am]

BILLING CODE 4163–70–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–15–0020]

Proposed Data Collections Submitted for Public Comment and Recommendations

The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, 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. To request more information on the below proposed project or to obtain a copy of the information collection plan and instruments, call 404–639–7570 or send comments to Leroy A. Richardson, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov*.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget (OMB) approval. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (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 the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to, or for, a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information. Written comments should be received within 60 days of this notice.

Proposed Project—Coal Workers' Health Surveillance Program (CWHSP)(OMB Control No. 0920–0020, Expiration Date 2/28/2015)—Revision—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

NIOSH would like to submit an Information Collection Request (ICR) to revise the data collection instruments being utilized within the Coal Workers' Health Surveillance Program (CWHSP). On May 1, 2014, the Mine Safety and Health Administration (MSHA) published final rule 30 CFR parts 70, 71, 72, 75, and 90. The new MSHA rule added surface coal miners, a respiratory health assessment, and spirometry testing for chronic obstructive pulmonary disease (COPD) to the previously mandated chest x-ray examination program. These additions are being referred to as the Expanded CWHSP (an additional component under the current CWHSP).

This request incorporates all components that now fall under the CWHSP. Those components include: Coal Workers' X-ray Surveillance Program (CWXSP), B Reader Program, Enhanced Coal Workers' Health Surveillance Program (ECWHSP), Expanded Coal Workers' Health Surveillance Program, and National Coal Workers' Autopsy Study (NCWAS). The CWHSP is a congressionally-mandated medical examination program for monitoring the health of coal miners and was originally established under the Federal Coal Mine Health and Safety Act of 1969 with all subsequent amendments (the Act). The Act provides the regulatory authority for the administration of the CWHSP. This Program, which operates in accordance with 42 CFR part 37, is useful in providing information for protecting the health of miners (whose participation is entirely voluntary), and also in documenting trends and patterns in the prevalence of coal workers' pneumoconiosis ('black lung' disease) among miners employed in U.S. coal mines. The total estimated annualized burden hours of 13,471 is based on the following collection instruments:

- Coal Mine Operator Plan (2.10) and Coal Contractor Plan (2.18)—Under 42 CFR part 37, every coal operator and coal contractor in the U.S. must submit a plan approximately every 4 years, providing information on how they plan to notify their miners of the opportunity

to obtain the medical examination. Completion of this form with all requested information (including a roster of current employees) takes approximately 30 minutes.

• Radiographic Facility Certification Document (2.11)—X-ray facilities seeking NIOSH approval to provide miner radiographs under the CWHSP must complete an approval packet including this form which requires approximately 30 minutes for completion.

• Miner Identification Document (2.9)—Miners who elect to participate in the CWHSP must fill out this document which requires approximately 20 minutes. This document records demographic and occupational history, as well as information required under the regulations in relation to the examinations.

• Chest Radiograph Classification Form (2.8)—NIOSH utilizes a radiographic classification system developed by the International Labour Office (ILO) in the determination of pneumoconiosis among coal miners. Physicians (B Readers) fill out this form regarding their interpretations of the radiographs (each image has two separate interpretations, and approximately 7% of the images require additional interpretations). Based on prior practice it takes the physician approximately 3 minutes per form.

• Physician Application for Certification (2.12)—Physicians taking the B Reader examination are asked to complete this registration form which provides demographic information as well as information regarding their medical practices. It typically takes the physician about 10 minutes to complete this form.

• Guidelines for Spirometry in the ECWHSP Mobile (Internal use, no form number assigned)—Miners (both active and former) participating in the ECWHSP component of the Program are offered a spirometry test. This form is administered by a NIOSH employee (or contractor) in the ECWHSP Mobile Unit during the initial intake process and takes approximately 5 minutes to complete. This information is required to make sure that the test can be done safely and that the miner is physically capable of performing the spirometry maneuvers.

• Spirometry Facility Certification Document (2.14)—This new form is analogous to the Radiographic Facility Certification Document (2.11) and records the spirometry facility equipment/staffing information. Spirometry facilities seeking NIOSH approval to provide miner spirometry testing under the CWHSP must complete an approval packet which includes this form. It is estimated that it will take approximately 30 minutes for this form to be completed at the facility.

• Respiratory Assessment Form (2.13)—This new form is designed to assess respiratory symptoms and certain medical conditions and risk factors. It is estimated that it will take approximately 5 minutes for this form to be administered to the miner by an employee at the facility.

• Spirometry Results Notification Form (2.15)—This new form will replace previous forms 2.15, 2.16 and 2.17. It is used to: Collect information that will allow NIOSH to identify the miner in order to provide notification of the spirometry test results; assure that the test can be done safely; record certain factors that can affect test results; provide documentation that the required components of the spirometry examination have been transmitted to NIOSH for processing; and conduct quality assurance audits and interpretation of results. It is estimated that it will take the facility approximately 20 minutes to complete this form.

• Pathologist Invoice—Under the NCWAS, the invoice submitted by the pathologist must contain a statement that the pathologist is not receiving any other compensation for the autopsy. Each participating pathologist may use their individual invoice as long as this statement is added. It is estimated that only 5 minutes is required for the pathologist to add this statement to the standard invoice that they routinely use.

• Pathologist Report—Under the NCWAS the pathologist must submit information found at autopsy, slides, blocks of tissue, and a final diagnosis indicating presence or absence of pneumoconiosis. The format of the autopsy reports is variable depending on the pathologist conducting the autopsy. Since an autopsy report is routinely completed by a pathologist, the only additional burden is the specific request for a clinical abstract of terminal illness and final diagnosis relating to pneumoconiosis. Therefore, only 5 minutes of additional burden is estimated for the pathologist's report.

• Consent, Release and History Form (2.6)—This form documents written authorization from the next-of-kin to perform an autopsy on the deceased miner. A minimum of essential information is collected regarding the deceased miner including an occupational history and a smoking history. From past experience, it is estimated that 15 minutes is required for the next-of-kin to complete this form.

As indicated by the below burden table, the total annualized burden hours for this request are 13,471. There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden/response (in hrs)	Total burden (in hrs)
Coal Mine Operator	2.10	388	1	30/60	194
Coal Mine Contractor	2.18	575	1	30/60	288
X-ray Facility Supervisor	2.11	40	1	30/60	20
Coal Miner	2.9	14,560	1	20/60	4,853
B Reader Physician	2.8	31,000	1	3/60	1,550
Physicians taking the B Reader Examination.	2.12	100	1	10/60	17
NIOSH employee (or contractor)	Guidelines for Spirometry in the ECWHSP Mobile Unit—No Form # assigned (internal document).	4,560	1	5/60	380
Spirometry Facility Supervisor	2.14	200	1	30/60	100
Spirometry Facility Employee	2.13	14,560	1	5/60	1,213
Spirometry Technician	2.15	14,560	1	20/60	4,853
Pathologist	Invoice —No standard form	5	1	5/60	1

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden/response (in hrs)	Total burden (in hrs)
Pathologist	Pathology Report—No standard form.	5	I	5/60	1
Next-of-kin for deceased miner	2.6	5	1	15/60	1
Total					13,471

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2014–29219 Filed 12–12–14; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–15–0621]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The notice for the proposed information collection is published to obtain comments from the public and affected agencies.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address any of the following: (a) 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; (b) Evaluate the accuracy of the agencies 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; (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; and (e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570 or send an email to *omb@cdc.gov.* Written comments and/or suggestions regarding the items contained in this notice should be directed to the Attention: CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

National Youth Tobacco Surveys (NYTS) 2015–2017—Revision—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Centers for Disease Control and Prevention (CDC) has periodically collected information about tobacco use among adolescents since 2004 (National Youth Tobacco Survey (NYTS) 2004, 2006, 2009, 2011, 2012, 2013, and 2014; OMB no. 0920–0621, exp. 1/31/2015). At present, the NYTS is the most comprehensive source of nationally representative tobacco data among students in grades 9–12, and the only source of such data for students in grades 6–8. The NYTS has provided national estimates of tobacco use behaviors, information about exposure to pro- and anti-tobacco influences, and information about racial and ethnic disparities in tobacco-related topics. Information collected through the NYTS is used to identify trends over time, to inform the development of tobacco cessation programs for youth, and to evaluate the effectiveness of existing interventions and programs.

CDC is requesting OMB approval to conduct additional cycles of the NYTS in the spring of 2015, 2016, and 2017. The survey will be conducted among nationally representative samples of students attending public and private schools in grades 6–12, and will be administered to students as an optically scannable booklet of multiple-choice questions. Information supporting the NYTS also will be collected from state-, district-, and school-level administrators and teachers. During the 2015–2017 timeframe, a number of changes will be incorporated that reflect CDC's ongoing collaboration with FDA and the need to measure progress toward meeting strategic goals established by the Family Smoking Prevention and Tobacco Control Act. The 2015 survey will examine the following topics: Use of cigarettes, smokeless tobacco, cigars, pipes, bidis, snus, hookahs, electronic vapor products, and dissolvable tobacco products; knowledge and attitudes; media and advertising; access to tobacco products; secondhand smoke exposure; and cessation. Information collection will occur annually.

Results of the NYTS will continue to be used for public health program planning and evaluation. Information collected through the NYTS is also expected to provide multiple measures and data for monitoring progress on multiple tobacco-related objectives for Healthy People 2020.

OMB approval is requested for three years. Participation is voluntary and the total estimated annualized burden hours are 15,504. There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
State Administrators	State-level Recruitment Script for the NYTS	35	1	30/60
District Administrators	District-level Recruitment Script for the NYTS	150	1	30/60
School Administrators	School-level Recruitment Script for the NYTTS.	220	1	30/60
Teachers	Data Collection Checklist for the NYTS	973	1	15/60
Students	National Youth Tobacco Survey	20,077	1	45/60

LeRoy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2014–29218 Filed 12–12–14; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30-Day 15–14AUI]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The notice for the proposed information collection is published to obtain comments from the public and affected agencies.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address any of the following: (a) 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; (b) Evaluate the accuracy of the agencies 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; (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; and (e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570 or send an email to *omb@cdc.gov.* Written comments and/or suggestions regarding the items contained in this notice should be directed to the Attention: CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

WISEWOMAN National Program Evaluation—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The CDC has supported the WISEWOMAN program (Well-Integrated Screening and Evaluation for Women Across the Nation) since 1995. The WISEWOMAN program is designed to serve low-income women ages 40–64 who have elevated risk factors for cardiovascular disease (CVD) and have no health insurance, or are underinsured for medical and preventive care services. Through the WISEWOMAN program, women have access to screening services for selected CVD risk factors such as elevated blood cholesterol, hypertension, and abnormal blood glucose levels; referrals to lifestyle programs; and referrals to medical care. WISEWOMAN participants must be co-enrolled in the CDC-sponsored National Breast and Cervical Cancer Early Detection Program (NBCCEDP).

The WISEWOMAN program is administered through cooperative agreements with state, territorial, or tribal health departments. At present, approximately two-thirds of program funding is provided by CDC with the other one-third supplied by the state, territory, or tribal organization. Each WISEWOMAN awardee submits to CDC an annual progress report that describes program objectives and activities, and semi-annual data reports (known as minimum data elements, or MDE) on the screening, assessment, and lifestyle program services offered to women who participate in the program (see WISEWOMAN Reporting System, OMB No. 0920–0612, exp. 12/31/2016). Participant-level MDE are de-identified prior to transmission to CDC.

In 2013, CDC released the fourth funding opportunity announcement (FOA) for the WISEWOMAN program (DP13–1302), which resulted in four-year cooperative agreements with 22 state, territorial, and tribal health departments, including 5 new and 17 continuing awardees from the previous FOA. Key program elements were retained (*e.g.,* provision of screening services, promotion of healthy lifestyle behaviors, and linkage to community resources), but a number of changes were incorporated into the program at that time due to shifts in populations, systems, and community needs. The current FOA reflects increased emphasis on improving access to clinical systems of care and increased emphasis on leveraging existing resources in the community. Lifestyle interventions have also been reframed to include lifestyle programs and health coaching sessions, and MDE have been updated to capture information about risk reduction counseling and participants' readiness to change. The current cooperative agreement also stresses monitoring and performance evaluation as key program dimensions. Additionally, more information is needed to augment that from previous evaluation efforts.

CDC seeks to conduct a one-time, multi-component evaluation to assess the effectiveness of the program on individual-, organizational-, and community-level outcomes. The in-depth assessment is designed to complement the routine progress and MDE information already being collected from WISEWOMAN program awardees. The new data collection will focus on obtaining qualitative and

quantitative information at the organizational and community levels about process and procedures implemented, and barriers, facilitators, and other contextual factors that affect program implementation and participant outcomes. Data collection activities will include a Program Survey with all WISEWOMAN awardee programs, administered in the second and fourth program years; a Network Survey of WISEWOMAN awardees and partner organizations, also conducted in the second and fourth program years; and a one-time Site Visit to a subset of awardees across the second to fourth program years. During site visits, semi-structured discussions will be conducted with WISEWOMAN staff and partner members who serve in diverse roles and are positioned to provide a variety of perspectives on program implementation.

OMB approval is requested for three years. Participation is voluntary and there are no costs to respondents other than their time. The total estimated annualized burden hours are 132.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Avg. burden per response (in hr)
WISEWOMAN Awardee Administrators	Program Survey	15	1	1
	Network Survey	15	1	30/60
	Site Visit Discussion Guide	6	1	75/60
Awardee Partners	Network Survey	147	1	30/60
	Site Visit Discussion Guide	12	1	45/60
Healthy Behavior Support staff	Site Visit Discussion Guide	12	1	45/60
Clinical Providers	Site Visit Discussion Guide	12	1	45/60

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2014–29289 Filed 12–12–14; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day-15–15GJ]

Proposed Data Collections Submitted for Public Comment and Recommendations

The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, 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. To request more information on the below proposed project or to obtain a copy of the information collection plan and instruments, call 404–639–7570 or send comments to Leroy A. Richardson, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov.*

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget (OMB) approval. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected;(d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information. Written comments should be received within 60 days of this notice.

Proposed Project

Title of Project—Investigating the Implementation and Evaluation of Top-ranked HSMS Elements — New— National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

NIOSH, under Pub. L. 91–596, Sections 20 and 22 (Section 20–22, Occupational Safety and Health Act of 1977) has the responsibility to conduct research relating to innovative methods, techniques, and approaches dealing with occupational safety and health problems.

This project seeks to understand the best practices for developing, implementing, and maintaining a robust risk management system (*i.e.* health and safety management system [HSMS]). Researchers suggest that an HSMS requires considerable knowledge, skills, abilities, and competencies from all individuals within an organization as well as focused and purposeful coordination between them.

Previous research considered the sheer number of possible choices to be a barrier to HSMS adoption. Therefore, NIOSH began to understand what the most fundamentally important elements were that support the development, implementation and maintenance of a comprehensive, effective risk-based HSMS. NIOSH surveyed practicing health and safety executives, managers, and professionals from a variety of mining commodities to determine if they agreed on which HSMS elements and practices were most important. The results of this study suggested that the following areas require consistent focus and attention: Leadership Development; Accountability; Knowledge, Skills, and Abilities Development; System Coordination; Culture Enhancement;

Behavior Optimization; and Risk Management. To date, little empirical research has been conducted to address practical research questions related to each.

Therefore, the current research task is designed to investigate research questions related to the practical purpose, implementation, and evaluation of each element: (1) how is each of these HSMS elements best executed within mining organizations?; (2) how do you know an element has been successfully implemented within the organization?; and (3) what are the barriers to implementing these HSMS elements within mining organizations?

This study employs a strictly qualitative approach to answer the research questions. A qualitative approach allows researchers to probe participants and learn about their specific experiences through in-depth examples. A protocol that will be used during an interview and/or focus group was developed. The subject matter in the protocol is focused on implementing and evaluating specific elements within managers' HSMS and possible barriers to implementation and evaluation.

NIOSH is seeking a three year approval for this project which will target mine sites for participation by reaching out to organizational leaders/managers of health and safety at respective mines for their participation. Data collection, in the form of interviews and/or focus groups will occur to answer the questions for this study.

Respondents targeted for this study include corporate or site mine managers (also referred to in some cases as leaders, executives, coordinators or supervisors). These individuals are responsible for the day-to-day administration and/or implementation of the HSMS. In some cases, more than one individual is responsible for certain aspects of the HSMS. Therefore, depending on how these responsibilities are designated at mine sites and how many of these leaders are interested at each mine site, researchers will either facilitate a single interview or a focus group with mine site leadership.

Participants will be recruited through members of mine management using a mine recruitment script. It is estimated that a sample of up to 100 individuals (approximately 34 per year) will agree to participate among a variety of mine sites. Participants will be between the ages of 18 and 75, currently employed, and living in the United States. Participation will require no more than 60 minutes of workers' time (approximately five minutes for the informed consent process and 55 minutes for the interview or focus group—there is no cost to respondents other than their time).

Upon collection of the data, researchers will analyze and determine the effect that each element has on a mine's ability to develop, implement or maintain an HSMS. With that said, lines of theoretical inquiry will be used to inform the thinking behind the practical guidance ultimately provided to mining organizations. Essentially, best practices can be provided that are applicable across an HSMS, not respective to just one aspect or element. Therefore, the findings will be used to make an HSMS more feasible and applicable for the mining industry.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Safety/health Mine Representative	Mine Manager Recruitment Script	8	1	5/60	1
Safety/health Mine Manager	Informed Consent Form	34	1	5/60	3
Safety/health Mine Manager	HSMS Interview/Focus Group Protocol.	34	1	55/60	31
Total					35

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2014–29252 Filed 12–12–14; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day-15–0900]

Proposed Data Collections Submitted for Public Comment and Recommendations

The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, 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. To request more information on the below proposed project or to obtain a copy of the information collection plan and instruments, call 404–639–7570 or send comments to Leroy A. Richardson, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov*.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget (OMB) approval. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected;(d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to

a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information. Written comments should be received within 60 days of this notice.

Proposed Project

Contact Investigation Outcome Reporting Forms (OMB Control No. 0920–0900, expiration date: October 31, 2017)– Revision -National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Division of Global Migration and Quarantine (DGMQ), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Centers for Disease Control and Prevention (CDC), Division of Global Migration and Quarantine (DGMQ) requests revision to a currently approved information collection, OMB Control Number 0920–0900, Contact Investigation Outcome Reporting Forms. CDC is requesting the addition of Ebola-specific information collection tools to supplement the CDC's routine contact investigation activities so that CDC can better assess the risk to individuals who may have been exposed to a confirmed case of Ebola while traveling to or within the United States. These forms were approved by OMB under an emergency clearance, OMB Control Number 0920–1032. The additional forms to be added are as follows:

- Ebola Airline passenger exposure questionnaire—This contact investigation form gathers information from airline passengers who traveled on plane(s) and sat within a 3 foot area around the suspected case and travel companions of the suspected case to determine the level of exposure and risk, as well as other passengers who may have had contact with the case's bodily fluids. Information gathered in this form is shared with the CDC to determine risk level. Risk levels are outlined in *CDC's Movement and Monitoring Guidance*.
- Ebola exposure Assessment Flight Crew—The flight exposure questionnaire is used to ascertain the same relevant information included in the passenger questionnaire for all crew who worked on flight(s) and came into contact with Ebola patient(s).
- Ebola exposure Assessment Cleaning Crew—This form collects the same information as the flight crew exposure questionnaire, used to determine the level of exposure a member of the cleaning crew who serviced a flight with an ill patient(s).
- Ebola exposure Assessment Airport or other port of entry staff—This questionnaire is utilized for airport staff who may have come into contact with a person ill with Ebola. Airport staff members are identified through conversations with airport authority to determine which employees carried out tasks that would have put them in contact with the ill person or their body fluids.
- Passengers of other commercial conveyance Ebola exposure questionnaire—This questionnaire collects the same information as the airline passenger questionnaire but will be utilized for passengers of commercial conveyance that is land- or waterborne
- Finally, the introduction and confirmation script is to be used by CDC staff manning open call lines available for persons who traveled on planes that carried suspected or confirmed patients with Ebola. As with the other questionnaires, this script assesses the risk of a plan passenger who was not in the immediate vicinity of the Ebola patient but still has concerns about the level of exposure and risk of contracting the virus.

CDC is not proposing any changes to the routine contact investigation forms already approved under this information collection request.

The total burden associated with this revision is 10,949 hours, including both standard contact investigation forms and updated forms to account for Ebola transmission. There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response	Total burden hours
State/local health department staff.	General Contact Investigation Outcome Reporting Form (Air).	12	1	5/60	1
Cruise Ship Physicians/Cargo Ship Managers.	General Contact Investigation Outcome Reporting Form (Maritime—word version).	100	1	5/60	8
Cruise Ship Physicians/Cargo Ship Managers.	General Contact Investigation Outcome Reporting Form (Maritime—Excel version).	100	1	5/60	8
State/local health department staff.	General Contact Investigation Outcome Reporting Form (Land).	12	1	5/60	1
Cruise Ship Physicians/Cargo Ship Managers.	TB Contact Investigation Outcome Reporting Form (Air).	1,244	1	5/60	104
Cruise Ship Physicians/Cargo Ship Managers.	TB Contact Investigation Outcome Reporting Form (Maritime—word version).	150	1	5/60	13
State/local health department staff.	TB Contact Investigation Outcome Reporting Form (Maritime—Excel version).	150	1	5/60	13
Cruise Ship Physicians/Cargo Ship Managers.	Measles Contact Investigation Outcome Reporting Form (Air).	964	1	5/60	80
Cruise Ship Physicians/Cargo Ship Managers.	Measles Contact Investigation Outcome Reporting Form (Maritime—word version).	63	1	5/60	5
State/local health department staff.	Measles Contact Investigation Outcome Reporting Form (Maritime—excel version).	63	1	5/60	5
Cruise Ship Physicians/Cargo Ship Managers.	Rubella Contact Investigation Outcome Reporting Form (Air).	95	1	5/60	8
Cruise Ship Physicians/Cargo Ship Managers.	Rubella Contact Investigation Outcome Reporting Form (Maritime –word version).	12	1	5/60	1
Cruise Ship Physicians/Cargo Ship Managers.	Rubella Contact Investigation Outcome Reporting Form (Maritime—excel version).	12	1	5/60	1

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response	Total burden hours
Passenger	Ebola Airline Exposure Assessment Passenger.	3,400	2	20/60	2,267
Flight Crew	Ebola Airline Exposure Assessment Flight Crew.	2,400	2	20/60	1,600
Cleaning Crew	Ebola Airline Exposure Assessment Cleaning Crew.	1,200	2	20/60	800
Airport or Other Port of Entry Staff.	Ebola Airline Exposure Assessment Airport or Other Port of Entry Staff.	1,000	2	20/60	667
Passengers on other commercial conveyances.	Ebola Exposure Questionnaire for Passengers on other commercial conveyances.	1,800	2	20/60	1,200
Traveler	Script—Introduction and Confirmation	50,000	1	5/60	4,167
Total					10,949

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2014–29220 Filed 12–12–14; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Case Plan Requirement, Title IV–E of the Social Security Act

OMB No.: 0970–0428

Description: Under section 471(a)(16) of title IV–E of the Social Security Act (the Act), to be eligible for payments, states and tribes must have an approved title IV–E plan that provides for the development of a case plan for each child for whom the State or Tribe receives foster care maintenance payments and that provides a case review system that meets the requirements in section 475(5) and 475(6) of the Act.

The case review system assures that each child has a case plan designed to achieve placement in a safe setting that is the least restrictive (most family-like) setting available and in close proximity to the child's parental home, consistent with the best interest and special needs of the child. Through these requirements, States and Tribes also comply, in part, with title IV–B section 422(b) of the Act, which assures certain protections for children in foster care.

The case plan is a written document that provides a narrative description of the child-specific program of care. Federal regulations at 45 CFR 1356.21(g) and section 475(1) of the Act delineate the specific information that should be addressed in the case plan. The Administration for Children and Families (ACF) does not specify a recordkeeping format for the case plan nor does ACF require submission of the document to the Federal government. Case plan information is recorded in a format developed and maintained by the State or Tribal child welfare agency.

Respondents: State and Tribe title IV–B and title IV–E agencies

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Case Plan	512,515	1	4.80	2,464,893

Estimated Total Annual Burden Hours: 2,464,893.

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, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *infocollection@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.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2014–29235 Filed 12–12–14; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; 30-Day Comment Request Evaluation of the NIH Academic Research Enhancement Award (NIH OD)

SUMMARY: Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Institutes of Health (NIH), has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below. This proposed information

collection was previously published in the **Federal Register** on July 9, 2014, Vol. 79, page 38921, and allowed 60-days for public comment. No public comments were received during the 60-day period. The purpose of this notice is to allow an additional 30 days for public comment. The Office of the Director (OD), National Institutes of Health, may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Direct Comments to OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974, Attention: NIH Desk Officer.

DATES: *Comment Due Date:* Comments regarding this information collection are best assured of having their full effect if received within 30-days of the date of this publication.

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the data collection plans and instruments or request more information on the proposed project, contact Michelle M. Timmerman, Ph.D., Director, AREA Program, Office of the Director, National Institutes of Health, 6705 Rockledge Drive, Bethesda, Maryland 20892 or call non-toll-free number 301–402–0672, or email your request, including your address to *michelle.timmerman@mail.nih.gov.* Formal requests for additional plans and instruments must be requested in writing.

Proposed Collection: Evaluation of the NIH Academic Research Enhancement Award, 0925, NEW submission, Office of the Director (OD), National Institutes of Health (NIH).

Need and Use of Information Collection: The Academic Research Enhancement Award (AREA) Program is a grant mechanism spanning most of the Institutes and Centers (ICs) of the National Institutes of Health (NIH). The AREA program was established by Congress in 1985 to provide support to scientists at public and private colleges and universities that receive relatively small amounts of NIH funding. The purpose of the program is to support meritorious research, expose undergraduate and graduate students to research, and strengthen the research environment of the institutions receiving the grants. In the past three years alone, the federal government has awarded approximately 78 million dollars annually in AREA grants. The evaluation will allow NIH and Congress to assess the extent to which the AREA program is meeting its goals and make recommendations so that this significant investment of public funds may be used as effectively as possible.

The evaluation will utilize the NIH's archived data on grants, institutions, Principal Investigators (PIs) and students funded with AREA monies. The evaluation will collect new data about (1) the quantity and quality of student participation in AREA projects, (2) records of PIs' subsequent funding histories, (3) applicants' experiences with the application process, (4) PIs' experiences implementing AREA Program objectives, and (5) the impact of AREA Program research participation on student career paths and outcomes.

The results of the evaluation will indicate the extent to which the AREA Program is meeting its goals of supporting meritorious research, strengthening the research environment at institutions of higher education that are not research intensive, and recruiting and training subsequent generations of the United States' biomedical scientist workforce. Intended audiences include the United States Congress, staff at NIH's Institutes and Centers which make AREA awards, and staff at NIH's Office of the Director.

OMB approval is requested for one year. There are no costs to respondents other than their time. The total estimated annualized burden hours are 458.

ESTIMATES OF ANNUALIZED BURDEN HOURS

Type of respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total annual burden hours
Web Survey—Awardees	480	1	30	240
Interviews—Awardees	50	1	45	38
Web Survey—Students	301	1	20	100
Web Survey—Applicants	240	1	20	80
Totals	1,021		458	

Dated: December 3, 2014.

Lawrence A. Tabak,

Principal Deputy Director, NIH.

[FR Doc. 2014–29294 Filed 12–12–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke, Interagency Pain Research Coordinating Committee Call for Committee Membership Nominations

SUMMARY: The Department of Health and Human Services (HHS)(Department) has created the Interagency Pain Research Coordinating Committee and is seeking nominations for this committee.

DATES: Nominations are due by COB January 12, 2015.

ADDRESSES: Nominations must be sent to Linda Porter, Ph.D., by USPS mail at NINDS/NIH, 31 Center Drive, Room 8A27, Bethesda, MD 20892, or by email to *porterl@ninds.nih.gov.*

FOR FURTHER INFORMATION CONTACT: Linda Porter, *porterl@ninds.nih.gov.*

SUPPLEMENTARY INFORMATION: As specified in Public Law 111–148 (''Patient Protection and Affordable Care Act'') the Committee will: (a) Develop a summary of advances in pain care research supported or conducted by the Federal agencies relevant to the

diagnosis, prevention, and treatment of pain and diseases and disorders associated with pain; (b) identify critical gaps in basic and clinical research on the symptoms and causes of pain; (c) make recommendations to ensure that the activities of the National Institutes of Health and other Federal agencies are free of unnecessary duplication of effort; (d) make recommendations on how best to disseminate information on pain care; and (e) make recommendations on how to expand partnerships between public entities and private entities to expand collaborative, cross-cutting research.

Membership on the committee will include six (6) non-Federal members from among scientists, physicians, and other health professionals and six (6) non-Federal members of the general public who are representatives of leading research, advocacy, and service organizations for individuals with pain-related conditions. Members will serve overlapping three year terms. It is anticipated that the committee will meet at least once a year.

The Department strives to ensure that the membership of HHS Federal advisory committees is fairly balanced in terms of points of view represented and the committee's function. Every effort is made to ensure that the views of diverse ethnic and racial groups and people with disabilities are represented on HHS Federal advisory committees, and the Department therefore, encourages nominations of qualified candidates from these groups. The Department also encourages geographic diversity in the composition of the Committee. Appointment to this Committee shall be made without discrimination on the basis of age, race, ethnicity, gender, sexual orientation, disability, and cultural, religious, or socioeconomic status.

The Department is soliciting nominations for one non-federal member from among scientists, physicians, and other health professionals and for three non-federal members of the general public who are representatives of leading research, advocacy, and service organizations for people with pain-related conditions. These candidates will be considered to fill positions opened through completion of current member terms. Nominations are due by COB January 5, 2015, and should be sent to Linda Porter, Ph.D., by USPS mail at NINDS/NIH, 31 Center Drive, Room 8A27, Bethesda, MD 20892, or by email to *porterl@ninds.nih.gov.* Nominations must include contact information for the nominee and a current curriculum vitae or resume of the nominee.

Dated: December 5, 2014.

Walter J. Koroshetz,

Acting Director, National Institute of Neurological Disorders and Stroke, National Institutes of Health.

[FR Doc. 2014–29323 Filed 12–12–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5752–N–108]

30-Day Notice of Proposed Information Collection: Energy Efficient Mortgages (EEMs)

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* January 14, 2015.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email at *Colette Pollard* @hud.gov or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on July 16, 2014.

A. Overview of Information Collection

Title of Information Collection: Energy Efficient Mortgages (EEMs).

OMB Approval Number: 2502–0561.

Type of Request: Extension.

Form Number: None.

Description of the need for the information and proposed use: Lenders provide the required information to determine the eligibility of a mortgage to be insured under Section 513 of the Housing and Community Development Act of 1992 (Section 106 of the Energy Policy Act of 1992). Section 2123 of the Housing and Economic Recovery Act of 2008 (HERA) (Public Law 110–289, approved July 30, 2008)) amended Section 106 of the Energy Policy Act of 1992 which revised the maximum dollar amount that can be added to an FHA-insured mortgage for energy efficient improvements.

Respondents: Business.

Estimated Number of Responses: 110.

Estimated Number of Responses: 2, 420.

Frequency of Response: One per mortgage.

Average Hours per Response: 4.25 hours.

Total Estimated Burdens: 2, 571 hours.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(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 collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Date: December 10, 2014.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2014–29299 Filed 12–12–14; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5752–N–106]

30-Day Notice of Proposed Information Collection: Self-Help Homeownership Opportunity Program (SHOP)

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* January 14, 2015.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email at *Colette Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on October 10, 2014.

A. Overview of Information Collection

Title of Information Collection: Self-Help Homeownership Opportunity Program (SHOP).

OMB Approval Number: 2506–0157.

Type of Request: Extension of currently approved collection.

Form Number: HUD–424CB, HUD–2880, HUD–2993, HUD–2995, HUD–96011.

Description of the need for the information and proposed use: This is a proposed information collection for submission requirements under the SHOP Notice of Funding Availability (NOFA). HUD requires information in order to ensure the eligibility of SHOP applicants and the compliance of SHOP proposals, to rate and rank SHOP applications, and to select applicants for grant awards. Information is collected on an annual basis from each applicant that responds to the SHOP NOFA. The SHOP NOFA requires applicants to submit specific forms and narrative responses.

Respondents: National and regional non-profit self-help housing organizations (including consortia) that apply for funds in response to the SHOP NOFA.

Frequency of Submission: Annually in response to the issuance of a SHOP NOFA.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, hours per response, frequency of response, and total hours of response for all respondents.

The estimates of the average hours needed to prepare the information collection are based on information provided by previous applicants. Actual hours will vary depending on the proposed scope of the applicant's program, the applicant's geographic service area and the number of affiliate organizations. The information burden is generally greater for national organizations with numerous affiliates.

Paperwork requirement	Number of respondents	Frequency	Hours per response	Total annual hours
SF–424	10	1	1	10
HUD–424CB	10	1	10	10
HUD–424 CBW	10	1	30	300
SF–LLL	10	1	.5	5
HUD–2880	10	1	.5	5
HUD–2993	10	1	.5	5
HUD–2995	10	1	.5	5
HUD–96011	10	1	.5	5
Applicant Eligibility	10	1	10	100
SHOP Program Design and Scope of Work	10	1	30	300
Rating Factor 1	10	1	25	250
Rating Factor 2	10	1	25	250
Rating Factor 3	10	1	55	550
Rating Factor 4	10	1	30	300
Rating Factor 5	10	1	25	250
Total Annual Hour Burden			243.5	2435

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(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 collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: December 9, 2014.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2014–29310 Filed 12–12–14; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5752–N–107]

30-Day Notice of Proposed Information Collection: Protection and Enhancement of Environmental Quality

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* January 14, 2015.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email at *Colette Pollard @hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on October 10, 2014.

A. Overview of Information Collection

Title of Information Collection: Protection and Enhancement of Environmental Quality.

OMB Approval Number: 2506–0177.

Type of Request: Extension of currently approved collection.

Form Number: None.

Description of the need for the information and proposed use: HUD requests its applicants to supply environmental information that is not otherwise available to HUD staff for the environmental review on an applicant's proposal for HUD financial assistance to develop or improve housing or community facilities. HUD itself must perform an environmental review for the purpose of compliance with its environmental regulations found at 24 CFR part 50, Protection and Enhancement of Environmental Quality. Part 50 implements the National Environmental Policy Act and implementing procedures of the Council on Environmental Quality, as well as the related federal environmental laws and executive orders. HUD's agency-wide provisions—24 CFR 50.3(h)(1) and 50.32 [copy attached]—regulate how individual HUD program staffs are to utilize such collected data when HUD itself prepares the environmental review and compliance. Separately, individual HUD programs each have their own regulations and guidance implementing environmental and related collection responsibilities. For the next three years, this approved collection will continue unchanged under this OMB control number to assure adequate coverage for all HUD programs subject to Part 50.

Respondents: Businesses, not-for-profit institutions, and local governments receiving HUD funding.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
Total	2,600	1	2,600	2	5,200	$52	$270,400

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(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 collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: December 9, 2014.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2014–29307 Filed 12–12–14; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5752–N–105]

30-Day Notice of Proposed Information Collection: Pre-Purchase Homeownership Counseling Demonstration and Impact Evaluation

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* January 14, 2015.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email at *Colette Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on March 10, 2014.

A. Overview of Information Collection

Title of Information Collection: Pre-Purchase Homeownership Counseling Demonstration and Impact Evaluation.

OMB Approval Number: 2528–0293.

Type of Request: Revision.

Form Number: None.

Description of the need for the information and proposed use: The U.S. Department of Housing and Urban Development (HUD) is conducting an important national study of the effectiveness of pre-purchase homeownership counseling services. This request covers several data collection activities: (a) Administering an interim survey to study participants; (b) recruiting study participants to participate in focus groups and conducting the focus groups to collect qualitative data; [1] (c) collecting consent from co-borrowers of study participants; [2] (d) continuing to collect loan origination and servicing data from lenders and service tracking data from counseling agencies; and (e) continuing to collect updated tracking information from study participants. The interim survey will be administered 12 months after participants complete the baseline survey. The interim survey will provide the first comparison of study participants' characteristics from the baseline survey. The information collected through the focus groups will be used to support the implementation analysis and to collect qualitative information about study participants' experiences with pre-purchase homeownership counseling services. The collection of consent from study participants' co-borrowers is necessary to allow the study to collect data related to the characteristics and performance of study participants' mortgage loans. As part of OMB approval # 2528–0293, the study collects data from participating counseling agencies on services that study participants receive. The study also collects study participants' loan origination and service tracking data from the study's three participating lenders for loans that do not have a co-borrower. Lastly, the study collects updated study participant contact information and other tracking data in order locate study participants for the interim survey and for future surveys. Maintaining contact with study participants over time is critical to minimizing attrition and ensuring high response rates to the follow-up surveys. We study seek to continue the collection of service tracking data, loan origination and servicing data, and tracking information past the # 2528–0293 expiration date.

Respondents: i.e. affected public): Up to 6,000 study participants; approximately 1,800 co-borrowers; 64 counseling organizations; and, staff at 3 lenders. The average time per study participant (up to 6,000 study participants) to complete the interim survey is 35 minutes. A total of up to 144 study participants will participate in 12 focus groups of 8–12 participants each. Each focus group will take approximately 120 minutes. Prior to the focus groups, the study team will contact eligible study participants in three cities to request participation in a focus group and confirm eligibility information. The recruitment calls are estimated to take approximately 5 minutes per person. The study's enrollment projections suggest that the three largest study sites will include approximately 720 eligible study participants, although recruitment will end sooner if the available focus group slots are filled. The collection of co-borrower consent involves including the co-borrower consent form in the study's regular tracking letters, along with a request for the co-borrower to review, sign, and return the written consent form. For co-borrowers who do not return the written form, the study will also be able to collect consent verbally at the time of the interim survey and during phone calls with the co-borrower. The study estimates that approximately 1,800 study participants will have co-borrowers. The co-borrowers' review of the co-borrower consent information and completion of the consent process is estimated to require approximately 5 minutes per co-borrower. The average time per client for counseling agencies to document the services provided to study participants is 10 minutes, with responses required for both the educational component and for the counseling services. The average time for lenders to prepare study participants' loan origination and performance data for the study team is 60 minutes. The study team will ask for this data at 6 points during the next 3 years from each lender. The study mails study tracking letters 2–3 times per year. The average time for study participants' review of the letters and return of the tracking form is 5 minutes. The total burden for the study is 9,666 hours: 8,348 hours for study participants, 150 hours for co-borrowers, 1,150 hours for counseling agencies, and 18 hours for lenders.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden minutes per response	Total burden hours	Annual burden hours	Hourly cost per response	Annual cost
Interim Survey	6,000	1	1	35	3,500	3,500	$35	$210,000
Focus group recruitment calls	720	1	1	5	60	60	25	1,500
Focus groups	144	1	1	120	288	288	25	7,200
Co-borrower consent form	1,800	1	1	5	150	150	25	3,750

[1] This activity has been modified from OMB Approval #2528–0293. The study requests to conduct focus groups with study participants instead of individual telephone interviews.

[2] This activity has been modified from OMB Approval #2528–0293. The study has revised the co-borrower consent form and requests approval for the revised form.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden minutes per response	Total burden hours	Annual burden hours	Hourly cost per response	Annual cost
Loan origination and performance data: Lenders	3	6	2	60	18	6	35	630
Service tracking information: Housing counseling agencies	3,450	2	1	10	1,150	1,150	25	28,750
Tracking Letter	6,000	9	3	5	4,500	1,500	5	270,000
Total	18,117	21	10		9,666	6,654		521,830

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(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 collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Date: December 9, 2014

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2014–29308 Filed 12–12–14; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5800–FA–07]

Announcement of Funding Awards HOPE VI Main Street Grant Program Fiscal Year (FY) 2014

AGENCY: Office of the Acting Assistant Secretary for Public and Indian Housing, HUD

ACTION: Announcement of funding awards.

SUMMARY: In accordance with Section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of funding decisions made by the Department in a competition for funding under the FY 2014 Notice of Funding Availability (NOFA) for the HOPE VI Main Street Program. This announcement contains the name and address of the award recipient under said NOFA.

FOR FURTHER INFORMATION CONTACT: For questions concerning the HOPE VI Main Street Program awards, contact Lawrence Gnessin, HOPE VI Main Street Program Manager, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, email *lawrence.gnessin@hud.gov,* and telephone (202) 402–2676. Hearing or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: The purpose of the HOPE VI Main Street program is to provide grants to small communities to assist in the rejuvenation of an historic or traditional central business district or ''Main Street'' area by replacing unused commercial space in buildings with affordable housing units. The objectives of the program are to redevelop Main Street areas; preserve historic or traditional architecture or design features in Main Street areas; enhance economic development efforts in Main Street areas; and provide affordable housing in Main Street areas.

The FY 2014 award announced in this Notice was selected for funding in a NOFA competition posted on the *http://www.grants.gov* Web site on July 4, 2014. Applicants to this Notice were eligible for awards in FY 2014, but HUD reserved the right to award one FY 2015 grant to applicants from this FY 2014 NOFA. In addition, HUD intends to award FY 2015 funds to an FY 2014 applicant if funding becomes available. That process will be announced separately.

The amount allotted to fund the HOPE VI Main Street grant were from appropriations for Section 24 of the Housing Act of 1937, as amended. The amount allotted for FY2014 was $500,000. The HOPE VI Main Street grantee information is as follows:

Town of Kit Carson
301 Main Street
Kit Carson, CO 80825–0375

In accordance with Section 102 (a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (103 Stat.1987, 42 U.S.C. 3545), the Department is publishing the name, address, and amount of the award made under FY 2014 HOPE VI Main Street NOFA.

Dated: December 5, 2014.

Jemine Bryon,

Acting Assistant Secretary for Public and Indian Housing.

[FR Doc. 2014–29309 Filed 12–12–14; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2014–N209; FF08ESMF00–FXES11120800000F2–145]

Proposed Habitat Conservation Plan/Natural Community Conservation Plan for the Counties of Yuba and Sutter, CA; Scoping for Environmental Impact Statement

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent; notice of public scoping meeting; request for comments.

SUMMARY: Under the National Environmental Policy Act, we, the U.S. Fish and Wildlife Service, intend to prepare a draft environmental impact statement (EIS) for the proposed habitat conservation plan/natural community conservation plan for the Counties of Yuba and Sutter, hereafter referred to as the Yuba-Sutter Regional Conservation Plan (YSRCP). The YSRCP would provide a regional approach for the long-term conservation of covered species plan area, while allowing for compatible future land use and development under county and city

general plan updates and the regional transportation plans. The draft EIS is being prepared under the Federal Endangered Species Act of 1973, as amended, and the California Natural Community Conservation Planning Act. We announce meetings and invite comments.

DATES: To ensure consideration, please send your written comments by January 29, 2015. The public scoping meeting is on Tuesday, January 6th, from 3–5 and 6–8, at the Yuba County Government Center, Wheatland room, 915 8th St, Marysville, CA 95901.

ADDRESSES: To request further information or submit written comments, please use one of the following methods, and note that your information request or comment is in reference to the Yuba-Sutter Regional Conservation Plan:

- *U.S. Mail:* U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 2800 Cottage Way, Room W–2605, Sacramento, CA 95825.
- *In-Person Drop-Off, Viewing, or Pickup:* Call (916) 414–6600 to make an appointment during regular business hours to drop off comments or view received comments at the above location.
- *Fax:* U.S. Fish and Wildlife Service, (916) 414–6713, Attn.: Ellen McBride.

FOR FURTHER INFORMATION CONTACT: Ellen McBride, Senior Biologist, or Mike Thomas, Chief Conservation Planning Division, Sacramento Fish and Wildlife Office, by phone at (916) 414–6600 or by U.S. mail at the above address. If you use a telecommunications device for the deaf, please call the Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Introduction

We, the U.S. Fish and Wildlife Service (Service), intend to prepare a draft environmental impact statement (EIS) to evaluate the impacts of several alternatives related to the potential issuance of an incidental take permit (ITP), as well as impacts of the implementation of the supporting proposed habitat conservation plan/natural community conservation plan, which we will refer to as the Yuba-Sutter Regional Conservation Plan (YSRCP). The EIS will be a joint EIS/environmental impact report (EIS/EIR), for which the Service, Yuba and Sutter Counties, and the California Department of Fish and Wildlife (CDFW) intend to gather information necessary for preparation.

The YSRCP is designed to be a comprehensive regional plan that will provide long-term conservation and management of natural communities, sensitive species, and the habitats upon which those species depend, while accommodating other important uses of the land. It is intended to serve as a habitat conservation plan pursuant to the Federal Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and as a natural community conservation plan under the California Natural Community Conservation Planning Act.

The YSRCP will address State and Federal endangered species compliance requirements for the Counties of Yuba and Sutter (Counties); the Cities of Wheatland, Yuba City, and Live Oak; and the YSRCP implementing entity that will be established to implement the YSRCP (permit applicants) for activities and projects in the YSRCP plan area that they conduct or approve. The California Department of Transportation (Caltrans), while not directly a permit applicant because of limited discretionary authority over projects, may participate in the YSRCP by contributing conservation lands to the overall conservation strategy established by the YSRCP. The plan area generally includes the Counties of Sutter and Yuba; however, the plan area does not include the Sutter Buttes, portions of Southern Sutter County within the Natomas Basin HCP, portions of Eastern Yuba County that are dominated by oak woodlands, and the City of Marysville. The permit applicants are currently preparing a complete draft of the YSRCP as an HCP/NCCP and the permitting agencies (Service and CDFW) are assisting and will be proceeding with agency review and finalization in the coming months. The permit applicants intend to apply for a 50-year incidental take permit (ITP) from the Service. The permittees are seeking authorized incidental take of threatened and endangered species that could result from activities covered under the YSRCP. We announce meetings and invite comments.

The Service will serve as the administrative lead for all actions related to this **Federal Register** notice for the EIS component of the EIS/EIR. Sutter County will serve as the State lead agency under the California Environmental Quality Act (CEQA) for the EIR component. Sutter County, in accordance with CEQA, is publishing a similar notice.

Project Summary

In 2001, Caltrans began the planning process for improvements to State Routes 70 and 99 in Yuba and Sutter Counties. Early environmental review indicated that the roadway improvement projects would affect federally listed species and would lead to additional cumulative effects, because the roadway improvements would prompt additional urban development within these corridors. In order to ensure compliance with the Act, the Service recommended preparation of an HCP, to which the Counties and Caltrans agreed. The parties agreed to interim planning guidelines during preparation of the HCP, which allowed the Service to issue a biological opinion to allow the roadway projects to proceed. The Counties, Service, CDFW, and Caltrans formed a working group in accordance with the provisions of the biological opinion. The working group evaluated conservation planning approaches, and the Counties pursued grant funding. The working group agreed to address the California Endangered Species Act (CESA), as well as the federal Act, by preparing a combined HCP/NCCP. Work on the YSRCP began in 2004 and resulted in delineation of the plan area boundaries, determination of the covered species, and identification of the permit applicants. Development of the YSRCP is still in progress. In 2012, the the permit applicants, CDFG, and the Service entered into the YSRCP Planning Agreement. The planning agreement set out the initial scope of the program and defined the roles and responsibilities of the parties in the development of the YSRCP. The planning agreement has helped guide the YSRCP planning process and to define the initial scope of the effort. Sutter County served as the lead in coordination of the process and preparation of the YSRCP.

The YSRCP's conservation strategy proposes to provide a regional approach for the long-term conservation of covered species (see Covered Species) and natural communities within the YSRCP plan area, while allowing for compatible future land use and development under county and city general plan updates and the regional transportation plans. The YSRCP identifies and addresses the covered activities that would be carried out by the permittees that could result in take of covered species within the YSRCP plan area. The proposed YSRCP is intended to be consistent with and support compliance with other Federal and State wildlife-related laws and regulations, other local conservation planning efforts, and county and city general plans.

The YSRCP is being designed to streamline and coordinate existing processes for review and permitting of public and private activities that

potentially affect protected species. To meet this goal, the YSRCP sets out a conservation strategy that includes measures that are intended to ensure that impacts on covered species and their habitat related to covered activities are avoided, minimized, or mitigated, as appropriate. These covered activities encompass the range of existing and future activities that are associated with much of the regional economy (see Covered Activities).

Background

Section 9 of the Act (16 U.S.C. 1531 *et seq.*) prohibits the ''take'' of wildlife species listed as endangered or threatened. The Act defines the term ''take'' as: to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect listed species, or to attempt to engage in such conduct (16 U.S.C. 1532). Harm includes significant habitat modifications or degradation that actually kills or injures listed wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, and sheltering [50 CFR 17.3(c)]. Pursuant to section 10(a)(1)(B) of the Act, we may issue permits to authorize ''incidental take'' of listed species. ''Incidental take'' is defined by the Act as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity. Service regulations governing permits for threatened species and endangered species, respectively, are promulgated in 50 CFR 17.22 and 17.32.

Section 10(a)(1)(B) of the Act contains provisions for issuing such ITPs to non-Federal entities for the take of endangered and threatened species, provided the following criteria are met:

- The take will be incidental;
- The applicants will, to the maximum extent practicable, minimize and mitigate the impact of such taking;
- The applicants will develop a proposed HCP and ensure that adequate funding for the plan will be provided;
- The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
- The applicants will carry out any other measures that the Service may require as being necessary or appropriate for the purposes of the HCP.

Thus, the purpose of issuing an ITP is to allow the applicants, under their respective regional authority, to authorize development while conserving the covered species and their habitat. Implementation of a multispecies HCP, rather than a species-by-species or project-by-project approach, will maximize the benefits of conservation measures for covered species and eliminate expensive and time-consuming efforts associated with processing individual ITPs for each project within the applicants' proposed plan area. The Service expects that the permit applicants will request ITP coverage for a period of 50 years.

Plan Area

The proposed YSRCP plan area (or permit area) includes approximately 469,271 acres, including 141,644 acres in Yuba County and 327,627 acres in Sutter County. This area includes the Cities of Wheatland, Yuba City, and Live Oak, and the spheres of influence of each jurisdiction. The plan area excludes the areas listed below:

- The Sutter Buttes, because their ecological characteristics are distinct from surrounding areas and because the Buttes are largely protected from future development;
- Portions of southern Sutter County within the Natomas Basin HCP area;
- Portions of eastern Yuba County dominated by oak woodlands; and
- Marysville, because of lack of funding and no future growth plans.

The YSRCP plan area is bounded on the west by Yolo and Colusa Counties, on the north by Butte County, on the east by Placer County and portions of Yuba County outside the Plan Area, and on the south by Yolo and Sacramento Counties and by the portion of Sutter County that is located within the Natomas Basin HCP Area.

The boundary of the YSRCP plan area is based on political, ecological, and hydrologic factors. The geographic scope focuses on valley bottom lands. Areas chosen for inclusion were selected on the basis of their likelihood to experience future growth; need to expand and maintain infrastructure; ability to provide connectivity to adjacent conservation efforts; and feasibility of contributing to a plan that is scientifically defensible, flexible, and amenable to analysis and implementation. The plan area is broad enough to accommodate changes in jurisdictional boundaries over time, provided the boundaries do not extend beyond the boundaries of the plan area and project impacts do not exceed the take authorization provided by the final ITP.

Covered Activities

The proposed section 10 ITP may allow take of Covered Species resulting from proposed Covered Activities on non-Federal land in the YSRCP Plan Area. The Permit Applicants intend to request incidental take authorization for Covered Species that could be affected by activities identified in the YSRCP. The proposed activities within the YSRCP Plan Area for which ITP coverage is requested include construction and maintenance of facilities and infrastructure, both public and private, that are consistent with local general plans and local, State, and Federal laws. The following list is not intended to be exhaustive; rather, it provides an overview of the types of activities that would be expected to occur. Covered Activities fall into nine general categories, which are further described below:

1. Residential, commercial, industrial, and commercial agricultural facilities;
2. Recreational facilities;
3. Transportation facilities;
4. Public and private utilities;
5. Mining and mineral extraction;
6. Groundwater supply and delivery facilities;
7. Flood control maintenance and other stream-related facilities;
8. Wastewater and waste management facilities; and
9. Monitoring and management activities within the YSRCP reserves.

These categories were created to help organize Covered Activities into groupings that would have similar impacts on Covered Species. Covered Activities, which would normally be implemented or carried out in accordance with all other Federal, State, and local laws and regulations, are described in greater detail below. In addition to the description of Covered Activities below, the YSRP also contains a list of specific projects that are currently proposed and that would be covered by the Plan.

1. Residential, Commercial, Industrial, and Agricultural Facilities

This category includes construction, operation, maintenance, and use of residential, commercial, industrial, and agricultural facilities within the Plan Area. This category is intended to be as inclusive as possible, to accommodate both urban growth and public infrastructure projects; it includes the construction, operation, maintenance, and use of typical public and private urban and rural facilities. This category also includes the construction, maintenance, and use of urban and rural facilities, including residential, commercial, industrial, and other types of urban development and infrastructure; rural residential development and infrastructure; agricultural structures, warehouses, and processing facilities; and public service and community serving and cultural facilities, including fire and police stations, community and convention centers, recreation centers, and similar

facilities. Vegetation management and control and fuel management activities would also be included.

2. Recreational Facilities

This category includes construction, operation, maintenance, and use of recreational facilities in the Plan Area. This category is intended to be as inclusive as possible, to accommodate both urban growth and public infrastructure projects, and includes but is not limited to the construction, maintenance, and use of urban and rural facilities, including large recreational facilities such as golf courses, parks, and ball fields; recreational facilities maintenance; and improvements to and expansion of existing parks and bicycle and pedestrian trails. Trail maintenance activities, including vegetation management activities, and minor remediation projects within recreational facilities, are also proposed for inclusion.

3. Transportation Facilities

This category includes construction of transportation facilities in the Plan Area, including construction, operation, and maintenance of State highways, including addition of new lanes and off-ramps; paved and unpaved roads, bridges, culverts, and transit facilities; new construction and improvements, including road widening, bridges, intersection level-of-service improvements, grade separations, and sound wall installation; and road repair and rehabilitation, including construction of retaining walls to stabilize adjacent embankments. This category also includes channel modifications incidental to streambank stabilization and road restoration and vegetation management.

4. Public and Private Utilities

This category includes construction, operation and maintenance, and use of public and private utilities in the Plan Area, including transmission lines, telecommunication lines, telecommunication towers, and gas lines; vegetation management activities; maintenance of small utility facilities; and access and maintenance of infrastructure facilities.

5. Mining and Mineral Extraction

This category includes mining or mineral extraction in the Plan Area, including construction, operation, and maintenance of operations for mining of sand, soil, aggregate, and other mineral resources, and mineral extraction, including gas wells and gas pipelines.

6. Groundwater Supply and Delivery Facilities

This category includes construction of typical water supply and delivery facilities in the Plan Area, including water treatment plants, water supply pipelines, percolation ponds, and pump stations; groundwater recharge sites and associated facilities; maintenance of water supply facilities; and operation and maintenance of pump stations, operations yards, utility yards, and corporation yards. Surface water projects will not be covered under the YSRCP.

7. Flood Control Maintenance and Other Stream-Related Facilities

This category includes detention basins and other stream-related facilities in the Plan Area, including bank and levee stabilization and bank or levee improvements, including levee grouting. This includes the construction, operation and maintenance, and use of retention/detention ponds; channel modifications incidental to streambank stabilization associated with retention/detention ponds; bridge construction and replacement, including vehicular, train, and pedestrian bridges; culverts; restoration projects outside the reserve system; creek-side trail projects; and levee maintenance.

8. Wastewater and Waste Management Facilities

This category includes construction, operation and maintenance, and use of wastewater and waste management facilities in the Plan Area, including typical wastewater and waste management facilities; stormwater management facilities, such as storm sewer systems, nonpoint source reduction, outfalls, and drainage improvements; hazardous materials remediation for, and restoration related to, abandoned dumps; operation and maintenance of pump stations, operations yards, utility yards, and corporation yards; and sewage treatment plants, sanitary sewer systems (including rehabilitation of force mains and effluent lines, discharge and reclamation lines, and pump stations), water recycling, recycling centers, transfer stations, and landfills.

9. Monitoring and Management Activities Within the YSRCP Reserves

This includes projects and activities associated with implementation of the YSRCP's conservation strategy, most of which will take place within the reserve system assembled by the Plan. This includes construction and maintenance of recreational and management and maintenance and operational facilities and infrastructure; vegetation management; relocation of covered species from impact sites and within reserves as necessary; demolition or removal of structures, roads, or artificial livestock ponds to increase public safety or to restore habitat; control of introduced predators; stream maintenance for habitat purposes; surveys and monitoring for mitigation and restoration/enhancement projects; travel through reserves by various means for management or maintenance purposes; fire management hazardous materials remediation; repair of existing facilities damaged by floods or fire; and operations related to water supply for reserve management. This category also includes limited recreational use of YSRCP reserves and activities related to habitat enhancement, restoration, and creation, and species surveys, monitoring, and research.

Covered Species

Covered Species are those species addressed in the proposed YSRCP for which conservation actions will be implemented and for which the Permit Applicants will seek incidental take authorizations for a period of up to 50 years. Proposed Covered Species are expected to include threatened and endangered species listed under the Act, species listed under the CESA, and currently unlisted species that have the potential to become listed during the life of the YSRCP and have some likelihood to occur within the YSRCP Plan Area. The YSRCP is currently expected to address 18 listed and non-listed wildlife and plant species. The list of proposed Covered Species may change as the planning process progresses; species may be added or removed as more is learned about the nature of Covered Activities and their impact within the YSRCP Plan Area.

The following Federally listed threatened and endangered wildlife species are proposed to be covered by the YSRCP. The threatened vernal pool fairy shrimp (*Branchinecta lynchi*), endangered vernal pool tadpole shrimp (*Lepidurus packardi*), threatened valley elderberry longhorn beetle (*Desmocerus californicus dimorphus*), and the threatened giant garter snake (*Thamnophis gigas*).

The following unlisted wildlife species are proposed to be covered by the YSRCP: western spadefoot toad (*Spea hammondii*), western pond turtle (*Actinemys marmorata*), Swainson's hawk (*Buteo swainsoni*), western yellow-billed cuckoo (*Coccyzus americanus occidentalis*), bank swallow (*Riparia riparia*), California black rail (*Laterallus jamaicensis coturniculus*),

greater sandhill crane (*Grus canadensis tabida*), bald eagle (*Haliaeetus leucocephalus*), western burrowing owl (*Athene cunicularia hypugaea*), and tricolored blackbird (*Agelaius tricolor*).

''Take'' as defined under the Act does not apply to listed plant species, and therefore cannot be authorized under a section 10 permit. However, the Permit Applicants propose to include plant species on the permit in recognition of the conservation benefits provided for them under an HCP. For the purposes of the Plan, certain plant species are further included to meet regulatory obligations under section 7 of the Act and CESA. All species included on an ITP would receive assurances under the Service's ''No Surprises'' regulations found in 50 CFRs 17.22(b)(5) and 17.32(b)(5). The following unlisted plant species are proposed for inclusion in the YSRCP in recognition of the conservation benefits provided for them under the YSRCP and the assurances permit holders would receive if they are included on a permit: Bogg's Lake hedge-hyssop (*Gratiola heterosepala*), Ahart's dwarf rush (*Juncus leiospermus* var. *ahartii*), dwarf downingia (*Downingia pusilla*), and legenere (*Legenere limosa*). Bogg's Lake hedge-hyssop is listed as endangered under CESA.

Environmental Impact Statement

Before deciding whether to issue the requested Federal ITP, the Service will prepare a draft EIS in order to analyze the environmental impacts associated with issuance of the ITP. In the EIS component of the EIS/EIR, the Service will consider the following alternatives: (1) The proposed action, which includes the issuance of take authorizations consistent with the proposed YSRCP under Section 10(a)(1)(B) of the Act; (2) no action (no permit issuance); and (3) a reasonable range of additional alternatives. The EIS/EIR will include a detailed analysis of the impacts of the proposed action and alternatives. The range of alternatives could include variations in impacts, conservation, permit duration, Covered Species, Covered Activities, Permit Area, or a combination of these elements.

The EIS/EIR will identify and analyze potentially significant direct, indirect, and cumulative impacts of our authorization of incidental take (permit issuance) and the implementation of the proposed YSRCP on biological resources, land uses, utilities, air quality, water resources, cultural resources, socioeconomics and environmental justice, recreation, aesthetics, climate change and greenhouse gases, and other environmental issues that could occur with implementation of each alternative. The Service will also identify measures to avoid or minimize any significant effects of the proposed action on the quality of the human environment.

Following completion of the environmental review, the Service will publish a notice of availability and a request for comment on the Draft EIS/EIR and the applicants' permit application, which will include the proposed the YSRCP.

Public Comments

We request data, comments, new information, or suggestions from the public, other concerned governmental agencies, the scientific community, Tribes, industry, or any other interested party on this notice. We will consider these comments in developing a Draft EIS/EIR and in the development of an HCP and ITP. We particularly seek comments on the following:

1. Biological information concerning species in the proposed Plan Area;
2. Relevant data concerning these species;
3. Additional information concerning the range, distribution, population size, and population trends of the species;
4. Current or planned activities in the subject area and their possible impacts on the species;
5. The presence of archaeological sites, buildings and structures, historic events, sacred and traditional areas, and other historic preservation concerns, which are required to be considered in project planning by the National Historic Preservation Act; and
6. Identification of any other environmental issues that should be considered with regard to the proposed development and permit action.

You may submit your comments and materials by one of the methods listed in the **ADDRESSES** section.

Comments and materials we receive, as well as supporting documentation we use in preparing the EIS/EIR document, will be available for public inspection by appointment during normal business hours (Monday through Friday, 8 a.m. to 4:30 p.m.) at the Service's Sacramento address (see **ADDRESSES**).

Scoping Meetings

See **DATES** for the date and time of the scheduled public meeting. The purpose of the scoping meeting is to provide the public with a general understanding of the background of the proposed HCP and activities it would cover, alternative proposals under consideration for the Draft EIS, and the Service's role and steps to be taken to develop the Draft EIS for the proposed HCP/NCCP.

The primary purpose of these meetings and public comment period is to solicit suggestions and information on the scope of issues and alternatives for the Service to consider when drafting the EIS. Written comments will be accepted at the meeting. Comments can also be submitted by methods listed in the **ADDRESSES** section. Once the Draft EIS and proposed HCP/NCCP are complete and made available for review, there will be additional opportunity for public comment on the content of these documents through additional public comment periods.

Meeting Location Accommodations

Persons needing reasonable accommodations in order to attend and participate in the public meetings should contact Ellen McBride at (916) 414–6600 as soon as possible. In order to allow sufficient time to process requests, please call at least one week before the public meeting. Information regarding this proposed action is available in alternative formats upon request.

Authority

We publish this notice under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and its implementing regulations (40 CFR 1501.7, 1506.6, and 1508.22), as well as in compliance with section 10(c) of the Act (16 U.S.C. 1531 *et seq.*).

Dated: November 25, 2014.

Alexandra Pitts,

Deputy Regional Director, U.S. Fish and Wildlife Service, Pacific Southwest Region, Sacramento, California.

[FR Doc. 2014–29255 Filed 12–12–14; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[14XL 1109AF LLUTW01100 L12200000.AL0000 24 1A]

Notice of Closure: Target Shooting Public Safety Closure on the Lake Mountains in Utah County, UT

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management (BLM), pursuant to its regulations, is maintaining an existing closure of approximately 900 acres of public land on the Lake Mountains in Utah County, Utah, to the discharge or use of firearms or dangerous weapons

for the purposes of recreational target shooting to protect public safety, property and resources. This closure does not restrict other public activities or access to the Lake Mountains area.

DATES: This notice reestablishes the temporary target shooting closure order within the described area for no longer than two years from December 15, 2014, or earlier if a land use planning decision is completed.

FOR FURTHER INFORMATION CONTACT: Rebecca Hotze, Field Manager; Phone: 801–977–4300; Salt Lake Field Office; 2370 South Decker Lake Boulevard, West Valley City, Utah 84119; email: *blm_ut_sl_mail@blm.gov.*

Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal hours.

SUPPLEMENTARY INFORMATION: This temporary closure affects public lands on the Lake Mountains, Utah County, Utah. The legal description of the affected public lands is:

Salt Lake Meridian, Utah

T. 7 S., R. 1 E.
Sec. 6, lot 1, NE¼SE¼;
Sec. 7, lot 1.
T. 7 S., R. 1 W.
Sec. 13, lots 2, 11, 12 and portions of lots 3, 4, 9, and 10, and the SE¼SW¼ lying east of the 345 KV power line*;
Sec. 24, portions of lots 1–3, 10, 13, 17, 18, and portions of lots 11 and 12, and the NW¼ lying east of the 345 KV power line*;
Sec. 26, NW¼NE¼, NW¼SW¼, and portions of the N½NW¼ lying east of the 345 KV power line*;
*BLM right-of-way UTU 0115794.
The area described contains approximately 900 acres more or less.

The Salt Lake Field Office hereby closes a portion of the Lake Mountains, Utah County, Utah, to all target shooting for public safety reasons. The area will be closed under the authority of 43 CFR 8364.1—Closures and Restrictions and in conformance with BLM Washington Office Instruction Memorandum 2013–035, Requirements for Processing and Approving Temporary Public Land Closure and Restriction Orders. Due to unsafe conditions and danger to the public, it is imperative for the BLM to reestablish the closure on the area.

The Lake Mountains are a small mountain range located on the west side of Utah Lake. The range is only about 8 miles wide and 12 miles long. The city of Saratoga Springs borders the north side of the mountains and Eagle Mountain City is along the west side. State Highway 68 runs along the eastern bench of the Lake Mountains; it is a main arterial road and is used by residential, agricultural and recreational traffic. There are a number of communication sites on the top of the mountain, as well as a major power line that runs along a lower elevation ridge. Across Highway 68, there are private residences along the lake shore. Utah Lake is a popular area for recreationists, boaters, and anglers. A lake access point known as ''the Knolls'' is one of the few public access points on the western shoreline and is located just off Highway 68. The Lake Mountains are comprised of a mixed ownership pattern of lands managed by the BLM, Utah School and Institutional Trust Lands Administration (SITLA), and several private property owners. The area encompassed by the closure is primarily used by residents of Utah County and southern Salt Lake County for target shooting.

Prior to the 2012 closure, the Lake Mountains received about 4,000 target shooters each month; and on weekends, as many as 400 shooters concentrated into 5 areas, and other dispersed locations. The slopes of the Lake Mountains provide a natural backstop ideal for target shooting; however, some shooters chose to target practice in the relatively flat terrain on the lower slopes. Given the topography of the area and the number of people who visit it, the area subject to this Order is not conducive to safe target shooting. Target shooting in the area has resulted in nearby private residences being shot and near-misses of automobiles and people. An additional danger is the annual threat from target shooting-related wildfires adjacent to private residences, a major power line located on the eastern bench, communication towers on the ridge top, and public land resources.

The previous two-year closure proved effective in redirecting target shooting to safer locations, allowing cleanup of the area, eliminating illegal dumping and significantly reducing target shooting-related wildfires. Since the implementation of the closure in August 2012, no near-misses from errant gunfire have been reported to law enforcement.

Since the implementation of the original 2012 target shooting safety closure, several additional actions have been taken by private landowners, other agency partners and the BLM to augment the closure. Regular patrols have been conducted by the Utah County Sheriff's Office, BLM law enforcement rangers and private property owners. Barricades have been installed to identify the closure boundary, especially along private property and in areas receiving recurring violations, such as the Little Cove area. Utah County is completing the construction of a fence along the west side of Highway 68 with gates to allow public access on a few controlled routes. Utah County also has started planning for development of a nearby managed target shooting range. In April 2014, SITLA closed approximately 1,500 acres of state lands adjacent to and near the BLM closure to recreational access. Additionally, the BLM is initiating an amendment to its land use plan to develop a more permanent solution for the target shooting issues in this area. With the closure and these subsequent actions, volunteers have been able to clean up the large amounts of trash and household appliances in these areas.

This closure is made under the authority of the regulations in 43 CFR 8364.1—Closures and Restrictions, and is in conformance with BLM Washington Office Instruction Memorandum 2013–035, Requirements for Processing and Approving Temporary Public Land Closure and Restriction Orders. 43 CFR 8364.1(a) states: ''To protect persons, property, and public lands and resources, the authorized officer may issue an order to close or restrict use of designated public lands.'' The closure only applies to the discharge or use of firearms or dangerous weapons for the purposes of recreational target shooting and does not affect legal hunting. Any person who violates the above restriction may be tried before a United States Magistrate and fined no more than $1,000, imprisoned for no more than 12 months, or both. Such violations also may be subject to the enhanced fines provided for in 18 U.S.C. 3571.

Authority: 43 CFR 8364.1

Jenna Whitlock,
Associate State Director.

[FR Doc. 2014–29277 Filed 12–12–14; 8:45 am]
BILLING CODE 4310–DQ–P

DEPARTMENT OF INTERIOR

National Park Service

[NPS–SERO–BICY–16765; PPSESEROC3, PMP00UP05.YP0000]

Assessment of Eligible and Ineligible Lands for Consideration as Wilderness Areas, Big Cypress National Preserve

AGENCY: National Park Service, Interior.

ACTION: Notice of intent to assess Big Cypress National Preserve lands for wilderness eligibility.

SUMMARY: Pursuant to the Wilderness Act of 1964, and in accordance with National Park Service (NPS) *Management Policies* (2006), Section 6.2.1, the NPS intends to assess lands within the original 1974 legislated boundary of Big Cypress National Preserve for wilderness eligibility. A determination of eligibility and subsequent future actions will be announced in the **Federal Register** upon completion of the assessment.

DATES: The eligibility assessment began on September 16, 2014 and is anticipated to be completed by January 30, 2015.

FOR FURTHER INFORMATION CONTACT: Suggestions, comments, and requests for further information should be directed to Big Cypress National Preserve Chief of Interpretation Bob Degross by phone at 239–695–2000, via email at *Bob_DeGross@nps.gov,* or by mail at Big Cypress National Preserve, 33100 Tamiami Trail East Ochopee, Florida 34141.

Dated: November 19, 2014.

Sherri L. Fields,

Acting Regional Director, Southeast Region.

[FR Doc. 2014–29259 Filed 12–12–14; 8:45 am]

BILLING CODE 4310–JD–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–911]

Certain Lithium Silicate Materials and Products Containing the Same; Commission Determination Not To Review an Initial Determination Granting a Joint Motion To Terminate the Investigation Based on a Settlement Agreement; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (''ID'') (Order No. 16) granting a joint motion to terminate the investigation based on a settlement agreement.

FOR FURTHER INFORMATION CONTACT: Lucy Grace D. Noyola, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone 202–205–3438. 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 (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on March 27, 2014, based on a complaint filed by Ivoclar Vivadent AG of Schaan, Liechtenstein; Ivoclar Vivadent, Inc. of Amherst, New York; and Ivoclar Vivadent Manufacturing Inc. of Somerset, New Jersey (collectively, ''Ivoclar''). 79 FR 17180, 17180–81 (Mar. 27, 2014). The complaint alleges violations of Section 337 of the Tariff Act of 1930, as amended, 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 lithium silicate materials and products containing the same by reason of infringement of certain claims of U.S. Patent Nos. 8,047,021 and 8,444,756. *Id.* at 17180. The notice of investigation names as respondents Dentsply International Inc. of York, Pennsylvania; Dentsply Prosthetics U.S. LLC, a/k/a Dentsply Ceramco, of York, Pennsylvania; and DeguDent GmbH of Hanau-Wolfgang, Germany (collectively, ''Respondents''). *Id.* at 17181. The Office of Unfair Import Investigations (OUII) also was named as a party to the investigation. *Id.*

On October 29, 2014, Ivoclar and Respondents filed a joint motion to terminate this investigation in its entirety on the basis of a settlement agreement. On November 6, 2014, the Commission Investigative Staff (''Staff'') filed a response supporting the motion.

On November 10, 2014, the presiding administrative law judge (''ALJ'') issued Order No. 16, granting the motion. The ALJ found that the joint motion complies with the Commission Rules. Specifically, the ALJ found that (1) the moving parties submitted their settlement agreement and a statement that they have no other agreements concerning the subject matter of this investigation and (2) the moving parties and Staff believe that granting the motion would not be contrary to the public interest. The ALJ also noted that termination of litigation under these circumstances as an alternative method of dispute resolution is generally in the public interest and will conserve public and private resources. No petitions for review were filed.

The Commission has determined not to review the subject ID.

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).

Issued: December 9, 2014.

By order of the Commission.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2014–29230 Filed 12–12–14; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2011–0059]

Occupational Exposure to Hazardous Chemicals in Laboratories Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning its proposal to extend OMB approval of the information collection requirements specified in the Standard on Occupational Exposure to Hazardous Chemicals in Laboratories.

DATES: Comments must be submitted (postmarked, sent, or received) by February 13, 2015.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov*, which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit your comments and attachments to the

OSHA Docket Office, Docket No. OSHA–2011–0059, U.S. Department of Labor, Room N–2625, 200 Constitution Avenue NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and the OSHA docket number (OSHA–2011–0059) for the Information Collection Request (ICR). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments see the ''Public Participation'' heading in the section of this notice titled ''**SUPPLEMENTARY INFORMATION.**''

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download from the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney at the address below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Theda Kenney or Todd Owen, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accord with the Paperwork Reduction Act of 1995 (PRA–95)(44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

The Standard entitled ''Occupational Exposure to Hazardous Chemicals in Laboratories'' (29 CFR 1910.1450; the ''Standard'') applies to laboratories that use hazardous chemicals in accord with the Standard's definitions for ''laboratory use of hazardous chemicals'' and ''laboratory scale.'' The Standard requires these laboratories to maintain worker exposures at or below the permissible exposure limits specified for the hazardous chemicals in 29 CFR part 1910, subpart Z. The laboratories do so by developing a written Chemical Hygiene Plan (CHP) that describes the following: standard operating procedures for using hazardous chemicals; hazard-control techniques; equipment-reliability measures; worker information and training programs; conditions under which the employer must approve operations, procedures, and activities before implementation; and medical consultations and examinations. The CHP also designates personnel responsible for implementing the CHP, and specifies the procedures to be used to provide additional protection to workers exposed to particularly hazardous chemicals.

Other information collection requirements of the Standard include: documenting exposure monitoring results; notifying workers in writing of these results; presenting specified information and training to workers; establishing a medical surveillance program for overexposed workers; providing required information to the physician; obtaining the physician's written opinion on using proper respiratory equipment; and establishing, maintaining, transferring, and disclosing exposure monitoring and medical records. These collection of information requirements, including the CHP, control worker overexposure to hazardous laboratory chemicals, thereby preventing serious illnesses and death among workers exposed to such chemicals.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions to protect workers, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA is proposing to extend the information collection requirements contained in the Occupational Exposure to Hazardous Chemicals in Laboratories Standard (29 CFR 1910.1450). The Agency is requesting to increase the existing burden hour estimate for the collection of information requirements in the Standard. In this regard, the Agency is requesting to adjust the current burden hour estimate from 293,373 to 332,350 hours a total increase of 38,977 hours.

Type of Review: Extension of currently approved collections.

Title: Occupational Exposure to Hazardous Chemicals in Laboratories.

OMB Number: 1218–0131.

Affected Public: Business or other for-profits.

Number of Respondents: 64,404.

Frequency of Responses: Annually; monthly, quarterly, semi-annually, on occasion.

Total Responses: 990,403.

Average Time per Response: Varies from 3 minutes (.05 hour) to replace the safe practice manual to 1 hour to develop a new manual.

Estimated Total Burden Hours: 332,350.

Estimated Cost (Operation and Maintenance): $0.

IV. Public Participation—Submission of Comments on this Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name

and the OSHA docket number (Docket No. OSHA–2011–0059) for the ICR. You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or a facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled ADDRESSES). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger or courier service, please contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and date of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download from this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* Web site to submit comments and access the docket is available at the Web site's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available from the Web site, and for assistance in using the Internet to locate docket submissions.

V. Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC, on December 9, 2014.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2014–29239 Filed 12–12–14; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL COUNCIL ON DISABILITY

Sunshine Act Meetings

TIME AND DATES: The Members of the National Council on Disability (NCD) will hold a quarterly meeting on Monday, January 12, 2015, from 11 a.m. to 1 p.m., Eastern Time.

PLACE: This meeting will occur by phone. NCD staff will participate in the call from the NCD office at 1331 F Street NW., Suite 850, Washington, DC 20004. Interested parties may join the meeting in person at the NCD office or may join the phone line in a listening-only capacity (other than the period allotted for by-phone public comment) using the following call-in number: 888–430–8691; Conference ID: 1272932; Conference Title: NCD Meeting; Host Name: Jeff Rosen.

MATTERS TO BE CONSIDERED: The Council will discuss and vote on its forthcoming report on defining and measuring home- and community-based services; will receive an overview of the upcoming 114th Congress; and receive its annual ethics training.

AGENDA: The times provided below are approximations for when each agenda item is anticipated to be discussed (all times Eastern):

Monday, January 12, 2015

11 a.m.–11:30 a.m. Call to Order and Council Reports
11:30 a.m.–12 p.m. Review and Approve the Home- and Community-Based Services report
12 p.m.–12:30 p.m. Briefing on the 114th Congress
12:30 p.m.–1 p.m. Annual Ethics Training
1 p.m. Adjournment

PUBLIC COMMENT: Due to the brevity of the meeting, NCD will limit public comment to email submissions only. Any individual interested in providing public comment should send his or her submission to *PublicComment@ncd.gov* with the subject line ''Public Comment'' and include his or her name, organization, and state in the body of the email.

CONTACT PERSON FOR MORE INFORMATION: Anne Sommers, NCD, 1331 F Street NW., Suite 850, Washington, DC 20004; 202–272–2004 (V), 202–272–2074 (TTY).

ACCOMMODATIONS: A CART streamtext link has been arranged for this teleconference meeting. The web link to access CART is *http://www.streamtext.net/text.aspx?event=011215ncd1100am.* Those who plan to attend the meeting in-person and require accommodations should notify NCD as soon as possible to allow time to make arrangements. To help reduce exposure to fragrances for those with multiple chemical sensitivities, NCD requests that all those attending the meeting in person refrain from wearing scented personal care products such as perfumes, hairsprays, and deodorants.

Dated: December 11, 2014.

Rebecca Cokley,

Executive Director.

[FR Doc. 2014–29401 Filed 12–11–14; 11:15 am]

BILLING CODE 8421–03–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meetings of Humanities Panel

AGENCY: National Endowment for the Humanities.

ACTION: Notice of Meetings.

SUMMARY: The National Endowment for the Humanities will hold three meetings of the Humanities Panel, a federal advisory committee, during January, 2015. The purpose of the meetings is for panel review, discussion, evaluation, and recommendation of applications for financial assistance under the National Foundation on the Arts and Humanities Act of 1965.

DATES: See Supplementary Information section for meeting dates.

ADDRESSES: The meetings will be held at The John W. Kluge Center at the Library of Congress, 101 Independence Avenue SE., Washington, DC 20540–4860.

FOR FURTHER INFORMATION CONTACT: Lisette Voyatzis, Committee Management Officer, 400 7th Street SW., Room 4060, Washington, DC 20506; (202)606–8322; *evoyatzis@neh.gov.* Hearing-impaired individuals who prefer to contact us by phone may use NEH's TDD terminal at (202) 606–8282.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App.), notice is hereby given of the following meetings:

1. DATE: January 27, 2015
TIME: 8:30 a.m. to 5:00 p.m.
This meeting will discuss applications for Kluge Fellowships, submitted to the division of Research Programs.
2. DATE: January 28, 2015
TIME: 8:30 a.m. to 5:00 p.m.
This meeting will discuss applications for Kluge Fellowships, submitted to the division of Research Programs.
3. DATE: January 29, 2015
TIME: 8:30 a.m. to 5:00 p.m.

This meeting will discuss applications for Kluge Fellowships, submitted to the division of Research Programs.

Because these meetings will include review of personal and/or proprietary financial and commercial information given in confidence to the agency by grant applicants, the meetings will be closed to the public pursuant to sections 552b(c)(4) and 552b(c)(6) of Title 5, U.S.C., as amended. I have made this determination pursuant to the authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee Meetings dated July 19, 1993.

Dated: December 9, 2014.

Lisette Voyatzis,

Committee Management Officer.

[FR Doc. 2014–29214 Filed 12–12–14; 8:45 am]

BILLING CODE 7536–01–P

NATIONAL LABOR RELATIONS BOARD

Notice of Appointments of Individuals to Serve as Members of Performance Review Boards

Authority: 5 U.S.C. 4314(c)(4).

AGENCY: National Labor Relations Board.

ACTION: The National Labor Relations Board is issuing this notice that the individuals whose names and position titles appear below have been appointed to serve as members of performance review boards in the National Labor Relations Board for the rating year beginning October 1, 2013 and ending September 30, 2014.

Name and Title

Kathleen A. Nixon—Deputy Chief Counsel to the Chairman

Gary W. Shinners—Executive Secretary

William B. Cowen—Solicitor

Robert Schiff—Chief of Staff for the Chairman

Anne G. Purcell—Associate General Counsel, Division of Operations Management

Linda Dreeben—Deputy Associate General Counsel, Division of Enforcement Litigation

Margery Lieber—Associate General Counsel, Division of Legal Counsel

Barry J. Kearney—Associate General Counsel, Division of Advice

FOR FURTHER INFORMATION CONTACT: Gary Shinners, Executive Secretary, National Labor Relations Board, 1099 14th Street NW., Washington, DC 20570, (202) 273–3737 (this is not a toll-free number), 1–866–315–6572 (TTY/TDD).

By Direction of the Board,

William B. Cowen,

Solicitor.

[FR Doc. 2014–29278 Filed 12–12–14; 8:45 am]

BILLING CODE 7545–01–P

OFFICE OF PERSONNEL MANAGEMENT

Excepted Service; Consolidated Listing of Schedules A, B, and C Exceptions

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: This provides the consolidated notice of all agency specific excepted authorities, approved by the Office of Personnel Management (OPM), under Schedule A, B, and C, as of June 30, 2014, as required by Civil Service Rule VI, Exceptions from the Competitive Service.

FOR FURTHER INFORMATION CONTACT: Senior Executive Resources Services, Senior Executive Service and Performance Management, Employee Services, (202) 606–2246.

SUPPLEMENTARY INFORMATION: Civil Service Rule VI (5 CFR 6.1) requires the U.S. Office of Personnel Management (OPM) to publish notice of exceptions granted under Schedule A, B, and C. Under 5 CFR 213.103(a) it is required that all Schedule A, B, and C appointing authorities available for use by all agencies to be published as regulations in the **Federal Register** (FR) and the Code of Federal Regulations (CFR). Excepted appointing authorities established solely for use by one specific agency do not meet the standard of general applicability prescribed by the **Federal Register** Act for regulations published in either the FR or the CFR. Therefore, 5 CFR 213.103(b) requires monthly publication, in the Notices section of the **Federal Register**, of any Schedule A, B, and C appointing authorities applicable to a single agency. Under 5 CFR 213.103(c) it is required that a consolidated listing of all Schedule A, B, and C authorities, current as of June 30 of each year, be published annually in the Notices section of the **Federal Register** at *www.federalregister.gov/agencies/personnel-management-office.* That notice follows. Governmentwide authorities codified in the CFR are not printed in this notice.

When making appointments under an agency-specific authority, agencies should first list the appropriate Schedule A, B, or C, followed by the applicable number, for example: Schedule A, 213.3104(x)(x). Agencies are reminded that all excepted authorities are subject to the provisions of 5 CFR part 302 unless specifically exempted by OPM at the time of approval.

OPM maintains continuing information on the status of all Schedule A, B, and C appointing authorities. Interested parties needing information about specific authorities during the year may obtain information by writing to the Senior Executive Resource Services, Office of Personnel Management, 1900 E Street NW., Room 7412, Washington, DC 20415, or by calling (202) 606–2246.

The following exceptions are current as of June 30, 2014.

Schedule A

03. Executive Office of the President (Sch. A, 213.3103)

(a) Office of Administration—

(1) Not to exceed 75 positions to provide administrative services and support to the White House Office.

(b) Office of Management and Budget—

(1) Not to exceed 20 positions at General Schedule (GS) grades 5 through 15.

(2) Not to Exceed 34 positions that require unique technical skills needed for the re-designing and re-building of digital interfaces between citizens, businesses, and Government as a part of the Smarter Information Technology Delivery initiative. This authority may be used to make permanent, time-limited and temporary appointments to Digital Services Expert positions (GS–301) directly related to the implementation of the Smarter Information Technology Delivery initiative at the GS–14 to 15 level. No new appointments may be made under this authority after September 30, 2016.

(c) Council on Environmental Quality—

(1) Professional and technical positions in grades GS–9 through 15 on the staff of the Council.

(d)–(f) (Reserved)

(g) National Security Council—

(1) All positions on the staff of the Council.

(h) Office of Science and Technology Policy—

(1) Thirty positions of Senior Policy Analyst, GS–15; Policy Analyst, GS–11 through 14; and Policy Research Assistant, GS–9, for employment of anyone not to exceed 5 years on projects of a high priority nature.

(i) Office of National Drug Control Policy—

(1) Not to exceed 18 positions, GS–15 and below, of senior policy analysts and other personnel with expertise in drug-related issues and/or technical knowledge to aid in anti-drug abuse efforts.

04. Department of State (Sch. A, 213.3104)

(a) Office of the Secretary—

(1) All positions, GS–15 and below, on the staff of the Family Liaison Office, Director General of the Foreign Service and the Director of Personnel, Office of the Under Secretary for Management.

(2) (Reserved)

(b)–(f) (Reserved)

(g) Bureau of Population, Refugees, and Migration—

(1) Not to exceed 10 positions at grades GS–5 through 11 on the staff of the Bureau.

(h) Bureau of Administration—

(1) (Reserved)

(2) One position of the Director, Art in Embassies Program, GM–1001–15.

(3) (Reserved)

05. Department of the Treasury (Sch. A, 213.3105)

(a) Office of the Secretary—

(1) Not to exceed 20 positions at the equivalent of GS–13 through 17 to supplement permanent staff in the study of complex problems relating to international financial, economic, trade, and energy policies and programs of the Government, when filled by individuals with special qualifications for the particular study being undertaken.

(2) Covering no more than 100 positions supplementing permanent staff studying domestic economic and financial policy, with employment not to exceed 4 years.

(3) Not to exceed 100 positions in the Office of the Under Secretary for Terrorism and Financial Intelligence.

(4) Up to 35 temporary or time-limited positions at the GS–9 through 15 grade levels to support the organization, design, and stand-up activities for the Consumer Financial Protection Bureau (CFPB), as mandated by P.L. 111–203. This authority may be used for the following series: GS–201, GS–501, GS–560, GS–1035, GS–1102, GS–1150, GS–1720, GS–1801, and GS–2210. No new appointments may be made under this authority after July 21, 2011, the designated transfer date of the CFPB.

(b)–(d) (Reserved)

(e) Internal Revenue Service—

(1) Twenty positions of investigator for special assignments.

(f) (Reserved)

(g) (Reserved, moved to DOJ)

(h) Office of Financial Responsibility—

(1) Positions needed to perform investment, risk, financial, compliance, and asset management requiring unique qualifications currently not established by OPM. Positions will be in the Office of Financial Stability at GS–12 through 15 or Senior Level (SL), for initial employment not to exceed 4 years. No new appointments may be made under this authority after December 31, 2012.

06. Department of Defense (Sch. A, 213.3106)

(a) Office of the Secretary—

(1)–(5) (Reserved)

(6) One Executive Secretary, US–USSR Standing Consultative Commission and Staff Analyst (SALT), Office of the Assistant Secretary of Defense (International Security Affairs).

(b) Entire Department (including the Office of the Secretary of Defense and the Departments of the Army, Navy, and Air Force) —

(1) Dependent School Systems overseas—Professional positions in Military Dependent School systems overseas.

(2) Positions in Attaché 1 systems overseas, including all professional and scientific positions in the Naval Research Branch Office in London.

(3) Positions of clerk-translator, translator, and interpreter overseas.

(4) Positions of Educational Specialist the incumbents of which will serve as Director of Religious Education on the staffs of the chaplains in the military services.

(5) Positions under the program for utilization of alien scientists, approved under pertinent directives administered by the Director of Defense Research and Engineering of the Department of Defense, when occupied by alien scientists initially employed under the program including those who have acquired United States citizenship during such employment.

(6) Positions in overseas installations of the DOD when filled by dependents of military or civilian employees of the U.S. Government residing in the area. Employment under this authority may not extend longer than 2 months following the transfer from the area or separation of a dependent's sponsor: Provided that

(i) A school employee may be permitted to complete the school year; and

(ii) An employee other than a school employee may be permitted to serve up to 1 additional year when the military department concerned finds that the additional employment is in the interest of management.

(7) Twenty secretarial and staff support positions at GS–12 or below on the White House Support Group.

(8) Positions in DOD research and development activities occupied by participants in the DOD Science and Engineering Apprenticeship Program for High School Students. Persons employed under this authority shall be bona fide high school students, at least 14 years old, pursuing courses related to the position occupied and limited to 1,040 working hours a year. Children of DOD employees may be appointed to these positions, notwithstanding the sons and daughters restriction, if the positions are in field activities at remote locations. Appointments under this authority may be made only to positions for which qualification standards established under 5 CFR part 302 are consistent with the education and experience standards established for comparable positions in the competitive service. Appointments under this authority may not be used to extend the service limits contained in any other appointing authority.

(9) (Reserved)

(10) Temporary or time-limited positions in direct support of U.S. Government efforts to rebuild and create an independent, free and secure Iraq and Afghanistan, when no other appropriate appointing authority applies. Positions will generally be located in Iraq or Afghanistan, but may be in other locations, including the United States, when directly supporting operations in Iraq or in Afghanistan. No new appointments may be made under this authority after September 30, 2014.

(11) Not to exceed 3,000 positions that require unique cyber security skills and knowledge to perform cyber risk and strategic analysis, incident handling and malware/vulnerability analysis, program management, distributed control systems security, cyber incident response, cyber exercise facilitation and management, cyber vulnerability detection and assessment, network and systems engineering, enterprise architecture, investigation, investigative analysis and cyber-related infrastructure inter-dependency analysis. This authority may be used to make permanent, time-limited and temporary appointments in the following occupational series: Security (GS–0080), Computer engineers (GS–0854), Electronic engineers (GS–0855), Computer scientists (GS–1550), Operations research (GS–1515), Criminal investigators (GS–1811), Telecommunications (GS–0391), and IT specialists (GS–2210). Within the scope of this authority, the U.S. Cyber Command is also authorized to hire

miscellaneous administrative and program (GS–0301) series when those positions require unique cyber security skills and knowledge. All positions will be at the GS 09 through 15 or equivalent. No new appointments may be made under this authority after December 31, 2014.

(c) (Reserved)

(d) General—

(1) Positions concerned with advising, administering, supervising, or performing work in the collection, processing, analysis, production, evaluation, interpretation, dissemination, and estimation of intelligence information, including scientific and technical positions in the intelligence function; and positions involved in the planning, programming, and management of intelligence resources when, in the opinion of OPM, it is impracticable to examine. This authority does not apply to positions assigned to cryptologic and communications intelligence activities/functions.

(2) Positions involved in intelligence-related work of the cryptologic intelligence activities of the military departments. This includes all positions of intelligence research specialist, and similar positions in the intelligence classification series; all scientific and technical positions involving the applications of engineering, physical, or technical sciences to intelligence work; and professional as well as intelligence technician positions in which a majority of the incumbent's time is spent in advising, administering, supervising, or performing work in the collection, processing, analysis, production, evaluation, interpretation, dissemination, and estimation of intelligence information or in the planning, programming, and management of intelligence resources.

(e) Uniformed Services University of the Health Sciences—

(1) Positions of President, Vice Presidents, Assistant Vice Presidents, Deans, Deputy Deans, Associate Deans, Assistant Deans, Assistants to the President, Assistants to the Vice Presidents, Assistants to the Deans, Professors, Associate Professors, Assistant Professors, Instructors, Visiting Scientists, Research Associates, Senior Research Associates, and Postdoctoral Fellows.

(2) Positions established to perform work on projects funded from grants.

(f) National Defense University—

(1) Not to exceed 16 positions of senior policy analyst, GS–15, at the Strategic Concepts Development Center. Initial appointments to these positions may not exceed 6 years, but may be extended thereafter in 1-, 2-, or 3-year increments, indefinitely.

(g) Defense Communications Agency—

(1) Not to exceed 10 positions at grades GS–10/15 to staff and support the Crisis Management Center at the White House.

(h) Defense Acquisition University—

(1) The Provost and professors.

(i) George C. Marshall European Center for Security Studies, Garmisch, Germany—

(1) The Director, Deputy Director, and positions of professor, instructor, and lecturer at the George C. Marshall European Center for Security Studies, Garmisch, Germany, for initial employment not to exceed 3 years, which may be renewed in increments from 1 to 2 years thereafter.

(j) Asia-Pacific Center for Security Studies, Honolulu, Hawaii—

(1) The Director, Deputy Director, Dean of Academics, Director of College, deputy department chairs, and senior positions of professor, associate professor, and research fellow within the Asia Pacific Center. Appointments may be made not to exceed 3 years and may be extended for periods not to exceed 3 years.

(k) Business Transformation Agency—

(1) Fifty temporary or time-limited (not to exceed four years) positions, at grades GS–11 through 15. The authority will be used to appoint persons in the following series: Management and Program Analysis, GS–343: Logistics Management, GS–346; Financial Management Programs, GS–501; Accounting, GS–510; Computer Engineering, GS–854; Business and Industry, GS–1101; Operations Research, GS–1515; Computer Science, GS–1550; General Supply, GS–2001; Supply Program Management, GS–2003; Inventory Management, GS–2010; and Information Technology, GS–2210.

(l) Special Inspector General for Afghanistan—

(1) Positions needed to establish the Special Inspector General for Afghanistan Reconstruction. These positions provide for the independent and objective conduct and supervision of audits and investigations relating to the programs and operations funded with amounts appropriated and otherwise made available for the reconstruction of Afghanistan. These positions are established at GS grade levels for initial employment not to exceed 3 years and may, with prior approval of OPM, be extended for an additional period of 2 years. No new appointments may be made under this authority after January 31, 2011.

07. Department of the Army (Sch. A, 213.3107)

(a)–(c) (Reserved)

(d) U.S. Military Academy, West Point, New York—

(1) Civilian professors, instructors, teachers (except teachers at the Children's School), Cadet Social Activities Coordinator, Chapel Organist and Choir-Master, Director of Intercollegiate Athletics, Associate Director of Intercollegiate Athletics, Coaches, Facility Manager, Building Manager, three Physical Therapists (Athletic Trainers), Associate Director of Admissions for Plans and Programs, Deputy Director of Alumni Affairs; and Librarian when filled by an officer of the Regular Army retired from active service, and the Military Secretary to the Superintendent when filled by a U.S. Military Academy graduate retired as a regular commissioned officer for disability.

(e)–(f) (Reserved)

(g) Defense Language Institute—

(1) All positions (professors, instructors, lecturers) which require proficiency in a foreign language or knowledge of foreign language teaching methods.

(h) Army War College, Carlisle Barracks, PA—

(1) Positions of professor, instructor, or lecturer associated with courses of instruction of at least 10 months duration for employment not to exceed 5 years, which may be renewed in 1-, 2-, 3-, 4-, or 5-year increments indefinitely thereafter.

(i) (Reserved)

(j) U.S. Military Academy Preparatory School, Fort Monmouth, New Jersey—

(1) Positions of Academic Director, Department Head, and Instructor.

(k) U.S. Army Command and General Staff College, Fort Leavenworth, Kansas—

(1) Positions of professor, associate professor, assistant professor, and instructor associated with courses of instruction of at least 10 months duration, for employment not to exceed up to 5 years, which may be renewed in 1-, 2-, 3-, 4-, or 5-year increments indefinitely thereafter.

08. Department of the Navy (Sch. A, 213.3108)

(a) General—

(1)–(14) (Reserved)

(15) Marine positions assigned to a coastal or seagoing vessel operated by a naval activity for research or training purposes.

(16) All positions necessary for the administration and maintenance of the official residence of the Vice President.

(b) Naval Academy, Naval Postgraduate School, and Naval War College—

(1) Professors, Instructors, and Teachers; the Director of Academic Planning, Naval Postgraduate School; and the Librarian, Organist-Choirmaster, Registrar, the Dean of Admissions, and Social Counselors at the Naval Academy.

(c) Chief of Naval Operations—

(1) One position at grade GS–12 or above that will provide technical, managerial, or administrative support on highly classified functions to the Deputy Chief of Naval Operations (Plans, Policy, and Operations).

(d) Military Sealift Command

(1) All positions on vessels operated by the Military Sealift Command.

(e)–(f) (Reserved)

(g) Office of Naval Research—

(1) Scientific and technical positions, GS–13 through 15, in the Office of Naval Research International Field Office which covers satellite offices within the Far East, Africa, Europe, Latin America, and the South Pacific. Positions are to be filled by personnel having specialized experience in scientific and/or technical disciplines of current interest to the Department of the Navy.

09. Department of the Air Force (Sch. A, 213.3109)

(a) Office of the Secretary—

(1) One Special Assistant in the Office of the Secretary of the Air Force. This position has advisory rather than operating duties except as operating or administrative responsibilities may be exercised in connection with the pilot studies.

(b) General—

(1) Professional, technical, managerial and administrative positions supporting space activities, when approved by the Secretary of the Air Force.

(2) Two hundred positions, serviced by Hill Air Force Base, Utah, engaged in interdepartmental activities in support of national defense projects involving scientific and technical evaluations.

(c) Norton and McClellan Air Force Bases, California—

(1) Not to exceed 20 professional positions, GS–11 through 15, in Detachments 6 and 51, SM–ALC, Norton and McClellan Air Force Bases, California, which will provide logistic support management to specialized research and development projects.

(d) U.S. Air Force Academy, Colorado—

(1) (Reserved)

(2) Positions of Professor, Associate Professor, Assistant Professor, and Instructor, in the Dean of Faculty, Commandant of Cadets, Director of Athletics, and Preparatory School of the United States Air Force Academy.

(e) (Reserved)

(f) Air Force Office of Special Investigations—

(1) Positions of Criminal Investigators/Intelligence Research Specialists, GS–5 through 15, in the Air Force Office of Special Investigations.

(g) Wright-Patterson Air Force Base, Ohio—

(1) Not to exceed eight positions, GS–12 through 15, in Headquarters Air Force Logistics Command, DCS Material Management, Office of Special Activities, Wright-Patterson Air Force Base, Ohio, which will provide logistic support management staff guidance to classified research and development projects.

(h) Air University, Maxwell Air Force Base, Alabama—

(1) Positions of Professor, Instructor, or Lecturer.

(i) Air Force Institute of Technology, Wright-Patterson Air Force Base, Ohio—

(1) Civilian deans and professors.

(j) Air Force Logistics Command—

(1) One Supervisory Logistics Management Specialist, GM–346–14, in Detachment 2, 2762nd Logistics Management Squadron (Special), Greenville, Texas.

(k) Wright-Patterson AFB, Ohio—

(1) One position of Supervisory Logistics Management Specialist, GS–346–15, in the 2762nd Logistics Squadron (Special), at Wright-Patterson Air Force Base, Ohio.

(l) Air National Guard Readiness Center—

(1) One position of Commander, Air National Guard Readiness Center, Andrews Air Force Base, Maryland.

10. Department of Justice (Sch. A, 213.3110)

(a) General—

(1) Deputy U.S. Marshals employed on an hourly basis for intermittent service.

(2) Positions at GS–15 and below on the staff of an office of a special counsel.

(3)–(5) (Reserved)

(6) Positions of Program Manager and Assistant Program Manager supporting the International Criminal Investigative Training Assistance Program in foreign countries. Initial appointments under this authority may not exceed 2 years, but may be extended in 1-year increments for the duration of the in-country program.

(7) Positions necessary throughout DOJ, for the excepted service transfer of NDIC employees hired under Schedule A, 213.3110(d). Authority expires September 30, 2012.

(b) (Reserved)

(c) Drug Enforcement Administration—

(1) (Reserved)

(2) Four hundred positions of Intelligence Research Agent and/or Intelligence Operation Specialist in the GS–132 series, grades GS–9 through 15.

(3) Not to exceed 200 positions of Criminal Investigator (Special Agent). New appointments may be made under this authority only at grades GS–7 through 11.

(d) (Reserved, moved to Justice)

(e) Bureau of Alcohol, Tobacco, and Firearms—

(1) One hundred positions of Criminal Investigator for special assignments.

(2) One non-permanent SL Criminal Investigator to serve as a senior advisor to the Assistant Director (Firearms, Explosives, and Arson).

11. Department of Homeland Security (Sch. A, 213.3111)

(a) (Revoked 11/19/2009)

(b) Law Enforcement Policy—

(1) Ten positions for oversight policy and direction of sensitive law enforcement activities.

(c) Homeland Security Labor Relations Board/Homeland Security Mandatory Removal Board—

(1) Up to 15 SL and GS (or equivalent) positions.

(d) General—

(1) Not to exceed 1,000 positions to perform cyber risk and strategic analysis, incident handling and malware/vulnerability analysis, program management, distributed control systems security, cyber incident response, cyber exercise facilitation and management, cyber vulnerability detection and assessment, network and systems engineering, enterprise architecture, intelligence analysis, investigation, investigative analysis and cyber-related infrastructure interdependency analysis requiring unique qualifications currently not established by OPM. Positions will be at GS grade levels 09 through 15. No new appointments may be made under this authority after December 31, 2014.

(e) Papago Indian Agency—Not to exceed 25 positions of Immigration and Customs Enforcement (ICE) Tactical Officers (Shadow Wolves) in the Papago Indian Agency in the State of Arizona when filled by the appointment of persons of one-fourth or more Indian blood. (Formerly 213.3105(b)(9))

(f) U.S. Citizenship and Immigration Services

(1) Reserved. (Formerly 213.3110(b)(1))

(2) Not to exceed 500 positions of interpreters and language specialists, GS–1040–5 through 9. (Formerly 213.3110(b)(2))

(3) Reserved. (Formerly 213.3110(b)(3))

(g) U.S. Immigration and Customs Enforcement—

(1) Not to exceed 200 staff positions, GS–15 and below for an emergency staff to provide health related services to foreign entrants. (Formerly 213.3116(b)(16))

(h) Federal Emergency Management Agency—

(1) Field positions at grades GS–15 and below, or equivalent, which are engaged in work directly related to unique response efforts to environmental emergencies not covered by the Disaster Relief Act of 1974, Public Law 93–288, as amended. Employment under this authority may not exceed 36 months on any single emergency. Persons may not be employed under this authority for long-term duties or for work not directly necessitated by the emergency response effort. (Formerly 213.3195(a))

(2) Not to exceed 30 positions at grades GS–15 and below in the Offices of Executive Administration, General Counsel, Inspector General, Comptroller, Public Affairs, Personnel, Acquisition Management, and the State and Local Program and Support Directorate which are engaged in work directly related to unique response efforts to environmental emergencies not covered by the Disaster Relief Act of 1974, Public Law 93–288, as amended. Employment under this authority may not exceed 36 months on any single emergency, or for long-term duties or work not directly necessitated by the emergency response effort. No one may be reappointed under this authority for service in connection with a different emergency unless at least 6 months have elapsed since the individual's latest appointment under this authority. (Formerly 213.3195(b))

(3) Not to exceed 350 professional and technical positions at grades GS–5 through 15, or equivalent, in Mobile Emergency Response Support Detachments (MERS). (Formerly 213.3195(c))

(i) U.S. Coast Guard—

(1) Reserved. (Formerly 213.3194(a))

(2) Lamplighters. (Formerly 213.3194(b))

(3) Professors, Associate Professors, Assistant Professors, Instructors, one Principal Librarian, one Cadet Hostess, and one Psychologist (Counseling) at the Coast Guard Academy, New London, Connecticut. (Formerly 213.3194(c))

12. Department of the Interior (Sch. A, 213.3112)

(a) General—

(1) Technical, maintenance, and clerical positions at or below grades GS–7, Wage Grade (WG) grade 10, or equivalent, in the field service of the Department of the Interior, when filled by the appointment of persons who are certified as maintaining a permanent and exclusive residence within, or contiguous to, a field activity or district, and as being dependent for livelihood primarily upon employment available within the field activity of the Department.

(2) All positions on Government-owned ships or vessels operated by the Department of the Interior.

(3) Temporary or seasonal caretakers at temporarily closed camps or improved areas to maintain grounds, buildings, or other structures and prevent damages or theft of Government property. Such appointments shall not extend beyond 130 working days a year without the prior approval of OPM.

(4) Temporary, intermittent, or seasonal field assistants at GS–7, or its equivalent, and below in such areas as forestry, range management, soils, engineering, fishery and wildlife management, and with surveying parties. Employment under this authority may not exceed 180 working days a year.

(5) Temporary positions established in the field service of the Department for emergency forest and range fire prevention or suppression and blister rust control for not to exceed 180 working days a year: Provided, that an employee may work as many as 220 working days a year when employment beyond 180 days is required to cope with extended fire seasons or sudden emergencies such as fire, flood, storm, or other unforeseen situations involving potential loss of life or property.

(6) Persons employed in field positions, the work of which is financed jointly by the Department of the Interior and cooperating persons or organizations outside the Federal service.

(7) All positions in the Bureau of Indian Affairs and other positions in the Department of the Interior directly and primarily related to providing services to Indians when filled by the appointment of Indians. The Secretary of the Interior is responsible for defining the term ''Indian.''

(8) Temporary, intermittent, or seasonal positions at GS–7 or below in Alaska, as follows: Positions in nonprofessional mining activities, such as those of drillers, miners, caterpillar operators, and samplers. Employment under this authority shall not exceed 180 working days a year and shall be appropriate only when the activity is carried on in a remote or isolated area and there is a shortage of available candidates for the positions.

(9) Temporary, part-time, or intermittent employment of mechanics, skilled laborers, equipment operators, and tradesmen on construction, repair, or maintenance work not to exceed 180 working days a year in Alaska, when the activity is carried on in a remote or isolated area and there is a shortage of available candidates for the positions.

(10) Seasonal airplane pilots and airplane mechanics in Alaska, not to exceed 180 working days a year.

(11) Temporary staff positions in the Youth Conservation Corps Centers operated by the Department of the Interior. Employment under this authority shall not exceed 11 weeks a year except with prior approval of OPM.

(12) Positions in the Youth Conservation Corps for which pay is fixed at the Federal minimum wage rate. Employment under this authority may not exceed 10 weeks.

(b) (Reserved)

(c) Indian Arts and Crafts Board—

(1) The Executive Director

(d) (Reserved)

(e) Office of the Assistant Secretary, Territorial and International Affairs—

(1) (Reserved)

(2) Not to exceed four positions of Territorial Management Interns, grades GS–5, GS–7, or GS–9, when filled by territorial residents who are U.S. citizens from the Virgin Islands or Guam; U.S. nationals from American Samoa; or in the case of the Northern Marianas, will become U.S. citizens upon termination of the U.S. trusteeship. Employment under this authority may not exceed 6 months.

(3) (Reserved)

(4) Special Assistants to the Governor of American Samoa who perform specialized administrative, professional, technical, and scientific duties as members of his or her immediate staff.

(f) National Park Service—

(1) (Reserved)

(2) Positions established for the administration of Kalaupapa National Historic Park, Molokai, Hawaii, when filled by appointment of qualified patients and Native Hawaiians, as provided by Public Law 95–565.

(3) Seven full-time permanent and 31 temporary, part-time, or intermittent positions in the Redwood National Park, California, which are needed for rehabilitation of the park, as provided by Public Law 95–250.

(4) One Special Representative of the Director.

(5) All positions in the Grand Portage National Monument, Minnesota, when filled by the appointment of recognized

members of the Minnesota Chippewa Tribe.

(g) Bureau of Reclamation—

(1) Appraisers and examiners employed on a temporary, intermittent, or part-time basis on special valuation or prospective-entrymen-review projects where knowledge of local values on conditions or other specialized qualifications not possessed by regular Bureau employees are required for successful results. Employment under this provision shall not exceed 130 working days a year in any individual case: Provided, that such employment may, with prior approval of OPM, be extended for not to exceed an additional 50 working days in any single year.

(h) Office of the Deputy Assistant Secretary for Territorial Affairs—

(1) Positions of Territorial Management Interns, GS–5, when filled by persons selected by the Government of the Trust Territory of the Pacific Islands. No appointment may extend beyond 1 year.

13. Department of Agriculture (Sch. A, 213.3113)

(a) General—

(1) Agents employed in field positions the work of which is financed jointly by the Department and cooperating persons, organizations, or governmental agencies outside the Federal service. Except for positions for which selection is jointly made by the Department and the cooperating organization, this authority is not applicable to positions in the Agricultural Research Service or the National Agricultural Statistics Service. This authority is not applicable to the following positions in the Agricultural Marketing Service: Agricultural commodity grader (grain) and (meat), (poultry), and (dairy), agricultural commodity aid (grain), and tobacco inspection positions.

(2)–(4) (Reserved)

(5) Temporary, intermittent, or seasonal employment in the field service of the Department in positions at and below GS–7 and WG–10 in the following types of positions: Field assistants for sub professional services; agricultural helpers, helper-leaders, and workers in the Agricultural Research Service and the Animal and Plant Health Inspection Service; and subject to prior OPM approval granted in the calendar year in which the appointment is to be made, other clerical, trades, crafts, and manual labor positions. Total employment under this subparagraph may not exceed 180 working days in a service year: Provided, that an employee may work as many as 220 working days in a service year when employment beyond 180 days is required to cope with extended fire seasons or sudden emergencies such as fire, flood, storm, or other unforeseen situations involving potential loss of life or property. This paragraph does not cover trades, crafts, and manual labor positions covered by paragraph (i) of Sec. 213.3102 or positions within the Forest Service.

(6)–(7) (Reserved)

(b)–(c) (Reserved)

(d) Farm Service Agency—

(1) (Reserved)

(2) Members of State Committees: Provided, that employment under this authority shall be limited to temporary intermittent (WAE) positions whose principal duties involve administering farm programs within the State consistent with legislative and Departmental requirements and reviewing national procedures and policies for adaptation at State and local levels within established parameters. Individual appointments under this authority are for 1 year and may be extended only by the Secretary of Agriculture or his designee. Members of State Committees serve at the pleasure of the Secretary.

(e) Rural Development—

(1) (Reserved)

(2) County committeemen to consider, recommend, and advise with respect to the Rural Development program.

(3)–(5) (Reserved)

(6) Professional and clerical positions in the Trust Territory of the Pacific Islands when occupied by indigenous residents of the Territory to provide financial assistance pursuant to current authorizing statutes.

(f) Agricultural Marketing Service—

(1) Positions of Agricultural Commodity Graders, Agricultural Commodity Technicians, and Agricultural Commodity Aids at grades GS–9 and below in the tobacco, dairy, and poultry commodities; Meat Acceptance Specialists, GS–11 and below; Clerks, Office Automation Clerks, and Computer Clerks at GS–5 and below; Clerk-Typists at grades GS–4 and below; and Laborers under the Wage System. Employment under this authority is limited to either 1,280 hours or 180 days in a service year.

(2) Positions of Agricultural Commodity Graders, Agricultural Commodity Technicians, and Agricultural Commodity Aids at grades GS–11 and below in the cotton, raisin, peanut, and processed and fresh fruit and vegetable commodities and the following positions in support of these commodities: Clerks, Office Automation Clerks, and Computer Clerks and Operators at GS–5 and below; Clerk-Typists at grades GS–4 and below; and, under the Federal Wage System, High Volume Instrumentation (HVI) Operators and HVI Operator Leaders at WG/WL–2 and below, respectively, Instrument Mechanics/Workers/Helpers at WG–10 and below, and Laborers. Employment under this authority may not exceed 180 days in a service year. In unforeseen situations such as bad weather or crop conditions, unanticipated plant demands, or increased imports, employees may work up to 240 days in a service year. Cotton Agricultural Commodity Graders, GS–5, may be employed as trainees for the first appointment for an initial period of 6 months for training without regard to the service year limitation.

(3) Milk Market Administrators

(4) All positions on the staffs of the Milk Market Administrators.

(g)–(k) (Reserved)

(l) Food Safety and Inspection Service—

(1)–(2) (Reserved)

(3) Positions of Meat and Poultry Inspectors (Veterinarians at GS–11 and below and non-Veterinarians at appropriate grades below GS–11) for employment on a temporary, intermittent, or seasonal basis, not to exceed 1,280 hours a year.

(m) Grain Inspection, Packers and Stockyards Administration—

(1) 150 positions of Agricultural Commodity Aid (Grain), GS–2 through 4; 100 positions of Agricultural Commodity Technician (Grain), GS–4 through 7; and 60 positions of Agricultural Commodity Grader (Grain), GS–5 through 9, for temporary employment on a part-time, intermittent, or seasonal basis not to exceed 1,280 hours in a service year.

(n) Alternative Agricultural Research and Commercialization Corporation—

(1) Executive Director

14. Department of Commerce (Sch. A, 213.3114)

(a) General—

(1)–(2) (Reserved)

(3) Not to exceed 50 scientific and technical positions whose duties are performed primarily in the Antarctic. Incumbents of these positions may be stationed in the continental United States for periods of orientation, training, analysis of data, and report writing.

(b)–(c) (Reserved)

(d) Bureau of the Census—

(1) Managers, supervisors, technicians, clerks, interviewers, and enumerators in the field service, for time-limited employment to conduct a census.

(2) Current Program Interviewers employed in the field service.

(e)–(h) (Reserved)

(i) Office of the Under Secretary for International Trade—

(1) Fifteen positions at GS–12 and above in specialized fields relating to international trade or commerce in units under the jurisdiction of the Under Secretary for International Trade. Incumbents will be assigned to advisory rather than to operating duties, except as operating and administrative responsibility may be required for the conduct of pilot studies or special projects. Employment under this authority will not exceed 2 years for an individual appointee.

(2) (Reserved)

(3) Not to exceed 15 positions in grades GS–12 through 15, to be filled by persons qualified as industrial or marketing specialists; who possess specialized knowledge and experience in industrial production, industrial operations and related problems, market structure and trends, retail and wholesale trade practices, distribution channels and costs, or business financing and credit procedures applicable to one or more of the current segments of U.S. industry served by the Under Secretary for International Trade, and the subordinate components of his organization which are involved in Domestic Business matters. Appointments under this authority may be made for a period not to exceed 2 years and may, with prior OPM approval, be extended for an additional 2 years.

(j) National Oceanic and Atmospheric Administration—

(1)–(2) (Reserved)

(3) All civilian positions on vessels operated by the National Ocean Service.

(4) Temporary positions required in connection with the surveying operations of the field service of the National Ocean Service. Appointment to such positions shall not exceed 8 months in any 1 calendar year.

(k) (Reserved)

(l) National Telecommunication and Information Administration—

(1) 38 professional positions in grades GS–13 through 15.

15. Department of Labor (Sch. A, 213.3115)

(a) Office of the Secretary—

(1) Chairman and five members, Employees' Compensation Appeals Board.

(2) Chairman and eight members, Benefits Review Board.

(b)–(c) (Reserved)

(d) Employment and Training Administration—

(1) Not to exceed 10 positions of Supervisory Manpower Development Specialist and Manpower Development Specialist, GS–7 through 15, in the Division of Indian and Native American Programs, when filled by the appointment of persons of one-fourth or more Indian blood. These positions require direct contact with Indian tribes and communities for the development and administration of comprehensive employment and training programs.

16. Department of Health and Human Services (Sch. A, 213.3116)

(a) General—

(1) Intermittent positions, at GS–15 and below and WG–10 and below, on teams under the National Disaster Medical System including Disaster Medical Assistance Teams and specialty teams, to respond to disasters, emergencies, and incidents/events involving medical, mortuary and public health needs.

(b) Public Health Service—

(1) (Reserved)

(2) Positions at Government sanatoria when filled by patients during treatment or convalescence.

(3) (Reserved)

(4) Positions concerned with problems in preventive medicine financed or participated in by the Department of Health and Human Services and a cooperating State, county, municipality, incorporated organization, or an individual in which at least one-half of the expense is contributed by the participating agency either in salaries, quarters, materials, equipment, or other necessary elements in the carrying on of the work.

(5)–(6) (Reserved)

(7) Not to exceed 50 positions associated with health screening programs for refugees.

(8) All positions in the Public Health Service and other positions in the Department of Health and Human Services directly and primarily related to providing services to Indians when filled by the appointment of Indians. The Secretary of Health and Human Services is responsible for defining the term ''Indian.''

(9) (Reserved)

(10) Health care positions of the National Health Service Corps for employment of any one individual not to exceed 4 years of service in health manpower shortage areas.

(11)–(15) (Reserved)

(c)–(e) (Reserved)

(f) The President's Council on Physical Fitness—

(1) Four staff assistants.

17. Department of Education (Sch. A, 213.3117)

(a) Positions concerned with problems in education financed and participated in by the Department of Education and a cooperating State educational agency, or university or college, in which there is joint responsibility for selection and supervision of employees, and at least one-half of the expense is contributed by the cooperating agency in salaries, quarters, materials, equipment, or other necessary elements in the carrying on of the work.

18. Environmental Protection Agency (Sch. A, 213.3118)

24. Board of Governors, Federal Reserve System (Sch. A, 213.3124)

(a) All positions

27. Department of Veterans Affairs (Sch. A, 213.3127)

(a) Construction Division—

(1) Temporary construction workers paid from ''purchase and hire'' funds and appointed for not to exceed the duration of a construction project.

(b) Alcoholism Treatment Units and Drug Dependence Treatment Centers—

(1) Not to exceed 400 positions of rehabilitation counselors, GS–3 through 11, in Alcoholism Treatment Units and Drug Dependence Treatment Centers, when filled by former patients.

(c) Board of Veterans' Appeals—

(1) Positions, GS–15, when filled by a member of the Board. Except as provided by section 201(d) of Public Law 100–687, appointments under this authority shall be for a term of 9 years, and may be renewed.

(2) Positions, GS–15, when filled by a non-member of the Board who is awaiting Presidential approval for appointment as a Board member.

(d) Vietnam Era Veterans Readjustment Counseling Service—

(1) Not to exceed 600 positions at grades GS–3 through 11, involved in the Department's Vietnam Era Veterans Readjustment Counseling Service.

(e) Not to Exceed 75 positions that require unique technical skills needed for the re-designing and re-building of digital interfaces between citizens, businesses, and Government as a part of the Smarter Information Technology Delivery initiative. This authority may be used to make permanent, time-limited and temporary appointments to non-supervisory Digital Services Expert positions (GS–301) directly related to the implementation of the Smarter Information Technology Delivery initiative at the GS–15 level. No new appointments may be made under this authority after September 30, 2017.

32. Small Business Administration (Sch. A, 213.3132)

(a) When the President under 42 U.S.C. 1855–1855g, the Secretary of

Agriculture under 7 U.S.C. 1961, or the Small Business Administration under 15 U.S.C. 636(b)(1) declares an area to be a disaster area, positions filled by time-limited appointment of employees to make and administer disaster loans in the area under the Small Business Act, as amended. Service under this authority may not exceed 4 years, and no more than 2 years may be spent on a single disaster. Exception to this time limit may only be made with prior OPM approval. Appointments under this authority may not be used to extend the 2-year service limit contained below. No one may be appointed under this authority to positions engaged in long-term maintenance of loan portfolios.

(b) When the President under 42 U.S.C. 1855–1855g, the Secretary of Agriculture under 7 U.S.C. 1961, or the Small Business Administration under 15 U.S.C. 636(b)(1) declares an area to be a disaster area, positions filled by time-limited appointment of employees to make and administer disaster loans in that area under the Small Business Act, as amended. No one may serve under this authority for more than an aggregate of 2 years without a break in service of at least 6 months. Persons who have had more than 2 years of service under paragraph (a) of this section must have a break in service of at least 8 months following such service before appointment under this authority. No one may be appointed under this authority to positions engaged in long-term maintenance of loan portfolios.

33. Federal Deposit Insurance Corporation (Sch. A, 213.3133)

(a)–(b) (Reserved)

(c) Temporary or time-limited positions that are directly related with resolving failing insured depository institutions; financial companies; or brokers and dealers; covered by the Dodd-Frank Wall Street Reform and Consumer Protection Act, including but not limited to, the marketing and sale of institutions and any associated assets; paying insured depositors; and managing receivership estates and all associated receivership management activities, up to termination. Time limited appointments under this authority may not exceed 7 years.

36. U.S. Soldiers' and Airmen's Home (Sch. A, 213.3136)

(a) (Reserved)

(b) Positions when filled by member-residents of the Home.

37. General Services Administration (Sch. A, 213.3137)

(a) Not to Exceed 95 positions that require unique technical skills needed for the re-designing and re-building of digital interfaces between citizens, businesses, and Government as a part of the Smarter Information Technology Delivery initiative. This authority may be used nationwide to make permanent, time-limited and temporary appointments to Digital Services Expert positions (GS–301) directly related to the implementation of the Smarter Information Technology Delivery initiative at the GS–11 to 15 level. No new appointments may be made under this authority after September 30, 2017.

46. Selective Service System (Sch. A, 213.3146)

(a) State Directors

48. National Aeronautics and Space Administration (Sch. A, 213.3148)

(a) 150 alien scientists having special qualifications in the fields of aeronautical and space research where such employment is deemed by the Administrator of the National Aeronautics and Space Administration to be necessary in the public interest.

55. Social Security Administration (Sch. A, 213.3155)

(a) Arizona District Offices—

(1) Six positions of Social Insurance Representative in the district offices of the Social Security Administration in the State of Arizona when filled by the appointment of persons of one-fourth or more Indian blood.

(b) New Mexico—

(1) Seven positions of Social Insurance Representative in the district offices of the Social Security Administration in the State of New Mexico when filled by the appointment of persons of one-fourth or more Indian blood.

(c) Alaska—

(1) Two positions of Social Insurance Representative in the district offices of the Social Security Administration in the State of Alaska when filled by the appointments of persons of one-fourth or more Alaskan Native blood (Eskimos, Indians, or Aleuts).

62. The President's Crime Prevention Council (Sch. A, 213.3162)

(a) (Reserved)

65. Chemical Safety and Hazard Investigation Board (Sch. A, 213.3165)

(a) (Reserved)

(b) (Reserved)

66. Court Services and Offender Supervision Agency of the District of Columbia (Sch. A, 213.3166)

(a) (Reserved, expired 3/31/2004)

70. Millennium Challenge Corporation (MCC) (Sch. A, 213.3170)

(a) (Reserved, expired 9/30/2007)

(b)

(1) Positions of Resident Country Directors and Deputy Resident Country Directors. The length of appointments will correspond to the length or term of the compact agreements made between the MCC and the country in which the MCC will work, plus one additional year to cover pre- and post-compact agreement related activities.

74. Smithsonian Institution (Sch. A, 213.3174)

(a) (Reserved)

(b) Smithsonian Tropical Research Institute—All positions located in Panama which are part of or which support the Smithsonian Tropical Research Institute.

(c) National Museum of the American Indian—Positions at GS–15 and below requiring knowledge of, and experience in, tribal customs and culture. Such positions comprise approximately 10 percent of the Museum's positions and, generally, do not include secretarial, clerical, administrative, or program support positions.

75. Woodrow Wilson International Center for Scholars (Sch. A, 213.3175)

(a) One Asian Studies Program Administrator, one International Security Studies Program Administrator, one Latin American Program Administrator, one Russian Studies Program Administrator, two Social Science Program Administrators, one Middle East Studies Program Administrator, one African Studies Program Administrator, one Global Sustainability and Resilience Program Administrator, one Canadian Studies Program Administrator; one China Studies Program Administrator, and one Science, Technology and Innovation Program Administrator.

78. Community Development Financial Institutions Fund (Sch. A, 213.3178)

(a) (Reserved, expired 9/23/1998)

80. Utah Reclamation and Conservation Commission (Sch. A, 213.3180)

(a) Executive Director

82. National Foundation on the Arts and the Humanities (Sch. A, 213.3182)

(a) National Endowment for the Arts—

(1) Artistic and related positions at grades GS–13 through 15 engaged in the review, evaluation and administration of applications and grants supporting the arts, related research and assessment, policy and program

development, arts education, access programs and advocacy, or evaluation of critical arts projects and outreach programs. Duties require artistic stature, in-depth knowledge of arts disciplines and/or artistic-related leadership qualities.

90. African Development Foundation (Sch. A, 213.3190)

(a) One Enterprise Development Fund Manager. Appointment is limited to four years unless extended by OPM.

91. Office of Personnel Management (Sch. A, 213.3191)

(a)–(c) (Reserved)

(d) Part-time and intermittent positions of test examiners at grades GS–8 and below.

94. Department of Transportation (DOT) (Sch. A, 213.3194)

(a)–(d) (Reserved)

(e) Maritime Administration—

(1)–(2) (Reserved)

(3) All positions on Government-owned vessels or those bareboats chartered to the Government and operated by or for the Maritime Administration.

(4)–(5) (Reserved)

(6) U.S. Merchant Marine Academy, positions of: Professors, Instructors, and Teachers, including heads of Departments of Physical Education and Athletics, Humanities, Mathematics and Science, Maritime Law and Economics, Nautical Science, and Engineering; Coordinator of Shipboard Training; the Commandant of Midshipmen, the Assistant Commandant of Midshipmen; Director of Music; three Battalion Officers; three Regimental Affairs Officers; and one Training Administrator.

(7) U.S. Merchant Marine Academy positions of: Associate Dean; Registrar; Director of Admissions; Assistant Director of Admissions; Director, Office of External Affairs; Placement Officer; Administrative Librarian; Shipboard Training Assistant; three Academy Training Representatives; and one Education Program Assistant.

(f) Up to 40 positions at the GS–13 through 15 grade levels and within authorized SL allocations necessary to support the following credit agency programs of the Department: the Federal Highway Administration's Transportation Infrastructure Finance and Innovation Act Program, the Federal Railroad Administration's Railroad Rehabilitation and Improvement Financing Program, the Federal Maritime Administration's Title XI Program, and the Office of the Secretary's Office of Budget and Programs Credit Staff. This authority may be used to make temporary, time-limited, or permanent appointments, as the DOT deems appropriate, in the following occupational series: Director or Deputy Director SL–301/340, Origination Team Lead SL–301, Deputy Director/Senior Financial Analyst GS–1160, Origination Financial Policy Advisor GS–301, Credit Budgeting Team Lead GS–1160, Credit Budgeting Financial Analysts GS–1160, Portfolio Monitoring Lead SL–1160, Portfolio Monitoring Financial Analyst GS–1160, Financial Analyst GS–1160. No new appointments may be made under this authority after December 31, 2014.

95. (Reserved)

Schedule B

03. Executive Office of the President (Sch. B, 213.3203)

(a) (Reserved)

(b) Office of the Special Representative for Trade Negotiations—

(1) Seventeen positions of economist at grades GS–12 through 15.

04. Department of State (Sch. B, 213.3204)

(a)(1) One non-permanent senior level position to serve as Science and Technology Advisor to the Secretary.

(b)–(c) (Reserved)

(d) 17 positions on the household staff of the President's Guest House (Blair and Blair-Lee Houses).

(e) (Reserved)

(f) Scientific, professional, and technical positions at grades GS–12 to 15 when filled by persons having special qualifications in foreign policy matters. Total employment under this authority may not exceed 4 years.

05. Department of the Treasury (Sch. B, 213.3205)

(a) Positions of Deputy Comptroller of the Currency, Chief National Bank Examiner, Assistant Chief National Bank Examiner, Regional Administrator of National Banks, Deputy Regional Administrator of National Banks, Assistant to the Comptroller of the Currency, National Bank Examiner, Associate National Bank Examiner, and Assistant National Bank Examiner, whose salaries are paid from assessments against national banks and other financial institutions.

(b)–(c) (Reserved)

(d) (Reserved) Transferred to 213.3211(b)

(e) (Reserved) Transferred to 213.3210(f)

06. Department of Defense (Sch. B, 213.3206)

(a) Office of the Secretary—

(1) (Reserved)

(2) Professional positions at GS–11 through 15 involving systems, costs, and economic analysis functions in the Office of the Assistant Secretary (Program Analysis and Evaluation); and in the Office of the Deputy Assistant Secretary (Systems Policy and Information) in the Office of the Assistant Secretary (Comptroller).

(3)–(4) (Reserved)

(5) Four Net Assessment Analysts.

(b) Interdepartmental activities—

(1) Seven positions to provide general administration, general art and information, photography, and/or visual information support to the White House Photographic Service.

(2) Eight positions, GS–15 or below, in the White House Military Office, providing support for airlift operations, special events, security, and/or administrative services to the Office of the President.

(c) National Defense University—

(1) 61 positions of Professor, GS–13 through 15, for employment of any one individual on an initial appointment not to exceed 3 years, which may be renewed in any increment from 1 to 6 years indefinitely thereafter.

(d) General—

(1) One position of Law Enforcement Liaison Officer (Drugs), GS–301–15, U.S. European Command.

(2) Acquisition positions at grades GS–5 through 11, whose incumbents have successfully completed the required course of education as participants in the Department of Defense scholarship program authorized under 10 U.S.C. 1744.

(e) Office of the Inspector General—

(1) Positions of Criminal Investigator, GS–1811–5 through 15.

(f) Department of Defense Polygraph Institute, Fort McClellan, Alabama—

(1) One Director, GM–15.

(g) Defense Security Assistance Agency—All faculty members with instructor and research duties at the Defense Institute of Security Assistance Management, Wright Patterson Air Force Base, Dayton, Ohio. Individual appointments under this authority will be for an initial 3-year period, which may be followed by an appointment of indefinite duration.

07. Department of the Army (Sch. B, 213.3207)

(a) U.S. Army Command and General Staff College—

(1) Seven positions of professors, instructors, and education specialists. Total employment of any individual under this authority may not exceed 4 years.

08. Department of the Navy (Sch. B, 213.3208)

(a) Naval Underwater Systems Center, New London, Connecticut—

(1) One position of Oceanographer, grade GS–14, to function as project director and manager for research in the weapons systems applications of ocean eddies.

(b) Armed Forces Staff College, Norfolk, Virginia—All civilian faculty positions of professors, instructors, and teachers on the staff of the Armed Forces Staff College, Norfolk, Virginia.

(c) Defense Personnel Security Research and Education Center—One Director and four Research Psychologists at the professor or GS–15 level.

(d) Marine Corps Command and Staff College—All civilian professor positions.

(e) Executive Dining facilities at the Pentagon—One position of Staff Assistant, GS–301, whose incumbent will manage the Navy's Executive Dining facilities at the Pentagon.

(f) (Reserved)

09. Department of the Air Force (Sch. B, 213.3209)

(a) Air Research Institute at the Air University, Maxwell Air Force Base, Alabama—Not to exceed four interdisciplinary positions for the Air Research Institute at the Air University, Maxwell Air Force Base, Alabama, for employment to complete studies proposed by candidates and acceptable to the Air Force. Initial appointments are made not to exceed 3 years, with an option to renew or extend the appointments in increments of 1-, 2-, or 3- years indefinitely thereafter.

(b)–(c) (Reserved)

(d) Air University—Positions of Instructor or professional academic staff at the Air University associated with courses of instruction of varying durations, for employment not to exceed 3 years, which may be renewed for an indefinite period thereafter.

(e) U.S. Air Force Academy, Colorado—One position of Director of Development and Alumni Programs, GS–301–13.

10. Department of Justice (Sch. B, 213.3210)

(a) Drug Enforcement Administration—

Criminal Investigator (Special Agent) positions in the Drug Enforcement Administration. New appointments may be made under this authority only at grades GS–5 through 11. Service under the authority may not exceed 4 years. Appointments made under this authority may be converted to career or career-conditional appointments under the provisions of Executive Order 12230, subject to conditions agreed upon between the Department and OPM.

(b) (Reserved)

(c) Not to exceed 400 positions at grades GS–5 through 15 assigned to regional task forces established to conduct special investigations to combat drug trafficking and organized crime.

(d) (Reserved)

(e) United States Trustees—Positions, other than secretarial, GS–6 through 15, requiring knowledge of the bankruptcy process, on the staff of the offices of United States Trustees or the Executive Office for U.S. Trustees.

(f) Bureau of Alcohol, Tobacco, and Firearms

(1) Positions, grades GS–5 through 12 (or equivalent), of Criminal Investigator. Service under this authority may not exceed 3 years and 120 days.

11. Department of Homeland Security (Sch. B, 213.3211)

(a) Coast Guard.

(1) (Reserved)

(b) Secret Service—Positions concerned with the protection of the life and safety of the President and members of his immediate family, or other persons for whom similar protective services are prescribed by law, when filled in accordance with special appointment procedures approved by OPM. Service under this authority may not exceed:

(1) A total of 4 years; or

(2) 120 days following completion of the service required for conversion under Executive Order 11203.

13. Department of Agriculture (Sch. B, 213.3213)

(a) Foreign Agricultural Service—

(1) Positions of a project nature involved in international technical assistance activities. Service under this authority may not exceed 5 years on a single project for any individual unless delayed completion of a project justifies an extension up to but not exceeding 2 years.

(b) General—

(1) Temporary positions of professional Research Scientists, GS–15 or below, in the Agricultural Research Service, Economic Research Service, and the Forest Service, when such positions are established to support the Research Associateship Program and are filled by persons having a doctoral degree in an appropriate field of study for research activities of mutual interest to appointees and the agency. Appointments are limited to proposals approved by the appropriate Administrator. Appointments may be made for initial periods not to exceed 2 years and may be extended for up to 2 additional years. Extensions beyond 4 years, up to a maximum of 2 additional years, may be granted, but only in very rare and unusual circumstances, as determined by the Human Resources Officer for the Research, Education, and Economics Mission Area, or the Human Resources Officer, Forest Service.

(2) Not to exceed 55 Executive Director positions, GM–301–14 to 15, with the State Rural Development Councils in support of the Presidential Rural Development Initiative.

14. Department of Commerce (Sch. B, 213.3214)

(a) Bureau of the Census—

(1) (Reserved)

(2) Not to exceed 50 Community Services Specialist positions at the equivalent of GS–5 through 12.

(b)–(c) (Reserved)

(d) National Telecommunications and Information Administration—

(1) Not to exceed 10 Telecommunications Policy Analysts, grades GS–11 through 15. Employment under this authority may not exceed 2 years.

15. Department of Labor (Sch. B, 213.3215)

(a) Administrative Review Board—Chair and a maximum of four additional Members.

(b) (Reserved)

(c) Bureau of International Labor Affairs—

(1) Positions in the Office of Foreign Relations, which are paid by outside funding sources under contracts for specific international labor market technical assistance projects. Appointments under this authority may not be extended beyond the expiration date of the project.

17. Department of Education (Sch. B, 213.3217)

(a) 75 positions, not to exceed GS–13, of a professional or analytical nature when filled by persons, other than college faculty members or candidates working toward college degrees, who are participating in mid-career development programs authorized by Federal statute or regulation, or sponsored by private nonprofit organizations, when a period of work experience is a requirement for completion of an organized study program. Employment under this authority shall not exceed 1 year.

(b) 50 positions, GS–7 through 11, concerned with advising on education

policies, practices, and procedures under unusual and abnormal conditions. Persons employed under this provision must be bona fide elementary school and high school teachers. Appointments under this authority may be made for a period of not to exceed 1 year, and may, with the prior approval of OPM, be extended for an additional period of 1 year.

27. Department of Veterans Affairs (Sch. B, 213.3227)

(a) Not to exceed 800 principal investigatory, scientific, professional, and technical positions at grades GS–11 and above in the medical research program.

(b) Not to exceed 25 Criminal Investigator (Undercover) positions, GS–1811, in grades GS–5 through 12, conducting undercover investigations in the Veterans Health Administration (VA) supervised by the VA, Office of Inspector General. Initial appointments shall be greater than 1 year, but not to exceed 4 years and may be extended indefinitely in 1-year increments.

28. Broadcasting Board of Governors (Sch. B, 213.3228)

(a) International Broadcasting Bureau—

(1) Not to exceed 200 positions at grades GS–15 and below in the Office of Cuba Broadcasting. Appointments may not be made under this authority to administrative, clerical, and technical support positions.

36. U.S. Soldiers' and Airmen's Home (Sch. B, 213.3236)

(a) (Reserved)

(b) Director, Health Care Services; Director, Member Services; Director, Logistics; and Director, Plans and Programs.

40. National Archives and Records Administration (Sch. B, 213.3240)

(a) Executive Director, National Historical Publications and Records Commission.

48. National Aeronautics and Space Administration (Sch. B, 213.3248)

(a) Not to exceed 40 positions of Astronaut Candidates at grades GS–11 through 15. Employment under this authority may not exceed 3 years.

55. Social Security Administration (Sch. B, 213.3255)

(a) (Reserved)

74. Smithsonian Institution (Sch. B, 213.3274)

(a) (Reserved)

(b) Freer Gallery of Art—

(1) Not to exceed four Oriental Art Restoration Specialists at grades GS–9 through 15.

76. Appalachian Regional Commission (Sch. B, 213.3276)

(a) Two Program Coordinators.

78. Armed Forces Retirement Home (Sch. B, 213.3278)

(a) Naval Home, Gulfport, Mississippi—

(1) One Resource Management Officer position and one Public Works Officer position, GS/GM–15 and below.

82. National Foundation on the Arts and the Humanities (Sch. B, 213.3282)

(a) (Reserved)

(b) National Endowment for the Humanities—

(1) Professional positions at grades GS–11 through 15 engaged in the review, evaluation, and administration of grants supporting scholarship, education, and public programs in the humanities, the duties of which require in-depth knowledge of a discipline of the humanities.

91. Office of Personnel Management (Sch. B, 213.3291)

(a) Not to exceed eight positions of Associate Director at the Executive Seminar Centers at grades GS–13 to 14. Appointments may be made for any period up to 3 years and may be extended without prior approval for any individual. Not more than half of the authorized faculty positions at any one Executive Seminar Center may be filled under this authority.

(b) Federal Executive Institute—12 positions of faculty members at grades GS–13 through 15. Initial appointments under this authority may be made for any period up to 3 years and may be extended in 1-, 2-, or 3-year increments indefinitely thereafter.

Schedule C

Agency name	Organization name	Position title	Authorization No.	Effective date
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES.	Administrative Conference of the United States.	Executive Assistant	AA140001	2/28/2014
DEPARTMENT OF AGRICULTURE.	Natural Resources Conservation Service.	Assistant Chief	DA130107	7/10/2013
		Senior Advisor	DA130121	7/29/2013
	Rural Business Service	Special Assistant	DA130091	7/18/2013
		Confidential Assistant	DA130225	10/18/2013
	Office of Communications	Director of Scheduling and Advance.	DA130117	7/25/2013
		Deputy Director	DA130220	9/19/2013
		Press Assistant (2)	DA140013	12/6/2013
			DA140027	1/29/2014
		Press Secretary	DA140035	2/7/2014
		Deputy Director of Scheduling	DA130210	8/21/2013
	Office of the Assistant Secretary for Administration.	Special Assistant	DA130110	7/29/2013
		Deputy Director, Intergovernmental Affairs.	DA130119	7/30/2013
		Confidential Assistant (2)	DA130217	9/6/2013
			DA140066	5/13/2014
	Office of the General Counsel	Senior Counselor	DA130120	7/30/2013
	Office of the Secretary	Executive Assistant	DA130122	8/6/2013
		Policy Assistant	DA130209	8/21/2013
		Director of the Office of Faith Based and Neighborhood Outreach.	DA140001	10/30/2013
		Confidential Assistant (2)	DA140004	11/5/2013
			DA140046	3/21/2014

Agency name	Organization name	Position title	Authorization No.	Effective date
	Office of the Under Secretary for Rural Development.	State Director, Vermont/New Hampshire.	DA130096	8/8/2013
		Special Assistant	DA130218	9/5/2013
		State Director	DA140010	11/15/2013
	Office of the Under Secretary for Marketing and Regulatory Programs.	Confidential Assistant	DA130126	8/8/2013
		Senior Advisor	DA130176	8/16/2013
	Rural Housing Service	Special Assistant	DA130114	7/18/2013
		State Director—Alabama	DA130125	8/15/2013
		State Director—Virginia	DA130128	8/15/2013
		State Director—Utah	DA130129	8/15/2013
		State Director—Kansas	DA130130	8/15/2013
		State Director—Illinois	DA130131	8/15/2013
		State Director—New Mexico	DA130132	8/15/2013
		State Director—Pennsylvania	DA130133	8/15/2013
		State Director—Washington	DA130134	8/15/2013
		State Director—Texas	DA130135	8/15/2013
		State Director—North Dakota	DA130136	8/15/2013
		State Director—Alaska	DA130137	8/15/2013
		State Director—Nebraska	DA130138	8/15/2013
		State Director—Iowa	DA130139	8/15/2013
		State Director—Nevada	DA130140	8/15/2013
		State Director—South Dakota	DA130141	8/15/2013
		State Director—Oklahoma	DA130142	8/15/2013
		State Director—Arkansas	DA130143	8/15/2013
		State Director—Maine	DA130144	8/15/2013
		State Director—Florida	DA130145	8/15/2013
		State Director—Ohio	DA130146	8/15/2013
		State Director—West Virginia	DA130147	8/15/2013
		State Director—Indiana	DA130148	8/15/2013
		State Director—Minnesota	DA130149	8/15/2013
		State Director—Idaho	DA130151	8/15/2013
		State Director—Massachusetts	DA130152	8/15/2013
		State Director—Louisiana	DA130153	8/15/2013
		State Director—North Carolina	DA130154	8/15/2013
		State Director—Michigan	DA130155	8/15/2013
		State Director—Arizona	DA130156	8/15/2013
		State Director—Wisconsin	DA130157	8/15/2013
		State Director—New Jersey	DA130158	8/15/2013
		State Director—California	DA130159	8/15/2013
		State Director—Tennessee	DA130160	8/15/2013
		State Director—Mississippi	DA130161	8/15/2013
		State Director—Puerto Rico	DA130162	8/15/2013
		State Director—Kentucky	DA130163	8/15/2013
		State Director—Missouri	DA130164	8/15/2013
		State Director—South Carolina	DA130165	8/15/2013
		State Director—Oregon	DA130199	8/15/2013
		State Director—Hawaii	DA130150	9/19/2013
		State Director—Virginia	DA140054	4/25/2014
		State Director—Wyoming	DA140075	5/30/2014
		Chief of Staff	DA140067	5/29/2014
	Farm Service Agency	Chief of Staff	DA130116	7/25/2013
		State Executive Director—Alaska	DA130166	8/15/2013
		State Executive Director—Arizona	DA130167	8/15/2013
		State Executive Director—Arkansas.	DA130168	8/15/2013
		State Executive Director—California.	DA130169	8/15/2013
		State Executive Director—Delaware.	DA130170	8/15/2013
		State Executive Director—Hawaii	DA130171	8/15/2013
		State Executive Director—Illinois	DA130172	8/15/2013
		State Executive Director—Indiana	DA130173	8/15/2013
		State Executive Director—Iowa	DA130174	8/15/2013
		State Executive Director—Kansas	DA130175	8/15/2013
		State Executive Director—Kentucky.	DA130177	8/15/2013
		State Executive Director—Mississippi.	DA130179	8/15/2013
		State Executive Director—Nebraska.	DA130180	8/15/2013
		State Executive Director—Nevada	DA130181	8/15/2013

Agency name	Organization name	Position title	Authorization No.	Effective date
		State Executive Director—New Hampshire.	DA130182	8/15/2013
		State Executive Director—Rhode Island.	DA130183	8/15/2013
		State Executive Director—South Dakota.	DA130184	8/15/2013
		State Executive Director—New York.	DA130185	8/15/2013
		State Executive Director—Wisconsin.	DA130186	8/15/2013
		State Executive Director—Virginia	DA130187	8/15/2013
		State Executive Director—Washington.	DA130189	8/15/2013
		State Executive Director—West Virginia.	DA130190	8/15/2013
		State Executive Director—Wyoming.	DA130191	8/15/2013
		State Executive Director—North Dakota.	DA130192	8/15/2013
		State Executive Director—Oklahoma.	DA130193	8/15/2013
		State Executive Director—Pennsylvanian.	DA130194	8/15/2013
		State Executive Director—Tennessee.	DA130195	8/15/2013
		State Executive Director—Utah	DA130196	8/15/2013
		State Executive Director—Vermont	DA130197	8/15/2013
		State Executive Director—Michigan.	DA130198	8/15/2013
		State Executive Director—Alabama	DA130200	8/15/2013
		State Executive Director—Maine ...	DA130201	8/15/2013
		State Executive Director—New Jersey.	DA130202	8/15/2013
		State Executive Director—Ohio	DA130203	8/15/2013
		State Executive Director—Oregon	DA130207	8/15/2013
		State Executive Director—Louisiana.	DA130208	8/15/2013
			DA140051	4/4/2014
		Senior Advisor	DA140020	12/23/2013
		State Executive Director, North Carolina.	DA140021	12/23/2013
		State Executive Director—West Virginia.	DA140050	4/2/2014
		State Executive Director—Georgia	DA140069	5/29/2014
		State Executive Director—Oregon	DA140089	6/11/2014
		State Executive Director—Florida ..	DA140024	1/13/2014
		State Executive Director—New Mexico.	DA140057	4/18/2014
		State Executive Director—Maryland.	DA140063	4/30/2014
	Office of the Under Secretary for Marketing and Regulatory Programs.	Senior Advisor	DA130176	8/16/2013
	Office of the Under Secretary Farm and Foreign Agricultural Service.	Confidential Assistant	DA130226	10/23/2013
	Office of the Under Secretary for Food, Nutrition and Consumer Services.	Chief Communications Officer	DA140015	12/13/2013
	Foreign Agricultural Service	Confidential Assistant	DA140023	1/13/2014
	Office of Under Secretary for Natural Resources and Environment.	Special Assistant	DA140025	1/13/2014
	Food Safety and Inspection Service.	Senior Advisor	DA140052	4/3/2014
BROADCASTING BOARD OF GOVERNORS.	International Broadcasting Bureau	General Manager	IB140004	6/19/2014
DEPARTMENT OF COMMERCE ..	Office of the General Counsel	Counselor	DC130065	7/1/2013
		Special Assistant	DC130091	9/9/2013
	Office of the Chief of Staff	Senior Advisor	DC130066	7/1/2013
		Scheduling Assistant	DC130075	7/30/2013
		Director of Scheduling and Advance.	DC130093	9/4/2013
		Director of Advance and Protocol ..	DC140018	12/23/2013

Agency name	Organization name	Position title	Authorization No.	Effective date
		Confidential Assistant	DC140031	1/14/2014
		Advance Specialist	DC140084	4/29/2014
		Deputy Director of Advance	DC140101	6/4/2014
		Senior Protocol Officer	DC140122	6/16/2014
		Special Assistant	DC130067	7/12/2013
		Executive Assistant	DC140007	11/4/2013
	Office of the Under Secretary	Senior Policy Advisor	DC130077	8/7/2013
		Director of External Affairs	DC130102	10/22/2013
		Congressional Affairs Specialist	DC140005	11/4/2013
		Deputy Chief of Staff for United States Patent and Trade Office.	DC140013	12/13/2013
		Senior Advisor (2)	DC140021	1/3/2014
			DC140104	6/4/2014
		Special Assistant	DC140049	1/30/2014
	Assistant Secretary and Director General for United States and Foreign Commercial Service.	Director of Outreach	DC130086	8/20/2013
	Office of Policy and Strategic Planning.	Special Assistant	DC130089	8/26/2013
	Office of the Secretary	Director, Office of Faith Based and Neighborhood Partnerships.	DC130090	9/4/2013
	Office of the Deputy Secretary	Special Assistant	DC130094	9/4/2013
		Special Advisor	DC140120	6/12/2014
	Office of Public Affairs	Press Assistant	DC130098	10/21/2013
		Deputy Director of Public Affairs	DC140023	1/9/2014
		Director of Speechwriting	DC140099	6/2/2014
	Office of Legislative and Intergovernmental Affairs.	Confidential Assistant	DC140006	11/4/2013
	Office of Business Liaison	Senior Advisor	DC140011	11/26/2013
		Special Assistant	DC140014	12/12/2013
	Office of Executive Secretariat	Deputy Director, Executive Secretariat.	DC140016	12/12/2013
		Confidential Assistant/Editor	DC140052	2/5/2014
	Office of Assistant Secretary for Legislative and Intergovernmental Affairs.	Associate Director of Legislative Affairs.	DC140024	1/9/2014
	International Trade Administration	Deputy Director of Public Affairs	DC140063	3/7/2014
		Confidential Assistant	DC140125	6/24/2014
	Office of the Chief Economist	Special Project Advisor	DC140076	4/28/2014
	Assistant Secretary for Industry and Analysis.	Senior Advisor for Manufacturing Policy.	DC140079	4/30/2014
	Office of the Assistant Secretary for Economic Development.	Director, Office of Innovation and Entrepreneurship.	DC140086	5/2/2014
	Office of White House Liaison	Special Assistant	DC140087	5/2/2014
	Director General of the United States and Foreign Commercial Service and Assistant Secretary for Global Markets.	Special Assistant for Policy Initiatives.	DC140106	6/9/2014
		Senior Advisor	DC140119	6/12/2014
	Advocacy Center	Policy Assistant	DC140123	6/16/2014
COMMISSION ON CIVIL RIGHTS	Commissioners	Special Assistant(4)	CC130003	7/11/2013
			CC130004	8/15/2013
			CC130006	9/11/2013
			CC140001	12/19/2013
COMMODITY FUTURES TRADING COMMISSION.	Office of the Chief Economist	Chief Economist	CT140001	12/5/2013
	Office of the Chairperson	Executive Assistant	CT140002	1/16/2014
		Attorney Advisor (General)	CT140003	3/14/2014
		Director of Legislative Affairs (2)	CT140004	5/5/2014
			CT140006	6/16/2014
	Division of Enforcement	Director, Division of Enforcement	CT140008	6/9/2014
	Commodity Futures Trading Commission.	Administrative Assistant	CT140009	6/25/2014
CONSUMER PRODUCT SAFETY COMMISSION.	Office of Commissioners	Special Assistant	PS130005	7/30/2013
		Special Assistant (Legal) (2)	PS120001	12/5/2013
			PS140005	2/28/2014
	Office of Executive Director	Supervisory Public Affairs Specialist.	PS140003	12/5/2013
COUNCIL ON ENVIRONMENTAL QUALITY.	Council on Environmental Quality	Special Assistant for Land and Water.	EQ140002	12/19/2013
		Special Assistant for Communications.	EQ140004	12/20/2013

Agency name	Organization name	Position title	Authorization No.	Effective date
		Executive Assistant	EQ140006	2/28/2014
DEPARTMENT OF DEFENSE	Office of the Assistant Secretary of Defense (Special Operations/ Low Intensity Conflict and Interdependent Capabilities).	Special Assistant(Special Operations and Low Intensity Conflict) (2).	DD130106	7/5/2013
			DD130114	8/20/2013
		Principal Director for Special Operations and Combating Terrorism.	DD140057	4/10/2014
	Office of the Secretary	Advance Officer	DD130109	7/19/2013
			DD130112	7/25/2013
			DD130113	8/8/2013
			DD130123	9/25/2013
		Special Advisor	DD130116	8/20/2013
		Deputy White House Liaison	DD140061	4/14/2014
	Office of the Assistant Secretary of Defense (International Security Affairs).	Special Assistant for International Security Affairs.	DD130118	8/20/2013
		Special Assistant for Russia, Ukraine and Eurasia.	DD130119	8/29/2013
		Special Assistant for Europe and the North Atlantic Treaty Organization.	DD130120	9/6/2013
	Office of Assistant Secretary of Defense (Legislative Affairs).	Special Assistant (5)	DD130129	10/17/2013
			DD130130	11/6/2013
			DD140021	2/5/2014
			DD140041	2/11/2014
			DD140065	5/19/2014
	Office of Assistant Secretary of Defense (Public Affairs).	Senior Public Affairs Advisor	DD140003	10/31/2013
	Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics).	Special Assistant(Acquisition, Technology and Logistics).	DD140008	12/3/2013
	Washington Headquarters Services.	Defense Fellow (9)	DD140019	1/13/2014
			DD140022	2/5/2014
			DD140023	2/5/2014
			DD140024	2/5/2014
			DD140049	3/25/2014
			DD140068	5/21/2014
			DD140100	6/27/2014
			DD140102	6/27/2014
			DD140104	6/27/2014
	Office of the Under Secretary of Defense (Policy).	Special Assistant for Asian and Pacific Security Affairs.	DD140018	2/24/2014
	Office of the Under Secretary of Defense (Personnel and Readiness).	Special Assistant the Under Secretary of Defense (Personnel and Readiness).	DD140020	2/24/2014
	Office of the Assistant Secretary of Defense (Homeland Defense and America's Security Affairs).	Special Assistant for Homeland Defense and Americas' Security Affairs.	DD140047	3/5/2014
	Office of the Assistant Secretary of Defense (Asian and Pacific Security Affairs).	Special Assistant for South and Southeast Asia.	DD140050	3/12/2014
	Assistant Secretary of Defense (Acquisition).	Special Assistant for Acquisition	DD140063	6/23/2014
	Office of Principal Deputy Under Secretary for Policy.	Special Assistant for Strategy, Plans and Forces.	DD140107	6/27/2014
DEPARTMENT OF THE AIR FORCE.	Office of the General Counsel	Attorney-Advisor	DF130034	7/2/2013
DEPARTMENT OF THE ARMY	Office Assistant Secretary Army (Acquisition, Logistics and Technology).	Special Assistant for Acquisition, Logistics and Technology.	DW130054	8/30/2013
	Office Assistant Secretary Army (Civil Works).	Special Assistant(Civil Works)	DW140011	3/13/2014
	Office of the Under Secretary	Special Assistant	DW140014	6/4/2014
DEPARTMENT OF THE NAVY	Office of the Assistant Secretary of Navy (Manpower and Reserve Affairs).	Special Assistant	DN130007	8/9/2013
	Office of the Secretary	Senior Advisor for Energy	DN140013	5/5/2014
DEPARTMENT OF EDUCATION	Office of Innovation and Improvement.	Chief of Staff	DB130056	7/17/2013

Agency name	Organization name	Position title	Authorization No.	Effective date
		Associate Assistant Deputy Secretary.	DB130072	9/20/2013
		Confidential Assistant	DB140021	12/4/2013
		Senior Advisor for Science, Technology, Engineering and Math.	DB140056	4/3/2014
	Office of Elementary and Secondary Education.	Deputy Assistant Secretary for Policy and Early Learning.	DB130060	7/17/2013
		Confidential Assistant (2)	DB140005	11/1/2013
			DB140008	12/5/2013
		Chief of Staff	DB140049	3/6/2014
		Special Assistant (3)	DB140025	12/11/2013
			DB140059	4/8/2014
			DB140060	4/15/2014
		Deputy Assistant Secretary for Policy and Strategic Initiatives.	DB140082	6/12/2014
	Office of the Secretary	Chief of Staff	DB130054	7/22/2013
		Deputy Assistant Secretary for Policy and Programs.	DB130069	9/13/2013
		Deputy Director, Office of Educational Technology.	DB140012	11/12/2013
		Confidential Assistant (5)	DB140011	11/12/2013
			DB140016	11/15/2013
			DB140030	1/28/2014
			DB140035	2/3/2014
			DB140072	5/22/2014
		Deputy White House Liaison	DB140034	2/3/2014
		Deputy Chief of Staff for Operations.	DB140036	2/7/2014
		Special Assistant (3)	DB140042	2/28/2014
			DB140015	3/11/2014
			DB140070	5/19/2014
		Senior Advisor	DB140057	4/3/2014
	Office of Planning, Evaluation and Policy Development.	Special Assistant	DB130064	8/21/2013
	Office of the General Counsel	Confidential Assistant	DB130065	9/4/2013
		Special Assistant	DB140022	12/6/2013
	Office of the Under Secretary	Special Assistant (2)	DB130059	9/11/2013
			DB140002	10/28/2013
		Deputy Director, White House Initiative on Historically Black Colleges and Universities.	DB130068	9/12/2013
		Confidential Assistant (3)	DB140004	10/29/2013
			DB140064	4/28/2014
			DB140073	5/22/2014
		Chief of Staff	DB140071	5/23/2014
	Office of the Deputy Secretary	Executive Director	DB130067	9/12/2013
		Special Counsel	DB130071	9/20/2013
		Confidential Assistant	DB140039	3/5/2014
		Special Assistant	DB140080	6/18/2014
	Office of Career Technical and Adult Education.	Confidential Assistant (4)	DB130073	9/23/2013
			DB140031	2/3/2014
			DB140084	6/17/2014
			DB140087	6/20/2014
	Office of Communications and Outreach.	Press Secretary	DB140003	10/29/2013
		Special Assistant (3)	DB140007	11/7/2013
			DB140019	11/22/2013
			DB140065	5/12/2014
		Confidential Assistant	DB140040	2/20/2014
		Assistant Press Secretary	DB140053	3/26/2014
		Deputy Assistant Secretary for State and Local Engagement.	DB140054	3/27/2014
		Deputy Press Secretary	DB140063	4/18/2014
	Special Assistant for Strategic Communications.		DB140081	6/12/2014
	Office of Legislation and Congressional Affairs.	Confidential Assistant (2)	DB140010	11/13/2013
			DB140037	2/5/2014
		Special Assistant (2)	DB140026	1/29/2014
			DB140055	4/3/2014
		Chief of Staff	DB140074	5/28/2014

Agency name	Organization name	Position title	Authorization No.	Effective date
	Office of Planning, Evaluation and Policy Development.	Confidential Assistant (2)	DB140006	11/20/2013
			DB140044	3/6/2014
		Deputy Assistant Secretary for Planning and Policy Development.	DB140048	3/6/2014
		Special Assistant	DB140052	3/13/2014
		Chief of Staff	DB140067	5/9/2014
	Office for Civil Rights	Chief of Staff	DB140024	12/11/2013
	Office of Postsecondary Education	Special Assistant	DB140038	2/11/2014
	Office of the Under Secretary	Special Assistant	DB140062	4/15/2014
	Office of Special Education and Rehabilitative Services.	Special Assistant	DB140061	5/5/2014
DEPARTMENT OF ENERGY	Office of the Chief Financial Officer	Chief of Staff	DE130072	7/1/2013
	Advanced Research Projects Agency—Energy.	Technology to Market Advisor	DE130077	7/12/2013
	Office of Nuclear Energy	Chief of Staff	DE130080	7/18/2013
	Assistant Secretary for Energy Efficiency and Renewable Energy.	Scheduler	DE130082	7/23/2013
	Office of Management	Director of Scheduling and Advance and Senior Advisor for Strategic Planning.	DE130081	7/24/2013
		Scheduler (2)	DE130105	8/28/2013
			DE140025	12/23/2013
		Special Assistant (3)	DE130097	9/11/2013
			DE140039	3/13/2014
			DE140054	5/12/2014
		Senior Advisor	DE140080	6/27/2014
	Office of the Assistant Secretary for Energy Efficiency and Renewable Energy.	Special Assistant for Strategic Planning.	DE130083	7/25/2013
	Office of the Secretary of Energy Advisory Board.	Director Secretarial Boards and Council.	DE130086	7/25/2013
	Associate Administrator for External Affairs.	Deputy Director for Communications.	DE130092	8/2/2013
	Office of the Secretary of Energy Advisory Board.	Deputy Director Secretarial Boards and Council.	DE130085	8/9/2013
	Office of the Deputy Secretary	Special Assistant	DE130090	8/20/2013
	Office of the Secretary	Senior Advisor (2)	DE130089	8/22/2013
			DE140016	12/3/2013
		Special Advisor	DE130116	10/18/2013
		Special Advisor for Finance	DE140003	10/28/2013
		Special Assistant	DE140005	11/6/2013
		White House Liaison	DE140045	3/7/2014
		Deputy White House Liaison	DE140061	5/12/2014
	Office of the Assistant Secretary for International Affairs.	Special Assistant	DE130106	8/26/2013
	Office of Nuclear Energy	Special Advisor (2)	DE130101	9/4/2013
			DE140020	12/9/2013
	Office of Public Affairs	Speechwriter	DE130102	9/4/2013
		Director of Digital Strategy	DE130108	10/18/2013
		Deputy Director	DE130111	10/18/2013
		Assistant Press Secretary	DE130119	10/18/2013
		Chief Speechwriter	DE130107	10/22/2013
		Press Secretary	DE140012	11/22/2013
		Deputy Press Secretary	DE140043	3/11/2014
	Loan Programs Office	Special Advisor	DE130117	9/24/2013
	Office of the Assistant Secretary for Congressional and Intergovernmental Affairs.	Director of External Affairs	DE130118	9/30/2013
		Senior Advisor (2)	DE130122	9/30/2013
			DE140044	3/5/2014
		Deputy Assistant Secretary for House Affairs.	DE140019	12/9/2013
		Special Assistant	DE140056	4/24/2014
	Office of the Secretary of Energy Advisory Board.	Special Advisor	DE130109	10/18/2013
	Office of Fossil Energy	Senior Advisor	DE130112	10/18/2013
	Office of the Deputy Secretary	Special Advisor	DE130115	10/22/2013
	Office of Under Secretary for Science.	Special Assistant	DE140006	11/1/2013
	Office of the Deputy Secretary	Special Advisor	DE130113	11/6/2013

Agency name	Organization name	Position title	Authorization No.	Effective date
	Office of Economic Impact and Diversity.	Special Advisor	DE140002	11/6/2013
	Office of Assistant Secretary for International Affairs.	Special Assistant	DE140013	11/8/2013
		Special Advisor	DE140014	11/19/2013
	Office of Under Secretary	Special Assistant	DE140015	12/16/2013
	National Nuclear Security Administration.	Deputy Press Secretary	DE140022	1/15/2014
	Office of Fossil Energy	Advisor	DE140036	1/31/2014
	National Nuclear Security Administration.	Senior Advisor for Reactors and Nuclear Power Generation.	DE140035	2/10/2014
	Office of Assistant Secretary for Energy Efficiency and Renewable Energy.	Director of Lab Commercialization Impact.	DE140037	2/10/2014
		Chief of Staff	DE140040	3/10/2014
	Loan Programs Office	Senior Advisor	DE140023	2/11/2014
	Office of the Secretary of Energy Advisory Board.	Deputy Director	DE140053	4/4/2014
	Office of Under Secretary for Science.	Senior Advisor	DE140057	4/23/2014
	Office of Energy Policy and Systems Analysis.	Advisor for Climate Change	DE140062	5/16/2014
	Office of Energy Policy and Systems Analysis.	Special Assistant	DE140064	6/18/2014
ENVIRONMENTAL PROTECTION AGENCY.	Office of the Administrator	Special Assistant	EP130037	8/6/2013
		Special Assistant for Public Engagement.	EP130038	8/6/2013
		Deputy White House Liaison	EP140001	10/23/2013
		Deputy Press Secretary	EP140021	3/13/2014
		White House Liaison	EP140028	5/21/2014
		Special Assistant for Public Engagement.	EP140034	6/3/2014
	Office of the Deputy Administrator	Special Assistant for Policy and Operations.	EP130033	8/21/2013
		Policy Advisor	EP130034	8/28/2013
	Office of the Associate Administrator for Congressional and Intergovernmental Relations.	Deputy Associate Administrator for Office of Congressional Affairs.	EP130031	9/11/2013
	Office of the Associate Administrator for External Affairs and Environmental Education.	Speech Writer (2)	EP130039	8/22/2013
			EP140031	5/21/2014
		Director, Office of Public Engagement.	EP140006	12/4/2013
		Deputy Associate Administrator for External Affairs and Environmental Education.	EP140013	1/29/2014
		Press Secretary	EP140018	2/28/2014
		Deputy Press Secretary	EP140023	4/1/2014
		Director of Public Engagement	EP140024	4/10/2014
		Chief Speech Writer	EP140027	5/8/2014
	Office of the Assistant Administrator for Solid Waste and Emergency Response.	Special Assistant	EP140040	6/17/2014
	Operations Staff	Deputy Director for Scheduling and Advance.	EP140014	2/4/2014
	Office of the Associate Administrator for Policy.	Deputy Associate Administrator for Policy.	EP140015	2/7/2014
EXPORT–IMPORT BANK	Office of Export Finance Group	Senior Vice President of Export Finance.	EB130004	8/26/2013
	Office of the Chairman	Deputy Chief of Staff	EB140001	11/7/2013
		Executive Vice President and Chief Risk Officer.	EB140002	11/21/2013
		Executive Secretary	EB140004	3/11/2014
	Office of Communications	Speechwriter	EB140003	2/5/2014
		Vice President of External Relations and Outreach.	EB140005	3/18/2014
		Senior Advisor for Communications.	EB140006	4/7/2014
		Senior Vice President for Communications.	EB140007	5/12/2014
FARM CREDIT ADMINISTRATION	Office of the Board	Executive Assistant (2)	FL130005	8/5/2013

Agency name	Organization name	Position title	Authorization No.	Effective date
			FL130004	8/6/2013
FEDERAL COMMUNICATIONS COMMISSION.	Office of Media Relations	Communications Director	FC140005	11/20/2013
		Public Affairs Specialist	FC140009	4/30/2014
		Director of Outreach and Strategy	FC140011	6/24/2014
FEDERAL ENERGY REGULATORY COMMISSION.	Office of the Chairman	Confidential Assistant (2)	DR130006	7/30/2013
			DR140001	2/20/2014
		Program Analyst	DR130007	9/6/2013
FEDERAL HOUSING FINANCE AGENCY.	Office of the Director	Executive Advisor/Chief of Staff	HA140001	1/7/2014
		Special Advisor on Strategic Decisions and Governmental Agency Relations.	HA140002	1/13/2014
		Special Advisor on Strategic Decisions and Industry Relations.	HA140004	1/13/2014
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION.	Office of the Chairman	Confidential Assistant (2)	FR130002	9/6/2013
			FR140001	6/16/2014
FEDERAL TRADE COMMISSION	Office of the Chairman	Director, Office of Public Affairs	FT140005	1/13/2014
GENERAL SERVICES ADMINISTRATION.	Office of Administrative Services	Chief of Staff	GS130021	7/23/2013
	Northeast and Caribbean Region	Special Assistant	GS130023	8/14/2013
	Office of Communications and Marketing.	Director of Public Engagement	GS130025	9/27/2013
	The Heartland Region	Special Assistant	GS140004	12/20/2013
	Mid-Atlantic Region	Special Assistant	GS140005	1/14/2014
	Pacific Rim Region	Special Assistant	GS140009	3/6/2014
	Office of the Administrator	Senior Advisor	GS140020	5/5/2014
		Chief Customer Officer	GS140041	6/13/2014
	Office of Communications and Marketing.	Press Secretary	GS140023	5/16/2014
		Deputy Press Secretary	GS140039	6/13/2014
	Office of Citizen Services and Innovative Technologies.	Program Director, Presidential Innovation Fellows.	GS140040	6/13/2014
DEPARTMENT OF HEALTH AND HUMAN SERVICES.	Centers for Medicare and Medicaid Services.	Senior Advisor	DH130095	7/10/2013
	Office of the Secretary	Policy Advisor (2)	DH130098	7/12/2013
			DH130099	7/12/2013
		Advance Lead	DH130106	7/29/2013
		Deputy White House Liaison for Political Personnel, Boards and Commissions.	DH140002	10/21/2013
		Special Assistant	DH140019	1/24/2014
		Confidential Assistant	DH140030	2/4/2014
		Special Advisor	DH140072	6/5/2014
		Senior Advisor	DH140070	6/6/2014
	Health Resources and Services Administration Office of the Administrator.	Special Assistant	DH130111	8/7/2013
	Office of the Assistant Secretary for Public Affairs.	Senior Advisor for Digital Communications.	DH130096	7/9/2013
		Director of Speechwriting	DH130110	8/9/2013
		Confidential Assistant	DH130120	9/5/2013
		Digital Communications Coordinator (2).	DH130129	9/27/2013
			DH140058	5/1/2014
		Deputy Director for Speechwriting	DH140032	2/4/2014
		Special Assistant for Specialty Media.	DH140060	5/2/2014
		Online Communications and Outreach Advisor.	DH140071	6/6/2014
	Office of the Assistant Secretary for Health.	Policy Advisor	DH130114	8/22/2013
		Associate Director	DH130117	9/12/2013
		Special Assistant (2)	DH140020	1/10/2014
			DH140056	4/28/2014
		Director of Communications	DH140042	2/28/2014
	Office of Intergovernmental and External Affairs.	Regional Director, Chicago, Illinois-Region V.	DH130119	9/5/2013
		Regional Director, Denver, Colorado, Region VIII.	DH140011	12/6/2013

Agency name	Organization name	Position title	Authorization No.	Effective date
		Special Assistant	DH140017	1/2/2014
		Deputy Director, Office of Intergovernmental and External Affairs and Director of External Affairs.	DH140029	1/29/2014
		Confidential Assistant	DH140050	4/1/2014
		Director of Business Outreach	DH140073	6/6/2014
	Administration on Aging	Confidential Assistant	DH130121	9/5/2013
	Office of the Assistant Secretary for Planning and Evaluation.	Director of Public Health Policy (Office of Health Reform).	DH130122	9/5/2013
	Office of Health Reform	Confidential Assistant (Office of Health Reform).	DH140004	11/1/2013
		Senior Policy Analyst	DH140065	5/16/2014
	Office of the National Coordinator for Health Information Technology.	Special Assistant	DH140024	1/29/2014
	Office of the Assistant Secretary for Children and Families.	Policy Advisor for Early Childhood	DH140033	2/4/2014
		Policy Advisor, Administration for Children and Families.	DH140034	2/4/2014
	Center for Consumer Information and Insurance Oversight.	State Exchange Group Director	DH140101	6/26/2014
DEPARTMENT OF HOMELAND SECURITY.	Office of the Under Secretary for Science and Technology.	Advisor	DM130136	7/10/2013
		Special Assistant for Science and Technology.	DM140109	3/25/2014
	Office of the Assistant Secretary for Public Affairs.	Assistant Press Secretary	DM130147	8/1/2013
		Press Secretary	DM130168	9/13/2013
		Press Assistant	DM140137	5/19/2014
		Director of Speechwriting	DM140139	5/21/2014
		Deputy Director of Speechwriting	DM140142	5/21/2014
	U.S. Customs and Border Protection.	Senior Advisor (2)	DM130160	8/23/2013
			DM140097	3/7/2014
		Advisor	DM140102	3/13/2014
	Office of the Under Secretary for National Protection and Programs Directorate.	Advisor	DM130166	9/16/2013
		Confidential Assistant (2)	DM140032	1/23/2014
			DM140089	2/10/2014
		Senior Advisor	DM140122	4/8/2014
		Senior Advisor for Public Affairs	DM140131	4/30/2014
	Office of the Chief of Staff	White House Liaison	DM130171	9/24/2013
		Deputy White House Liaison	DM140031	1/8/2014
		Special Assistant	DM140085	1/28/2014
		Director of Trips and Advance	DM140111	3/25/2014
		Confidential Assistant	DM140129	5/12/2014
	Federal Emergency Management Agency.	Associate Director for Public Affairs/Press Secretary.	DM130178	9/30/2013
		Special Assistant (2)	DM140112	3/25/2014
			DM140127	4/28/2014
		Counselor	DM140147	5/28/2014
		Director of Public Affairs	DM140155	6/19/2014
	Office of the Assistant Secretary for Policy.	Senior Director	DM130155	11/6/2013
		Confidential Assistant	DM140015	12/3/2013
		Senior Advisor	DM140039	2/25/2014
		Director, Homeland Security Advisory Council.	DM140101	3/11/2014
		Special Assistant	DM140105	3/14/2014
	Office of the Assistant Secretary for Intergovernmental Affairs.	Special Advisor	DM140007	11/13/2013
	Office of the Under Secretary for Intelligence and Analysis.	Deputy Chief of Staff	DM140010	11/26/2013
		Special Advisor	DM140043	1/27/2014
	Office of the General Counsel	Counselor (2)	DM140012	11/26/2013
			DM140183	6/24/2014
		Confidential Assistant	DM140088	2/3/2014
	Office of the Secretary	Special Assistant (3)	DM140019	12/19/2013
			DM140126	4/28/2014
			DM140151	6/2/2014
	U.S. Immigration and Customs Enforcement.	Congressional Relations Director	DM140099	3/11/2014

Agency name	Organization name	Position title	Authorization No.	Effective date
		Director of Communications	DM140181	6/24/2014
	U.S. Citizenship and Immigration Services.	Counselor (2)	DM140100	3/11/2014
			DM140185	6/26/2014
		Special Assistant	DM140148	5/28/2014
	Privacy Officer	Advisor to the Chief Privacy Officer	DM140113	3/26/2014
	Immediate Office of the Deputy Secretary.	Special Assistant	DM140108	3/28/2014
	Office of the Executive Secretariat	Secretary Briefing Book Coordinator.	DM140133	5/7/2014
		Special Assistant	DM140140	5/21/2014
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT.	Office of the Secretary	Deputy Chief of Staff for Operations and Strategy.	DU130034	7/23/2013
		Special Assistant (2)	DU130038	9/4/2013
			DU130041	9/11/2013
		Special Policy Advisor	DU130044	10/22/2013
	Office of the Chief Human Capital Officer.	Director of Scheduling	DU130030	7/25/2013
		Advance Coordinator	DU130047	10/22/2013
	Office of Congressional and Intergovernmental Relations.	Congressional Relations Officer (2)	DU130046	10/22/2013
			DU130048	10/22/2013
		Associate Director of Intergovernmental Relations.	DU130049	10/22/2013
		General Deputy Assistant Secretary for Congressional Relations.	DU130050	10/22/2013
	Office of Public Affairs	Deputy Press Secretary	DU130051	10/22/2013
		General Deputy Assistant Secretary for Public Affairs.	DU140014	3/20/2014
		Press Secretary	DU140021	4/16/2014
		Special Assistant for Public Engagement.	DU140030	6/13/2014
	Office of the General Counsel	Senior Counsel	DU130045	11/1/2013
	Office of Field Policy and Management.	Regional Administrator (Northwest/Alaska).	DU140002	11/15/2013
	Great Plains (Kansas City)	Regional Administrator (Great Plains).	DU140006	11/15/2013
	Office of Community Planning and Development.	Senior Advisor	DU140009	2/14/2014
	Office of Housing	Senior Advisor/Chief of Staff	DU140008	2/20/2014
	Office of Policy Development and Research.	Deputy Assistant Secretary for International and Philanthropic Innovation.	DU140023	5/22/2014
		Financial Analyst for Housing Finance.	DU140027	6/6/2014
		Special Assistant for Policy Development and Research.	DU140029	6/9/2014
	Office of the Administration	Scheduling Assistant	DU140026	5/22/2014
DEPARTMENT OF THE INTERIOR.	Secretary's Immediate Office	Senior Advisor	DI130043	7/10/2013
		Special Assistant (5)	DI130040	7/2/2013
			DI130047	7/17/2013
			DI140022	3/27/2014
			DI140023	3/27/2014
			DI140027	4/8/2014
		White House Liaison	DI130054	8/30/2013
		Deputy Director of Advance	DI140026	4/25/2014
		Deputy Press Secretary	DI140048	6/20/2014
	United States Fish and Wildlife Service.	Special Assistant	DI130045	7/22/2013
	National Park Service	Special Assistant, National Park Service.	DI140002	10/24/2013
	Office of Congressional and Legislative Affairs.	Deputy Director, Office of Congressional and Legislative Affairs.	DI140008	12/16/2013
	Bureau of Land Management	Advisor	DI140012	1/24/2014
	Bureau of Ocean Energy Management.	Advisor	DI140015	1/30/2014
	Bureau of Safety and Environmental Enforcement.	Special Assistant	DI140021	3/25/2014
	Office of Assistant Secretary—Land and Minerals Management.	Advisor	DI140034	5/12/2014

Agency name	Organization name	Position title	Authorization No.	Effective date
	Office of Assistant Secretary—Water and Science.	Counselor—Water and Science	DI140040	6/20/2014
DEPARTMENT OF JUSTICE	Office of Legislative Affairs	Attorney Advisor (3)	DJ130073	7/23/2013
			DJ130075	7/30/2013
			DJ140055	6/16/2014
		Chief of Staff and Attorney Advisor	DJ130089	9/4/2013
	Office of the Associate Attorney General.	Senior Counsel	DJ130076	7/30/2013
		Confidential Assistant	DJ140031	2/12/2014
		Counsel and Deputy Chief of Staff	DJ140046	5/7/2014
	Office of Public Affairs	Public Affairs Specialist	DJ130078	8/1/2013
		Speechwriter	DJ130093	9/5/2013
		Deputy Press Secretary	DJ140011	11/26/2013
		Press Secretary	DJ140016	12/30/2013
		Deputy Director	DJ140023	1/23/2014
		Confidential Assistant	DJ140063	6/10/2014
		Press Assistant	DJ140082	6/30/2014
	Office of Justice Programs	Senior Advisor (2)	DJ130084	8/20/2013
			DJ140015	12/30/2013
	Antitrust Division	Counsel	DJ130086	8/20/2013
	Office on Violence Against Women	Program Specialist	DJ140020	1/10/2014
	Civil Rights Division	Senior Counselor	DJ140024	2/5/2014
	Executive Office for United States Attorneys.	Counsel	DJ140037	3/28/2014
	Community Oriented Policing Services.	Chief of Staff	DJ140041	4/10/2014
DEPARTMENT OF LABOR	Office of the Secretary	Deputy Director of Office of Recovery for Auto Communities and Workers.	DL130038	7/11/2013
		Deputy Director for Auto Communities and Workers.	DL130039	7/12/2013
		Special Assistant (7)	DL130043	7/19/2013
			DL130044	7/19/2013
			DL130063	9/26/2013
			DL140034	3/28/2014
			DL140048	5/13/2014
			DL140055	6/5/2014
			DL140072	6/25/2014
		Policy Advisor	DL130048	7/29/2013
		Director of Public Engagement	DL130058	9/13/2013
		Deputy Director of Public Engagement.	DL140016	1/31/2014
		White House Liaison	DL140037	4/1/2014
		Senior Advisor	DL140044	5/8/2014
	Office of the Deputy Secretary	Chief Innovation Officer	DL130042	8/5/2013
		Senior Policy Advisor	DL140067	6/23/2014
	Office of Public Affairs	Press Secretary	DL130053	8/19/2013
		Director of External Partnership	DL130056	9/5/2013
		Special Assistant (2)	DL130059	9/19/2013
			DL140008	12/13/2013
		Speechwriter (2)	DL140001	11/27/2013
			DL140039	4/17/2014
	Employee Benefits Security Administration.	Special Assistant	DL140005	12/6/2013
	Wage and Hour Division	Policy Advisor	DL140007	12/13/2013
		Senior Advisor	DL140040	4/16/2014
	Office of Congressional and Intergovernmental Affairs.	Senior Legislative Officer (2)	DL140013	1/14/2014
			DL140054	6/9/2014
		Regional Representative	DL140043	5/5/2014
		Senior Legislative Assistant (2)	DL140049	5/13/2014
			DL140065	6/16/2014
	Office of Chief Financial Officer	Senior Advisor	DL140014	2/7/2014
	Office of the Assistant Secretary for Policy.	Chief of Staff	DL140030	3/28/2014
	Bureau of International Labor Affairs.	Counselor	DL140052	5/29/2014
	Veterans Employment and Training Service.	Special Assistant	DL140053	6/9/2014
	Office of the Assistant Secretary for Administration and Management.	Special Assistant	DL140056	6/16/2014

Agency name	Organization name	Position title	Authorization No.	Effective date
	Bureau of International Labor Affairs.	Chief of Staff	DL140068	6/25/2014
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION.	Office of the Administrator	Executive Officer	NN140002	10/29/2013
	Office of the Chief Financial Officer/Comptroller.	Policy Analyst	NN140010	11/26/2013
	Office of Communications	Special Assistant	NN140012	1/16/2014
		Public Affairs Specialist	NN140019	5/12/2014
NATIONAL CREDIT UNION ADMINISTRATION.	Office of the Board	Senior Policy Advisor	CU140001	10/18/2013
NATIONAL ENDOWMENT FOR THE ARTS.	Office of the Chairman	Director of Public Affairs	NA140002	3/6/2014
		Congressional Liaison	NA140003	3/27/2014
		Special Assistant to the Chief of Staff.	NA140004	6/9/2014
NATIONAL ENDOWMENT FOR THE HUMANITIES.	National Endowment for the Humanities.	Confidential Assistant to the Chief of Staff.	NH140005	5/20/2014
NATIONAL MEDIATION BOARD	National Mediation Board	Confidential Assistant	NM140001	11/18/2013
NATIONAL TRANSPORTATION SAFETY BOARD.	Office of Board Members	Special Assistant (2)	TB140001	1/16/2014
		TB140002	2/24/2014	
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION.	Occupational Safety and Health Review Commission.	Confidential Assistant	SH140001	3/26/2014
	Office of Commissioners	Counsel	SH140002	4/28/2014
OFFICE OF MANAGEMENT AND BUDGET.	Office of the Director	Assistant to the Deputy Director	BO130026	7/30/2013
		Assistant to the Director	BO140013	6/9/2014
		Assistant for Management	BO140006	12/6/2013
		Senior Advisor	BO140008	12/20/2013
		Special Assistant	BO140012	4/24/2014
		Confidential Assistant (2)	BO140015	4/28/2014
		BO140016	5/28/2014	
	Office of Legislative Affairs	Deputy to the Associate Director for Legislative Affairs.	BO130027	8/8/2013
	Office of Strategic Planning and Communications.	Specialist for Strategic Planning and Communications.	BO140004	11/18/2013
		Press Secretary	BO140003	11/26/2013
	Office of E-Government and Information Technology.	Confidential Assistant	BO140018	6/9/2014
	Health Division	Confidential Assistant	BO140025	6/30/2014
OFFICE OF NATIONAL DRUG CONTROL POLICY.	Office of Intergovernmental Public Liaison.	Public Engagement Specialist	QQ130004	9/16/2013
	Office of the Director	Policy and Administrative Coordinator.	QQ130005	9/18/2013
	Office of Demand Reduction	Special Assistant	QQ140003	6/20/2014
OFFICE OF PERSONNEL MANAGEMENT.	Office of the Director	Director of Scheduling and Advance (2).	PM140001	10/30/2013
			PM140032	6/20/2014
		Assistant Director, Office of Public Engagement (3).	PM140010	1/8/2014
			PM140028	6/12/2014
			PM140033	6/24/2014
		Senior Advisor	PM140023	4/16/2014
		Special Assistant	PM140025	5/2/2014
	Office of Communications	Chief Speechwriter and Senior Advisor for Communications.	PM140004	11/1/2013
		Social Media Director	PM140012	1/29/2014
		Deputy Director of Communications and Press Secretary.	PM140019	3/27/2014
		Special Projects Coordinator	PM140024	5/2/2014
	Office of the General Counsel	Senior Counsel and Advisor	PM140029	6/12/2014
OFFICE OF SCIENCE AND TECHNOLOGY POLICY.	Director's Office	Confidential Assistant	TS130002	8/7/2013
		Executive Assistant	TS130003	9/16/2013
		Policy Advisor	TS140003	2/7/2014
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE.	Office of the Ambassador	Director of Scheduling and Advance.	TN140001	11/12/2013
		Special Assistant	TN140006	6/17/2014
	Office of the United States Trade Representative.	Deputy Assistant United States Trade Representative for Public and Media Affairs.	TN140002	1/9/2014

Agency name	Organization name	Position title	Authorization No.	Effective date
	Office of the Intergovernmental Affairs and Public Liaison.	Director for Intergovernmental Affairs and Public Engagement.	TN140003	5/8/2014
OVERSEAS PRIVATE INVESTMENT CORPORATION.	Office of the President	Deputy Chief of Staff (3)	PQ130003	8/15/2013
			PQ130004	9/27/2013
			PQ140009	6/13/2014
PENSION BENEFIT GUARANTY CORPORATION.	Office of the Executive Director	Chief of Staff	BG130001	8/8/2013
	Office of Policy and External Affairs.	Deputy Chief Policy Officer	BG130002	8/20/2013
PRESIDENT'S COMMISSION ON WHITE HOUSE FELLOWSHIPS.	President's Commission on White House Fellowships.	Public Relations Associate	WH130003	9/11/2013
		Special Assistant	WH140002	1/24/2014
		Associate Director for Education	WH140003	1/30/2014
SECURITIES AND EXCHANGE COMMISSION.	Office of the Chairman	Information Technology Specialist	SE130006	9/19/2013
		Confidential Assistant	SE140003	6/9/2014
	Office of the Chief Operating Officer.	Writer-Editor	SE140001	2/21/2014
SMALL BUSINESS ADMINISTRATION.	Office of the Administrator	White House Liaison	SB130018	7/31/2013
		Deputy Scheduler	SB130023	9/5/2013
		Scheduler	SB140014	4/8/2014
		Special Assistant	SB140015	4/8/2014
	Office of Communications and Public Liaison.	Deputy Assistant Administrator for Office of Communications and Public Liaison.	SB130019	7/31/2013
		Senior Speechwriter	SB140012	3/21/2014
		Press Secretary	SB140024	6/9/2014
		Special Advisor for Public Engagement.	SB140026	6/11/2014
		Press Assistant	SB140028	6/19/2014
	Office of Investment	Special Advisor	SB130025	10/18/2013
	Office of Faith-Based and Neighborhood Partnerships.	Director of Faith-Based and Neighborhood Partnerships.	SB140002	12/13/2013
	Office of Field Operations	Regional Administrator (Region IX)	SB140004	12/19/2013
		Regional Administrator (Region II)	SB140022	6/9/2014
	Office of Congressional and Legislative Affairs.	Deputy Assistant Administrator for Congressional and Legislative Affairs.	SB140006	1/9/2014
		Legislative Policy Advisor	SB140019	5/1/2014
	Office of the General Counsel	Deputy General Counsel	SB140007	1/31/2014
	Office of Government Contracting and Business Development.	Senior Advisor	SB140008	2/10/2014
	Office of Entrepreneurial Development.	Director of Clusters and Skills Initiatives.	SB140011	2/12/2014
		Special Advisor for Entrepreneurial Development.	SB140018	4/22/2014
	Office of Capital Access	Special Assistant	SB140025	6/9/2014
SOCIAL SECURITY ADMINISTRATION.	Office of Legislation and Congressional Affairs.	Legislative Liaison	SZ130015	8/15/2013
	Office of the Commissioner	Senior Advisor	SZ130016	9/20/2013
	Office of Communications	Press Officer	SZ140002	11/25/2013
DEPARTMENT OF STATE	Bureau of Oceans and International Environmental and Scientific Affairs.	Senior Advisor	DS130092	7/9/2013
	Office of the Global Women's Issues.	Senior Advisor (3)	DS130098	7/11/2013
			DS140003	11/12/2013
		Staff Assistant	DS140023	1/15/2014
	Office of the Secretary	Staff Assistant (2)	DS130100	7/12/2013
			DS140016	1/24/2014
		Deputy Chief of Staff for Policy	DS130116	9/11/2013
		Special Assistant	DS140088	6/20/2014
	Office of the Special Representative for Global Partnership Initiative.	Special Assistant	DS130107	8/6/2013
		Senior Advisor (2)	DS130122	9/6/2013
			DS140022	1/16/2014
	Bureau of Consular Affairs	Supervisory Public Affairs Specialist.	DS130060	9/11/2013
	Office of the Under Secretary for Management.	Staff Assistant	DS130124	9/18/2013

Agency name	Organization name	Position title	Authorization No.	Effective date
	Office of the Under Secretary for Arms Control and International Security Affairs.	Special Assistant (2)	DS130120	9/19/2013
			DS140060	2/10/2014
		Staff Assistant	DS140018	12/23/2013
	Bureau of Conflict and Stabilization Operations.	Director of Overseas Operations	DS140001	10/28/2013
	Bureau of Legislative Affairs	Legislative Management Officer (3)	DS140006	11/13/2013
			DS140067	3/11/2014
			DS140073	4/3/2014
		Deputy Assistant Secretary	DS140089	6/10/2014
	Bureau of Overseas Buildings Operations.	Director, Art In Embassies Program.	DS140008	11/15/2013
	Bureau of East Asian and Pacific Affairs.	Staff Assistant	DS140025	1/16/2014
	Bureau for Education and Cultural Affairs.	Special Assistant	DS140012	1/17/2014
	Bureau of Western Hemisphere Affairs.	Deputy Assistant Secretary	DS140027	1/17/2014
		Staff Assistant	DS140011	3/11/2014
	Bureau of Economic and Business Affairs.	Staff Assistant	DS140053	1/29/2014
		Senior Advisor	DS140079	4/18/2014
	Office of the Deputy Secretary for Management and Resources.	Senior Advisor (2)	DS140061	2/11/2014
			DS140077	4/16/2014
	Bureau of International Narcotics and Law Enforcement Affairs.	Special Assistant	DS140054	2/14/2014
		Senior Advisor	DS140024	3/13/2014
	Office of the Under Secretary for Economic Growth, Energy, and the Environment.	Special Assistant	DS140010	2/20/2014
		Senior Advisor	DS140081	4/28/2014
	Office of the Chief of Protocol	Protocol Officer	DS140058	2/20/2014
		Protocol Officer (Visits)	DS140075	4/15/2014
	Bureau of Public Affairs	Supervisory Public Affairs Specialist.	DS140062	2/20/2014
		Staff Assistant (2)	DS140064	2/28/2014
			DS140065	3/5/2014
		Deputy Assistant Secretary (2)	DS140072	4/21/2014
			DS140106	6/20/2014
	Bureau of Energy Resources	Special Assistant	DS140063	2/20/2014
	Office of International Information Programs.	Senior Advisor	DS140056	2/25/2014
		Public Affairs Specialist	DS140074	4/3/2014
	Office of the Under Secretary for Public Diplomacy and Public Affairs.	Staff Assistant (2)	DS140069	3/19/2014
			DS140085	5/15/2014
	Bureau of International Security and Nonproliferation.	Staff Assistant	DS140076	4/16/2014
	Office of the Coordinator for Counterterrorism.	Senior Advisor	DS140078	4/17/2014
	Office of the Under Secretary for Civilian Security, Democracy, and Human Rights.	Staff Assistant	DS140083	5/9/2014
	Bureau of Democracy, Human Rights and Labor.	Deputy Assistant Secretary	DS140082	5/15/2014
	Office of Faith Based Community Initiatives.	Special Representative	DS140104	6/18/2014
TRADE AND DEVELOPMENT AGENCY.	Office of the Director	Chief of Staff	TD130004	9/26/2013
DEPARTMENT OF TRANSPORTATION.	Office of the Chief Information Officer.	Director of Information Technology Strategy.	DT130030	7/22/2013
	Office of Assistant Secretary for Transportation Policy.	Deputy Assistant Secretary for Public Engagement.	DT130031	7/25/2013
		Deputy Director for Public Engagement.	DT130040	11/1/2013
		Senior Policy Advisor	DT140015	1/13/2014
	Office of the Secretary	Scheduler	DT130033	7/25/2013
		Associate Director for Transportation Policy.	DT130039	8/23/2013
		White House Liaison	DT130041	9/9/2013

Agency name	Organization name	Position title	Authorization No.	Effective date
		Associate Director for Scheduling and Advance.	DT140013	1/9/2014
			DT140014	1/9/2014
			DT140016	1/24/2014
			DT140030	4/23/2014
		Speechwriter	DT140001	10/22/2013
	Office of Public Affairs	Press Secretary	DT140005	11/26/2013
	Office of Assistant Secretary for Budget and Programs.	Deputy Assistant Secretary for Finance and Budget.	DT140006	11/26/2013
	Office of Assistant Secretary for Governmental Affairs.	Director of Governmental Affairs	DT140012	1/9/2014
		Associate Director for Governmental and Tribal Affairs.	DT140026	4/9/2014
		Deputy Assistant Secretary for Congressional Affairs.	DT140028	4/16/2014
		Deputy Assistant Secretary for Governmental Affairs.	DT140029	4/25/2014
DEPARTMENT OF THE TREASURY.	Office of Assistant Secretary (Public Affairs).	Press Assistant	DY130090	8/22/2013
		Spokesperson (2)	DY140023	12/20/2013
			DY140027	12/23/2013
		Senior Advisor (2)	DY140066	4/11/2014
			DY140082	6/4/2014
		Media Affairs Specialist/ Spokesperson	DY140076	5/9/2014
		Special Assistant	DY140077	5/14/2014
		Confidential Assistant	DY140081	5/29/2014
	Office of Under Secretary for Terrorism and Financial Intelligence.	Senior Advisor	DY140012	11/15/2013
	Office of Under Secretary for Domestic Finance.	Senior Advisor (2)	DY140013	11/15/2013
			DY140016	11/25/2013
	Office of the Secretary of the Treasury.	Special Assistant (3)	DY140022	12/20/2013
			DY140065	4/11/2014
			DY140079	5/19/2014
		Deputy Executive Secretary	DY140030	1/9/2014
		Deputy White House Liaison	DY140032	1/22/2014
	Assistant Secretary (Economic Policy).	Special Assistant	DY140033	1/22/2014
	Under Secretary for International Affairs.	Special Assistant	DY140045	2/20/2014
		Senior Advisor	DY140072	5/6/2014
	Under Secretary for Terrorism and Financial Intelligence.	Senior Policy Advisor	DY140047	3/6/2014
	Assistant Secretary for Financial Institutions.	Senior Advisor	DY140053	3/10/2014
		Policy Advisor	DY140095	6/24/2014
	Assistant Secretary for International Finance.	Assistant for International Finance	DY140078	5/14/2014
	Assistant Secretary for Management.	Confidential Assistant	DY140083	6/4/2014
UNITED STATES INTERNATIONAL TRADE COMMISSION.	Office of Commissioner Johansson	Staff Assistant (Legal)	TC130015	8/9/2013
	Office of Commissioner Kieff	Confidential Assistant	TC140001	10/24/2013
		Staff Assistant (Legal) (2)	TC140002	10/24/2013
			TC140004	11/7/2013
	Office of Commissioner Broadbent	Staff Assistant	TC140005	3/7/2014
	Office of Commissioner Schmidtlein.	Confidential Assistant	TC140010	5/8/2014
		Staff Assistant (Legal) (2)	TC140008	5/13/2014
			TC140009	5/15/2014
		Senior Economist	TC140007	5/15/2014
DEPARTMENT OF VETERANS AFFAIRS.	Veterans Benefits Administration	Special Assistant	DV130027	7/31/2013
	Office of the Assistant Secretary for Public and Intergovernmental Affairs.	Press Secretary	DV140004	11/7/2013
	Office of the General Counsel	Special Assistant	DV140019	2/21/2014
	Office of the Secretary and Deputy	Special Assistant/White House Liaison.	DV140026	3/27/2014
		Special Assistant (2)	DV140033	5/2/2014

Agency name	Organization name	Position title	Authorization No.	Effective date
			DV140040	6/27/2014

Authority: 5 U.S.C. 3301 and 3302; E.O.10577, 3 CFR, 1954–1958 Comp., p. 218.

U.S. Office of Personnel Management.

Katherine Archuleta,

Director.

[FR Doc. 2014–29223 Filed 12–12–14; 8:45 am]

BILLING CODE 6325–39–P

OFFICE OF PERSONNEL MANAGEMENT

Request for Applications: Multi-State Plan Program Advisory Board, 3206—NEW

AGENCY: U.S. Office of Personnel Management.

ACTION: Notice.

SUMMARY: This notice announces that OPM is soliciting applications for membership for individuals to serve on the Multi-State Plan Program Advisory Board.

DATES: Applications will be accepted until February 16, 2015.

ADDRESSES: Interested persons are invited to submit applications to National Healthcare Operations, Office of Personnel Management, by applying online at *https://www.usajobs.gov/GetJob/ViewDetails/386696900?share=email.*

FOR FURTHER INFORMATION CONTACT: National Healthcare Operations, Office of Personnel Management, 1900 E Street NW., Room 3468, Washington, DC 20415. Phone: 202–606–2808; Email: *mspp@opm.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 1334 of the Patient Protection and Affordable Care Act (''Affordable Care Act'') (42 U.S.C. 18054) authorizes OPM to establish and administer the Multi-State Plan (MSP) Program to increase consumer choice and foster competition across the Marketplace. Under Section 1334(h) of the Affordable Care Act, the Director of OPM must ''establish an advisory board to provide recommendations on the activities'' of the MSP Program and a ''significant percentage of the members of such board shall be comprised of enrollees in a multi-State qualified health plan, or representatives of such enrollees.''

Members of the Advisory Board shall exchange information, ideas, and recommendations regarding OPM's administration of the MSP Program, including plan design, branding and marketing, network adequacy, and other topics assigned to it by the Director.

Advisory Board meetings will serve as a forum for interactive dialogue and exchange of individual experiences and viewpoints among consumers, consumer representatives, and OPM staff. This forum will serve to better inform OPM's policy development, rulemaking, and outreach activities with regard to the MSP Program.

II. Requests for Applications

The Advisory Board shall consist of up to 15 members and will be co-chaired by the OPM Director or his/her designee and an MSP Program enrollee. Advisory Board members generally serve for a term of two years and may be re-appointed by the Director of OPM or his/her designee. A significant percentage of the Advisory Board members should be MSP Program enrollees or MSP Program enrollee representatives. Enrollee representatives may include public health and/or healthcare professionals (including providers, navigators, and assisters) or members of other consumer advocacy groups that have worked with or on behalf of healthcare consumers. Health insurance issuers or representatives of health insurance issuers will not be considered for Advisory Board membership.

We are seeking applicants that have knowledge and experience in one or more of the following fields:

- Experience as an MSP enrollee or MSP enrollee representative
- Experience with and/or knowledge of public health or health insurance issues
- Experience working for and/or with consumer advocacy groups regarding healthcare issues
- Knowledge of the Affordable Care Act, the health care system, or health-related programs.

Applicants must answer questions regarding their experience with the MSP Program, knowledge of the Affordable Care Act, and experience working with various consumer groups and must also answer questions regarding conflicts of interest.

We hope to establish a board that draws from all segments of society, including, but not limited to, individuals with disabilities or who belong to, work for, or represent disability organizations; lesbian, gay, bisexual, transgender (LGBT) people or people who belong to, work for, or represent LGBT organizations; people who come from rural or medically-underserved populations or who belong to, work for, or represent organizations that work on behalf of such populations; people who are members of racial or ethnic minorities or who belong to, work for, or represent organizations that work on behalf of such minority groups; and people who are members of tribes or who belong to, work for, or represent tribal organizations. For that reason, we encourage all individuals who believe they have relevant expertise or a perspective that would be useful to offer to apply.

Application Materials: Each applicant must include a completed application and, if available, upload a resume. We request that all resumes include the following:

- Title and current position
- Professional affiliation
- Home or business address
- Telephone number
- Email address
- List of areas of expertise

Applicants may also upload a cover letter and letters of endorsement or recommendation. Interested persons are invited to submit applications to National Healthcare Operations, Office of Personnel Management, by applying online at *https://www.usajobs.gov/GetJob/ViewDetails/386696900?share=email.*

III. Copies of the Charter

The MSP Program Advisory Board Charter is available on the OPM Web site at: *http://www.opm.gov/healthcare-insurance/multi-state-plan-program/consumer/advisory-board-charter.pdf*

U.S. Office of Personnel Management.

Katherine Archuleta,

Director.

[FR Doc. 2014–29226 Filed 12–12–14; 8:45 am]

BILLING CODE 6325–64–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–73793; File No. SR–NYSEArca-2014–137]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the NYSE Arca Options Fee Schedule To Amend the Application of Routing Fees Effective December 1, 2014

December 9, 2014.

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 November 26, 2014, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Arca Options Fee Schedule (''Fee Schedule'') to amend the application of Routing Fees. The Exchange proposes to implement the change on December 1, 2014. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule as it relates to the application of Routing Fees. The purpose of the proposed change is to account for recent changes introduced on other exchanges that impact the fees charged when routing orders.

The Exchange currently charges OTP Holders or OTP Firms (collectively, ''OTPs'') a Routing Fee when it routes orders to other exchanges for execution. The Routing Fee is comprised of an $0.11 per contract fee, plus the applicable transaction fees assessed by the away market for execution of the order (which the Exchange is able to discern from the away market fee schedule). The Routing Fees are applicable for both standard and mini options and are set forth separately in the Fee Schedule.

Recently, the BOX Options Exchange LLC (''BOX'') adopted per contract pricing that varies based upon the counter party to the trade. This pricing change makes it impossible to know in advance of the execution what the charges will be for an order routed to BOX. For example, a Professional Customer order routed to BOX in a non-Penny option would be charged $0.35 per contract if it traded against another Professional Customer or Broker/Dealer, but would be charged $0.94 per contract if it traded against a Customer.[4]

In order to provide OTPs with certainty regarding the routing fees for which they may be liable, the Exchange is proposing to amend the Fee Schedule as it relates to the application of Routing Fees, as set forth in the sections of the Fee Schedule relating to Trade-Related Charges for Standard Options and Trade-Related Charges for Mini Options. The proposed amendments would specify in both sections that if the actual transaction fees assessed by the away exchange(s) cannot be determined prior to the execution, the Exchange would charge the $0.11 per contract fee plus the highest per contract charge assessed by the away exchange(s) for the relevant option class and type of market participant (*e.g.,* Customer, Firm, Broker/Dealer, Professional Customer or Market Maker).

The Exchange proposes to make other non-substantive changes to the Fee Schedule. First, the Exchange proposes to replace the reference to ''away market,'' with a reference to ''away exchange,'' because the Exchange only routes orders to registered exchanges. Second, the Exchange proposes to replace the term ''charged'' with the term ''assessed,'' to make it parallel with the proposed changes to the Routing Fees. Third, the Exchange proposes to add the following text as a parenthetical: ''calculated on an order-by-order basis since different away exchange charge different amounts.'' The Exchange notes that this rule text is based on the fee schedule for NYSE Amex Options LLC (''NYSE Amex Options'') and represents how the Exchange currently calculates the Routing Fee. Fourth, the Exchange proposes to delete the parenthetical text that provides ''applies to both Mini and standard option contracts'' as this parenthetical is redundant because the Routing Fee is set forth separately in the Fee Schedule in the specific sections relating to fees for standard options and for Mini options. Finally, to provide clarity regarding the applicability of Routing Fees, the Exchange proposes to add the following text, which is based on language from the NYSE Amex Options fee schedule: ''The Routing Fee is in addition to NYSE Arca's customary execution fees applicable to the order.''

The Exchange notes that OTPs can avoid having their orders routed to away markets by utilizing specific, non-routable order types if they so choose.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[5] in general, and furthers the objectives of Section 6(b)(4) of the Act,[6] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed fee change is reasonable and equitable because charging market participants a set per contract rate in those instances when an order is routed to an away exchange provides market participants with certainty, which will enable them to make informed decisions regarding whether to continue to designate such orders as eligible for routing to away exchanges. The Exchange further believes that the proposed fee change to charge the highest rate charged by the away

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* BOX Fee Schedule, Section 1 (as of November 2014), *available here, http://boxexchange.com/assets/BOX_Fee_Schedule.pdf.*

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4).

exchange if the Exchange cannot discern the per contract charge in the option class in question in advance of the execution is reasonable and equitable because the Exchange cannot know in advance what the charge would be on the away exchange. If the Exchange charged the lowest feasible charge, the Exchange could end up bearing the costs of routing an order to an away exchange. The Exchange notes that—just as they do today—to avoid incurring any Routing Fee in preference of an execution on the Exchange, OTPs are able to designate their orders as non-routable.

The Exchange believes that the proposed non-substantive changes to the Fee Schedule are reasonable and equitable because they provide transparency in the Fee Schedule regarding how the Exchange calculates transaction fees, including Routing Fees, and eliminate redundant rule text.

The Exchange further believes that this proposed change is not unfairly discriminatory either as it applies equally to all OTPs that send orders to the Exchange.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes the proposed fee change is reasonably designed to be fair and equitable, and therefore, will not unduly burden any particular group of market participants trading on the Exchange vis-à-vis another group (*i.e.,* Market Markers versus non-Market Makers) as it applies equally to all OTP Holders that send routable orders to the Exchange.

The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [7] of the Act and subparagraph (f)(2) of Rule 19b–4 [8] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [9] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2014–137 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–2014–137. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2014–137, and should be submitted on or before January 5, 2015.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–29241 Filed 12–12–14; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(2).

[9] 15 U.S.C. 78s(b)(2)(B).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–73797; File No. SR–EDGA–2014–32]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Rules 1.5 and 11.3 of EDGA Exchange, Inc.

December 9, 2014.

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 28, 2014, EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

by the Exchange. The Exchange has designated this proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6)(iii) thereunder,[4] which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend Rules 1.5(z), the definition of Sponsored Participant,[5] and 11.3, titled Access, to harmonize its sponsored access rules and definitions with those set forth under BATS Exchange, Inc. (''BATS'') Rules 1.5(x) and 11.3 as well as BATS Y-Exchange, Inc. (''BYX'') Rules 1.5(x) and 11.3.[6]

The text of the proposed rule change is available at the Exchange's Web site at *http://www.directedge.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rules 1.5(z) and 11.3 to harmonize its sponsored access rules with those set forth under BATS Rules 1.5(x) and 11.3 and BYX Rules 1.5(x) and 11.3.[7] Earlier this year, the Exchange and its affiliate EDGX Exchange, Inc. (''EDGX'') received approval to effect a merger (the ''Merger'') of the Exchange's parent company, Direct Edge Holdings LLC, with BATS Global Markets, Inc., the parent of BATS and BYX (together with BATS, BYX, EDGA and EDGX, the ''BGM Affiliated Exchanges'').[8] In the context of the Merger, the BGM Affiliated Exchanges are working to align certain rules, retaining only intended differences between the BGM Affiliated Exchanges. As part of this effort, the proposal set forth below harmonizes Exchange Rules 1.5(z) and 11.3 with BATS and BYX Rules 1.5(x) and 11.3 by aligning the rules around sponsored access for all sponsored participants and sponsoring members of the BGM Affiliated Exchanges.[9]

Rule 11.3 currently provides that the System[10] shall be available for entry and execution of orders by Users with authorized access. In order to obtain authorized access to the System, each Member must enter into an agreement with the Exchange in such form as the Exchange may provide. A Sponsored Participant[11] may obtain authorized access to the System only if such access is authorized in advance by one or more Sponsoring Members[12] as follows: (i) Sponsored Participants must enter into and maintain sponsored or direct access arrangements with one or more Sponsoring Members establishing proper relationship(s) and account(s) through which the Sponsored Participant may trade on the System; (ii) Sponsoring Member shall maintain a list of Sponsored Participants who Sponsoring Member has authorized to obtain access to the System pursuant to this Rule, shall update the list of Sponsored Participants as necessary, and provide the list of Sponsored Participants to the Exchange upon request; and (iii) Sponsoring Members shall comply with Rule 15c3–5 under the Exchange Act (the ''Market Access Rule'')[13] with regard to market access arrangements with Sponsored Participants.

The Exchange is proposing to delete Rules 11.3(b)(2) and (3), which are described in items (ii) and (iii) above. The Exchange is proposing to delete 11.3(b)(2) in order to add more thorough requirements for a Member to provide sponsored access to a Sponsored Participant, as described below. The Exchange is proposing to delete Rule 11.3(b)(3) in order to align the Exchange's rules with those of BATS and BYX. The Exchange notes that, while Rule 11.3(b)(3) requires a Sponsoring Member to comply with the Market Access Rule, such obligation applies to all brokers or dealers with market access[14] and thus exists whether or not the Exchange has a rule requiring compliance. As such, deleting current Rule 11.3(b)(3) does not alter a Member's or a Sponsored Participant's obligation to comply with the Market Access Rule.

The Exchange is also proposing to amend Rule 11.3(b)(1) in order to replace ''sponsored or direct access arrangements'' with ''customer agreements.'' In coordination with this change, the Exchange is also proposing to add the following sentence to the end of Rule 11.3(b)(1): ''Such customer agreement(s) must incorporate the sponsorship provisions set forth in paragraph (2) below.''

The Exchange is also proposing to add a new Rule 11.3(b)(2), which contains the requirements for the customer agreements referenced in proposed Rule 11.3(b)(1). As proposed, in order for a Sponsored Participant to obtain and maintain authorized access to the System, a Sponsored Participant and its Sponsoring Member must agree in writing to the following sponsorship provisions: (i) The Sponsored Participant and its Sponsoring Member must have entered into and maintained a User Agreement with the Exchange; (ii) the Sponsoring Member must acknowledge and agree that all orders entered by the Sponsored Participant and any person acting on behalf of or in the name of such Sponsored Participant and any executions occurring as a result of such orders are binding in all respects on the Sponsoring Member, and the Sponsoring Member is responsible for any and all actions taken by such Sponsored Participant and any person acting on behalf of or in the name of such Sponsored Participant; (iii) the Sponsoring Member shall comply with the Exchange's Certificate of Incorporation, By-Laws, Rules and procedures, and the Sponsored Participant shall comply with the Exchange's Certificate of Incorporation, By-Laws, Rules and procedures, as if such Sponsored Participant were a Member; (iv) the Sponsored Participant shall maintain, keep current and provide to the Sponsoring Member, and to the Exchange upon request, a list of Authorized Traders who may obtain access to the System on behalf of the

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6)(iii).

[5] As defined below.

[6] *See* BATS Rules 1.5(x) and 11.3; BYX Rules 1.5(x) and 11.3.

[7] *See* supra note 5.

[8] *See* Securities Exchange Act Release No. 71449 (January 30, 2014), 79 FR 6961 (February 5, 2014) (SR–EDGX–2013–43; SR–EDGA–2013–34).

[9] The Exchange understands that EDGX is to file a proposed rule change with the Commission to adopt similar requirements.

[10] System is defined in EDGA Rule 1.5(cc).

[11] Sponsored Participant is defined in EDGA Rule 1.5(z).

[12] Sponsoring Members is defined in EDGA Rule 1.5(aa).

[13] 17 CFR 240.15c3–5.

[14] 17 CFR 240.15c3–5(b).

Sponsored Participant. Sponsored Participant shall be subject to the obligations of Rule 11.4 with respect to such Authorized Traders; [15] (v) the Sponsored Participant shall familiarize its Authorized Traders with all of the Sponsored Participant's obligations under this Rule and will assure that they receive appropriate training prior to any use or access to the System; (vi) the Sponsored Participant may not permit anyone other than Authorized Traders to use or obtain access to the System; (vii) the Sponsored Participant shall take reasonable security precautions to prevent unauthorized use or access to the System, including unauthorized entry of information into the System, or the information and data made available therein. The Sponsored Participant understands and agrees that the Sponsored Participant is responsible for any and all orders, trades and other messages and instructions entered, transmitted or received under identifiers, passwords and security codes of Authorized Traders, and for the trading and other consequences thereof; (viii) the Sponsored Participant acknowledges its responsibility to establish adequate procedures and controls that permit it to effectively monitor its employees', agents' and customers' use and access to the System for compliance with the terms of this agreement; and (ix) the Sponsored Participant shall pay when due all amounts, if any, payable to Sponsoring Member, the Exchange or any other third parties that arise from the Sponsored Participant's access to and use of the System. Such amounts include, but are not limited to applicable exchange and regulatory fees.

The Exchange is also proposing to replace Rule 11.3(b)(3) to state that the Sponsoring Member must provide the Exchange with a written statement in form and substance acceptable to the Exchange identifying each Sponsored Participant by name and acknowledging its responsibility for the orders, executions and actions of such Sponsored Participant. Such written statement in form and substance acceptable to the Exchange will be available as the ''Sponsored Application and Agreements'' form on the Exchange's Web site.[16]

Finally, the Exchange is proposing to amend Rule 1.5(z) to align the definition of Sponsored Participant with the definition on BATS and BYX [17] and to align the definition with the relationship between a Sponsoring Member, Sponsored Participant, and the Exchange, as proposed above. Specifically, the Exchange is proposing that the term Sponsored Participant mean a person which has entered into a sponsorship arrangement with a Sponsoring Member pursuant to Rule 11.3.

The Exchange notes that this proposal would in effect restore Exchange Rules 1.5(z) and 11.3 to their state prior to filing SR–EDGA–2012–24 (the ''Filing'').[18] In the Filing, the Exchange described the rationale for the proposed changes as being rendered superfluous and unnecessary by the adoption of Market Access Rule. Such changes, in contrast to the rules on BATS and BYX, however, created a situation in which the Exchange still had Sponsored Participants that were entering orders through Sponsoring Members, but the Exchange had no direct relationship with Sponsored Participants. In certain circumstances, this arrangement led to employees of the Exchange being unable to discuss certain order and/or trade details with Sponsored Participants. Based on these experiences, the Exchange no longer views the proposed rule text as superfluous, but, rather, such proposed rule text outlines a reasonable set of standards for a sponsored access relationship between the Exchange, the Sponsoring Member, and the Sponsored Participant. The Exchange believes that the proposed changes will enhance its rules and, as discussed above, harmonize the Exchange's rules with those of BATS and BYX. The Exchange does note that the proposal is not intended to supersede or supplement the Market Access Rule in any way, but rather to establish a more thorough set of rules under which the Exchange, Sponsored Participants, and Sponsoring Members will interact. As such, the Exchange also notes that compliance with the proposed rules has no bearing on whether any particular Member, Sponsoring Member, or Sponsored Participant is in compliance with the Market Access Rule.

Implementation Date

The Exchange intends to implement the proposed rule change on or about January 12, 2015. The Exchange will announce the implementation of the proposed rule change via a trading notice to be posted on the Exchange's Web site.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act [19] and furthers the objectives of Section 6(b)(5) of the Act,[20] in that it is designed promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, protect investors and the public interest. The proposal would effectively allow a Sponsoring Member(s) to provide a Sponsored Participant(s) with access to the Exchange and the ability to interact directly with Exchange employees. More specifically, the Exchange believes that the proposal is designed to promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general protect investors and the public interest because it would allow the Exchange to directly recognize the trading activity of Sponsored Participants and to communicate directly with Sponsored Participants regarding any potential issues that may arise.

The Exchange believes that the proposed rule change is not designed to permit unfair discrimination between customers, issuers, brokers or dealers. The proposed rule change is identical to the existing rules of BATS and BYX.[21] The proposed rule change is intended to align the Exchange's requirements for Sponsoring Members to provide sponsored access to Sponsored Participants with that of BATS, BYX, and EDGX [22] in order to provide consistent rules across the BGM Affiliated Exchanges. Consistent rules, in turn, will simplify the regulatory requirements for Members of the Exchange that are also participants on the other BGM Affiliated Exchanges. The proposed rule change would provide greater harmonization between the rules of the BGM Affiliated Exchanges of similar purpose, resulting in greater uniformity and less burdensome and more efficient regulatory compliance. As such, the proposed rule change would foster cooperation and coordination with persons engaged in facilitating transactions in securities and would remove impediments to and perfect the mechanism of a free and open market and a national market system.

[15] *See* EDGA Rule 11.4.

[16] The Exchange's Web site is accessible at *www.directedge.com*.

[17] *See* supra note 5.

[18] *See* Securities Exchange Act Release No. 67712 (August 22, 2012), 77 FR 52097 (August 28, 2012) (SR–EDGA–2012–27).

[19] 15 U.S.C. 78f(b).

[20] 15 U.S.C. 78f(b)(5).

[21] *See* supra note 5.

[22] *See* supra note 9.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change would not impose any burden on competition. The Exchange believes that the proposed rule changes will not burden intramarket competition because all Sponsoring Members and Sponsored Participants would be subject to the same requirements for sponsored access. The proposed rule change is not designed to address any competitive issues but rather is designed to provide greater harmonization among the Exchange, EDGX, BATS and BYX rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance for common members of the BGM Affiliated Exchanges.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has designated this rule filing as non-controversial under Section 19(b)(3)(A) of the Act [23] and paragraph (f)(6) of Rule 19b–4 thereunder.[24]

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: (1) Necessary or appropriate in the public interest; (2) for the protection of investors; or (3) 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 proposal 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–EDGA–2014–32 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 No. SR–EDGA–2014–32. 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–EDGA–2014–32 and should be submitted on or before January 5, 2015.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–29244 Filed 12–12–14; 8:45 am]

BILLING CODE 8011–01–P

[23] 15 U.S.C. 78s(b)(3)(A).

[24] 17 CFR 240.19b–4.

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–73796; File No. SR–EDGX–2014–33]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Rules 1.5 and 11.3 of EDGX Exchange, Inc.

December 9, 2014.

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 28, 2014, EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(6)(iii) thereunder,[4] which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

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The text of the proposed rule change is available at the Exchange's Web site at *http://www.directedge.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6)(iii).

[5] As defined below.

[6] *See* BATS Rules 1.5(x) and 11.3; BYX Rules 1.5(x) and 11.3.

statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rules 1.5(z) and 11.3 to harmonize its sponsored access rules with those set forth under BATS Rules 1.5(x) and 11.3 and BYX Rules 1.5(x) and 11.3.[7] Earlier this year, the Exchange and its affiliate EDGA Exchange, Inc. (''EDGA'') received approval to effect a merger (the ''Merger'') of the Exchange's parent company, Direct Edge Holdings LLC, with BATS Global Markets, Inc., the parent of BATS and BYX (together with BATS, BYX, EDGA and EDGX, the ''BGM Affiliated Exchanges'').[8] In the context of the Merger, the BGM Affiliated Exchanges are working to align certain rules, retaining only intended differences between the BGM Affiliated Exchanges. As part of this effort, the proposal set forth below harmonizes Exchange Rules 1.5(z) and 11.3 with BATS and BYX Rules 1.5(x) and 11.3 by aligning the rules around sponsored access for all sponsored participants and sponsoring members of the BGM Affiliated Exchanges.[9]

Rule 11.3 currently provides that the System[10] shall be available for entry and execution of orders by Users with authorized access. In order to obtain authorized access to the System, each Member must enter into an agreement with the Exchange in such form as the Exchange may provide. A Sponsored Participant[11] may obtain authorized access to the System only if such access is authorized in advance by one or more Sponsoring Members[12] as follows: (i) Sponsored Participants must enter into and maintain sponsored or direct access arrangements with one or more Sponsoring Members establishing proper relationship(s) and account(s) through which the Sponsored Participant may trade on the System; (ii) Sponsoring Member shall maintain a list of Sponsored Participants who Sponsoring Member has authorized to obtain access to the System pursuant to this Rule, shall update the list of Sponsored Participants as necessary, and provide the list of Sponsored Participants to the Exchange upon request; and (iii) Sponsoring Members shall comply with Rule 15c3–5 under the Exchange Act (the ''Market Access Rule'')[13] with regard to market access arrangements with Sponsored Participants.

The Exchange is proposing to delete Rules 11.3(b)(2) and (3), which are described in items (ii) and (iii) above. The Exchange is proposing to delete 11.3(b)(2) in order to add more thorough requirements for a Member to provide sponsored access to a Sponsored Participant, as described below. The Exchange is proposing to delete Rule 11.3(b)(3) in order to align the Exchange's rules with those of BATS and BYX. The Exchange notes that, while Rule 11.3(b)(3) requires a Sponsoring Member to comply with the Market Access Rule, such obligation applies to all brokers or dealers with market access[14] and thus exists whether or not the Exchange has a rule requiring compliance. As such, deleting current Rule 11.3(b)(3) does not alter a Member's or a Sponsored Participant's obligation to comply with the Market Access Rule.

The Exchange is also proposing to amend Rule 11.3(b)(1) in order to replace ''sponsored or direct access arrangements'' with ''customer agreements.'' In coordination with this change, the Exchange is also proposing to add the following sentence to the end of Rule 11.3(b)(1): ''Such customer agreement(s) must incorporate the sponsorship provisions set forth in paragraph (2) below.''

The Exchange is also proposing to add a new Rule 11.3(b)(2), which contains the requirements for the customer agreements referenced in proposed Rule 11.3(b)(1). As proposed, in order for a Sponsored Participant to obtain and maintain authorized access to the System, a Sponsored Participant and its Sponsoring Member must agree in writing to the following sponsorship provisions: (i) The Sponsored Participant and its Sponsoring Member must have entered into and maintained a User Agreement with the Exchange; (ii) the Sponsoring Member must acknowledge and agree that all orders entered by the Sponsored Participant and any person acting on behalf of or in the name of such Sponsored Participant and any executions occurring as a result of such orders are binding in all respects on the Sponsoring Member, and the Sponsoring Member is responsible for any and all actions taken by such Sponsored Participant and any person acting on behalf of or in the name of such Sponsored Participant; (iii) the Sponsoring Member shall comply with the Exchange's Certificate of Incorporation, By-Laws, Rules and procedures, and the Sponsored Participant shall comply with the Exchange's Certificate of Incorporation, By-Laws, Rules and procedures, as if such Sponsored Participant were a Member; (iv) the Sponsored Participant shall maintain, keep current and provide to the Sponsoring Member, and to the Exchange upon request, a list of Authorized Traders who may obtain access to the System on behalf of the Sponsored Participant. Sponsored Participant shall be subject to the obligations of Rule 11.4 with respect to such Authorized Traders;[15] (v) the Sponsored Participant shall familiarize its Authorized Traders with all of the Sponsored Participant's obligations under this Rule and will assure that they receive appropriate training prior to any use or access to the System; (vi) the Sponsored Participant may not permit anyone other than Authorized Traders to use or obtain access to the System; (vii) the Sponsored Participant shall take reasonable security precautions to prevent unauthorized use or access to the System, including unauthorized entry of information into the System, or the information and data made available therein. The Sponsored Participant understands and agrees that the Sponsored Participant is responsible for any and all orders, trades and other messages and instructions entered, transmitted or received under identifiers, passwords and security codes of Authorized Traders, and for the trading and other consequences thereof; (viii) the Sponsored Participant acknowledges its responsibility to establish adequate procedures and controls that permit it to effectively monitor its employees', agents' and customers' use and access to the System for compliance with the terms of this agreement; and (ix) the Sponsored Participant shall pay when due all amounts, if any, payable to Sponsoring Member, the Exchange or any other third parties that arise from the Sponsored Participant's access to and use of the System. Such amounts

[7] *See* supra note 5.

[8] *See* Securities Exchange Act Release No. 71449 (January 30, 2014), 79 FR 6961 (February 5, 2014) (SR–EDGX–2013–43; SR–EDGA–2013–34).

[9] The Exchange understands that EDGA is to file a proposed rule change with the Commission to adopt similar requirements.

[10] System is defined in EDGX Rule 1.5(cc).

[11] Sponsored Participant is defined in EDGX Rule 1.5(z).

[12] Sponsoring Members is defined in EDGX Rule 1.5(aa).

[13] 17 CFR 240.15c3–5.

[14] 17 CFR 240.15c3–5(b).

[15] *See* EDGX Rule 11.4.

include, but are not limited to applicable exchange and regulatory fees.

The Exchange is also proposing to replace Rule 11.3(b)(3) to state that the Sponsoring Member must provide the Exchange with a written statement in form and substance acceptable to the Exchange identifying each Sponsored Participant by name and acknowledging its responsibility for the orders, executions and actions of such Sponsored Participant. Such written statement in form and substance acceptable to the Exchange will be available as the ''Sponsored Application and Agreements'' form on the Exchange's Web site.[16]

Finally, the Exchange is proposing to amend Rule 1.5(z) to align the definition of Sponsored Participant with the definition on BATS and BYX[17] and to align the definition with the relationship between a Sponsoring Member, Sponsored Participant, and the Exchange, as proposed above. Specifically, the Exchange is proposing that the term Sponsored Participant mean a person which has entered into a sponsorship arrangement with a Sponsoring Member pursuant to Rule 11.3.

The Exchange notes that this proposal would in effect restore Exchange Rules 1.5(z) and 11.3 to their state prior to filing SR–EDGX–2012–24 (the ''Filing'').[18] In the Filing, the Exchange described the rationale for the proposed changes as being rendered superfluous and unnecessary by the adoption of Market Access Rule. Such changes, in contrast to the rules on BATS and BYX, however, created a situation in which the Exchange still had Sponsored Participants that were entering orders through Sponsoring Members, but the Exchange had no direct relationship with Sponsored Participants. In certain circumstances, this arrangement led to employees of the Exchange being unable to discuss certain order and/or trade details with Sponsored Participants. Based on these experiences, the Exchange no longer views the proposed rule text as superfluous, but, rather, such proposed rule text outlines a reasonable set of standards for a sponsored access relationship between the Exchange, the Sponsoring Member, and the Sponsored Participant. The Exchange believes that the proposed changes will enhance its rules and, as discussed above, harmonize the Exchange's rules with those of BATS and BYX. The Exchange does note that the proposal is not intended to supersede or supplement the Market Access Rule in any way, but rather to establish a more thorough set of rules under which the Exchange, Sponsored Participants, and Sponsoring Members will interact. As such, the Exchange also notes that compliance with the proposed rules has no bearing on whether any particular Member, Sponsoring Member, or Sponsored Participant is in compliance with the Market Access Rule.

Implementation Date

The Exchange intends to implement the proposed rule change on or about January 12, 2015. The Exchange will announce the implementation of the proposed rule change via a trading notice to be posted on the Exchange's Web site.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act[19] and furthers the objectives of Section 6(b)(5) of the Act,[20] in that it is designed promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, protect investors and the public interest. The proposal would effectively allow a Sponsoring Member(s) to provide a Sponsored Participant(s) with access to the Exchange and the ability to interact directly with Exchange employees. More specifically, the Exchange believes that the proposal is designed to promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general protect investors and the public interest because it would allow the Exchange to directly recognize the trading activity of Sponsored Participants and to communicate directly with Sponsored Participants regarding any potential issues that may arise.

The Exchange believes that the proposed rule change is not designed to permit unfair discrimination between customers, issuers, brokers or dealers. The proposed rule change is identical to the existing rules of BATS and BYX.[21] The proposed rule change is intended to align the Exchange's requirements for Sponsoring Members to provide sponsored access to Sponsored Participants with that of BATS, BYX, and EDGA[22] in order to provide consistent rules across the BGM Affiliated Exchanges. Consistent rules, in turn, will simplify the regulatory requirements for Members of the Exchange that are also participants on the other BGM Affiliated Exchanges. The proposed rule change would provide greater harmonization between the rules of the BGM Affiliated Exchanges of similar purpose, resulting in greater uniformity and less burdensome and more efficient regulatory compliance. As such, the proposed rule change would foster cooperation and coordination with persons engaged in facilitating transactions in securities and would remove impediments to and perfect the mechanism of a free and open market and a national market system.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change would not impose any burden on competition. The Exchange believes that the proposed rule changes will not burden intramarket competition because all Sponsoring Members and Sponsored Participants would be subject to the same requirements for sponsored access. The proposed rule change is not designed to address any competitive issues but rather is designed to provide greater harmonization among the Exchange, EDGA, BATS and BYX rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance for common members of the BGM Affiliated Exchanges.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has designated this rule filing as non-controversial under Section 19(b)(3)(A) of the Act[23] and paragraph (f)(6) of Rule 19b–4 thereunder.[24]

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

[16] The Exchange's Web site is accessible at *www.directedge.com.*

[17] *See* supra note 5.

[18] *See* Securities Exchange Act Release No. 67711 (August 22, 2012), 77 FR 52096 (August 28, 2012) (SR–EDGX–2012–24).

[19] 15 U.S.C. 78f(b).

[20] 15 U.S.C. 78f(b)(5).

[21] *See* supra note 5.

[22] *See* supra note 9.

[23] 15 U.S.C. 78s(b)(3)(A).

[24] 17 CFR 240.19b–4.

action is: (1) Necessary or appropriate in the public interest; (2) for the protection of investors; or (3) 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 proposal 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–EDGX–2014–33 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 No. SR–EDGX–2014–33. 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–EDGX–2014–33 and should be submitted on or before January 5, 2015.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–29243 Filed 12–12–14; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–73789; File No. SR–NASDAQ–2014–120]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify NASDAQ Rule 7049 Fees

December 8, 2014.

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 December 3, 2014, The NASDAQ Stock Market LLC (''NASDAQ'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

NASDAQ is proposing to modify fees assessed under NASDAQ Rule 7049 for the NASDAQ InterACT surveillance tool. While the changes proposed herein are effective upon filing, the Exchange has designated that the amendments be operative on January 2, 2015.

The text of the proposed rule change is available at *nasdaq.cchwallstreet.com* at NASDAQ's principal office, 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, NASDAQ included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ is proposing to amend Rule 7049 to increase the fee and related fee cap for subscription to the NASDAQ InterACT service. InterACT is a real-time compliance tool accessed through an existing Nasdaq Workstation or Weblink ACT 3.0 user account, which assists a member firm with supervision of its trade activity reported to the FINRA/NASDAQ Trade Reporting Facility, and with its supervision of trade throughs to help in complying with Rule 611 of Regulation NMS.[3] The Exchange currently assesses a fee of $300 per month, per user, for the first three users, and $100 per month, per user, for each additional user, with a maximum fee of $1,500 per month, per member firm. The Exchange began offering the service in 2009[4] and has not increased fees since its adoption, notwithstanding that the Exchange's costs in offering and supporting the service have increased. Accordingly, NASDAQ is proposing to increase the fee assessed for the service to $400 per month, per user, with an increased fee cap of $2,400 per month, per member firm. The Exchange is also proposing to eliminate the reduced fee rate of $100 per user, per month assessed for the fourth through ninth subscriptions.[5] The Exchange notes that offering the discounted fee for the fourth through ninth user subscriptions was designed to encourage member firms to purchase more subscriptions, thus ensuring broad use of the service and, ultimately, NASDAQ's ability to offer the service long-term. NASDAQ believes that the reduced fee has had the desired effect and, accordingly, is assessing the same fee for all subscriptions through the sixth, at which point member firms will have reached the new fee cap. Lastly, upon launch of InterACT in May 2009, NASDAQ offered the service at no cost for sixty days. Accordingly, NASDAQ is

[25] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 242.611.

[4] Securities Exchange Act Release No. 59786 (April 17, 2009), 74 FR 18769 (April 24, 2009) (SR–NASDAQ–2009–033).

[5] Subscriptions beyond the ninth are provided at no cost because the subscribing member firm has met the $1,500 monthly fee cap.

proposing to delete text from the rule that concerns the expired free period.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[6] in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,[7] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NASDAQ operates or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. This proposal is reasonable, equitable and not unfairly discriminatory for the reasons noted below.

NASDAQ believes that the proposed increases to the fee and fee cap are reasonable because they will allow NASDAQ to realign the fee assessed for the service with the costs it incurs in offering it, while also ensuring that the service continues to provide NASDAQ with a profit. Eliminating the reduced fee for the fourth through ninth subscriptions is reasonable because NASDAQ believes that it has served its purpose by attracting an adequate number of subscribers to the service to ensure its viability. As a consequence, NASDAQ believes that such incentive pricing is no longer needed.

NASDAQ believes that the increased fees and elimination of incentive pricing is an equitable allocation because NASDAQ is assessing the fee increase uniformly among subscribers up to the fee cap, which is also increased. NASDAQ notes that it incurs the same costs in offering a subscription, regardless of the number of member subscriptions. As such, increasing the fee and applying it uniformly to all subscriptions without any distinction based on the number of subscriptions a member firm has, up to the increased fee cap, better aligns the fees paid with the costs incurred by NASDAQ in offering the service.

The Exchange believes that the proposed changes are not unfairly discriminatory because they now apply a uniform fee per subscription, thus eliminating a distinction made in the fee assessed based on the number of subscriptions held. The Exchange notes that some member firms may incur a disproportionate increase in fees as compared to others under the proposed change as a result of the elimination of the incentive pricing provided for the fourth through ninth subscriptions and increase in the fee cap. Under the proposed change, a member firm that has four to six subscriptions will experience a greater per subscription fee increase than a member firm with three or fewer subscriptions, whereas subscriptions in excess of six under the proposed change exceed the new fee cap and are therefore offered at no cost. The Exchange does not believe that the changes are unfairly discriminatory because they eliminate a distinction in the fee assessed based on NASDAQ's desire to ensure wide acceptance of the service, and better align the fee assessed for a subscription with the costs that NASDAQ incurs in providing it. NASDAQ notes that it is retaining the fee cap, albeit at a higher level, which will ensure that no member firm pays more than $2,400 per month.

Lastly, the proposed elimination of the rule text concerning the expired free period is designed to clarify the rule text and avoid any potential confusion among market participants that may arise if the language were to remain.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule changes will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.[8] NASDAQ 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. In such an environment, NASDAQ must carefully balance the fees it assesses with the costs incurred to remain competitive with other exchanges. To the extent NASDAQ's fees are too high or another exchange's products and services provide greater value, NASDAQ will likely lose subscriber revenue. As such, NASDAQ believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. In this instance, NASDAQ is proposing to increase the fees for a service for the first time since it was offered in 2009 to realign the fee assessed for the subscription to the service with the costs it incurs in offering it, and to ensure that the service provides NASDAQ with a profit. Moreover, the Exchange does not believe that the fee increase imposes an unnecessary burden on competition because the service is optional and member firms may develop their own alternatives to the service or purchase similar functionality from third parties. Accordingly, NASDAQ does not believe that the proposed changes will impose any unnecessary burden on competition.

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

The foregoing change has become effective pursuant to Section 19(b)(3)(A) of the Act,[9] and paragraph (f) [10] of Rule 19b-4, thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. 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–2014–120 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–NASDAQ–2014–120. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(4) and (5).

[8] 15 U.S.C. 78f(b)(8).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f).

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 offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2014–120, and should be submitted on or before January 5, 2015.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–29240 Filed 12–12–14; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–73794; File No. SR–NYSEMKT–2014–98]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Amex Options Fee Schedule To Amend the Application of Routing Surcharge Fees

December 9, 2014.

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 November 26, 2014, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Amex Options Fee Schedule (''Fee Schedule'') to amend the application of Routing Surcharge fees. The Exchange proposes to implement the change on December 1, 2014. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule as it relates to the application of Routing Surcharge fees. The purpose of the proposed change is to account for recent changes introduced on other exchanges that impact the fees charged when routing orders.

The Exchange currently charges ATP Holders a Routing Surcharge when it routes orders to other exchanges for execution. The Routing Surcharge is comprised of an $0.11 per contract fee, plus the applicable charges assessed by the away market for execution of the order (which the Exchange is able to discern from the away market fee schedule). If the executing exchange does not charge a transaction fee for the execution of a Customer order, the Routing Surcharge is waived.

Recently, the BOX Options Exchange LLC (''BOX'') adopted per contract pricing that varies based upon the counter party to the trade. This pricing change makes it impossible to know in advance of the execution what the charges will be for an order routed to BOX. For example, a Professional Customer order routed to BOX in a non-Penny option would be charged $0.35 per contract if it traded against another Professional Customer or Broker/Dealer, but would be charged $0.94 per contract if it traded against a Customer.[4]

In order to provide ATP Holders with certainty regarding the routing fees for which they may be liable, the Exchange is proposing to amend the Fee Schedule as it relates to the application of Routing Surcharge fees, specifically endnote 7. The proposed amendment would specify that if the actual transaction fees assessed by the away exchange(s) cannot be determined prior to the execution, the Exchange would charge the $0.11 per contract fee plus the highest per contract charge assessed by the away exchange(s) for the relevant option class and type of market participant (*e.g.,* Customer, Firm, Broker/Dealer, Professional Customer or Market Maker).

The Exchange proposes to make a non-substantive changes [sic] to the Fee Schedule to replace the term ''all actual charges'' with the term ''any transaction fees'' as the Exchange believes that the term transaction fees better represents the applicable charges on away exchanges, and is consistent with existing rule text on the NYSE Arca, Inc. Options (''NYSE Arca'') Fee Schedule.

The Exchange notes that ATP Holders can avoid having their orders routed to away markets by utilizing specific, non-routable order types if they so choose.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[5] in general, and furthers the objectives of Section 6(b)(4) of the Act,[6] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed fee change is reasonable and equitable because charging market participants a set per contract rate in those instances when an order is routed to an away exchange provides market participants with certainty, which will enable them to make informed decisions regarding whether to continue to designate such orders as eligible for routing to away exchange. The Exchange further believes that the proposed fee change to charge the

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* BOX Fee Schedule, Section 1 (as of November 2014), *available here, http://boxexchange.com/assets/BOX_Fee_Schedule.pdf.*

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4).

highest rate charged by the away exchange if the Exchange cannot discern the per contract charge in the option class in question in advance of the execution is reasonable and equitable because the Exchange cannot know in advance what the charge would be on the away exchange. If the Exchange charged the lowest feasible charge, the Exchange could end up bearing the costs of routing an order to an away exchange. The Exchange notes that—just as they do today—to avoid incurring any Routing Surcharge in preference of an execution on the Exchange, ATP Holders are able to designate their orders as non-routable.

The Exchange believes that the proposed non-substantive change to the Fee Schedule is reasonable and equitable because it conforms the terms used in the Fee Schedule to terms used by NYSE Arca and that better describe the applicable charges.

The Exchange further believes that this proposed change is not unfairly discriminatory either as it applies equally to all ATP Holders that send orders to the Exchange.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes the proposed fee change is reasonably designed to be fair and equitable, and therefore, will not unduly burden any particular group of market participants trading on the Exchange vis-à-vis another group (*i.e.,* Market Markers versus non-Market Makers) as it applies equally to all ATP Holders that send routable orders to the Exchange.

The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [7] of the Act and subparagraph (f)(2) of Rule 19b–4 [8] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [9] 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–NYSEMKT–2014–98 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–NYSEMKT–2014–98. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2014–98, and should be submitted on or before January 5, 2015.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–29242 Filed 12–12–14; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(2).

[9] 15 U.S.C. 78s(b)(2)(B).

[10] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Midwest Mezzanine Fund V SBIC, L.P. License No. 05/05–0318]

Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that Midwest Mezzanine Fund V SBIC, L.P., 55 West Monroe Street, Suite 3650 Chicago, IL 60603, a Federal Licensee under the Small Business Investment Act of 1958, as amended (''the Act''), in connection with the financing of a small concern, has sought an exemption under Section 312 of the Act and Section 107.730, Financings which constitute Conflicts of Interest of the Small Business Administration (''SBA'') Rules and Regulations (13 CFR 107). Midwest Mezzanine Fund V SBIC, L.P., proposes purchasing subordinated debt and equity financings provided to Currie

Medical Specialties, Inc. of 8758 Hellman Avenue, Rancho Cucamonga, CA 91730, Denison Pharmaceuticals, Inc. of One Power Hill Road, Lincoln, RI 02865, Packaging Concepts & Design, LLC of 1307 I Allen Drive, Troy, Mi 48083, Uncle Milton Industries, Inc. of 29209 Canwood Street, Suite 120, Agoura Hills, CA 91301, and Vapor Power International, LLC of 551 South County Line Road, Franklin Park, IL 60131. The financings Midwest Mezzanine Fund V SBIC, L.P. seeks to purchase are held by Midwest Mezzanine Fund V, L.P.

These financings are brought within the purview of § 107.730(d) of the Regulations because Midwest Mezzanine Fund V SBIC, L.P. and Midwest Mezzanine Fund V, L.P. Partners II SBIC, L.P. are Associates. Therefore this transaction requires prior SBA exemption.

Notice is hereby given that any interested person may submit written comments on the transaction, within fifteen days of the date of this publication, to the Associate Administrator for Investment and Innovation, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

Javier E. Saade,

Associate Administrator for Office of Investment and Innovation.

[FR Doc. 2014–29271 Filed 12–12–14; 8:45 am]

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SOCIAL SECURITY ADMINISTRATION

[Docket No SSA–2014–0077]

Agency Information Collection Activities: Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions and an extension of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB) Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, Email address: *OIRA_Submission@omb.eop.gov.*

(SSA) Social Security Administration, OLCA, Attn: Reports Clearance Director, 3100 West High Rise, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–966–2830, Email address: *OR.Reports.Clearance@ssa.gov,* or you may submit your comments online through *www.regulations.gov,* referencing Docket ID Number [SSA–2014–0077].

SSA submitted the information collections below to OMB for clearance. Your comments regarding the information collections would be most useful if OMB and SSA receive them 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than January 14, 2015. Individuals can obtain copies of the OMB clearance package by writing to *OR.Reports.Clearance@ssa.gov.*

1. *Supplemental Security Income (SSI) Claim Information Notice—20 CFR 416.210–0960–0324.* Section 1611(e)(2) of the Social Security Act requires individuals to file for and obtain all payments (annuities, pensions, disability benefits, veteran's compensation, etc.) for which they are eligible before qualifying for SSI payments. Individuals do not qualify for SSI if they do not first apply for all other benefits. SSA uses the information on Form SSA–L8050–U3 to verify and establish a claimant or recipient's eligibility under the SSI program. Respondents are SSI applicants or recipients who may be eligible for other payments from public or private programs.

Note: This is a correction notice. SSA published this information collection as a revision on September 25, 2014, at 79 FR 57650. Since we are no longer revising this information collection, it is now an extension of an OMB-approved information collection.

Type of Request: Extension of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–L8050–U3	17,044	1	10	2,841

2. *You Can Make Your Payment by Credit Card—0960–0462.* Using information from Form SSA–4588 and its electronic application, Form SSA–4589, SSA updates individuals' Social Security records to reflect payments made on their overpayments. In addition, SSA uses this information to process payments through the appropriate credit card company. SSA provides the SSA–4588 when we inform an individual that we detected an overpayment. Individuals may choose to make a one-time payment or recurring monthly payments by completing and submitting the SSA–4588. SSA uses the SSA–4589 electronic intranet application only when individuals choose to telephone the Program Service Centers to make a one-time payment in lieu of completing Form SSA–4588. An SSA debtor contact representative completes the SSA–4589 electronic intranet application. Respondents are OASDI beneficiaries and SSI recipients who have outstanding overpayments.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–4588 Paper Form	13,200	1	10	2,200
SSA–4589 Electronic Intranet Application	221,3196	1	5	18,443

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
Totals	234,516			20,643

3. *Application for Extra Help with Medicare Prescription Drug Plan Costs—20 CFR 418.3101–0960–0696.* The Medicare Modernization Act of 2003 mandated the creation of the Medicare Part D prescription drug coverage program and the provision of subsidies for eligible Medicare beneficiaries. SSA uses Form SSA–1020 or the Internet i1020, the Application for Extra Help with Medicare Prescription Drug Plan Costs, to obtain income and resource information from Medicare beneficiaries and to make a subsidy decision. The respondents are Medicare beneficiaries applying for the Part D low-income subsidy.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–1020 (Paper Application Form	617,070	1	30	308,535
i1020 Online Application	282,228	1	25	117,595
Field Office Interview	155,687	1	30	77,844
Totals	1,054,985			503,974

Dated: December 10, 2014.

Faye Lipsky,

Reports Clearance Director, Social Security Administration.

[FR Doc. 2014–29246 Filed 12–12–14; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice: 8973]

Culturally Significant Objects Imported for Exhibition Determinations: ''Kuba Textiles: Geometry in Form, Space, and Time'' Exhibition

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), E.O. 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Kuba Textiles: Geometry in Form, Space, and Time,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit objects at the Neuberger Museum of Art, Purchase College, Purchase, New York, from on or about February 26, 2015, until on or about June 16, 2015, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including lists of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6467). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: December 5, 2014.

Kelly Keiderling,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2014–29273 Filed 12–12–14; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 8970]

Culturally Significant Objects Imported for Exhibition Determinations: ''Piero di Cosimo: The Poetry of Painting in Renaissance Florence''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), E.O. 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Piero di Cosimo: The Poetry of Painting in Renaissance Florence,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the National Gallery of Art, Washington, DC, from on or about February 1, 2015, until on or about May 3, 2015, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the imported objects, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: December 4, 2014.

Kelly Keiderling,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2014–29312 Filed 12–12–14; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[PUBLIC NOTICE: 8972]

Culturally Significant Objects Imported for Exhibition Determinations: ''Björk'' Exhibition

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Björk,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at The Museum of Modern Art, New York, New York, from on or about March 8, 2015, until on or about June 7, 2015, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including lists of the exhibit objects, contact Julianne C. Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6467). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: December 7,2014.

Kelly Keiderling,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2014–29272 Filed 12–12–14; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 8968]

Culturally Significant Objects Imported for Exhibition Determinations: ''The Habsburgs: Rarely Seen Artworks from Europe's Greatest Dynasty''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), E.O. 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''The Habsburgs: Rarely Seen Artworks from Europe's Greatest Dynasty,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit objects at the Minneapolis Institute of Arts, Minneapolis, Minnesota, from on or about February 15, 2015, until on or about May 10, 2015, the Museum of Fine Arts, Houston, Houston, Texas, from on or about June 14, 2015, to on or about September 13, 2015, the High Museum of Art, Atlanta, Georgia, from on or about October 18, 2015, to on or about January 17, 2016, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the imported objects, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: December 5, 2014.

Kelly Keiderling,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2014–29274 Filed 12–12–14; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 8969]

Culturally Significant Object Imported for Exhibition Determinations: ''Visiting Masterpiece: Gustav Klimt's Adam and Eve''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), E.O. 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the object to be included in the exhibition ''Visiting Masterpiece: Gustav Klimt's Adam and Eve,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The object is imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the imported object at the Museum of Fine Arts Boston, Boston, Massachusetts, from on or about January 17, 2015, until on or about April 27, 2015, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a description of the imported object, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: December 4, 2014.

Kelly Keiderling,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2014–29275 Filed 12–12–14; 8:45 am]

BILLING CODE 4710–05–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Determinations under the African Growth and Opportunity Act

AGENCY: Office of the United States Trade Representative.

ACTION: Notice .

SUMMARY: The United States Trade Representative (USTR) has determined that Guinea and Madagascar have each adopted effective visa systems and related procedures to prevent unlawful transshipment of textile and apparel articles and the use of counterfeit documents in connection with the shipment of such articles and has implemented and follows, or is making substantial progress toward implementing and following, the customs procedures required by the African Growth and Opportunity Act (AGOA). Therefore, as specified in this

notice, imports of eligible products from Guinea and Madagascar qualify for the textile and apparel benefits provided for under AGOA.

DATES: *Effective Date:* December 15, 2014.

FOR FURTHER INFORMATION CONTACT: Constance Hamilton, Deputy Assistant U.S. Trade Representative for Africa, Office of the United States. Trade Representative, at (202) 395–9514.

SUPPLEMENTARY INFORMATION: The AGOA (Title I of the Trade and Development Act of 2000, Public Law 106–200, as amended provides preferential tariff treatment for imports of certain textile and apparel products of beneficiary sub-Saharan African countries. The textile and apparel trade benefits under AGOA are available to imports of eligible products from countries that the President designates as ''beneficiary sub-Saharan African countries,'' provided that these countries: (1) Have adopted an effective visa system and related procedures to prevent unlawful transshipment of textile and apparel articles and the use of counterfeit documents in connection with shipment of such articles; and (2) have implemented and follow, or are making substantial progress toward implementing and following, certain customs procedures that assist the Customs Service in verifying the origin of the products. In Proclamation 8741 (October 25, 2011) the President designated Guinea as a ''beneficiary sub-Saharan Africa country'' and proclaimed that, for purposes of section 112(c) of the AGOA, Guinea shall be considered a lesser developed beneficiary sub-Saharan African country. In Proclamation 9145 (June 26, 2014), the President similarly designated Madagascar as a ''beneficiary sub-Saharan Africa country'' and, for purposes of section 112(c) of the AGOA, shall be considered a lesser developed beneficiary sub-Saharan African country.

In Proclamation 7350 (October 2, 2000), the President authorized the USTR to perform the function of determining whether eligible sub-Saharan beneficiary countries have met the two requirements described above. The President directed the USTR to announce any such determinations in the **Federal Register** and to implement them through modifications the Harmonized Tariff Schedule of the United States (HTS). Based on actions that both Guinea and Madagascar have taken, I have determined that each country have satisfied these two requirements. Accordingly, pursuant to the authority assigned to the USTR in Proclamation 7350, U.S. note 7(a) to subchapter II of chapter 98 of the HTS, and U.S. notes 1 and 2(d) to subchapter XIX of the HTS are modified by inserting ''Guinea'' and ''Madagascar'' in alphabetical sequence in the list of countries. The foregoing modifications to the HTS are effective with respect to articles entered, or withdrawn from warehouse for consumption, on date of publication. Importers claiming preferential tariff treatment under the AGOA for entries of textile and apparel articles should ensure that those entries meet the applicable visa requirements. See Visa Requirements Under the African Growth and Opportunity Act, 66 FR 7837 (2001).

Michael B.G. Froman,

United States Trade Representative.

[FR Doc. 2014–29169 Filed 12–12–14; 8:45 am]

BILLING CODE 3290–F5–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in California

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Limitation on Claims for Judicial Review of Actions by the California Department of Transportation (Caltrans), pursuant to 23 U.S.C. 327.

SUMMARY: The FHWA, on behalf of Caltrans, is issuing this notice to announce actions taken by Caltrans that are final within the meaning of 23 U.S.C. 139(*l*)(1). The actions relate to a proposed highway project, widen and seismically retrofit the existing Riverside Drive Bridge (53C–1298), located south of the junction of Victory Boulevard, Sonora Avenue and Riverside Drive; and north of Zoo Drive in the Hollywood Community Planning Area in the City and County of Los Angeles, State of California. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA, on behalf of Caltrans, is advising the public of final agency actions subject to 23 U.S.C. 139(*l*)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before May 14, 2015 If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: For Caltrans: Tami Podesta, Branch Chief, Division of Environmental Planning, California Department of Transportation, 100 South Main Street, Los Angeles, California, 90275, Regular Office Hours M–F 8:00 a.m.-5:00 p.m., Phone Number (213) 897–0309, Email *tami_podesta@dot.ca.gov.*

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, the Federal Highway Administration (FHWA) assigned, and the California Department of Transportation (Caltrans) assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Notice is hereby given that the Caltrans has taken final agency actions subject to 23 U.S.C. 139(*l*)(1) by issuing licenses, permits, and approvals for the following highway project in the State of California: The City of Los Angeles and the California Department of Transportation propose to widen and seismically retrofit the existing Riverside Drive Bridge (53C–1298), located south of the junction of Victory Boulevard, Sonora Avenue and Riverside Drive; and north of Zoo Drive in the Hollywood Community Planning Area of the City and County of Los Angeles. The project would include widening and rehabilitating the existing four-lane bridge to correct existing geometrical design deficiencies, address seismic vulnerabilities, and improve pedestrian and bicycle travel; BHLS-5006 (205). The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Environmental Assessment (EA) for the project, approved on May 7, 2013, in the FHWA Finding of No Significant Impact issued on August 29,2013, and in other documents in the FHWA project records. The EA, FONSI and other project records are available by contacting Caltrans at the addresses provided above. The Caltrans EA and FONSI can be viewed and downloaded from the project Web site at *http://www.dot.ca.gov/dist07/resources/envdocs/docs/Riverside_Drive_Bridge_Final_IS–EA_APPROVED.pdf.*

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. General: The National Environmental Policy Act (NEPA) (42 U.S.C. 4321–4351)
2. Safe, Accountable, Flexible and Efficient, Transportation Equity Act, A Legacy for Users (SAFETEA–LU)
3. MAP 21- Moving Ahead for Progress in the 21st Century
4. US Army Corps of engineers (USACE)- Section 404 and Section 408
5. US Fish and Wildlife Service (USFWS)- Section 7

6. State Historic Preservation Office-Section 106 (MOA)

7. Title VI of the Civil Rights Act of 1964

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(*l*)(1)

Issued on: December 4, 2014.

Tami Podesta,

Senior Environmental Planner, California Department of Transportation.

[FR Doc. 2014–29238 Filed 12–12–14; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2014–0237]

Agency Information Collection Activities; New Information Collection: Generic Clearance of Customer Satisfaction Surveys

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for its review and approval and invites public comment. 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 our programs are effective and meet our customers' needs, the Federal Motor Carrier Safety Administration (FMCSA) seeks to obtain OMB approval of a generic clearance to collect feedback on our service delivery. By 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. On August 29, 2014, FMCSA published a notice in the **Federal Register** (79 FR 51639) allowing for a 60-day comment period on this ICR. The agency received no comments in response to that notice.

DATES: Please send your comments by January 14, 2015. OMB must receive your comments by this date in order to act on the ICR.

ADDRESSES: All comments should reference Federal Docket Management System (FDMS) Docket Number FMCSA–2014–0237. Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/Federal Motor Carrier Safety Administration, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Mr. Brian Ronk, Program Manager, FMCSA, Office of Enforcement and Program Delivery, Outreach Division/MC–ESO. Telephone (202) 366–1072; or email *brian.ronk@dot.gov.* Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590.

Mr. Jeff Loftus,, Supervisory Transportation Specialist, Technology Division/MC–RRT, Office of Analysis, Research and Technology, Telephone (202) 385–2363; or email *jeff.loftus@dot.gov,* Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance of Customer Satisfaction Surveys.

OMB Control Number: 2126–00XX.

Type of Request: New collection.

Respondents: State and local agencies, general public and stakeholders, original equipment manufacturers (OEM) and suppliers to the commercial motor vehicle (CMV) industry, fleets, owner-operators, state CMV safety agencies, research organizations and contractors, news organizations, safety advocacy groups, and other Federal agencies.

Estimated Number of Respondents: 5,900.

Estimated Time per Response: Range from 10—120 minutes per response.

Expiration Date: N/A. This is a new ICR.

Frequency of Response: Generally, on an annual basis.

Estimated Total Annual Burden: 5,274 hours.

Background

Executive Order 12862 ''Setting Customer Service Standards,'' direct Federal agencies to provide service to the public that matches or exceeds the best service available in the private sector (58 FR 48257, September 11, 1993). In order to work continuously to ensure that our programs are effective and meet our customers' needs, FMCSA seeks to obtain OMB approval of a generic clearance to collect qualitative feedback from our customers on our service delivery. The surveys covered in this generic clearance will provide a means for FMCSA to collect this data directly from our customers. 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 perception, experiences and expectations, provide an early warning of issues with service, or focus attention on areas of communication, training or changes in operations that 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.

The solicitation of feedback will target areas such as: Timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses will be assessed to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on the Agency's services will be unavailable.

The Agency will only submit a collection for approval under this generic clearance if it meets the following conditions:

- The collections are voluntary.
- The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government.
- The collections are noncontroversial and do not raise issues of concern to other Federal agencies.
- Any collection is targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future.

• Personally identifiable information (PII) is collected only to the extent necessary and is not retained.

• Information gathered is intended to be used only internally for general service improvement and program management purposes and is not intended for release outside of the agency (if released, the agency must indicate the qualitative nature of the information).

• Information gathered will not be used for the purpose of substantially informing influential policy decisions; and

• Information gathered will yield qualitative information; the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalized to the population of study.

Feedback collected under this generic clearance provides useful information, but does 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 nonresponse bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to 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. As a general matter, information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FMCSA to perform its functions; (2) the accuracy of the estimated burden; (3) ways for the FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information.

Issued under the authority delegated in 49 CFR 1.87 on December 8, 2014

G. Kelly Regal,

Associate Administrator, Office of Research and Information Technology, and Chief Information Officer.

[FR Doc. 2014–29292 Filed 12–12–14; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2014–0310]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA).

ACTION: Notice of applications for exemptions request for comments.

SUMMARY: FMCSA announces receipt of applications from 66 individuals for exemption from the prohibition against persons with insulin-treated diabetes mellitus (ITDM) operating commercial motor vehicles (CMVs) in interstate commerce. If granted, the exemptions would enable these individuals with ITDM to operate CMVs in interstate commerce.

DATES: Comments must be received on or before January 14, 2015.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2014–0310 using any of the following methods:

• *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

• *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

• *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

• *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket numbers for this notice. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below for further information.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, R.N., Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

I. Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal Motor Carrier Safety Regulations for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. The 66 individuals listed in this notice have recently requested such an exemption from the diabetes prohibition in 49 CFR 391.41(b) (3), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by statute.

II. Qualifications of Applicants

Eric D. Ambler

Mr. Ambler, 43, has had ITDM since 2005. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting

in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Ambler understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Ambler meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Wisconsin.

Clay B. Anderson

Mr. Anderson, 39, has had ITDM since 2004. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Anderson understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Anderson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Illinois.

Gregory C. Bartley

Mr. Bartley, 57, has had ITDM since 2009. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Bartley understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Bartley meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he has stable nonproliferative diabetic retinopathy in his right eye, and stable proliferative diabetic retinopathy in his left eye. He holds a Class A CDL from Pennsylvania.

Aaron M. Batts

Mr. Batts, 29, has had ITDM since 2006. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Batts understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Batts meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from North Carolina.

Nathan R. Batzel

Mr. Batzel, 26, has had ITDM since 2002. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Batzel understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Batzel meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds an operator's license from Minnesota.

Michael R. Bell

Mr. Bell, 62, has had ITDM since 2009. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Bell understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Bell meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class C CDL from Maryland.

Andrew Coffey

Mr. Coffey, 54, has had ITDM since 2012. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Coffey understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Coffey meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds an operator's license from Connecticut.

Robert N. Coury

Mr. Coury, 59, has had ITDM since 1999. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Coury understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Coury meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds an operator's license from Nevada.

Jerry A. Cox, Sr.

Mr. Cox, Sr., 51, has had ITDM since 1999. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Cox understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Cox meets the requirements of the vision standard at 49 CFR

391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Louisiana.

Lloyd F. Cuckow

Mr. Cuckow, 45, has had ITDM since 2014. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Cuckow understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Cuckow meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Colorado.

Kenneth B. Dennard

Mr. Dennard, 65, has had ITDM since 2012. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Dennard understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Dennard meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Georgia.

Eric Q. Dickerson

Mr. Dickerson, 65, has had ITDM since 2011. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Dickerson understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Dickerson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds an operator's license from Indiana.

James P. Dreifuerst

Mr. Dreifuerst, 47, has had ITDM since 1973. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Dreifuerst understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Dreifuerst meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Wisconsin.

Billy D. Dryer

Mr. Dryer, 64, has had ITDM since 1999. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Dryer understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Dryer meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Missouri.

James H. Elliott

Mr. Elliott, 44, has had ITDM since 1981. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Elliott understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Elliott meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he has stable nonproliferative diabetic retinopathy. He holds an operator's license from Ohio.

Domenic R. Folino

Mr. Folino, 52, has had ITDM since 2010. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Folino understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Folino meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

Jimmie W. Grist

Mr. Grist, 69, has had ITDM since 2014. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Grist understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Grist meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Idaho.

Scott M. Guyette

Mr. Guyette, 38, has had ITDM since 2011. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or

more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Guyette understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Guyette meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds an operator's license from Wisconsin.

Carl D. Hall

Mr. Hall, 79, has had ITDM since 2014. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Hall understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Hall meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Kentucky.

Howard M. Hammel

Mr. Hammel, 51, has had ITDM since 2013. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Hammel understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Hammel meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from New Jersey.

Derrick D. Harris

Mr. Harris, 46, has had ITDM since 2014. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Harris understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Harris meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Illinois.

Terry M. Jacobson

Mr. Jacobson, 60, has had ITDM since 1983. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Jacobson understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Jacobson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds an operator's license from Wisconsin.

Kevin R. Johnson

Mr. Johnson, 53, has had ITDM since 2004. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Johnson understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Johnson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds an operator's license from Michigan.

Martin S. Kiss

Mr. Kiss, 64, has had ITDM since 2011. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Kiss understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Kiss meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Illinois.

Robert S. Krueger

Mr. Krueger, 62, has had ITDM since 2014. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Krueger understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Krueger meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Washington.

David J. Long

Mr. Long, 43, has had ITDM since 1989. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Long understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Long meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

Michael R. Ludowese

Mr. Ludowese, 33, has had ITDM since 2008. His endocrinologist examined him in 2014 and certified that

he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Ludowese understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Ludowese meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Minnesota.

David P. Magee

Mr. Magee, 21, has had ITDM since 1998. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Magee understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Magee meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds an operator's license from Missouri.

Gary F. Marson

Mr. Marson, 65, has had ITDM since 2013. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Marson understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Marson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Wisconsin.

Steven R. Mc Clain

Mr. Mc Clain, 63, has had ITDM since 2008. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Mc Clain understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Mc Clain meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Illinois.

Arthur D. McFadden, Sr.

Mr. McFadden, 70, has had ITDM since 2000. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. McFadden understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. McFadden meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Iowa.

Elbert J. Means

Mr. Means, 63, has had ITDM since 2014. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Means understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Means meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from South Carolina.

James A. Meridith

Mr. Meridith, 69, has had ITDM since 2013. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Meridith understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Meridith meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Michigan.

Richard A. Moore

Mr. Moore, 55, has had ITDM since 2013. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Moore understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Moore meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

Keith B. Muehler

Mr. Muehler, 45, has had ITDM since 2014. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Muehler understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Muehler meets the

requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from North Dakota.

John K. Murray

Mr. Murray, 46, has had ITDM since 2006. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Murray understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Murray meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds an operator's license from New York.

Harold N. Myers

Mr. Myers, 64, has had ITDM since 2012. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Myers understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Myers meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds an operator's license from Iowa.

Clayton L. Neuhauser

Mr. Neuhauser, 59, has had ITDM since 2006. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Neuhauser understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Neuhauser meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from North Dakota.

Eugene E. Patterson, III

Mr. Patterson, 44, has had ITDM since 2006. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Patterson understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Patterson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds an operator's license from Texas.

John D. Pede, Jr.

Mr. Pede, 52, has had ITDM since 2014. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Pede understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Pede meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

Jack E. Pollock

Mr. Pollock, 47, has had ITDM since 2013. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Pollock understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Pollock meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Georgia.

John F. Prophet

Mr. Prophet, 52, has had ITDM since 2013. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Prophet understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Prophet meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Florida.

David M. Pullen

Mr. Pullen, 57, has had ITDM since 2013. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Pullen understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Pullen meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Virginia.

Dominic F. Quartullo

Mr. Quartullo, 59, has had ITDM since 2014. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in

impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Quartullo understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Quartullo meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Wisconsin.

David Quintrall

Mr. Quintrall, 65, has had ITDM since 2011. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Quintrall understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Quintrall meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Wyoming.

Michael E. Reed

Mr. Reed, 49, has had ITDM since 2014. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Reed understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Reed meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Iowa.

Carlos B. Rodriguez

Mr. Rodriguez, 48, has had ITDM since 2013. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Rodriguez understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Rodriguez meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from New York.

Marvin A. Ryan

Mr. Ryan, 56, has had ITDM since 2013. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Ryan understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Ryan meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Indiana.

David J. Sierra

Mr. Sierra, 70, has had ITDM since 2014. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Sierra understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Sierra meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from New Jersey.

Larry D. Small

Mr. Small, 60, has had ITDM since 1992. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Small understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Small meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from New Jersey.

Roger E. Smith

Mr. Smith, 68, has had ITDM since 1990. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Smith understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Smith meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he has stable nonproliferative and proliferative diabetic retinopathy. He holds a Class C CDL from Iowa.

Terrell W. Smith

Mr. Smith, 27, has had ITDM since 2003. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Smith understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Smith meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds an operator's license from Pennsylvania.

Anthony L. Spratto

Mr. Spratto, 60, has had ITDM since 1990. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Spratto understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Spratto meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he has stable nonproliferative diabetic retinopathy. He holds an operator's license from Wisconsin.

Timothy R. Stephens

Mr. Stephens, 39, has had ITDM since 2004. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Stephens understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Stephens meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Kansas.

Howard C. Stines

Mr. Stines, 64, has had ITDM since 1993. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Stines understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Stines meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Tennessee.

Christopher E. Swanson

Mr. Swanson, 31, has had ITDM since 2003. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Swanson understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Swanson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds an operator's license from California.

Scott R. Swisher

Mr. Swisher, 49, has had ITDM since 2012. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Swisher understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Swisher meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Kansas.

Diana C. Tabala

Ms. Tabala, 43, has had ITDM since 1983. Her endocrinologist examined her in 2013 and certified that she has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. Her endocrinologist certifies that Ms. Tabala understands diabetes management and monitoring has stable control of her diabetes using insulin, and is able to drive a CMV safely. Ms. Tabala meets the requirements of the vision standard at 49 CFR 391.41(b)(10). Her ophthalmologist examined her in 2013 and certified that she has stable nonproliferative diabetic retinopathy. She holds a Class C CDL from New York.

Brewster E. Thurston

Mr. Thurston, 55, has had ITDM since 2011. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Thurston understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Thurston meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Vermont.

Phillip J. Ulmer

Mr. Ulmer, 53, has had ITDM since 2013. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Ulmer understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Ulmer meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Louisiana.

Charles A. Walker

Mr. Walker, 61, has had ITDM since 2014. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Walker understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV

safely. Mr. Walker meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds an operator's license from Illinois.

Roger L. Watt

Mr. Watt, 70, has had ITDM since 2010. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Watt understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Watt meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

John D. Weaver

Mr. Weaver, 33, has had ITDM since 2012. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Weaver understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Weaver meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Wyoming.

Avery White

Mr. White, 35, has had ITDM since 2012. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. White understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. White meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Georgia.

Leroy D. Yost

Mr. Yost, 70, has had ITDM since 2014. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Yost understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Yost meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Iowa.

Wayne W. Zander

Mr. Zander, 60, has had ITDM since 2014. His endocrinologist examined him in 2014 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Zander understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Zander meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2014 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from South Dakota.

III. Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated in the date section of the notice.

FMCSA notes that section 4129 of the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users requires the Secretary to revise its diabetes exemption program established on September 3, 2003 (68 FR 52441) [1]. The revision must provide for individual assessment of drivers with diabetes mellitus, and be consistent with the criteria described in section 4018 of the Transportation Equity Act for the 21st Century (49 U.S.C. 31305).

Section 4129 requires: (1) elimination of the requirement for 3 years of experience operating CMVs while being treated with insulin; and (2) establishment of a specified minimum period of insulin use to demonstrate stable control of diabetes before being allowed to operate a CMV.

In response to section 4129, FMCSA made immediate revisions to the diabetes exemption program established by the September 3, 2003 notice. FMCSA discontinued use of the 3-year driving experience and fulfilled the requirements of section 4129 while continuing to ensure that operation of CMVs by drivers with ITDM will achieve the requisite level of safety required of all exemptions granted under 49 U.S.C.. 31136 (e).

Section 4129(d) also directed FMCSA to ensure that drivers of CMVs with ITDM are not held to a higher standard than other drivers, with the exception of limited operating, monitoring and medical requirements that are deemed medically necessary.

The FMCSA concluded that all of the operating, monitoring and medical requirements set out in the September 3, 2003 notice, except as modified, were in compliance with section 4129(d). Therefore, all of the requirements set out in the September 3, 2003 notice, except as modified by the notice in the **Federal Register** on November 8, 2005 (70 FR 67777), remain in effect.

IV. Submitting Comments

You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov* and in the search box insert the docket number FMCSA–2014–0310 and click the search button. When the new screen appears, click on the blue ''Comment Now!''

[1] Section 4129(a) refers to the 2003 notice as a ''final rule.'' However, the 2003 notice did not issue a ''final rule'' but did establish the procedures and standards for issuing exemptions for drivers with ITDM.

button on the right hand side of the page. On the new page, enter information required including the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period and may change this proposed rule based on your comments. FMCSA may issue a final rule at any time after the close of the comment period.

V. Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble, To submit your comment online, go to *http://www.regulations.gov* and in the search box insert the docket number FMCSA–2014–0310 and click ''Search.'' Next, click ''Open Docket Folder'' and you will find all documents and comments related to the proposed rulemaking.

Issued on: December 5, 2014.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2014–29286 Filed 12–12–14; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2002–12844]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 7 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective January 17, 2015. Comments must be received on or before January 14, 2015.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) numbers: Docket No. [Docket No. FMCSA–2002–12844], using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, R.N., Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

I. Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

II. Exemption Decision

This notice addresses 7 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. FMCSA has evaluated these 7 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Howard F. Breitkreutz (MN)
John E. Evenson (WI)
Steven C. Humke (IA)
Craig M. Landry (LA)
Andrew H. Rusk (IL)
Kenneth E. Vigue, Jr. (WA)
Richard A. Winslow (MN)

The exemptions are extended subject to the following conditions: (1) That each individual has a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the requirements in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provides a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retains a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) the person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it

was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

III. Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 7 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (67 FR 68719; 68 FR 2629; 69 FR 71100; 72 FR 1053; 73 FR 76440; 75 FR 80887; 77 FR 76167). Each of these 7 applicants has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the requirement specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption requirements.

These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

IV. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA–2002–12844), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so the Agency can contact you if it has questions regarding your submission.

To submit your comment online, got to *http://www.regulations.gov* and put the docket number, ''FMCSA–2002–12844'' in the ''Keyword'' box, and click ''Search.'' When the new screen appears, click on ''Comment Now!'' button and type your comment into the text box in the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope. FMCSA will consider all comments and material received during the comment period and may change this notice based on your comments.

Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov* and in the search box insert the docket number, ''FMCSA–2002–12844'' in the ''Keyword'' box and click ''Search.'' Next, click ''Open Docket Folder'' button choose the document listed to review. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

Issued on: December 5, 2014.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2014–29284 Filed 12–12–14; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2004–19477; FMCSA–2010–0327]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 10 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective January 14, 2015. Comments must be received on or before January 14, 2015.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) numbers: Docket No. [Docket No. FMCSA–2004–19477; FMCSA–2010–0327], using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records

notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, R.N., Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

I. Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

II. Exemption Decision

This notice addresses 10 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. FMCSA has evaluated these 10 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Charles L. Alsager, Jr. (IA)
Ross E. Burroughs (NJ)
Christopher L. Depuy (OH)
John B. Etheridge (GA)
Larry J. Folkerts (IA)
Paul W. Hunter (AL)
Ray P. Lenz (IA)
Francis M. McMullin (PA)
Norman Mullinas (OH)
David J. Triplett (KY)

The exemptions are extended subject to the following conditions: (1) That each individual has a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the requirements in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provides a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retains a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

III. Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 10 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (69 FR 64806; 70 FR 2705; 72 FR 1056; 73 FR 76439; 75 FR 79084; 75 FR 65057; 75 FR 79081; 77 FR 75496). Each of these 10 applicants has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the requirement specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption requirements. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

IV. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA–2004–19477; FMCSA–2010–0327), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so the Agency can contact you if it has questions regarding your submission.

To submit your comment online, got to *http://www.regulations.gov* and put the docket number, ''FMCSA–2004–19477; FMCSA–2010–0327'' in the ''Keyword'' box, and click ''Search.'' When the new screen appears, click on ''Comment Now!'' button and type your comment into the text box in the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope. FMCSA will consider all comments and material received during the comment period and may change this notice based on your comments.

Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov* and in the search box insert the docket number, ''FMCSA–2004–19477; FMCSA–2010–0327'' in the ''Keyword'' box and click ''Search.'' Next, click ''Open Docket Folder'' button choose the document listed to review. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

Issued on: December 5, 2014.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2014–29287 Filed 12–12–14; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2013–0443]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to grant requests from 9 individuals for exemptions from the regulatory requirement that interstate commercial motor vehicle (CMV) drivers have ''no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV.'' The regulation and the associated advisory criteria published in the Code of Federal Regulations as the ''Instructions for Performing and Recording Physical Examinations'' have resulted in numerous drivers being prohibited from operating CMVs in interstate commerce based on the fact that they have had one or more seizures and are taking anti-seizure medication, rather than an individual analysis of their circumstances by a qualified medical examiner. The Agency concluded that granting exemptions for these CMV drivers will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions. FMCSA grants exemptions that will allow these 9 individuals to operate CMVs in interstate commerce for a 2-year period. The exemptions preempt State laws and regulations and may be renewed.

DATES: The exemptions are effective December 15, 2014. The exemptions expire on December 15, 2016.

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Division Chief, Physical Qualifications, Office of Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are 8:30 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

A. Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* and/or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

B. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the safety regulations for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period.

FMCSA grants 9 individuals an exemption from the regulatory requirement in § 391.41(b)(8), to allow these individuals who take anti-seizure medication to operate CMVs in interstate commerce for a 2-year period. The Agency's decision on these exemption applications is based on an individualized assessment of each applicant's medical information, including the root cause of the respective seizure(s), the length of time elapsed since the individual's last seizure, and each individual's treatment regimen. In addition, the Agency reviewed each applicant's driving record found in the Commercial Driver's License Information System (CDLIS) [1] for commercial driver's license (CDL) holders, and interstate and intrastate inspections recorded in Motor Carrier Management Information System (MCMIS) [2]. For non-CDL holders, the Agency reviewed the driving records from the State licensing agency. The Agency acknowledges the potential consequences of a driver experiencing a seizure while operating a CMV. However, the Agency believes the drivers covered by the exemptions granted here have demonstrated that they are unlikely to have a seizure and their medical condition does not pose a risk to public safety.

In reaching the decision to grant these exemption requests, the Agency considered both current medical literature and information and the 2007 recommendations of the Agency's Medical Expert Panel (MEP). The Agency previously gathered evidence for potential changes to the regulation at 49 CFR 391.41(b)(8) by conducting a comprehensive review of scientific literature that was compiled into the ''*Evidence Report on Seizure Disorders and Commercial Vehicle Driving''* (*Evidence Report*) [CD–ROM HD TL230.3 .E95 2007]. The Agency then convened a panel of medical experts in the field of neurology (the MEP) on May 14–15, 2007, to review 49 CFR 391.41(b)(8) and the advisory criteria regarding individuals who have experienced a seizure, and the 2007 *Evidence Report.* The *Evidence Report* and the MEP recommendations are published on-line at *http://www.fmcsa.dot.gov/rules-regulations/topics/mep/mep-reports.htm,* under Seizure Disorders, and are in the docket for this notice.

MEP Criteria for Evaluation

On October 15, 2007, the MEP issued the following recommended criteria for evaluating whether an individual with epilepsy or a seizure disorder should be allowed to operate a CMV.[3] The MEP recommendations are included in previously published dockets.

Epilepsy diagnosis. If there is an *epilepsy diagnosis,* the applicant should be seizure-free for *8 years, on or off medication.* If the individual is taking anti-seizure medication(s), the plan for medication should be stable for *2 years.* Stable means no changes in medication, dosage, or frequency of medication administration. Recertification for drivers with an epilepsy diagnosis should be performed every year.

Single unprovoked seizure. If there is a *single unprovoked seizure* (*i.e.,* there is no known trigger for the seizure), the individual should be seizure-free for *4 years, on or off medication.* If the individual is taking anti-seizure medication(s), the plan for medication should be stable for *2 years.* Stable means no changes in medication, dosage, or frequency of medication administration. Recertification for drivers with a single unprovoked seizure should be performed every 2 years.

Single provoked seizure. If there is a *single provoked seizure* (*i.e.,* there is a known reason for the seizure), the Agency should consider specific criteria that fall into the following two

[1] *Commercial Driver License Information System* (CDLIS) is an information system that allows the exchange of commercial driver licensing information among all the States. CDLIS includes the databases of fifty-one licensing jurisdictions and the CDLIS Central Site, all connected by a telecommunications network.

[2] *Motor Carrier Management Information System* (MCMIS) is an information system that captures data from field offices through SAFETYNET, CAPRI, and other sources. It is a source for FMCSA inspection, crash, compliance review, safety audit, and registration data.

[3] Engel, J., Fisher, R.S., Krauss, G.L., Krumholz, A., and Quigg, M.S., ''Expert Panel Recommendations: Seizure Disorders and Commercial Motor Vehicle Driver Safety,'' FMCSA, October 15, 2007.

categories: low-risk factors for recurrence and moderate-to-high risk factors for recurrence.

• *Examples of low-risk factors for recurrence* include seizures that were caused by a medication; by non-penetrating head injury with loss of consciousness less than or equal to 30 minutes; by a brief loss of consciousness not likely to recur while driving; by metabolic derangement not likely to recur; and by alcohol or illicit drug withdrawal.

• *Examples of moderate-to-high-risk factors for recurrence* include seizures caused by non-penetrating head injury with loss of consciousness or amnesia greater than 30 minutes, or penetrating head injury; intracerebral hemorrhage associated with a stroke or trauma; infections; intracranial hemorrhage; post-operative complications from brain surgery with significant brain hemorrhage; brain tumor; or stroke. The MEP report indicates individuals with moderate to high-risk conditions should not be certified. Drivers with a history of a single provoked seizure with low risk factors for recurrence should be recertified every year.

Medical Review Board Recommendations and Agency Decision

FMCSA presented the MEP's findings and the *Evidence Report* to the Medical Review Board (MRB) for consideration. The MRB reviewed and considered the 2007 ''Seizure Disorders and Commercial Driver Safety'' evidence report and the 2007 MEP recommendations. The MRB recommended maintaining the current advisory criteria, which provide that ''drivers with a history of epilepsy/seizures off anti-seizure medication and seizure-free for 10 years may be qualified to drive a CMV in interstate commerce. Interstate drivers with a history of a single unprovoked seizure may be qualified to drive a CMV in interstate commerce if seizure-free and off anti-seizure medication for a 5 year period or more'' [Advisory criteria to 49 CFR 391.43(f)].

The Agency acknowledges the MRB's position on the issue but believes relevant current medical evidence supports a less conservative approach. The medical advisory criteria for epilepsy and other seizure or loss of consciousness episodes was based on the 1988 ''Conference on Neurological Disorders and Commercial Drivers'' (NITS Accession No. PB89–158950/AS). A copy of the report can be found in the docket referenced in this notice.

The MRB's recommendation treats all drivers who have experienced a seizure the same, regardless of individual medical conditions and circumstances. In addition, the recommendation to continue prohibiting drivers who are taking anti-seizure medication from operating a CMV in interstate commerce does not consider a driver's actual seizure history and time since the last seizure. The Agency has decided to use the 2007 MEP recommendations as the basis for evaluating applications for an exemption from the seizure regulation on an individual, case-by-case basis.

C. Exemptions

Following individualized assessments of the exemption applications, including a review of detailed follow-up information requested from each applicant, FMCSA is granting exemptions from 49 CFR 391.41(b)(8) to 9 individuals. Under current FMCSA regulations, all of the 9 drivers receiving exemptions from 49 CFR 391.41(b)(8) would have been considered physically qualified to drive a CMV in interstate commerce except that they presently take or have recently stopped taking anti-seizure medication. For these 9 drivers, the primary obstacle to medical qualification was the FMCSA Advisory Criteria for Medical Examiners, based on the 1988 ''Conference on Neurological Disorders and Commercial Drivers,'' stating that a driver should be off anti-seizure medication in order to drive in interstate commerce. In fact, the Advisory Criteria have little if anything to do with the actual risk of a seizure and more to do with assumptions about individuals who are taking anti-seizure medication.

In addition to evaluating the medical status of each applicant, FMCSA evaluated the crash and violation data for the 9 drivers, some of whom currently drive a CMV in intrastate commerce. The CDLIS and MCMIS were searched for crash and violation data on the 9 applicants. For non-CDL holders, the Agency reviewed the driving records from the State licensing agency.

These exemptions are contingent on the driver maintaining a stable treatment regimen and remaining seizure-free during the 2-year exemption period. The exempted drivers must submit annual reports from their treating physicians attesting to the stability of treatment and that the driver has remained seizure-free. The driver must undergo an annual medical examination by a medical examiner, as defined by 49 CFR 390.5, following the FCMSA's regulations for the physical qualifications for CMV drivers.

FMCSA published a notice of receipt of application and requested public comment during a 30-day public comment period in a **Federal Register** notice for each of the applicants. A short summary of the applicants' qualifications and a discussion of the comments received follows this section. For applicants who were denied an exemption, a notice will be published at a later date.

D. Comments

Docket # FMCSA–2013–0443

On March 21, 2014, FMCSA published a notice of receipt of exemption applications and requested public comment on 13 individuals (79 FR 15791; Docket number FMCSA–2014–06160). The comment period ended on April 21, 2014. No commenters responded to this **Federal Register** notice. Of the 13 applicants, four were denied. The Agency has determined that the following nine applicants should be granted an exemption.

Thomas Bynum

Mr. Bynum is a 61 year-old class A CDL holder in North Carolina. He does not have a history of seizure. He takes anti-seizure medication since his surgery 35 years ago with the dosage and frequency remaining the same since that time. If granted the exemption, he would like to drive a CMV. His physician states that he is supportive of Mr. Bynum receiving an exemption.

Brian Conaway

Mr. Conaway is a 42 year-old class B CDL holder in Ohio. He has a history of seizure and has remained seizure free and off anti-seizure medication since his surgery 1999. If granted the exemption, he would like to drive a CMV. His physician states that he is supportive of Mr. Conaway receiving an exemption.

Joan Diaz

Ms. Diaz is a 49 year-old class B CDL holder in Maryland. She has a history of seizure disorder and has remained seizure free for 32 years. She takes anti-seizure medication with the dosage and frequency remaining the same for over 3 years. If granted the exemption, she would like to drive a school bus. Her physician states that he is supportive of Ms. Diaz receiving an exemption.

Ronald Hartl

Mr. Hartl is a 55 year old driver in Wisconsin. He has a history of epilepsy and has remained seizure free for 35 years. He takes anti-seizure medication with the dosage and frequency remaining the same for over 10 years. If granted the exemption, he would like to drive a CMV. His physician states that he is supportive of Mr. Hartl receiving an exemption.

Donald Hernandez

Mr. Hernandez is a 40 year-old driver in California. He has a history of seizure disorder and has remained seizure free for 14 years. He takes anti-seizure medication with the dosage and frequency remaining the same for over 2 years. If granted the exemption, he would like to drive a CMV. His physician states that he is supportive of Mr. Hernandez receiving an exemption.

Craig Hoisington

Mr. Hoisington is a 41 year-old driver in New Hampshire. He has a history of epilepsy and has remained seizure free for 10 years. He takes anti-seizure medication with the dosage and frequency remaining the same for over 2 years. If granted the exemption, he would like to drive a CMV. His physician states that he is supportive of Mr. Hoisington receiving an exemption.

Michael Miller

Mr. Miller is a 56 year-old driver in Wisconsin. He has a history of epilepsy and has remained seizure free seizure for 11 years. He takes anti-seizure medication with the dosage and frequency remaining the same since that time. If granted the exemption, he would like to drive a CMV. His physician states that he is supportive of Mr. Miller receiving an exemption.

Peter Thompson

Mr. Thompson is a 21 year-old driver in Florida. He has a history of seizure and has remained seizure free for over 10 years. He discontinued his anti-seizure medication 8 years ago. If granted the exemption, he would like to drive a CMV. His physician states that he is supportive of Mr. Thompson receiving an exemption.

Nathaniel Ware

Mr. Ware is a 33 year-old driver in Alabama. He has a history of a one seizure and has remained seizure free for 4 years. He takes anti-seizure medication with the dosage and frequency remaining the same for 2 years. If granted the exemption, he would like to drive a CMV. His physician states that he is supportive of Mr. Ware receiving an exemption.

E. Basis for Exemption

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the epilepsy/seizure standard in 49 CFR 391.41(b)(8) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. Without the exemption, applicants will continue to be restricted to intrastate driving. With the exemption, applicants can drive in interstate commerce. Thus, the Agency's analysis focuses on whether an equal or greater level of safety is likely to be achieved by permitting each of these drivers to drive in interstate commerce as opposed to restricting the driver to driving in intrastate commerce.

Conclusion

The Agency is granting exemptions from the epilepsy standard, 49 CFR 391.41(b)(8), to 9 individuals based on a thorough evaluation of each driver's safety experience, and medical condition. Safety analysis of information relating to these 9 applicants meets the burden of showing that granting the exemptions would achieve a level of safety that is equivalent to or greater than the level that would be achieved without the exemption. By granting the exemptions, the interstate CMV industry will gain 9 highly trained and experienced drivers. In accordance with 49 U.S.C. 31315(b)(1), each exemption will be valid for 2 years, with annual recertification required unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) the person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

FMCSA exempts the following 9 drivers for a period of 2 years with annual medical certification required: Thomas Bynum (NC); Brian Conaway (OH); Joan Diaz (MD); Ronald Hartl (WI); Donald Hernandez (CA); Craig Hoisington (NH); Michael Miller (WI);

Peter Thompson (FL); and Nathaniel Ware (AL) from the prohibition of CMV operations by persons with a clinical diagnosis of epilepsy or seizures. If the exemption is still in effect at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: December 5, 2014.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2014–29282 Filed 12–12–14; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Reports, Forms, and Record Keeping Requirements Agency Information Collection Activity Under OMB Review

AGENCY: National Highway Traffic Safety Administration (NHTSA), U.S. Department of Transportation (DOT).

ACTION: Notice

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and the expected burden. The **Federal Register** Notice with a 60-day comment period was published on June 30, 2014 (79 FR 36865–36867).

DATES: Comments must be submitted on or before January 14, 2015.

ADDRESSES: Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725–17th Street NW., Washington, DC 20503, Attention NHTSA Desk Officer.

FOR FURTHER INFORMATION CONTACT: Ms. Liza Lemaster-Sandbank, Contracting Officer's Representative, Occupant Protection Division (NTI–112), Office of Impaired Driving and Occupant Protection, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE., W44–302, Washington, DC 20590. Ms. Lemaster-Sandbank's phone number is 202–366–4292 and her email address is *liza.lemaster@dot.gov.*

SUPPLEMENTARY INFORMATION:

Title: Implementing a Leadership Framework for Traffic Safety.

Type of Request: New information collection requirement.

Abstract: In 2012, there were 21,667 occupants of passenger vehicles who died in motor vehicle traffic crashes. Of the occupants for whom restraint status was known, 52% were unrestrained at the time of the crash. Research shows that wearing a seatbelt or using a child safety seat can greatly reduce the chances of fatal or serious injury as a result of a motor vehicle collision. High visibility enforcement (*i.e.,* highly visible enforcement accompanied by public information supporting the enforcement) has been demonstrated to increase seat belt use. A NHTSA-convened work group of law enforcement representatives from states with secondary seat belt laws, but

exemplary work in support of occupant protection enforcement, identified strong leadership as the critical component in their successes. Strong leadership within any law enforcement agency can result in various practices and methodologies that spotlight a program's importance and help to make occupant protection, as well as other traffic safety issues, an integral part of the agencies' culture. Regardless of whether the occupant protection program is organized as a specialized unit or broadly integrated within the routine operations of the law enforcement agency, key management and enforcement roles must be clearly defined and assigned to specific individuals by the executive staff.

NHTSA is undertaking a study to implement a leadership model framework within three law enforcement agencies selected by NHTSA, evaluate the process and determine if the traffic safety outcome of interest is realized, specifically the impact on increased seat belt use and reduction in unrestrained fatalities. To accomplish this, NHTSA will provide technical assistance to three law enforcement demonstration communities for the implementation of leadership frameworks in support of safety initiatives, specifically occupant protection. Evaluation measures will involve the independent identification, collection and evaluation of both qualitative and quantitative data that specifically document changes in enforcement activity and its effects on the surrounding communities' behaviors. Under this proposed effort, a total of 108 interviews of law enforcement personnel will be conducted over two time periods. Eighteen interviews will be conducted in each of the three demonstration sites, once during the demonstration implementation and once at the end of the demonstration project. Overall findings will be provided to other law enforcement agencies to use as a resource for improving occupant protection enforcement programs and efforts.

Affected Public: Interviewees will represent law enforcement leadership as well as line officers. Law enforcement leadership participants will include the top management in the agency (colonel, chief, etc.). The interviewees will either be self-selected or selected by the demonstration agency. The demonstration agency will have the best insights into individuals who best represent these three types for inclusion into the study and will assist in announcements of interview participation opportunities as well as scheduling that is amenable to particular interviewees. NHTSA's contractor will work closely with the demonstration communities (well in advance of data collection) to provide them with the information they need to select interviewees who can provide the best data for the study. This will ensure that the right people are selected, have ample time to be provided information about the study, and are able to be replaced with another suitable participant if they choose not to participate. To get volunteers, the contractor will provide information to the demonstration sites about what types of volunteers they are seeking, but will ultimately rely on each site to disseminate that information to officers. If officers do not volunteer for interviews, the contractor will work with the site to explore additional ways of disseminating information about the interviews and/or encouraging participation; if necessary, the site will be asked to select additional participants for interviews.

Estimated Total Annual Burden: 135 hours (108 interviews, averaging 1.25 hours).

Comments are invited on the following:

(i) 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;

(ii) the accuracy of the agency's estimate of the burden of the proposed information collection;

(iii) ways to enhance the quality, utility, and clarity of the information to be collected; and

(iv) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is most effective if OMB receives it within 30 days of publication.

Authority: 44 U.S.C. Section 3506(c)(2)(A).

Issued on: December 9, 2014.

Jeff Michael,

Associate Administrator, Research and Program Development.

[FR Doc. 2014–29300 Filed 12–12–14; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Disability Compensation, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. App. 2, that the Advisory Committee on Disability Compensation (Committee) will meet on January 26–28, 2015, at the U.S. Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420. The Committee will meet in Room 730 each day. The sessions will begin at 8:30 a.m. and end at 4:30 p.m. each day. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the maintenance and periodic readjustment of the VA Schedule for Rating Disabilities. The Committee is to assemble and review relevant information relating to the nature and character of disabilities arising during service in the Armed Forces, provide an ongoing assessment of the effectiveness of the rating schedule, and give advice on the most appropriate means of responding to the needs of Veterans relating to disability compensation.

The Committee will receive briefings on issues related to compensation for Veterans with service-connected disabilities and other VA benefits programs. Time will be allocated for receiving public comments. Public comments will be limited to three minutes each. Individuals wishing to make oral statements before the Committee will be accommodated on a first-come, first-served basis. Individuals who speak are invited to submit 1–2 page summaries of their comments at the time of the meeting for inclusion in the official meeting record.

The public may submit written statements for the Committee's review to Nancy Copeland, Designated Federal Officer, Department of Veterans Affairs, Veterans Benefits Administration, Compensation Service, Regulation Staff (211D), 810 Vermont Avenue NW, Washington, DC 20420 or email at *nancy.copeland@va.gov.* Because the meeting is being held in a government building, a photo I.D. must be presented at the Guard's Desk as a part of the clearance process. Therefore, you should allow an additional 15 minutes before the meeting begins. Any member of the public wishing to attend the meeting or seeking additional information should email Mrs. Copeland or contact her at (202) 461–9685 or alternatively email Mr. Brendan Sheedy at *brendan.sheedy@va.gov* or call him (202) 461–9297.

Dated: December 10, 2014.

Rebecca Schiller,

Federal Advisory Committee Management Officer.

[FR Doc. 2014–29257 Filed 12–12–14; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

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Part II

Bureau of Consumer Financial Protection

12 CFR Parts 1024 and 1026

Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z); Proposed Rule

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Parts 1024 and 1026

[Docket No. CFPB–2014–0033]

RIN 3170–AA49

Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Proposed rule with request for comment.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is proposing amendments to certain mortgage servicing rules issued in 2013. These proposed amendments focus primarily on clarifying, revising, or amending provisions regarding force-placed insurance notices, policies and procedures, early intervention, and loss mitigation requirements under Regulation X's servicing provisions; and periodic statement requirements under Regulation Z's servicing provisions. The proposed amendments also address proper compliance regarding certain servicing requirements when a consumer is a potential or confirmed successor in interest, is in bankruptcy, or sends a cease communication request under the Fair Debt Collection Practices Act. The proposed rule makes technical corrections to several provisions of Regulations X and Z. The Bureau requests public comment on these changes.

DATES: Comments must be received on or before March 16, 2015.

ADDRESSES: You may submit comments, identified by Docket No. CFPB–2014–0033 or RIN 3170–AA49, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: FederalRegisterComments@cfpb.gov.* Include CFPB–2014–0033 AND/OR RIN 3170–AA49 in the subject line of the message.
- *Mail:* Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau, 1700 G Street NW., Washington, DC 20552.
- *Hand Delivery/Courier:* Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau, 1275 First Street NE., Washington, DC 20002.

Instructions: All submissions should include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to *http://www.regulations.gov.* In addition, comments will be available for public inspection and copying at 1275 First Street NE., Washington, DC 20002, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning (202) 435–7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Dania L. Ayoubi, David H. Hixson, Bradley S. Lipton, Joel L. Singerman, or Shiri B. Wolf, Counsels; or William R. Corbett or Laura A. Johnson, Senior Counsels; Office of Regulations, at (202) 435–7700.

SUPPLEMENTARY INFORMATION:

I. Summary of the Proposed Rule

In January 2013, the Bureau issued several final rules concerning mortgage markets in the United States (2013 Title XIV Final Rules), pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Public Law 111–203, 124 Stat. 1376 (2010).[1] Two of these rules were (1) the Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X) (2013 RESPA Servicing Final Rule);[2] and (2) the Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z) (2013 TILA Servicing Final Rule).[3] These two rules are referred to collectively as the 2013 Mortgage Servicing Final Rules.

The Bureau clarified and revised those rules through notice and comment rulemaking during the summer and fall of 2013 in the (1) Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (July 2013 Mortgage Final Rule)[4] and (2) Amendments to the 2013 Mortgage Rules under the Equal Credit Opportunity Act (Regulation B), Real Estate Settlement Procedures Act (Regulation X), and the Truth in Lending Act (Regulation Z) (September 2013 Mortgage Final Rule).[5] In October 2013, the Bureau issued clarified compliance requirements in relation to successors in interest, early intervention requirements, bankruptcy law, and the Fair Debt Collection Practices Act (FDCPA),[6] through an Interim Final Rule (October 2013 IFR or IFR)[7] and a contemporaneous compliance bulletin (October 2013 Servicing Bulletin).[8] In addition, in October 2014, the Bureau added an alternative definition of small servicer in the Amendments to the 2013 Mortgage Rules under the Truth in Lending Act (Regulation Z).[9] The purpose of each of these updates was to address important questions raised by industry, consumer advocacy groups, and other stakeholders. The 2013 Mortgage Servicing Final Rules, as amended in 2013 and 2014, are referred to herein as the Mortgage Servicing Rules.

The Bureau is now proposing several additional amendments to the Mortgage Servicing Rules to revise regulatory provisions and official interpretations relating to the Regulation X and Z

[1] Specifically, on January 10, 2013, the Bureau issued Escrow Requirements Under the Truth in Lending Act (Regulation Z), 78 FR 4725 (Jan. 22, 2013) (2013 Escrows Final Rule), High-Cost Mortgage and Homeownership Counseling Amendments to the Truth in Lending Act (Regulation Z) and Homeownership Counseling Amendments to the Real Estate Settlement Procedures Act (Regulation X), 78 FR 6855 (Jan. 31, 2013) (2013 HOEPA Final Rule), and Ability to Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 FR 6407 (Jan. 30, 2013) (January 2013 ATR Final Rule). The Bureau concurrently issued a proposal to amend the January 2013 ATR Final Rule, which was finalized on May 29, 2013. *See* 78 FR 6621 (Jan. 30, 2013) (January 2013 ATR Proposal) and 78 FR 35429 (June 12, 2013) (May 2013 ATR Final Rule). On January 17, 2013, the Bureau issued the Real Estate Settlement Procedures Act (Regulation X) and Truth in Lending Act (Regulation Z) Mortgage Servicing Final Rules, 78 FR 10901 (Feb. 14, 2013) (Regulation Z) and 78 FR 10695 (Feb. 14, 2013) (Regulation X) (2013 Mortgage Servicing Final Rules). On January 18, 2013, the Bureau issued the Disclosure and Delivery Requirements for Copies of Appraisals and Other Written Valuations Under the Equal Credit Opportunity Act (Regulation B), 78 FR 7215 (Jan. 31, 2013) (2013 ECOA Valuations Final Rule) and, jointly with other agencies, issued Appraisals for Higher-Priced Mortgage Loans (Regulation Z), 78 FR 10367 (Feb. 13, 2013) (2013 Interagency Appraisals Final Rule). On January 20, 2013, the Bureau issued the Loan Originator Compensation Requirements under the Truth in Lending Act (Regulation Z), 78 FR 11279 (Feb. 15, 2013) (2013 Loan Originator Final Rule).

[2] 78 FR 10695 (Feb. 14, 2013).

[3] 78 FR 10901 (Feb. 14, 2013).

[4] 78 FR 44685 (July 24, 2013).

[5] 78 FR 60381 (Oct. 1, 2013).

[6] 15 U.S.C. 1692 *et seq.*

[7] 78 FR 62993 (Oct. 23, 2013).

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

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

mortgage servicing rules.[10] The proposals cover nine major topics, summarized below generally in the order they appear in the proposed rule. More details can be found in the proposed rule.

1. Successors in interest. The Bureau is proposing three sets of rule changes relating to successors in interest. First, the Bureau is proposing to apply all of the Mortgage Servicing Rules to successors in interest once a servicer confirms the successor in interest's identity and ownership interest in the property.[11] Second, the Bureau is proposing rules relating to how a mortgage servicer confirms a successor in interest's status. Third, the Bureau is proposing that, to the extent that the Mortgage Servicing Rules apply to successors in interest, the rules apply with respect to all successors in interest who acquire an ownership interest in a transfer protected from acceleration, and therefore foreclosure, under Federal law.

2. Definition of delinquency. The Bureau is proposing to add a general definition of delinquency that would apply to all of the servicing provisions of Regulation X and the provisions regarding periodic statements for mortgage loans in Regulation Z. Under the proposed definition, a borrower and a borrower's mortgage loan obligation are delinquent beginning on the date a payment sufficient to cover principal, interest, and, if applicable, escrow, becomes due and unpaid.

3. Requests for information. The Bureau is proposing amendments that would change how a servicer must respond to requests for information asking for ownership information for loans in trust for which the Federal National Mortgage Association (Fannie Mae) or Federal Home Loan Mortgage Corporation (Freddie Mac) is the trustee, investor, or guarantor.

4. Force-placed insurance. The Bureau is proposing to amend the required disclosures to account for when a servicer wishes to force-place insurance when the borrower has insufficient, rather than expiring or expired, hazard insurance coverage on the property. Additionally, the Bureau is proposing to give servicers the option to include a borrower's mortgage loan account number on the notices required under § 1024.37. The Bureau is also proposing several technical edits to correct discrepancies between the model forms and the text of § 1024.37.

5. Early intervention. The Bureau is proposing to clarify generally the early intervention live contact obligations and written early intervention notice obligations. The Bureau is also proposing to require servicers to provide written early intervention notices to certain borrowers who are in bankruptcy or who have invoked their cease communication rights under the FDCPA.

6. Loss mitigation. The Bureau is proposing to: (1) Require servicers to meet the loss mitigation requirements more than once in the life of a loan for borrowers who become current after a delinquency; (2) Modify the existing exception to the 120-day prohibition on foreclosure filing to allow a servicer to join the foreclosure action of a senior lienholder; (3) Clarify that servicers have significant flexibility in setting a reasonable date by which a borrower must return documents and information to complete an application, so long as the date maximizes borrower protections and allows borrowers a reasonable period of time to return documents and information; (4) Clarify that servicers must take affirmative steps to delay a foreclosure sale, even where the sale is conducted by a third party; clarify the servicer's duty to instruct foreclosure counsel to take steps to comply with the dual-tracking prohibitions; and indicate that a servicer who has not taken, or caused counsel to take, all reasonable affirmative steps to delay the sale, is required to dismiss the foreclosure action if necessary to avoid the sale; (5) Require that servicers promptly provide a written notice once they receive a complete loss mitigation application; require that the notice indicate that the servicer has received a complete application but clarify that the servicer might later request additional information if needed; require that the notice provide the date of completion and a disclosure indicating whether a foreclosure sale was scheduled as of that date, the date foreclosure protections began, a statement informing the borrower of applicable appeal rights, and a statement that the servicer will complete its evaluation within 30 days from the date of the complete application; (6) Address and clarify how servicers obtain information not in the borrower's control and evaluate a loss mitigation application while waiting for such third party information; prohibit servicers from denying borrowers based upon delay in receiving such third party information; require that servicers promptly provide a written notice to the borrower if the servicer lacks third party information 30 days after receiving the borrower's complete application; and require servicers to notify borrowers of their determination in writing promptly upon receipt of the third party information; (7) Permit servicers to offer a short-term repayment plan based upon an evaluation of an incomplete application; (8) Clarify that servicers may stop collecting documents and information from a borrower pertaining to a loss mitigation option after receiving information confirming that the borrower is ineligible for that option; and (9) Address and clarify how loss mitigation procedures and timelines apply to a transferee servicer that receives a mortgage loan for which there is a loss mitigation application pending at the time of a servicing transfer.

7. Prompt payment crediting. The Bureau is proposing to clarify how servicers must treat periodic payments made by consumers who are performing under either temporary loss mitigation programs or permanent loan modifications. Under the Bureau's proposal, periodic payments made pursuant to temporary loss mitigation programs would continue to be credited according to the loan contract and could, if appropriate, be credited as partial payments, while periodic payments made pursuant to a permanent loan modification would be credited under the terms of the permanent loan agreement.

8. Periodic statements. The Bureau is proposing to: (1) Clarify certain periodic statement disclosure requirements relating to mortgage loans that have been accelerated, are in temporary loss mitigation programs, or have been permanently modified, to conform generally the disclosure of the amount due with the Bureau's understanding of the legal obligation in each of those circumstances; (2) Require servicers to send modified periodic statements to consumers who have filed for bankruptcy, subject to certain exceptions, with content varying depending on whether the consumer is a debtor in a Chapter 7 or Chapter 13 bankruptcy case; and to conduct consumer testing on proposed sample periodic statement forms that servicers could use for consumers in bankruptcy to ensure compliance with § 1026.41; and (3) Exempt servicers from the periodic statement requirement for charged-off mortgage loans if the servicer will not charge any additional fees or interest on the account and provides a final periodic statement.

9. Small servicer. The proposal would make certain changes to the small

[10] Note that RESPA and TILA differ in their terminology. Whereas Regulation X generally refers to ''borrowers,'' Regulation Z generally refers to ''consumers.''

[11] This proposal uses the term ''successor in interest's status'' to refer to the successor in interest's identity and ownership interest in the property.

servicer definition. The small servicer definition generally applies to servicers who service 5,000 or fewer mortgage loans for all of which the servicer is the creditor or assignee. The proposal would exclude certain seller-financed transactions from being counted toward the 5,000 loan limit, allowing servicers that would otherwise qualify for small servicer status to retain their exemption while servicing those transactions.

The proposed rule also makes technical corrections to several provisions of Regulations X and Z. The Bureau seeks public comment on all of the proposed changes.

II. Background

A. Title XIV Rules under the Dodd-Frank Act

In response to an unprecedented cycle of expansion and contraction in the mortgage market that sparked the most severe U.S. recession since the Great Depression, Congress passed the Dodd-Frank Act, which was signed into law on July 21, 2010. In the Dodd-Frank Act, Congress established the Bureau and generally consolidated the rulemaking authority for Federal consumer financial laws, including the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA), in the Bureau.[12] At the same time, Congress significantly amended the statutory requirements governing mortgages with the intent to restrict the practices that contributed to and exacerbated the crisis.[13] Under the statute, most of these new requirements would have taken effect automatically on January 21, 2013, if the Bureau had not issued implementing regulations by that date.[14] To avoid uncertainty and potential disruption in the national mortgage market at a time of economic vulnerability, the Bureau issued several final rules in a span of less than two weeks in January 2013 to implement these new statutory provisions and provide for an orderly transition. These rules included the 2013 Mortgage Servicing Final Rules, issued on January 17.

On January 17, 2013, the Bureau issued the 2013 Mortgage Servicing Final Rules. Pursuant to the Dodd-Frank Act, which permitted a maximum of one year for implementation, these rules became effective on January 10, 2014. The Bureau issued additional corrections and clarifications to the 2013 Mortgage Servicing Final Rules in the summer and fall of 2013 and in the fall of 2014.

B. Implementation Plan for New Mortgage Rules

On February 13, 2013, the Bureau announced an initiative to support implementation of the new mortgage rules (Implementation Plan),[15] under which the Bureau would work with the mortgage industry to ensure that the 2013 Title XIV Final Rules could be implemented accurately and expeditiously. The Implementation Plan included: (1) Coordination with other agencies; (2) publication of plain-language guides to the new rules; (3) ongoing conversations with stakeholders involved in implementation with respect to questions and concerns they had identified; (4) publication of additional interpretive guidance and corrections or clarifications of the new rules as needed; (5) publication of readiness guides for the new rules; and (5) education of consumers on the new rules.

In the course of the implementation process, the Bureau identified a number of respects in which the 2013 Mortgage Servicing Final Rules posed implementation challenges. As a result, in July 2013 and September 2013, following notice and comment, the Bureau issued two final rules amending discrete aspects of the 2013 Mortgage Servicing Final Rules. Among other things, the July 2013 Mortgage Final Rule clarified, corrected, or amended provisions on the relation to State law of Regulation X's servicing requirements; implementation dates for certain adjustable-rate mortgage servicing notices under Regulation Z; and the small servicer exemption from certain servicing rules. Among other things, the September 2013 Mortgage Final Rule modified provisions of Regulation X related to error resolution, information requests, and loss mitigation procedures. In October 2013, the Bureau issued an IFR, which among other things, provisionally suspended the effectiveness of certain requirements of the 2013 Mortgage Servicing Final Rules with respect to consumers in bankruptcy and consumers who had exercised their rights under the FDCPA to direct that debt collectors cease contacting them with respect to outstanding debts. In the October 2013 Servicing Bulletin, the Bureau also clarified compliance requirements regarding successors in interest, early intervention live contact requirements, and the FDCPA. In addition, in October 2014, the Bureau issued a final rule that, among other things, adds an alternative definition of small servicer that applies to certain nonprofit entities that service, for a fee, only loans for which the servicer or an associated nonprofit entity is the creditor.

C. Ongoing Monitoring

After the January 10, 2014 effective date of the rules, the Bureau has continued to engage in ongoing outreach and monitoring with industry, consumer advocacy groups, and other stakeholders, including holding numerous individual meetings as well as hosting a bankruptcy roundtable discussion on June 16, 2014, among representatives of consumer advocacy groups, bankruptcy attorneys, mortgage servicers, trade groups, and bankruptcy trustees. As a result, the Bureau has identified further issues that continue to pose implementation challenges or require clarification. The Bureau has also recognized that there are instances in which the rules are creating unintended consequences or failing to achieve desired objectives.

The Bureau recognizes both the implementation process that industry has experienced with respect to the Mortgage Servicing Rules and the costs that industry has incurred. The Bureau believes that the majority of the provisions in this proposal will impose, at most, minimal new compliance burdens, and in many cases will reduce the compliance burden relative to the existing rules. Where the Bureau is proposing adding new requirements, the Bureau is doing so after careful weighing of incremental costs and benefits.

This proposal concerns additional revisions to the Mortgage Servicing Rules. The purpose of these revisions is to address important questions raised by industry, consumer advocacy groups, or other stakeholders. As discussed below, the Bureau contemplates additional

[12] *See, e.g.,* sections 1011 and 1021 of the Dodd-Frank Act, 12 U.S.C. 5491 and 5511 (establishing and setting forth the purpose, objectives, and functions of the Bureau); section 1061 of the Dodd-Frank Act, 12 U.S.C. 5581 (consolidating certain rulemaking authority for Federal consumer financial laws in the Bureau); section 1100A of the Dodd-Frank Act (codified in scattered sections of 15 U.S.C.) (similarly consolidating certain rulemaking authority in the Bureau). *But see* Section 1029 of the Dodd-Frank Act, 12 U.S.C. 5519 (subject to certain exceptions, excluding from the Bureau's authority any rulemaking authority over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both).

[13] *See* title XIV of the Dodd-Frank Act, Public Law 111–203, 124 Stat. 1376 (2010) (codified in scattered sections of 12 U.S.C., 15 U.S.C., and 42 U.S.C.).

[14] *See* Dodd-Frank Act section 1400(c), 15 U.S.C. 1601 note.

[15] Press Release, Consumer Fin. Prot. Bureau, CFPB Lays Out Implementation Plan for New Mortgage Rules (Feb. 13, 2013), *available at http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-lays-out-implementation-plan-for-new-mortgage-rules/.*

revisions in several sections of Regulations X and Z.

III. Legal Authority

As discussed more fully in the section-by-section analysis, the Bureau is proposing this rule pursuant to the FDCPA and the Dodd-Frank Act. Section 1061 of the Dodd-Frank Act transferred to the Bureau the ''consumer financial protection functions'' previously vested in certain other Federal agencies, including the Board of Governors of the Federal Reserve System (Board). The term ''consumer financial protection function'' is defined to include ''all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law, including performing appropriate functions to promulgate and review such rules, orders, and guidelines.'' Section 1061 of the Dodd-Frank Act also transferred to the Bureau all of the Department of Housing and Urban Development's (HUD's) consumer protection functions relating to RESPA. Title X of the Dodd-Frank Act, including section 1061 of the Dodd-Frank Act, along with TILA, RESPA, the FDCPA, and certain subtitles and provisions of title XIV of the Dodd-Frank Act, are Federal consumer financial laws.[16]

A. RESPA

Section 19(a) of RESPA, 12 U.S.C. 2617(a), authorizes the Bureau to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of RESPA, which include its consumer protection purposes. In addition, section 6(j)(3) of RESPA, 12 U.S.C. 2605(j)(3), authorizes the Bureau to establish any requirements necessary to carry out section 6 of RESPA, and section 6(k)(1)(E) of RESPA, 12 U.S.C. 2605(k)(1)(E), authorizes the Bureau to prescribe regulations that are appropriate to carry out RESPA's consumer protection purposes. As identified in the 2013 RESPA Servicing Final Rule, the consumer protection purposes of RESPA include ensuring that servicers respond to borrower requests and complaints in a timely manner and maintain and provide accurate information, helping borrowers avoid unwarranted or unnecessary costs and fees, and facilitating review for foreclosure avoidance options. Each of the proposed amendments or clarifications to Regulation X is intended to achieve some or all these purposes.

Additionally, as explained below, certain of the proposed amendments to Regulation X implement specific provisions of RESPA.

This proposed rule also includes amendments to the official Bureau commentary in Regulation X. Section 19(a) of RESPA authorizes the Bureau to make such reasonable interpretations of RESPA as may be necessary to achieve the consumer protection purposes of RESPA. Good faith compliance with the interpretations would afford servicers protection from liability under section 19(b) of RESPA.

B. TILA

Section 105(a) of TILA, 15 U.S.C. 1604(a), authorizes the Bureau to prescribe regulations to carry out the purposes of TILA. Under section 105(a), such regulations may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. Under section 102(a), 15 U.S.C. 1601(a), the purposes of TILA are ''to assure a meaningful disclosure of credit terms so that the consumers will be able to compare more readily the various credit terms available and avoid the uniformed use of credit'' and to protect consumers against inaccurate and unfair credit billing practices. For the reasons discussed in this proposal, the Bureau is proposing to adopt amendments to Regulation Z to carry out TILA's purposes and such additional requirements, adjustments, and exceptions as, in the Bureau's judgment, are necessary and proper to carry out the purposes of TILA, prevent circumvention or evasion thereof, or to facilitate compliance therewith.

Section 105(f) of TILA, 15 U.S.C. 1604(f), authorizes the Bureau to exempt from all or part of TILA any class of transactions if the Bureau determines that TILA coverage does not provide a meaningful benefit to consumers in the form of useful information or protection. For the reasons discussed in this notice, the Bureau is proposing to exempt certain transactions from the requirements of TILA pursuant to its authority under section 105(f) of TILA.

Additionally, as explained below, certain of the proposed amendments to Regulation Z implement specific provisions of TILA.

This proposed rule also includes amendments to the official Bureau commentary in Regulation Z. Good faith compliance with the interpretations would afford protection from liability under section 130(f) of TILA.

C. FDCPA

The Bureau also exercises its authority to prescribe rules with respect to the collection of debts by debt collectors pursuant to section 814(d) of the FDCPA, 15 U.S.C. 1692l(d). For the reasons discussed below, the Bureau proposes to rely on this authority to clarify a borrower's cease communication protections under section 805(c) of the FDCPA and to interpret the exceptions set forth in section 805(c)(2) and (3) of the FDCPA to include the written early intervention notice required by proposed § 1024.39(d)(2)(iii). The proposed rule also includes Bureau advisory opinions for purposes of section 813(e) of the FDCPA, 15 U.S.C. 1692k(e). Under that section, ''[n]o provision of [the FDCPA] imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Bureau, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.''

D. The Dodd-Frank Act

Section 1022(b)(1) of the Dodd-Frank Act, 12 U.S.C. 5512(b)(1), authorizes the Bureau to prescribe rules ''as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.'' RESPA, TILA, the FDCPA, and title X of the Dodd-Frank Act are Federal consumer financial laws.

Section 1032(a) of the Dodd-Frank Act, 12 U.S.C. 5532(a), provides that the Bureau ''may prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.''

[16] *See* Dodd-Frank Act section 1002(14), 12 U.S.C. 5481(14) (defining ''Federal consumer financial law'' to include the ''enumerated consumer laws,'' the provisions of title X of the Dodd-Frank Act, and the laws for which authorities are transferred under title X subtitles F and H of the Dodd-Frank Act); Dodd-Frank Act section 1002(12), 12 U.S.C. 5481(12) (defining ''enumerated consumer laws'' to include TILA); Dodd-Frank Act section 1400(b), 12 U.S.C. 5481(12) note (defining ''enumerated consumer laws'' to include certain subtitles and provisions of Dodd-Frank Act title XIV); Dodd-Frank Act section 1061(b)(7), 12 U.S.C. 5581(b)(7) (transferring to the Bureau all of HUD's consumer protection functions relating to RESPA).

The authority granted to the Bureau in section 1032(a) of the Dodd-Frank Act is broad and empowers the Bureau to prescribe rules regarding the disclosure of the ''features'' of consumer financial products and services generally. Accordingly, the Bureau may prescribe rules containing disclosure requirements even if other Federal consumer financial laws do not specifically require disclosure of such features.

Section 1032(c) of the Dodd-Frank Act, 12 U.S.C. 5532(c), provides that, in prescribing rules pursuant to section 1032 of the Dodd-Frank Act, the Bureau ''shall consider available evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services.'' Accordingly, in proposing to amend provisions authorized under section 1032(a) of the Dodd-Frank Act, the Bureau has considered available studies, reports, and other evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services.

IV. Proposed Effective Date

The Bureau proposes that all of the changes proposed herein, except for the changes in proposed § 1026.41(e)(5) and (f), take effect 280 days after publication of a final rule in the **Federal Register**. The Bureau believes that the proposed changes generally reinforce existing Bureau guidance, provide greater clarity in an effort to facilitate compliance, expand existing preemptions, or otherwise provide relief from regulatory requirements; therefore the Bureau believes an effective date of 280 days after publication may be appropriate.

The Bureau proposes that the changes to proposed § 1026.41(e)(5) and (f) take effect one year after publication of a final rule in the **Federal Register**. These proposed changes would limit the circumstances in which a servicer is exempt from the periodic statement requirements with respect to a consumer who is a debtor in bankruptcy and, when an exemption does not apply with respect to such consumers, require that periodic statements contain certain bankruptcy-related modifications; therefore the Bureau believes an effective date of one year after publication may be appropriate.

The Bureau seeks comment on whether the proposed effective dates are appropriate, or whether the Bureau should adopt alternative effective dates.

V. Section-by-Section Analysis of the Proposed Rule

A. Regulation X and Regulation Z

Several of the Bureau's proposals under either Regulation X or Regulation Z affect provisions in both Regulations X and Z. For example, the proposed definition of delinquency in § 1024.31 affects requirements in §§ 1024.39 through 1024.41 of Regulation X, as well as § 1026.41 of Regulation Z. Generally, the Bureau discusses each section of the proposed rule under the heading designating the applicable regulation below—part V.B. for Regulation X and part V.C. for Regulation Z. However, because the proposed rule and commentary relating to successors in interest are interspersed throughout Regulation X and Regulation Z, the Bureau is providing an overview of the proposed rule under this combined part V.A for both Regulation X and Regulation Z. In this combined part, references to specific sections of part 1024 refer to Regulation X, and references to specific sections of part 1026 refer to Regulation Z. The Bureau then discusses each specific section of the proposed rule relating to successors in interest in more detail under the heading designating the applicable regulation below.

Overview of Proposed Rule Relating to Successors in Interest

Background. Current § 1024.38(b)(1)(vi) provides that servicers are required to maintain policies and procedures that are reasonably designed to ensure that the servicer can, upon notification of the death of a borrower, promptly identify and facilitate communication with the successor in interest of the deceased borrower with respect to the property securing the deceased borrower's mortgage loan.[17] When the Bureau adopted this requirement in the 2013 RESPA Servicing Final Rule, the Bureau stated that it ''understands that successors in interest may encounter challenges in communicating with mortgage servicers about a deceased borrower's mortgage loan account. The Bureau believes that it is essential that servicers' policies and procedures are reasonably designed to facilitate communication with successors in interest regarding a deceased borrower's mortgage loan accounts.''[18] The Bureau issued the October 2013 Servicing Bulletin to provide implementation guidance about this requirement.[19] The Bureau noted that it had received ''reports of servicers either outright refusing to speak to a successor in interest or demanding documents to prove the successor in interest's claim to the property that either do not exist . . . or are not reasonably available.''[20] The Bureau also stated that these practices ''often prevent a successor in interest from pursuing assumption of the mortgage loan and, if applicable, loss mitigation options.''[21] The October 2013 Servicing Bulletin provided examples of servicer practices and procedures that would accomplish the objectives set forth in § 1024.38(b)(1)(vi) and alleviate these problems.[22]

As explained in more detail in the discussion that follows and in the section-by-section analysis of the proposed sections,[23] the Bureau is proposing three sets of rules relating to successors in interest. First, the Bureau is proposing rules providing that, to the extent that the Mortgage Servicing Rules apply to successors in interest, the rules apply specifically with respect to successors in interest who acquired an ownership interest in the property securing a mortgage loan in a transfer protected by the Garn-St Germain Depository Institutions Act of 1982 (the Garn-St Germain Act).[24] Second, the Bureau is proposing rules relating to how a mortgage servicer confirms a successor in interest's identity and ownership interest in the property.

[17] A successor in interest is ''[o]ne who follows another in ownership or control of property.'' Black's Law Dictionary (9th ed. 2009). For the purposes of this proposal, the Bureau is referring to successors in interest who have been transferred a legal interest in a property securing a mortgage loan from a borrower on the mortgage loan; the successor in interest may not necessarily have assumed the mortgage loan obligation (*i.e.,* legal liability for the mortgage debt) under State law, and the servicer may not necessarily have agreed to add the successor in interest as obligor on the mortgage loan.

[18] 78 FR 10695, 10781 (Feb. 14, 2013).

[19] October 2013 Servicing Bulletin.

[20] *Id.* at 2.

[21] *Id.*

[22] *Id.* On July 17, 2014, the Bureau also issued an interpretive rule clarifying that where a successor in interest who has previously acquired a legal interest in a dwelling agrees to be added as obligor on the mortgage loan, the servicer's express acknowledgment of the successor in interest as obligor does not constitute an ''assumption'' as that term is used in Regulation Z. *See* 79 FR 41631 (July 17, 2014). Accordingly, the Regulation Z Ability-to-Repay Rule does not apply when a creditor expressly accepts a successor in interest as obligor on a loan. *See id.* The interpretive rule also noted that the servicer must comply with any ongoing obligations pertaining to consumer credit, such as the ARM notice requirements (12 CFR 1026.20(c) and (d)) and periodic statement requirement (12 CFR 1026.41), after the successor in interest is added as an obligor on the mortgage note.

[23] *See* section-by-section analyses of §§ 1024.30(d), 1024.31, 1024.36(i), 1024.38(b)(1)(vi), 1024.39(b)(1), 1024.41(b), 1026.2(a)(11), 1026.2(a)(27), and 1026.41(a), *infra.*

[24] 12 U.S.C. 1701j-3(d).

Third, the Bureau is proposing to apply all of the Mortgage Servicing Rules to successors in interest whose identity and ownership interest in the property have been confirmed by the servicer (''confirmed successors in interest''). As explained in more detail in the discussion that follows and in the section-by-section analysis of the proposed sections, the Bureau believes that these changes are necessary to address the significant problems successors in interest continue to encounter with respect to the servicing of mortgage loans secured by their property. The Bureau has received information from consumers, consumer advocacy groups, and other stakeholders demonstrating that such problems remain pervasive, despite the Bureau's earlier guidance.

Successors in interest covered by the proposed rule would not necessarily have assumed the mortgage loan obligation (*i.e.,* legal liability for the mortgage debt) under State law. The Bureau understands that whether a successor in interest has assumed a mortgage loan obligation under State law is a fact-specific question. The proposed rule would not affect this question but would apply with respect to a successor in interest regardless of whether that person has assumed the mortgage loan obligation under State law.[25]

Scope of successor in interest rules. The Bureau is proposing changes to the Mortgage Servicing Rules regarding who qualifies as a successor in interest for purposes of relevant provisions of the rules. Current § 1024.38(b)(1)(vi) refers to ''the successor in interest of the deceased borrower.'' As the Bureau noted in the 2013 Mortgage Rule Amendments, the Garn-St Germain Act ''generally prohibits the exercise of due-on-sale clauses with respect to certain protected transfers.'' [26] These protected transfers include certain transfers involving the death of a borrower, specifically ''a transfer to a relative resulting from the death of a borrower'' and ''a transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety.'' [27] In addition to these categories involving the death of a borrower, the Garn-St Germain Act protects other categories of transfers: ''a transfer where the spouse or children of the borrower become an owner of the property;'' ''a transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property;'' ''a transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property;'' and ''any other transfer or disposition described in regulations prescribed by the Federal Home Loan Bank Board.'' [28]

The Bureau is proposing that, to the extent that the Mortgage Servicing Rules apply to successors in interest, the rules would apply to all successors in interest who acquired an ownership interest in the property securing a mortgage loan in a transfer protected by the Garn-St Germain Act, rather than only successors in interest who acquired an ownership interest upon a borrower's death. Accordingly, for the purposes of Regulation X, the Bureau is proposing to define successor in interest in § 1024.31 as a member of any of the categories of successors in interest who acquired an ownership interest in the property securing a mortgage loan in a transfer protected by the Garn-St Germain Act. The Bureau also is proposing to modify current § 1024.38(b)(1)(vi) to account for all transfers to successors in interest meeting this definition. Similarly, for the purposes of Regulation Z, proposed § 1026.2(a)(27) defines successor in interest to cover all categories of successors in interest who acquired an ownership interest in the dwelling securing a mortgage loan in a transfer protected by the Garn-St Germain Act. Successors in interest covered by the proposed definitions would not necessarily have assumed the mortgage loan obligation (*i.e.,* legal liability for the mortgage debt) under State law.[29]

When the Bureau issued current § 1024.38(b)(1)(vi), it stated that it had ''received information about difficulties faced by surviving spouses, children, or other relatives who succeed in the interest of a deceased borrower to a property that they also occupied as a principal residence, when that property is secur[ing] a mortgage loan account solely in the name of the deceased borrower.'' [30] Since that time, the Bureau has received additional information about difficulties faced by other categories of successors in interest who acquired an ownership interest in the property securing a mortgage loan in a transfer protected by the Garn-St Germain Act, such as divorced spouses of prior borrowers.[31] For example, the Bureau has received reports from consumers and consumer advocacy groups that successors in interest who are transferred an ownership interest in property securing a mortgage loan upon divorce or legal separation face similar challenges to those faced by successors in interest in situations involving borrower death.

The Bureau believes that successors in interest in situations other than those involving a borrower's death face the same risk of unnecessary foreclosure and other consumer harm and have the same legal rights with respect to the mortgage loan and property as successors in interest upon death. Further, because the Bureau is proposing to apply all of the Mortgage Servicing Rules to confirmed successors in interest in large part to prevent unnecessary foreclosure, the Bureau believes that it is appropriate to defer to Congress's policy choice about which categories of successors in interest should be protected from foreclosure. Accordingly, the Bureau is proposing that the Mortgage Servicing Rules should apply with respect to all categories of successors in interest who acquired an ownership interest in the property securing a mortgage loan in a transfer protected by the Garn-St Germain Act.

Confirming a successor in interest's status. The Bureau is proposing modifications to Regulation X's mortgage servicing rules (subpart C of Regulation X) relating to how a mortgage servicer confirms a successor in interest's identity and ownership

[25] As noted, the Bureau has also clarified in an interpretive rule that where a successor in interest who has previously acquired a legal interest in a dwelling agrees to be added as obligor on the mortgage loan, the servicer's express acknowledgment of the successor in interest as obligor does not constitute an ''assumption'' as that term is used in Regulation Z. *See* 79 FR 41631 (July 17, 2014).

[26] 78 FR 60381, 60406 (Oct. 1, 2013).

[27] 12 U.S.C. 1701j–3(d).

[28] *Id.* The Garn-St Germain Act also prohibits exercise of due-on-sale clauses with respect to certain other situations that do not involve transfer of an ownership interest in the property. *See id.* The Bureau's proposed rule would not apply to these situations.

[29] As noted, the Bureau understands that whether a successor in interest has assumed a mortgage loan obligation under State law is a fact-specific question.

[30] 78 FR 10695, 10781 (Feb. 14, 2013).

[31] The Bureau interprets ''spouse'' to include married same-sex spouses. *See* Memorandum on Ensuring Equal Treatment for Same-Sex Married Couples (Same-Sex Married Couple Policy) (June 25, 2015), *available at http://files.consumerfinance.gov/f/201407_cfpb_memo_ensuring-equal-treatment-for-same-sex-married-couples.pdf* (''It is the Bureau's policy, to the extent federal law permits and consistent with the legal position announced by the U.S. Department of Justice in interpreting relevant statutes, regulations and policies, to recognize all marriages valid at the time of the marriage in the jurisdiction where the marriage was celebrated. Accordingly, the Bureau will regard a person who is married under the laws of any jurisdiction to be married nationwide for purposes of the federal statutes and regulations under the Bureau's jurisdiction regardless of the person's place of residency.'').

interest in the property securing the mortgage loan.[32] Proposed § 1024.36(i) requires a servicer to respond to a written request that indicates that the person making the request may be a successor in interest by providing that person with information regarding the documents the servicer requires to confirm the person's identity and ownership interest in the property. Proposed § 1024.38(b)(1)(vi) provides several related modifications to the current policies and procedures provision involving successors in interest.

Proposed § 1024.38(b)(1)(vi)(A) requires servicers to maintain policies and procedures that are reasonably designed to ensure that the servicer can, upon notification of the death of a borrower or of any transfer of the property securing a mortgage loan, promptly identify and facilitate communication with any potential successors in interest regarding the property. Proposed § 1024.38(b)(1)(vi)(B) requires servicers to maintain policies and procedures reasonably designed to ensure that the servicer can, upon identification of a potential successor in interest, promptly provide to that person a description of the documents the servicer reasonably requires to confirm the person's identity and ownership interest in the property and how the person may submit a written request under § 1024.36(i) (including the appropriate address). Proposed § 1024.38(b)(1)(vi)(C) requires servicers to maintain policies and procedures reasonably designed to ensure that the servicer can confirm promptly, upon the receipt of such documents, the person's status as a successor in interest, where appropriate, and promptly notify the person, as applicable, that the servicer has confirmed the person's status, has determined that additional documents are required (and what those documents are), or has determined that the person is not a successor in interest.

The Bureau is proposing these changes because it believes, based on the information it has received from consumers, consumer advocacy groups, and other stakeholders, that successors in interest continue to have difficulty demonstrating their identity and ownership interest in the property to servicers' satisfaction.[33] The October 2013 Servicing Bulletin indicated that servicers should have a practice of ''[p]romptly providing to any party claiming to be a successor in interest a list of all documents or other evidence the servicer requires, which should be reasonable in light of the laws of the relevant jurisdiction, for the party to establish (1) the death of the borrower and (2) the identity and legal interest of the successor in interest.''[34] Nonetheless, the Bureau has heard numerous reports that some servicers continue to require successors in interest to submit documents that the Bureau believes are unreasonable in light of the particular situation of that successor in interest, or in light of the laws of the relevant jurisdiction. For instance, the Bureau has heard reports that some servicers have required successors in interest to produce probate documents for estates that do not require probate. The Bureau has also heard reports that some servicers have taken a long time to confirm the successor in interest's status, even after receipt of appropriate documentation. The Bureau has also heard reports that some servicers have failed to communicate to the successor in interest whether the servicer has confirmed the successor in interest's status.

The Bureau believes that these difficulties present significant problems related to RESPA's purposes and therefore warrant an appropriate response in Regulation X's mortgage servicing rules. When the Bureau issued the 2013 RESPA Servicing Final Rule, the Bureau stated that RESPA, as amended by the Dodd-Frank Act, ''reflects at least two significant consumer protection purposes: (1) To establish requirements that ensure that servicers have a reasonable basis for undertaking actions that may harm borrowers and (2) to establish servicers' duties to borrowers with respect to the servicing of federally related mortgage loans.''[35] Further, the Bureau stated that the Dodd-Frank Act ''provides the Bureau authority to establish prohibitions on servicers of federally related mortgage loans appropriate to carry out the consumer protection purposes of RESPA . . . . [I]n light of the systemic problems in the mortgage servicing industry . . ., the Bureau is exercising this authority in this rulemaking to implement protections for borrowers with respect to mortgage servicing.''[36] The Bureau believes that the proposed modifications to Regulation X's mortgage servicing rules regarding confirmation of a successor in interest's identity and ownership interest in the property similarly serve these purposes, in particular with respect to preventing unnecessary foreclosure and other homeowner harms.

Where a successor in interest's property secures a mortgage loan, a foreclosure or threatened foreclosure imperils that ownership interest and poses significant risk of consumer harm, even though the successor in interest may not have assumed the mortgage loan obligation under State law. Successors in interest may also have difficulty, beyond that of other homeowners, in avoiding foreclosure. The Bureau believes that such increased risk of harm may arise because successors in interest are more likely than other homeowners to experience an income disruption due to death or divorce, and because successors in interest have more difficulty than other homeowners obtaining information about the status of the mortgage loan, options for modification, and payoff information. Successors in interest may also be more likely than other homeowners to experience difficulty with the prompt crediting of their payments, resulting in unnecessary foreclosure. For all these reasons, the Bureau believes that successors in interest are a particularly vulnerable group at risk of substantial harms.

These potential harms are most likely to occur when a servicer does not promptly confirm a successor in interest's identity and ownership interest in the property. Before confirmation of the successor in interest's identity and ownership interest, the servicer may, in some circumstances, have legitimate concerns about sharing information about the mortgage loan, crediting payments, or evaluating the unconfirmed successor in interest for loss mitigation options. Accordingly, when confirmation is delayed, the potential risk of foreclosure and other harms to the successor in interest increase. For these reasons, the

[32] The Bureau believes that similar modifications to Regulation Z's mortgage servicing rules relating to how a mortgage servicer confirms a successor in interest's identity and ownership interest in the dwelling are unnecessary. Regulation X's mortgage servicing rules apply to the vast majority of mortgage loans to which Regulation Z's mortgage servicing rules apply. Accordingly, the rules under Regulation X relating to how a mortgage servicer confirms a successor in interest's identity and ownership interest in the property would generally apply to loans to which Regulation Z's mortgage servicing rules apply, making unnecessary similar modifications to Regulation Z.

[33] *See, e.g.,* California Reinvestment Coalition, Chasm Between Words and Deeds X*: How Ongoing Mortgage Servicing Problems Hurt California Homeowners and Hardest-Hit Communities,* at 20 (May 21, 2014) (noting that majority of housing counselors surveyed reported continuation of previously reported problems regarding successors in interest, such as that ''servicers often . . . would require [such homeowners] to go through costly and unnecessary hoops'').

[34] CFPB Bulletin 2013–12.

[35] 78 FR 10901, 10914 (Feb. 14, 2013).

[36] *Id.* at 10703.

Bureau believes that the difficulties faced by successors in interest with respect to confirmation of their status have caused successors in interest to face unnecessary problems with respect to the mortgage loans secured by the property, which may lead to unnecessary foreclosure on the property.

The Bureau's October 2013 Servicing Bulletin addressed these problems for a subset of successors in interest by requiring servicers to have policies and procedures in place to facilitate the provision of information to successors in interest who had inherited a property securing a deceased borrower's mortgage loan. Nonetheless, the Bureau has continued to receive reports that all categories of successors in interest, including those who inherit the property upon death of a family member, continue to experience difficulties in having servicers confirm the successor in interest's legal status. The Bureau believes, therefore, that proposing changes to the rules themselves is appropriate and necessary to clarify servicers' obligations and to ensure that the requirements are widely understood and enforceable. The Bureau believes that enabling successors in interest to demonstrate efficiently their status to servicers and having servicers promptly confirm this status is particularly important. Such prompt confirmation will reduce the risk of unnecessary foreclosures and other consumer harm. Because the Bureau is proposing to apply all of the Mortgage Servicing Rules to confirmed successors in interest, enabling successors in interest to demonstrate their status to servicers efficiently and requiring servicers to confirm this status promptly would allow successors in interest to access the rules' protections as quickly as possible. Moreover, as explained in the discussion above of the scope of successor in interest rules, the Bureau also believes that it is appropriate to extend protections to successors in interest in situations beyond a borrower's death.

Applying Mortgage Servicing Rules to successors in interest. The Bureau is proposing to apply all of the Mortgage Servicing Rules to confirmed successors in interest. Accordingly, proposed § 1024.30(d) provides that a successor in interest shall be considered a borrower for the purposes of Regulation X's mortgage servicing rules once a servicer confirms the successor in interest's identity and ownership interest in the property. Similarly, proposed § 1026.2(a)(11) provides that a confirmed successor in interest is a consumer with respect to Regulation Z's mortgage servicing rules. Under the proposed rule, the Mortgage Servicing Rules would apply with respect to a confirmed successor in interest regardless of whether that person has assumed the mortgage loan obligation (*i.e.,* legal liability for the mortgage debt) under State law.

The Bureau believes, based on the information it has received from consumers, consumer advocacy groups, and other stakeholders, that successors in interest face many of the challenges that the Mortgage Servicing Rules were designed to prevent.[37] For example, the Bureau has learned that successors in interest often have difficulty receiving information about the mortgage loan secured by the property or correcting errors regarding the mortgage loan account. The Bureau has also learned that servicers sometimes refuse to accept, or may misapply, payments from successors in interest. The Bureau has also heard numerous reports that successors in interest often encounter difficulties being evaluated for loss mitigation options, including that servicers often require successors in interest to assume the mortgage loan obligation under State law before evaluating the successor in interest for loss mitigation options. This practice appears to contravene Fannie Mae and Freddie Mac requirements that, for loans governed by Fannie Mae or Freddie Mac guidelines, servicers must evaluate successors in interest for loss mitigation options prior to processing an assumption.[38] The problems encountered by successors in interest in correcting servicing errors and obtaining information may persist even after the servicer has confirmed the successor in interest's identity and ownership interest in the property.

The ability of successors in interest to sell, encumber, or make improvements to their property is limited by the lien securing the mortgage loan. As homeowners of property securing a mortgage loan, successors in interest typically must satisfy the loan's payment obligations to avoid foreclosure, even though a successor in interest will not necessarily have assumed liability for the mortgage debt under State law. Successors in interest, like other homeowners, can face serious adverse consequences from foreclosure. These consumer harms may include loss of the home and accumulated equity, displacement, and damage to credit scores.[39] Successors in interest, however, may have more difficulty preventing or resolving servicing errors than other borrowers.

The Bureau believes that the problems faced by successors in interest are similar to many of the problems that prompted the Bureau to adopt the Mortgage Servicing Rules. When the Bureau issued the 2013 RESPA Servicing Final Rule, it stated that ''the consumer protection purposes of RESPA include responding to borrower requests and complaints in a timely manner, maintaining and providing accurate information, helping borrowers avoid unwarranted or unnecessary costs and fees, and facilitating review for foreclosure avoidance options.''[40] The Bureau believes that these purposes similarly would be served by providing successors in interest with the protections available to borrowers under Regulation X. Specifically, the Bureau believes that applying Regulation X's mortgage servicing rules to successors in interest would provide these homeowners with access to information about the mortgage, help successors in interest avoid unwarranted or unnecessary costs and fees, and prevent unnecessary foreclosure.

The Bureau believes that it is especially important for the loss mitigation procedures in § 1024.41 to apply to successors in interest. When the Bureau issued the 2013 RESPA Servicing Final Rule, the Bureau stated that ''establishing national mortgage servicing standards . . . ensure[s] that borrowers have a full and fair opportunity to receive an evaluation for a loss mitigation option before suffering the harms associated with foreclosure.''[41] The Bureau also stated

[37] *See, e.g.,* California Reinvestment Coalition, Chasm Between Words and Deeds X *How Ongoing Mortgage Servicing Problems Hurt California Homeowners and Hardest-Hit Communities,* at 20 (May 21, 2014) (noting that majority of housing counselors surveyed reported continuation of previously reported problems regarding successors in interest, such as that ''servicers often would not speak to such homeowners, would require them to go through costly and unnecessary hoops, and would leave them more vulnerable to foreclosure'').

[38] *See* Fannie Mae, Servicing Guide Announcement SVC–2013–17 (Aug. 28, 2013), *available at https://www.fanniemae.com/content/announcement/svc1317.pdf*; Freddie Mac, Bulletin 2013–3 (Feb. 15, 2013), *available at http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1303.pdf.*.

[39] Although successors in interest should not face the same credit reporting consequences after a foreclosure as signatories to the debt, inconsistencies in the credit scoring system make uncertain any generalization about the impact of a foreclosure on credit score, and successors in interest may, in some instances, face credit score risks comparable to those of an original signatory. For example, a foreclosure judgment may be reported against the successor in interest and reflected in the credit score as a judgment, regardless of whether the successor in interest has personal liability on the debt.

[40] 78 FR 10695, 10709 (Feb. 14, 2013).

[41] *Id.* at 10815.

that ''[t]hese standards are appropriate and necessary to achieve the consumer protection purposes of RESPA, including facilitating borrowers' review for loss mitigation options, and to further the goals of the Dodd-Frank Act to ensure a fair, transparent, and competitive market for mortgage servicing.''[42] The Bureau believes that these same consumer protection purposes would be served by applying the loss mitigation procedures in § 1024.41 to successors in interest, who, as homeowners of property securing a mortgage loan, may need to make payments on the loan to avoid foreclosure.

The Bureau believes that successors in interest may represent a particularly vulnerable group of consumers. Because successors in interest can face serious adverse consequences from foreclosure, successors in interest often accede to the responsibilities of the mortgage loan following death or divorce. Further, successors in interest may be more likely than other homeowners to experience a disruption in household income and therefore may be more likely than other homeowners to need loss mitigation to avoid foreclosure. The Bureau therefore believes that requiring servicers to evaluate a complete loss mitigation application received from a confirmed successor in interest under § 1024.41's procedures would serve RESPA's consumer protection purposes.

Further, because a servicer's acknowledgment of a successor in interest's subsequent assumption of the mortgage loan under State law is not subject to the Regulation Z Ability-to-Repay Rule,[43] successors in interest are particularly dependent on a prompt loss mitigation evaluation to assess the mortgage loan's affordability. A servicer's evaluation of a complete loss mitigation application often provides the successor in interest with critical information about the long-term affordability of the loan. The Bureau therefore believes that requiring servicers to evaluate a complete loss mitigation application received from a confirmed successor in interest supports the successor in interest in making a fully informed decision about whether to assume the mortgage loan obligation under State law. The Bureau also believes that requiring servicers to comply with § 1024.41's procedures with respect to confirmed successors in interest would not impose significant costs on servicers.

With respect to Regulation Z, when the Bureau issued the 2013 TILA Servicing Final Rule, the Bureau stated that ''[t]he purposes of TILA are to 'assure a meaningful disclosure of credit terms so that the consumers will be able to compare more readily the various credit terms available and avoid the uninformed use of credit' and to protect consumers against inaccurate and unfair credit billing practices.''[44] Additionally, the Bureau noted that the Dodd-Frank Act ''empowers the Bureau to prescribe rules regarding the disclosure of the 'features' of consumer financial products and services generally . . . even if other Federal consumer financial laws do not specifically require disclosure of such features,''[45] and that the Dodd-Frank Act ''is a broad source of authority to modify or exempt the disclosure requirements of TILA'' regarding ''residential mortgage loans if the Bureau determines that such exemption or modification is in the interest of consumers and in the public interest.''[46] The Bureau believes that these purposes would be served by applying Regulation Z's mortgage servicing rules to successors in interest, who, as homeowners of dwellings securing mortgage loans, may be required to make payments on the loan to avoid foreclosure. Specifically, the Bureau believes that applying Regulation Z's mortgage servicing rules to successors in interest would protect successors in interest against inaccurate and unfair payment crediting practices by the servicer of the mortgage loan on which they may be making payments and which encumbers their property. The Bureau also believes that applying Regulation Z's mortgage servicing rules to successors in interest would benefit consumers and the public because the rules would help prevent unnecessary foreclosure by, for example, keeping successors in interest informed of the status of the mortgage loan and requiring a servicer to credit promptly payments from successors in interest. Moreover, the proposed amendments to Regulation Z would help ensure that successors in interest receive prompt information about the amount necessary to pay off the mortgage loan, as other homeowners do under Regulation Z.

Legal Authority. For the reasons expressed above in this part V.A., the Bureau believes these proposed changes to the Mortgage Servicing Rules carry out the purposes of RESPA and TILA. The Bureau is proposing to exercise its authority under sections 6(j)(3), 6(k)(1)(E) and 19(a) of RESPA to make these amendments relating to successors in interest to Regulation X's mortgage servicing rules. The Bureau is proposing to exercise its authority under section 105(a) of TILA to make these amendments relating to successors in interest to Regulation Z's mortgage servicing rules. The Bureau is also proposing to exercise its authority under section 1022(b) of the Dodd-Frank Act to prescribe regulations necessary or appropriate to carry out the purposes and objectives of Federal consumer financial laws.

The Bureau believes that it is reasonable to interpret ''borrower'' under RESPA and ''consumer'' under TILA to include successors in interest and to apply the Mortgage Servicing Rules to confirmed successors in interest. The Bureau believes that this treatment is consistent with State property law and thus the context in which RESPA and TILA were enacted. At common law, a successor in interest ''retains the same rights as the original owner, with no change in substance.''[47] As a matter of State law, successors in interest have historically been afforded many of the same rights and responsibilities as the prior borrower. For example, there is a significant amount of State law indicating that a successor in interest, like the prior borrower, possesses the right to redeem following the mortgagee's foreclosure on the property.[48] Moreover, there is significant State law providing that the contractual rights and obligations under the mortgage loan of the prior borrower are freely assignable to successors in interest.[49] Further, before the enactment of the Garn-St Germain Act, several States had longstanding prohibitions on the exercise of due-on-sale clauses, thereby limiting servicers to the same contractual remedies with respect to successors in interest as were available against the prior borrower, whether or not the successor in interest under State law assumes the legal obligation to pay

[42] *Id.*

[43] *See* 79 FR 41631 (July 17, 2014).

[44] 78 FR 10901, 10914 (Feb. 14, 2013) (quoting 15 U.S.C. 1601(a)).

[45] *Id.*

[46] *Id.*

[47] Successor in interest, Black's Law Dictionary (9th ed. 2009).

[48] ''Property sold subject to redemption . . . may be redeemed in the manner hereinafter provided, by the . . . judgment debtor, or his successor in interest in the whole or any part of the property.'' *Phillips* v. *Hagart,* 45 P. 843, 843 (Cal. 1896); *see also, e.g., Forty-Four Hundred E. Broadway Co.* v. *4400 E. Broadway,* 660 P.2d 866, 868 (Az. Ct. App. 1982) (citing *Call* v. *Thunderbird Mortg. Co.,* 375 P.2d 169 (Cal. 1962)); *Brastrup* v. *Ellingson,* 161 NW. 553, 554 (N.D. 1917); *Tate* v. *Dinsmore,* 175 SW. 528, 529 (Ark. 1915).

[49] *See, e.g., Badran* v. *Household Fin. Corp.,* 2008 WL 4335098, at *4 (Mich. Ct. App. 2008); *Bermes* v. *Sylling,* 587 P.2d 377 (Mont. 1978); *In re Fogarty's Estate,* 300 N.Y.S. 231 (N.Y. Sur. Ct. 1937).

the mortgage.[50] Additionally, while successors in interest may not be personally liable on the mortgage note, absent their express assumption of such liability under State law, in a significant number of mortgages across the United States, the borrower on the note is also under State law not personally liable for the debt upon foreclosure because a deficiency judgment is not allowed.[51] Accordingly, under State law, a successor in interest is often in virtually the same legal position as the borrower on the note with respect to foreclosure.

The Bureau also believes that this treatment of successors in interest is consistent with other aspects of Federal law. The Garn-St Germain Act, like the Bureau's proposed amendments to the Mortgage Servicing Rules, protects successors in interest from foreclosure after transfer of homeownership to them. Additionally, several bankruptcy courts have held that successors in interest are entitled to the same treatment as prior borrowers, for example with respect to curing an arrearage on a mortgage and reinstating the loan.[52]

The Bureau is aware that some courts have indicated that successors in interest would not ordinarily be considered borrowers under RESPA.[53] Notwithstanding these cases, which were decided without the benefit of regulations such as those that the Bureau is now proposing, the Bureau believes that the term ''borrower'' may also be interpreted to include successors in interest and that it is reasonable to consider confirmed successors in interest borrowers for the purposes of the Mortgage Servicing Rules. As homeowners of a property securing a mortgage loan, successors in interest typically must satisfy the loan's payment obligations to avoid foreclosure. As described above, successors in interest therefore step into the shoes of the borrower for many legal purposes.

B. Regulation X

Section 1024.30 Scope

30(d) Successors in Interest

As explained in part V.A., the Bureau is proposing that all of the Mortgage Servicing Rules apply to confirmed successors in interest (as defined by the proposed definition of successor in interest, discussed in the section-by-section analysis of § 1024.31). Proposed § 1024.30(d) accordingly provides that a successor in interest must be considered a borrower for the purposes of subpart C of Regulation X (Regulation X's mortgage servicing rules) once a servicer confirms the successor in interest's identity and ownership interest in a property that secures a mortgage loan covered by Regulation X's mortgage servicing rules. Confirmed successors in interest covered by proposed § 1024.30(d) would not necessarily have assumed the mortgage loan obligation (*i.e.,* legal liability for the mortgage debt) under State law.[54] The Bureau also notes that the exemptions and scope limitations in Regulation X's mortgage servicing rules would also apply to the servicing of a mortgage loan with respect to a successor in interest.[55]

As described in part V.A., the Bureau is proposing this change because the Bureau believes, based on numerous reports from consumers, consumer advocacy groups, and other stakeholders, that successors in interest face many of the challenges that Regulation X's mortgage servicing rules were designed to prevent. The Bureau believes that the same reasons supporting the Bureau's adoption of the 2013 RESPA Servicing Final Rule support proposed § 1024.30(d) because successors in interest are homeowners whose property is subject to foreclosure if the mortgage loan obligation is not satisfied, even though the successor in interest may not have assumed that obligation under State law. The Bureau has considered each section of Regulation X's mortgage servicing rules and believes that each section should apply to confirmed successors in interest.

The Bureau believes that it is appropriate to limit the application of this portion of the proposed rule to successors in interest whom servicers have confirmed have an ownership interest in the property. Because some people representing themselves as successors in interest may not actually have an ownership interest in the property, requiring servicers to apply Regulation X's mortgage servicing rules' communication, disclosure, and loss mitigation requirements to successors in interest before servicers have confirmed the successor in interest's identity and ownership interest in the property may present privacy and other concerns. It would also be inappropriate to require servicers to incur substantial costs before confirming the successor in interest's identity and ownership interest in the property. However, the Bureau believes that applying Regulation X's mortgage servicing rules to confirmed successors in interest does not present privacy concerns. The Bureau believes that a confirmed successor in interest's ownership interest in the property securing the mortgage loan is sufficient to allow the successor in interest to receive information about the mortgage loan.

Specifically, the Bureau believes that §§ 1024.35 and 1024.36 should apply to confirmed successors in interest.[56] When the Bureau issued §§ 1024.35 and 1024.36 in the 2013 RESPA Servicing

[50] *See, e.g., Continental Fed. Sav. & Loan Ass'n* v. *Fetter,* 564 P.2d 1013, 1017 n.4 (Okla. 1977) (collecting cases). The Garn-St Germain Act later preempted restrictions on due-on-sale clauses generally, but prohibited exercise of due-on-sale clauses with respect to certain categories of successors in interest. *See* 12 U.S.C. 1701j–3(b) (preempting restrictions); *id.* § 1701j-3(d) (prohibiting exercise for certain categories).

[51] Deficiency judgments against borrowers upon foreclosure are disallowed with respect to most residential mortgages in several states, including Alaska, Arizona, California, Hawaii, Minnesota, Montana, Nevada, North Dakota, Oklahoma, Oregon, and Washington. *See* Connecticut General Assembly, Office of Legislative Research, OSR Research Report 2010–R–0327, *Comparison of State Laws on Mortgage Deficiencies and Redemption Periods* (Dec. 9, 2011) (citing and updating National Consumer Law Center, Survey of State Foreclosure Laws (2009)), *available at http://www.cga.ct.gov/2010/rpt/2010–R–0327.htm.*

[52] *See, e.g., In re Smith,* 469 B.R. 198, 202 (Bankr. S.D.N.Y. 2012); *In re Curinton,* 300 B.R. 78, 82 (Bankr. M.D. Fla. 2003) (quoting *In re Garcia,* 276 B.R. 627, 631 (Bankr. D. Ariz. 2002)).

[53] *See, e.g., Wilson* v. *Bank of Am., N.A.,* 2014 WL 4744555, at *8-*10 (E.D. Pa. Sept. 24, 2014).

[54] As indicated in part V.A., *supra,* the Bureau understands that whether a successor in interest has assumed a mortgage loan obligation (*i.e.,* legal liability for the mortgage debt) under State law is a fact-specific question.

[55] Section 1024.30(b) exempts small servicers from §§ 1024.38 through 1024.41 (except § 1024.41(j)). Likewise, § 1024.30(b) provides an exemption from these sections with respect to reverse mortgage transactions and mortgage loan transactions for which the servicer is a qualified lender. Accordingly, except as otherwise provided in § 1024.41(j), §§ 1024.38 through 1024.41 would not apply to successors in interest with respect to small servicers, reverse mortgage transactions, and mortgage loans for which the servicer is a qualified lender. Consistent with 12 CFR 591.5(b)(1), which excludes reverse mortgages from the Garn-St Germain's Act limitation on the exercise of certain due-on-sale clauses, the Bureau is therefore not proposing to apply § 1024.41's foreclosure-related protections with respect to reverse mortgages secured by a property acquired by a successor in interest. Under the proposed rule, however, §§ 1024.30 through 1024.37 would apply with respect to reverse mortgages secured by a property acquired by a successor in interest. Similarly, § 1040.30(c) provides that § 1024.33(a) only applies to mortgage loans that are secured by a first lien and that §§ 1024.39 through 1024.41 only apply to mortgage loans secured by property that is a borrower's principal residence. Accordingly, with respect to successors in interest, § 1024.33(a) would only apply to mortgage loans that are secured by a first lien and §§ 1024.39 through 1024.41 would only apply to mortgage loans secured by property that is a borrower's principal residence.

[56] As described in the section-by-section analysis of § 1024.36(i), *infra,* in addition to proposing that Regulation X's mortgage servicing rules, including § 1024.36, apply with respect to confirmed successors in interest, the Bureau is also proposing a new information request requirement in § 1024.36(i) that applies before the servicer has confirmed the successor in interest's status.

Final Rule, the Bureau stated that ''both borrowers and servicers would be best served if the Bureau were to clearly define a servicer's obligation to correct errors or respond to information requests.''[57] The Bureau believes that clearly defining a servicer's obligation with respect to a successor in interest would similarly benefit both servicers and successors in interest. Under current § 1024.38(b)(1)(vi), servicers are required to have policies and procedures reasonably designed to ensure that the servicer can identify and communicate with successors in interest. Because §§ 1024.35 and 1024.36 do not currently necessarily apply to successors in interest, however, the extent of the obligation to communicate with successors in interest, as well as how a successor in interest may obtain information from a servicer, are not clear. The Bureau therefore believes that §§ 1024.35 and 1024.36 would provide important protections to successors in interest. For instance, § 1024.35 would provide successors in interest with important protections regarding a servicer's failure to accept payments conforming to the servicer's written requirements for payments. Additionally, § 1024.36's requirements to provide information about the mortgage loan would prevent unnecessary foreclosure on the successor in interest's property by, for example, allowing a successor in interest to obtain information about the servicer's requirements for payments. Because successors in interest, like prior borrowers, bear the risk of unnecessary foreclosure, the Bureau believes that §§ 1024.35 and 1024.36 should apply to successors in interest, as homeowners of the property, for the same reasons that these rules apply to prior borrowers.

Providing successors in interest with protections under §§ 1024.35 and 1024.36 may cause servicers to incur costs, such as the cost of providing responses to information requests from successors in interest and handling error resolution. The Bureau believes, however, that the resulting consumer protection of this vulnerable group justifies the cost. Further, because servicers are already required to comply with the requirements of §§ 1024.35 and 1024.36 with respect to prior borrowers and may already expend some resources to communicate with successors in interest, the additional cost to servicers to apply these requirements to successors in interest will be minimal.

As noted, the Bureau believes that providing confirmed successors in interest with information about the mortgage loan as required by §§ 1024.35 and 1024.36 does not present privacy concerns. The Bureau solicits comment on whether any information that could be provided to successors in interest under §§ 1024.35 and 1024.36 presents privacy concerns and whether servicers should be permitted to withhold any information from successors in interest out of such privacy concerns.

As explained in part V.A., the Bureau believes that the loss mitigation procedures contained in § 1024.41 should apply to confirmed successors in interest and that servicers should be required to evaluate successors in interest for loss mitigation options to prevent unnecessary foreclosure. The Bureau believes that significant consumer harm flows from a servicer's failure to afford a successor in interest the same access to loss mitigation as other homeowners. As discussed in part V.A., the Bureau also believes that requiring servicers to evaluate successors in interest for loss mitigation prior to the successor in interest's assumption of liability for the mortgage debt under State law is consistent with Fannie Mae and Freddie Mac guidelines and serves RESPA's purposes.[58] Accordingly, under the proposed rule, once a servicer confirms a successor in interest's identity and ownership interest in the property, if the servicer receives a complete loss mitigation application from the successor in interest more than 37 days before a foreclosure sale, for example, the servicer must evaluate the successor in interest for all loss mitigation options available to the successor in interest, as required by § 1024.41(c)(1).

Consistent with § 1024.41's treatment of borrowers generally, the proposal would not require a servicer to offer a successor in interest any particular loss mitigation option. Further, under the proposed rule, a servicer could require a successor in interest to provide the same information and meet the same criteria for loss mitigation as other borrowers. The proposed rule would also not prevent a servicer from conditioning an offer for a loss mitigation option on the successor in interest's assumption of the mortgage loan obligation under State law or from offering loss mitigation options to the borrower that differ based on whether the borrower would simultaneously assume the mortgage loan obligation. Under the proposed rule, however, a servicer could not condition review and evaluation of a loss mitigation application on the successor in interest's assumption of the mortgage obligation. Once a servicer confirms a successor in interest's identity and ownership interest in the property, a servicer would, for example, be required under § 1024.41(b) to respond to a loss mitigation application from the successor in interest and exercise reasonable diligence in obtaining documents and information to complete the loss mitigation application. The foreclosure prohibitions under § 1024.41(f) and (g) would also apply.

Providing successors in interest with § 1024.41's protections may cause servicers to incur costs. Servicers may have to devote additional resources to responding to and evaluating loss mitigation applications from successors in interest. Further, providing successors in interest with § 1024.41's protections may delay or prevent foreclosure on the property securing the mortgage loan. The Bureau believes, however, that the resulting consumer protection of this vulnerable group justifies the cost. Further, because servicers are already required to comply with § 1024.41's requirements with respect to prior borrowers, the additional cost to servicers to apply these requirements to successors in interest should be minimal.

For similar reasons, the early intervention and continuity of contact requirements contained in §§ 1024.39 and 1024.40 should apply to confirmed successors in interest. In issuing these provisions in the 2013 RESPA Servicing Final Rule, the Bureau stated that §§ 1024.39 and 1024.40 are ''appropriate to achieve the consumer protection purposes of RESPA, including to help borrowers avoid unwarranted or unnecessary costs and fees and to facilitate review of borrowers for foreclosure avoidance options.''[59] The Bureau further stated that §§ 1024.39 and 1024.40 are ''necessary and appropriate to carry out the purpose . . . of the Dodd-Frank Act of ensuring that markets for consumer financial products and services are fair, transparent, and competitive'' and that ''consumers are provided with timely and understandable information to make responsible decisions about financial transactions, and markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.''[60] The Bureau believes that these same consumer protection purposes would be served by

[57] 78 FR 10695, 10736 (Feb. 14, 2013).

[58] *See* Fannie Mae, Servicing Guide Announcement SVC–2013–17 (Aug. 28, 2013); Freddie Mac, Bulletin 2013–3 (Feb. 15, 2013).

[59] 78 FR 10695, 10791 (Feb. 14, 2013) (discussing 12 CFR 1024.39); *see also id.* at 10809–10 (discussing 12 CFR 1024.40).

[60] *Id.* at 10791.

applying §§ 1024.39 and 1024.40 to successors in interest, who as homeowners of a property securing a mortgage loan may be required to make payments on the loan to avoid foreclosure. In particular, the protections provided by §§ 1024.39 and 1024.40 would serve to prevent unnecessary foreclosure by alerting successors in interest to any delinquency on the mortgage loan secured by their property and assisting with the process of applying for loss mitigation options.

Providing successors in interest with protections under §§ 1024.39 and 1024.40 may cause servicers to incur costs. In particular, servicers may be required to devote additional staffing and personnel to communicating with successors in interest. The Bureau believes, however, that providing consumer protections to this vulnerable group justifies the cost. Further, because servicers are already required to comply with §§ 1024.39's and 1024.40's requirements with respect to prior borrowers, the additional cost to servicers to apply these requirements to successors in interest should be minimal.

Finally, the Bureau believes that the requirements contained in § 1024.33 (regarding mortgage servicing transfers), § 1024.34 (regarding escrow payments and account balances), and § 1024.37 (regarding force-placed insurance) should apply to confirmed successors in interest. The same rationale for applying these rules to prior borrowers applies with respect to successors in interest, who are also homeowners and may be required to make payments on the loan to avoid foreclosure.[61] Further, it would add unnecessary complexity to the rules to apply the rest of Regulation X's mortgage servicing rules to confirmed successors in interest but not to apply §§ 1024.33, 1024.34, and 1024.37 to such successors in interest. The Bureau believes it is preferable to apply all of Regulation X's mortgage servicing rules to confirmed successors in interest, unless there is a compelling reason not to apply a particular rule. The Bureau is aware of no such compelling reason with respect to §§ 1024.33, 1024.34, and 1024.37 but solicits comment as to whether any such compelling reasons exist.

Providing successors in interest with protections under §§ 1024.33, 1024.34, and 1024.37 may cause servicers to incur costs, in particular the costs involved in communicating with successors in interest. The Bureau believes, however, that the resulting consumer protection of this vulnerable group justifies the cost. Further, because servicers are already required to comply with the requirements of §§ 1024.33, 1024.34, and 1024.37 with respect to prior borrowers, the additional cost to servicers to apply these requirements to successors in interest should be minimal.

The Bureau solicits comment on whether any particular sections of Regulation X's mortgage servicing rules should apply with respect to successors in interest even if the servicer has not confirmed the successor in interest's identity and ownership interest in the property. Further, the Bureau solicits comment on whether any particular sections of Regulation X's mortgage servicing rules should not apply with respect to confirmed successors in interest.

Proposed commentary. Proposed comment 30(d)–1 clarifies the requirement in proposed § 1024.30(d) that a successor in interest must be considered a borrower for the purposes of Regulation X's mortgage servicing rules once a servicer confirms the successor in interest's identity and ownership interest in the property. The proposed comment provides the example of the application of § 1024.41's loss mitigation procedures to successors in interest: If a servicer receives a loss mitigation application from a successor in interest after confirming the successor in interest's identity and ownership interest in the property, the servicer must review and evaluate the application and notify the successor in interest in accordance with the procedures set forth in § 1024.41.[62] The proposed comment also notes, in contrast, § 1024.36(i)'s requirement that a servicer must respond to written requests for certain information from a potential successor in interest in accordance with the requirements of § 1024.36(c) through (g) before confirming that person's status.

Proposed comment 30(d)–2 clarifies the effect on the prior borrower of a servicer's confirmation of a successor in interest's identity and ownership interest in the property. The proposed comment provides that, even after a servicer's confirmation of a successor in interest's identity and ownership interest in the property, the servicer is still required to comply with the requirements of Regulation X's mortgage servicing rules with respect to the prior borrower, unless that borrower also has either died or been released from the obligation on the mortgage loan.[63] Accordingly, once a servicer confirms a successor in interest's identity and ownership interest in the property and the prior borrower has either died or been released from the obligation on the mortgage loan, the servicer would no longer be required to comply with the requirements of Regulation X's mortgage servicing rules with respect to the prior borrower. The proposed comment also provides that the prior borrower retains any rights under Regulation X's mortgage servicing rules that accrued prior to the confirmation of the successor in interest to the extent these rights would otherwise survive the prior borrower's death or release from the obligation. Accordingly, for example, a deceased borrower's estate would still have any claims that accrued prior to the borrower's death.[64] (As described in the section-by-section analysis of § 1026.2(a)(11), the Bureau is proposing similar commentary with respect to Regulation Z's requirements.)

The Bureau is proposing comment 30(d)-2 because the Bureau believes that Regulation X's mortgage servicing rules would generally provide important protections to prior borrowers even after confirmation of a successor in interest. The prior borrower may still be liable on the mortgage note, and so the prior borrower may have significant legal interests at stake with respect to the mortgage loan, including potential credit reporting and any subsequent foreclosure or resulting deficiency. The Bureau believes that these ongoing interests of prior borrowers generally justify the continued application of Regulation X's mortgage servicing rules to prior borrowers after confirmation of a successor in interest. Alternatively, the Bureau seeks comment on whether the prior borrower should not continue to receive Regulation X's mortgage servicing protections once a successor in interest's identity and ownership interest have been confirmed.

[61] *See id.* at 10727 (describing 12 CFR 1024.33); *id.* at 10734 (describing 12 CFR 1024.34); *id.* at 10763 (describing 12 CFR 1024.37).

[62] As described in the section-by-section analysis of § 1024.41(b), *infra,* proposed comment 41(b)–1.ii provides that if a servicer receives a loss mitigation application from a potential successor in interest before confirming that person's identity and ownership interest in the property, the servicer is required to review and evaluate that loss mitigation application upon such confirmation in accordance with the procedures set forth in § 1024.41.

[63] Under proposed comment 30(d)–2, in the absence of confirmation of a successor in interest, the servicer is still required to comply with Regulation X's mortgage servicing rules with respect to the prior borrower (*i.e.,* the prior borrower's estate) even if the prior borrower has died.

[64] *See, e.g., Wilson,* 2014 WL 4744555, at *8, *10-*18 (describing RESPA claims brought by ''Plaintiff as Administratrix of the Estate'').

The Bureau acknowledges that, under proposed comment 30(d)–2, servicers will sometimes be required to comply with Regulation X's mortgage servicing rules with respect to more than one person—both the prior borrower and the successor in interest, as well as, in some cases, multiple successors in interest who each acquire an ownership interest in a property. The Bureau notes that, under the Mortgage Servicing Rules, it is already the case that the rules may apply with respect to more than one borrower for a particular mortgage loan. It is quite common for more than one borrower (for example, spouses) to be obligated on the mortgage note, and the Mortgage Servicing Rules apply with respect to each borrower in such cases. Accordingly, the Bureau does not believe that applying Regulation X's mortgage servicing rules to successors in interest presents novel challenges for servicers in this regard.

On the other hand, the Bureau does not believe that it often would be useful to the prior borrower or the borrower's estate after the borrower has either died or been released from the obligation on the mortgage loan to continue to receive the protections of Regulation X's mortgage servicing rules once a servicer confirms a successor in interest's identity and ownership interest in the property. When a successor in interest has been confirmed and the prior borrower has died, the borrower's estate would typically have a relatively narrow interest in the mortgage loan. Likewise, when the prior borrower has been released from the obligation on the mortgage loan, that borrower may have interests relating to loan activity prior to the release of the obligation but would have little or no interest in subsequent loan activity. Accordingly, the Bureau believes that prior borrowers should not receive Regulation X's mortgage servicing protections when a successor in interest has been confirmed and the prior borrower has also died or been released from the mortgage obligation, but should retain any rights that accrued previously to the extent such rights would otherwise survive the death of the borrower or the release of the borrower from the obligation.

The Bureau solicits comment on whether other circumstances exist, beyond death and relief of the obligation on the mortgage loan, in which Regulation X's mortgage servicing rules should not apply to the prior borrower once a successor in interest has been confirmed.

Section 1024.31 Definitions

Delinquency

Section 1024.31 contains definitions for various terms that are used throughout the provisions of subpart C of Regulation X. It does not contain a definition of the term ''delinquency,'' although it is defined for purposes of §§ 1024.39(a) and (b) and 1024.40(a). Since the publication of the 2013 RESPA Servicing Final Rule, the Bureau has received numerous inquiries about how servicers should calculate delinquency with respect to those provisions of the Mortgage Servicing Rules that refer to delinquency but do not define delinquency. In particular, stakeholders have asked the Bureau how servicers should calculate the 120-day foreclosure referral waiting period set forth in § 1024.41(f)(1)(i). To provide greater clarity, the Bureau is proposing to add a single definition of ''delinquency'' that will apply to all provisions in subpart C of Regulation X, and to remove the definitions from the commentary to §§ 1024.39(a) and (b) and 1024.40(a).

Delinquency is currently defined for purposes of §§ 1024.39(a) and (b) and 1024.40(a) as beginning ''on the day a payment sufficient to cover principal, interest, and, if applicable, escrow for a given billing cycle is due and unpaid, even if the borrower is afforded a period after the due date to pay before the servicer assesses a late fee.'' [65] Delinquency is not defined for purposes of other sections of subpart C, including § 1024.41(f)(1), which prohibits a servicer from making the first notice or filing for foreclosure unless ''[a] borrower's mortgage loan obligation is more than 120 days delinquent.''

To address apparent confusion, as well as to ensure that the term ''delinquency'' is interpreted consistently throughout Regulation X's mortgage servicing rules, the Bureau is proposing to remove the current definition of delinquency applicable to §§ 1024.39(a) and (b) and 1024.40(a) and to add a general definition of delinquency in § 1024.31 that would apply to all sections of subpart C.[66] The Bureau is proposing to define delinquency as a period of time during which a borrower and the borrower's mortgage loan obligation are delinquent, and to clarify within the proposed definition that a borrower and a borrower's mortgage loan obligation are delinquent beginning on the day a periodic payment sufficient to cover principal, interest, and, if applicable, escrow, became due and unpaid, until such time as the payment is made.[67] Delinquency under the proposed definition is not triggered by a borrower's failure to pay a late fee, consistent with current comments 39(a)–1.i and 40(a)–3. As the Bureau explained in the 2012 RESPA Servicing Proposal, the Bureau believes that there is a low risk that borrowers who are otherwise current with respect to principal, interest, and escrow payments will be pushed into foreclosure solely because of a failure to pay accumulated late charges.[68]

In contrast with the definition of delinquency currently found in comments 39(a)–1.i and 40(a)–3, the proposed definition does not include the phrase ''for a given billing cycle.'' As used in the context of the live contact and continuity of contact requirements under §§ 1024.39 and 1024.40, respectively, that phrase was intended to ensure that the servicer met the respective requirements of those rules during each billing cycle in which the borrower was delinquent. However, such a definition would have created incongruities if applied to the 120-day foreclosure referral waiting period in § 1024.41(f)(1)(i).

By proposing to define ''delinquency,'' the Bureau intends to provide servicers, borrowers, and other stakeholders with clear guidance on how to determine whether a borrower is delinquent for purposes of Regulation X's servicing provisions and when the borrower's delinquency began. Servicers may use different definitions of ''delinquency'' for operational purposes, and servicers may use different or additional terminology when referring to borrowers who are late or behind on their payments—for example, servicers may refer to borrowers as ''past due'' or ''in default,'' and may distinguish between borrowers who are ''delinquent'' and ''seriously delinquent.'' Except as provided in the Mortgage Servicing Rules themselves, the Bureau does not intend the proposed definition of delinquency to affect industry's existing procedures for identifying and dealing with borrowers

[65] Comments 39(a)–1.i and 40(a)–3.

[66] The proposed definition would not affect the interpretation of § 1024.33(c), which prohibits servicers from treating a borrower as ''late for any purpose'' if a transferee servicer receives a payment from a borrower within the 60-day period beginning on the effective date of a transfer.

[67] All three concepts—delinquency, delinquent borrower, and delinquent mortgage loan obligation—are used interchangeably throughout subpart C. *See, e.g.,* 12 CFR 1024.39(a) (''delinquent borrower''; ''borrower's delinquency''); 12 CFR 1024.39(b) (same); 12 CFR 1024.41(f)(1)(i) (''A borrower's mortgage loan obligation is more than 120 days delinquent'').

[68] *See* 77 FR 57199, 57252 (Sept. 17, 2012).

who are late or behind on their payments. The Bureau therefore seeks comment regarding whether the proposed definition has the potential of interfering with industry's existing policies and procedures. In addition, the Bureau seeks comment on whether there are alternative ways to articulate the proposed definition that may improve uniform interpretation and implementation.

The Bureau is also proposing to add three comments to the proposed definition of delinquency to provide servicers additional guidance in determining whether and for how long a borrower has been delinquent. Proposed comment 31 (Delinquency)–1 essentially restates existing comments 39(a)–1.i and 40(a)–3: that a borrower becomes delinquent beginning the day on which the borrower fails to make a periodic payment, even if the servicer grants the borrower additional time after the due date to pay before charging the borrower a late fee.

Proposed comment 31 (Delinquency)–2 explains how delinquency should be calculated if a servicer applies a borrower's payments to the oldest outstanding periodic payment. The Bureau understands from its outreach that many servicers credit payments made to a delinquent account to the oldest outstanding periodic payment; the model deed of trust provided by the GSEs provides that the servicer will apply payments ''in the order in which [they] became due.'' [69] The Bureau also understands that some servicers that use this method may be concerned about how to calculate the length of a borrower's delinquency without increased certainty from the Bureau.[70] As it stated in the 2012 TILA Servicing Proposal, the Bureau believes that this method of crediting payments provides greater consumer protection, because it advances the date the borrower's delinquency began and therefore shortens the length of a borrower's delinquency.[71] Nonetheless, consistent with its decision in the context of the 2013 TILA Servicing Final Rule, the Bureau is not requiring servicers to apply payments to the oldest outstanding periodic payment at this time. The Bureau initially proposed to require servicers to apply payments in this way in the 2012 TILA Servicing Proposal, but it ultimately decided not to adopt the proposed provision, finding that it provided limited consumer benefit and posed a potential conflict with State law.[72] The Bureau is not revisiting that decision in this rulemaking. The Bureau will continue to monitor the market to evaluate servicers' payment crediting practices and those practices' effects on consumers.

At this time, rather than requiring that servicers apply payments to the oldest outstanding periodic payment, the Bureau is proposing comment 31 (Delinquency)–2 to clarify that, *if* a servicer applies payments to the oldest outstanding periodic payment, the date of the borrower's delinquency must advance accordingly. The proposed comment includes an example illustrating this concept. The example assumes a mortgage loan obligation with a periodic payment due on the first of each month. The borrower misses the periodic payment due on January 1, but makes a payment in full on February 1. The servicer credits the payment it received on February 1 to the January deficiency. Pursuant to proposed comment 31 (Delinquency)–2, on February 2, the borrower is one day delinquent. Servicers have indicated to the Bureau that if they apply payments in this manner, this method of calculating delinquency means that, in light of the 120-day foreclosure referral waiting period in § 1024.41(f)(1)(i), servicers will not be able to foreclose on a borrower who misses one or two payments but does not become seriously delinquent—for example, a borrower who misses one payment over the course of a year but makes all other payments in full and on time. The Bureau understands that most servicers would not treat such a borrower as seriously delinquent and would not initiate loss mitigation procedures or seek to foreclose on that borrower. As such, the Bureau believes that the proposed comment will not place a significant additional burden on most servicers. The Bureau will continue to monitor the market to evaluate whether and to what extent servicers are choosing to foreclose on borrowers who are only one or two payments behind, including whether such foreclosure practices raise consumer protection concerns that would be appropriately addressed through formal guidance or rulemaking.

Proposed comment 31 (Delinquency)-3 permits servicers to apply a payment tolerance to partial payments under certain circumstances. The Bureau has learned from its outreach that some servicers elect or are required to treat borrowers as having made a timely payment even if they make payments that are less than the amount due by some small amount (perhaps as a result of a scrivener's error or recent ARM payment adjustment). The Bureau understands that servicers that apply a payment tolerance advance the outstanding payment amount to the borrower's account, such that the account is reflected as current in the servicer's systems. The Bureau understands that the maximum amount these servicers use for a payment tolerance varies from $10 to $50.[73] These servicers would prefer not to initiate early intervention communications, continuity of contact requirements, or loss mitigation procedures with those borrowers for that given billing cycle. Proposed comment 31 (Delinquency)–3 permits servicers that elect to advance outstanding funds to a borrower's mortgage loan account to treat the borrower's insufficient payment as timely, and therefore not delinquent, for purposes of Regulation X's mortgage servicing rules. The comment clarifies, however, that if a servicer chooses not to treat the borrower as delinquent for purposes of subpart C of Regulation X, the borrower is not delinquent as defined in § 1024.31. This clarification is intended to prevent servicers from selectively applying a payment tolerance only where doing so benefits the servicer. Specifically, the clarification is intended to prevent the circumstance under which a servicer treats a borrower as current in order to avoid the early intervention, continuity of contact, or loss mitigation requirements, while treating the same borrower as delinquent for purposes of

[69] *See, e.g.,* Fannie Mae, *Security Instruments, https://www.fanniemae.com/singlefamily/security-instruments* (security instruments for various states but with a uniform covenant that payments shall be applied to each periodic payment in the order in which it became due); Fannie Mae & Freddie Mac, California Single Family Uniform Instrument, Form 3005–4, *available at https://www.fanniemae.com/content/legal_form/3005w.doc*; Fannie Mae & Freddie Mac, New York Single Family Uniform Instrument, Form 3033, *available at https://www.fanniemae.com/content/legal_form/3033w.doc.*

[70] Am. Bankers Ass'n. Letter to Consumer Fin. Prot. Bureau (Oct. 24, 2014), *available at http://www.aba.com/Advocacy/commentletters/Documents/ABALetterRollingDelinquencies102414.pdf.*

[71] *See* 77 FR 57318, 57352–53 (Sept. 17, 2012).

[72] *See* 78 FR 10901, 10955–56 (Feb. 14, 2013).

[73] The variation in the payment tolerance amounts used could relate to whether the servicer is bound by the terms of the National Mortgage Settlement, which includes a mandatory payment tolerance policy: Servicers subject to the National Mortgage Settlement must accept and credit up to two payments that come within $50 of the scheduled payment to the borrower's account. The National Mortgage Settlement is *available at: http://www.nationalmortgagesettlement.com/.* The five servicers subject to the National Mortgage Settlement are Bank of America, JP Morgan Chase, Wells Fargo, CitiMortgage, and Ally/GMAC. Ocwen reached a separate settlement agreement containing an identical provision at a later time, also *available at http://www.nationalmortgagesettlement.com/.*

initiating foreclosure under § 1024.41(f)(1). The Bureau seeks comment on whether it should limit servicers' use of a payment tolerance to a specific dollar amount or percentage of the periodic payment amount, and if so, what the specific amount or percentage should be.

Successors in Interest

As described in part V.A., the Bureau is proposing that, to the extent that the Mortgage Servicing Rules apply to successors in interest, those rules should apply with respect to transfers to all categories of successors in interest who acquired an ownership interest in the property securing a mortgage loan in a transfer protected by the Garn-St Germain Act.[74] Accordingly, the Bureau is proposing to add a definition of successor in interest to § 1024.31 that is broader than the category of successors in interest contemplated by current § 1024.38(b)(1)(vi) and that would cover all categories of successors in interest who acquired an ownership interest in the property securing a mortgage loan in a transfer protected by the Garn-St Germain Act. (As discussed in the section-by-section analysis of § 1026.2(a)(27), the Bureau is proposing to add a similar definition to Regulation Z.)

The proposed definition states that a successor in interest is a person to whom an ownership interest in a property securing a mortgage loan is transferred from the borrower, provided that the transfer falls under an exemption specified in the appropriate section of the Garn-St Germain Act. The Bureau intends the proposed definition to apply throughout the relevant proposed rule and commentary. (As discussed in the section-by-section analysis of § 1024.38(b)(1)(vi), the Bureau is also proposing modifying current § 1024.38(b)(1)(vi) to account for all protected transfers under the Garn-St Germain Act.)

The Bureau solicits comment on whether the proposed definition of successor in interest is appropriate for the purposes of the Mortgage Servicing Rules. The Bureau also solicits comment on whether certain categories of successors in interest protected by the Garn-St Germain Act should not be covered by the Bureau's definition of successor in interest. The Bureau further solicits comment on whether additional categories of successors in interest, beyond those protected by the Garn-St Germain Act, should be covered by the Bureau's definition of successor in interest.

The Bureau also solicits comment on whether the Mortgage Servicing Rules should expressly and specifically address the status of persons who possess an ownership interest in the property, have not have assumed the mortgage loan obligation (*i.e.,* legal liability for the mortgage debt) under State law, but did not acquire an ownership interest from a prior borrower on the mortgage loan. Such persons would include, for example, persons who purchased the property jointly with the prior borrower but did not undertake the mortgage loan obligation when the loan was originated and may not necessarily have assumed the mortgage loan obligation thereafter. The Bureau is considering, but is not proposing at this time, expressly providing that such persons are borrowers for the purposes of the Mortgage Servicing Rules. The Bureau solicits comment on whether this category of persons are having difficulty with their treatment by mortgage servicers, and if so, the extent and nature of the difficulty.

Section 1024.36™Requests for Information

36(a) Information Request

Section 1463(a) of the Dodd-Frank Act amended RESPA to add section 6(k)(1)(D), which states that a servicer shall not fail to provide information regarding the owner or assignee of a mortgage loan within ten business days of a borrower's request. Currently, when a borrower submits a request for information under § 1024.36(a) asking for the owner or assignee of a mortgage loan held by a trust in connection with a securitization transaction and administered by an appointed trustee, comment 36(a)-2 provides that the servicer complies with § 1024.36(d) by responding by identifying both the name of the trust and the name, address, and appropriate contact information for the trustee. The comment provides that, among other examples, if a mortgage loan is owned by Mortgage Loan Trust, Series ABC–1, for which XYZ Trust Company is the trustee, the servicer complies with § 1024.36(d) by responding to a request for information regarding the owner or assignee of the mortgage loan by identifying the owner as Mortgage Loan Trust, Series ABC–1, and providing the name, address, and appropriate contact information for XYZ Trust Company as the trustee. Proposed amendments to comment 36(a)-2 would change how a servicer must respond to such requests when Fannie Mae or Freddie Mac is the trustee, investor, or guarantor.

The Bureau has received feedback from industry suggesting that providing borrowers with detailed information about the trust when Fannie Mae or Freddie Mac is the trustee, investor, or guarantor is unnecessarily burdensome on servicers. According to industry, servicers' systems do not typically track the name of the trust for each such loan, so a servicer must ask the trustee for this information each time it receives an information request asking for the loan's owner or assignee. Moreover, because the loss mitigation provisions for loans governed by Fannie Mae or Freddie Mac are determined by Fannie Mae or Freddie Mac and not by the trust, the trust-identifying information may be of less value to borrowers when Fannie Mae or Freddie Mac is the trustee, investor, or guarantor. Industry has therefore requested that the Bureau reconsider the requirement for a servicer to provide specific trust-identifying information for loans governed by Fannie Mae's or Freddie Mac's servicing guidelines.

While the Bureau acknowledges industry's concerns, the Bureau continues to believe that a borrower should be able to obtain the identity of the trust by submitting a request for information under § 1024.36(a). Consumer advocacy groups have informed the Bureau that borrowers require trust-identifying information in order to raise certain claims or defenses during litigation, as well as to exercise the extended right of rescission under § 1026.23(a)(3) when applicable. Further, for loans held in a trust for which Fannie Mae or Freddie Mac is not the trustee, investor, or guarantor, a borrower would require the trust-identifying information to determine what loss mitigation options are available.

Nonetheless, the Bureau believes that, with respect to a loan for which Fannie Mae or Freddie Mac is the trustee, investor, or guarantor, it may not be necessary for a servicer to identify both the trustee and the trust in response to all requests for information seeking ownership information. To the extent that borrowers asking for the owner or assignee of a loan are seeking information about loss mitigation options or the requirements imposed on the servicer by the owner of the loan, such information is usually publicly available in Fannie Mae's or Freddie Mac's respective Seller-Servicing Guide without distinction based on the particular trust. If a borrower knows that Fannie Mae or Freddie Mac is the trustee, investor, or guarantor, the borrower can look to those guides and related bulletins to learn what loss

[74] 12 U.S.C. 1701j-3(d).

mitigation options are available, what foreclosure processes the servicer must follow, how the servicer is compensated, and a wide variety of other information applicable to the loan. Alternatively, borrowers can access the appropriate Web site to learn more information once they know which entity's guidelines apply; both Fannie Mae and Freddie Mac maintain Web sites containing a considerable amount of information relating to standards affecting borrowers' mortgage loans. Fannie Mae and Freddie Mac also maintain dedicated telephone lines for borrower inquiries. As such, requiring a servicer to identify Fannie Mae or Freddie Mac as the owner or assignee of the loan (without also identifying the name of the trust) would give most borrowers access to the information they seek.

Given the foregoing considerations, the Bureau is proposing to revise comment 36(a)–2 to provide that, for loans for which Fannie Mae or Freddie Mac is the trustee, investor, or guarantor, a servicer complies with § 1024.36(d) by responding to requests for information asking only for the owner or assignee of the loan by providing only the name and contact information for Fannie Mae or Freddie Mac, as applicable, without also providing the name of the trust. However, proposed comment 36(a)–2 also provides that, if a request for information expressly requests the name or number of the trust or pool, the servicer complies with § 1024.36(d) by providing the name of the trust, and the name, address, and appropriate contact information for the trustee, regardless of whether or not Fannie Mae or Freddie Mac is the trustee, investor, or guarantor.

The Bureau believes that proposed comment 36(a)–2 would preserve a borrower's access to information while reducing burden on servicers by no longer requiring them to obtain trust-identifying information for loans for which Fannie Mae or Freddie Mac is the trustee, investor, or guarantor. Further, the Bureau believes that, by requiring servicers to provide specific trust-identifying information upon a request expressly seeking such information, proposed comment 36(a)–2 would ensure that borrowers who do require specific trust-identifying information can obtain it. For other borrowers, receiving trust-identifying information, which could appear technical or unfamiliar, might be confusing and is unlikely to benefit the borrower.

The proposed amendments also restructure comment 36(a)–2 to improve clarity. The proposed changes would not affect a servicer's existing obligations with respect to loans not held in a trust for which an appointed trustee receives payments on behalf of the trust, or with respect to any loan held in a trust for which neither Fannie Mae nor Freddie Mac is the trustee, investor, or guarantor. For loans that are not held in a trust for which an appointed trustee receives payments on behalf of the trust, proposed amendments to comment 36(a)–2.i would preserve the requirement for servicers to respond to a request for information regarding the owner or assignee of a mortgage loan by identifying the person on whose behalf the servicer receives payments from the borrower. This proposed revision subsumes the requirement in current comment 36(a)–2.i to identify the servicer or its affiliate as the owner or assignee when a loan is held in portfolio and would therefore eliminate the current comment's explicit reference to portfolio loans.

Proposed comment 36(a)–2.i also clarifies that a servicer is not the owner or assignee for purposes of § 1024.36(d) if the servicer holds title to the loan, or title is assigned to the servicer, solely for the administrative convenience of the servicer in servicing the mortgage loan obligation. This change is intended to bring the commentary to § 1024.36(d) clearly in line with the Regulation Z provisions in § 1026.39 related to transfer of ownership notices. As to loans held in a trust for which Fannie Mae or Freddie Mac is not the investor, guarantor, or trustee, proposed comments 36(a)–2.ii.A and 36(a)–2.ii.B preserve the obligation in existing comment 36(a)–2.ii that servicers would still comply with § 1024.36(d) by identifying both the trust and the trustee of such loans to the borrower, regardless of how the borrower phrased the request for ownership information.

Similarly, the proposed amendments would not change a servicer's requirements for responding to requests for ownership information for loans for which the Government National Mortgage Association (Ginnie Mae) is the guarantor. As noted in both current comment 36(a)–2 and proposed comment 36(a)–2.ii.B, Ginnie Mae is not the owner or assignee of the loan solely as a result of its role as a guarantor. In addition, servicing requirements for those loans are governed by the Federal agency insuring the loan—such as the Federal Housing Association, the Department of Veterans' Affairs, the Rural Housing Services, or the Office of Public and Indian Housing—not by Ginnie Mae itself.

36(i) Successors in Interest

The Bureau is proposing a new request for information requirement regarding the confirmation of a successor in interest's identity and ownership interest in the property. Proposed § 1024.36(i) requires a servicer to respond to a written request that indicates that the person may be a successor in interest and that includes the name of the prior borrower and information that enables the servicer to identify that borrower's mortgage loan account. Under the proposed rule, a servicer must respond to such a request by providing the person with information regarding the documents the servicer requires to confirm the person's identity and ownership interest in the property. With respect to the written request, the proposed rule requires the servicer to treat the person as a borrower for the purposes of the procedural requirements of § 1024.36(c) through (g)—for instance, the servicer must acknowledge receipt within five days and respond in writing within 30 days without charge. The proposed rule also provides that if a servicer has, under § 1024.36(b), established an address that a borrower must use to request information, a servicer must comply with the requirements of § 1024.36(i) only for requests received at the established address. As with the policies and procedures requirement regarding successors in interest (proposed § 1024.38(b)(1)(vi), discussed in the section-by-section analysis of § 1024.38(b)(1)(vi)), but unlike the application of Regulation X's mortgage servicing rules to successors in interest generally (proposed § 1024.30(d), discussed in the section-by-section analysis of § 1024.30(d)), servicers would be required to comply with proposed § 1024.36(i) before confirming the successor in interest's identity and ownership interest in the property.

As indicated in part V.A., the Bureau is proposing § 1024.36(i) to address problems faced by successors in interest in confirming their identity and ownership interest in the property securing the mortgage loan; the Bureau believes that these problems may lead to unnecessary foreclosure on homeowners' property. The Bureau is proposing § 1024.36(i) in conjunction with proposed § 1024.38(b)(1)(vi)(B) (*see* section-by-section analysis of § 1024.38(b)(1)(vi)), which would require servicers to maintain policies and procedures that are reasonably designed to ensure that the servicer can, upon identification of any potential successor in interest—including through any request made by a potential

successor in interest under § 1024.36(i) or any loss mitigation application received from a potential successor in interest—promptly provide to the potential successor in interest a description of the documents the servicer reasonably requires to confirm that person's identity and ownership interest in the property and how the person may submit a written request under § 1024.36(i) (including the appropriate address). The Bureau intends that proposed § 1024.38(b)(1)(vi)(B) would require servicers to have policies and procedures to determine what documents are reasonable to require from successors in interest in particular circumstances, so that the servicer is prepared to provide promptly a description of these documents, while proposed § 1024.36(i) would give potential successors in interest a mechanism to obtain this information from servicers. The Bureau believes that the separate requirement in proposed § 1024.36(i) is appropriate, in addition to the policies and procedures requirement in proposed § 1024.38(b)(1)(vi)(B), because information regarding the documents the servicer requires to confirm a successor in interest's status may be of importance to each individual successor in interest and so each successor in interest should have a mechanism to obtain this information from a servicer.

The Bureau intends that proposed § 1024.36(i) would apply to a broad range of written communication from potential successors in interest. Under the proposed rule, the successor in interest would not need to specifically request information regarding the documents the servicer requires to confirm the person's identity and ownership interest in the property. As with other requests for information, the successor in interest would also not need to indicate specifically that the request is a written request under § 1024.36 or to make the request in any particular form. Accordingly, servicers would be required to provide the information in response to any written communication indicating that the person may be a successor in interest that is accompanied by the name of the prior borrower and information that enables the servicer to identify that borrower's mortgage loan account. For instance, a servicer would be required to provide the information regarding the documents the servicer requires to confirm a person's identity and ownership interest in the property in response to a written request for loss mitigation from a person other than a known borrower, because such a request suggests that the person may be a successor in interest, or in response to a written statement from a person other than the known borrower that the known borrower has died.

The Bureau is proposing this broad language because the Bureau is concerned that some successors in interest may not be aware that they need to confirm their identity and ownership interest in the property. In the alternative, the Bureau is also considering requiring servicers to respond only to a written communication that actually requests this information. The Bureau solicits comment on each approach. Additionally, the Bureau intends that proposed § 1024.36(i) would apply with respect to the servicer's receipt of written communication from any potential successor in interest unless and until the servicer becomes aware that the transfer to the successor in interest was not protected by the Garn-St Germain Act.[75] The Bureau is proposing that the requirement apply in this manner because the Bureau believes that even though a servicer may be unaware at the time of initial contact with a potential successor in interest whether the transfer was protected, in these situations the servicer should still communicate with the potential successor in interest about confirmation and should not wait until it has reason to believe that the transfer was protected.

The Bureau anticipates that many requests under proposed § 1024.36(i) will indicate the nature of the transfer of the ownership interest from the prior borrower to the successor in interest. In that case, the Bureau anticipates that servicers will respond with information that is specifically relevant to that successor in interest's specific situation. The Bureau anticipates that, if the potential successor in interest does not indicate the nature of the transfer of the ownership interest to the successor in interest and the servicer does not otherwise have that information, servicers will respond with more general information about how successors in interest may confirm their identity and ownership interest in the property in a range of situations.

The Bureau solicits comment on whether a servicer should only be required to respond under proposed § 1024.36(i) when a possible successor in interest expressly requests information regarding how to confirm the successor in interest's identity and ownership interest in the property.

The Bureau believes that it is appropriate for the requirements of § 1024.36(c) through (g) to apply to requests under proposed § 1024.36(i). In particular, the Bureau believes that requiring servicers to state in writing what documents the servicer requires to confirm a successor in interest's status would avoid confusion about what documents are required. The Bureau also believes that applying the timing requirements in § 1024.36(c) through (g) to requests under § 1024.36(i) would ensure that potential successors in interest promptly receive this information from servicers.

The Bureau also believes that it is appropriate to require that requests under § 1024.36(i) be sent to an exclusive address if a servicer has established one under § 1024.36(b), as is required for other requests for information under § 1024.36. It would be unnecessarily burdensome to require servicers to respond to requests for information from potential successors in interest that the servicer receives at other locations. Because servicers are not ordinarily required to respond to requests for information received at other locations, servicers would need to train staff and set up systems at these locations solely to comply with § 1024.36(i). Further, the Bureau believes that successors in interest would be able to send information requests to the designated address because, under § 1024.36(b), a servicer that designates an address for receipt of information requests must post the designated address on any Web site maintained by the servicer if the Web site lists any contact address for the servicer and because successors in interest may in some circumstances have access to written communications provided to the prior borrower that identify the address. In the alternative, however, the Bureau is considering requiring servicers to respond to requests for information received from potential successors in interest at any location. The Bureau solicits comment on these two approaches and whether there is another approach that would better facilitate communication between successors in interest and servicers without unnecessarily burdening servicers.

[75] Pursuant to the Bureau's Same-Sex Marriage Couple Policy, *see* note 31, *supra.,* a same-sex spouse would be evaluated for confirmation as a successor in interest under proposed § 1024.38(b)(1)(vi)(B) as would any other potential successor in interest. As with any potential successor in interest, confirmation of that person's status as a successor in interest would depend on whether, under State law, the person had acquired an ownership interest in a property securing a mortgage loan in a transfer protected by the Garn-St Germain Act.

The Bureau notes that, because § 1024.36(c) through (g) apply to requests under proposed § 1024.36(i), § 1024.36(f)(1)(i)'s rule on duplicative information applies to requests under proposed § 1024.36(i). A servicer is therefore not required to respond to a request under proposed § 1024.36(i) if the information requested is substantially the same as information previously requested for which the servicer has previously complied with its obligation to respond. Accordingly, a servicer would not repeatedly need to provide substantially similar information in response to every communication from successors in interest meeting the criteria described in proposed § 1024.36(i). The Bureau solicits comment on whether this limitation is sufficiently clear from the application of § 1024.36(c) through (g) to requests under proposed § 1024.36(i) or whether instead the Bureau should issue appropriate clarifying commentary.

The application of Regulation X's mortgage servicing rules' scope provision (§ 1024.30(b)) to successors in interest means that proposed § 1024.36(i), but not proposed § 1024.38(b)(1)(vi), would apply to small servicers, with respect to reverse mortgage transactions, and with respect to mortgage loans for which the servicer is a qualified lender. Accordingly, small servicers, for example, would be required to respond to requests for information under § 1024.36(i) by providing information about the documents the servicer requires to confirm the person's identity and ownership interest in the property, even though small servicers would not be required to maintain policies and procedures to decide promptly what documents the servicer reasonably requires to confirm the successor in interest's identity and ownership interest in the property. The Bureau believes that this approach appropriately balances the burden on small servicers with the need for successors in interest to receive this information. The Bureau solicits comment on alternatives to this approach.

Proposed commentary. Proposed comment 36(i)-1 provides that, for the purposes of requests under § 1024.36(i), a servicer is only required to provide information regarding the documents the servicer requires to confirm the person's identity and ownership interest in the property, not any other information that may also be requested by the person. The Bureau is proposing this comment to make clear that, while servicers would need to comply with the procedural requirements of § 1024.36(c) through (g) with respect to providing information regarding the documents the servicer requires to confirm the person's identity and ownership interest in the property, servicers are not required to provide any other information about the mortgage loan that the potential successor in interest may request before confirmation of the potential successor in interest's status. The Bureau is proposing this comment because the Bureau believes that it would be inappropriate to require servicers to provide information about the mortgage loan before confirming a successor in interest's identity and ownership interest in the property. As discussed in the section-by-section analysis of § 1024.30(d), based on the application of proposed § 1024.30(d) to current § 1024.36, successors in interest would be able to request information about the mortgage loan more generally once the servicer confirms the successor in interest's identity and ownership interest in the property.

The Bureau is not proposing, but is considering, additional requirements regarding requests for information about the mortgage loan received by servicers from a potential successor in interest before confirmation of that person's status. The Bureau is considering requiring servicers to provide the information requested upon confirmation of the successor in interest's status. A servicer would therefore be required to preserve any information requests received from a potential successor in interest, so that the servicer would be able to respond to the request upon confirmation of that person's status.[76] Alternatively, the Bureau is considering requiring servicers to respond to any such requests from a potential successor in interest by informing the potential successor in interest that the information request must be resubmitted upon confirmation of the person's status. The Bureau seeks comment on these approaches.

[76] As described in the section-by-section analysis of § 1024.41(b), *infra,* proposed comment 41(b)–1.ii similarly provides that if a servicer receives a loss mitigation application from a potential successor in interest before confirming that person's status, upon such confirmation, the servicer is required to review and evaluate that loss mitigation application in accordance with the procedures set forth in § 1024.41.

Section 1024.37 Force-Placed Insurance

37(c) Requirements Before Charging Borrower for Force-Placed Insurance

37(c)(2) Content of Notice

37(c)(2)(v)

Under § 1024.37(b), a servicer may not charge a borrower for force-placed insurance ''unless the servicer has a reasonable basis to believe that the borrower has failed to comply with the mortgage loan's contract requirement to maintain hazard insurance.'' Section 1024.37(c)(1) requires a servicer to provide to a borrower an initial notice and a reminder notice before assessing a fee or charge related to force-placed insurance. Sections 1024.37(c)(2) and 1024.37(d)(2) specify the notices' content. Section 1024.37(c)(2)(v) requires the initial and reminder force-placed insurance notices to include a statement that a borrower's hazard insurance has expired or is expiring, as applicable. This provision does not specify what a notice must state if a borrower has insufficient coverage, such as when the borrower's insurance provides coverage in a dollar amount less than that required by the mortgage loan contract. The Bureau is proposing to amend § 1024.37(c)(2)(v) to address situations in which a borrower has insufficient, rather than expiring or expired, hazard insurance. (As discussed in the section-by-section analysis of § 1024.37(d)(2)(ii), the Bureau is proposing a related amendment to § 1024.37(d)(2)(ii)).

Specifically, § 1024.37(c)(2)(v) currently requires the initial notice to include a statement that, among other things, ''the borrower's hazard insurance is expiring or has expired, as applicable, and that the servicer does not have evidence that the borrower has hazard insurance coverage past the expiration date. * * * '' Section 1024.37(d)(2)(i)(C) requires the reminder notice to include the same statement if, after providing the initial notice, a servicer does not receive any evidence of hazard insurance.

The Bureau is concerned that the statements required by § 1024.37(c)(2)(v) and (d)(2)(i)(C) may not afford servicers flexibility to address circumstances in which a borrower has insufficient coverage. When a borrower has hazard insurance that is insufficient under the mortgage loan contract's requirements, a statement that coverage has expired or is expiring may not be applicable. Similarly, the notices must state that the servicer does not have evidence that the borrower has hazard insurance past the coverage date, but § 1024.37 does not

permit the notice to instead state that the servicer lacks evidence that the borrower's hazard insurance provides sufficient coverage. Moreover, § 1024.37(c)(4) and (d)(4) prohibit a servicer from including in the force-placed insurance notices any information other than that required by § 1024.37(c)(2) or (d)(2). As a result, a servicer cannot explain on the notice itself that the borrower's hazard insurance is insufficient rather than expired or expiring. Although a servicer could include such an explanation on a separate piece of paper in the same transmittal as the force-placed insurance notice,[77] the Bureau believes that servicers and borrowers may benefit if servicers are able to state on the notice itself that the servicer lacks evidence of sufficient coverage.

Accordingly, the Bureau is proposing to amend § 1024.37(c)(2)(v) to provide that the force-placed insurance notices must include a statement that the borrower's hazard insurance is expiring, has expired, or provides insufficient coverage, as applicable, and that the servicer does not have evidence that the borrower has hazard insurance coverage past the expiration date or evidence that the borrower has hazard insurance that provides sufficient coverage, as applicable. The Bureau believes that this amendment may enable servicers to provide borrowers with notices that are more accurately tailored for their precise circumstances and potentially avoid confusing a borrower whose coverage is not expiring but is insufficient under the mortgage loan contract.

The Bureau solicits comments on whether other modifications to the required content of the force-placed insurance notices are necessary or appropriate to address circumstances in which a servicer force-places insurance for reasons other than expired or expiring coverage.

37(c)(4) Additional Information

Section 1024.37(c) currently requires servicers to provide a borrower a notice at least 45 days before assessing a fee or charge related to force-placed insurance. Section 1024.37(c)(4) prohibits a servicer from including in the notice any information other than that required by § 1024.37(c)(2), though a servicer may provide a borrower with additional information on separate pieces of paper in the same transmittal. The Bureau is proposing to amend § 1024.37(c)(4) to grant servicers the flexibility to include a borrower's mortgage loan account number in the notice required by § 1024.37(c)(1)(i). (As discussed in the section-by-section analyses of § 1024.37(d)(4) and (e)(4), the Bureau is also proposing to make parallel amendments to § 1024.37(d)(4) and (e)(4) with respect to the notices required by § 1024.37(c)(1)(ii) and (e)(1)(i).)

The Bureau has received questions inquiring whether servicers may include a borrower's mortgage loan account number in the notices required by § 1024.37, including the initial notice required by § 1024.37(c)(1)(i). The Bureau understands that providing a borrower's mortgage loan account number in the notice may facilitate identifying a borrower and locating the borrower's account information when the borrower contacts the servicer in response to the force-placed insurance notice. Under the current rule, however, servicers may not include any additional information on the required notices and therefore may include a borrower's account number only on a separate piece of paper in the same transmittal.

In the 2013 RESPA Servicing Final Rule, the Bureau explained that providing required information along with additional information in the same notice could obscure the most important information or lead to information overload. The Bureau stated that it would be better if servicers have the latitude to provide the additional information on separate pieces of paper in the same transmittal.[78]

Nonetheless, the Bureau believes it may be appropriate to give servicers the flexibility to include a borrower's mortgage loan account number in the notices required by § 1024.37. An account number is a customary disclosure on communications between a servicer and a borrower. The Bureau believes that an account number is unlikely to obscure other information on the notices or lead to information overload. The Bureau also believes that including the borrower's mortgage loan account number may help to facilitate communications between a borrower and a servicer regarding a notice provided under § 1024.37. The Bureau does not believe that servicers should be required to include a separate piece of paper in the transmittal solely to identify the mortgage loan account number. Therefore, the Bureau is proposing to amend § 1024.37(c)(4) to grant servicers the flexibility to include a borrower's mortgage loan account number in the notices required by § 1024.37.

The Bureau seeks comment on this proposal to grant servicers flexibility to include a borrower's mortgage loan account number in the notices required by § 1024.37 and whether there are other types of information that servicers should be allowed to include that would not obscure the required disclosures or create information overload.

37(d) Reminder Notice

37(d)(2) Content of the Reminder Notice

37(d)(2)(ii) Servicer Not Receiving Demonstration of Continuous Coverage

The Bureau is proposing to amend § 1024.37(d)(2)(ii), which specifies the information a force-placed insurance reminder notice must contain if a servicer does not have evidence that the borrower has had hazard insurance in place continuously. This provision does not address the scenario in which a servicer receives evidence that the borrower has had hazard insurance in place continuously, but the servicer lacks evidence that the continued hazard insurance is sufficient under the mortgage loan contract. As discussed in the section-by-section analysis of § 1024.37(c)(2)(v), while a servicer could include on a separate piece of paper a statement clarifying that it is purchasing insurance due to insufficient coverage, the Bureau believes it may be preferable for the notice itself to be clear in this regard.

In order to align the requirements of § 1024.37(d)(2)(ii) with the proposed changes to § 1024.37(c)(2)(v), the Bureau is proposing to amend § 1024.37(d)(2)(ii) to clarify that the provision applies when a servicer has received hazard insurance information after providing the initial notice but has not received evidence demonstrating that the borrower has had sufficient hazard insurance coverage in place continuously. The Bureau believes that this amendment would clarify § 1024.37(d)(2)(ii)'s applicability when a borrower has insufficient hazard insurance.

The Bureau solicits comment on whether other modifications to the required contents of the force-placed insurance notices are necessary or appropriate to address circumstances in which a servicer force-places insurance for reasons other than expired or expiring coverage.

37(d)(2)(ii)(B)

The proposal makes a technical correction to § 1024.37(d)(2)(ii)(B) to correct the statement that the notice must set forth the information required by § 1024.37(c)(2)(ii) through (iv), (x), (xi), and (d)(2)(i)(B) and (D). Section

[77] *See* 12 CFR 1024.37(c)(2) and (d)(2).

[78] 78 FR 10695, 10770 (Feb. 14, 2013).

1024.37(d)(2)(ii)(B) should state that the notice must also set forth information required by § 1024.37(c)(2)(ix).

37(d)(3) Format

Section 1024.37(d)(3) sets forth certain formatting requirements for the reminder notice required by § 1024.41(c)(1)(ii). The reminder notice contains some of the same information as the initial notice provided under § 1024.37(c)(1)(i). The proposal makes a technical correction to § 1024.37(d)(3) to state that the formatting instructions in § 1024.37(c)(3), which apply to information set forth in the initial notice, also apply to the information set forth in the reminder notice provided pursuant to § 1024.37(d). The purpose of this change is to clarify that, when the same information appears in both the initial notice and the reminder notice, that information must be formatted the same way in both notices.

37(d)(4) Additional Information

The Bureau is proposing two amendments with respect to § 1024.37(d)(4). First, the Bureau is proposing to amend § 1024.37(d)(4) to give servicers the flexibility to include a borrower's mortgage loan account number in the notice required by § 1024.37(c)(1)(ii). For the reasons discussed in the section-by-section analysis of § 1024.37(c)(4), the Bureau believes that giving servicers flexibility to include the account number may benefit servicers and borrowers without obscuring other information on the notice or leading to information overload.

The Bureau seeks comment on this proposal to grant servicers flexibility to include a borrower's mortgage loan account number in the notices required by § 1024.37 and whether there are other types of information that servicers should be allowed to include that would not obscure the required disclosures or create information overload.

Second, the proposal makes technical corrections to redesignate comment 37(d)(4)–1 as comment 37(d)(5)–1, and to correct an erroneous reference in that comment to § 1024.37(d)(4), which instead should be a reference to § 1024.37(d)(5).

37(e) Renewing or Replacing Force-Placed Insurance

37(e)(4) Additional Information

The Bureau is proposing two amendments with respect to § 1024.37(e)(4). First, the Bureau is proposing to amend § 1024.37(e)(4) to give servicers the flexibility to include a borrower's mortgage loan account number in the notice required by § 1024.37(e)(1)(i). For the reasons discussed in the section-by-section analysis of § 1024.37(c)(4), the Bureau believes that giving servicers flexibility to include the account number may benefit servicers and borrowers without obscuring other information on the notice or leading to information overload.

The Bureau seeks comment on this proposal to grant servicers flexibility to include a borrower's mortgage loan account number in the notices required by § 1024.37 and whether there are other types of information that servicers should be allowed to include that would not obscure the required disclosures or create information overload.

Second, the proposal makes a technical correction to remove the unnecessary words ''[a]s applicable'' from § 1024.37(e)(4).

Legal Authority

These proposed amendments and clarifications to § 1024.37 implement sections 6(k)(1)(A), 6(k)(2), 6(*l*), and 6(m) of RESPA.

Section 1024.38 General Servicing Policies, Procedures, and Requirements

38(b) Objectives

(38)(b)(1)(vi) Successors in Interest

Current § 1024.38(b)(1)(vi) provides that servicers shall maintain policies and procedures that are reasonably designed to achieve the objective of, upon notification of the death of a borrower, promptly identifying and facilitating communication with the successor in interest of the deceased borrower with respect to the property securing the deceased borrower's mortgage loan. The Bureau is proposing several modifications to this requirement. Like proposed § 1024.36(i) (*see* section-by-section analysis of § 1024.36(i)), proposed § 1024.38(b)(1)(vi) applies with respect to potential successors in interest before the servicer confirms the successor in interest's identity and ownership interest in the property. By contrast, the Mortgage Servicing Rules generally would not apply to successors in interest (*see* section-by-section analysis of § 1024.30(d)) until the servicer has confirmed the person's identify and ownership interest in the property securing the mortgage loan.

Consistent with the proposed definition of successor in interest (*see* section-by-section analysis of § 1024.31), proposed § 1024.38(b)(1)(vi) expands the current policies and procedures requirement regarding identifying and communicating with successors in interest beyond the situation of borrower death. Proposed § 1024.38(b)(1)(vi)(A) requires servicers to maintain policies and procedures that are reasonably designed to ensure that the servicer can identify and facilitate communication with any potential successors in interest upon notification either of the death of a borrower or of any transfer of the property securing a mortgage loan. The Bureau expects that a servicer may be notified of the existence of a potential successor in interest in a variety of ways, either directly (by the successor in interest identifying him or herself) or indirectly (such as by receipt of a loss mitigation application from someone other than the prior borrower). The Bureau also notes that, although the proposed rule applies only with respect to transfers to successors in interest who acquired an ownership interest in the property securing a mortgage loan in a transfer protected by the Garn-St Germain Act, proposed § 1024.38(b)(1)(vi)(A) applies with respect to the servicer's initial notification of any transfer of the property securing a mortgage loan unless and until the servicer becomes aware that the transfer to the successor in interest was not protected by the Garn-St Germain Act. The Bureau is proposing that the requirement apply in this manner because the Bureau believes that even though a servicer may be unaware at the time of initial contact with a potential successor in interest whether the transfer was protected, the servicer should still identify and facilitate communication with the potential successor in interest; the servicer should not wait until it has reason to believe that the transfer was protected.

Proposed § 1024.38(b)(1)(vi)(B) requires servicers to maintain policies and procedures that are reasonably designed to ensure that the servicer can, upon identification of a potential successor in interest—including through any request made by a potential successor in interest under § 1024.36(i) or any loss mitigation application received from a potential successor in interest—provide promptly to the potential successor in interest a description of the documents the servicer reasonably requires to confirm that person's identity and ownership interest in the property and how the person may submit a written request under § 1024.36(i) (including the appropriate address). The Bureau intends that this rule would require servicers to have policies and procedures in place so that the servicer can determine what documents are reasonable to require from successors in

interest in particular circumstances, so that servicers are able to provide a description of these documents promptly. (As explained in the section-by-section analysis of proposed § 1024.38(b)(1)(vi), proposed comment 38(b)(1)(vi)–1 further clarifies the requirement that the documents required by the servicer are reasonable in the particular circumstances of a specific successor in interest.) As explained in the section-by-section analysis of § 1024.36(i), the Bureau is proposing § 1024.38(b)(1)(vi)(B) in conjunction with proposed § 1024.36(i), which requires servicers to respond to information requests indicating that a person may be a successor in interest by providing information regarding the documents the servicer requires to confirm the person's identity and ownership interest in the property. Accordingly, proposed § 1024.38(b)(1)(vi)(B) requires servicers to have policies and procedures in place to determine what documents to provide to potential successors in interest who contact them. Proposed § 1024.36(i) also provides potential successors in interest a mechanism to prompt servicers to provide this information.

Additionally, proposed § 1024.38(b)(1)(vi)(C) requires servicers to maintain policies and procedures that are reasonably designed to ensure that the servicer can, upon the receipt of such documents (*i.e.,* those the servicer reasonably requires to confirm that person's identity and ownership interest in the property), promptly notify the person, as applicable, that the servicer has confirmed the person's status, has determined that additional documents are required (and what those documents are), or has determined that the person is not a successor in interest. The proposed rule would require servicers to have policies and procedures in place to confirm promptly potential successors in interest's status, so that a servicer can promptly notify the person whether the servicer has confirmed the person's status or if additional documents are required. The Bureau intends to provide servicers with flexibility under this proposed rule regarding the form of notification to a potential successor in interest. The Bureau does not believe that it is appropriate to require servicers to notify the potential successor in interest in writing. Adding an additional written notice requirement could be unnecessarily burdensome on servicers and may delay servicer responses to successors in interest. The Bureau solicits comment, however, on whether servicers should instead be required to notify a potential successor in interest in writing whether the servicer has confirmed the person's status.

As explained in part V.A., the Bureau is proposing these changes to § 1024.38(b)(1)(vi) because the Bureau believes, based on reports from consumers, consumer advocacy groups, and other stakeholders, that successors in interest often have difficulty demonstrating their identity and ownership interest in the property to servicers' satisfaction. The Bureau believes, therefore, that changes to the Bureau's rules are appropriate to clarify servicers' obligations and ensure that the requirements are widely understood and enforceable.

The Bureau also solicits comment on whether other changes to Regulation X's mortgage servicing rules would protect successors in interest from unnecessary foreclosure before a servicer has confirmed the successor in interest's status, and, if so, what these changes would be.

Proposed commentary. Proposed comment 38(b)(1)(vi)–1 clarifies that the documents a servicer requires to confirm a potential successor in interest's identity and ownership interest in the property must be reasonable in light of the laws of the relevant jurisdiction, the successor in interest's specific situation, and the documents already in the servicer's possession. The proposed comment provides that the required documents may, where appropriate, include, for example, a death certificate, an executed will, or a court order.

The Bureau is proposing comment 38(b)(1)(vi)–1 because, as described in part V.A, the Bureau believes, based on repeated reports from consumers, consumer advocacy groups, and other stakeholders, that servicers may request documentation to prove the successor in interest's identity and ownership interest in the property that is unreasonable in the successor in interest's particular situation. For instance, the Bureau has heard reports that servicers may request probate documents for transfers upon death in which probate is not required, such as when spouses own a property in joint tenancy and the ownership interest in the property transfers as a matter of law upon one spouse's death.

Proposed comment 38(b)(1)(vi)–2 provides examples illustrating documents that a servicer may require to confirm a potential successor in interest's identity and ownership interest in the property and that generally would be reasonable, subject to the relevant law governing each situation, in four common situations involving potential successors in interests. These situations are:

(1) *Tenancy by the entirety or joint tenancy.* A potential successor in interest indicates (or the servicer knows from its records or other sources) that the prior borrower and the potential successor in interest owned the property as tenants by the entirety or joint tenants and that the prior borrower has died. To demonstrate that the potential successor in interest has an ownership interest in the property upon the death of the prior borrower, applicable law does not require a probate proceeding, but requires only that there be a prior recorded deed listing both the potential successor in interest and the prior borrower as tenants by the entirety (*e.g.,* married grantees) or joint tenants. The proposed comment provides that it would be reasonable for the servicer to require the potential successor in interest to provide documentation of the recorded instrument, if the servicer does not already have it, and the deceased borrower's death certificate. The proposed comment also provides that, because a probate proceeding is not required under applicable law, requiring documentation of a probate proceeding would be unreasonable.

(2) *Affidavits of heirship.* A potential successor in interest indicates that he or she acquired an ownership interest in the property upon the death of the prior borrower through intestate succession. To demonstrate that the potential successor in interest has an ownership interest in the property upon the death of the prior borrower, applicable law does not require a probate proceeding, but requires only an appropriate affidavit of heirship documenting the chain of title. The proposed comment provides that it would be reasonable for the servicer to require the potential successor in interest to provide the affidavit of heirship and the death certificate of the prior borrower. The proposed comment also provides that, because a probate proceeding is not required under applicable law, requiring documentation of a probate proceeding would be unreasonable.

(3) *Divorce or legal separation.* A potential successor in interest indicates that he or she acquired an ownership interest in the property from a spouse who is a borrower as a result of a property agreement incident to a divorce proceeding. Under applicable law, transfer from the borrower spouse is demonstrated by a final divorce decree and accompanying separation agreement executed by both spouses. Applicable law does not require a deed conveying the interest in the property. The proposed comment provides that it

would be reasonable for the servicer to require the potential successor in interest to provide documentation of the final divorce decree and an executed separation agreement. The proposed comment also provides that because applicable law does not require a deed, requiring documentation of a deed would be unreasonable.

(4) *Living spouses or parents.* A potential successor in interest indicates that he or she acquired an ownership interest in the property from a living spouse or parent who is a borrower by quitclaim deed or act of donation. The proposed comment provides that it would be reasonable for the servicer to require the potential successor in interest to provide the quitclaim deed or act of donation. The proposed comment also provides that it would be unreasonable to require additional documents to establish ownership.

The Bureau is proposing comment 38(b)(1)(vi)–2 because the Bureau believes that it would be helpful to provide more specific guidance about what are reasonable documents to require from a potential successor in interest to confirm the person's status as a successor in interest in very common and straightforward situations. The Bureau recognizes that this proposed comment does not cover all possible situations involving successors in interest and that additional documents may be required in certain less straightforward situations. In particular, the Bureau notes that this proposed comment does not describe situations involving the death of a borrower with a will or trust. The Bureau has not included commentary regarding such situations because the Bureau believes that such situations may not always be as straightforward as the examples provided. For instance, situations involving the death of a borrower with a will may require probate documentation. Additionally, the Bureau believes that servicers may be more familiar with situations where the borrower has a will or trust and that therefore servicers may need less guidance from the Bureau in determining what documents are appropriate in these circumstances.

The Bureau solicits comment on whether proposed comment 38(b)(1)(vi)–2 accurately describes examples of reasonably required documents to confirm a successor in interest's identity and ownership interest in the property. The Bureau also solicits comment on whether it would be reasonable for servicers to require additional documents (such as affidavits or notarized copies) from a potential successor in interest to confirm the validity of documents submitted by the potential successor in interest. The Bureau also solicits comment on whether the Bureau should include other common examples of reasonably required documents to confirm a successor in interest's identity and ownership interest in the property and what those examples should be.

Proposed comment 38(b)(1)(vi)–3 clarifies proposed § 1024.38(b)(1)(vi)(C)'s requirement that servicers maintain policies and procedures reasonably designed to ensure that the servicer can, upon the receipt of the documents that the servicer reasonably requires, promptly notify the person, as applicable, that the servicer has confirmed the person's status, has determined that additional documents are required (and what those documents are), or has determined that the person is not a successor in interest. The proposed comment provides that, upon the receipt of the documents, the servicer's confirmation must be sufficiently prompt so as not to interfere with the successor in interest's ability to apply for loss mitigation options according to the procedures provided in § 1024.41. The proposed comment also provides that, in general, a servicer's policies and procedures must be reasonably designed to ensure that confirmation of a successor in interest's status occurs at least 30 days before the next applicable milestone provided in proposed comment 41(b)(2)(ii)–2.[79]

The Bureau is proposing comment 38(b)(1)(vi)–3 because the Bureau understands that successors in interest may have difficulty pursuing loss mitigation options to avoid foreclosure when the servicer does not promptly confirm the successor in interest's identity and ownership interest in the property. The Bureau has heard reports that miscommunication and delay in the process of confirming successors in interest's identity and ownership interest in the property sometimes prevent successors in interest from successfully applying for loss mitigation. In general, as each milestone provided in proposed comment 41(b)(2)(ii)–2 passes, a borrower is likely to enjoy fewer protections under § 1024.41 when the application becomes complete.

Proposed comment 38(b)(1)(vi)–3 would help to ensure that servicer delay in confirmation of successor in interest status would not unnecessarily hinder successors in interest's ability to apply for loss mitigation options. The Bureau believes that servicers generally are aware of the progress of each loan in the foreclosure process. Accordingly, the Bureau believes that it would not be particularly burdensome for servicers to design policies and procedures for confirming potential successors in interest's status that take into account the foreclosure status of a particular loan, so that the servicer would be able to confirm the successor in interest's status sufficiently promptly for the successor in interest to apply for loss mitigation under § 1024.41. The proposed comment provides that, in general, confirmation of a successor in interest's status at least 30 days before the next applicable milestone would provide the successor in interest sufficient opportunity to pursue loss mitigation.

As with other policies and procedures required by § 1024.38, the policies and procedures required under proposed § 1024.38 (b)(1)(vi) would have to be ''reasonably designed'' to achieve the stated objective. The Bureau recognizes that, for various reasons (*e.g.,* the timing of the servicer's receipt of documents from the potential successor, the status of pending foreclosure proceedings, etc.), it may not be possible in every case to confirm a successor in interest's status sufficiently promptly so as not to interfere with the successor in interest's ability to apply for loss mitigation options according to the procedures provided in § 1024.41 or to confirm a successor in interest's status 30 days before the next applicable milestone provided in proposed comment 41(b)(2)(ii)–2. However, the Bureau believes that servicers should be able to adopt policies and procedures to ensure that they generally confirm the status of successors in interest sufficiently promptly for successors in interest to apply for loss mitigation options according to the procedures provided in § 1024.41.

The Bureau solicits comment generally on proposed § 1024.38(b)(1)(vi). Further, proposed § 1024.38(b)(1)(vi) uses the word ''promptly'' in several instances. The Bureau is considering adding commentary clarifying what the Bureau considers ''promptly'' to mean in the various instances. The Bureau solicits comment on whether it should add this commentary and if so, what should be considered ''promptly'' for the purposes of § 1024.38(b)(1)(vi).

[79] Proposed comment 41(b)(2)(ii)–2 provides the following milestones: ''i. The date by which any document or information submitted by a borrower will be considered stale or invalid pursuant to any requirements applicable to any loss mitigation option available to the borrower; ii. The date that is the 120th day of the borrower's delinquency; iii. The date that is 90 days before a foreclosure sale; iv. The date that is 38 days before a foreclosure sale.''

38(b)(2) Properly Evaluating Loss Mitigation Applications

38(b)(2)(vi)

The Bureau is proposing to add § 1024.38(b)(2)(vi), which requires a servicer to maintain policies and procedures reasonably designed to ensure that the servicer can promptly identify and obtain documents or information not in the borrower's control that the servicer requires to determine which loss mitigation options, if any, to offer the borrower in accordance with the requirements of proposed § 1024.41(c)(4), discussed below.

Under current § 1024.41(c)(1), if a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, the servicer shall, within 30 days of receipt, evaluate the borrower for all loss mitigation options available to the borrower and provide the notice required under § 1024.41(c)(1)(ii). Section 1024.41(b)(1) defines a complete loss mitigation application to include information that the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower.[80] Thus, a loss mitigation application becomes complete notwithstanding that a servicer might require additional information that is not in the control of the borrower.[81]

Through outreach efforts, the Bureau has learned that servicers cannot always obtain necessary third-party information in time to evaluate a borrower's complete loss mitigation application within 30 days of receipt as required by § 1024.41(c)(1). Servicers and Federal agencies have informed the Bureau that this can occur because a servicer delays requesting the information or because a third party from whom the servicer requested the information delays providing it. Currently, § 1024.41 does not specifically address this circumstance—when a servicer is unable to obtain information not in the borrower's control within 30 days of receiving a complete application and thus cannot complete the evaluation within that timeframe as required by § 1024.41(c)(1). Proposed § 1024.41(c)(4), discussed in more detail in the section-by-section analysis of § 1024.41(c)(4), addresses these issues by adding requirements with respect to the servicer's obligation to pursue necessary information not in the borrower's control and the servicer's responsibilities if such information is not obtained within 30 days after a complete application is received.

Servicers often need to be able to access information from parties other than the borrower at different points during a loss mitigation application process. The Bureau believes that the policies and procedures requirements in proposed § 1024.38(b)(2)(vi) would facilitate compliance with the requirements for gathering information not in the borrower's control under proposed § 1024.41(c)(4). Maintaining such policies and procedures would ensure that servicers efficiently identify and obtain information not in the borrower's control in accordance with § 1024.41(c)(4). Efficiency in obtaining information not in the borrower's control provides enhanced consumer protection benefits by shortening the loss mitigation evaluation process and facilitating compliance with § 1024.41(c)(1)'s requirement to evaluate complete loss mitigation applications within 30 days.

The Bureau also believes that proposed § 1024.38(b)(2)(vi) would contribute to the goals of § 1024.38(b)(2) more generally. Section 1024.38(b)(2) requires servicers to maintain policies and procedures regarding various aspects of evaluation of loss mitigation applications, including (among others) document collection and proper evaluation. As the Bureau explained in the 2012 RESPA Servicing Proposal, these and other requirements of § 1024.38(b)(2) facilitate servicer compliance with § 1024.41 and lead to loss mitigation processes that better protect consumers.[82] Similarly, the Bureau believes that requiring servicers to maintain policies and procedures regarding the identification and collection of non-borrower information under proposed § 1024.38(b)(2)(vi) would protect borrowers by facilitating compliance with proposed § 1024.41(c)(4) and the evaluation timelines provided under § 1024.41(c)(1).

Legal Authority

The Bureau is proposing these amendments to § 1024.38 pursuant to its authority under section 19(a) of RESPA. As explained above, the Bureau believes that the servicing policies, procedures, and requirements set forth in these proposed amendments are necessary to achieve the purposes of RESPA, including to avoid unwarranted or unnecessary costs and fees, to ensure that servicers are responsive to consumer requests and complaints, to ensure that servicers provide accurate and relevant information about the mortgage loan accounts that they service, and to facilitate the review of borrowers for foreclosure avoidance options. The Bureau believes that, without sound policies and procedures and without achieving certain standard requirements, servicers will not be able to achieve those purposes. The Bureau is also proposing these amendments to § 1024.38 pursuant to its authority under section 1022(b) of the Dodd-Frank Act to prescribe regulations necessary or appropriate to carry out the purposes and objectives of Federal consumer financial laws. Specifically, the Bureau believes that these proposed amendments to § 1024.38 are necessary and appropriate to carry out the purpose under section 1021(a) of the Dodd-Frank Act of ensuring that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation. The Bureau additionally is relying on its authority under section 1032(a) of the Dodd-Frank Act, which authorizes the Bureau to prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.

Section 1024.39 Early Intervention Requirements for Certain Borrowers

39(a) Live Contact

The Bureau is proposing several clarifications, revisions, and amendments to § 1024.39(a) and its commentary. The proposed changes are intended to clarify that a servicer's early intervention live contact obligations recur in each billing cycle while a borrower is delinquent and to provide additional examples illustrating how the live contact requirements apply in certain circumstances, such as when a borrower is unresponsive or is in the process of applying for loss mitigation pursuant to § 1024.41.

Repeated Attempts To Establish Live Contact

Section 1024.39(a) currently requires a servicer to establish or make good faith efforts to establish live contact with a delinquent borrower not later than the 36th day of the borrower's delinquency. Current comment 39(a)–1 states that a borrower's delinquency begins ''on the day a payment sufficient to cover principal, interest, and, if applicable, escrow *for a given billing*

[80] 12 CFR 1024.41(b)(1).

[81] *See* comment 41(b)(1)–5.

[82] 77 FR 57199, 57248 (Sept. 17, 2012).

cycle is due and unpaid . . . .'' [83]). The Bureau has always understood these provisions to require servicers to make continual attempts to contact a borrower who remains delinquent for more than one billing cycle. The Bureau is proposing to revise § 1024.39(a) to codify this interpretation. The proposed revision would expressly require servicers to establish or make good faith efforts to establish live contact with a delinquent borrower no later than the 36th day after each payment due date for the duration of the borrower's delinquency.

As it stated in the 2012 RESPA Servicing Proposal, the Bureau intended the live contact provisions to create an ongoing obligation for a servicer to attempt to communicate with a delinquent borrower. In its discussion of the decision to limit a servicer's obligation to provide written notice under § 1024.39(b)(1) to once every 180 days, the Bureau noted that it was not including a similar limitation in § 1024.39(a) because it expected a servicer to contact a borrower during each period of delinquency.[84] In the 2013 RESPA Final Servicing Rule, the Bureau confirmed that it expected servicers to attempt to make live contact on a recurring basis and stated that, ''[w]ith respect to the live contact requirement . . . a servicer must establish or make good faith effort to establish live contact, *even with borrowers who are regularly delinquent,* by the 36th day of a borrower's delinquency.''[85] In the October 2013 Servicing Bulletin, the Bureau again clarified that servicers have an obligation to make good faith efforts to contact a borrower within 36 days of when a borrower first becomes delinquent, ''and for each of any subsequent billing periods for which the borrower's obligation is due and unpaid.''

The Bureau continues to believe that borrowers who remain delinquent for more than one billing cycle benefit from receiving repeated live contact and that relieving a servicer of its obligations to establish live contact after the initial delinquent billing cycle would undermine the intent of § 1024.39(a). Accordingly, the Bureau is proposing to clarify § 1024.39(a) to codify its understanding and require servicers expressly to establish or make good faith efforts to establish live contact with a delinquent borrower no later than 36 days after each payment due date for the duration of the borrower's delinquency.

To provide additional guidance, the Bureau is proposing to revise and re-order comment 39(a)–1 and its subsections. First, the Bureau proposes to remove the language in current comment 39(a)–1.i. As discussed in the section-by-section analysis of § 1024.31, the Bureau is proposing a new definition of delinquency applicable to all of subpart C. If adopted as proposed, the new definition generally would mirror the language in current comment 39(a)–1.i, making that language superfluous. Second, the Bureau is proposing to revise existing comments 39(a)–1 and 39(a)–1.i and add comments 39(a)–1.i.A and 39(a)–1.i.B to illustrate how a servicer may comply with the recurring live contact obligation when a borrower is delinquent for one or more billing cycles. Proposed comment 39(a)–1.i.B gives the example of a borrower with a payment due date on the first of the month who misses three consecutive payments, on January 1, February 1, and March 1. The proposed comment provides that a servicer can meet the requirements of § 1024.39(a) by, for example, attempting to make live contact with the borrower on February 5, and again on March 25. Because a servicer has 36 days from the date a borrower first becomes delinquent to establish or make good faith efforts to establish live contact with the borrower, the proposed comment explains that an attempt to establish live contact with the borrower on February 5 meets the requirements of § 1024.39(a) for both January and February.

The Bureau is also proposing to revise comment 39(a)–2 to codify guidance from the October 2013 Servicing Bulletin, which clarified that servicers are permitted to combine their live contact attempts with their attempts to contact borrowers for other purposes, including, for example, by providing a borrower with information about available loss mitigation options when contacting the borrower for purposes of collection.[86]

Finally, the Bureau is proposing to add comment 39(a)–3 to clarify that, while the Bureau expects servicers to continue to attempt to make live contact with borrowers who are regularly delinquent, a borrower's failure to respond to such attempts, as well as the length of the borrower's delinquency, are relevant circumstances to consider when evaluating a servicer's good faith. To this end, the Bureau is proposing to add an example it first provided in the October 2013 Servicing Bulletin. The example would provide that, in the case of a borrower with six or more consecutive delinquencies, good faith efforts to establish live contact might include adding a sentence in the borrower's periodic statement or another communication encouraging the borrower to contact the servicer. The Bureau is proposing to re-designate current comments 39(a)–3 and 39(a)–4 as, respectively, comments 39(a)–4 and 39(a)–5 to accommodate the addition of proposed comment 39(a)–3.

Compliance With § 1024.41

The Bureau is also proposing to add comment 39(a)–6 to illustrate how a servicer can meet its early intervention live contact requirements when a delinquent borrower is engaged in various stages of the loss mitigation procedures set forth in § 1024.41. Proposed comment 39(a)–6 codifies guidance the Bureau provided in its October 2013 Servicing Bulletin. In the bulletin, the Bureau reiterated that the live contact requirements are designed to give servicers significant flexibility to tailor their procedures to particular circumstances. As explained in comment 39(a)–2, good faith efforts to establish live contact consist of ''reasonable steps under the circumstances to reach a borrower . . . '' The Bureau went on to provide several examples of reasonable steps, including the example of a servicer that has established and is maintaining live contact with a borrower ''with regard to the borrower's completion of a loss mitigation application and the servicer's evaluation of that borrower for loss mitigation options.''[87]

The Bureau is now proposing to codify its guidance from the October 2013 Servicing Bulletin. As the Bureau stated in the 2013 RESPA Servicing Final Rule, the live contact requirements are intended, in part, to ensure that borrowers receive timely information about loss mitigation options at an early stage of delinquency.[88] For borrowers who have already applied or are in the process of applying for loss mitigation, however, repeated or parallel attempts by the servicer to establish live contact pursuant to the requirements of § 1024.39(a) may be confusing or harassing. Therefore, the Bureau is proposing to add commentary codifying the bulletin's guidance and clarifying generally that a servicer working with a borrower pursuant to the procedures of § 1024.41 complies with the requirements of § 1024.39(a).

[83] Comment 39(a)–1 (emphasis added).

[84] 77 FR 57199, 57256 (Sept. 17, 2012).

[85] 78 FR 10696, 10795 (Feb. 14, 2013) (emphasis added).

[86] October 2013 Servicing Bulletin at 5.

[87] October 2013 Servicing Bulletin at 5.

[88] *See, e.g.,* 78 FR 10695, 10793 (Feb. 14, 2013).

Specifically, proposed comment 39(a)-6 clarifies that a servicer that has established and is maintaining ongoing contact with regard to a borrower's completion of a loss mitigation application, or in connection with the servicer's evaluation of the borrower's complete loss mitigation application, complies with the requirements of § 1024.39(a). In addition, the proposed comment clarifies that a servicer that has evaluated and denied a borrower for all available loss mitigation options has complied with the requirements of § 1024.39(a). The Bureau believes that, once a servicer has complied with the requirements of § 1024.41 with respect to a specific borrower, and has determined that the borrower does not qualify for any available loss mitigation options, continued live contact between a borrower and a servicer no longer serves the purpose of § 1024.39(a). Indeed, at that point, continued attempts by the servicer to establish live contact may frustrate or even harass a borrower who was recently denied for loss mitigation. Accordingly, the Bureau is proposing to clarify that a servicer complies with § 1024.39(a) if the servicer has sent a notice to a borrower (in compliance with § 1024.41(c)(1)(ii)) notifying the borrower that the borrower is not eligible for any loss mitigation options.

The Bureau believes, however, that a borrower who cures a prior delinquency but subsequently becomes delinquent again would benefit from the servicer resuming compliance with the live contact requirement. Therefore, proposed comment 39(a)–6 also clarifies that a servicer is again subject to the requirements of § 1024.39(a) with respect to a borrower who becomes delinquent after curing a prior delinquency. The Bureau is proposing to add a reference to proposed comment 39(a)–6 in proposed comment 39(a)–3 to indicate that the examples set forth in comment 39(a)–6 represent examples of ''good faith efforts.''

39(b) Written Notice

39(b)(1)

The Bureau is proposing certain revisions to § 1024.39(b)(1) and its commentary to clarify the frequency with which a servicer must provide the written early intervention notice and to ensure consistency with the proposed revisions to the live contact requirements in § 1024.39(a). Under the proposed revision, a servicer must send a written notice to a delinquent borrower no later than the 45th day of the borrower's delinquency, but a servicer does not have to send such a notice more than once in any 180 day period. If the borrower remains delinquent or becomes 45 days delinquent again after the 180-day period expires, the proposed revision requires the servicer to provide the written notice again.

Current comment 39(b)(1)–1 references the definition of delinquency in current comment 39(a)–1.i. As explained in the section-by-section analysis of § 1024.39(a), the definition of delinquency included in current comment 39(a)–1.i and referenced in comment 39(b)(1)–1 states that a borrower's delinquency begins on the day a payment sufficient to cover principal, interest, and, if applicable, escrow *for a given billing cycle* is due and unpaid. As with § 1024.39(a), the inclusion of the phrase ''for a given billing cycle'' in the definition of delinquency for purposes of § 1024.39(b)(1) creates a recurring obligation on the part of servicers to provide a delinquent borrower with a written notice. In contrast with the recurring obligation to make live contact under § 1024.39(a), however, servicers only have to comply with the requirement to send a written notice once in a 180-day period.[89] This is because, as the Bureau explained in the 2012 RESPA Servicing Proposal, the Bureau did not believe ''that borrowers who are consistently delinquent would benefit from receiving the same written notice every month.''[90]

As discussed in the section-by-section analysis of § 1024.31, the Bureau's proposed new definition of delinquency in § 1024.31 does not use the phrase ''for a given billing cycle.'' The Bureau wishes to clarify that it continues to expect servicers to send a written notice more than once, notwithstanding the revised language in the proposed definition of delinquency. Accordingly, the Bureau is proposing revisions to § 1024.39(b)(1) and comment 39(b)(1)–2 to preserve the recurring nature of the written notice requirement, as well as the limitation that a servicer has to send a written notice only once during any 180-day period. Under the proposed revision, a servicer must send a written notice to a delinquent borrower no later than the 45th day of the borrower's delinquency, but no more than once in any 180-day period. If the borrower either remains delinquent or becomes delinquent again at some point after the 180-day period expires, the proposed revision would require the servicer to provide the borrower with another written notice 45 days from the date of her most recent missed payment.

In addition, the Bureau is proposing to clarify through a revision to comment 39(b)(1)–2 that a servicer is again required to send written notice to a borrower who remains delinquent more than 180 days after the servicer sent the first notice. Current comment 39(b)(1)–2 provides an example of a borrower who fails to make a payment due on March 1. The comment states that the servicer is required to send a written notice within 45 days thereafter—*i.e.,* by April 15; it further provides that, if the borrower fails to make the April 1 payment, the servicer does not need to send a second written notice because it already did so within the previous 180 days. The Bureau is proposing to add a further explanation that, if the borrower misses a payment on October 1, the servicer is again obligated to provide a written notice within 45 days after October 1, since the 45th day (November 15) falls more than 180 days from the date the servicer provided the first written notice. This proposal also makes a minor technical change to comment 39(b)(1)–2 to correct an erroneous reference to § 1024.39(a), which should instead be a reference to § 1024.39(b).

Finally, the Bureau is proposing to add comment 39(b)(1)–6 to clarify the obligation of a transferee servicer to provide the written notice required by § 1024.39(b). Proposed comment 39(b)(1)–6 states that a transferee servicer is not required to provide a second written notice to a borrower who already received a written notice from the transferor servicer on or before the borrower's 45th day of delinquency. The comment further clarifies, however, that a servicer is required to comply with § 1024.39(b) regardless of whether the transferor servicer sent the borrower a written notice in the preceding 180-day period. In other words, if the transferor servicer provided a first written notice after an initial missed payment and, following the transfer, the borrower remains or becomes 45 days delinquent again, the transferee servicer would have to provide a written notice again, regardless of whether or not 180 days had passed since the date the transferor servicer provided the first written notice to the borrower.

The Bureau is proposing this clarification because it believes that the rationale that justified applying the 180-day limitation to mortgage loans serviced by a single servicer may not apply in the case of a loan whose servicing rights are transferred to another servicer. The Bureau explained in the 2013 RESPA Servicing Final Rule

[89] 12 CFR 1024.39(b)(1).

[90] 77 FR 57199, 57257 (Sept. 17, 2012).

that it did not believe that borrowers who are repeatedly delinquent would benefit from receiving essentially the same written notice month after month.[91] Accordingly, it adopted a once-every-180-days limitation on the general requirement to provide a written notice under § 1024.39(b). In the case of a transferred loan, however, the Bureau believes that a transferee servicer may provide additional and different information to a delinquent borrower under § 1024.39(b)(2) and that a borrower would benefit from receiving this information sooner rather than later following a transfer. Accordingly, the Bureau believes it is appropriate to clarify that the 180-day limitation in § 1024.39(b)(1) does not apply where the prior notice triggering the 180-day waiting period was provided by the transferor servicer prior to transfer.

Successors in interest. As described in the section-by-section analysis of § 1024.30(d), proposed § 1024.30(d) provides that a confirmed successor in interest must be considered a borrower for the purposes of Regulation X's mortgage ervicing rules. Accordingly, once a servicer confirms a successor in interest's identity and ownership interest in the property, a servicer would be required to make reasonable efforts to establish live contact and to make written contact with the successor in interest regarding a delinquent mortgage loan under § 1024.39's early intervention requirements.

Proposed comment 39(b)(1)–5 clarifies that, where a servicer has already provided a written early intervention notice to a prior borrower under § 1024.39(b) before confirming a successor in interest's status, the servicer is not required also to provide that notice to the confirmed successor in interest, but the servicer must provide the confirmed successor in interest with any additional written early intervention notices required after confirming the successor in interest's status. The Bureau believes that it would be unnecessary and difficult for servicers to provide additional copies of the written early intervention notices that servicers have already provided to the prior borrower. The Bureau also believes that, in many cases, successors in interest may have received the original notice mailed by the servicer to the prior borrower. Further, as described in the section-by-section analysis of § 1026.2(a)(11), servicers would be required to provide confirmed successors in interest with periodic statements under § 1026.41 of Regulation Z, so confirmed successors in interest will generally be kept apprised of the status of the mortgage loan.

39(b)(2) Content of the Written Notice

The Bureau is proposing to clarify when a servicer must include the disclosures under § 1024.39(b)(2)(iii) and (iv) in the written early intervention notice. Section 1024.39(b)(2)(iii) and (iv) currently state that, ''if applicable,'' the written notice must include a statement providing a brief description of examples of loss mitigation options that may be available and either application instructions or a statement informing the borrower how to obtain more information about loss mitigation options from the servicer. The Bureau is proposing to add a comment to clarify when such disclosures are ''applicable'' and when a servicer is therefore required to include them in the written early intervention notice. Specifically, proposed comment 39(b)(2)–4 provides that, if loss mitigation options are available, a servicer must include in the written notice the disclosures set forth in § 1024.39(b)(2)(iii) and (iv). The proposed comment further provides that loss mitigation options are available if the owner or assignee of a borrower's mortgage loan offers an alternative to foreclosure that is made available through the servicer. Additionally, the proposed comment provides that the availability of loss mitigation options does not depend upon a borrower's eligibility for those options, but simply depends upon whether the owner or assignee of a borrower's mortgage loan generally offers loss mitigation options through the servicer. Proposed comment 39(b)(2)-4 is generally intended to assist servicers in determining when they are required to include the § 1024.39(b)(2)(iii) and (iv) disclosures in the written early intervention notice, and whether they are exempt from providing the written notice under proposed § 1024.39(d)(1)(ii) or (d)(2)(ii) as discussed in the section-by-section analyses of § 1024.39(d)(1) and (d)(2).

Legal Authority

The Bureau is proposing the amendments to § 1024.39(a) and (b) pursuant to its authorities under sections 6(j)(3), 6(k)(1)(E), and 19(a) of RESPA. As explained above, the Bureau finds, consistent with section 6(k)(1)(E), that the proposed amendments to § 1024.39(a) and (b) are appropriate to achieve the consumer protection purposes of RESPA, including to help borrowers avoid unwarranted or unnecessary costs and fees and to facilitate review of borrowers for foreclosure avoidance options. For the same reasons, the proposed amendments to § 1024.39(a) and (b) are authorized under section 6(j)(3) of RESPA as necessary to carry out section 6 of RESPA, and under section 19(a) as necessary to achieve the purposes of RESPA, including borrowers' avoidance of unwarranted or unnecessary costs and fees and the facilitation of review of borrowers for foreclosure avoidance options.

The Bureau is also proposing the amendments to § 1024.39(a) and (b) pursuant to its authority under section 1022(b) of the Dodd-Frank Act to prescribe regulations necessary or appropriate to carry out the purposes and objectives of Federal consumer financial laws, including the purposes and objectives of Title X of the Dodd-Frank Act. Specifically, the Bureau believes that these amendments are necessary and appropriate to carry out the purpose under section 1021(a) of the Dodd-Frank Act of ensuring that markets for consumer financial products and services are fair, transparent, and competitive, and the objectives under section 1021(b) of the Dodd-Frank Act of ensuring that consumers are provided with timely and understandable information to make responsible decisions about financial transactions, and markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation. The Bureau additionally relies on its authority under section 1032(a) of the Dodd-Frank Act, which authorizes the Bureau to prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.

39(d) Exemptions

39(d)(1) Borrowers in Bankruptcy

The Bureau is proposing to revise § 1024.39(d)(1) to narrow the scope of the bankruptcy exemption from § 1024.39(a) and (b)'s early intervention requirements. Section 1024.39(d)(1) currently exempts a servicer from the early intervention requirements with respect to a mortgage loan if at least one of the borrowers is a debtor in bankruptcy. The proposed revisions preserve the current exemption from the live contact requirements of § 1024.39(a) as it relates to a borrower in bankruptcy, but they provide that the exemption would no longer apply to a borrower

[91] *See* 78 FR 10695, 10800 (Feb. 14, 2013).

who is jointly liable on the mortgage loan with someone who is a debtor in a Chapter 7 or Chapter 11 bankruptcy case.[92] The proposal partially lifts the exemption from the written notice requirements of § 1024.39(b) and requires a servicer to provide the written notice unless no loss mitigation options are available, the borrower's confirmed plan of reorganization provides for the surrendering of the property or avoidance of the lien securing the mortgage loan, the borrower files a Statement of Intention in the bankruptcy case identifying an intent to surrender the mortgage loan, or a court enters an order avoiding the lien securing the mortgage loan or lifting the automatic stay with respect to the property securing the mortgage loan. That is, if loss mitigation options are available, the proposal requires that a servicer, with certain exceptions, provide the written early intervention notice required by § 1024.39(b) to borrowers in bankruptcy.

The objectives of the early intervention requirements under § 1024.39 include ensuring that delinquent borrowers have an opportunity to pursue loss mitigation options at the early stages of delinquency, encouraging communication between servicers and delinquent borrowers, and encouraging delinquent borrowers to work with their servicers to identify alternatives to foreclosure.[93] Section 1024.39(a) requires a servicer to establish or make good faith efforts to establish live contact with a delinquent borrower not later than the 36th day of the borrower's delinquency and, promptly after establishing live contact, inform the borrower about the availability of loss mitigation options, if appropriate. Section 1024.39(b) requires a servicer to provide to a delinquent borrower a written notice with specific information, including examples of loss mitigation options that may be available and instructions on how to obtain more information about loss mitigation options from the servicer, not later than the 45th day of the borrower's delinquency.

In the 2012 RESPA Servicing Proposal, the Bureau sought comment on ''whether servicers may reasonably question how they could comply with [the] Bureau's propos[ed early intervention requirements] in light of other applicable laws,'' including the Bankruptcy Code.[94] The preamble acknowledged that the Bankruptcy Code's automatic stay generally prohibits, among other things, actions to collect, assess, or recover a claim against the debtor that arose before the debtor filed for bankruptcy.[95] In response, industry expressed concerns that the early intervention requirements could conflict with existing law, including the Bankruptcy Code.[96]

In the 2013 RESPA Servicing Final Rule, the Bureau addressed these concerns by adopting § 1024.39(c), which provides that nothing in § 1024.39 requires a servicer to communicate with a borrower in a manner otherwise prohibited under applicable law.[97] The Bureau also added a comment to § 1024.39(c), specifying that servicers are not required to communicate with borrowers in a manner that would be inconsistent with applicable bankruptcy law or a court order in a bankruptcy case, and that servicers could adapt the requirements of § 1024.39 in any manner that would permit them to inform borrowers of loss mitigation options. The Bureau explained that these additions were intended to clarify that servicers could take a flexible approach to complying with § 1024.39 and that the Bureau did not intend for its early intervention requirements to require servicers to take any action that may be prohibited under, among other things, the Bankruptcy Code's automatic stay provisions.[98]

Notwithstanding this flexibility, servicers continued to express concerns to the Bureau about their ability to comply with the early intervention requirements while also avoiding violations of bankruptcy law. Specifically, servicers sought guidance regarding whether § 1024.39 would require some attempt at compliance even if the borrower was protected by the automatic stay, and whether servicers would be subject to claims by private litigants asserting that bankruptcy was not an excuse for a servicer's lack of performance under § 1024.39.

Based on these inquiries, the Bureau determined that the interaction of bankruptcy law and the early intervention requirements required further study and that there was insufficient time before the final rule's January 10, 2014 effective date to calibrate the requirements.[99] Accordingly, the Bureau issued the October 2013 IFR, which added current § 1024.39(d)(1), exempting servicers from the early intervention requirements for a mortgage loan when the borrower is a debtor in bankruptcy. The Bureau clarified in comment 39(d)(1)–2 that, when two or more borrowers are joint obligors with primary liability on the mortgage loan, the exemption applies if any of the borrowers is in bankruptcy. The Bureau further clarified in comment 39(d)(1)–3 that a servicer has no obligation to resume compliance with § 1024.39 with respect to any portion of a mortgage loan that is discharged under applicable provisions of the Bankruptcy Code.

In issuing the IFR, the Bureau did not take a position as to whether early intervention efforts might violate the Bankruptcy Code's automatic stay or discharge injunction.[100] The Bureau encouraged servicers that had been communicating with borrowers in bankruptcy about loss mitigation options to continue doing so and expressed the opinion that some borrowers in bankruptcy may benefit from receiving tailored loss mitigation information that is appropriate to their circumstances.[101] The Bureau also solicited comments on the scope of the exemption, the triggers for qualifying for the exemption and when to resume early intervention, and how communications might be tailored to

[92] ''Consumer homeowners typically seek relief under either Chapter 7 or Chapter 13 of the Bankruptcy Code. Chapter 7 requires the debtor to surrender all nonexempt property for distribution to creditors. In return, the debtor's debts are discharged, with some exceptions. Chapter 13 permits debtors with regular income to keep their property and to repay creditors in whole or in part by making monthly payments to a Chapter 13 trustee, who then distributes the payments to creditors.'' Alan M. White & Carolina Reid, *Saving Homes, Bankruptcies and Loan Modifications in the Foreclosure Crisis,* 65 Fla. L. Rev. 1713, 1717 (Dec. 2013) (citing Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy,* 2009 Wis. L. Rev. 565, 579, 643 (2009)). Some consumer homeowners seek relief under Chapter 11 of the Bankruptcy Code, usually because their debt levels exceed Chapter 13's limitations, and family farmers and fishermen may file under Chapter 12. *See* 11 U.S.C. 109(d)-(f) (defining who may be a debtor under Chapter 11, Chapter 12, and Chapter 13). Because relatively few consumer homeowners seek relief under Chapter 11 or Chapter 12 of the Bankruptcy Code, the discussion of early intervention focuses primarily on homeowners in Chapter 7 or Chapter 13 cases. *See* Administrative Office of the U.S. Courts, *U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2013, available at http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2013/1213_f2.pdf (indicating that in 2013, there were only 1,320 nonbusiness Chapter 11 filings and 495 Chapter 12 filings nationwide).*

[93] *See* 77 FR 57199, 57251 (Sept. 17, 2012); 78 FR 10695, 10787 (Feb. 14, 2013).

[94] 77 FR 57199, 57260–61 (Sept. 17, 2012).

[95] *Id. See also* 11 U.S.C. 362(a).

[96] 78 FR 10695, 10806–07 (Feb. 14, 2013).

[97] *Id.*

[98] *Id.* at 10806.

[99] 78 FR 62993, 62997 (Oct. 23, 2013).

[100] *See id.*

[101] *Id.*

meet the particular needs of borrowers in bankruptcy.[102] Finally, the Bureau stated that it would continue to examine this issue and might reinstate an early intervention requirement with respect to borrowers in bankruptcy, though the Bureau indicated that it would not reinstate any such requirement without notice and comment rulemaking and an appropriate implementation period.[103]

During the IFR's official comment period, the Bureau received approximately 30 comments, several of which discussed § 1024.39(d)(1)'s exemption from the early intervention requirements for borrowers in bankruptcy.[104] The Bureau has since continued to engage stakeholders on the scope of this exemption, including by hosting the roundtable discussion on June 16, 2014, among representatives of consumer advocacy groups, bankruptcy attorneys, servicers, trade groups, and bankruptcy trustees. The Bureau has also sought comment from bankruptcy judges and experts and conducted its own analysis of the intersection of the early intervention requirements and bankruptcy law.

Based upon its review of the comments received and its study of the intersection of the early intervention requirements and bankruptcy law, the Bureau believes it may be appropriate to reinstate the early intervention requirements with respect to borrowers in bankruptcy, under certain circumstances. The Bureau is proposing to do so in the present rulemaking because, as noted in the IFR, the Bureau believes that it would be preferable to use notice and comment rulemaking, rather than simply finalizing the IFR with modifications, to reinstate the early intervention requirements with respect to such borrowers.[105] The Bureau believes that this approach will allow stakeholders to more fully consider and comment on the Bureau's specific proposal. The Bureau also believes that it is appropriate for the Bureau to address comments it already received in response to the IFR. Accordingly, the following discussion of the proposed revisions to § 1024.39(d)(1) and accompanying commentary includes discussion of the comments received regarding the IFR, as well as ex parte comments received after the IFR's official comment period ended.

Live Contact

Commenters supported almost uniformly the IFR's exemption from § 1024.39(a)'s live contact requirement. Servicers and trade groups urged the Bureau to maintain the exemption in order to avoid conflicts with the Bankruptcy Code. One trade group added that a borrower likely would have received early intervention outreach prior to filing for bankruptcy, such that additional early intervention attempts during bankruptcy would be redundant or unnecessary. Two bankruptcy judges commented that the Bureau should not require servicers to attempt to establish live contact with borrowers because such attempts may violate the automatic stay under certain circumstances. One bankruptcy judge and two industry participants further noted that contacting a borrower represented by bankruptcy counsel might, under certain circumstances, implicate ethics rules or State laws prohibiting direct contact with a party that is represented by counsel.

A consortium of consumer advocacy groups submitted comments generally opposing the exemption from the early intervention requirements, arguing that the flexibility afforded by § 1024.39(c) is sufficient to address any concerns about violating the automatic stay or discharge injunction. In subsequent ex parte comments, however, several of these groups clarified that, with one exception discussed below, they were comfortable with the exemption from the live contact requirements. Finally, during the bankruptcy roundtable discussion, which included representatives from industry and consumer advocacy groups, as well as bankruptcy trustees, no attendees took the position that the Bureau should lift the exemption with respect to live contact.

In light of these comments, the Bureau is proposing to maintain the exemption from the live contact requirements with respect to a borrower who is in bankruptcy, has discharged personal liability for the mortgage loan, or shares liability on a mortgage loan with a person who is a debtor in a Chapter 12 or Chapter 13 bankruptcy case. In addition to the issues identified in the comments, two other factors inform the Bureau's proposal to maintain the exemption. First, the Bureau believes that live contact may be perceived as more intrusive and of less value to a borrower in bankruptcy. As discussed in the section-by-section analysis of § 1024.39(a), the live contact requirements are ongoing and generally require a servicer to make continued efforts to establish live contact with a borrower so long as a borrower remains delinquent. In addition, compliance with § 1024.39(a) is not limited to—and does not in every case require—a discussion of available loss mitigation options. Section 1024.39(a) requires a servicer to inform a borrower of loss mitigation options ''if appropriate.'' More broadly, ''[l]ive contact provides servicers an opportunity to discuss the circumstances of a borrower's delinquency,''[106] and, based on this discussion, a servicer may determine not to inform a borrower of loss mitigation options. Current comment 39(a)–3.i.B provides an example demonstrating that it is reasonable for a servicer to not provide information about the availability of loss mitigation options to a borrower who has missed a January 1 payment and notified the servicer that full late payment will be transmitted to the servicer by February 15.[107] In that situation, a live contact conversation could serve as a reminder to a borrower who inadvertently missed a payment, or it could give the servicer an opportunity to discuss when the borrower would cure a temporary delinquency; it would not necessarily involve a discussion of loss mitigation options. Borrowers who seek protection under the Bankruptcy Code, however, may do so in part to terminate unwelcome creditor communications about outstanding payment obligations. For such borrowers, the Bureau believes that a servicer's repeated attempts to establish live contact, which may not lead to a discussion of available loss mitigation options between the parties, may be of diminished value to the borrower.

Second, while some courts have determined that a creditor may properly contact a borrower in bankruptcy, including by telephone, to inform the borrower about loss mitigation options or to negotiate the terms of a loss mitigation agreement,[108] other courts

[102] *Id.* at 62998.

[103] *Id.*

[104] The IFR comment period closed on November 22, 2013. Subsequent written and oral presentations to the Bureau imparting information or argument directed to the merits or outcome of the IFR were subject to the Bureau's policy on ex parte presentations. *See* Consumer Fin. Prot. Bureau, CFPB Bulletin 11–3, *Policy on Ex Parte Presentations in Rulemaking Proceedings* (Aug. 16, 2011) (CFPB Bulletin 11–3), *available at http://files.consumerfinance.gov/f/2011/08/Bulletin_20110819_ExPartePresentationsRulemakingProceedings.pdf.*

[105] 78 FR 62993, 62998 (Oct. 23, 2013).

[106] Comment 39(a)–2.

[107] This proposal would redesignate this comment as comment 39(a)–4.i.B.

[108] *See, e.g., Brown* v. *Bank of Am. (In re Brown),* 481 B.R. 351, 360 (Bankr. W.D. Pa. 2012) (holding that creditor did not violate the automatic stay by making telephone calls to a borrower regarding foreclosure alternatives); *In re Silva,* No. 09–02504, 2010 WL 605578, at *1 (Bankr. D. Haw. Feb. 19, 2010) (''Nothing in the Bankruptcy Code prevents or prohibits a chapter 7 or chapter 13 debtor or its secured creditors from entering into communications or negotiations about the possibility of a loan modification.''); *In re Medina,*

Continued

have found that a creditor violated the automatic stay by making live contact with a borrower to discuss loss mitigation.[109] The Bureau notes that these violations appear to involve extreme facts, such as creditors making dozens of phone calls, some of which threatened legal action, to borrowers who had requested that the creditor stop contacting them and either had already decided to surrender the property or were not interested in the offered loss mitigation options.[110] Nonetheless, while the Bureau does not believe that compliance with § 1024.39(a)'s live contact requirement would generally violate the stay, the Bureau is concerned that, given the interactive and potentially unscripted nature of live contact, as well as the fact that live contact does not necessarily require a discussion of loss mitigation options, borrowers or courts may view a servicer's attempts to establish live contact as a communication prohibited by the automatic stay under certain circumstances. Accordingly, the Bureau believes it may not be appropriate to require servicers to engage in live contact with borrowers in bankruptcy.

For these reasons, the Bureau is proposing § 1024.39(d)(1)(i), which provides that a servicer is exempt from the early intervention live contact requirements with respect to a borrower who is a debtor in bankruptcy or has discharged personal liability through bankruptcy. Proposed § 1024.39(d)(1)(i) also provides that a servicer is exempt from the live contact requirements with respect to a borrower if any borrower on the mortgage loan is a debtor in a Chapter 12 or Chapter 13 bankruptcy case. When a debtor files for protection under Chapter 12 or Chapter 13, the Bankruptcy Code implements a ''co-debtor stay,'' prohibiting creditors from engaging in collection efforts against certain of the debtor's joint obligors, such as a joint obligor on the debtor's mortgage loan, even though the joint obligor has not filed for bankruptcy.[111] Because contacting a borrower covered by the ''co-debtor stay'' raises some of the same concerns as contacting a borrower covered by the automatic stay, the Bureau believes it may be appropriate to exempt servicers from compliance with § 1024.39(a) with respect to a borrower who is jointly liable on mortgage loan with someone who is a debtor in a Chapter 12 or Chapter 13 bankruptcy case.

Proposed § 1024.39(d)(1)(i) provides that the exemption from § 1024.39(a)'s live contact requirements applies to only those non-bankrupt borrowers who are jointly liable on a mortgage loan with a debtor in a Chapter 12 or Chapter 13 bankruptcy case; the proposed exemption therefore excludes borrowers who are jointly liable on a mortgage loan with a debtor in a Chapter 7 or Chapter 11 case. This is a departure from current § 1024.39(d)(1), under which the Bureau intentionally crafted a broad exemption from § 1024.39, making the exemption applicable to any joint obligor of a debtor in bankruptcy, irrespective whether the joint obligor was in bankruptcy or protected against collection attempts by the co-obligor stay under 11 U.S.C. 1201(a) or 1301(a). A consortium of consumer advocacy groups commented that this exemption is too broad, as there is no ''co-obligor stay'' provision in Chapter 7 or Chapter 11 of the Bankruptcy Code. Thus, they argued, there is no prohibition against contacting a joint obligor of a Chapter 7 or Chapter 11 debtor and therefore no reason to exempt a servicer from the live contact requirements in these circumstances. The consumer advocacy groups gave the example of a married couple who jointly own a home. If one spouse filed for protection under Chapter 7, the automatic stay would not apply to the other spouse, and a servicer would not violate the automatic stay by contacting or attempting to negotiate a loss mitigation option with the non-debtor spouse. Under the current broad exemption, however, a servicer has no obligation to make reasonable efforts to establish live contact with the non-debtor spouse, even if the couple were legally separated or living apart for years.

The Bureau believes that it may not be necessary to exempt a servicer from the live contact requirements with respect to a joint obligor of a debtor in a Chapter 7 or Chapter 11 case. As the consumer advocacy groups noted, the Bankruptcy Code does not prevent collection attempts against such joint obligors and servicers do not violate the automatic stay by contacting them.[112] Further, the Bureau believes that these joint obligors may benefit from early intervention in the same way that borrowers who are not in bankruptcy do. Therefore, proposed § 1024.39(d)(i) does not exempt a servicer from the live contact requirement with respect to a joint obligor of a debtor in a Chapter 7 or Chapter 11 case.

Proposed comment 39(d)(1)(i) clarifies when the exemption from the live contact requirements begin. The proposed comment states that the requirements of § 1024.39(a) would not apply once a petition is filed under the Bankruptcy Code, commencing any case in which the borrower is a debtor, or a Chapter 12 or Chapter 13 case in which any borrower on the mortgage loan is a debtor. The proposed comment further clarifies that the requirements of § 1024.39(a) also do not apply if the borrower has discharged personal liability for the mortgage loan under 11 U.S.C. 727, 1141, 1228, or 1328.

Written Notice

The Bureau received several comments regarding the bankruptcy exemption from § 1024.39(b)'s written early intervention notice requirement. Most initial industry comments in response to the IFR did not draw a distinction between the live contact and written notice requirements, arguing broadly in favor of a blanket exemption from early intervention. One servicer commented specifically that the written notice requirements could implicate the

No. 6:12–bk–00066–ABB, 2012 WL 2090419, at *1 (Bankr. M.D. Fla. June 8, 2012) (''The automatic stay and the discharge provisions of the Bankruptcy Code do not prevent the parties from negotiating and entering into a loan modification post-petition.'').

[109] *See, e.g., In re Culpepper,* 481 B.R. 650, 659–60 (Bankr. D. Or. 2012) (stating that a creditor's reasonable contacts with a debtor regarding foreclosure alternatives may be permissible, but nonetheless finding a stay violation because the creditor made more than 100 phones calls to a borrower who had requested the creditor stop contacting her and the creditor discussed only loss mitigation options (i) for which the borrower was ineligible, (ii) in which the borrower was not interested, and (iii) which would have revived at least a portion of the borrower's discharged mortgage debt); *In re Whitmarsh,* 383 B.R. 735, 737 (Bankr. D. Neb. 2008) (stating that ''[a] phone call or two to follow up a letter regarding loss mitigation efforts is understandable,'' but finding that the creditor violated the automatic stay by making at least 22 phone calls, some of which threatened legal action, to borrowers who had already decided to surrender the property and had requested in writing on several occasions that the creditor make contact only with the borrowers' attorney).

[110] *Culpepper,* 481 B.R. at 659–60; *Whitmarsh,* 383 B.R. at 737.

[111] 11 U.S.C. 1201(a) and 1301(a) (both stating that ''[e]xcept as provided in subsections (b) and (c) of this section, after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless—(1) such individual became liable on or secured such debt in the ordinary course of such individual's business; or (2) the case is closed, dismissed, or converted to a case under chapter 7 or 11 of this title.'').

[112] *In re Chugach Forest Products, Inc.,* 23 F.3d 241, 246 (9th Cir. 1994) (''As a general rule, '[t]he automatic stay of section 362(a) protects only the debtor, property of the debtor or property of the estate. It does not protect non-debtor parties or their property. Thus, section 362(a) does not stay actions against guarantors, sureties, corporate affiliates, or other non-debtor parties liable on the debts of the debtor.'") (quoting *Advanced Ribbons & Office Prods.* v. *U.S. Interstate Distrib. (In re Advanced Ribbons & Office Prods.),* 125 B.R. 259, 263 (B.A.P. 9th Cir. 1991)).

automatic stay or raise issues about contacting a borrower represented by counsel. The servicer also stated that it was considering whether it would be more appropriate to send a borrower loss mitigation information immediately upon the filing of a bankruptcy petition, rather than notices only at specific points in a borrower's delinquency.

Most commenters that specifically addressed the written notice requirements, however, stated that servicers could comply with § 1024.39(b) without violating the automatic stay. Consumer advocacy groups argued that borrowers in bankruptcy would benefit from information about loss mitigation options and that there is no case law holding that a written notice describing loss mitigation options violates the automatic stay. The consumer advocacy groups argued further that the written notice required by § 1024.39(b) could not violate the automatic stay because it is purely informational and contains no payment demand. Two bankruptcy judges and a bankruptcy law professor commented that a written notice compliant with § 1024.39(b) and containing a bankruptcy disclaimer would raise fewer concerns about the automatic stay than live contact because the notice does not contain any payment demand and because the nature of the notice is an invitation to apply for debt relief.

During the bankruptcy roundtable, several industry participants stated that it would be appropriate for servicers to provide a borrower in bankruptcy with the written notice containing information related to available loss mitigation options, particularly as § 1024.39(b) does not require a servicer to send the notice more than once in a six-month period. Thus, these participants took the position that the notice is unlikely to harass a borrower. Several roundtable participants further stated that any written notice requirement should be limited to borrowers in Chapter 7 who first become delinquent after filing bankruptcy and borrowers in Chapter 13 who are delinquent on their bankruptcy plan payments (as opposed to delinquent under the mortgage loan contract).

The Bureau continues to believe that borrowers in bankruptcy will benefit from receiving the written notice required under § 1024.39(b). Specifically, the Bureau believes that the content of the notice, including the statement providing a brief description of loss mitigation options that may be available from the servicer and the application instructions or a statement informing the borrower how to obtain more information about loss mitigation options from the servicer, may be of particular value to a delinquent borrower in bankruptcy. The Bureau believes that receipt of the written early intervention notice may be critical in educating borrowers about available loss mitigation options. The Bureau further believes that borrowers who have filed for bankruptcy should not be denied an opportunity to obtain information about available loss mitigation options. This information may be uniquely critical for borrowers in bankruptcy as they make decisions about how best to eliminate or reorganize their debts.

Other Federal agencies have similarly recognized that borrowers in bankruptcy are in need of information regarding loss mitigation options and should be considered for available foreclosure alternatives. In 2008, HUD issued FHA loss mitigation guidance requiring mortgagees to provide information to a bankrupt borrower's attorney regarding foreclosure alternatives and instructions on how to apply.[113] HUD further recommended that mortgagees should provide debtors not represented by counsel with the same loss mitigation information and review debtors' bankruptcy petitions to determine if they are eligible for loss mitigation.[114] The Department of the Treasury does not require HAMP participants to actively solicit borrowers in bankruptcy for loss mitigation options, but it has made clear that such borrowers may be eligible for HAMP.[115]

The Bureau understands that even after a borrower files for bankruptcy, a servicer is not categorically barred from communicating with the borrower.[116] Courts have found that, under appropriate circumstances, servicers may provide periodic statements, notices of change in payments, and other communications without violating the automatic stay.[117] As noted above, several courts have determined that a servicer may properly contact a borrower to inform the borrower about loss mitigation options or to negotiate the terms of a loss mitigation agreement. Consumer advocacy groups and bankruptcy attorneys have also commented that sending a notice of potential loss mitigation options, without any accompanying demand for payment, would not implicate the automatic stay.

Accordingly, the Bureau is proposing to revise the exemption set forth in § 1024.39(d)(1). Under the proposal, a servicer would, with certain exceptions, be required to provide the written early intervention notice required by § 1024.39(b) to a delinquent borrower who is in bankruptcy or has discharged personal liability for the mortgage loan. Specifically, proposed § 1024.39(d)(ii) generally limits the exemption to instances where there are no loss mitigation options available or where the borrower is surrendering the property or avoiding the lien securing the mortgage loan. Thus, under the proposal, a servicer would be required to provide the written early intervention notice to a borrower in bankruptcy, except in limited circumstances. As discussed above, the Bureau believes that information in the written early intervention notice is valuable to all borrowers and may be particularly useful to a borrower who is in bankruptcy for the purpose of reducing or reorganizing outstanding debts.

The Bureau notes that servicers have expressed concerns about communicating with a borrower

[113] U.S. Dep't of Housing and Urban Dev., Mortgagee Letter 2008–32, *Use of FHA Loss Mitigation During Bankrutpcy* (Oct. 17, 2008) (HUD Mortgagee Letter 2008–32), *available at http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/2008ml.cfm.*

[114] *Id.*

[115] U.S. Dep't of the Treasury & U.S. Dep't of Housing and Urban Dev., MHA Handbook v. 4.4, Making Home Affordable Program Handbook for Servicers of Non-GSE Loans, at 79, 82 (Mar. 3, 2014) (''Borrowers in active Chapter 7 or Chapter 13 bankruptcy cases are eligible for HAMP at the servicer's discretion in accordance with investor guidelines, but servicers are not required to solicit these borrowers proactively for HAMP. * * * Borrowers who have received a Chapter 7 bankruptcy discharge in a case involving the first lien mortgage who did not reaffirm the mortgage debt under applicable law are eligible for HAMP. * * * [A] servicer is deemed to have made a Reasonable Effort to solicit [those] borrower[s] after sending two written notices to the last address of record in addition to the two required written notices. * * *''), *available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_44.pdf.*

[116] *See, e.g., Zotow* v. *Johnson (In re Zotow),* 432 B.R. 252, 258 (B.A.P. 9th Cir. 2010) (''[T]he automatic stay does not prevent all communications between a creditor and the debtor.'') (citations omitted); *In re Duke,* 79 F.3d 43, 45 (7th Cir. 1996) (holding that creditor does not violate automatic stay by sending a ''nonthreatening and non-coercive'' offer to reaffirm a pre-petition debt and stating that ''the respite provided by § 362 'is * * * from the threat of immediate action by creditors, such as a foreclosure or a lawsuit'''') (quoting *Brown* v. *Pa. State Emps. Credit Union,* 851 F.2d 81, 86 (3d Cir. 1988)).

[117] *See* section-by-section analysis of 12 CFR 1026.41, *infra; see also Zotow,* 432 B.R. at 260 (notice of payment change due to escrow deficiency); *Duke,* 79 F.3d at 45 (offer to reaffirm debt); *Schatz* v. *Chase Home Fin. (In re Schatz),* 452 B.R. 544 (Bankr. M.D. Pa. 2011) (periodic statements); *Singh* v. *U.S. Bank (In re Singh),* 457 B.R. 790 (Bankr. E.D. Cal. 2011) (notice of payment change); *see also Morgan Guaranty Trust Co. of N.Y.* v. *Am. Sav. & Loan Ass'n,* 804 F.2d 1487, 1491 (9th Cir. 1986) (''[M]ere requests for payment are not barred absent coercion or harassment by the creditor. * * *'').

represented by counsel, but the Bureau does not believe that these concerns warrant a blanket exemption from providing the written early intervention notice to borrowers in bankruptcy. Section 1024.39(c) already provides that a servicer is not required to communicate with a borrower in a manner otherwise prohibited by applicable law, which could include State laws regarding communications with a represented party. Moreover, as existing comments 39(a)–4 and 39(b)–3 clarify, a servicer may satisfy the live contact and written notice requirements of § 1024.39 by providing information about loss mitigation options to a person authorized by the borrower to communicate with the servicer on the borrower's behalf.[118] To the extent that a servicer is concerned about communicating with a borrower represented by counsel, it may communicate with the borrower's authorized representative instead. As HUD has recognized, communicating with a borrower's bankruptcy counsel about available loss mitigation does not raise concerns about violating the automatic stay.[119]

The Bureau also does not believe that it is appropriate, as some commenters suggested, to limit the written early intervention notice to instances where a borrower in Chapter 7 first becomes delinquent while in bankruptcy or to where a borrower in Chapter 13 fails to make payments due under the bankruptcy plan. Although a borrower in Chapter 7 who was delinquent pre-bankruptcy may have already received early intervention, such a borrower may benefit from updated information related to available loss mitigation options, particularly when determining whether to retain the property. Additionally, a borrower in Chapter 13 making timely plan payments may still be delinquent under the mortgage loan contract and may benefit from receiving timely information about loss mitigation options. The Bureau understands that most Chapter 13 cases are unsuccessful, with more than half resulting in dismissal,[120] indicating that a borrower who is temporarily current on bankruptcy plan payments may ultimately need to modify the mortgage loan to enable a successful bankruptcy plan. The Bureau therefore believes that it may be better to provide such borrowers with information about loss mitigation options earlier rather than later.

Nonetheless, as noted above, proposed § 1024.39(d)(1)(ii) retains the exemption from the written early intervention notice in certain circumstances. Proposed § 1024.39(d)(1)(ii)(A) provides that a servicer is exempt from the written notice requirement if no loss mitigation options are available. The Bureau believes that a primary value of the written early intervention notice to a delinquent borrower in bankruptcy is to inform the borrower of potential loss mitigation options to avoid foreclosure. If no loss mitigation options are available, however, the value of the written notice may be significantly diminished for a borrower in bankruptcy.

In addition, proposed § 1024.39(d)(1)(ii)(B) through (D) exempt a servicer from the written early intervention notice requirement in several situations where the borrower in bankruptcy surrenders the property securing the mortgage loan or avoids (*i.e.,* renders unenforceable) the lien securing the mortgage loan. First, proposed § 1024.39(d)(1)(ii)(B) provides that a servicer is exempt if the borrower's confirmed plan of reorganization provides for the borrower to surrender the property, provides for the avoidance of the lien securing the mortgage loan, or otherwise does not provide for, as applicable, the payment of pre-bankruptcy arrearage or the maintenance of payments due under the mortgage loan.[121] Second, proposed § 1024.39(d)(1)(ii)(C) provides that a servicer is exempt if the borrower files a statement of intention with the bankruptcy court that identifies an intent to surrender the property securing the mortgage loan.[122] Finally, proposed § 1024.39(d)(1)(ii)(D) provides that a servicer is exempt if the bankruptcy court enters an order providing for the avoidance of the servicer's lien or lifting the automatic stay with respect to the property securing the mortgage loan. In each of these situations, the borrower relinquishes the property or otherwise discontinues making regular payments on the mortgage loan. The Bureau believes that apprising a borrower in bankruptcy of loss mitigation options at that time may be of diminished value. Moreover, in these situations, the borrower may be significantly delinquent and may have already received information about loss mitigation options, either before or during bankruptcy.

The Bureau is also proposing two comments to clarify proposed § 1024.39(d)(1)(ii). First, proposed comment 39(d)(1)(ii)–1 provides that for purposes of § 1024.39(d)(1)(ii), the term ''plan of reorganization'' refers to a borrower's plan of reorganization filed under the applicable provisions of Chapter 11, Chapter 12, or Chapter 13 of the Bankruptcy Code and confirmed by a court with jurisdiction over the borrower's bankruptcy case. This comment is intended to avoid any confusion about what the term ''plan of reorganization'' means when used in § 1024.39(d)(1).

Second, proposed comment 39(d)(1)(ii)—2 states that, if the FDCPA applies to a servicer's communications with a borrower in bankruptcy and the borrower has sent a notification under

[118] *See also* 78 FR 10695, 10796 (Feb. 14, 2013) (''[Section] 1024.39 requires that servicers reach out to borrowers. * * * [T]he Bureau believes it would mitigate the burden on the servicer to be able to communicate with either the borrower or the borrower's representative.''); *id.* at 10797 (''[C]omment 39(a)–4 [clarifies] that the Bureau's guidance with respect to communicating with a borrower's representative also applies to the written notice provision at § 1024.39(b).'').

[119] HUD Mortgagee Letter 2008–32 (''As a result of these discussions [with bankruptcy experts], the Department understands that contact with debtor's counsel or a bankruptcy trustee does not constitute a violation of the automatic stay and that waiting until a bankruptcy is discharged or dismissed before offering loss mitigation may be injurious to the interests of the borrower, the mortgagee and the FHA insurance funds.''); *see also Henry* v. *Assocs. Home Equity Servs., Inc. (In re Henry),* 266 B.R. 457 (Bankr. C.D. Cal. 2001) (''If a debtor is represented by counsel, any creditor may communicate with counsel for the debtor without violating the automatic stay. Counsel has no need to be shielded from a client's creditors. It is part of the job of counsel for a debtor to deal with the client's creditors.''); *United States* v. *Nelson,* 969 F.2d 626, 628 (8th Cir. 1992) (holding that creditor did not violate the stay by sending a letter to debtor's counsel); *Cash Am. Pawn, L.P.* v. *Murphy,* 209 B.R. 419, 424 (E.D. Tex. 1997) (similar); *Murray* v. *Great Valley Sav. Ass'n,* (*In re Murray),* 89 B.R. 533, 536 (Bankr. E.D. Pa. 1988) (similar); *cf. Duke,* 79 F.3d at 45 (holding that creditor did not violate stay by copying debtor on letter it sent to debtor's counsel).

[120] *See* Ed Flynn, *Chapter 13 Revisited: Can it help Solve the Judiciary's Fiscal Problems?,* 32 a.m. Bankr. Inst. J. 20, 20 (Dec. 2013) (stating that over 55% of Chapter 13 cases are dismissed before plan completion); U.S. Dep't of Justice, Office of the U.S. Trustee, Chapter 13 Trustee Data and Statistics, *available at http://www.justice.gov/ust/eo/private_trustee/data_statistics/ch13.htm.* (indicating that over 50% of Chapter 13 cases filed since 2004 have been dismissed prior to completion).

[121] In Chapter 13, for example, a borrower who is delinquent on a mortgage loan as of the date of the bankruptcy filing may, subject to certain restrictions, confirm a plan of reorganization that provides for the borrower to make payments that will pay down the pre-bankruptcy arrearage over time while the borrower also continues to make the periodic payments as they come due under the mortgage loan. *See* 11 U.S.C. 1322(b)(5) (stating that the plan of reorganization may ''provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due'').

[122] *See* 11 U.S.C. 521(a)(2) (requiring a Chapter 7 debtor to file ''a statement of intention with respect to the retention or surrender of [secured property of the estate]'').

FDCPA section 805(c), proposed comment 39(d)(2)(iii)–2 may be applicable. As discussed more fully in the section-by-section analysis of § 1024.39(d)(2), proposed comment 39(d)(2)(iii)–2 would, under certain circumstances, exempt a servicer from the written notice requirements if the borrower has sent a notification pursuant to FDCPA section 805(c) and is unrepresented by a person authorized by the borrower to communicate with the servicer on the borrower's behalf.

Resuming Compliance

The Bureau is also proposing to revise current comment 39(d)(1)–2 and redesignate it as comment 39(d)(1)–1. As revised and redesignated, proposed comment 39(d)(1)–1 addresses a servicer's obligation to resume compliance with the early intervention requirements following a borrower's bankruptcy. The proposed comment provides that, with respect to any borrower who has not discharged the mortgage debt, a servicer must resume compliance with § 1024.39(a) and (b), as applicable, as of the first delinquency that follows the earliest of the following outcomes in the bankruptcy case: (1) the case is dismissed, (2) the case is closed, (3) the borrower reaffirms the mortgage loan under 11 U.S.C. 524, or (4) the borrower receives a discharge under 11 U.S.C. 727, 1141, 1228, or 1328. However, proposed comment 39(d)(1)–1 also clarifies that the requirement to resume compliance with § 1024.39 does not require a servicer to communicate with a borrower in a manner that would be inconsistent with applicable bankruptcy law or a court order in a bankruptcy case. The proposed revisions provide that, to the extent necessary to comply with such law or court order, a servicer may adapt the requirements of § 1024.39 as appropriate. In addition, proposed comment 39(d)(1)–1 provides that compliance with § 1024.39(a) is not required with respect to any borrower who has discharged the mortgage debt under applicable provisions of the Bankruptcy Code. If the borrower's bankruptcy case is revived—for example, if the court reinstates a previously dismissed case or reopens the case—the servicer is again exempt from the requirements of proposed § 1024.39(a).

The Bureau requests comment on proposed § 1024.39(d)(1), including the scope of the exemptions, the triggers for qualifying for the exemptions and resuming early intervention, and how communications may be tailored to meet the particular needs of borrowers in bankruptcy. The Bureau further solicits comment on whether servicers have had difficulties receiving notices regarding the dismissal or closing of a bankruptcy case or of the debtor's discharge, and whether the obligation to resume early intervention should be contingent on receiving such notices. Additionally, the Bureau requests comment on whether the timing of the written early intervention notice should be different for a borrower in bankruptcy, such as whether a servicer should be required to provide the written notice to a borrower in bankruptcy within 45 days after the bankruptcy case commences, rather than by the 45th day of the borrower's delinquency.

Legal Authority

The Bureau is proposing to exercise its authority under sections 6(j)(3) and 19(a) of RESPA to exempt servicers from the early intervention live contact requirements in § 1024.39(a) for a mortgage loan while the borrower is a debtor in bankruptcy, while any borrower on the mortgage loan is a debtor in Chapter 12 or Chapter 13 bankruptcy, or if the borrower has discharged personal liability for the mortgage loan through bankruptcy. For the reasons discussed above, the Bureau does not believe at this time that the consumer protection purposes of RESPA would be furthered by requiring servicers to comply with § 1024.39(a) for a mortgage loan under those bankruptcy-related circumstances.

The Bureau is also proposing to exercise its authority under sections 6(j)(3) and 19(a) of RESPA to exempt a servicer from the written early intervention notice requirements in § 1024.39(b) if no loss mitigation options are available and the borrower is a debtor in bankruptcy, any borrower on the mortgage loan is a debtor in Chapter 12 or Chapter 13 bankruptcy, or the borrower has discharged personal liability for the mortgage loan through bankruptcy. The Bureau is also proposing to exercise its authority under sections 6(j)(3) and 19(a) of RESPA to exempt a servicer from the written early intervention notice requirements in § 1024.39(b) if the borrower is a debtor in bankruptcy and any of the three following conditions are met: (1) The borrower's confirmed plan of reorganization provides that the borrower will surrender the property securing the mortgage loan, provides for the avoidance of the lien securing the mortgage loan, or otherwise does not provide for, as applicable, the payment of pre-bankruptcy arrearage or the maintenance of payments due under the mortgage loan; (2) the borrower files with the court a Statement of Intention pursuant to 11 U.S.C. 521(a) identifying an intent to surrender the property securing the mortgage loan; or (3) a court enters an order in the bankruptcy case providing for the avoidance of the lien securing the mortgage loan or lifting the automatic stay pursuant to 11 U.S.C. 362 with respect to the property securing the mortgage loan. For the reasons discussed above, the Bureau believes at this time that the consumer protection purposes of RESPA would not be furthered by requiring compliance with § 1024.39(b) under those circumstances.

39(d)(2) Fair Debt Collection Practices Act

The Bureau is proposing to revise the scope of the current exemption from the early intervention requirements set forth in § 1024.39(d)(2). Section 1024.39(d)(2) currently exempts servicers subject to the FDCPA with respect to a mortgage loan for which a borrower has sent a cease communication notification pursuant to FDCPA section 805(c) (15 U.S.C. 1692c(c)) from the early intervention requirements.[123] The proposal maintains the current exemption from the live contact requirements of § 1024.39(a) but partially lifts the exemption from the written early intervention notice requirements of § 1024.39(b). Specifically, the proposal requires that a servicer must provide a modified written early intervention notice if loss mitigation options are available. In addition to the information set forth in § 1024.39(b)(2), the proposal provides that the modified written early intervention notice must include a statement that the servicer may or intends to invoke its specified remedy of foreclosure. Proposed model clause MS–4(D) in appendix MS–4 to this part may be used to comply with this requirement. The proposal provides that the written notice may not contain a request for payment. In addition, it prohibits a servicer from providing the written notice more than once during any 180-day period. To the extent a servicer would be required to provide the modified written notice under § 1024.39(d)(2)(iii), the proposal

[123] This proposal discusses the impact of a borrower's cease communication notification on a servicer's obligations under the early intervention requirements, and is intended to apply equally to a borrower's notice to the servicer that the borrower refuses to pay a debt. *See* FDCPA section 805(c) (''If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt. * * *'').

provides the servicer with a safe harbor from liability under the FDCPA. Consistent with the discussion in this section, the Bureau is proposing to issue an advisory opinion interpreting the FDCPA cease communication requirement in relation to the Mortgage Servicing Rules under FDCPA section 813(e) (15 U.S.C. 1692k(e)). As provided in that section, no liability arises under the FDCPA for an act done or omitted in good faith in conformity with an advisory opinion of the Bureau while that advisory opinion is in effect. For the reasons discussed below, the Bureau is proposing to provide a safe harbor for certain communications between a servicer and a borrower notwithstanding a borrower's invocation of the ''cease communication'' right.

The objectives of the early intervention requirements under § 1024.39 include ensuring that servicers provide delinquent borrowers with information about their options at the early stages of delinquency, encouraging communication between servicers and delinquent borrowers, and encouraging delinquent borrowers to work with their servicers to identify alternatives to foreclosure.[124] Section 1024.39(a) requires a servicer to establish or make good faith efforts to establish live contact with a delinquent borrower not later than the 36th day of the borrower's delinquency and, promptly after establishing live contact, inform the borrower about the availability of loss mitigation options, if appropriate. Section 1024.39(b) requires a servicer to provide to a delinquent borrower a written notice with specific information, including examples of loss mitigation options that may be available and instructions on how to obtain more information about loss mitigation options from the servicer, not later than the 45th day of the borrower's delinquency.

In the Bureau's 2012 RESPA Servicing Proposal, the Bureau sought comment on ''whether servicers may reasonably question how they could comply with [the] Bureau's propos[ed early intervention requirements] in light of [other applicable] laws,'' including the FDCPA.[125] A servicer of a mortgage that was in default at the time the servicer acquired it may be a debt collector under FDCPA section 803(6). The FDCPA generally grants consumers the right to bar debt collectors from communicating with them regarding a debt by sending a written cease communication notification pursuant to FDCPA section 805(c). However, even after a borrower sends a servicer a cease communication notification, the servicer is not categorically barred under the FDCPA from all communication with the borrower. FDCPA section 805(c) contains specific exceptions that allow further communications with the borrower with respect to a debt for the following reasons: (1) To advise the borrower that the debt collector's further efforts are being terminated; (2) to notify the borrower that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or (3) where applicable, to notify the borrower that the debt collector or creditor intends to invoke a specified remedy.[126]

To address industry concerns about conflicts with existing law, in the 2013 RESPA Servicing Final Rule, the Bureau added § 1024.39(c), which provides that nothing in § 1024.39 requires a servicer to communicate with a borrower in a manner otherwise prohibited under applicable law, including the FDCPA.[127] The Bureau subsequently clarified compliance requirements in relation to the FDCPA in the October 2013 IFR and October 2013 Servicing Bulletin.[128] Under the IFR, a servicer subject to the FDCPA with respect to a borrower is exempt from the requirements of §§ 1024.39 and 1026.20(c) with regard to a mortgage loan for which the borrower has sent a cease communication notification pursuant to FDCPA section 805(c). The Bureau explained that, because the early intervention rule (§ 1024.39) and the adjustable-rate mortgage (ARM) payment adjustment notice rule (§ 1026.20(c)) are neither statutorily mandated by the Dodd-Frank Act nor in response to a borrower-initiated communication, the interplay between §§ 1024.39 and 1026.20(c) and the cease communication provision of FDCPA section 805(c) was unclear. At that time, the Bureau did not make a determination as to the legal status of early intervention efforts or the ARM payment adjustment notice requirements following the receipt of a borrower's proper cease communication request. The Bureau stated that it would explore, as part of a broader rulemaking on debt collection, the legal issues and practical benefits of requiring: (1) Some type of early intervention to notify borrowers of the potential availability of loss mitigation options, balancing the rights of debtors to protect themselves against certain debt collector practices with the consumer protections afforded by servicer-borrower contact that may lead to the resolution of borrower default; and (2) some form of § 1026.20(c) notice, balancing the rights of debtors to prevent debt collectors from communicating with them with the consumer protection afforded by timely notice of interest rate and payment adjustments.[129] The Bureau noted that the future rulemaking on debt collection issues may alter or eliminate the exemptions set forward in the IFR.[130]

The Bureau received a number of comments in response to the IFR during the official comment period and ex parte comments after the close of the official comment period. Accordingly, the following discussion of the proposed rule refers to both sets of comments. The Bureau received comments from various trade associations in support of the FDCPA-related exemptions under the IFR and the safe harbor from liability under the FDCPA that the Bureau granted servicers. One trade association encouraged the Bureau to make a comprehensive determination as to the legal status of communications required under the servicing rules and their impact on or conflict with the FDCPA before making additional changes. Two commenters stated that the Bureau should address these questions through rulemaking rather than through a subsequent compliance bulletin.

A consumer advocacy group's comment requested that the Bureau not require borrowers to choose between their rights under the FDCPA and the benefits of the servicing rules. The comment described the written early intervention notice as a ''form letter'' and argued that most borrowers would not view the notice as the type of debt collection that they meant to stop through a cease communication notification. In a follow-up ex parte meeting with the Bureau, the consumer advocacy group stated that servicers that are careful to send only mandated notices in compliance with the Bureau's requirements are unlikely to face litigation risk and suggested that a servicer could include language on a required notice acknowledging that the borrower has exercised cease communication rights.

The Bureau has learned through continued outreach that important consumer protections may be implicated by the current FDCPA-related exemption from the early

[124] *See* 77 FR 57199, 57251 (Sept. 17, 2012); 78 FR 10695, 10788–89 (Feb. 14, 2013).

[125] 77 FR 57199, 57260–61 (Sept. 17, 2012).

[126] FDCPA section 805(c)(1) through (3).

[127] 78 FR 10695, 10806–07 (Feb. 14, 2013).

[128] 78 FR 62993 (Oct. 23, 2013); CFPB Bulletin 2013–12.

[129] 78 FR 62993, 62994 (Oct. 23, 2013).

[130] *Id. at* 62998–99.

intervention requirements under § 1024.39(d)(2). Specifically, the Bureau believes that a borrower may send a blanket cease communication notification and thus unwittingly forfeit the opportunity to gain information about potential loss mitigation options under the early intervention rules. Borrowers assisted by counsel or housing counselors may find themselves choosing between their rights to invoke cease communication protections pursuant to FDCPA section 805(c) or the benefits of the early intervention rules under § 1024.39. Therefore, the Bureau is taking the opportunity to revisit the exemption from the early intervention requirements at this time rather than as part of a later and broader rulemaking on debt collection.[131]

The Bureau considers whether it may be appropriate to alter or eliminate the exemption from the early intervention live contact requirements in § 1024.39(a), the written notice requirements in § 1024.39(b), or both. The proposal maintains the current exemption from the live contact requirements of § 1024.39(a), but would partially lift the exemption from the written early intervention notice requirements of § 1024.39(b) if loss mitigation options are available. After careful consideration, the Bureau believes that a modified written early intervention notice is closely linked to the exceptions promulgated to the cease communication rights by FDCPA section 805(c), and that the written notice is more closely linked to those exceptions than the live contact requirements.

Live Contact

The Bureau understands that the nature of live contact and the information conveyed may be highly variable. The information conveyed, the manner for conveying that information, and whether any information is conveyed depends on the borrower's circumstances, the servicer's perception of those circumstances, and the servicer's exercise of reasonable discretion.[132] The servicer may contact the borrower in person, by telephone, or not at all, if the servicer's good faith efforts to reach the borrower fail.[133] By their nature, discussions or conversations resulting from live contact are not and cannot be closely prescribed.[134] Such variability is inconsistent with the narrow exceptions in FDCPA section 805(c), which permit a debt collector to communicate further with a borrower for extremely limited purposes after a borrower has sent a servicer a cease communication notification. Because the information conveyed and the manner for conveying such information may be highly variable in the context of live contact, the Bureau believes that requiring a servicer to comply with the live contact requirements with regard to a mortgage loan for which a borrower has sent a notification pursuant to FDCPA section 805(c) is inappropriate and may put a servicer subject to the FDCPA with respect to that borrower's loan at risk of violating the FDCPA. The Bureau is proposing no general rule about whether oral versus written communications are more likely to violate the FDCPA, but notes only that the live contact requirements of § 1024.39(a) are less susceptible to standard, uniform delivery in compliance with the cease communication exceptions in FDCPA section 805(c) than are the written early intervention notice requirements.

The Bureau also believes that live contact may be less valuable to a delinquent borrower who has properly invoked the FDCPA's cease communication protections. Compliance with § 1024.39(a) is not limited to—and does not in every case require—a discussion of available loss mitigation options. Section 1024.39(a) requires that a servicer inform the borrower about the availability of loss mitigation options, ''if appropriate.'' More broadly, ''[l]ive contact provides servicers an opportunity to discuss the circumstances of a borrowers' delinquency,''[135] and, based on this discussion, a servicer may determine not to inform a borrower of loss mitigation options. As current comment 39(a)–3.i explains, ''[i]t is within a servicer's reasonable discretion to determine whether informing a borrower about the availability of loss mitigation options is appropriate under the circumstances.''[136] Under certain circumstances, a servicer may determine that promptly informing the borrower about the availability of loss mitigation options is not appropriate under the circumstances. Current comment 39(a)–3.i.B provides an example that demonstrates it is reasonable for a servicer to not provide information about the availability of loss mitigation options to a borrower who has missed a January 1 payment and notified the servicer that full late payment will be transmitted to the servicer by February 15.[137] The purpose of such a conversation could be to remind a borrower who perhaps inadvertently missed a payment of a past due amount, or to give the servicer an opportunity to discuss when the borrower may cure a temporary delinquency, but the conversation may not necessarily involve a discussion of loss mitigation options.

When a delinquent borrower has instructed the servicer to stop communicating with the borrower about the debt, the Bureau believes that repeated attempts to establish live contact with such a borrower that may not lead to a discussion of available loss mitigation options may be unwanted and in contravention to the purposes of the FDCPA's cease communication protections. The early intervention live contact requirement is a recurring obligation that generally requires servicers to make continued efforts to establish live contact with a borrower so long as a borrower remains delinquent.[138] A borrower who has sent a servicer a cease communication notification may perceive a servicer's early intervention live contact under § 1024.39(a) as a repeated, intrusive, and unwanted communication. The Bureau is also concerned that, given the recurring and relatively unstructured nature of the live contact requirements, requiring early intervention through live contact may increase the potential for harassment in direct contravention of the FDCPA.[139]

Balancing the considerations discussed above, the Bureau is proposing to maintain the current exemption from the live contact requirements of § 1024.39(a).

[131] The Bureau is not, however, making a determination as to the legal status of the requirements under § 1026.20(c) following receipt of proper cease communication requests at this time. As noted in the IFR, the Bureau continues to encourage servicers to provide ARM payment adjustment notices to the extent that the FDCPA permits. *See* 78 FR 62993, 62999 (Oct. 23, 2013).

[132] *See* comment 39(a)–3.i. This proposal would redesignate current comment 39(a)–3.i as comment 39(a)–4.i.

[133] *See* comment 39(a)-2 (''Good faith efforts to establish live contact consist of reasonable steps under the circumstances to reach a borrower and may include telephoning the borrower on more than one occasion or sending written or electronic communication encouraging the borrower to establish live contact with the servicer.''). This proposal would move this language into comment 39(a)–3.

[134] *See* 78 FR 10695, 10793 (Feb. 14, 2013).

[135] Comment 39(a)–2.

[136] Comment 39(a)–3.i. This proposal would redesignate current comment 39(a)–3.i as comment 39(a)–4.i.

[137] This proposal would redesginate current comment 39(a)–3.i.B as comment 39(a)–4.i.B.

[138] *See* CFPB Bulletin 2013–12; section-by-section analysis of § 1024.39(a), *supra*.

[139] *See* FDCPA section 806 (''A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.'').

Specifically, proposed § 1024.39(d)(2)(i) provides that a servicer subject to the FDCPA with respect to a borrower is exempt from the early intervention live contact requirement under § 1024.39(a) with regard to a mortgage loan for which the borrower has sent a notification pursuant to FDCPA section 805(c).

Written Notice

The Bureau believes that the written early intervention notice will generally be closely linked to the invocation of foreclosure. Current § 1024.39(b) requires a servicer to provide a delinquent borrower with the written notice not later than the 45th day of the borrower's delinquency. As a general matter, this written notice must be sent well before the servicer may initiate foreclosure: in most cases, the servicer must wait until a borrower's mortgage loan obligation is more than 120 days delinquent, after the written notice has been sent, to make the first notice or filing to initiate the foreclosure process.[140] As the Bureau explained in the preamble to the 2013 RESPA Servicing Final Rule, the purpose of the written notice is to provide more information to a borrower who has not cured by the 45th day of delinquency. Providing a borrower with notice in writing that includes, for example, the servicer's contact information as well as relevant information regarding loss mitigation options and housing counselors, conveys important information to a borrower that the servicer may not have communicated to the borrower through live contact. Additionally, the written notice generally provides more information than likely would have been provided through live contact and provides the borrower with information that may be reviewed and discussed with a housing counselor or other advisor.[141]

The Bureau understands that in most cases, there may be some loss mitigation options available. Therefore, in most cases, borrowers receiving the written early intervention notice will have an opportunity to respond to the written notice by applying for loss mitigation, should they so choose. Where a borrower responds to the written notice by applying for loss mitigation, the dual tracking restrictions of the 2013 RESPA Servicing Final Rule apply, further limiting the servicer's ability to invoke the remedy of foreclosure. Pursuant to § 1024.41(f)(2) and (g), respectively, a servicer may not make the first notice or filing for foreclosure if a borrower submits a complete loss mitigation application before foreclosure referral, and cannot move for foreclosure judgment or order of sale or conduct a foreclosure sale if a borrower submits a complete loss mitigation application more than 37 days before a foreclosure sale.

The failure to provide a borrower with the written early intervention notice may impede a servicer's ability to invoke foreclosure, particularly if loss mitigation options are available. For example, because failure to provide a borrower with the written early intervention notice may result in borrowers submitting requests for loss mitigation at a later point in time—*e.g.,* closer to the foreclosure sale—failure to provide the written early intervention notice may delay or otherwise interfere with the servicer's exercise of its specified remedy of foreclosure. In addition, the Bureau understands that some states require documentation of a servicer's efforts to modify the loan, or require a servicer to provide the borrower with information substantially similar to the written early intervention notice, prior to initiating foreclosure or conducting a foreclosure sale (*e.g.,* California, Illinois). Therefore, the Bureau believes that when loss mitigation options are available, the written early intervention notice is particularly critical to a servicer's ability to invoke its specified remedy of foreclosure, and that the information conveyed through the written notice is closely linked to the exceptions in FDCPA section 805(c)(2) and (3) to permit a servicer to communicate further with a borrower after a borrower has sent a servicer a cease communication notification.

If loss mitigation options are available, as will generally be the case, the Bureau believes that the written early intervention notice may be of significant value to borrowers, as well as tied closely to the servicer's ability to invoke its specified remedy of foreclosure. Indeed, the Bureau has stated that the early intervention notice requirements were designed primarily to encourage delinquent borrowers to work with their servicers to identify options for avoiding foreclosure.[142] Specifically, the Bureau believes that the content of the written early intervention notice, including the statement providing a brief description of examples of loss mitigation options that may be available from the servicer and the application instructions or a statement informing the borrower how to obtain more information about loss mitigation options from the servicer,[143] may be of particular value and relevance to a delinquent borrower facing debt collection in informing the borrower of the availability of loss mitigation. The Bureau believes that receipt of the modified written early intervention notice may be critical in educating delinquent borrowers about potentially available loss mitigation options. The Bureau further believes that borrowers who have sent a cease communication notification under the FDCPA may benefit from receiving information about loss mitigation options that may be available, which would be provided to other borrowers who have not sent the servicer a cease communication notification. Given its broad experience with consumers in debt, facing foreclosure, or dealing with other financial difficulties, the Bureau believes that, in invoking the FDCPA's cease communication protections, borrowers are unlikely to have intended to prevent communication about loss mitigation options. Regardless of whether the borrower is in fact eligible for or takes advantage of loss mitigation options that may be available, if the borrower receives the written early intervention notice, the borrower at a minimum has an opportunity to gain information about potential options.

The Bureau has also learned that consumer advocates, in some cases, may advise a borrower to refrain from sending a servicer a cease communication notification pursuant to FDCPA section 805(c) in order to preserve access to information about loss mitigation and continue to receive early intervention communications from a servicer. The Bureau believes that borrowers who have invoked the FDCPA's cease communication protections should not be denied an opportunity to obtain information about potential loss mitigation options; indeed, this information may be even more critical for delinquent borrowers facing debt collection.

In the limited circumstances where no loss mitigation options are available, the Bureau believes that the written early intervention notice will be of significantly less value to a borrower who has exercised cease communication rights under the FDCPA and is not as closely tied to the servicer's right to invoke foreclosure due to the limited impact of the dual-tracking restrictions in the absence of loss mitigation options. Therefore, the Bureau believes that it is not appropriate to require servicers to provide the written early

[140] *See* 12 CFR 1024.41(f)(1)(i).

[141] *See* 78 FR 10695, 10796–97 (Feb. 14, 2013).

[142] *Id.* at 10787.

[143] *See* section-by-section analysis of § 1024.39(b)(2), *supra.*

intervention notice to such borrowers who have exercised their FDCPA cease communication rights.

Balancing the considerations discussed above, the Bureau is proposing to partially lift the exemption in current § 1024.39(d)(2) and to require the provision of a modified form of the written early intervention notice to borrowers who have exercised their cease communication rights, while retaining the exemption from § 1024.39(b) if no loss mitigation options are available. Specifically, the Bureau is proposing § 1024.39(d)(2)(ii) to explain that, with regard to a mortgage loan for which the borrower has sent a notification pursuant to section 805(c) of the FDCPA, a servicer subject to the FDCPA with respect to that borrower's loan is exempt from the written early intervention notice requirement under § 1024.39(b) if no loss mitigation options are available. And proposed § 1024.39(d)(2)(iii) provides that a servicer subject to the FDCPA with respect to a borrower must provide a modified written early intervention notice with regard to a mortgage loan for which the borrower has sent a notification pursuant to section 805(c) of the FDCPA if loss mitigation options are available.

In addition to the information required pursuant to § 1024.39(b)(2), proposed § 1024.39(d)(2)(iii) would modify the written early intervention notice to: (1) Include a statement that the servicer may or intends to invoke its specified remedy of foreclosure; (2) prohibit that the written notice contain a request for payment; and (3) prohibit a servicer from providing the written notice more than once during any 180-day period. To assist servicers in complying with the requirements of proposed § 1024.39(d)(2)(iii), the Bureau has developed proposed model clause MS–4(D), contained in appendix MS–4 to Part 1024. A more detailed discussion of the proposed model clause is contained in the section-by-section analysis of appendix MS.

The Bureau is also proposing to add comment 39(d)(2)(iii)–1 to offer servicers additional guidance on complying with the modified written early intervention notice required by proposed § 1024.39(d)(2)(iii). First, the proposed comment explains that in requiring servicers to provide a borrower the written early intervention notice under proposed § 1024.39(d)(2)(iii), the Bureau provides servicers a safe harbor from liability under the FDCPA with respect to the written notice. Specifically, proposed comment 39(d)(2)(iii)–1 provides that, to the extent the FDCPA applies to a servicer's communications with a borrower, a servicer does not violate section 805(c) of the FDCPA by providing the modified written notice required by § 1024.39(d)(2)(iii) after a borrower has sent a notification pursuant to section 805(c) of the FDCPA with respect to that borrower's loan. Second, the proposed comment reminds servicers that in providing the written early intervention notice, they must continue to comply with all other applicable provisions of the FDCPA. Specifically, comment 39(d)(2)(iii)–1 provides that, in providing the borrower the written notice, the servicer must continue to comply with all other applicable provisions of the FDCPA, including prohibitions on unfair, deceptive, and abusive practices as contained in sections 805 through 808 of the FDCPA, 15 U.S.C. 1692c through 1692f.

The Bureau is proposing an additional comment to address circumstances in which a borrower has invoked the FDCPA's cease communication protections and is also a borrower in bankruptcy. Specifically, proposed comment 39(d)(2)(iii)–2 provides that, to the extent the FDCPA applies to a servicer's communications with a borrower and the borrower has sent a notification pursuant to section 805(c) of the FDCPA, a servicer is not required to provide the written notice required by § 1024.39(d)(2)(iii) if the borrower is in bankruptcy and is not represented by a person authorized by the borrower to communicate with the servicer on the borrower's behalf. Proposed comment 39(d)(2)(iii)–2 further provides that if the borrower is represented by a person authorized by the borrower to communicate with the servicer on the borrower's behalf, however, the servicer must provide the modified written notice required by § 1024.39(d)(2)(iii) to the borrower's representative. The Bureau requests comment on whether including proposed comment 39(d)(2)(iii)–2 is appropriate. The Bureau also seeks comment on whether there may be a conflict between the language of proposed model clause MS–4(D) and applicable bankruptcy laws when a borrower has exercised cease communication rights under the FDCPA and is also a borrower in bankruptcy and the scope of any conflict. Proposed model clause MS–4(D) is contained in appendix MS–4. A more detailed discussion of the proposed model clause is contained in the section-by-section analysis of appendix MS.

The Bureau intends this proposal to partially lift the current exemption for a servicer subject to the FDCPA with respect to a borrower to be limited to the Bureau's explicit interpretation. Accordingly, the Bureau intends the proposal to be narrow and based only upon the interplay between two specific federal requirements providing consumer protections—the early intervention requirements of § 1024.39 of Regulation X and the cease communication provision of section 805(c) of the FDCPA. The Bureau believes that, in the limited circumstance where a servicer is subject to the FDCPA with respect to a borrower, and that borrower has sent the servicer a cease communication notification, the strong consumer interest in receiving timely information about potentially available loss mitigation options under § 1024.39(b) may outweigh or at least equal the consumer protection offered by section 805(c) of the FDCPA. Under that limited circumstance, the Bureau also believes that the relationship between the Bureau's required written early intervention notice and the servicer's invocation of its specified remedy of foreclosure is closely linked so as to bring a proposed modified written early intervention notice requirement within the statutory exceptions of section 805(c) of the FDCPA. The Bureau seeks comment on whether partially lifting the exemption for the written early intervention notice if loss mitigation options are available is appropriate.

The Bureau reminds servicers that they may only rely on the exemptions in proposed § 1024.39(d)(2)(i) and (ii) if both the servicer is subject to the FDCPA with respect to a borrower, meaning that the servicer of a defaulted mortgage loan is also acting as a debt collector under section 803(6) of the FDCPA (*i.e.,* the servicer acquired the mortgage at the time that it was in default) and the borrower has properly sent the servicer a written cease communication notification under section 805(c) of the FDCPA. Therefore, even if a servicer receives a written cease communication notification from a borrower, if the servicer is not also acting as a debt collector for purposes of the FDCPA with respect to that borrower's mortgage loan, the servicer must continue to comply with all of the early intervention requirements under § 1024.39.

The Bureau has narrowly tailored the proposal to reduce the risk that servicers will circumvent a borrower's cease communication rights. As noted above, the proposed requirement that a servicer subject to the FDCPA with respect to a borrower provide a delinquent borrower with the modified written early intervention notice applies only if the servicer is subject to the FDCPA with

respect to that borrower, meaning that the servicer of a mortgage loan that was in default at the time the servicer acquired it is also acting as a debt collector under section 803(6) of the FDCPA, and only if that borrower has properly invoked the FDCPA's cease communication protections. The Bureau believes that the proposal to partially lift the exemption for the written early intervention notice will generally only be relevant in instances where the servicer has received a cease communication notification prior to the 45th day of the borrower's delinquency.[144] Additionally, the proposal relates to only the modified written early intervention notice, while maintaining the exemption for early intervention live contact and the exemption for the written notice if no loss mitigation options are available. If no loss mitigation options are available, *i.e.,* the owner or assignee of a borrower's mortgage loan does not offer an alternative to foreclosure that is made available through the servicer, this proposal leaves the current exemption in place.[145] Furthermore, this proposal requires that the modified written early intervention notice include a statement that the servicer may or intends to invoke its specified remedy of foreclosure, prohibits the servicer from making a request for payment via the written early intervention notice, and prohibits a servicer from providing the written notice more than once during any 180-day period. The Bureau believes that limiting the proposal in this manner reduces the risk that the modified written early intervention notice will be used to circumvent a borrower's cease communication rights under section 805(c) of the FDCPA.

Borrower-Initiated Communications

The Bureau expects that, after the borrower has sent a cease communication notification, any subsequent borrower-initiated communications with a servicer for the purposes of loss mitigation will be limited to a discussion of loss mitigation options that may be available. Therefore, even after a borrower has sent a cease communication notification under the FDCPA, a servicer should respond to a borrower who inquires about loss mitigation with information limited to potentially available loss mitigation options. For example, a servicer may discuss with a borrower available loss mitigation options that the owner or assignee of the borrower's mortgage loan offers, instructions on how the borrower can apply for loss mitigation, what documents and information the borrower would need to provide to complete a loss mitigation application, and the potential terms or details of a loan modification program, including the monthly payment and duration of the program. The Bureau is proposing to issue an advisory opinion interpreting the FDCPA cease communication requirement in relation to the Mortgage Servicing Rules under section 813(e) of the FDCPA. As provided in that section, no liability arises under the FDCPA for an act done or omitted in good faith in conformity with an advisory opinion of the Bureau while that advisory opinion is in effect.

The Bureau believes that a servicer's responding to borrower-initiated communications with specific information about loss mitigation options that may be available does not undermine the protections offered by section 805(c) of the FDCPA, which empowers borrowers to direct debt collectors to cease contacting them to collect a debt and frees borrowers from the burden of being subject to unwanted communications. Borrower-initiated communications are by their nature wanted communications and therefore do not impose such a burden. Such communications benefit borrowers by providing them with valuable information about potentially available loss mitigation options. The Bureau believes that when a servicer communicates with a borrower who has invoked the FDCPA's cease communication protections about potentially available loss mitigation options in the limited manner described in this proposal, the servicer does not violate section 805(c) of the FDCPA. The Bureau believes that a borrower's cease communication notification pursuant to the FDCPA should ordinarily be understood to exclude borrower-initiated communications with a servicer for the purposes of loss mitigation because the borrower has specifically requested the communication at issue. As the Bureau explained in the October 2013 Servicing Bulletin, even if the borrower sends a cease communication notification while a specific action the borrower requested of the servicer is in process, the borrower usually should be understood to have excluded the specific action from the general request to cease communication. Thus, only if the borrower sends a communication to the servicer specifically withdrawing the request for such action may a servicer cease to carry out the requirements of these provisions. Accordingly, these communications would—under the Bureau's proposed advisory opinion—be consistent with the FDCPA's requirements, and a servicer would not be liable for violating the FDCPA with respect to such communications.

However, the Bureau's proposed advisory opinion would not protect a servicer from using such borrower-initiated communications for the purpose of loss mitigation as a pretext for collection of a debt in circumvention of a borrower's cease communication protections. In any subsequent borrower-initiated communications with a servicer for the purposes of loss mitigation, the servicer may not and is strictly prohibited from making a request for payment, including, for example, initiating conversations with the borrower related to repayment of the debt (through a debt payment plan or otherwise), demanding that the borrower make a payment, requesting that the borrower bring the account current or make a partial payment on the account, or attempting to collect the outstanding balance or arrearage.[146] Only if the borrower, without prompting from the servicer, independently inquires about or requests to make a payment or initiates a discussion of possible payment plans other than as part of loss mitigation, may the servicer engage in a discussion related to payment of the debt. The Bureau reiterates that servicers may not misuse borrower-initiated communications for the purpose of loss mitigation as an opportunity or pretext to direct or steer borrowers to a discussion of repayment or collection of the debt in circumvention of a borrower's cease communication protections. Additionally, the servicer may not begin or resume contacting the borrower in contravention of the cease communication notification, unless the borrower consents or revokes a prior cease communication request. As discussed above, all other provisions of the FDCPA, including the prohibitions on unfair, deceptive, and abusive practices as contained in sections 805 through 808 of the FDCPA, remain intact notwithstanding the proposed requirement that the servicer provide the modified written early intervention

[144] *See* FDCPA section 805(c) (''If such notice from the consumer is made by mail, notification shall be complete upon receipt.'').

[145] *See* section-by-section analysis of § 1024.39(b)(2)–4, *supra.*

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

notice if loss mitigation options are available to borrowers who have exercised their FDCPA cease communication rights. The Bureau seeks comment generally on borrower-initiated communications for the purpose of loss mitigation in this context and the scope of the Bureau's proposed advisory opinion.

Legal Authority

The Bureau is proposing to exercise its authority under sections 6(j)(3) and 19(a) of RESPA to exempt a servicer that is a debt collector pursuant to the FDCPA with regard to a mortgage loan from the early intervention live contact requirements in § 1024.39(a) when a borrower has exercised the cease communication right under the FDCPA prohibiting the servicer from communicating with the borrower regarding the debt. For the reasons discussed above, the Bureau believes at this time that the consumer protection purposes of RESPA would not be furthered by requiring compliance with § 1024.39(a) at a time when a borrower has specifically requested that the servicer stop communicating with the borrower about the debt. Accordingly, the Bureau is proposing to implement proposed § 1024.39(d)(2)(i) pursuant to its authority under sections 6(j)(3) and 19(a) of RESPA.

The Bureau is also proposing to exercise its authority under sections 6(j)(3) and 19(a) of RESPA to exempt a servicer that is a debt collector pursuant to the FDCPA with regard to a mortgage loan from the written early intervention notice requirements in § 1024.39(b) when a borrower has exercised the cease communication right under the FDCPA if no loss mitigation options are available. For the reasons discussed above, the Bureau believes at this time that the consumer protection purposes of RESPA would not be furthered by requiring compliance with § 1024.39(b) at a time when a borrower has specifically requested that the servicer stop communicating with the borrower about the debt and when no loss mitigation options are available. Accordingly, the Bureau is proposing to implement proposed § 1024.39(d)(2)(ii) pursuant to its authority under sections 6(j)(3) and 19(a) of RESPA.

The Bureau is proposing to exercise its authority under section 6(k)(1)(E) of RESPA to add proposed § 1024.39(d)(2)(iii). The Bureau has authority to implement requirements for servicers to provide information about borrower options pursuant to section 6(k)(1)(E) of RESPA. As the Bureau has previously determined, providing borrowers with timely information about loss mitigation options and the foreclosure process, disclosures encouraging servicers to work with borrowers to identify any appropriate loss mitigation options, and information about housing counselors and State housing finance authorities are necessary to provide borrowers a meaningful opportunity to avoid foreclosure.[147] The Bureau also exercises its authority to prescribe rules with respect to the collection of debts by debt collectors pursuant to section 814(d) of the FDCPA, 15 U.S.C. 1692l(d). Pursuant to this authority, the Bureau is clarifying a borrower's cease communication protections under the FDCPA. Section 805(c) of the FDCPA sets forth both the cease communication requirement and its exceptions. Under section 805(c)(2) and (3) of the FDCPA, a borrower's cease communication request does not prohibit a debt collector from communicating with the borrower ''to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor'' or ''where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.'' For the reasons given above, the Bureau believes that requiring a servicer to provide the written early intervention notice if loss mitigation options are available is a reasonable interpretation of the exceptions under section 805(c)(2) and (3) of the FDCPA. The Bureau believes that because the written early intervention notice will generally be closely linked to the invocation of foreclosure, such a notice informs a borrower that the servicer may invoke or intends to invoke the specified remedy of foreclosure and thus falls within the scope of the exceptions under section 805(c)(2) and (3) of the FDCPA. Accordingly, the Bureau is proposing to implement proposed § 1024.39(d)(2)(iii) pursuant to its authority under section 6(k)(1)(E) of RESPA and section 814(d) of the FDCPA.

Section 1024.41 Loss Mitigation Procedures

41(b) Receipt of a Loss Mitigation Application

Successors in interest. As described in the section-by-section analysis of § 1024.30(d), proposed § 1024.30(d) provides that once a servicer confirms a successor in interest's identity and ownership interest in the property, the successor in interest must be considered a borrower for the purposes of Regulation X's mortgage servicing rules. Accordingly, the servicer must comply with § 1024.41's loss mitigation procedures with respect to a loss mitigation application submitted by a confirmed successor in interest.

Proposed comment 41(b)–1.i clarifies that, if a servicer receives a loss mitigation application, including a complete loss mitigation application, from a potential successor in interest before confirming that person's identity and ownership interest in the property, the servicer may, but is not required to, review and evaluate the loss mitigation application in accordance with the procedures set forth in § 1024.41. The proposed comment also provides that if a servicer complies with the requirements of § 1024.41 for a complete loss mitigation application submitted by a potential successor in interest before confirming that person's identity and ownership interest in the property, § 1024.41(i)'s limitation on duplicative requests applies with respect to any loss mitigation application subsequently submitted by that person, provided that confirmation of the successor in interest's status would not affect the servicer's evaluation of the application.

The Bureau is proposing comment 41(b)–1.i to make clear that servicers may, but are not required to, review and evaluate loss mitigation applications from successors in interest before confirming a successor in interest's identity and ownership interest in the property, even though servicers would not be required to do so under the proposed rule. The Bureau is proposing this comment to ensure that the proposed requirement to review and evaluate applications from a successor in interest upon confirmation of the successor in interest's status would not imply that the servicer may not do so before confirmation. Further, the Bureau believes that where a servicer complies with the requirements of § 1024.41 for a complete loss mitigation application submitted by a potential successor in interest and confirmation of the successor in interest's status would not affect the outcome of the successor's application for loss mitigation, a subsequent request would be duplicative and thus should be subject to § 1024.41(i)'s limitation.

Proposed comment 41(b)–1.ii provides that if a servicer receives a loss mitigation application from a potential successor in interest before confirming that person's status, upon such confirmation the servicer must review and evaluate that loss mitigation application in accordance with the procedures set forth in § 1024.41. For purposes of § 1024.41, the servicer must

[147] *See* 77 FR 57199, 57260 (Sept. 17, 2012).

treat the loss mitigation application as if it had been received on the date that the servicer confirmed the successor in interest's status. Accordingly, servicers would be required to preserve any loss mitigation application received from a potential successor in interest, so that the servicer can review and evaluate that application upon confirmation of the successor in interest's status and the successor in interest would not have to resubmit the loss mitigation application.

The Bureau is proposing comment 41(b)–1.ii because successors in interest may be confused by having to resubmit identical documents simply because the servicer has confirmed the successor in interest's status. The Bureau believes that it is preferable to require servicers to preserve loss mitigation applications received from potential successors in interest and review and evaluate those loss mitigation applications upon confirming the successor in interest's status.

41(b)(1) Complete Loss Mitigation Application

The Bureau is proposing to revise comment 41(b)(1)–1 to clarify that, in the course of gathering documents and information from a borrower to complete a loss mitigation application, a servicer may stop collecting documents and information pertaining to a particular loss mitigation option after receiving information confirming that the borrower is ineligible for that option.

Section 1024.41(b)(1) defines a complete application as an application for which a servicer has received all the information the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower. Current comment 41(b)(1)–1 explains that a servicer has the flexibility to establish the type and amount of information that it will require from borrowers applying for loss mitigation options, and the Bureau explained in the 2013 RESPA Servicing Final Rule that the servicer may tailor application requirements to each individual borrower.[148] In exercising reasonable diligence to obtain a complete application under § 1024.41(b)(1), therefore, a servicer may determine that an application is complete even when the borrower has not submitted certain information that the servicer regularly requires but is irrelevant with respect to that particular borrower.[149]

The Bureau has learned from servicers and consumer advocacy groups that some servicers have been attempting to collect a large number of documents from borrowers, including some that are irrelevant to determining whether a particular borrower is eligible for any loss mitigation option. To the extent that this practice represents a servicer's good faith effort to exercise reasonable diligence under § 1024.41(b)(1), the Bureau wishes to clarify that § 1024.41(b)(1) does not require it. The Bureau believes that an interpretation that § 1024.41(b)(1) requires a servicer to collect documents or information after the servicer has confirmed that such documents cannot affect the outcome of an evaluation unnecessarily burdens both the servicer and the borrower and hinder efforts to complete the loss mitigation application.

Therefore, the Bureau is proposing to amend comment 41(b)(1)–1 to explain that, in the course of gathering documents and information from a borrower to complete a loss mitigation application, a servicer may stop collecting documents or information for a particular loss mitigation option after receiving information confirming that the borrower is ineligible for that option. As revised, proposed comment 41(b)(1)-1 includes the following example: if a particular loss mitigation option is only available for military servicemembers, once a servicer receives documents or information confirming that the borrower is not a military servicemember, the servicer may stop collecting documents or information from the borrower that the servicer would use to evaluate the borrower for that loss mitigation option. The proposed comment further explains that making such a determination does not affect a servicer's obligation to exercise reasonable diligence in obtaining a complete application; the servicer must continue its efforts to obtain documents and information from the borrower that pertain to all other available loss mitigation options. Finally, the proposed comment provides that a servicer may not stop collecting documents and information for any loss mitigation option based solely upon the borrower's stated preference for a different loss mitigation option.

As the Bureau explained in the 2013 RESPA Servicing Final Rule, the Bureau believes that an application process that would impose an obligation on borrowers to select a desired loss mitigation option and permit servicers to evaluate the borrower for only that option would be inappropriate.[150] The Bureau believes that requiring servicers to evaluate loss mitigation applications for all loss mitigation options available to a borrower helps the borrowers make better-informed decisions about the complex options involved in loss mitigation.[151] The Bureau is also concerned that permitting a servicer to stop collecting borrower information based solely upon a borrower's stated preference for one option or another might allow the servicer to inappropriately influence the borrower's preference during communications with the borrower. It also might allow the servicer to otherwise circumvent § 1024.41 by simply choosing to review a borrower for a particular loss mitigation option, as it would be difficult to verify whether a borrower has expressed such a preference. However, the Bureau believes that, where a servicer receives information that conclusively demonstrates that a borrower is not eligible for a particular loss mitigation option, as in the example in proposed comment 41(b)(1)–1, borrowers and servicers will benefit from clarity in the comment that the servicer may stop collecting information from the borrower that the servicer might otherwise need to complete the application. The Bureau believes that proposed comment 41(b)(1)-1 would help ensure that servicers continue to consider borrowers for all loss mitigation options in a single application process notwithstanding the significant flexibility servicers enjoy in establishing application requirements.

The Bureau also notes that pursuant to proposed comment 41(b)(1)–1, a servicer may stop collecting documents and information from a borrower pertaining to a particular loss mitigation option after receiving information confirming that the borrower is ineligible for that option, even if the servicer previously requested such documents and information in the notice sent pursuant to § 1024.41(b)(2)(i)(B).

41(b)(2) Review of a Loss Mitigation Application Submission

41(b)(2)(i) Requirements

The Bureau is proposing to add comment 41(b)(2)(i)–1 to clarify the timelines for when a servicer must review and acknowledge a borrower's loss mitigation application when no foreclosure sale has been scheduled as of the date the loss mitigation application is received. Under § 1024.41(b)(2)(i), if a servicer receives a loss mitigation application 45 days or more before a foreclosure sale, the servicer must: (1) Promptly review the

[148] *See* 78 FR 10695, 10824 (Feb. 14, 2013).

[149] *See id.*

[150] *Id.* at 10828.

[151] *See id.*

application to determine if it is complete, and (2) within five days of receiving the application, notify the borrower that the application was received and is complete or incomplete, and if incomplete, state the additional documents and information needed to complete the application.[152]

Section 1024.41(b)(2)(i) does not expressly address whether this requirement applies when an application is received before a foreclosure sale is scheduled.[153] The Bureau believes that, in that scenario, the application was still received ''45 days or more before a foreclosure sale,'' and that the requirements of § 1024.41(b)(2)(i) still apply. To codify this interpretation, the Bureau is proposing to add new comment 41(b)(2)(i)–1, which provides that for purposes of § 1024.41(b)(2)(i), if a foreclosure sale has not been scheduled as of the date an application is received, the application shall be treated as if it were received at least 45 days before a foreclosure sale. The proposed comment clarifies that servicers must comply with all of the requirements of § 1024.41(b)(2)(i) even when no foreclosure sale has been scheduled as of the date a servicer receives a borrower's loss mitigation application. The Bureau believes that the proposed comment will provide certainty to servicers and borrowers.

41(b)(2)(ii) Time Period Disclosure

The Bureau is proposing to revise commentary discussing a servicer's obligations in setting a reasonable date for the return of documents and information under § 1024.41(b)(2)(ii).

When a borrower submits an incomplete loss mitigation application at least 45 days before a scheduled foreclosure sale, § 1024.41(b)(2)(ii) requires the servicer to select a reasonable date by which the borrower should return documents and information to complete the application. Current comment 41(b)(2)(ii)–1 clarifies that, in selecting this date, the servicer should consider four specific milestones that implicate borrower protections under § 1024.41: (1) The date by which any document or information that a borrower submitted will be considered stale or invalid pursuant to any requirements applicable to any available loss mitigation option, (2) the date that is the 120th day of the borrower's delinquency, (3) the date that is 90 days before a foreclosure sale, and (4) the date that is 38 days before a foreclosure sale. In general, as each milestone passes, it becomes more likely that a borrower will enjoy fewer protections under § 1024.41 when the application becomes complete. As the Bureau explained in the September 2013 Mortgage Final Rule, § 1024.41(b)(2)(ii) was drafted to afford the servicer sufficient flexibility to set a date for the return of documents that will maximize a borrower's protections in light of the borrower's individual application timeline.[154]

The Bureau has received a number of inquiries from servicers seeking guidance on how they should determine the reasonable date under § 1024.41(b)(2)(ii) when the nearest remaining milestone is not scheduled to take place for a significant amount of time. This might be the case, for example, when the borrower has not submitted any information that can go stale, the loan is more than 120 days delinquent, and the foreclosure sale is scheduled to take place in six months. In this circumstance, the nearest remaining milestone might not occur for three months—the date that is 90 days before the foreclosure sale. Servicers have questioned whether, in similar situations, § 1024.41(b)(2)(ii) requires a servicer to select a reasonable date that allows the borrower months to return the necessary documents, or whether the servicer may select an earlier date in order to encourage the borrower to respond more promptly.

The Bureau has learned that different servicers use different approaches when the nearest remaining milestone is months away. One servicer informed the Bureau that it selects the nearest remaining milestone as the reasonable date for the return of documents, even when the milestone is many months in the future. Several other servicers indicated that they always select the earlier of 90 days or the nearest remaining milestone.

The Bureau believes that selecting a reasonable date that is months away may ultimately disadvantage some borrowers. As the Bureau explained in the September 2013 Mortgage Final Rule, the reasonable date provision under § 1024.41(b)(2)(ii) was intended, in part, to maximize borrower protections by encouraging the borrower to submit necessary information in time to receive the most protections possible under § 1024.41.[155] The Bureau believes that allowing a borrower 90 days or more to return documents may discourage borrowers from promptly providing documents and information necessary to complete a loss mitigation application, which ultimately may not further the goal of maximizing their protections under § 1024.41. Generally, the longer a borrower waits to submit documentation to complete an application, the greater the risk that a delinquency will grow, which might negatively affect the borrower's eligibility to receive loss mitigation and might make it more difficult for the borrower to perform under a loss mitigation program that the servicer later offers. Several servicers have informed the Bureau that they share these concerns but have been reluctant to set an earlier return date for fear of violating § 1024.41(b)(2)(ii).

In order to encourage servicers to set reasonable dates that will avoid these outcomes, as well as to clarify the contents of comment 41(b)(2)(ii)–1, the Bureau is proposing to revise comment 41(b)(2)(ii)–1 and add comments 41(b)(2)(ii)–2 and 3. As amended, proposed comment 41(b)(2)(ii)–1 states that, in setting a reasonable date for the return of documents and information under § 1024.41(b)(2)(ii), a servicer must allow a reasonable period of time for the borrower to obtain and submit documents and information necessary to make the loss mitigation application complete. The proposed comment also explains that, generally, a reasonable period of time would not be less than seven days.

Proposed comment 41(b)(2)(ii)–2 also provides, as 41(b)(2)(ii)–1 currently does, that a servicer must preserve maximum borrower rights under § 1024.41 in setting a reasonable date under § 1024.41(b)(2)(ii). However, proposed comment 41(b)(2)(ii)–2 also states that subject to comment 41(b)(2)(ii)'s clarification that the servicer allow the borrower a reasonable period of time to obtain and submit necessary documents, a servicer generally should not set a reasonable date that is further away than the nearest of the remaining milestones, which would be listed in proposed comment 41(b)(2)(ii)–2.

Finally, proposed comment 41(b)(2)(ii)–3 addresses situations where the nearest remaining milestone will not occur for several months based on the timing of a scheduled foreclosure sale and the documents that the borrower had already submitted when the

[152] 12 CFR 1024.41(b)(2)(i).

[153] In the September 2013 Mortgage Final Rule, the Bureau adopted new § 1024.41(b)(3) and related commentary to address borrowers' rights where no foreclosure sale has been scheduled as of the date a complete loss mitigation application is received. The final rule clarified that if a foreclosure sale has not yet been scheduled as of the date that a complete loss mitigation application is received, the application shall be treated as if it were received at least 90 days before a foreclosure sale. *See* 78 FR 60381, 60397 (Oct. 1, 2013).

[154] 78 FR 60381, 60395–96 (Oct. 1, 2013).

[155] *See id.*

servicer selects a reasonable date for the return of documents or information. The proposed comment states that a servicer has flexibility in selecting a reasonable date, subject to comments 41(b)(2)(ii)–1 and 2, and that a servicer may select any date that it determines both maximizes borrower rights under § 1024.41 and allows the borrower a reasonable period of time to obtain and submit documents and information necessary to make the loss mitigation application complete. The proposed comment also provides the following explanatory example: a servicer may set a reasonable date that is earlier than the nearest remaining milestone listed in comment 41(b)(2)(ii)–2 and does not need to select that milestone as the reasonable date itself.

The Bureau believes that the proposed revisions would clarify servicers' obligations under § 1024.41(b)(2)(ii). The Bureau believes that the proposed revisions would help servicers by clarifying that they have significant flexibility in setting a reasonable date under § 1024.41(b)(2)(ii)—servicers may select any date that they determine preserves maximum borrower protections and allows borrowers a reasonable period of time to submit the requested information. As noted above, the Bureau believes that a flexible standard permits servicers to account for borrowers' individual circumstances and maximize protections for each borrower when selecting a reasonable date under § 1024.41(b)(2)(ii).[156] The proposed revisions should shorten application timelines where appropriate, encourage borrowers to respond more promptly, and increase the likelihood of a successful loss mitigation outcome for the borrower.

The Bureau seeks comment on whether this proposal will provide servicers with sufficient guidance in setting a reasonable date for the return of documents and information under § 1024.41(b)(2)(ii) that will maximize borrower protections. The Bureau also seeks comment on whether to address expressly those situations where the nearest remaining milestone will not occur for several months based on the date of a scheduled foreclosure sale and the documents the borrower had submitted at the time the servicer selects the reasonable date under § 1024.41(b)(2)(ii). The Bureau also seeks comment on whether the Bureau should adopt a less flexible standard that would leave servicers with little or no discretion in setting a reasonable date under § 1024.41(b)(2)(ii), and if so, what would constitute an appropriate standard under such an approach.

41(c) Evaluation of Loss Mitigation Applications

41(c)(1) Complete Loss Mitigation Application

Under § 1024.41(c)(1), a servicer that receives a complete loss mitigation application more than 37 days before a foreclosure sale must, within 30 days of receiving the complete application, evaluate the borrower for all loss mitigation options available to the borrower and provide the borrower with a notice in writing stating, among other things, the servicer's determination of which loss mitigation options, if any, it will offer to the borrower. Furthermore, pursuant to § 1024.41(e)(1), if a complete loss mitigation application is received less than 90 days but more than 37 days before a foreclosure sale, a servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than seven days after the servicer provides the offer to the borrower. In the Bureau's February 2013 RESPA Servicing Final Rule, the Bureau stated that it believes the timing of the loss mitigation procedures, including the appeal process, are clear—''[a]ll such deadlines are based on when information is received by or provided by a servicer.''[157]

However, the Bureau has heard some concerns about the scenario where a servicer receives a complete loss mitigation application 38 days before a foreclosure sale, evaluates the borrower for all loss mitigation options available, and 30 days later provides the borrower the written notice stating the servicer's determination of which loss mitigation options it will offer. The borrower has a minimum of seven days to accept or reject the offer, but accounting for the time it takes for the notice to reach the borrower, particularly if provided by mail, the borrower may effectively have less than seven days to accept or reject the offer. Additionally, assuming that the borrower mails an acceptance of a loss mitigation option to the servicer in this scenario, it is possible that the servicer may not receive the borrower's response until after the date of the foreclosure sale. The Bureau believes that this potential timeline may be problematic and may impact a borrower's ability to timely respond, especially when a borrower is just days away from a scheduled foreclosure sale. The Bureau understands that a similar situation may arise with respect to the length of time that a borrower has to make an appeal. Section 1024.41(h)(2) provides that a servicer shall permit a borrower to make an appeal within 14 days after the servicer provides the offer of a loss mitigation option to the borrower. Again, accounting for the time it takes for the notice to reach the borrower, particularly if provided by mail, the borrower may effectively have less than 14 days to make an appeal.

The Bureau makes no proposal at this time but seeks comment on whether the timing and method of correspondence of loss mitigation offers and appeals between servicers and borrowers generally is presenting a problem. The Bureau further seeks comment on the specific scenario described above in which a complete loss mitigation application is received on or near the 38th day before a foreclosure sale and whether borrowers are facing particular difficulties timely responding to servicers in this context. The Bureau reminds servicers that under § 1024.38(b)(1)(i), a servicer must maintain policies and procedures that are reasonably designed to ensure that the servicer can provide accurate and timely disclosures to a borrower as required by Regulation X's mortgage servicing rules, including § 1024.41, or other applicable law.

41(c)(2) Incomplete Loss Mitigation Application Evaluation

41(c)(2)(iii) Payment Forbearance

The Bureau is proposing to revise § 1024.41(c)(2)(iii) to permit servicers to offer short-term repayment plans based upon an evaluation of an incomplete loss mitigation application. Section 1024.41(c)(2) generally prohibits a servicer from evading the requirement to evaluate a complete loss mitigation application by offering a loss mitigation option based upon an evaluation of any information provided by a borrower in connection with an incomplete application. However, current § 1024.41(c)(2)(iii) offers an exception to this rule—it permits a servicer to offer a short-term payment forbearance program based upon an incomplete application.

The Bureau has received inquiries seeking clarification of whether § 1024.41(c)(2)(iii) also permits a servicer to offer a short-term repayment plan based upon an evaluation of an incomplete application. For the reasons explained below, the Bureau believes that it is appropriate, under certain conditions, to permit servicers to offer short-term repayment plans based upon an evaluation of an incomplete loss mitigation application.

[156] *See id.*

[157] 78 FR 10695, 10836 (Feb. 14, 2013).

In the Bureau's September 2013 Mortgage Final Rule, the Bureau explained that permitting a servicer to offer a short-term payment forbearance program based upon an incomplete application was an appropriate exception to § 1024.41(c)(1)'s general requirement that a borrower should be evaluated for all available loss mitigation options at once, and only after a servicer receives a complete application.[158] The Bureau determined that allowing the short-term payment forbearance exception under § 1024.41(c)(2)(iii) would, with appropriate safeguards, benefit borrowers by permitting a relatively efficient solution to a temporary hardship without exhausting a borrower's protections under § 1024.41.[159] The Bureau believes that the same considerations apply to short-term repayment plans and therefore proposes to expressly include them under § 1024.41(c)(2)(iii).[160]

Therefore, the Bureau is proposing to amend § 1024.41(c)(2)(iii) to permit servicers to offer a short-term payment forbearance program or a short-term repayment plan to a borrower based upon an evaluation of an incomplete loss mitigation application. Proposed § 1024.41(c)(2)(iii) requires that the short-term payment forbearance program or repayment plan must be provided to the borrower in writing before the program or plan begins and must clearly specify the payment terms and duration. As is already the case where a servicer offers a short-term payment forbearance program, proposed § 1024.41(c)(2)(iii) requires that a servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, and shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of a payment forbearance program or repayment plan offered under § 1024.41(c)(2)(iii). Finally, proposed § 1024.41(c)(2)(iii) provides that a servicer may offer a short-term forbearance program in conjunction with a short-term repayment plan.

As with short-term payment forbearance programs, the Bureau believes that permitting a servicer to offer a short-term repayment plan based upon an evaluation of an incomplete application affords a servicer flexibility to address a borrower's temporary hardship in a relatively efficient manner.[161] The Bureau further believes that permitting a servicer to offer a short-term repayment plan based on an evaluation of an incomplete application could reduce the burden on both servicers and some borrowers by eliminating the need to gather many borrower documents that may be necessary to complete an application under § 1024.41(b)(1). Further, the Bureau believes that permitting a servicer to offer a short-term repayment plan based upon an evaluation of an incomplete application provides borrowers a way to address a temporary hardship without exhausting protections provided under § 1024.41 that begin once an application becomes complete.[162]

However, as the Bureau discussed in the September 2013 Mortgage Final Rule, permitting a servicer to offer loss mitigation based upon an evaluation of an incomplete application could potentially have adverse consequences for a borrower.[163] If a servicer were to inappropriately divert a borrower into a loss mitigation program based upon an incomplete application, it could exacerbate a delinquency and put the borrower at risk of losing the opportunity to complete the application and receive the full protections of § 1024.41.[164] Also, a borrower who is offered a short-term payment forbearance program or short-term repayment plan under proposed § 1024.41(c)(2)(iii) may be experiencing a hardship for which other, longer-term loss mitigation solutions might be more appropriate for a particular borrower's circumstance.

To mitigate these concerns, the Bureau is proposing to apply comments 41(c)(2)(iii)–2 and 41(c)(2)(iii)–3, which currently mitigate against such risks for short-term payment forbearance programs, to short-term repayment plans. Proposed comment 41(c)(2)(iii)–2 explains that, where a servicer offers a short-term payment forbearance program or a short-term repayment plan based on the evaluation of an incomplete application, the application remains subject to the other obligations in § 1024.41. These obligations include reviewing the application for completeness under § 1024.41(b)(2), exercising reasonable diligence under § 1024.41(b)(1), and providing the borrower with the § 1024.41(b)(2)(i)(B) notice acknowledging the servicer's receipt of the application and indicating that the servicer has determined that the application is incomplete. Proposed comment 41(c)(2)(iii)–3 explains that, even if a servicer offers a short-term payment forbearance program or a short-term repayment plan based on an evaluation of an incomplete loss mitigation application, the servicer must comply with all the requirements in § 1024.41 if the borrower completes the loss mitigation application.

The Bureau believes that the proposed revisions to comments 41(c)(2)(iii)–2 and 3 would help ensure that servicers do not offer short-term repayment plans based on incomplete loss mitigation applications to evade their obligations under § 1024.41. As the Bureau explained in the September 2013 Mortgage Final Rule, these protections help preserve a borrower's option to submit a complete application and be considered for a long-term loss mitigation solution where appropriate.[165]

To further mitigate the risks associated with permitting a servicer to offer a loss mitigation option based upon an evaluation of an incomplete application, the Bureau also is proposing to revise comment 41(b)(1)–4.iii to clarify a servicer's obligation to exercise reasonable diligence during a short-term payment forbearance program or short-term repayment plan. Proposed comment 41(b)(1)–4.iii provides that reasonable diligence under § 1024.41(b)(1) requires a servicer to notify a borrower when a short-term repayment plan is being offered based on an evaluation of an incomplete application. The servicer must notify the borrower that the borrower has the option of completing the application to receive a full evaluation of all loss mitigation options available to the borrower. Proposed comment 41(b)(1)–4.iii. further explains that, if a servicer provides such a notification, the borrower remains in compliance with a payment forbearance program or repayment plan, and the borrower does

[158] 78 FR 60381, 60398–400 (Oct. 1, 2013).

[159] *See id.* at 60399–400 (discussing the rationale for permitting short-term forbearance programs based upon the evaluation of an incomplete application).

[160] The Bureau appreciates that some industry participants consider repayment plans to be a form of forbearance. In order to avoid confusion regarding the definition of a forbearance program, proposed § 1024.41(c)(2)(iii) explicitly differentiates between the two. *See* note 166, *infra,* (clarifying the primary distinction between the definitions of short-term repayment plans and short-term payment forbearance programs).

[161] *See* 78 FR 60381, 60399–400 (Oct. 1, 2013) (discussing the rationale for permitting short-term forbearance programs based on an evaluation of an incomplete application).

[162] *See* 78 FR 39901, 39913 (July 2, 2013) (discussing similar considerations about expending the protections of § 1024.41 in context of short-term paymentforbearance programs).

[163] 78 FR 60381, 60399–400 (Oct. 1, 2013).

[164] *See id.*

[165] *Id.* at 603400 (discussing similar considerations in context of short-term payment forbearance programs offered under § 1024.41(c)(2)(iii)).

not request further assistance, the servicer may suspend reasonable diligence efforts while the borrower remains in compliance with the short-term repayment plan and does not request further assistance, but that, if the borrower remains delinquent near the end of the program or plan, the servicer should contact the borrower near the end of the forbearance or repayment period to determine if the borrower wishes to complete the application and proceed with a full loss mitigation evaluation. The Bureau believes that permitting the servicer to suspend document collection while a borrower is performing under a short-term repayment plan will limit borrower confusion and avoid unnecessary servicer burden, but that continued servicer engagement at the outset and near the end of the plan will help the borrower make well-informed decisions about the mortgage loan.

As noted above, the Bureau is proposing to amend § 1024.41(c)(2)(iii) to require that a short-term payment forbearance program or a short-term repayment plan must be provided to the borrower in writing before the program or plan begins and must clearly specify the payment terms and duration. The Bureau believes that requiring a servicer to send the borrower the terms of any loss mitigation option offered under proposed § 1024.41(c)(2)(iii) in writing before the program or plan begins will reduce misunderstandings between the servicer and the borrower regarding the terms and existence of a payment forbearance program or repayment plan. The Bureau understands that, in the past, such misunderstandings sometimes resulted in the borrower making incorrect payments, causing the delinquency to grow in size and duration.

The Bureau is also proposing a change to comment 41(c)(2)(iii)–1 to clarify that § 1024.41(c)(2)(iii) no longer applies exclusively to short-term payment forbearance programs. As amended, the first sentence of comment 41(c)(2)(iii)–1 states that the exemption under § 1024.41(c)(2)(iii) applies to, ''among other things,'' short-term payment forbearance programs. The comment would otherwise remain in its current form.

Definition of ''Short-Term Repayment Plan''

The Bureau is also proposing to add comment 41(c)(2)(iii)–4 to define a repayment plan as a loss mitigation option pursuant to which a servicer allows a borrower to repay past due payments over a specified period of time until the mortgage loan account is current.[166] Under this definition, only those plans that would cure a delinquency would be permitted under § 1024.41(c)(2)(iii). The Bureau believes that this is essential to protect a borrower because a borrower generally remains delinquent during a repayment plan—and the longer a delinquency exists without a complete application, the fewer borrower protections § 1024.41 is likely to provide if the borrower later completes the application. By requiring the plan to cure the borrower's delinquency if successfully completed, the Bureau seeks to prohibit a servicer from offering a repayment plan that would likely leave the borrower in a worse position.

Proposed comment 41(c)(2)(iii)–4 defines short-term repayment plans to include no more than three months of payments due and a repayment period lasting no more than six months. The Bureau believes that the definition of a short-term repayment plan should limit both the maximum amount of the arrearage that may be included in the plan and the maximum time of repayment. The Bureau believes that these limitations will help protect borrowers who accept offers for short-term repayment plans by increasing the likelihood that the borrowers will successfully complete the plans. The Bureau believes that a borrower is less likely to complete a repayment plan that accounts for a larger delinquency; and that longer-term plans may be more difficult for borrowers to complete successfully. The Bureau also believes that borrowers may not be served as well by extended repayment plans—the longer the repayment period lasts, the longer the delinquency remains and the longer negative credit reporting continues.

Additionally, a borrower who accepts a short-term repayment plan based upon an evaluation of an incomplete application risks losing the protections of § 1024.41 depending on whether and when the borrower completes the application. Generally, the longer a borrower's application remains incomplete, the greater the risk that the borrower will enjoy fewer protections under § 1024.41. For example, under § 1024.41(f)(1)(i), a servicer may not make the first notice or filing for any judicial or non-judicial foreclosure process until a borrower's mortgage loan obligation is more than 120 days delinquent. Similarly, several protections under § 1024.41 only apply if a borrower completes the loss mitigation application a certain number of days before a foreclosure sale, including the evaluation timelines under § 1024.41(c)(1), foreclosure protections under § 1024.41(g), and appeal rights under § 1024.41(h), among others. Therefore, the longer a short-term repayment plan offered under § 1024.41(c)(2)(iii) lasts, the greater the risk that a borrower will lose important protections under § 1024.41 if the borrower fails to complete the plan. Consequently, the Bureau is proposing, in the context of incomplete applications, to limit the duration of a short-term repayment plan offered based upon an incomplete application, require that the plan bring the borrower current, and prohibit servicers from proceeding to foreclosure while the borrower is performing on the short-term repayment plan. The Bureau seeks comment on the adequacy of these protections for borrowers.

The Bureau also solicits comment on the appropriate maximum duration for short-term repayment plans offered under § 1024.41(c)(2)(iii). The Bureau notes that proposed comment 41(c)(2)(iii)–2 does not preclude a servicer from offering a longer-term repayment plan; it merely prohibits the servicer from doing so based upon an evaluation of an incomplete application.

41(c)(2)(iv) Facially Complete Application

The Bureau is proposing to revise § 1024.41(c)(2)(iv). First, the Bureau is proposing a minor technical change to § 1024.41(c)(2)(iv) to correct an erroneous reference to § 1026.41(b)(2)(i)(B), which should instead be a reference to § 1024.41(b)(2)(i)(B). Second, the Bureau is proposing to amend § 1024.41(c)(2)(iv) to provide that an application is facially complete if a servicer is required under proposed § 1024.41(c)(3) to send the borrower a notice of complete application.

Currently, § 1024.41(c)(2)(iv) provides that, if a borrower submits all the missing documents and information as stated in the notice required pursuant to § 1024.41(b)(2)(i)(B), or no additional information is requested in such notice, an application shall be considered facially complete. Section 1024.41(c)(2)(iv) provides a series of protections that apply once an application is facially complete. First, if the servicer later discovers that additional information or corrections are required to complete the application, the servicer must promptly

[166] The proposed definition of ''short-term repayment plan'' would address repayment of already existing arrearage, in contrast to the definition of a payment forbearance program (defined under comment 41(c)(2)(iii)–1), which allows a borrower to forgo making certain payments or portions of payments for a period of time.

request the missing information or corrected documents and treat the application as complete for purposes of the dual tracking protections under § 1024.41(f)(2) and (g) until the borrower is given a reasonable opportunity to complete the application. If the borrower completes the application within this period, § 1024.41(c)(2)(iv) also requires a servicer to consider the application as complete as of the date it was facially complete for the purposes of § 1024.41(d), (e), (f)(2), (g), and (h),[167] and as of the date the application was actually complete for the purposes of § 1024.41(c).[168]

As explained in the section-by-section analysis of § 1024.41(c)(3), proposed § 1024.41(c)(3)(i) requires a servicer to provide a written notice informing the borrower, among other things, that the application is complete, the date the application became complete, and that the servicer expects to complete its evaluation within 30 days of the date it received the complete application. The Bureau believes that this notice of complete application would ensure that borrowers are informed of the next steps in the loss mitigation evaluation process and enable borrowers to make better-informed decisions about their finances. The Bureau also believes that this notice would limit confusion for both servicers and borrowers in determining which protections apply under § 1024.41, as many of those protections begin when the application becomes complete. However, the Bureau recognizes that, in certain circumstances, servicers might require additional documents or information from a borrower after sending a notice of complete application under proposed § 1024.41(c)(3)(i). For example, a servicer might require additional information after learning that a borrower has a source of income that the servicer first learned about while reviewing the complete application. To clarify the status of an application in this circumstance, the Bureau is proposing to provide expressly that the facially complete provision applies to an application for which a servicer has provided the notice of complete application under proposed § 1024.41(c)(3)(i).

Proposed § 1024.41(c)(2)(iv) states that a loss mitigation application shall be considered facially complete when a borrower submits all the missing documents and information as stated in the notice required under § 1024.41(b)(2)(i)(B), no additional information is requested in such notice, or when the servicer is required under § 1024.41(c)(3) to send the borrower a notice of complete application. Proposed § 1024.41(c)(iv) provides the identical protections as does current § 1024.41(c)(2)(iv). However, if a borrower timely completes an application after a servicer requests additional information or corrections to a previously submitted document, proposed § 1024.41(c)(iv) requires the application be treated as complete as of as of the date it *first became* facially complete for the purposes of § 1024.41(d), (e), (f)(2), (g), and (h), and as of the date the application was actually complete for the purposes of § 1024.41(c).

The Bureau believes that these proposed amendments would provide both borrowers and servicers with certainty about whether and when various protections apply under § 1024.41 in the circumstance where a servicer requires additional information for an application that the borrower previously completed. The Bureau also believes that these proposed amendments are appropriate to make clear that a borrower who has been informed that the application is complete will not lose protections if the servicer subsequently determines that it needs additional information. Finally, the Bureau believes that ensuring that many of a borrower's protections under § 1024.41 continue to apply will encourage servicers to efficiently process loss mitigation applications, which will reduce unnecessary delay in completing the evaluation.

41(c)(3) Notice of Complete Application

The Bureau is proposing to require a servicer to provide a written notice of complete application under new § 1024.41(c)(3).

The Bureau has learned from consumer advocacy groups that, during the loss mitigation application process, borrowers are frequently uncertain about whether an application is complete. Consumer advocacy groups and servicers inform the Bureau that, after a borrower submits documents and information that a servicer requests to complete an application, servicers often require the borrower to submit additional information or corrected versions of previously submitted documents several times during the application process, both before and after an application becomes complete. However, § 1024.41 currently requires a servicer to notify a borrower that an application is complete only if this is the case when the servicer provides the notice acknowledging receipt of an application under § 1024.41(b)(2)(i)(B). The Bureau understands from outreach efforts that applications are rarely complete at this stage, so many borrowers who complete an application might not receive notice that they have done so.

The Bureau is proposing to add § 1024.41(c)(3)(i) to require a servicer to provide a borrower a written notice, including specific information, promptly upon receiving the borrower's complete application. The notice must inform the borrower that the application is complete; the date the servicer received the complete application; whether a foreclosure sale was scheduled as of the date the servicer received the complete application and, if so, the date of that scheduled sale; and the date the borrower's foreclosure protections began under § 1024.41(f)(2) and (g) as applicable, with a concise description of those protections. The notice must also include a statement that the servicer expects to complete its evaluation within 30 days of the date it received the complete application and a statement that, although the application is complete, the borrower may need to submit additional information at a later date if the servicer determines that it is necessary. Finally, the notice must inform the borrower, if applicable, that the borrower will have the opportunity to appeal the servicer's determination to deny the borrower for any trial or permanent loan modification under § 1024.41(h).

Proposed § 1024.41(c)(3)(ii) provides that a servicer is not required to provide the notice of complete application in three circumstances: if the servicer has already notified the borrower under § 1024.41(b)(2)(i)(B) that the application is complete and the servicer has not subsequently requested additional information or a corrected version of a previously submitted document from the borrower to complete the application; the application was not complete or facially complete more than 37 days before a foreclosure sale; or the servicer has already provided a notice approving or denying the application under § 1024.41(c)(1)(ii).

The Bureau is also proposing commentary to explain certain aspects of the notice requirement under proposed § 1024.41(c)(3). Proposed comment 41(c)(3)(i)–1 explains that, generally, a servicer complies with the requirement to provide a borrower with written notice promptly under

[167] Sections 1024.41(d), (e), (f)(2), (g), and (h) respectively provide borrowers protections relating to a servicer's denial of a loan modification, the amount of time a borrower will have to respond to an offer of a loss mitigation option, dual tracking, and the right to appeal.

[168] Under § 1024.41(c) provides that a servicer's evaluation of a complete application is subject to a specific timeline and various other requirements.

§ 1024.41(c)(3)(i) by providing the written notice within five days of receiving a complete application from the borrower. Proposed comment 41(c)(3)(i)–2 states that the date the borrower's protections began under § 1024.41(f)(2) and (g) must be the date on which the application became either complete or facially complete, as applicable. Finally, proposed comment 41(c)(3)(i)–3 explains that § 1024.41(c)(3)(i) requires a servicer to send a notification, subject to the exceptions under § 1024.41(c)(3)(ii), every time a loss mitigation application becomes complete. That proposed comment further clarifies that if, after providing a notice under § 1024.41(c)(3)(i), a servicer requests additional information or corrections to a previously submitted document required to complete the application in accordance with § 1024.41(c)(2)(iv), the servicer might have to provide an additional notice under § 1024.41(c)(3)(i) if the borrower submits the additional information or corrected documents to complete the application.

The Bureau believes that requiring servicers to provide borrowers with the information in the notice of complete application under proposed § 1024.41(c)(3)(i) would ensure that borrowers are informed of the next steps in the evaluation process. The Bureau believes that receiving notice of when to expect an offer or denial will permit the borrower to make better-informed decisions. Additionally, the Bureau believes requiring, as does proposed § 1024.41(c)(3)(i)(B), that the notice of complete application indicate the date that the servicer received a complete application would limit confusion for both servicers and borrowers in determining which protections apply under § 1024.41. Many of those protections begin when an application becomes complete, and the Bureau believes that borrowers will better understand those protections if the notice provides the date of completion. The Bureau also believes that § 1024.41(c)(3)(i)(F)'s requirement that the notice of complete application inform borrowers that they may need additional or updated information from the borrower after determining that the application was complete will reduce borrower confusion when and if the servicer requests such additional information.

As noted above, proposed § 1024.41(c)(3)(i) requires a servicer to provide the notice of complete application promptly upon receiving a complete application, and proposed comment 41(c)(3)(i)–1 explains that a servicer generally acts promptly by providing the written notice within five days of receiving a complete application. The Bureau believes that, generally, a servicer should be able to provide the notice required under proposed § 1024.41(c)(3)(i) within five days of receiving the complete loss mitigation application from the borrower. However, the Bureau recognizes that servicers might sometimes require more than five days to determine whether a loss mitigation application is complete. The Bureau believes that the proposed comment provides servicers with sufficient flexibility to make an accurate determination but prevents undue delay. The Bureau believes that this approach is preferable to a stricter requirement that the notice must be provided within a specific number of days, without exception. The Bureau seeks comment on whether proposed § 1024.41(c)(3)(i) should provide such a stricter timing requirement and, if so, whether five days is an appropriate general standard of promptness for purposes of § 1024.41(c)(3)(i).

Also as noted above, proposed comment 41(c)(3)(i)–3 clarifies that § 1024.41(c)(3)(i) requires a servicer to send a notification every time a loss mitigation becomes complete during a single loss mitigation application process. The proposed comment includes an example describing a situation in which an application might become complete more than once because the servicer requests additional information or corrected documents after initially determining that the application was complete. Section 1024.41(c)(2)(iv) requires a servicer who has received an application that the servicer must treat as facially complete, and later discovers that additional information or corrections to a previously submitted document are required to complete the application, to request this information promptly. The Bureau believes that requiring a servicer to send an additional notification when the borrower submits additional information or corrected documents requested by the servicer would help ensure that a borrower has accurate and current information about the status of the loan and when to expect a servicer to complete the evaluation, which will help the borrower plan for the future.

The Bureau notes that § 1024.41(c)(2)(iv) was intended to address a limited set of circumstances where a servicer, subsequent to receiving the facially complete application, discovers that it requires additional information that was not previously requested by the servicer or corrections to a previously submitted document. The Bureau believes that repeated requests for additional documents and information by servicers could hamper borrower understanding of the loss mitigation process and impede borrower protections under the rules. To determine whether further rulemaking or guidance is required in this area, the Bureau will continue to monitor the market to evaluate whether and to what extent servicers are complying with § 1024.41(c)(2)(iv) by requesting such additional information or corrected documents only when such information is required.

The Bureau is aware that servicers may incur some costs in providing the notice required under proposed § 1024.41(c)(3). However, the Bureau notes that several servicers informed the Bureau during outreach efforts that they already provide a similar notice informing the borrower that an application is complete. For these servicers, proposed § 1024.41(c)(3) would likely impose relatively little additional burden, limited to ensuring that the notices contain the requisite disclosures. For other servicers, the Bureau believes that the benefits to the borrower outweigh those costs associated with providing the notice, especially in light of the difficulty that borrowers have had in the past in obtaining useful information from servicers during the loss mitigation application process.[169]

Moreover, the Bureau notes that four of the disclosures required under proposed § 1024.41(c)(3)(i) would contain standardized language for every borrower, and servicers currently must be able to identify the information required in the remaining disclosures (the date the application is complete, that a foreclosure sale is scheduled, the date of that sale, and the date on which the borrower's foreclosure protections began) in order to comply with various requirements under §§ 1024.40 and 1024.41. The Bureau believes that servicers may already be tracking this information in order to monitor compliance with the Mortgage Servicing Rules. Thus, providing the notice should not significantly burden servicers.

Finally, as described above, the exceptions under proposed § 1024.41(c)(3)(ii) provide that a servicer is not required to provide the notice of complete application in three circumstances. These exceptions are as follows: if the servicer has already

[169] *See* 77 FR 57199, 57204 (Sept. 17, 2012) (discussing servicer failures in the loss mitigation application process).

notified the borrower under § 1024.41(b)(2)(i)(B) that the application is complete and the servicer has since requested no additional information or a corrected version of a previously submitted document from the borrower; if the application was not complete or facially complete more than 37 days before a foreclosure sale; or if the servicer has already provided a notice approving or denying the application under § 1024.41(c)(1)(ii). These exceptions are intended to avoid unnecessary burden on servicers and prevent borrower confusion due to the receipt of conflicting or redundant information.

The Bureau seeks comment on whether the notice of complete application required under proposed § 1024.41(c)(3) should include additional or different disclosures than those listed above.

41(c)(4) Information Not in the Borrower's Control

The Bureau is proposing to amend § 1024.41(c)(1) and add § 1024.41(c)(4) to address a servicer's obligations with respect to information not in the borrower's control that the servicer requires to determine which loss mitigation options, if any, it will offer a borrower.

Under current § 1024.41(c)(1), if a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, the servicer shall, within 30 days of receipt, evaluate the borrower for all loss mitigation options available to the borrower and provide the notice required under § 1024.41(c)(1)(ii). A complete loss mitigation application includes all the information the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower.[170] Thus, a loss mitigation application may be complete notwithstanding that additional information may be required by a servicer that is not in the control of the borrower.[171]

As noted in the section-by-section analysis of § 1024.38(b)(2)(vi), the Bureau has learned through outreach that servicers do not always obtain necessary information not in the borrower's control in time to determine which loss mitigation options, if any, to offer a borrower within 30 days of receiving a complete loss mitigation application, as § 1024.41(c)(1) requires. For example, servicers are occasionally unable to obtain homeowner association payoff information or approval from the loan owner, investor, or mortgage insurance company within 30 days after of receiving a complete application. Servicers and Federal agencies have informed the Bureau that such delay sometimes results from the servicer's failure to request the information promptly, and it sometimes results because the party with the information delays in providing it.

Several servicers have expressed uncertainty about how to proceed in this circumstance. The Bureau understands that servicers have adopted different practices when this occurs. Some servicers have informed the Bureau that they exceed the 30-day evaluation timeframe in § 1024.41(c)(1) and wait to receive the third-party information before making any decision on the application and sending the notice required by § 1024.41(c)(1)(ii). One servicer informed the Bureau that it sends a denial notice to borrowers but also informs them that the servicer will reevaluate the application upon receipt of the third-party information. Although both of these solutions do not appear to preclude a borrower from receiving loss mitigation, neither provides the borrower with clear information about the status of the application or whether the servicer will offer any loss mitigation options to the borrower.

The Bureau is concerned that the absence of clear information about the status of the loss mitigation application may cause borrowers to abandon their pursuit of loss mitigation, or to be confused about their loss mitigation options and how they may pursue their rights under § 1024.41. A delay in the evaluation of a borrower's complete loss mitigation application may cause the borrower's hardship to worsen and thereby reduce the likelihood that the servicer will offer the borrower a loss mitigation option, among other consumer harms.

To address these concerns, the Bureau is proposing amendments to § 1024.41 that would require servicers to exercise reasonable diligence to gather necessary information not in the borrower's control and would provide guidance to servicers to address situations where another party's delay in providing such information prevents a servicer from completing the loss mitigation evaluation within 30 days of receiving a complete application.

First, the Bureau is proposing to amend § 1024.41(c)(1) to provide that proposed § 1024.41(c)(4)(ii) offers an exception to the general requirement that a servicer must evaluate a complete loss mitigation application received more than 37 days before a foreclosure sale within 30 days of receiving it from the borrower.

Second, under proposed § 1024.41(c)(4)(i), if a servicer requires documents or information not in the borrower's control, a servicer must exercise reasonable diligence in obtaining such documents or information. Proposed § 1024.41(c)(4)(ii)(A) prohibits a servicer from denying a borrower's complete application solely because the servicer has not received documents or information not in the borrower's control. In addition, proposed § 1024.41(c)(ii)(B) requires that if, 30 days after a complete loss mitigation application is received, a servicer is unable to determine which loss mitigation options, if any, it will offer the borrower because it lacks documents or information from a party other than the borrower or the servicer, the servicer must promptly provide the borrower a written notice stating the following: (1) That the servicer has not received documents or information not in the borrower's control that the servicer requires to determine which loss mitigation options, if any, the servicer will offer on behalf of the owner or assignee of the mortgage; (2) the specific documents or information that the servicer lacks; (3) the date on which the servicer first requested that documentation or information during the current loss mitigation application process; and (4) that the servicer will complete its evaluation of the borrower for all available loss mitigation options promptly upon receiving the documentation or information.

Finally, proposed § 1024.41(c)(4)(ii)(C) requires that, if a servicer is unable to determine which loss mitigation options, if any, to offer a borrower within 30 days of receiving a complete application due to lack of documents or information from a party other than the borrower or the servicer, upon receiving such documents or information, the servicer must promptly provide the borrower written notice stating the servicer's determination in accordance with § 1024.41(c)(1)(ii). Proposed comment 41(c)(4)(ii)(C)–1 clarifies that, in this circumstance, the servicer should not provide the borrower a written notice stating the servicer's determination until the servicer receives the documentation or information.

The Bureau is also proposing comments to explain a servicer's obligations under proposed § 1024.41(c)(4)(i)'s reasonable diligence standard with respect to gathering information not in the borrower's control. The proposed comments address a servicer's reasonable diligence obligations both upon receipt of a

[170] 12 CFR 1024.41(b)(1).

[171] *See* comment 41(b)(1)–5.

complete loss mitigation application and where a servicer has not received third-party information within 30 days of a complete application. First, proposed comment 41(c)(4)(i)–1 explains that a servicer must act with reasonable diligence to collect information not in the borrower's control that the servicer requires to determine which loss mitigation options, if any, it will offer the borrower. Proposed comments 41(c)(4)(i)–1.i and ii explain that a servicer must request such information from the appropriate person, at a minimum and without limitation: promptly upon determining that the servicer requires the documents or information to determine which loss mitigation options, if any, to offer the borrower; and, to the extent practicable, by a date that will enable the servicer to complete the evaluation within 30 days of receiving a complete application as set forth under § 1024.41(c)(1).

Second, proposed comment 41(c)(4)(i)–2 explains that, if a servicer has not received documents or information not in the borrower's control within 30 days of receiving a complete loss mitigation application, the servicer acts with reasonable diligence by attempting to obtain the documents or information from the appropriate person as quickly as possible. The Bureau notes that this standard might require a servicer to act with more immediate urgency to obtain the necessary third-party information than would the standard set forth in comment 41(c)(4)(ii)–1. The Bureau believes that this heightened standard is appropriate after the initial 30 days in order to keep the evaluation timeline as close as possible to the 30-day evaluation period under § 1024.41(c)(1). The Bureau believes that these proposed comments will result in shorter evaluation timelines by limiting servicer delay in the evaluation process.

The Bureau believes that proposed § 1024.41(c)(4)(ii)'s exception to the 30-day evaluation timeline should be narrowly tailored to avoid premature denials based solely on the absence of information not in the borrowers control, while requiring servicers to evaluate the complete application promptly upon receipt of such information. Proposed § 1024.41(c)(4)(ii) includes three provisions that would operate together to achieve these objectives.

First, proposed § 1024.41(c)(4)(ii)(A) prohibits a servicer from denying a complete application solely because the servicer has not received documents or information not in the borrower's control. The Bureau understands that third parties sometimes delay providing information that the servicer requires to determine which loss mitigation options, if any, to offer the borrower, notwithstanding a servicer's reasonable diligence in obtaining such information. However, the Bureau believes that a borrower's loss mitigation application should not be denied solely because a party other than the borrower or the servicer does not timely supply information that the servicer requires. Several servicers have informed the Bureau that they do not deny the borrower's application under this circumstance, and at least one industry trade association has encouraged the Bureau to expressly sanction this practice. The Bureau agrees that this standard would be appropriate in order to prevent the borrower from losing the opportunity for loss mitigation due solely to third-party delay.

Second, proposed § 1024.41(c)(4)(ii)(B) provides that if, 30 days after a complete application is received, the servicer is unable to make a determination as to which loss mitigation options, if any, it will offer to the borrower because the servicer lacks documents or information from a party other than the borrower or the servicer, the servicer must promptly provide a written notice to the borrower containing the disclosures listed above. The Bureau believes that the disclosures required by proposed § 1024.41(c)(4)(ii)(B) would help avoid borrower confusion in many cases where the evaluation of a loss mitigation application is delayed under § 1024.41(c)(4)(ii). For example, a borrower who had already received confirmation that the application was complete might be expecting a decision within 30 days, and without the notice required under proposed § 1024.41(c)(4)(ii)(B), the borrower might not receive subsequent notification regarding the status of the application prior to the servicer's decision on the application, even if there was significant delay due to the non-receipt of third-party information.

The Bureau believes that requiring a servicer to provide the disclosures in proposed § 1024.41(c)(4)(ii)(B) would reduce the burden on servicers associated with responding to a borrower's inquiries by providing greater clarity regarding the status of the application in this circumstance. The Bureau also believes that these disclosures would benefit both servicers and borrowers and promote compliance by making it easier for both parties to determine whether the servicer exercised reasonable diligence in obtaining third-party information as proposed § 1024.41(c)(4)(i) provides. Further, the Bureau intends for the disclosures to reduce the number of inquiries borrowers submit to servicers pertaining to application status. This would reduce servicer burden and improve communication between borrowers and servicers.

Third, proposed § 1024.41(c)(4)(ii)(C) provides that if, due to a lack of documents or information from a party other than the borrower or the servicer, a servicer is unable to determine which loss mitigation options, if any, to offer a borrower within 30 days of receiving the complete application, upon receiving such documents or information, the servicer must promptly provide the borrower a written notice stating the servicer's determination in accordance with § 1024.41(c)(1)(ii). The Bureau believes that requiring a servicer to determine promptly which loss mitigation options, if any, to offer the borrower upon receiving delayed documents or information from a party other than the borrower or the servicer and to provide the borrower written notice of the servicer's determination promptly will reduce delay and is consistent with industry practice.

Proposed comment 41(c)(4)(ii)–1 would clarify that the servicer must complete all possible steps in the evaluation process—including by taking all steps mandated by third-parties like mortgage insurance companies, guarantors, owners, or assignees—within 30 days of receiving a complete application, notwithstanding delay in receiving information from any third-party. The proposed comment would include the following clarifying example: if a servicer can determine a borrower's eligibility for all available loss mitigation options based upon the borrower's complete application subject only to approval from the mortgage insurance company, it must do so within 30 days of receiving the complete application notwithstanding the need to obtain such approval before offering any loss mitigation options to the borrower. The proposed comment is intended to prohibit a servicer from unnecessarily delaying the evaluation process because of delayed third-party information. The Bureau is concerned that this type of servicer delay would increase the risk that the borrower's documents would go stale, possibly delaying the evaluation further while the hardship worsens.

The Bureau notes that, while proposed § 1024.41(c)(4)(i) and (ii)(A) refer to ''information not in the borrower's control,'' proposed § 1024.41(c)(4)(ii)(B) and (C) refer only to ''information from a party other than

the borrower or the servicer.'' The Bureau believes that this distinction is appropriate given the different requirements that the proposed provisions would impose on servicers. Proposed § 1024.41(c)(4)(i) and (ii)(A), respectively, require a servicer to exercise reasonable diligence in obtaining any non-borrower information, and not deny the borrower solely because the servicer has not received such information. The Bureau believes that these protections are appropriate regardless of whether the missing information is in the control of the servicer or in the control of a third-party in order to ensure fair and efficient evaluation. However, proposed § 1024.41(c)(4)(ii)(B) and (C) offer an exception to the 30-day evaluation timeline provided under § 1024.41(c)(1). The Bureau believes that such an exception should exist only when the servicer itself lacks control over the information and must seek it from a third-party over which the servicer does not have control. The Bureau therefore proposes to limit the extension of the evaluation timeline to circumstances in which neither the servicer nor the borrower is in control of the necessary information. Since a servicer can generally access information in its own control at any time, the Bureau believes that it would be inappropriate to offer an exception to the 30-day evaluation timeline required under § 1024.41(c)(1) based upon a servicer's delay in doing so.

The Bureau seeks comment to better understand the cause of delay in servicers receiving non-borrower information necessary to determine which loss mitigation options, if any, to offer a borrower. Specifically, the Bureau seeks comment on how servicers and third-parties contribute to the delay, as well as which categories of non-borrower information most frequently result in delay. Finally, the Bureau seeks comment on whether to limit the amount of time that a servicer must exercise reasonable diligence in attempting to obtain information not in the borrower's control.

41(f) Prohibition on Foreclosure Referral

41(f)(1) Pre-foreclosure Review Period

The Bureau is proposing to amend § 1024.41(f)(1)(iii) so that the prohibition on referral to foreclosure until after the 120th day of delinquency would not apply when a servicer is joining the foreclosure action of a senior lienholder. Although current § 1024.41(f)(1) generally prohibits a servicer from making the first notice or filing required by applicable law to begin the foreclosure process unless a borrower's mortgage loan obligation is more than 120 days delinquent, the rule includes an exemption allowing a servicer to make a first notice or filing when the servicer is joining the foreclosure action of a subordinate lienholder. The proposed amendment to § 1024.41(f)(1)(iii) would similarly allow a servicer to make the first notice or filing before the loan obligation is 120 days delinquent when the servicer is joining the foreclosure action of a senior lienholder.

In the September 2013 Mortgage Final Rule, the Bureau decided that, if a borrower is current on a mortgage secured by a senior lien but is being foreclosed on by a subordinate lienholder, it would be appropriate for the servicer of the mortgage secured by the senior lien to join the foreclosure action, even though the borrower may not be delinquent on the mortgage secured by the senior lien, because the first notice or filing would not be based upon a borrower's delinquency in this circumstance.[172] The Bureau did not then consider the situation in which the servicer is joining the foreclosure action of a senior lienholder, and servicers have since asked the Bureau why the same rule does not apply in that situation. The Bureau believes that the same rationale makes it appropriate to expand the current exemption to circumstances in which the servicer is joining the foreclosure action of a senior lienholder. The Bureau believes that it would be appropriate for the servicer of the mortgage secured by the subordinate lien to join the foreclosure action, even though the borrower may not be delinquent on the mortgage secured by the subordinate lien, because the first notice or filing would not be based upon a borrower's delinquency with respect to the serviced loan. Further, expanding the exemption seems to present only minimal borrower protection concerns because the borrower would already be facing a foreclosure action on the property.

The Bureau believes that the proposed rule would be helpful to servicers by making clear that the servicer of a subordinate lien may participate in the existing foreclosure action on a senior lien. The servicer's participation in the foreclosure action of a senior lienholder may allow the servicer to represent the servicer's interests in the existing foreclosure action more fully under some circumstances. Additionally, it may sometimes be necessary, when the same servicer is responsible for both the senior and subordinate lien, for the servicer to initiate foreclosure on the subordinate lien as part of the foreclosure action on the senior lien, in order to clear title on the property for the subsequent owner.[173]

41(g) Prohibition on Foreclosure Sale

The Bureau is proposing to revise comments 41(g)-1 and (g)-3 and add new comment 41(g)-5. Together these changes would clarify servicers' obligations with respect to § 1024.41(g)'s prohibition against moving for foreclosure judgment or order of sale, or conducting a sale, during the evaluation of a complete loss mitigation application received more than 37 days before a foreclosure sale. The Bureau is also proposing to add commentary to clarify the requirements for policies and procedures under § 1024.38(b)(3)(iii) as the requirements relate to the prohibition under § 1024.41(g).

Under § 1024.41(g), if a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing, but more than 37 days before a foreclosure sale, the servicer is prohibited from moving for foreclosure judgment or order of sale, or conducting a foreclosure sale, unless: (1) The servicer has sent the borrower a notice pursuant to § 1024.41(c)(1)(ii) that the borrower is not eligible for any loss mitigation option and the appeal process under § 1024.41(h) is not applicable, the borrower has not requested an appeal within 14 days, or the servicer has denied the borrower's appeal; (2) the borrower rejects all loss mitigation options offered by the servicer; or (3) the borrower fails to perform under an agreement on a loss mitigation option.

Current comment 41(g)-1 explains that the prohibition on a servicer moving for judgment or order of sale includes making a dispositive motion for foreclosure judgment, such as a motion for default judgment, judgment on the pleadings, or summary judgment, which may directly result in a judgment of foreclosure or order of sale. The

[172] *See* 78 FR 60381, 60406 (Oct. 1, 2013).

[173] If the servicer in this circumstance does not initiate foreclosure on the subordinate lien, the servicer may be deemed not to have joined the subordinate lienholder in the foreclosure action, causing the subordinate lien to remain on the property after foreclosure. *See, e.g., Deutsche Bank Natl. Trust Co.* v. *Mark Dill Plumbing Co.,* 903 NE.2d 166, 169 (Ind. Ct. App. 2009), *aff'd on rehearing,* 908 NE. 2d 1273 (Ind. Ct. App. 2009) (''Foreclosure by a senior mortgagee does not affect the rights of a junior lienholder who was not made a party to the foreclosure action.''); *Portland Mort. Co.* v. *Creditors Protective Ass'n,* 262 P.2d 918, 922 (Or. 1953) (''The omitted junior lienholder is in the same position as if no foreclosure had ever taken place, and he has the same rights, no more and no less, which he had before the foreclosure suit was commenced.'').

comment further explains that a servicer that has made a dispositive motion before receiving a complete loss mitigation application has not moved for a foreclosure judgment or order of sale if the servicer takes reasonable steps to avoid a ruling on such motion or issuance of such order prior to completing the procedures required by § 1024.41, notwithstanding whether any such step successfully avoids a ruling on a dispositive motion or issuance of an order of sale. Comment 41(g)-2 provides that § 1024.41(g) does not prevent a servicer from proceeding with any steps in the foreclosure process, so long as any such steps do not cause or directly result in the issuance of a foreclosure judgment or order of sale, or the conduct of a foreclosure sale, in violation of § 1024.41. Comment 41(g)-3 explains that a servicer is responsible for promptly instructing foreclosure counsel retained by the servicer not to proceed with filing for foreclosure judgment or order of sale, or to conduct a foreclosure sale, in violation of § 1024.41(g), when a servicer has a received a complete loss mitigation application. Such instructions may include instructing counsel to move for continuance with respect to the deadline for filing a dispositive motion.[174]

Section 1024.41(g)'s prohibition applies to two distinct types of steps in the foreclosure process: *moving* for judgment or an order of sale and *conducting* a foreclosure sale. A servicer's obligations under § 1024.41(g) will vary depending on whether the foreclosure is judicial or non-judicial. If the applicable foreclosure procedure is non-judicial and does not require any court proceeding or order, then there is only one step in the foreclosure process addressed by § 1024.41(g)—conducting the sale during a pending loss mitigation evaluation. However, in a judicial foreclosure proceeding, a servicer must comply with both the prohibition against making or proceeding on a dispositive motion and the prohibition against conducting the foreclosure sale.

The Bureau proposed § 1024.41(g) in the 2012 RESPA Servicing Proposal, after the mortgage crisis had revealed that servicers often ''were ill-equipped to handle the high volumes of delinquent mortgages, loan modification requests, and foreclosures they were required to process.''[175] The Bureau noted that evaluations of mortgage servicer practices had found that servicers failed to properly structure and manage third-party vendor relationships and noted that the failures had ''manifested in significant harms for borrowers, including imposing unwarranted fees on borrowers and harms relating to so-called 'dual tracking' from miscommunications between service providers and servicer loss mitigation personnel.''[176] The Bureau also noted that, even before the mortgage crisis, servicers may have had ''financial incentives to foreclose rather than engage in loss mitigation.''[177] The Bureau stated that one of the main goals in proposing § 1024.41 was prohibiting completion of the foreclosure process during a pending evaluation of a borrower's loss mitigation application and that the prohibition would ''eliminate the clearest harms on borrowers resulting from servicers pursuing loss mitigation and foreclosure proceedings concurrently.''[178]

In adopting § 1024.41(g) in the 2013 RESPA Servicing Final Rule, the Bureau included moving for judgment or order of sale in the foreclosure prohibition. The Bureau explained that the rule restricted '''dual tracking,' where a servicer is simultaneously evaluating a consumer for loan modifications or other alternatives at the same time that it prepares to foreclose on the property.''[179] The Bureau did not believe that § 1024.41(g) would have a substantial impact on expected foreclosure timelines separate and apart from current market practices. However, the Bureau also believed that preventing the worst harms of dual-tracking would justify some disruption of foreclosure timelines.[180]

Since the Mortgage Servicing Rules went into effect, however, consumers have not always received the protections intended by § 1024.41(g). For instance, the Bureau has received reports that counsel retained by servicers to conduct the foreclosure proceeding lack current and accurate information about the completion of borrowers' loss mitigation applications. As a result, foreclosure counsel may not take adequate steps to avoid a judgment or order of sale and may fail to seek the delay or continuance of a sale when necessary to provide adequate time for the servicer to evaluate the loss mitigation application. In extreme cases, the Bureau has heard, foreclosure counsel may not represent accurately to the court the status of the loss mitigation application. Further, the Bureau has received reports that, even when servicers' foreclosure counsel take some steps to avoid a judgment or sale, they may fail to impress upon courts the significance of § 1024.41(g)'s prohibition. All of these failures to act in accordance with § 1024.41(g)'s requirements may result in the completion of foreclosure sales while the servicer is evaluating a borrower's complete loss mitigation application.

The Bureau has received inquiries concerning what steps a servicer must take to comply with § 1024.41(g) where a court orders a foreclosure sale date that does not afford sufficient time for the servicer to complete the evaluation process required by § 1024.41.[181] The Bureau has learned that some courts are ruling on a pending dispositive motion and setting a date for the foreclosure sale, despite the servicer's attempts through counsel to delay the ruling or order. In many cases, the initially scheduled sale date may not provide the servicer adequate time to complete the loss mitigation evaluation and appeals process. Servicers indicate that in some instances courts are requiring that the foreclosure continue to a completed sale even when review of a complete loss mitigation application is underway. Media accounts as well as reports from consumer advocacy groups confirm that some courts may be refusing to continue cases when confronted with a motion to do so.[182]

[174] Comment 41(g)-4 explains that although a servicer is not required to comply with the requirements in § 1024.41 with respect to a loss mitigation application submitted 37 days or less before a foreclosure sale, a servicer is required separately, in accordance with policies and procedures maintained pursuant to § 1024.38(b)(2)(v), to properly evaluate a borrower who submits an application for a loss mitigation option for all loss mitigation options for which the borrower may be eligible pursuant to any requirements established by the owner or assignee of the borrower's mortgage loan. Such evaluation may be subject to requirements applicable to a review of a loss mitigation application submitted by a borrower 37 days or less before a foreclosure sale.

[175] 77 FR 57199, 57203, 57266 (Sept. 17, 2012).

[176] *Id.* at 57249–50 (citing Press Release, Federal Reserve System, Office of the Comptroller of the Currency, and Office of Thrift Supervision, *Interagency Review of Foreclosure Policies and Practices,* at 5 (Apr. 2011), *available at http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011–47a.pdf.*)

[177] *Id.* at 57203 (Sept. 17, 2012).

[178] *Id.* at 57271.

[179] 78 FR 10695, 10698 (Feb. 14, 2013).

[180] *Id.* at 10834.

[181] Many borrower protections under § 1024.41 are determined as of the date a servicer receives a complete loss mitigation application from the borrower. *See* 12 CFR 1024.41(b)(3). Comment 41(b)(3)-1 explains that if a foreclosure sale is not scheduled as of the date a complete loss mitigation application is received the application is considered to have been received 90 days before a foreclosure sale. Thus, a servicer that receives a complete loss mitigation application before a foreclosure sale date is scheduled must provide the full loss mitigation evaluation procedures under § 1024.41, the various steps of which generally provide for a total possible timeline of 88 days to complete.

[182] *See, e.g.,* Alison Fitzgerald, *Homeowners steamrolled as Florida courts clear foreclosure*

Current comment 41(g)-1 explains that a servicer does not violate § 1024.41(g) where the servicer takes ''reasonable steps to avoid'' issuance of an order or ruling on a dispositive motion filed prior to receipt of the complete loss mitigation application from the borrower. However, there is no similar commentary explaining what, if any, ''reasonable steps'' a servicer must take to avoid a violation of the prohibition under § 1024.41(g) against conducting a sale after the servicer receives a complete loss mitigation application.

As the Bureau noted in the 2013 RESPA Servicing Final Rule, § 1024.41(g) ''prohibit[s] a servicer from completing the foreclosure process if a borrower has submitted a timely and complete loss mitigation application . . . until the servicer has completed the evaluation of the borrower . . . .'' [183] The Bureau believes that, regardless of the applicable foreclosure procedures, § 1024.41(g) does not permit a servicer to stand by while a sale goes forward unless the servicer can satisfy one of the three conditions listed under § 1024.41(g)(1) through (3). Based upon the reports and information received, the Bureau is concerned that the absence of express commentary requiring a servicer to take affirmative steps to delay the sale may have encouraged some servicers to fail to instruct foreclosure counsel appropriately and, further, may lead courts to discount servicer obligations under the rule, depriving borrowers of the important consumer protections against dual tracking that are provided under § 1024.41.

Therefore, the Bureau is proposing to revise and add commentary to clarify the operation of § 1024.41(g) in these situations. As revised, proposed comment 41(g)–1 clarifies that if, upon receipt of a complete loss mitigation application, a servicer or its foreclosure counsel fails to take reasonable steps to avoid a ruling on a pending motion for judgment or the issuance of an order of sale, the servicer must dismiss the foreclosure proceeding if necessary to avoid the sale. Proposed comment 41(g)–5 would clarify that § 1024.41(g) prohibits a servicer from conducting a foreclosure sale, even if a person other than the servicer administers or conducts the foreclosure sale proceedings, and that servicers must take reasonable steps to delay the sale until one of the conditions under § 1024.41(g)(1) through (3) is met.

The Bureau is also proposing to revise comment 41(g)–3 to clarify servicers' obligations under § 1024.41(g) when acting through foreclosure counsel. Similarly, the Bureau is proposing comment 38(b)(3)(iii)–1 to clarify that policies and procedures required under § 1024.38(b)(3)(iii) to facilitate sharing of information with service provider personnel responsible for handling foreclosure proceedings must be reasonably designed to ensure that servicer personnel promptly inform service provider personnel handling foreclosure proceedings that the servicer has received a complete loss mitigation application.

The proposed comments, taken together, would clarify that, once a servicer receives a complete loss mitigation application, a servicer must take reasonable steps to avoid a ruling on a dispositive motion or issuance of a judgment or an order of sale, and also must take reasonable steps to delay a foreclosure sale until after the servicer has completed the loss mitigation evaluation procedures required by § 1024.41. Where a servicer fails to take reasonable steps to avoid a ruling on a dispositive motion, to avoid issuance of a judgment or an order of sale, or to delay the foreclosure sale, or where the servicer's foreclosure counsel fails to take such steps, the servicer would have to dismiss the foreclosure proceeding, if dismissal is necessary to avoid completing the foreclosure during the pendency of the loss mitigation evaluation.

The Bureau believes that the proposed revisions to the commentary will aid servicers in complying with § 1024.41(g)'s prohibition and assist courts in applying the prohibition in foreclosure proceedings. The Bureau also believes that clarifying that a servicer must take affirmative reasonable steps, not only to delay issuance of a judgment or order, but also to delay the sale, will ensure that borrowers are protected from foreclosure during pending evaluations of complete loss mitigation applications. Further, the Bureau believes that it is appropriate to require a servicer to dismiss a foreclosure if necessary to permit completion of the loss mitigation evaluation procedures where the servicer or its foreclosure counsel has failed to take such reasonable steps. The Bureau believes that clarifying that dismissal is required if a servicer has failed to take reasonable steps on its own or through foreclosure counsel to avoid a ruling or to delay a foreclosure sale during a pending loss mitigation evaluation will incentivize servicers to develop more effective procedures to carry out the requirements of § 1024.41(g). The Bureau believes that dismissal should rarely be necessary, given that servicers have it within their power to take all such reasonable steps to avoid a ruling on a dispositive motion, issuance of a judgment or an order of sale, or the conduct of a foreclosure sale.

Under current comment 41(g)–1, a servicer that fails to take reasonable steps to avoid a ruling on a motion pending at the time the servicer receives a complete loss mitigation application violates § 1024.41(g)'s first prohibition against moving for judgment or order of sale. The Bureau believes that where a servicer fails to take reasonable steps to avoid a ruling on or issuance resulting from a dispositive motion, as postulated in current comment 41(g)–1, the servicer must still comply with the prohibition against conducting a sale. The completion of a foreclosure sale during the evaluation of a borrower's complete loss mitigation application is precisely the harm that the Bureau crafted § 1024.41(g) to avoid. The Bureau believes that a servicer's failure to comply with one element of § 1024.41(g), the prohibition against proceeding on a dispositive motion, does not justify disregard for the prohibition against conducting a sale. Consequently, to emphasize the necessity of a servicer's taking reasonable steps to avoid a ruling or issuance of an order for sale when there is a pending loss mitigation evaluation, the Bureau is proposing to revise comment 41(g)–1 to provide explicitly that failure to take such steps requires dismissal if necessary to avoid the foreclosure sale.

Proposed comment 41(g)–5 also clarifies that a servicer must seek to delay a foreclosure sale, notwithstanding the fact that a third-party, such as a sheriff, trustee, or other public official, administers or conducts the sale proceedings, as is the case under foreclosure procedure in many States. The Bureau believes that any interpretation of § 1024.41(g)'s prohibition against conducting a foreclosure sale that relieves servicers of a responsibility to act to prevent a foreclosure simply because the foreclosure procedure does not require the servicer itself to conduct or administer the sale is inconsistent with the purpose of § 1024.41(g). The Bureau believes servicers already have an obligation to prevent a foreclosure sale under § 1024.41(g)'s prohibition against the conduct of a foreclosure sale. The Bureau is proposing comment 41(g)–5 to

backlog, The Ctr. for Pub. Integrity, Sept. 10, 2014, *available at http://www.publicintegrity.org/2014/09/10/15463/homeowners-steamrolled-florida-courts-clear-foreclosure-backlog.*

[183] 78 FR 10695, 10834 (Feb. 14, 2013).

clarify a servicer's obligations under the prohibition, but is not adding a new requirement or interpretation.

The Bureau recognizes that in some jurisdictions, it may be difficult for a servicer to delay a foreclosure sale after entry of foreclosure judgment or issuance of an order of sale. The Bureau also understands that courts may be reluctant to delay foreclosure proceedings when lengthy backlogs of foreclosure matters create added pressure to expedite dockets. The Bureau believes that, even in these situations, reasonable steps to delay the sale are available to servicers and to courts administering foreclosure proceedings. Proposed comment 41(g)–5 provides a non-exclusive explanation of what reasonable steps might include. For instance, the Bureau believes that in judicial foreclosure proceedings, a servicer, through its counsel, may make a motion to continue the sale, remove it from the docket, or place the proceeding in any administrative status that stays the sale.[184] In non-judicial proceedings, the Bureau believes that servicers may have more control over the conduct of the sale and that analogous steps to those listed in proposed comment 41(g)–5 may apply. The Bureau seeks comment on what reasonable steps may be available to servicers to delay the conduct of a foreclosure sale under different foreclosure procedures.

Proposed comment 41(g)–3 explains that § 1024.41(g)'s prohibitions on moving for judgment or order of sale or conducting a sale may require a servicer to take steps through foreclosure counsel, and that a servicer is not relieved of its obligations because the foreclosure counsel's actions or inaction cause a violation. The proposed revisions to comment 41(g)–3 are consistent with the Bureau's understanding of servicer's responsibilities under the Mortgage Servicing Rules whenever service providers are involved, including the policies and procedures requirements under § 1024.38(b)(3). While the action or inaction of vendors or service providers may cause the violation in the first instance, the action or inaction of vendors or service providers does not change the servicer's responsibility for ensuring its compliance with the Mortgage Servicing Rules, whether directly or through service providers.

Proposed comment 41(g)–3 further explains that if a servicer has received a complete loss mitigation application, the servicer must promptly instruct counsel not to make a dispositive motion for foreclosure judgment or order of sale; to take reasonable steps, where such a dispositive motion is pending, to avoid a ruling on the motion or issuance of an order of sale; and to take reasonable steps to delay the conduct of a foreclosure sale until the servicer satisfies one of the conditions in § 1024.41(g)(1) through (3). The instructions to counsel may include instructing counsel to move for a continuance with respect to the deadline for filing a dispositive motion or to move for or request that the foreclosure sale be stayed, otherwise delayed, or removed from the docket, or that the foreclosure proceeding be placed in any administrative status that stays the sale. This list is not meant to be exhaustive, and the Bureau seeks comments on whether there are other helpful illustrative examples.

The Bureau believes that the proposed revisions to comment 41(g)–3 provide servicers, their foreclosure counsel, and courts with greater clarity with respect to the operation of § 1024.41(g)'s prohibition. As the Bureau noted in its earlier guidance regarding service providers, the fact that an entity enters into a business relationship with a service provider does not absolve the entity of responsibility for complying with Federal consumer financial law to avoid consumer harm.[185] The Bureau believes that codifying this principal in comment 41(g)–3 would ensure that servicers understand their obligations with respect to instructing foreclosure counsel promptly to take steps required by § 1024.41(g). The Bureau understands that when a servicer receives an application shortly before a court hearing or while a dispositive motion is pending, timely communication with foreclosure counsel may necessitate expedited procedures. However, the Bureau believes that timely communication in such situations presents neither a novel challenge to lawyers and their clients, nor an insurmountable one, given modern communication technology.

Proposed comment 38(b)(3)(iii)–1 explains that the policies and procedures must be reasonably designed to ensure that servicer personnel promptly instruct foreclosure counsel to take any step required by § 1024.41(g) sufficiently timely to avoid violating the prohibition against moving for judgment or order of sale or conducting a foreclosure sale. The Bureau believes that proposed comment 38(b)(3)(iii)–1 will help to ensure that counsel are timely informed of the status of loss mitigation applications and can more effectively seek delay from a court of the issuance of an order or a foreclosure sale. Having policies and procedures to timely instruct counsel to take the actions required by § 1024.41(g) will help servicers efficiently handle communication with a servicer's foreclosure counsel and ensure that the counsel accurately represents the status of loss mitigation applications and the obligations of servicers under § 1024.41(g) to courts handling foreclosure proceedings.[186]

Though the proposed commentary clarifications do not alter existing requirements under § 1024.41(g), the Bureau has considered the potential burdens for servicers in dismissing a foreclosure proceeding. In jurisdictions where significant foreclosure backlogs exist, dismissal may significantly delay completion of the foreclosure process (assuming no loss mitigation agreement is reached between the borrower and the servicer). In addition, in some jurisdictions a subsequent foreclosure brought by a servicer may encounter procedural challenges or defenses as a result of the dismissal. Nonetheless, the Bureau believes that dismissal is appropriate in the limited circumstances where a servicer fails to take reasonable steps to avoid a ruling or issuance of an order or delay the sale to protect borrowers from the dual-tracking harms § 1024.41(g) aims to prevent. Moreover, the Bureau notes that dismissal is required only to avoid a violation of § 1024.41(g) or to mitigate the harm to the consumer arising from the servicer's prior violation of § 1024.41(g) in failing to take reasonable steps to delay a foreclosure sale. Thus, only those servicers that fail to act to delay issuance of the order or judgment would incur any costs related to dismissal. The Bureau believes that expressly clarifying that dismissal may be required would ensure that servicers take reasonable steps to avoid foreclosure sales. The Bureau seeks comment on whether the clarification is adequate or whether additional

[184] As noted above, the maximum timeline for loss mitigation evaluations required by § 1024.41 is 88 days. *See* note 179, *supra.* The Bureau believes that in most judicial foreclosure procedures, a delay of a foreclosure sale often will not require a substantial elongation of the typical time period between an order and a sale.

[185] Consumer Fin. Prot. Bureau, CFPB Bulletin 2012–03, *Service Providers* (Apr. 13, 2012), *available at http://files.consumerfinance.gov/f/201204_cfpb_bulletin_service-providers.pdf.*

[186] The Bureau notes that § 1024.38(b)(1)(v) already requires servicers maintain policies and procedures reasonably designed to ensure that the servicer can submit documents or filings required for a foreclosure process, including documents or filings required by a court of competent jurisdiction, that reflect accurate and current information and that comply with applicable law.

clarification is necessary to protect borrowers from foreclosure.

The Bureau requests comment on whether all of the proposed commentary clarifications are appropriate and whether the commentary provides sufficient clarity to ensure that the prohibition under § 1024.41(g) will effectively prevent foreclosures during a pending loss mitigation evaluation. In addition, the Bureau requests comment on whether there are any specific reasonable steps to comply with § 1024.41(g) that servicers should take, beyond re-scheduling or delaying the sale, removing the sale from the docket, or placing the foreclosure proceeding in any administrative status that stays the sale, where a court has ruled upon a dispositive motion. Finally, the Bureau requests comment on whether there are situations in which a servicer should dismiss a foreclosure proceeding to stop a sale even where the servicer has taken the reasonable steps outlined in § 1024.41(g).

The Bureau requests comment on whether the incorporation into the regulation text of any elements of the proposed commentary would aid servicers in complying with § 1024.41(g). The Bureau believes that the proposed commentary would provide help in interpreting and complying with § 1024.41(g). However, the Bureau also recognizes that incorporation in the regulation text itself may aid servicers, consumers, and courts in applying the prohibition.

41(i) Duplicative Requests

Currently, § 1024.41(i) requires a servicer to comply with the requirements of § 1024.41 for only a single complete loss mitigation application for a borrower's mortgage loan account. Section 1024.38(b)(2)(v) requires a servicer to maintain policies and procedures designed to ensure that the servicer can properly evaluate a borrower for all loss mitigation options ''for which the borrower may be eligible pursuant to any requirements established by the owner or assignee of the borrower's mortgage loan[.]'' In effect, therefore, unless investor guidelines require them to do so, servicers are not required to comply with the loss mitigation provisions in § 1024.41 if they previously complied with those requirements with respect to the same borrower's prior complete loss mitigation application.

The Bureau is now proposing to revise § 1024.41(i) to provide that servicers are required to comply with the requirements of § 1024.41 unless the servicer has previously complied with § 1024.41 for a borrower's complete loss mitigation application and the borrower has been delinquent at all times since the borrower submitted that complete application. As further explained below, the Bureau believes that requiring servicers to comply with § 1024.41 again in these circumstances may serve an important consumer protection purpose by extending the protections of § 1024.41 and promoting the use of uniform loss mitigation procedures for all borrowers. At the same time, the Bureau believes the proposed revision preserves servicer and borrower incentives to dedicate appropriate resources to an initial loss mitigation application.

When the Bureau first proposed § 1024.41 in the 2012 RESPA Servicing Proposal, it sought comment on whether a borrower should be entitled to a renewed evaluation for a loss mitigation option if an appropriate time period had passed since the initial evaluation or if there had been a material change in the borrower's financial circumstances. Industry commenters generally supported the Bureau's proposal to limit a servicer's obligation to comply with § 1024.41 to one time over the life of a borrower's loan. Consumer advocacy groups, however, argued that the Bureau should require servicers to review a subsequent loss mitigation submission when a borrower has demonstrated a material change in the borrower's financial circumstances.[187]

In the 2013 RESPA Servicing Final Rule, the Bureau stated that it agreed with consumer advocacy groups that there are circumstances in which it is appropriate to reevaluate borrowers in light of a material change in financial circumstances. Further, it acknowledged that many owners or assignees of mortgage loans already require servicers to consider material changes in a borrower's financial circumstances.[188] However, the Bureau noted that ''significant challenges exist to determine whether a material change in financial circumstances has occurred[,]'' and that, in contrast with investor or GSE guidelines, § 1024.41 gives borrowers a private right of action to enforce its procedures.[189] In addition, the Bureau stated its belief that limiting the loss mitigation procedures of § 1024.41 to a single complete loss mitigation application provides borrowers with appropriate incentives to submit all relevant information up front and allows servicers to dedicate resources to those applications most likely to qualify for loss mitigation options. Accordingly, the Bureau adopted § 1024.41(i) as proposed and required servicers to comply with the loss mitigation procedures in § 1024.41 only once over the life of a mortgage loan.

Since the publication of the 2013 RESPA Servicing Final Rule, the Bureau has received numerous requests to revise § 1024.41(i) to require servicers to reevaluate borrowers who have experienced a change in financial circumstances and might therefore benefit from subsequent review of a new loss mitigation application under the requirements of § 1024.41. The Bureau continues to have concerns with requiring reevaluations under the Mortgage Servicing Rules when there has been a ''material change in financial circumstances,'' so is not proposing to do so in this rulemaking. However, continued industry monitoring efforts, outreach to stakeholders, and continued reports from consumers and consumer advocacy groups suggests that current § 1024.41(i) may unfairly disadvantage a borrower who experiences multiple hardships over the life of a loan. The Bureau believes that a borrower may greatly benefit from the protections of § 1024.41 for loss mitigation applications submitted in connection with each subsequent hardship. Moreover, the Bureau believes that revising § 1024.41(i) to require servicers to reevaluate borrowers in certain circumstances under the requirements of § 1024.41 would not place a significant additional burden on servicers because many servicers already reevaluate borrowers who reapply for loss mitigation using the procedures set forth in § 1024.41.

Based on this analysis, the Bureau is proposing to revise the current rule to require servicers to reevaluate borrowers under § 1024.41 in certain circumstances. However, as the Bureau explained in the 2013 RESPA Servicing Final Rule, the Bureau believes that a servicer's obligation to reevaluate borrowers under § 1024.41 should be limited in scope. Accordingly, proposed § 1024.41(i) provides that servicers are required to comply with § 1024.41 unless the servicer has previously complied with § 1024.41 for a borrower's complete loss mitigation application and the borrower has been delinquent at all times since the borrower submitted that complete application. That is, under proposed § 1024.41(i), a servicer would be required to comply with § 1024.41, even if it had previously complied with § 1024.41 for a borrower's complete loss mitigation application, for a borrower who has been current on payments at

[187] *See* 78 FR 10695, 10836 (Feb. 14, 2013).

[188] *Id.*

[189] *Id.*

any time between the borrower's prior complete loss mitigation application and a subsequent loss mitigation application. This revision is intended to preserve borrower and servicer incentives to reach a timely, efficient, and effective resolution to a borrower's hardship the first time a borrower applies for loss mitigation.

In addition, the Bureau believes that proposed § 1024.41(i) bases a servicer's obligation to reevaluate a borrower under § 1024.41 on an objective, bright-line test. One of the Bureau's concerns about the suggestions to require reevaluations under the Mortgage Servicing Rules when there has been a ''material change in financial circumstances'' is that the standard would be dependent upon a servicer's subjective determination. The Bureau believes that the challenges in implementing and enforcing such a standard would outweigh any intended benefit to borrowers. However, an easy-to-administer standard such as the one proposed may promote servicer compliance and reduce confusion for both servicers and borrowers. The Bureau also believes that this proposal may encourage consistent implementation of the Mortgage Servicing Rules by discouraging servicers from applying different loss mitigation procedures depending on whether a borrower has been previously evaluated under § 1024.41.

For purposes of this proposal, the Bureau assumes that a permanent modification of a borrower's mortgage loan obligation effectively cures the borrower's pre-modification delinquency. In other words, the Bureau assumes that a borrower who is performing under a permanent modification does not meet the definition of delinquency that the Bureau is proposing to add to § 1024.31. The Bureau seeks comment on whether there are types of permanent loan modifications or other circumstances for which this assumption would be inaccurate.

Finally, the Bureau is revising the current commentary to § 1024.41(i), which addresses servicers' obligations following the transfer of servicing rights, to accommodate proposed § 1024.41(k). Specifically, the Bureau is preserving the portion of comment 41(i)–1 that obligates a transferee servicer to comply with § 1024.41 regardless of whether a transferor servicer previously evaluated a borrower's complete loss mitigation application. As set forth in the section-by-section analysis of § 1024.41(k) below, the Bureau is proposing to move the balance of comment 41(i)–1, as revised, as well as comment 41(i)–2, as revised, into proposed § 1024.41(k) and proposed new commentary.

The Bureau seeks comment on the proposed revision to § 1024.41(i) generally. The Bureau specifically seeks comment on whether the borrower's right to a reevaluation should be contingent upon whether the borrower was current for a minimum period of time since the borrower's last-submitted complete loss mitigation application.

41(k) Servicing Transfers

The Bureau is proposing § 1024.41(k) to address the requirements applicable to loss mitigation applications pending at the time of a servicing transfer. Proposed § 1024.41(k) provides that, subject to certain exceptions, a transferee servicer must comply with § 1024.41's requirements within the same timeframes that were applicable to the transferor servicer. The proposed exceptions include a five-day extension of time for a transferee servicer to provide the written notification required by § 1024.41(b)(2)(i)(B), and a provision ensuring that a transferee servicer that acquires servicing through an involuntary transfer has at least 15 days after the transfer date to evaluate a borrower's pending complete loss mitigation application. The proposal also provides that if a borrower's appeal under § 1024.41(h) is pending as of the transfer date, a transferee servicer must evaluate the appeal pursuant to § 1024.41(h) if it is able to determine whether it should offer the borrower the loan modification options subject to the appeal; a transferee servicer that is unable to evaluate an appeal must treat the appeal as a complete loss mitigation application and evaluate the borrower for all loss mitigation options available to the borrower from the transferee servicer.

Currently, § 1024.41 addresses transfers through the commentary. Comment 41(i)–1 provides that, among other things, documents and information transferred to a transferee servicer may constitute a loss mitigation application to the transferee servicer and may cause the transferee servicer to be required to comply with § 1024.41 with respect to a borrower's mortgage loan account. Comment 41(i)–2 states that a transferee servicer must obtain documents and information a borrower submitted in connection with a loss mitigation application, and that a transferee servicer should continue the evaluation of a complete loss mitigation application to the extent practicable. Finally, comment 41(i)–2 also states that, for purposes of specific subsections in § 1024.41, if a loss mitigation application is complete as to a transferee servicer, the transferee servicer is considered to have received the documents and information constituting the complete application as of the date the transferor servicer received the documents and information. The purpose of comment 41(i)–2 is to ensure that a servicing transfer does not deprive a borrower of protections to which a borrower was entitled from the transferor servicer.[190]

The Bureau interprets § 1024.41 and comments 41(i)–1 and 2 as generally requiring a transferee servicer to stand in the shoes of the transferor servicer with respect to a loss mitigation application pending at transfer. A transferee servicer that receives a loss mitigation application as a result of a transfer should comply with § 1024.41 within the timeframes that were applicable to the transferor servicer, and, as comment 41(i)–2 states, a borrower's protections are based upon when the transferor servicer received documents and information constituting a complete application. Nonetheless, by stating that the transferee should continue the review to the extent practicable, comment 41(i)–2 implies that there are times when a transferee servicer may not be able to continue the evaluation of a complete application.

The Bureau is concerned that current § 1024.41 and comments 41(i)–1 and 2 may not provide sufficient clarity to servicers and borrowers regarding a transferee servicer's duties under § 1024.41 in certain circumstances. The Bureau has received questions about the timeframes in which a transferee servicer must act and whether a transferee servicer must provide notices to a borrower if the transferor servicer already provided the same notices. The Bureau has also received questions about a transferee servicer's responsibilities in the event that continuing the evaluation of a complete loss mitigation application is not practicable. Finally, through outreach and industry monitoring efforts, the Bureau has learned from servicers that complying with certain of § 1024.41's requirements, such as the requirement in § 1024.41(b)(2)(i)(B) to provide written notification to a borrower within five days after receiving a loss mitigation application, can be especially difficult in the transfer context.

The Bureau believes that servicers and borrowers will benefit from greater clarity regarding a transferee servicer's obligations and a borrower's protections under § 1024.41, including with respect to certain situations not currently discussed in § 1024.41 and comments

[190] 78 FR 10695, 10837 (Feb. 14, 2013).

41(i)–1 and 2. For example, the Bureau wishes to provide greater clarity regarding how transferee servicers should handle a pending appeal of a denial of a loan modification option, a pending offer of a loss mitigation option, and pending applications that are facially complete or become complete as of the transfer date. The Bureau also believes that under certain circumstances, it may be appropriate to provide a transferee servicer with an extension of time or flexibility in complying with § 1024.41.

The Bureau is therefore proposing § 1024.41(k) to address the requirements applicable to a transferee servicer with respect to a loss mitigation application pending as of the transfer date. As explained below, proposed § 1024.41(k) provides that, subject to certain exceptions, a transferee servicer must comply with § 1024.41's requirements within the same timeframes that were applicable to the transferor servicer. The proposal also provides that if a borrower's appeal under § 1024.41(h) is pending as of the transfer date, a transferee servicer must evaluate the appeal in accordance with § 1024.41(h) if it is able to determine whether it should offer the borrower the loan modification options subject to the appeal; a transferee servicer that is unable to evaluate an appeal must treat the appeal as a complete loss mitigation application and evaluate the borrower for all loss mitigation options available to the borrower from the transferee servicer.

Proposed comment 41(k)-1 provides that a loss mitigation application is considered pending if it was subject to § 1024.41 and had not been fully resolved before the transfer date. The comment also clarifies that a pending application is considered pending *complete* application if, as of the transfer date, the application was complete under the transferor servicer's criteria. Thus, proposed comment 41(k)-1 is intended to avoid ambiguity about whether a loss mitigation application that was fully resolved by a transferor servicer would cause a transferee servicer to be required to comply with § 1024.41.

While proposed § 1024.41(k) specifies the timeframes in which a transferee servicer must comply with § 1024.41's loss mitigation procedural requirements following a transfer, the Bureau expects that transferor servicers with policies and procedures adopted pursuant to § 1024.38 will help enable transferee servicers' compliance with § 1024.41. Section 1024.38(b)(4) requires a transferor servicer to have policies and procedures reasonably designed to ensure that it can timely transfer all information and documents in its possession or control related to a transferred mortgage loan to a transferee servicer in a form and manner that ensures the accuracy of the information and documents transferred. Section 1024.38(b)(4) further specifies that a transferor servicer's policies and procedures must be reasonably designed to ensure that the documents and information are transferred in a form and manner that ''enables a transferee servicer to comply with . . . applicable law.'' The Bureau therefore believes that a transferor servicer shares responsibility for enabling a transferee servicer to comply with § 1024.41(k)'s requirements and ensuring that borrowers will not be adversely impacted by a servicing transfer. Accordingly, the Bureau at this time does not believe it is necessary to impose any specific requirements in § 1024.41(k) with respect to transferor servicers. The Bureau will continue to monitor whether transferor servicers' practices raise consumer protection concerns that should be addressed through formal guidance or rulemaking.

41(k)(1) In General

Proposed § 1024.41(k)(1)(i) largely incorporates and clarifies existing comments 41(i)-1 and 2. It provides that a transferee servicer that acquires the servicing of a mortgage loan for which a loss mitigation application is pending as of the transfer date must comply with § 1024.41's requirements for that application. Proposed § 1024.41(k)(1)(i) further states that subject to the exemptions set forth in § 1024.41(k)(2) through (4), a transferee servicer must comply with § 1024.41's requirements within the timeframes that were applicable to the transferor servicer. Finally, proposed § 1024.41(k)(1)(i) states that any protections under § 1024.41(e) through (h), such as prohibitions on commencing foreclosure or conducting a foreclosure sale, that applied to a borrower before a transfer continue to apply notwithstanding the transfer.

The purpose of proposed § 1024.41(k)(1)(i) is to ensure that a transfer does not adversely affect a borrower who is pursuing loss mitigation options. A borrower generally has no control over whether and when a mortgage loan is transferred to another servicer. As the Bureau has previously observed, there is heightened risk inherent in transferring mortgage loans in loss mitigation.[191] The Bureau believes that generally holding a transferee servicer to the same standards and timelines as a transferor servicer helps mitigate the risk of consumer harm.

Proposed comment 41(k)(1)(i)-1.i incorporates a portion of existing comment 41(i)-2, stating that a transferee servicer must obtain from the transferor servicer documents and information a borrower submitted to a transferor servicer in connection with a loss mitigation application, consistent with policies and procedures adopted pursuant to § 1024.38. The proposed comment also provides that a transferee must comply with the applicable requirements of § 1024.41 with respect to a loss mitigation application received as a result of transfer, even if the transferor servicer was not required to comply with § 1024.41 (because, for example, the transferor servicer was a small servicer or the application was a duplicative request under § 1024.41(i) for the transferor servicer).

Proposed comment 41(k)(1)(i)-1.ii states that a transferee servicer must, in accordance with § 1024.41(b), exercise reasonable diligence to complete a loss mitigation application received as a result of a transfer. The proposed comment further explains that in the transfer context, reasonable diligence includes ensuring that a borrower is informed of any changes to the application process, such as a change in the address to which the borrower should submit documents and information to complete the application, as well as ensuring that the borrower is informed about which documents and information are necessary to complete the application. Proposed comments 41(k)(1)(i)-1.i and ii are intended to avoid any ambiguity about whether a transferee servicer is required to comply with § 1024.41 with respect to loss mitigation applications received as a result of a transfer.

Proposed comment 41(k)(1)(i)-2 mirrors the last sentence of current comment 41(i)-2, stating that for purposes of § 1024.41(e) (borrower response), (f) and (g) (foreclosure protections), and (h) (appeal process), a transferee servicer must consider documents and information that constitute a complete application to have been received as of the date the transferor servicer received the documents and information. Proposed comment 41(k)(1)-2 further clarifies that an application that was facially complete with respect to a transferor servicer remains facially complete under § 1024.41(c)(2)(iv) with respect to the transferee servicer as of the date it was facially complete with respect to the transferor servicer. It also clarifies

[191] *See* 79 FR 63295, 63296 (Oct. 23, 2014).

that if an application was complete with respect to the transferor servicer but is not complete with respect to the transferee servicer, the transferee servicer must treat the application as facially complete as of the date the application was complete with respect to the transferor servicer. The purpose of this comment is to ensure that a transfer does not affect the protections to which a borrower is entitled under § 1024.41.

Finally, proposed comment 41(k)(1)(i)-3 provides that a transferee servicer is not required to provide any notice required by § 1024.41 with respect to a particular loss mitigation application if the transferor servicer provided the notice to a borrower before the transfer. This comment is intended to address questions about whether a transferee servicer must resend a notice already provided by the transferor servicer as to a particular application.

Proposed § 1024.41(k)(1)(ii) provides that for purposes of § 1024.41(k), the transfer date is the date on which the transfer of servicing responsibilities from the transferor servicer to the transferee servicer occurs. Proposed comment 41(k)(1)(ii)-1provides that the transfer date corresponds to the date transferee servicer will begin accepting payments relating to the mortgage loan, which already must be disclosed on the notice of transfer of loan servicing pursuant to § 1024.33(b)(4)(iv).[192] Proposed comment 41(k)(1)(ii)-1 further clarifies that the transfer date is not necessarily the sale date for the transaction. As a result, the Bureau believes the proposed definition is consistent with the definition Fannie Mae employs in its servicing guide,[193] and the Bureau believes that it reflects the industry's common understanding of the term.

The Bureau solicits comment on the treatment of loss mitigation applications pending at transfer and whether it is appropriate to require a transferee servicer to comply with § 1024.41 within the timeframes that were applicable to the transferor servicer. Additionally, the Bureau solicits comment on whether, following a transfer, a transferee servicer should be required to provide a borrower a written notice of what documents and information the transferee servicer needs to complete the application, regardless of whether the transferor servicer has provided such a notice.

41(k)(2) Acknowledgement Notices

Proposed § 1024.41(k)(2) provides that if a transferee servicer acquires the servicing of a mortgage loan for which the period to provide the notice required by § 1024.41(b)(2)(i)(B) has not expired as of the transfer date, the transferee servicer must provide the notice within 10 days (excluding legal public holidays, Saturdays, or Sundays) after the date the transferor servicer received the application.

Section 1024.41(b)(2)(i)(B) states that if a servicer receives a loss mitigation application 45 days or more before a foreclosure sale, a servicer must notify the borrower in writing within five days (excluding legal public holidays, Saturdays, or Sundays) that the servicer acknowledges receipt of the application and the servicer has determined that the application is complete or incomplete. If the application is incomplete, the notice must, among other things, identify the documents or information necessary to complete the application.

The Bureau is concerned about a transferee servicer's ability to comply with § 1024.41(b)(2)(i)(B) in the scenario where a transferor servicer receives a loss mitigation application and, before the time period in which to provide the notice required by § 1024.41(b)(2)(i)(B) expires, it transfers the mortgage loan to the transferee servicer, without providing the notice. In that situation, a transferee servicer would be required to provide the notice within five days (excluding legal public holidays, Saturdays, or Sundays) of when the transferor servicer received the application. Depending on the timing of the transfer, a transferee servicer might have as little as one day after the transfer date to provide this notice.

Information the Bureau has gathered through its outreach and industry monitoring efforts confirms that a transferee servicer often has difficulty providing the notice required by § 1024.41(b)(2)(i)(B) within five days after the transferor servicer received a loss mitigation application. The Bureau understands that a transferee servicer typically requires several days to transition a mortgage loan file and related information onto its systems. A transferee servicer may be unable to transition this information and accurately review a loss mitigation application within the five-day time period specified in § 1024.41(b)(2)(i)(B), particularly for applications received within a few days before transfer. As a result, the Bureau believes that in this situation, a transferee servicer acting diligently and in good faith may still be unable to timely comply with the requirements of § 1024.41(b)(2)(i)(B).

The Bureau is therefore proposing to allow transferee servicers up to an additional five days to comply with § 1024.41(b)(2)(i)(B) with respect to applications pending as of the transfer date. Specifically, proposed § 1024.41(k)(2) requires a transferee servicer to provide the notice required by § 1024.41(b)(2)(i)(B) within 10 days (excluding legal public holidays, Saturdays, or Sundays) after the date the transferor servicer received a borrower's application.

The Bureau believes that establishing a specific deadline for the transferee servicer to provide the notice required by § 1024.41(b)(2)(i)(B) may encourage transferor and transferee servicers to work together to streamline the transfer of documents. In particular, a specific deadline underscores the importance of § 1024.38(b)(4)(i), which requires a transferor servicer to have policies and procedures reasonably designed to ensure that it can timely transfer all information and documents in its possession or control relating to a transferred mortgage loan to a transferee servicer in a form and manner that ensures the accuracy of the information and documents transferred. Thus, the Bureau expects transferor servicers to timely and accurately identify and transfer all loss mitigation applications to transferee servicers. Further, the Bureau believes a firm compliance deadline may avoid unnecessary delays in the loss mitigation application process, while at the same time affording transferee servicers additional time to properly respond to a borrower's application.

The Bureau also believes that this proposed extension would facilitate transferee servicers' compliance with § 1024.41(b)(2)(i)(B) while not materially affecting most borrowers. A borrower's protections under § 1024.41(e) through (h) are determined by the date on which a servicer receives a borrower's *complete* application; extending the time for a transferee servicer to comply with § 1024.41(b)(2)(i)(B) therefore could delay, but in most cases would not prevent, a borrower from obtaining those protections. Moreover, the proposed extension is for a relatively brief period of time, and the Bureau does not believe that a short delay in providing the § 1024.41(b)(2)(i)(B) notice would significantly lengthen the loss mitigation application process. Finally, the Bureau believes that

[192] Section 1024.33(b)(4)(iv) requires the notice of transfer to include ''The date on which the transferor servicer will cease to accept payments relating to the loan and the date on which the transferee servicer will begin to accept such payments. These dates shall either be the same or consecutive days.''

[193] *See* Fannie Mae, Servicing Guide Announcement SVC–2014–06, at 1 (May 9, 2014), *available at https://www.fanniemae.com/content/announcement/svc1406.pdf.*

allowing a transferee servicer some additional time to review a borrower's initial loss mitigation application may result in more accurate determinations regarding the documents and information needed to complete an application, which would ultimately benefit borrowers.

Nonetheless, the Bureau recognizes that a delay in providing the § 1024.41(b)(2)(i)(B) notice could impact a borrower in certain circumstances, such as when a servicer receives an incomplete loss mitigation application shortly before the 90th or 38th day before a foreclosure sale. In that instance, a borrower has an interest in completing the application as soon as possible to preserve the maximum protections available under § 1024.41(e) through (h). Allowing a transferee servicer additional time to provide a borrower with a written notification of the documents and information required to complete an application could result in a borrower being asked to obtain and submit the documents in a just a few days, which generally would be considered impracticable.[194]

The Bureau requests comment on whether borrowers currently have difficulty in obtaining and submitting required documents and information to complete an application that the servicer received shortly before the 90th or 38th day before a foreclosure sale, and whether the extension in proposed § 1024.41(k)(2) would exacerbate such difficulties. The Bureau further requests comment on whether a transferee servicer that avails itself of the extension in proposed § 1024.41(k)(2) should be required to give a borrower additional time to complete an application, such that the extension under § 1024.41(k)(2) would also give the a borrower additional time past the 90th or 38th day before a foreclosure sale to submit a complete application and obtain the applicable protections under § 1024.41(e) through (h).

The Bureau further requests comment on whether it is reasonable to require a transferee servicer to provide the written notification required by § 1024.41(b)(2)(i)(B) within 10 days (excluding legal public holidays, Saturdays, or Sundays) from the date a transferor servicer received a loss mitigation application, or whether a shorter or longer period is more appropriate. Finally, if a longer period were appropriate, the Bureau requests comment on whether a transferee servicer that avails itself of such a longer extension should be required to give a borrower additional time to complete an application, such that an extension would also give the a borrower additional time past the 90th or 38th day before a foreclosure sale to submit a complete application and obtain the applicable protections under § 1024.41(e) through (h).

41(k)(3) Complete Loss Mitigation Applications Pending at Transfer

Proposed § 1024.41(k)(3)(i) provides that, with two exceptions, a transferee servicer that acquires the servicing of a mortgage loan for which a complete loss mitigation application is pending as of the transfer date must comply with the applicable requirements of § 1024.41(c)(1) and (4) within 30 days of the date the transferor servicer received the complete application. Thus, unless an exception applies, a transfer does not affect the time in which a borrower should receive a notice of which loss mitigation options, if any, a servicer will offer to the borrower. The Bureau believes that this proposed requirement may be necessary to ensure that a transfer does not adversely affect a borrower.

Proposed comment 41(k)(3)(i)-1 clarifies a transferee servicer's obligations regarding an application that was complete with respect to the transferor servicer but for which the transferee servicer needs additional documentation or corrections to a previously submitted document to evaluate the borrower for all loss mitigation options based upon the transferee servicer's criteria. Specifically, the proposed comment clarifies that in this scenario and consistent with proposed § 1024.41(c)(2)(iv), the application is facially complete as of the date it was first facially complete or complete, as applicable, with respect to the transferor servicer, and the borrower is entitled to all of the protections under § 1024.41(c)(2)(iv). Additionally, once the transferee servicer receives the information or corrections necessary to complete the application, § 1024.41(c)(3) requires the transferee servicer to provide a notice of complete application. Finally, the proposed comment clarifies that an application that was complete with respect to the transferor servicer remains complete even if the transferee servicer requests that a borrower resubmit the same information in the transferee servicer's specified format or make clerical corrections to the application. The comment further clarifies that a borrower's failure to resubmit such information or make such clerical corrections does not extend the time in which the transferee servicer must complete the evaluation of the borrower's complete application. The purpose of this comment is to clarify that a borrower does not lose protections under § 1024.41, including foreclosure protections, if a transferee servicer determines that it needs additional documentation or corrections to a previously submitted document, and that a request to resubmit documents in a different format will not extend the time by which a borrower will receive a determination of which loss mitigation options the servicer will offer.

Proposed comment 41(k)(3)(i)-2 addresses the reverse situation in which a borrower's loss mitigation application was incomplete based upon the transferor servicer's criteria prior to transfer but the transferee servicer determines that the application is complete based upon its own criteria. In that case, the proposed comment clarifies that the application is considered a pending loss mitigation application complete as of the transfer date for purposes of § 1024.41(k)(3), but complete as of the date the transferor servicer received the documents and information constituting the complete application for purposes of § 1024.41(e) through (h). This comment is intended to avoid confusion about the timeframe in which the transferee servicer must evaluate a complete application and the date on which the borrower obtained protections under § 1024.41.

Proposed § 1024.41(k)(3)(ii)(A) sets forth the first proposed exception to the requirement to comply with § 1024.41(c)(1) and (4) within 30 days of the date the transferor servicer received the complete application. This proposed exception concerns involuntary transfers of servicing. The Bureau understands that a servicer that acquires servicing as a result of an involuntary transfer is less likely to be able to plan properly for a transfer, such as by engaging in pre-transfer due diligence, coordinating the delivery and onboarding of documents and information, or potentially negotiating contractual provisions requiring the transferor servicer to identify mortgage loans that are in active or pending loss mitigation. Additionally, involuntary transferee servicers may be more likely to receive loans from a failing or bankrupt servicer, which in turn may be more likely to have failed to maintain adequate records regarding borrowers' mortgage loans. As a result, an involuntary transferee servicer may be unable to complete the evaluation within 30 days of when the transferor servicer received the complete application.

[194] *See* comment 41(b)(2)(ii)-1.

Therefore, proposed § 1024.41(k)(3)(ii)(A) would allow a servicer that acquires servicing as a result of an involuntary transfer to comply with the applicable requirements of § 1024.41(c)(1) and (4) within 30 days of the date the transferor received a complete loss mitigation application, or within 15 days of the transfer date, whichever is later. The Bureau believes that allowing an involuntary transferee servicer at least 15 days from the transfer date to comply would give the transferee servicer sufficient opportunity to obtain documents and information from a transferor servicer and complete the evaluation of a borrower's application. The Bureau also believes that this relatively brief proposed extension of time, when applicable, would impose only limited costs on borrowers. A borrower's protections under § 1024.41(e) through (h) are established as of the date a servicer *receives* a complete application, and extending the time to *evaluate* the complete application would not alter those protections. Furthermore, allowing an involuntary transferee servicer a minimum of 15 days after the transfer date to review a complete loss mitigation application may result in a more accurate evaluation, ultimately benefitting a borrower.

Proposed § 1024.41(k)(3)(ii)(B) provides that a transfer is involuntary when an unaffiliated investor or a court or regulator with jurisdiction requires, with less than 30 days advance notice, the transferor servicer to transfer servicing to another servicer and the transferor servicer is in breach of, or default under, its servicing agreement for loss mitigation related-servicing performance deficiencies or is in receivership or bankruptcy. This proposed definition builds on the definition of involuntary transfer used in the Department of the Treasury's HAMP directives, which encompasses transfers that are required by a court or regulator with jurisdiction.[195] The Bureau believes, however, that including every investor-required transfer within the definition of involuntary transfer may be too broad for § 1024.41's purposes, as it could be interpreted as including all investor flow agreements, which could cover transfers for which the transferee servicer is able to plan and conduct reasonable preparation. Accordingly, with respect to investor-required transfers, the Bureau is proposing to limit the definition of involuntary transfer to those transfers that occur while the transferor servicer is in breach of, or in default under, its servicing agreement for loss mitigation related-servicing performance deficiencies. Further, the transferor servicer must have received the direction to transfer the loan thirty days or less before the transfer date. The Bureau believes that this definition will appropriately capture those transfers for which a transferee servicer may have difficulty timely complying with § 1024.41(c)'s loss mitigation requirements.

The second proposed exception concerns instances where a transferee servicer's completion of the evaluation within the timeframes set forth in proposed § 1024.41(k)(3)(i) or (ii)(A), as applicable, is impracticable under the circumstances. The Bureau understands that due to the unique circumstances and complications that may arise in connection with a transfer, there may be times when, despite the transferee servicer's good faith efforts, it may be impracticable to comply with the timing requirements of § 1024.41(k)(3)(i) or (ii)(A). In that situation, proposed § 1024.41(k)(3)(iii) requires a transferee servicer to comply with the applicable requirements of § 1024.41(c)(1) and (4) within a reasonably prompt time after expiration of the applicable time period in § 1024.41(k)(3)(i) or (ii)(A). The Bureau expects that in most circumstances, it will be practicable for a transferee servicer to evaluate a complete application within the prescribed timeframes and that an extension will not be necessary or appropriate.

The Bureau is also proposing comment 41(k)(3)(iii)-1, which clarifies that for purposes of § 1024.41(k)(3)(iii), a servicer that complies with the applicable requirements of § 1024.41(c)(1) and (4) within five days after the expiration of the applicable timeframe in proposed § 1024.41(k)(3)(i) or (ii)(A) would generally be considered to have acted within a ''reasonably prompt time.'' As discussed in the section-by-section analysis of § 1024.41(k)(2), servicing transfers can raise unique circumstances. The Bureau therefore believes that when it is impracticable for a transferee servicer to timely complete the evaluation of a borrower's pending complete loss mitigation application due to unforeseen complications arising from a transfer, a transferee servicer should be afforded additional time to complete the evaluation.

The Bureau seeks comment on the treatment of complete applications pending at transfer. In particular, the Bureau seeks comment on whether it is ever necessary or appropriate to give transferee servicers an extension of time to evaluate complete applications. If an extension is necessary or appropriate, the Bureau seeks comment on which factors and circumstances, including but not limited to involuntary transfers, may require an extension, the appropriate length of any extension, and the burden transferee servicers should have to carry to demonstrate a need for the extension. The Bureau also seeks comment on what obstacles transferee servicers currently face in obtaining and evaluating pending loss mitigation applications and the problems faced by borrower who have applications pending at the time of a servicing transfer, as well as whether an extension of time to comply with § 1024.41 following a transfer would ameliorate or exacerbate those problems.

41(k)(4) Applications Subject to Appeal Process

Proposed § 1024.41(k)(4) provides that if a borrower timely appeals a transferor servicer's denial of a loan modification option under § 1024.41(h), a transferee servicer must evaluate the appeal if it is able to determine whether it should offer the borrower the loan modification options subject to the appeal. A transferee servicer that is unable to evaluate an appeal must treat the borrower's appeal as a pending complete loss mitigation application and comply with the requirements of § 1024.41 for such application. Proposed § 1024.41(k)(4) would apply if a borrower made an appeal before the transfer date and the appeal remains pending as of the transfer date, or if the period for making an appeal under § 1024.41(h) had not expired as of the transfer date and a borrower subsequently made a timely appeal.

The Bureau believes that a transfer should not deprive a borrower of the right to appeal a servicer's denial of a loan modification option. As discussed in the 2013 RESPA Servicing Final Rule, borrowers and consumer advocacy groups dispute in many cases whether servicers have properly applied the requirements of loan modification programs.[196] The terms of loan modification programs are complex, and the Bureau continues to believe that, as with any complex and unique process, servicers may make mistakes in evaluating borrowers' complete applications. Moreover, investors or

[195] *See* Dep't of Treasury, Supplemental Directive 11–2, *Making Home Affordable Program—Servicing Transfers* (Dec. 27, 2011), *available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1112.pdf.*

[196] 78 FR 10695, 10835 (Feb. 14, 2013).

guarantors may be motivated to transfer servicing to a new servicer based on a determination that the new servicer is better able to evaluate borrowers for loss mitigation options. In that case, the Bureau believes that both a borrower and an investor or guarantor may benefit from the new servicer attempting to determine whether the transferor servicer mistakenly denied the borrower for a loan modification option.

Therefore, proposed § 1024.41(k)(4) provides that if a transferee servicer that acquires the servicing of a mortgage loan for which, as of the transfer date, a borrower's appeal under § 1024.41(h) is pending or a borrower's time period to appeal under § 1024.41(h) has not expired, the transferee servicer must evaluate the appeal if it is able to determine whether it should offer the borrower the loan modification options subject to the appeal. Proposed § 1024.41(k)(4)(i) further provides that, if a servicer is able to evaluate an appeal but it is not practicable under the circumstances to complete the determination within 30 days of when the borrower made the appeal, the transferee servicer must complete the evaluation of the borrower's appeal and provide the notice required by § 1024.41(h)(4) within a reasonably prompt time. Proposed comment 41(k)(4)-2 clarifies that in general, a reasonably prompt time would be within an additional five days after the expiration of the original 30-day evaluation window. Proposed § 1024.41(k)(4)(i) thus imposes the same requirements on a transferee servicer to evaluate a pending appeal as a pending complete loss mitigation application. For the reasons discussed above, the Bureau believes that in some circumstances, a transferee servicer may need to exceed the 30-day evaluation window to complete the evaluation.

The Bureau recognizes, however, that a transferee servicer may not always be able to determine whether a transferor servicer incorrectly denied the borrower for a loan modification option. For example, the transferee servicer may not have sufficient information about the evaluation criteria used by the transferor servicer, in particular when the transferor servicer denied a borrower for a loan modification option that the transferee servicer does not offer, or when the transferee servicer receives the mortgage loan file through an involuntary transfer and the transferor servicer failed to maintain proper records such that the transferee servicer does not have sufficient information to evaluate the appeal. The Bureau believes that such circumstances will be rare, that transferee servicers will generally be able to evaluate borrowers' appeals, and that borrowers will not be disadvantaged as a result of transfers. In those limited circumstances, however, proposed § 1024.41(k)(4)(ii) requires the transferee servicer to treat the appeal as a pending complete loss mitigation application and evaluate the borrower for all options available to the borrower from the transferee servicer. For purposes of § 1024.41(c) or (k)(2), as applicable, such a pending complete loss mitigation application would be considered received as of the date the appeal was received. For purposes of § 1024.41(e) through (h), such a pending complete loss mitigation application would be considered facially complete as of the date the application was facially complete with respect to the transferor servicer.

The Bureau believes that, in cases where the transferee servicer cannot evaluate the appeal, requiring the transferee servicer to reevaluate the borrower for all loss mitigation options that may be available to the borrower preserves the benefits of the appeal process for borrowers. Furthermore, the Bureau believes that the proposed requirement would not impose substantial burdens on transferee servicers because a transferee servicer is already required to comply with the requirements of § 1024.41 regardless of whether the borrower received an evaluation of a complete loss mitigation application from the transferor servicer.[197]

Proposed comment 41(k)(4)-1 notes that a transferee servicer may be unable to evaluate an appeal when, for example, the transferor servicer denied a borrower for a loan modification option that the transferee servicer does not offer or when the transferee servicer receives the mortgage loan file through an involuntary transfer and the transferor servicer failed to maintain proper records such that the transferee servicer lacks sufficient information to evaluate the appeal. The proposed comment also clarifies that if a transferee servicer is required to treat the appeal as a pending complete application, the transferee servicer must permit the borrower to accept or reject any loss mitigation options offered by the transferor servicer, in addition to the loss mitigation options, if any, that the transferee servicer determines to offer the borrower based on its own evaluation of the borrower's complete loss mitigation application. This proposed comment is intended to ensure that a transfer does not have the result of depriving a borrower of any loss mitigation options that were offered by the transferor servicer, and it is consistent with the treatment of pending loss mitigation offers in proposed § 1024.41(k)(5).

The Bureau requests comment on the treatment of appeals pending at transfer, including whether transferee servicers may need additional time to evaluate pending appeals, the extent to which transferee servicers are able to evaluate appeals of a transferor servicer's denial of a loan modification option, and whether a pending appeal should ever or always be treated as a new loss mitigation application such that a transferee servicer must evaluate the borrower for all available loss mitigation options. Additionally, the Bureau is concerned about the appropriate recourse when, if ever, a transferee servicer is unable to evaluate a borrower's appeal. The Bureau believes that treating the appeal as a pending complete application would provide benefits to borrowers, but the Bureau requests comment on whether such treatment would be in the borrower's best interests where, for example, the borrower's application documents may have gone stale or the borrower has little hope of being offered any loss mitigation option, and whether such treatment is inconsistent with applicable investor requirements.

41(k)(5) Pending Loss Mitigation Offers

Proposed § 1024.41(k)(5) provides that a transfer does not affect the borrower's ability to accept or reject a loss mitigation option offered under § 1024.41(c) or (h). Specifically, the proposal states that if a transferor servicer offered the borrower a loss mitigation option and the borrower's time to accept or reject the offer had not expired as of the transfer date, a transferee servicer must allow the borrower to accept or reject the offer.

Proposed comment 41(k)(5)-1 clarifies that a transferee servicer should expect that some borrowers will provide their acceptances to the transferor servicer and, pursuant to the policies and procedures maintained under § 1024.38(b)(4), a transferee servicer should obtain those acceptances from the transferor servicer. For example, a borrower may be able to accept a trial modification agreement by making an initial payment of the modified amount. A borrower may timely send this payment to the transferor servicer instead of to the transferee servicer. In this situation, the Bureau believes that the transferee servicer must honor an acceptance that the borrower timely sent to the transferor servicer.

[197] 12 CFR 1024.41(i); comment 41(i)–1.

Legal Authority

The Bureau proposes to rely on its authority under sections 6(j)(3), 6(k)(1)(C), 6(k)(1)(E) and 19(a) of RESPA to propose these amendments to § 1024.41. The proposed loss mitigation procedures are necessary and appropriate to achieve the consumer protection purposes of RESPA, including by requiring servicers to provide borrowers with timely access to accurate and necessary information regarding an evaluation for a foreclosure avoidance option and to facilitate the evaluation of borrowers for foreclosure avoidance options. Further, the proposed loss mitigation procedures implement, in part, a servicer's obligation to take timely action to correct errors relating to avoiding foreclosure under section 6(k)(1)(C) of RESPA by establishing servicer duties and procedures that must be followed where appropriate to avoid errors with respect to foreclosure.

In addition, the Bureau relies on its authority pursuant to section 1022(b) of the Dodd-Frank Act to prescribe regulations necessary or appropriate to carry out the purposes and objectives of Federal consumer financial law, including the purposes and objectives of title X of the Dodd-Frank Act. Specifically, the Bureau believes that the proposed amendments to § 1024.41 are necessary and appropriate to carry out the purpose under section 1021(a) of the Dodd-Frank Act of ensuring that markets for consumer financial products and services are fair, transparent, and competitive, and the objective under section 1021(b) of the Dodd-Frank Act of ensuring that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation. The Bureau additionally relies on its authority under section 1032(a) of the Dodd-Frank Act, which authorizes the Bureau to prescribe rules to ensure that features of any consumer financial product or service, both initially and over the terms of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.

Appendix MS

Appendix MS–3(A) through (D)—Model Forms for Force-Placed Insurance Notices

The Bureau is proposing three sets of changes to the model forms for force-placed insurance notices, located at appendix MS–3(A) through (D). First, the Bureau proposes to amend MS–3(A) and (B) to align the model forms to the proposed amendments to § 1024.37(c)(2)(v). As discussed in the section-by-section analysis of § 1024.37(c)(2)(v), the Bureau is proposing to amend that provision to require the force-placed insurance notice to state, as applicable, that the borrower's hazard insurance provides insufficient coverage and that the servicer does not have evidence that the borrower has hazard insurance that provides sufficient coverage. The Bureau is therefore proposing to make a corresponding change to the language in model forms MS–3(A) and (B), so that the forms include the statement ''your [hazard] [Insurance Type] insurance [is expiring] [expired] [provides insufficient coverage], and we do not have evidence that you have obtained new coverage.''

Second, the Bureau is proposing a technical change to align the model forms with the requirements of § 1024.37(c)(2)(ix)(A) and (e)(2)(viii)(A). Those provisions require the force-placed insurance initial, reminder, and renewal notices to include a statement that the insurance the servicer has purchased or purchases ''may cost significantly more than hazard insurance purchased by the borrower.'' Current model forms MS–3(A) through (D) omit the word ''significantly.'' The Bureau is proposing to amend model forms MS–3(A) through (D) to add the word significantly, such that each model form would track the language of § 1024.37(c)(2)(ix)(A) and (e)(2)(viii)(A).

Third, the Bureau is proposing a technical change to MS–3(D) to align the model form with the requirements of § 1024.37(e)(3), which requires servicers to provide certain information on the form in bold text.

Legal Authority

The Bureau is proposing to exercise its authority under section 6(k)(1)(E) of RESPA to amend the model forms in appendix MS–3(A) through (D) to Part 1024 of Regulation X. For the reasons given above, the Bureau believes that the amendments to the model forms for the force-placed insurance notices are appropriate to align the text of the model forms with the disclosures required by § 1024.37.

Appendix MS–4—Model Clause for the Written Early Intervention Notice

Proposed model clause MS–4(D) in appendix MS–4 illustrates the disclosures required under proposed § 1024.39(d)(2)(iii)(A). The Bureau has developed proposed model clause MS–4(D) to assist servicers that are subject to the FDCPA with respect to a borrower who has invoked the FDCPA's cease communication protections in complying with the modified written early intervention notice required by § 1024.39(d)(2)(iii). As discussed in the section-by-section analysis of § 1024.39(d)(2), proposed § 1024.39(d)(2)(iii) requires that the written early intervention notice include a statement that the servicer may or intends to invoke its specified remedy of foreclosure pursuant to section 805(c)(2) or (3) of the FDCPA. Proposed model clause MS–4(D) may be used to comply with this requirement. Specifically, proposed model clause MS–4(D) states, ''This is a legally required notice sent to borrowers who are at least 45 days delinquent. We have a right to invoke foreclosure. Loss mitigation or other alternatives may be available to help you avoid losing your home.'' The Bureau seeks comment on whether proposed model clause MS–4(D) is appropriate, and whether alternate or additional model clauses would be helpful to borrowers and servicers in this context.

Legal Authority

The Bureau is proposing to exercise its authority under section 6(k)(1)(E) of RESPA and section 814(d) of the FDCPA to add new model clause MS–4(D) in appendix MS–4 to Part 1024 of Regulation X. For the reasons discussed in the section-by-section analysis of § 1024.39(d)(2), the Bureau believes that requiring a servicer to provide the modified written early intervention notice if loss mitigation options are available is a reasonable interpretation of the exceptions under section 805(c)(2) and (3) of the FDCPA, which permit a debt collector to communicate with a consumer who has invoked the cease communication protections to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked or intends to invoke a specified remedy.

C. Regulation Z

Section 1026.2 Definitions and Rules of Construction

Paragraph (a)(11)

As noted in part V.A., the Bureau is proposing that all of the Mortgage Servicing Rules apply to confirmed successors in interest. Accordingly, similar to proposed § 1024.30(d) with respect to Regulation X's mortgage servicing rules,[198] proposed

[198] *See* section-by-section analysis of § 1024.30(d), *supra.*

§ 1026.2(a)(11) defines the term consumer to include a successor in interest once a servicer confirms the successor in interest's identity and ownership interest in the dwelling for the purposes of Regulation Z's mortgage servicing rules—§§ 1026.20(c) through (e), 1026.36(c), and 1026.41. Confirmed successors in interest covered by proposed § 1026.2(a)(11) would not necessarily have assumed the mortgage loan obligation (*i.e.,* legal liability for the mortgage debt) under State law.[199]

As described in part V.A., the Bureau is proposing this change because the Bureau believes, based on repeated reports from consumers, consumer advocacy groups, and other stakeholders, that successors in interest face many of the challenges that Regulation Z's mortgage servicing rules were designed to prevent. Because a successor in interest is a homeowner whose dwelling is subject to foreclosure if the mortgage loan obligation is not satisfied, the Bureau believes that the same reasons supporting the Bureau's adoption of the 2013 TILA Servicing Final Rule support proposed § 1026.2(a)(11).

The Bureau believes that it is appropriate to limit the application of this portion of the proposed rule to successors in interest whom servicers have confirmed have an ownership interest in the dwelling. Because some people representing themselves as successors in interest may not actually have an ownership interest in the dwelling, the Bureau believes that requiring servicers to apply Regulation Z's mortgage servicing rules' communication and disclosure requirements to successors in interest before servicers have confirmed the successor in interest's identity and ownership interest in the dwelling may present privacy and other concerns. For the same reason, the Bureau also believes it is inappropriate to require servicers to incur substantial costs before confirming the successor in interest's identity and ownership interest in the dwelling.

The Bureau has considered each of Regulation Z's mortgage servicing rules and believes that each portion should apply to confirmed successors in interest. The Bureau also generally believes that it would add unnecessary complexity to the rules to require servicers to apply some but not all of Regulation Z's mortgage servicing rules to confirmed successors in interest. The Bureau believes it is preferable to apply all of Regulation Z's mortgage servicing rules to confirmed successors in interest, unless there is a compelling reason not to apply a particular rule.

With respect to § 1026.20(c) through (e), under proposed § 1026.2(a)(11), once a servicer confirms a successor in interest's identity and ownership interest in the dwelling, the servicer would be required to provide successors in interest with ARM disclosures under § 1026.20(c) and (d) and with escrow account cancellation notices under § 1026.20(e).[200] The Bureau believes that the disclosures required by § 1026.20(c) through (e) would provide successors in interest with important information to allow the successor in interest to keep the mortgage loan current, which in turn will help the successor in interest avoid foreclosure. Further, because servicers are already required to comply with § 1026.20(c) through (e) with respect to prior consumers, any additional cost to servicers to apply these requirements to successors in interest would be minimal. The Bureau believes that the cost would be limited to updating servicer systems initially, adding individual successors in interest to the system on an ongoing basis, and printing and mailing costs, if any. The Bureau believes that the resulting consumer protection of this vulnerable group justifies the additional cost to servicers.

The Bureau solicits comment on whether § 1026.20(c) through (e) should not apply with respect to successors in interest. The Bureau also solicits comment on whether, in the case of consumer death, the servicer should continue providing disclosures to the consumer's estate until a successor in interest's status has been confirmed.

With respect to § 1026.36(c), under proposed § 1026.2(a)(11), once a servicer confirms a successor in interest's identity and ownership interest in the dwelling, the servicer would be required to comply with § 1026.36(c)'s requirements regarding payment processing, the prohibition on pyramiding of late fees, and payoff statements with respect to the successor in interest.[201] The Bureau believes that § 1026.36(c)'s protections would help successors in interest maintain ownership of their homes; successors in interest, as owners of a dwelling securing a mortgage loan, may be required to make payments on the loan to avoid foreclosure. As noted in part V.A., the Bureau has heard from consumers and consumer advocacy groups that some servicers have refused to accept payments from successors in interest, which in turn may lead to delinquency on the mortgage loan and, eventually, foreclosure. The Bureau believes that applying § 1026.36(c)'s prompt crediting requirements to confirmed successors in interest would alleviate this problem. The Bureau also believes that providing successors in interest with access to the loan's payoff balance would serve to keep successors in interest informed about the mortgage loan secured by the dwelling and would help prevent unnecessary foreclosure, as the payoff balance is the amount that ultimately must be paid to prevent the servicer from foreclosing on the dwelling.[202] The Bureau also believes that because successors in interest, as owners of a dwelling securing a mortgage loan, may be required to make payments on the loan to avoid foreclosure, the prohibition on pyramiding of late fees would serve TILA's purpose of ''protect[ing] consumers against inaccurate and unfair credit billing practices.'' [203]

Additionally, because § 1026.36(c) already requires servicers to comply with these requirements with respect to prior consumers, the Bureau believes that the additional cost to servicers to apply these requirements to successors in interest will be relatively minimal. In any event, the Bureau believes that providing these consumer protections to

[199] As indicated in part V.A., *supra,* the Bureau understands that whether a successor in interest has assumed a mortgage loan obligation (*i.e.,* legal liability for the mortgage debt) under State law is a fact-specific question.

[200] Section 1026.20(e) will become effective on August 1, 2015. *See* Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z), 78 FR 79730, 79732, 80328–29 (Dec. 31, 2013). Section 1026.20(c) and (d) apply with respect to ''a closed-end consumer credit transaction secured by the consumer's principal dwelling,'' and § 1026.20(e) applies with respect to ''a closed-end consumer credit transaction secured by a first lien on real property or a dwelling.'' Accordingly, with respect to successors in interest under proposed § 1026.2(a)(11), § 1026.20(c) and (d) would apply with respect to a mortgage loan secured by the successor in interest's principal dwelling, and § 1026.20(e) would apply in connection with a mortgage loan secured by a first lien on real property or a dwelling.

[201] Section 1026.36(c)(1) and (2) apply in connection with ''a consumer credit transaction secured by a consumer's principal dwelling,'' and § 1026.36(c)(3) applies in connection with ''a consumer credit transaction secured by a consumer's dwelling.'' Accordingly, with respect to successors in interest under proposed § 1026.2(a)(11), § 1026.36(c)(1) and (2) would apply in connection with a mortgage loan secured by a consumer's principal dwelling, and § 1026.36(c)(3) would apply in connection with a mortgage loan secured by a consumer's dwelling.

[202] For the reasons discussed in the section-by-section analysis of § 1024.30(d), *supra,* the Bureau believes that providing confirmed successors in interest with payoff balances does not present privacy concerns.

[203] 78 FR 10901, 10914 (Feb. 14, 2013) (quoting 15 U.S. C. 1601(a)).

this vulnerable group justifies the additional cost to servicers.

The Bureau solicits comment on whether certain parts of § 1026.36(c) should apply with respect to successors in interest even if the servicer has not confirmed the successor in interest's identity and ownership interest in the dwelling. Further, the Bureau solicits comment on whether certain parts of § 1026.36(c) should not apply with respect to confirmed successors in interest.

With respect to § 1026.41, under proposed § 1026.2(a)(11), once a servicer confirms a successor in interest's identity and ownership interest in the dwelling, the servicer would be required to provide the successor in interest with ongoing periodic statements required under § 1026.41.[204] As described in part V.A, the Bureau is proposing this change because the Bureau has received repeated reports from consumers and consumer advocacy groups that successors in interest face many of the challenges that Regulation Z's mortgage servicing rules were designed to prevent. Specifically, when the Bureau issued the periodic statement requirement in the 2013 TILA Servicing Final Rule, the Bureau stated that the periodic statement ''serve[s] a variety of important purposes, including informing consumers of their payment obligations, providing information about the mortgage loan, creating a record of transactions that increase or decrease the outstanding balance, providing information needed to identify and assert errors, and providing information when consumers are delinquent.'' [205] The Bureau believes that receiving periodic statements would serve these same purposes for successors in interest, who as homeowners of a dwelling securing a mortgage loan may be required to make payments on the loan to avoid foreclosure.

Further, because § 1026.41 already requires servicers to send periodic statements to the prior consumer, the Bureau believes that the additional cost to servicers to apply these requirements to successors in interest will be minimal. The Bureau believes that the cost would be limited to updating servicer systems initially, adding individual successors in interest to the system on an ongoing basis, and printing and mailing costs, if any. In any event, the Bureau believes that providing consumers who have an ownership interest in a property with detailed information about the status of the loan secured by the property justifies the additional cost.

The Bureau solicits comment on whether § 1026.41 should provide that, in the case of consumer death, the servicer should continue providing periodic statements to the consumer's estate until a successor in interest's status has been confirmed.

Proposed commentary. Proposed comment 2(a)(11)–1 provides that, even after a servicer confirms a successor in interest's status, the servicer is still generally required to comply with the requirements of §§ 1026.20(c) through (e), 1026.36(c), and 1026.41 with respect to the prior consumer. The proposed comment indicates, however, that a servicer is not required to comply with the requirements of §§ 1026.20(c) through (e) and 1026.41 if the prior consumer also has either died or has been released from the obligation on the mortgage loan, and a servicer is not required to comply with the requirements of § 1026.36(c) if the prior consumer also has been released from the obligation on the mortgage loan. The proposed comment also provides that the prior consumer retains any rights under §§ 1026.20(c) through (e), 1026.36(c), and 1026.41 that accrued prior to the confirmation of the successor in interest to the extent these rights would otherwise survive the prior consumer's death or release from the obligation.

The Bureau is proposing this comment because the Bureau believes that §§ 1026.20(c) through (e), 1026.36(c), and 1026.41 would still provide valuable information and protections to prior consumers even after confirmation of a successor in interest. In particular, because the prior consumer may remain liable on the mortgage loan even after a successor in interest is confirmed and so still has significant legal interests at stake, the Bureau believes that it would be appropriate for the prior consumer to continue receiving the information and protections of §§ 1026.20(c) through (e), 1026.36(c), and 1026.41.

The Bureau acknowledges that, under this proposed comment, servicers will sometimes be required to comply with Regulation Z's mortgage servicing rules with respect to more than one person—both the prior consumer and the successor in interest, as well as, in some cases, multiple successors in interest who each acquire an ownership interest in a dwelling. The Bureau notes that, under the Mortgage Servicing Rules, it is already the case that the rules may apply with respect to more than one consumer for a particular mortgage loan. It is quite common for more than one consumer (for example, spouses) to be obligated on the mortgage note, and the Mortgage Servicing Rules apply with respect to each consumer in such cases. Accordingly, the Bureau does not believe that applying Regulation Z's mortgage servicing rules to successors in interest presents novel challenges for servicers in this regard.

On the other hand, with respect to §§ 1026.20(c) through (e) and 1026.41, the Bureau believes that it would not often be useful to the prior consumer's estate to continue receiving ARM disclosures, escrow account cancellation notices, and periodic statements once a servicer confirms a successor in interest's status and the prior consumer has died. When a successor in interest's status has been confirmed and the prior consumer has died, the estate of the prior consumer would have at most a relatively narrow interest in the mortgage loan. Accordingly, the Bureau believes that prior consumers should not receive ARM disclosures, escrow account cancellation notices, or periodic statements after the successor in interest has been confirmed and the prior consumer has died. By contrast, with respect to § 1026.36(c), the Bureau believes that it would not reduce much burden on servicers to relieve them of the prompt crediting, prohibition on pyramiding of late fees, and payoff balance requirements after the successor in interest has been confirmed and the prior consumer has died. The Bureau also believes there may be some circumstances in which, for example, prompt crediting of payments from a deceased consumer's estate would help to prevent foreclosure. Accordingly, the Bureau believes that § 1026.36(c) should still apply to the prior consumer even after the successor in interest has been confirmed and the prior consumer has died. In the alternative, however, the Bureau is considering providing that § 1026.36(c) does not apply to the prior consumer when the servicer has confirmed a successor in interest's status and the prior consumer has died.

Once a successor in interest has been confirmed and the prior consumer has been released from the obligation on the mortgage loan, the prior consumer may have legal interests relating to loan activity prior to the release of the obligation, but would have little or no legal interest in subsequent loan activity. Accordingly, the Bureau believes that servicers should not be required to comply with the requirements of §§ 1026.20(c) through

[204] Section 1026.41 applies with respect to ''a closed-end consumer credit transaction secured by a dwelling.'' Accordingly, with respect to successors in interest under proposed § 1026.2(a)(11), § 1026.41 would apply with respect to a mortgage loan secured by a dwelling.

[205] 78 FR 10901, 10959 (Feb. 14, 2013).

(e), 1026.36(c), and 1026.41 once a successor in interest has been confirmed and the prior consumer has been released from the obligation on the mortgage loan.

The Bureau solicits comment on whether a servicer should not be required to comply with §§ 1026.20(c) through (e), 1026.36(c), and 1026.41 with respect to prior consumers after a successor in interest is confirmed. The Bureau also solicits comment on whether other circumstances exist, beyond death and relief of the obligation on the mortgage loan, in which some or all of the requirements of §§ 1026.20(c) through (e), 1026.36(c), and 1026.41 should not apply with respect to the prior consumer after a successor in interest is confirmed.

Paragraph (a)(27)

As described in part V.A., the Bureau believes that, to the extent that the Mortgage Servicing Rules apply to successors in interest, the proposed rule should apply with respect to all categories of successors in interest who acquired an ownership interest in the dwelling securing a mortgage loan in a transfer protected by the Garn-St Germain Act.[206] Accordingly, the Bureau is proposing to define successor in interest in § 1026.2(a)(27) to cover all categories of successors in interest who acquired an ownership interest in the dwelling securing a mortgage loan in a transfer protected by the Garn-St Germain Act. (As discussed in the section-by-section analysis of § 1024.31, the Bureau is proposing to add a similar definition to Regulation X.)

The proposed definition states that a successor in interest is a person to whom an ownership interest in a dwelling securing a mortgage loan is transferred from a prior consumer, provided that the transfer falls under an exemption specified in the appropriate section of the Garn-St Germain Act. The Bureau intends the proposed definition to apply throughout the proposed rule and commentary.

The Bureau solicits comment on whether certain categories of successors in interest protected by the Garn-St Germain Act should not be covered by the Bureau's definition of successor in interest. The Bureau also solicits comment on whether additional categories of successors in interest, beyond those protected by the Garn-St Germain Act, should be covered by the Bureau's definition of successor in interest.

Section 1026.36 Prohibited Acts or Practices and Certain Requirements for Credit Secured by a Dwelling

36(c) Servicing Practices

36(c)(1) Payment Processing

The Bureau is proposing commentary to § 1026.36(c)(1) to clarify how servicers must treat periodic payments made by consumers who are performing under either temporary loss mitigation programs or permanent loan modifications. (As described in the section-by-section analysis of § 1026.41(d), the Bureau is also proposing commentary to § 1026.41 clarifying certain periodic statement disclosures relating to temporary loss mitigation programs and permanent loan modifications.) Proposed comment 36(c)(1)(i)-4 provides that if the loan contract has not been permanently modified but the consumer has agreed to a temporary loss mitigation program, a periodic payment under § 1026.36(c)(1)(i) remains an amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle under the loan contract, irrespective of the payment due under the temporary loss mitigation program. Accordingly, if a consumer submits a payment under a temporary loss mitigation program that is less than an amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle under the loan contract, the servicer should generally treat the payment as a partial payment under § 1026.36(c)(1)(i), even though the consumer may have made the payment due under the temporary loss mitigation program.

The Bureau is proposing this comment in response to several inquiries regarding payment processing for payments due under temporary loss mitigation programs, which are quite common and not addressed by the Bureau's existing rules or commentary. The Bureau acknowledges that in the 2013 TILA Final Servicing Rule, it stated that ''if a consumer makes a payment sufficient to cover the principal, interest and escrow due under a trial modification plan, these funds should be applied.''[207] This statement may have suggested that a periodic payment under a temporary loss mitigation program is the payment due under the temporary loss mitigation program, rather than the amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle under the loan contract. However, the Bureau believes that this suggestion, which was not accompanied by any further explanation, is inaccurate. A temporary loss mitigation program is only a temporary or trial program, during which the consumer may be accumulating a delinquency according to the loan contract. The Bureau believes that it is appropriate to require servicers to credit payments in a way that reflects the continuing contractual obligation between the parties and that reflects any delinquency accumulating during the program. Further, if a consumer fails to comply with the terms of a temporary loss mitigation program, the servicer and consumer will typically revert back to the terms of the loan contract, treating payments submitted during the temporary loss mitigation program as if the program had not existed. Accordingly, the Bureau believes that it would be unnecessarily burdensome for servicers to treat the payment due under a temporary loss mitigation program as a periodic payment, and then to have to undo that treatment if the consumer later fails to comply with the terms of the temporary loss mitigation program. The Bureau also understands that consumers are not assessed a late fee for such payments so long as the payment is the payment due under the temporary loss mitigation program. Accordingly, the Bureau does not believe that consumers would be harmed by treating payments that are less than the amount due under the loan contract, but that are the payments due under a temporary loss mitigation program, as partial payments.

By contrast, proposed comment 36(c)(1)(i)–5 provides that if the loan contract has been permanently modified, a periodic payment under § 1026.36(c)(1)(i) is an amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle under the modified loan contract.

The Bureau believes that if the loan contract has been permanently modified, it is appropriate for the periodic payment to be an amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle under the modified loan contract. The Bureau believes that once a loan has been permanently modified, the obligation under the previous loan contract is not relevant to the periodic payment because only the modified loan contract, and not the original contract, now binds the consumer and the servicer.

The Bureau is also proposing a technical change to § 1026.36(c)(1). Section 1026.36(b) provides that § 1026.36(c)(1) applies to closed-end consumer credit transactions secured by

[206] 12 U.S.C. 1701j–3(d).

[207] 78 FR 10901, 10954 (Feb. 14, 2013).

a consumer's principal dwelling. However, current § 1026.36(c)(1) refers to consumer credit transactions secured by a consumer's principal dwelling, without referring to closed-end transactions. Consistent with § 1026.36(b), proposed § 1026.36(c)(1) modifies the existing language to refer directly to closed-end consumer credit transactions secured by a consumer's principal dwelling.

36(c)(2) No Pyramiding of Late Fees

The Bureau is also proposing a technical change to § 1026.36(c)(2). Section 1026.36(b) provides that § 1026.36(c)(2) applies to closed-end consumer credit transactions secured by a consumer's principal dwelling. However, current § 1026.36(c)(2) refers to consumer credit transactions secured by a consumer's principal dwelling, without referring to closed-end transactions. Consistent with § 1026.36(b), proposed § 1026.36(c)(2) modifies the existing language to refer directly to closed-end consumer credit transactions secured by a consumer's principal dwelling.

Section 1026.41 Periodic Statements for Residential Mortgage Loans

41(a) In General

As described above, proposed § 1026.2(a)(11) provides that a successor in interest is a consumer for purposes of § 1026.41 once a servicer confirms the successor in interest's status. Accordingly, the servicer would be required to provide the confirmed successor in interest with ongoing periodic statements.

Proposed comment 41(a)(1)–5.i. reiterates for clarity that a servicer must provide a confirmed successor in interest with a periodic statement meeting the requirements of § 1026.41. The Bureau is proposing this comment to ensure that the effect of proposed § 1026.2(a)(11) with respect to providing periodic statements to confirmed successors in interest is clear.

Proposed comment 41(a)(1)–5.ii provides that if a servicer sends a periodic statement meeting the requirements of § 1026.41 to another consumer, the servicer need not also send a periodic statement to a successor in interest; a single statement may be sent. The proposed comment also provides that if a servicer confirms more than one successor in interest's identity and ownership interest in the dwelling, the servicer need not send periodic statements to more than one of the confirmed successors in interest. This proposed comment is consistent with current comment 41(a)(1)–1, which provides that, when two consumers are joint obligors with primary liability on a closed-end consumer credit transaction secured by a dwelling, the periodic statement may be sent to either one of them. The Bureau is proposing comment 41(a)(1)–5.ii because the Bureau believes that it is appropriate to treat periodic statements sent to successors in interest consistently with how periodic statements for multiple obligors are treated. Servicers should not be required to send more than one periodic statement with respect to a mortgage loan. Alternatively, the Bureau is also considering the contrary rule that each successor in interest must receive a periodic statement.

The Bureau solicits comment on whether only one successor in interest should receive a periodic statement or whether instead each successor in interest should receive a periodic statement. The Bureau also solicits comment on whether other circumstances exist, beyond death orrelief of the obligation on the mortgage loan, in which the requirement to send periodic statements should not apply with respect to the prior consumer.

41(d) Content and Layout of the Periodic Statement

The Bureau is proposing to amend comment 41(d)–1, which addresses the requirement in § 1026.41(d) that several disclosures on the periodic statement be provided in close proximity to one another. Current comment 41(d)–1 states that items in close proximity may not have any intervening text between them. The close proximity standard is found in other parts of Regulation Z, including §§ 1026.24(b) and 1026.48. The proposed amendment would relax this requirement for purposes of § 1026.41(d) and instead provide that items in close proximity may not have any unrelated text between them. This proposal mirrors the standard for open-end credit plans secured by a consumer's dwelling found in § 1026.40(a) and its corresponding comment 40(a)(1)–3, which explain that while most of the disclosures required by § 1026.40(d) must be grouped together and segregated from all unrelated information, a creditor is permitted to include information that explains or expands upon the required disclosures.

Specifically, the proposed amendment to comment 41(d)–1 provides that items in close proximity may not have any unrelated text between them and explains that text is unrelated if it does not explain or expand upon the required disclosures. Text that explains or expands upon the required disclosures may include, for example, an additional explanation of the amount due when: a fee has been charged to the consumer but will not be collected until payoff (*e.g.,* attorney's fees); the consumer has agreed to a temporary loss mitigation program (as discussed further in the section-by-section analysis of § 1026.41(d)(2)); the consumer makes an advance payment; or the servicer reverses a fee. The Bureau believes that the proposed amendment to comment 41(d)-1 may provide servicers with additional flexibility to clarify or explain information on the periodic statement and may enable servicers to address circumstances not expressly provided for in § 1026.41(d). The Bureau seeks comment generally on this proposal to amend comment 41(d)–1 to relax the prohibition on intervening text to include only related text that explains or expands upon the required disclosures.

The Bureau is proposing additional commentary to § 1026.41(d) clarifying certain periodic statement disclosure requirements relating to temporary loss mitigation programs. (As described in the section-by-section analysis of § 1026.36(c), the Bureau is also proposing commentary to § 1026.36(c) relating to the periodic payment under temporary loss mitigation programs.) Proposed comment 41(d)–4 provides that, if the consumer has agreed to a temporary loss mitigation program, the disclosures required by § 1026.41(d)(2), (3), and (5) regarding how payments will be and were applied should nonetheless identify how payments are applied according to the loan contract, irrespective of the payment due under the temporary loss mitigation program.

The Bureau is proposing this commentary in response to several inquiries regarding how temporary loss mitigation programs affect certain disclosures on the periodic statement. Currently, the Bureau's rules and commentary do not address this issue. As described in the section-by-section analysis of § 1024.36(c)(1), proposed comment 36(c)(1)(i)–4 provides that if the consumer has agreed to a temporary loss mitigation program, a periodic payment under § 1026.36(c)(1)(i) remains an amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle under the loan contract, irrespective of the payment due under the temporary loss mitigation program. Accordingly, the Bureau believes that it is appropriate for the disclosures on the periodic statement required by § 1026.41(d)(2), (3), and (5) to identify how payments

will be and are applied according to the loan contract, irrespective of the payment due under the temporary loss mitigation program, because this is how servicers would actually be applying the payments under proposed comment 36(c)(1)(i)–4. The Bureau believes that the periodic statement should reflect how payments are actually being applied. The Bureau believes that this treatment is appropriate so that the consumer is kept apprised of how payments are being applied, including being notified of any delinquency that may be accumulating during a temporary loss mitigation program.

The Bureau is also proposing comment 41(d)–5 to address the disclosures that servicers must make on the first periodic statement provided to a consumer after an exemption under § 1026.41(e) terminates. The proposal clarifies that the first post-exemption periodic statement may be limited to disclosing the fees and charges imposed, payments received and applied, and transaction activity since the last payment due date that occurred while the exemption was in effect.

Section 1026.41(d) requires that a periodic statement include three disclosures concerning account activity that occurred ''since the last statement.'' First, § 1026.41(d)(2)(ii) requires the explanation of amount due to identify ''[t]he total sum of any fees or charges imposed since the last statement.'' Second, § 1026.41(d)(3)(i) requires the past payment breakdown to disclose ''all payments received since the last statement, including a breakdown showing the amount, if any, that was applied to principal, interest, escrow, fees and charges, and the amount, if any, sent to any suspense or unapplied funds account.'' Finally, § 1026.41(d)(4) requires the transaction activity to include ''[a] list of all transaction activity that occurred since the last statement.''

The Bureau has received inquiries regarding a servicer's disclosure obligations under § 1026.41(d)(2)(ii), (3)(i), and (4) for purposes of the first periodic statement provided after an exemption under § 1026.41(e) terminates. The Bureau understands that such circumstances may arise when a servicer provided periodic statements, became exempt from the requirements for one of the reasons under § 1026.41(e), and the exemption subsequently terminated, thereby requiring the servicer to resume providing statements. For example, a servicer may have been exempt from providing periodic statements for the duration of a consumer's bankruptcy case, may have provided coupon books but has now decided to begin providing periodic statements, or may have been exempt from the periodic statement requirement as a small servicer but no longer qualifies for that exemption. Alternatively, a mortgage loan might be transferred from a servicer that provides coupon books or was an exempt small servicer to a servicer that provides periodic statements.

Sections 1026.41(d)(2)(ii), (3)(i), and (4) could be interpreted as requiring the periodic statement to include information about account activity for the duration of the exemption period—literally ''since the last statement.'' However, the § 1026.41(d)(2)(ii), (3)(i), and (4) disclosures generally cover a time period equivalent to a billing cycle and the first post-exemption periodic statement should arguably cover a similar time period. Accordingly, the Bureau believes that it may be necessary to clarify the requirements of § 1026.41(d)(2)(ii), (3)(i), and (4) with respect to the first post-exemption periodic statement.

The Bureau recognizes that there may be benefits to providing a consumer with information regarding all fees and charges imposed, all payments received and applied, and all transaction activity that occurred during the exemption period. A consumer could review this information to determine if a servicer imposed any erroneous fees, failed to properly credit payments, or made other mistakes with respect to the consumer's mortgage loan while the exemption applied.

Nonetheless, the Bureau believes that consumers and servicers may be better served if the first post-exemption periodic statement includes account activity only since the final payment due date that occurred while the exemption was in effect. First, requiring the disclosure of all fees and charges imposed, payments received, and transaction activity during an exemption period—which could have spanned several months or years—may place an undue burden on servicers. The Bureau understands that servicers' systems are generally not equipped to provide months' or years' worth of account activity on a single periodic statement. The Bureau does not believe that servicers should incur the costs associated with providing a potentially lengthy first post-exemption periodic statement.

Second, including account activity for the duration of the exemption period, such as the total of all fees and charges imposed, could overwhelm or mislead consumers to believe that those fees and charges are presently due, even though the consumer may have previously paid many or all of them.

Third, including account activity for the duration of the exemption period undermines, in part, the rationale for the exemptions. For example, § 1026.41(e)(3) recognizes the value of a coupon book as striking a balance between ensuring consumers receive important information, and providing a low-burden method for servicers to comply with the periodic statement requirements.[208] Requiring the first post-exemption periodic statement to include the disclosures required under § 1026.41(d)(2)(ii), (3)(i), and (4) for the duration of the exemption arguably upsets the balance struck by the coupon book exemption. Similarly, the Bureau has recognized that servicers qualifying for the small servicer exemption have incentives to maintain ''high-touch,'' customer-centric customer servicer models and that consumers generally have easy access to these small, community-based servicers to obtain any information they desire.[209] In light of this ability to access information, in the circumstance in which a servicer begins sending periodic statements because it was previously but is no longer a small servicer, it may be unnecessary for the first post-exemption periodic statement to include disclosures related to the entire duration of the exemption period.

Finally, consumers will receive, or have alternative methods of obtaining, much of the account information that under this proposal would not be included in the first post-exemption periodic statement. Consumers who receive coupon books have a right to request the information set forth in § 1026.41(d)(2)(ii), (3)(i), and (4). Similarly, for servicers subject to Regulation X's servicing requirements, a consumer may obtain this information by submitting a written information request. In addition, even if the first post-exemption periodic statement does not include the past payment breakdown since the last pre-exemption periodic statement, § 1026.41(d) requires the statement to identify ''[t]he total of all payments received since the beginning of the current calendar year . . ..'' This year-to-date information, while not covering the entire exemption period, provides consumers with a broad overview of the costs of their mortgage loan and how their payments are being allocated to interest or fees as opposed to principal.[210]

[208] 78 FR 10901, 10973 (Feb. 14, 2013).

[209] *Id.* at 10975.

[210] *Id.* at 10966.

Accordingly, the Bureau is proposing comment 41(d)–5, which provides that for purposes of the first periodic statement following termination of an exemption under § 1026.41(e), the disclosures required by § 1026.41(d)(2)(ii), (d)(3)(i), and (d)(4) may be limited to the period since the final payment due date that occurred while the exemption was in effect. Proposed comment 41(d)–5 provides the following example: if a borrower's payments are due on the first of each month and a servicer's exemption under § 1026.41(e) terminated on January 15, the first statement provided to the consumer after January 15 may be limited to the total sum of any fees or charges imposed, the total of all payments received, and a list of all transaction activity only since January 1.

The Bureau seeks comment on proposed comment 41(d)–5, including whether to disclose account activity since a date other than the final payment due date that occurred while the exemption was in effect.

41(d)(1)

The Bureau is proposing commentary to § 1026.41(d)(1) clarifying certain periodic statement disclosure requirements relating to acceleration, temporary loss mitigation programs, and permanent loan modifications. The Bureau is proposing this commentary in response to several inquiries regarding how acceleration, temporary loss mitigation programs, and permanent loan modification affect disclosure of the amount due on the periodic statement. Currently, the Bureau's rules and commentary do not address this issue.

Section 1026.41(d)(1)(iii) provides that the periodic statement required by § 1026.41(d) must include the amount due, shown more prominently than other disclosures on the page. Proposed comment 41(d)(1)–1 provides that if the balance of a mortgage loan has been accelerated but the servicer will accept a lesser amount to reinstate the loan, the amount due disclosed on the periodic statement under § 1026.41(d)(1) should identify only the lesser amount that will be accepted to reinstate the loan, not the entire accelerated balance.

The Bureau is aware that after accelerating a mortgage loan, a servicer may be willing to accept a lesser amount to reinstate the loan, sometimes because doing so may be required by State law. The Bureau believes that it would be counterproductive in these circumstances for the borrower to receive a periodic statement disclosing the amount due as the full accelerated balance, which may be quite large. Because the borrower is much more likely to be able to pay a reinstatement amount than the full accelerated balance, the Bureau believes that receiving a periodic statement indicating that the amount due is the reinstatement amount would make the borrower more likely to actually pay the reinstatement amount, thereby possibly preventing foreclosure. The Bureau also believes it may confuse borrowers to receive a periodic statement indicating that the amount due is the full accelerated balanced when, in fact, the borrower is informed elsewhere that the borrower may pay only the reinstatement amount. Furthermore, the borrower may be deterred from reading other disclosures or documents if the borrower sees the full accelerated balance as the amount due, so the borrower may not actually become aware that reinstatement is possible, possibly leading to unnecessary foreclosure.

Proposed comment 41(d)(1)–2 provides that if the consumer has agreed to a temporary loss mitigation program, the amount due under § 1026.41(d)(1) may identify either the payment due under the temporary loss mitigation program or the amount due according to the loan contract. The Bureau believes that it may be confusing for borrowers who have agreed to a loss mitigation program to receive a periodic statement identifying the amount due under the loan contract when that amount is different from the payment due under the temporary loss mitigation program. Accordingly, the Bureau is proposing that servicers may, but are not required to, identify the payment due under the temporary loss mitigation program, instead of the amount due according to the loan contract.

The Bureau is not proposing to require that the payment due under the temporary loss mitigation program must be identified as the amount due because the Bureau is concerned about the consequences of requiring servicers to modify periodic statements whenever a borrower agrees to a temporary loss mitigation program. The Bureau understands that temporary loss mitigation programs are common and may be entered into for very short durations, so requiring servicers to modify periodic statements whenever a borrower agrees to a temporary loss mitigation program may be unduly burdensome for servicers. Furthermore, the Bureau is concerned that imposing additional requirements on servicers when a borrower agrees to a temporary loss mitigation program may deter servicers from offering temporary loss mitigation programs. In the alternative, however, the Bureau is considering requiring that if the consumer has agreed to a temporary loss mitigation program, the amount due under § 1026.41(d)(1) must identify the amount that the consumer has agreed to pay under the temporary loss mitigation program, rather than the amount due according to the loan contract.

The Bureau solicits comment on whether, if the consumer has agreed to a temporary loss mitigation program, servicers should be required, rather than permitted, to identify the amount due under § 1026.41(d)(1) as the payment due under the temporary loss mitigation program, rather than the amount due according to the loan contract.

Proposed comment 41(d)(1)–3 provides that if the loan contract has been permanently modified, the amount due under § 1026.41(d)(1) should identify only the amount due under the modified loan contract. The Bureau believes that once a loan has been permanently modified, the obligation under the previous loan contract is not relevant to the periodic statement because only the modified loan contract, and not the original contract, now binds the consumer and the servicer.

41(d)(2)

The Bureau is proposing commentary to § 1026.41(d)(2) clarifying certain periodic statement disclosure requirements relating to acceleration and temporary loss mitigation programs. The Bureau is proposing this commentary because, as noted in the section-by-section analysis of § 1026.41(d), the Bureau has received several inquiries regarding how acceleration and temporary loss mitigation programs affect disclosure of the explanation of amount due on the periodic statement and the Bureau's rules and commentary do not currently address this issue.

Section 1026.41(d)(2)(i) provides that the explanation of amount due on periodic statements required by § 1026.41 must include the monthly payment amount, including a breakdown showing how much, if any, will be applied to principal, interest, and escrow (if applicable) and, if a mortgage loan has multiple payment options, a breakdown of each of the payment options along with information on whether the principal balance will increase, decrease, or stay the same for each option listed. Proposed comment 41(d)(2)–1 provides that if the balance of a mortgage loan has been accelerated but the servicer will accept a lesser amount to reinstate the loan, the explanation of amount due under

§ 1026.41(d)(2) should omit the monthly payment amount that would generally be required under § 1026.41(d)(2)(i) and should include both the reinstatement amount and the accelerated amount. The proposed comment provides that the statement must also include an explanation that the reinstatement amount will be accepted to reinstate the loan. The proposed comment provides that this explanation should be on the front page of the statement or, alternatively, may be included on a separate page enclosed with the periodic statement or in a separate letter.

The Bureau is proposing this comment in conjunction with proposed comment 41(d)(1)–1 (discussed in the section-by-section analysis of § 1026.41(d)(1)), which provides that if the balance of a mortgage loan has been accelerated but the servicer will accept a lesser amount to reinstate the loan, the amount due disclosed on the periodic statement under § 1026.41(d)(1) should identify only the lesser amount that will be accepted to reinstate the loan. The Bureau is proposing comment 41(d)(2)–1 because, given that the amount due will reflect the reinstatement amount, the Bureau believes that the periodic statement should elsewhere identify the accelerated balance, which is the amount that the borrower technically owes under the loan contract and is significant information that the borrower should have. The Bureau believes that the explanation of amount due is where this disclosure is most appropriate. The Bureau is proposing that the monthly payment amount be omitted from the explanation of amount due after acceleration because the Bureau believes that once a loan has been accelerated, the monthly payment obligation is not relevant to the borrower, as the servicer will no longer accept this amount.

Because identification of both the reinstatement amount and the accelerated amount in the explanation of amount due may present some possibility of borrower confusion, the Bureau believes that the periodic statement should also include an explanation indicating that the reinstatement amount will be accepted to reinstate the loan. Consistent with the requirement under § 1026.41(d)(5) that partial payment information must be on the front page of the periodic statement or, alternatively, may be included on a separate page enclosed with the statement or in a separate letter, the Bureau believes it is appropriate that this explanation should be on the front page of the periodic statement or, alternatively, may be included on a separate page enclosed with the statement or in a separate letter.

Proposed comment 41(d)(2)–2 provides that if the consumer has agreed to a temporary loss mitigation program and the amount due on the periodic statement identifies the payment due under the temporary loss mitigation program, the explanation of amount due under § 1026.41(d)(2) should include both the amount due according to the loan contract and the payment due under the temporary loss mitigation program. The proposed comment provides that the statement should also include an explanation that the amount due is being disclosed as a different amount because of the temporary loss mitigation program. The proposed comment provides that this explanation should be on the front page of the statement or, alternatively, may be included on a separate page enclosed with the periodic statement or in a separate letter.

The Bureau is proposing this comment in conjunction with proposed comment 41(d)(1)–2 regarding amount due, which provides that if the consumer has agreed to a temporary loss mitigation program, the amount due under § 1026.41(d)(1) may identify either the payment due under the temporary loss mitigation program or the amount due according to the loan contract. The Bureau believes that when the amount due is disclosed on the periodic statement as the payment due under the temporary loss mitigation program, the periodic statement should elsewhere identify the amount due according to the loan contract, as this amount is significant information that the borrower should have. For example, under proposed comment 36(c)(1)(i)–4, the amount due according to the loan contract would be the amount promptly credited by the servicer. The Bureau believes that the explanation of amount due under § 1026.41(d)(2) is where this disclosure is most appropriate.

Because identification of both the payment due under the temporary loss mitigation program and the amount due according to the loan contract may present some possibility of borrower confusion, the Bureau believes that the statement should also include an explanation indicating that the amount due is being disclosed as a different amount than the amount due under the loan contract because of the temporary loss mitigation program. Consistent with the requirement under § 1026.41(d)(5) that partial payment information must be on the front page of the statement or, alternatively, may be included on a separate page enclosed with the periodic statement or in a separate letter, the Bureau believes it is appropriate that this explanation should be on the front page of the statement or, alternatively, may be included on a separate page enclosed with the periodic statement or in a separate letter.

41(d)(8)

Section 1026.41(d)(8) requires a servicer to include a so-called ''delinquency box'' containing certain prescribed information in periodic statements sent to consumers who are more than 45 days delinquent.[211] The Bureau is proposing certain revisions to § 1026.41(d)(8) to align the requirements of that section with the proposed definition of delinquency under Regulation X § 1024.31. Specifically, the Bureau is proposing to revise § 1026.41(d)(8) and add commentary to mirror the language in proposed § 1024.31 (Delinquency) and its related comments.

Current § 1026.41(d)(8) requires a servicer to include in each periodic statement certain information about a consumer's delinquency when the consumer is more than 45 days delinquent, including the date on which the consumer became delinquent. However, Regulation Z does not include an explanation of how a servicer must determine the length of a consumer's delinquency. The Bureau believes that it may confuse consumers if a servicer calculates the length of delinquency pursuant to § 1026.41(d)(8)(i) differently from the length of delinquency for purposes of the servicing requirements in subpart C of Regulation X. As such, the Bureau is proposing Regulation Z comment 41(d)(8)–1, which mirrors the proposed Regulation X definition of delinquency and accompanying comment 31 (Delinquency)-1. Specifically, proposed Regulation Z comment 41(d)(8)–1 clarifies that delinquency begins on the date a consumer misses a payment of principal, interest, and escrow (if applicable), notwithstanding any grace period the servicer affords the consumer.

In addition, the Bureau is proposing to add comment 41(d)(8)–2 to address how a creditor should disclose the length of a consumer's delinquency as required by § 1026.41(d)(8) if a servicer applies a borrower's payment to the oldest outstanding delinquency first. As discussed in the section-by-section analysis of § 1024.31, the Bureau is proposing a comment to the definition of delinquency to clarify that, if a servicer applies a consumer's payment

[211] 12 CFR 1026.41(d)(8).

to the oldest outstanding delinquency, the servicer must advance the date of the consumer's delinquency for purposes of calculating the length of a borrower's delinquency under the various applicable provisions of Regulation X's mortgage servicing rules. To ensure that a servicer's method of calculating the length of the consumer's delinquency for purposes of Regulation Z § 1026.41(d)(8)(i) is consistent with the method for doing the same under the proposed definition of delinquency in Regulation X, the Bureau proposes to include the same commentary in proposed Regulation Z comment 41(d)(8)–2.

Finally, the Bureau is proposing to revise § 1026.41(d)(8)(i) to harmonize its language with the notion that the date a borrower's delinquency begins advances as payments are applied to the oldest outstanding delinquency. Section 1026.41(d)(8)(i) requires servicers to include ''[t]he date on which the consumer became delinquent'' on a delinquent consumer's periodic statement. If comment 41(d)(8)-2 is adopted as proposed, ''the date on which a consumer became delinquent'' would advance as the consumer's payments are applied to prior missed payments, which may confuse consumers. Accordingly, the Bureau is proposing to revise § 1026.41(d)(8)(i) to require servicers to disclose the length of a consumer's delinquency as of the date of the periodic statement.

Legal Authority

The proposed amendments to § 1026.41(d) implement section 128(f)(1)(H) of TILA, which requires inclusion in periodic statements of any information that the Bureau may prescribe by regulation.

41(e) Exemptions

41(e)(4) Small Servicers

41(e)(4)(iii) Small Servicer Determination

41(e)(4)(iii)(A)

The Bureau is proposing to amend certain criteria for determining whether a servicer qualifies for the small servicer exemption under § 1026.41(e)(4). In determining whether a servicer qualifies for the small servicer exemption, § 1026.41(e)(4)(iii)(A) currently excludes from consideration mortgage loans voluntarily serviced by a servicer for a creditor or assignee that is not an affiliate of the servicer and for which the servicer does not receive any compensation or fees. The proposed amendment would remove the requirement that the non-affiliate must be a creditor or assignee, while continuing to exclude from consideration mortgage loans voluntarily serviced by a servicer for a non-affiliate for which the servicer does not receive any compensation or fees.

The Bureau's Mortgage Servicing Rules exempt small servicers from certain mortgage servicing requirements. Specifically, Regulation Z exempts small servicers, defined in § 1026.41(e)(4)(ii), from the requirement to provide periodic statements for residential mortgage loans.[212] Regulation X incorporates this same definition by reference to § 1026.41(e)(4) and thereby exempts small servicers from: (1) certain requirements relating to obtaining force-placed insurance,[213] (2) the general servicing policies, procedures, and requirements,[214] and (3) certain requirements and restrictions relating to communicating with borrowers about, and evaluation of applications for, loss mitigation options.[215]

Section 1026.41(e)(4)(ii) defines the term ''small servicer'' as a servicer that: (1) services, together with any affiliates,[216] 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee; (2) is a Housing Finance Agency, as defined in 24 CFR 266.5; or (3) is a nonprofit entity that services 5,000 or fewer mortgage loans, including any mortgage loans serviced on behalf of associated nonprofit entities, for all of which the servicer or an associated nonprofit entity is the creditor. Generally, under § 1026.41(e)(4)(ii)(A), a servicer cannot be a small servicer if it services any loan for which the servicer or its affiliate is not the creditor or assignee.

However, current § 1026.41(e)(4)(iii) excludes from consideration certain types of mortgage loans for purposes of determining whether a servicer qualifies as a small servicer: (1) mortgage loans voluntarily serviced by the servicer for a creditor or assignee that is not an affiliate of the servicer and for which the servicer does not receive any compensation or fees; (2) reverse mortgage transactions; and (3) mortgage loans secured by consumers' interests in timeshare plans.

In the May 2013 Mortgage Servicing Proposal, the Bureau proposed the exclusion for voluntarily serviced mortgage loans codified at current § 1026.41(e)(4)(iii)(A).[217] At that time, the Bureau had received feedback that certain servicers that would otherwise be considered small servicers voluntarily service mortgage loans for unaffiliated non-profit entities for charitable purposes and do not receive compensation or fees from engaging in that servicing.[218] Except for one comment received from a national trade association, *see* section-by-section analysis of § 1026.41(e)(4)(iii)(D), the Bureau received comments with respect to the voluntarily serviced proposal that focused only on charitable servicing for nonprofit organizations.[219] The language of current § 1026.41(e)(4)(iii)(A), however, does not require that the mortgage loan must have been made by a nonprofit organization to qualify for the voluntarily serviced exception. And as the Bureau explained, ''volunteer servicing is not limited to the servicing of mortgage loans owned or originated by nonprofit organizations . . . .''[220] Current § 1026.41(e)(4)(iii)(A) applies to any mortgage loan voluntarily serviced by a servicer for a non-affiliate creditor or assignee and for which the servicer does not receive any compensation or fees.

[212] 12 CFR 1026.41(e) (requiring delivery each billing cycle of a periodic statement, with specific content and form). For loans serviced by a small servicer, a creditor or assignee is also exempt from the Regulation Z periodic statement requirements. *See* 12 CFR 1026.41(e)(4)(i).

[213] 12 CFR 1024.17(k)(5) (prohibiting purchase of force-placed insurance in certain circumstances).

[214] 12 CFR 1024.30(b)(1) (exempting small servicers from §§ 1024.38 through 41, except as otherwise provided under § 1024.41(j), as discussed in note 215, *infra*). Sections 1024.38 through 40 respectively impose general servicing policies, procedures, and requirements; early intervention requirements for delinquent borrowers; and policies and procedures to maintain continuity of contact with delinquent borrowers.

[215] *See* 12 CFR 1024.41 (loss mitigation procedures). Though exempt from most of the rule, small servicers are subject to the prohibition of foreclosure referral before the loan obligation is more than 120 days delinquent and may not make the first notice or filing for foreclosure if a borrower is performing pursuant to the terms of an agreement on a loss mitigation option. 12 CFR 1024.41(j).

[216] ''Affiliate'' is defined in § 1026.32(b)(5) as any company that controls, is controlled by, or is under common control with another company, as set forth in the Bank Holding Company Act of 1956, 12 U.S.C. 1841 *et seq.* (BHCA). Under the BHCA, a company has ''control'' over another company if it (i) ''directly or indirectly . . . owns, controls, or has power to vote 25 per centum or more of any class of voting securities'' of the other company; (ii) ''controls . . . the election of a majority of the directors or trustees'' of the other company; or (iii) ''directly or indirectly exercises a controlling influence over the management or policies'' of the other company (based on a determination by the Board). 12 U.S.C. 1841(a)(2).

[217] 78 FR 25638, 25644 (May 2, 2013).

[218] *Id.*

[219] 78 FR 44685, 44697 (July 24, 2013). Since that time, the Bureau has finalized its proposal to add an alternative definition of small servicer that applies to certain nonprofit entities that service, for a fee, only loans for which the servicer or an associated nonprofit entity is the creditor. 79 FR 65300, 65304 (Nov. 3, 2014).

[220] 78 FR 44685, 44697 (July 24, 2013).

The Bureau has learned that certain depository institutions, which may qualify for the small servicer exemption, service for their depository customers seller-financed sales of residential real estate.[221] The Bureau understands that typically under these arrangements, the depository institution receives scheduled periodic payments from the purchaser of the property pursuant to the terms of the sale and deposits into the account of the seller (the depository institution's customer) the payments of principal and interest and such other payments with respect to the amounts received from the purchaser as may be required pursuant to the terms of the sale.[222] The Bureau understands that in some cases, the depository institution may elect to voluntarily service seller-financed sales of residential real estate on behalf of its depository customers without receiving any compensation or fees. The Bureau further understands that under these arrangements, although the depository customer is not an affiliate of the servicer, typically, the customer is neither a creditor[223] nor an assignee as required by current § 1026.41(e)(4)(iii)(A). Therefore, a depository institution that would otherwise qualify for the small servicer exemption and that voluntarily services seller-financed sales of residential real estate without receiving any compensation or fees would likely no longer qualify for the small servicer exemption.

The Bureau understands that certain depository institutions engage in this practice to provide their depository customers this service when, particularly in small or remote communities, there may not be an alternative service provider in the state. The Bureau believes that such seller-financed sales of residential real estate generally are limited and not widespread. For the reasons discussed in this section, the Bureau believes that, to the extent servicing cost savings are passed on to consumers, it may be beneficial to consumers for a depository institution that otherwise qualifies for the small servicer exemption to be able to voluntarily service transactions for a non-affiliate, who is neither a creditor nor an assignee, without losing its small servicer status, and that these benefits may outweigh the consumer protections provided by the servicing rules.

Accordingly, the Bureau is proposing to amend the voluntarily serviced exception under current § 1026.41(e)(4)(iii)(A) to exclude mortgage loans voluntarily serviced by a servicer for a non-affiliate of the servicer and for which the servicer does not receive any compensation or fees from consideration in determining whether a servicer qualifies as a small servicer, while no longer requiring that the non-affiliate be a creditor or assignee. Specifically, proposed § 1026.41(e)(4)(iii)(A) provides that mortgage loans voluntarily serviced by the servicer for a non-affiliate of the servicer and for which the servicer does not receive any compensation or fees would not be considered in determining whether a servicer qualifies as a small servicer.

Under the existing rule, mortgage loans voluntarily serviced by the servicer for a creditor or assignee that is not an affiliate of the servicer and for which the servicer does not receive any compensation or fees are not considered in determining whether a servicer qualifies as a small servicer. Because depository customers who seller-finance sales of residential real estate typically are neither creditors nor assignees, a depository institution that voluntarily services even a single such transaction likely would not qualify as a small servicer under the current rule. The Bureau is proposing to amend the current voluntarily serviced exception to exclude from consideration mortgage loans voluntarily serviced by a servicer for a non-affiliate for which the servicer does not receive any compensation or fees, while removing the requirement that the non-affiliate be a creditor or assignee. The Bureau is concerned that if a depository institution that would otherwise qualify for the small servicer exemption voluntarily services even a single transaction for which the non-affiliate is neither a creditor nor an assignee and does not receive any compensation or fees, it would be subject to all of the servicing rules for all of the mortgage loans that it services, including those that would otherwise be exempt for being owned or originated by the servicer. Although the Bureau believes the servicing rules provide important protections for consumers, the Bureau is concerned that these protections may not outweigh the potential for increased costs to consumers served by depository institutions that qualify for the small servicer exemption.

The Bureau has narrowly tailored the proposed amendment to the voluntarily serviced exception. The Bureau believes that continuing to limit the voluntarily serviced exception to mortgage loans voluntarily serviced by a servicer and for which the servicer does not receive any compensation or fees reduces the risk that the proposed amendment to § 1026.41(e)(4)(iii)(A) will be used to circumvent the servicing rules. The Bureau also believes that removing the requirement that the non-affiliate be a creditor or assignee does not unduly expand the existing exception. Rather, the Bureau believes that the rationale for the exception applies equally well to those non-affiliates who seller-finance sales of residential real estate and do not meet the definition of creditor under § 1026.2(a)(17) because they extend five or fewer mortgage loans in a year. The Bureau seeks comment on whether amending the voluntarily serviced exception to exclude from consideration mortgage loans voluntarily serviced by the servicer for a non-affiliate, without requiring that the non-affiliate be a creditor or assignee, is appropriate. The Bureau also seeks comment on whether it should grandfather existing mortgage loans voluntarily serviced by the servicer for a servicer's non-affiliate, which is not a creditor or assignee, and for which the servicer does not receive any compensation or fees.

Legal Authority

The Bureau is proposing to amend the voluntarily serviced exception under current § 1026.41(e)(4)(iii)(A) and exempt mortgage loans voluntarily serviced by a servicer for a non-affiliate of the servicer and for which the servicer does not receive any compensation or fees from the periodic statement requirement under section 128(f) of TILA pursuant to its authority under section 105(a) and (f) of TILA and section 1405(b) of the Dodd-Frank Act.

For the reasons discussed above, the Bureau believes that the proposed amendment is necessary and proper under section 105(a) of TILA to facilitate TILA compliance. As discussed above, the Bureau believes that if a depository institution that would otherwise qualify for the small servicer exemption voluntarily services a transaction for a non-affiliate that does not meet the definition of creditor or assignee, it would likely no longer qualify for the small servicer exemption. Accordingly, the current rule may result in depository institutions that would otherwise qualify for the small servicer exemption being unable to provide high-contact servicing or to comply with other applicable regulatory requirements due to the costs that would be imposed to comply with all of the servicing rules

[221] Seller financer is a defined term under § 1026.36(a)(5). This analysis generally refers to the practice of seller-financed sales of residential real estate unless specifically referring to the defined term.

[222] *See* 12 U.S.C. 2605(i)(3) (definition of servicing applicable to TILA, as amended by section 1401 of the Dodd-Frank Act).

[223] *See* 12 CFR 1026.2(a)(17).

for all of the mortgage loans they service, including those mortgage loans that would otherwise be exempt for being owned or originated by the servicer. Accordingly, the Bureau believes that the proposal to amend the voluntarily serviced exception to no longer require that the non-affiliate be a creditor or assignee facilitates compliance with TILA by allowing depository institutions to voluntarily service seller-financed sales of residential real estate, without losing status as a small servicer, in order to cost-effectively service loans in compliance with applicable regulatory requirements.

In addition, consistent with section 105(f) of TILA and in light of the factors in that provision, for servicers that voluntarily service mortgage loans for a non-affiliate and for which the servicer does not receive any compensation or fees, the Bureau believes that requiring them to comply with the periodic statement requirement in section 128(f) of TILA would not provide a meaningful benefit to consumers in the form of useful information or protection. The Bureau believes, as noted above, that requiring provision of periodic statements would impose significant costs and burden. Specifically, the Bureau believes that the proposal will not complicate, hinder, or make more expensive the credit process. In addition, consistent with section 1405(b) of the Dodd-Frank Act, for the reasons discussed above, the Bureau believes that exempting transactions voluntarily serviced by a servicer for a non-affiliate, without requiring the non-affiliate to be a creditor or assignee, from the requirements of section 128(f) of TILA would be in the interest of consumers and in the public interest.

In addition, the Bureau relies on its authority pursuant to section 1022(b) of the Dodd-Frank Act to prescribe regulations necessary or appropriate to carry out the purposes and objectives of Federal consumer financial law, including the purposes and objectives of Title X of the Dodd-Frank Act. Specifically, the Bureau believes that the proposed rule is necessary and appropriate to carry out the purpose under section 1021(a) of the Dodd-Frank Act of ensuring that all consumers have access to markets for consumer financial products and services that are fair, transparent, and competitive, and the objective under section 1021(b) of the Dodd-Frank Act of ensuring that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.

41(e)(4)(iii)(D)

The Bureau is proposing to amend certain criteria for determining whether a servicer qualifies for the small servicer exemption set forth under § 1026.41(e)(4). The proposal adds a new category of transactions that would not be considered in determining whether a servicer qualifies as a small servicer. Specifically, the proposal excludes transactions serviced by the servicer for a seller financer that meet all of the criteria identified in § 1026.36(a)(5).

As explained in the section-by-section analysis of § 1026.41(e)(4)(iii)(A), the Bureau's Mortgage Servicing Rules exempt small servicers from certain mortgage servicing requirements. In May 2013, along with other proposed amendments to Regulations X and Z, the Bureau proposed the exclusion for voluntarily serviced mortgage loans and requested comment on whether other mortgage loans serviced through similar limited arrangements should not be considered in determining whether a servicer is a small servicer.[224] The Bureau did not receive comments recommending that any other servicing arrangements be excluded from consideration for purposes of determining small servicer status. The Bureau received one comment from a national trade association requesting guidance regarding certain depository services some of its bank members provide for depositors who ''owner-finance'' the sale of residential real estate. The Bureau determined in the July 2013 Mortgage Final Rule that the comment was outside the scope of the proposal and that the commenter did not provide sufficient information about the service described for the Bureau to be able to provide guidance at that time.[225]

Since that time, the Bureau has learned more about the depository service described in the national trade association's comments. Specifically, the Bureau understands that certain depository institutions that may otherwise qualify for the small servicer exemption service, for a fee, seller-financed sales of residential real estate for their depository customers. However, because the depository institution is neither the creditor nor the assignee, the depository institution that engages in this practice likely would not qualify for the small servicer exemption because it is servicing, for a fee, a mortgage loan it does not own or did not originate.[226]

As explained in the section-by-section analysis of § 1026.41(e)(4)(iii)(A), the Bureau understands that certain depository institutions engage in this practice to provide their depository customers this service when, particularly in small or remote communities, there may not be an alternative service provider in the state. The Bureau believes that such seller-financed sales of residential real estate generally are limited and not widespread. The Bureau further understands that purchasers of seller-financed residential real estate, who may be unable to secure credit through traditional means, may benefit from a depository institution receiving their scheduled periodic payments and providing an independent accounting as a third party to the transaction. The Bureau believes that the Dodd-Frank Act and Mortgage Servicing Rules were intended to address systemic problems in the mortgage servicing industry and may not have contemplated the practice described here. For the reasons discussed in this section, the Bureau believes that, to the extent servicing cost savings are passed on to consumers, it may be beneficial to consumers for a depository institution that otherwise qualifies for the small servicer exemption to be able to service transactions for a seller financer that meet all of the criteria identified in § 1026.36(a)(5), without losing its small servicer status, and that these benefits may outweigh the consumer protections provided by the servicing rules.

Accordingly, the Bureau is proposing to add a new category of transactions that would not be considered in determining whether a servicer qualifies as a small servicer for transactions serviced by the servicer for a seller financer. Specifically, proposed § 1026.41(e)(4)(iii)(D) provides that transactions serviced by the servicer for a seller financer that meet all of the criteria identified in § 1026.36(a)(5) are not considered in determining whether a servicer qualifies as a small servicer. Section 1026.36(a)(5) identifies a seller financer as a natural person, estate, or trust that provides seller financing for the sale of only one property in any 12-month period to purchasers of such property, which is owned by the natural person, estate, or trust and serves as

[224] 78 FR 25638, 25644 (May 2, 2013).

[225] 78 FR 44685, 44697–98 (July 24, 2013).

[226] The Bureau further understands that, in some cases, the depository institution provides periodic payment receipts as well as annual tax reporting (for example, Internal Revenue Service Form 1098) and may assess late fees to the purchaser when the payment is late.

security for the financing.[227] The natural person, estate, or trust cannot have constructed, or acted as a contractor for the construction of, a residence on the property in its ordinary course of business.[228] The financing must have a repayment schedule that does not result in negative amortization and must have a fixed rate or an adjustable rate that is adjustable after five or more years, subject to reasonable annual and lifetime limitations on interest rate increases. If the financing agreement has an adjustable rate, the rate is determined by the addition of a margin to an index rate and is subject to reasonable rate adjustment limitations. The index the adjustable rate is based on is a widely available index such as indices for U.S. Treasury securities or the London Interbank Offered Rate (LIBOR).[229]

The Bureau has narrowly tailored the proposed new category of transactions that are not considered in determining whether a servicer qualifies as a small servicer. For example, the proposal relates only to transactions serviced by the servicer for a seller financer that meet all of the criteria identified in § 1026.36(a)(5). In contrast to the seller financer criteria identified in § 1026.36(a)(4), which permits seller financing for the sale of up to three properties in any 12-month period, the seller financer criteria identified in § 1026.36(a)(5) permits seller financing for the sale of only one property in any 12-month period. The Bureau believes that limiting the seller financer criteria to the sale of only one property in any 12-month period reduces the risk that this proposed new category of transactions not considered in determining whether a servicer qualifies as a small servicer will be used to circumvent the servicing rules.

Under the existing rule, a servicer qualifies for the small servicer exemption if it services, together with any affiliates, 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee. Because seller-financed transactions are not typically structured to meet this definition, a depository institution that services, for a fee, even a single seller-financed transaction likely would not qualify as a small servicer under the current rule. The Bureau is proposing to add a new category of transactions that would be excluded from consideration in determining whether a servicer qualifies as a small servicer to permit a depository institution that would otherwise qualify for the small servicer exemption to enter into servicing arrangements for seller-financed transactions without losing its small servicer status. The Bureau understands that, in some cases, the seller financer is not a ''creditor'' under the relevant definition[230] and that such seller-financed transactions are therefore not federally related mortgage loans, and likely would not be subject to Regulation X.[231] The Bureau is concerned that if a depository institution that would otherwise qualify for the small servicer exemption services even a single seller-financed transaction, it would be subject to all of the servicing rules for all of the mortgage loans that it services, including those that would otherwise be exempt for being owned or originated by the servicer. Although the Bureau believes that the servicing rules provide important protections for consumers, the Bureau is concerned that these protections may not outweigh the potential for increased costs to consumers served by depository institutions that would otherwise qualify for the small servicer exemption.

The Bureau seeks comment on whether excluding transactions serviced by a servicer for a seller financer that meet all of the criteria identified in § 1026.36(a)(5) in determining small servicer status is appropriate. The Bureau also seeks comment on whether it should grandfather existing transactions serviced by a servicer for a seller financer that meet all of the criteria identified in § 1026.36(a)(5).

Legal Authority

The Bureau is proposing to exempt transactions serviced by a servicer for a seller financer that meet all of the criteria identified in § 1026.36(a)(5) from the periodic statement requirement under section 128(f) of TILA pursuant to its authority under section 105(a) and (f) of TILA and section 1405(b) of the Dodd-Frank Act.

For the reasons discussed above, the Bureau believes that the proposed exemption is necessary and proper under section 105(a) of TILA to facilitate TILA compliance. As discussed above, the Bureau believes that if a depository institution that would otherwise qualify for the small servicer exemption services a transaction for a seller financer, it would likely no longer qualify for the small servicer exemption. Accordingly, the current rule may result in depository institutions that would otherwise qualify for the small servicer exemption being unable to provide high-contact servicing or to comply with other applicable regulatory requirements due to the costs that would be imposed to comply with all of the servicing rules for all of the mortgage loans they service, including those mortgage loans that would otherwise be exempt for being owned or originated by the servicer. Accordingly, the Bureau believes that the proposal to exempt transactions serviced by a servicer for a seller financer that meet all of the criteria identified in § 1026.36(a)(5) facilitates compliance with TILA by allowing depository institutions to service seller-financed transactions, without losing status as a small servicer, in order to cost-effectively service loans in compliance with applicable regulatory requirements.

In addition, consistent with section 105(f) of TILA and in light of the factors in that provision, for small servicers that service transactions for a seller financer that meet all of the criteria identified in § 1026.36(a)(5), the Bureau believes that requiring them to comply with the periodic statement requirement in section 128(f) of TILA would not provide a meaningful benefit to consumers in the form of useful information or protection. The Bureau believes, as noted above, that requiring provision of periodic statements would impose significant costs and burden. Specifically, the Bureau believes that the proposal will not complicate, hinder, or make more expensive the credit process. In addition, consistent with section 1405(b) of the Dodd-Frank Act, for the reasons discussed above, the Bureau believes that exempting transactions serviced by a servicer for a seller financer that meet all of the criteria identified in § 1026.36(a)(5) from the requirements of section 128(f) of TILA would be in the interest of consumers and in the public interest.

In addition, the Bureau relies on its authority pursuant to section 1022(b) of the Dodd-Frank Act to prescribe regulations necessary or appropriate to carry out the purposes and objectives of Federal consumer financial law, including the purposes and objectives of Title X of the Dodd-Frank Act. Specifically, the Bureau believes that the proposed rule is necessary and appropriate to carry out the purpose under section 1021(a) of the Dodd-Frank Act of ensuring that all consumers have access to markets for consumer financial products and services that are fair,

[227] 12 CFR 1026.36(a)(5)(i).

[228] 12 CFR 1026.36(a)(5)(ii).

[229] 12 CFR 1026.36(a)(5)(iii).

[230] 12 CFR 1024.2(b) (definition of federally related mortgage loan requires that the loan be made in whole or in part by a creditor, as defined in 15 U.S.C. 1602(g), that makes or invests in residential real estate loans aggregating more than $1,000,000 per year).

[231] 12 CFR 1024.5(a).

transparent, and competitive, and the objective under section 1021(b) of the Dodd-Frank Act of ensuring that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.

41(e)(5) Certain Consumers in Bankruptcy

The Bureau is proposing to revise § 1026.41(e)(5) to limit the circumstances in which a servicer is exempt from the periodic statement requirements with respect to a consumer who is a debtor in bankruptcy. Current § 1026.41(e)(5) provides that a servicer is exempt from the requirement to provide periodic statements for a mortgage loan while the consumer is a debtor in bankruptcy. Comment 41(e)(5)–3 states that if there are multiple obligors on the mortgage loan, the exemption applies if any of the obligors is in bankruptcy, and comment 41(e)(5)–2.ii explains that a servicer has no obligation to resume providing periodic statements with respect to any portion of the mortgage debt that is discharged in bankruptcy. In general, the proposed revisions to § 1026.41(e)(5) limit the exemption to consumers in bankruptcy who are surrendering the property or avoiding the lien securing the mortgage loan and to consumers who have requested that a servicer cease providing periodic statements (or coupon books, as applicable). In cases where a mortgage loan has multiple obligors and not all of them are in bankruptcy, the exemption would apply to a non-bankrupt obligor only when (i) one of the obligors is in Chapter 12 or Chapter 13 bankruptcy, and (ii) the non-bankrupt obligor requests that a servicer cease providing periodic statements or coupon books.

Specifically, proposed § 1026.41(e)(5)(i) limits the exemption to when two conditions are satisfied. First, the consumer must be a debtor in a bankruptcy case, must have discharged personal liability for the mortgage loan through bankruptcy, or must be a primary obligor on a mortgage loan for which another primary obligor is a debtor in a Chapter 12 or Chapter 13 bankruptcy case. Second, one of the following circumstances must apply: (1) The consumer requests in writing that the servicer cease providing periodic statements or coupon books; (2) the consumer's confirmed plan of reorganization provides that the consumer will surrender the property securing the mortgage loan, provides for the avoidance of the lien securing the mortgage loan, or otherwise does not provide for, as applicable, the payment of pre-bankruptcy arrearages or the maintenance of payments due under the mortgage loan; (3) a court enters an order in the consumer's bankruptcy case providing for the avoidance of the lien securing the mortgage loan, lifting the automatic stay pursuant to 11 U.S.C. 362 with respect to the property securing the mortgage loan, or requiring the servicer to cease providing periodic statements or coupon books; or (4) the consumer files with the bankruptcy court a Statement of Intention pursuant to 11 U.S.C. 521(a) identifying an intent to surrender the property securing the mortgage loan.

The proposal also provides that the exemption terminates and a servicer must resume providing periodic statements or coupon books in two general circumstances. First, notwithstanding meeting the above conditions for an exemption, the proposal requires servicers to provide periodic statements or coupon books if the consumer requests them in writing (unless a court has entered an order requiring otherwise). Second, with respect to any portion of the mortgage debt that is not discharged through bankruptcy, a servicer must resume providing periodic statements or coupon books within a reasonably prompt time after the next payment due date that follows the earliest of the following outcomes in either the consumer's or the joint obligor's bankruptcy case, as applicable: the case is dismissed, the case is closed, the consumer reaffirms the mortgage loan under 11 U.S.C. 524, or the consumer receives a discharge under 11 U.S.C. 727, 1141, 1228, or 1328.

Section 1420 of the Dodd-Frank Act amended section 128(f) of TILA to require periodic statements for residential mortgage loans. On January 17, 2013, the Bureau issued the 2013 TILA Servicing Final Rule implementing the periodic statement requirements and related exemptions in § 1026.41. (In certain circumstances, servicers may provide borrowers with a coupon book in place of periodic statements.) In the preamble to the final rule, the Bureau acknowledged industry's concern that the Bankruptcy Code's automatic stay prevents attempts to collect a debt from a consumer in bankruptcy, but the Bureau explained that it did not believe the Bankruptcy Code would prevent a servicer from sending a consumer a statement on the status of the mortgage loan.[232] The Bureau further explained that the final rule allowed servicers to make changes to the periodic statement that they believe are necessary when a consumer is in bankruptcy, such as including a message about the bankruptcy and presenting the amount due to reflect payment obligations determined by the individual bankruptcy proceeding.[233]

After publication of the final rule, industry stakeholders expressed more detailed concerns about the requirement to provide periodic statements to consumers under bankruptcy protection. Industry commenters expressed continued concerns about potential conflicts with bankruptcy law and many indicated that the periodic statement would need to be redesigned for consumers in bankruptcy. The Bureau received numerous inquiries and requests for clarification regarding how to reconcile the periodic statement requirement with various bankruptcy law requirements. Industry stakeholders expressed concern that bankruptcy courts, under certain circumstances, may find that a periodic statement violates the automatic stay or discharge injunction, even if a disclaimer were included. They requested guidance regarding whether and how servicers could permit consumers to opt-out of receiving statements. Bankruptcy trustees raised similar concerns and explained that sending a periodic statement that fails to recognize the unique character of Chapter 13's treatment of a mortgage in default arguably violates the Bankruptcy Code's automatic stay. Servicers and trustees further questioned how periodic statements could be adapted to the specific circumstances that may arise depending on the type of bankruptcy proceeding (*i.e.,* liquidation under Chapter 7, or reorganization under Chapter 11, Chapter 12, or Chapter 13).

Based on these inquiries, the Bureau determined that the interaction of bankruptcy law and the periodic statement requirement necessitated further study and that there was insufficient time before the rule's January 10, 2014 effective date to provide further calibration of the requirements. Accordingly, the Bureau issued the October 2013 IFR, which added current § 1026.41(e)(5) to exempt servicers from the periodic statement requirement with respect to consumers in bankruptcy.[234] The Bureau explained in commentary that the exemption in § 1024.41(e)(5) applies with respect to any person sharing primary liability on a mortgage loan with a debtor in bankruptcy,[235] and that a servicer has no obligation to resume compliance

[232] 78 FR 10901, 10966 (Feb. 14, 2013).

[233] *Id.* at 10966 n.125.

[234] 78 FR 62993, 63000–02 (Oct. 23, 2013).

[235] Comment 41(e)(5)–3.

with § 1024.41 with respect to any portion of a mortgage loan that is discharged under applicable provisions of the Bankruptcy Code.[236]

In issuing the IFR, the Bureau did not take a position as to whether providing periodic statements to a consumer in bankruptcy violates the automatic stay or discharge injunction. The Bureau also did not discourage servicers that send tailored periodic statements to consumers in bankruptcy from continuing to do so. The Bureau further expressed its belief that some consumers facing the complexities of bankruptcy may benefit from receiving a periodic statement, tailored to their circumstances.[237]

In the IFR, the Bureau stated that it would continue to examine this issue and might reinstate the requirement to provide a consumer in bankruptcy with a periodic statement. However, the Bureau explained that it would not reinstate any such requirement without notice and comment rulemaking and an appropriate implementation period. The Bureau solicited comment on the scope of the exemption, when a servicer qualifies for the exemption and when it must resume sending statements, and how the content of the periodic statement might be tailored to meet the particular needs of consumers in bankruptcy.[238]

Since issuing the IFR, the Bureau has continued to engage various stakeholders on the scope of this exemption, including hosting the roundtable discussion on June 16, 2014, among representatives of consumer advocacy groups, bankruptcy attorneys, servicers, trade groups, bankruptcy trustees, and the U.S. Trustee's Office. The Bureau has also sought comment from bankruptcy judges and experts and conducted its own further analysis of the intersection of the periodic statement requirement and bankruptcy law.[239]

Based upon its review of the comments received and its study of the intersection of the periodic statement requirements and bankruptcy law, the Bureau believes it may be appropriate to reinstate the periodic statement requirements with respect to consumers in bankruptcy under certain circumstances. The Bureau is proposing to do so in the present rulemaking because, as noted in the IFR, the Bureau believes that it would be preferable to use notice and comment rulemaking, rather than simply finalizing the IFR with modifications, to reinstate the periodic statement requirements with respect to such consumers. The Bureau believes that this approach will provide stakeholders the opportunity to more fully consider and comment on the Bureau's specific proposal. The Bureau also believes that it is appropriate to address comments it already received in response to the IFR. Accordingly, the following discussion of the proposal with respect to the periodic statement requirements also contains discussion of the comments received on the IFR, as well comments received after the IFR's official comment period ended.

Comments on the Scope of the Exemption

Comments on the scope of the exemption addressed two broad issues: (1) whether to maintain the current exemption; and (2) if a more limited exemption is appropriate, under what circumstances should a consumer in bankruptcy receive periodic statements.

On the first issue, several servicers and trade groups requested that the Bureau maintain the exemption without any adjustments. Some trade groups argued that the exemption provides a clear rule to servicers that periodic statements are not required for consumers in bankruptcy, whereas the original 2013 TILA Servicing Final Rule was unclear about the information periodic statements should contain and when it may be permissible to not provide periodic statements to a consumer in bankruptcy. These trade groups also commented that the amount due and other disclosures mandated by § 1026.41 could be confusing to consumers who are making payments according to a bankruptcy plan. During the bankruptcy roundtable discussion, a credit union and a community bank stated that their systems are not equipped to produce periodic statements that reflect Chapter 13's unique accounting practices and that tracking payments in a Chapter 13 case requires a significant amount of time and effort. These participants maintained that the cost of upgrading their systems outweighed any benefit to the relatively few bankrupt consumers in their portfolios. The credit union suggested that, at a minimum, the Bureau adopt a modified exemption from any future periodic statement requirement for entities with a limited number of consumers in bankruptcy or a limited percentage of their mortgage loans subject to bankruptcy proceedings.

Consumer advocacy groups strongly objected to the exemptions set forth in the IFR. They argued that consumers in bankruptcy need information about their mortgage loan accounts in order to make timely payments, determine whether the servicer correctly calculated and applied payments, and object to any account errors. The consumer advocacy groups stated that, in the past, such consumers have suffered improper fees and charges because servicers have avoided implementing protocols to account for payments made during bankruptcy. Moreover, the consumer advocacy groups argued that servicers' concerns that providing periodic statements would violate the automatic stay are exaggerated because court decisions finding stay violations have generally involved extreme facts—for example, servicers overtly attempting to collect payments outside of the bankruptcy process or ignoring a consumer's request to cease receiving statements.

An association of Chapter 13 trustees commented that periodic statements are necessary in Chapter 13 cases to determine whether servicers are correctly applying payments. The trustees echoed the consumer advocacy groups' concerns that servicers have not established systems to properly track and apply payments and that consumers are often subject to erroneous fees and charges. They argued that requiring servicers to disclose bankruptcy accounting practices would likely force servicers to improve their practices.

A bankruptcy law professor commented that in light of consumers' in bankruptcy demonstrated difficulty in paying their debts, such consumers need periodic statements to remind them of their payment obligations and that depriving them of statements is antithetical to bankruptcy's purpose of financial rehabilitation. One bankruptcy judge commented that requiring periodic statements in Chapter 13 cases may force servicers to improve their systems and more accurately apply consumer payments. Another bankruptcy judge suggested that, in lieu of monthly statements, the Bureau could require servicers to send initial notices acknowledging a consumer's bankruptcy case and identifying the monthly payment amount, followed by semi-annual or annual statements disclosing how the servicer has applied payments and the amount of outstanding fees.

Several servicers and trade groups, while supporting a temporary exemption, commented that a narrower exemption would be appropriate depending on whether the consumer

[236] Comment 41(e)(5)–2.ii.

[237] 78 FR 62993, 63001 (Oct. 23, 2013).

[238] *Id.* at 63002.

[239] Written or oral presentations to the Bureau imparting information or argument directed to the merits or outcome of the IFR were subject to the Bureau's policy on ex parte presentations. *See* CFPB Bulletin 11–3.

intends to retain the property, as discussed more below.

The Bureau also received comments regarding which consumers should receive periodic statements if the exemption did not apply to all consumers in bankruptcy. Commenters were generally in agreement that periodic statements would be appropriate for some consumers but not others. Some industry commenters drew a distinction between consumers who intend to retain their property and those who intend to surrender it or cease making payments on the mortgage loan. Specifically, these commenters took the position that periodic statements are not appropriate when a consumer intends to surrender the property or avoid (*i.e.,* render unenforceable) the lien securing the mortgage loan, when a consumer requests that a servicer cease providing periodic statements, when a court order or local rule prohibits providing statements, or after a court enters an order lifting the automatic stay to permit a servicer to pursue foreclosure. However, these commenters suggested that consumers in Chapter 11, Chapter 12, and Chapter 13 bankruptcy should receive statements when the plan of reorganization provides that the consumer will retain the property and continue making payments on the mortgage loan. In cases where a consumer retains the property, commenters noted, the consumer can benefit from information about the payments they must make to keep the property. Similarly, certain industry commenters suggested that consumers in Chapter 7 bankruptcy should receive statements if they file a Statement of Intention with the bankruptcy court stating that they intend to retain the property.

With some distinctions discussed below, consumer advocacy groups and trustees agreed that it may be appropriate to distinguish between consumers retaining the property and those surrendering it through bankruptcy. However, consumer advocacy groups also argued that comments 41(e)(5)-2.ii and 3 are unnecessarily broad in stating that the exemption applies to all joint obligors of a consumer in bankruptcy and that servicers have no obligation to resume providing periodic statements with respect to any portion of a mortgage loan that is discharged in bankruptcy. These groups maintained that joint obligors and consumers who have discharged a mortgage loan should be able to receive periodic statements in appropriate circumstances.

Despite general agreement on when periodic statements may be appropriate, commenters disagreed on three points. First, they disagreed on whether Chapter 7 consumers should be required to opt-in to receive periodic statements. Consumer advocacy groups argued that, as a default rule, a consumer in Chapter 7 bankruptcy should receive periodic statements. A law professor and bankruptcy judge generally agreed with this approach. On the other hand, servicers and trade groups favored an opt-in method, in which consumers would receive periodic statements only if their Statement of Intention filed with the court pursuant to 11 U.S.C. 521(a) identified an intent to retain the property or if they otherwise affirmatively requested statements. One servicer added that bankruptcy courts might not agree that checking the box to retain property on the Statement of Intention suffices as an affirmative request to receive periodic statements and that a court might therefore view the statement as an unwanted collection attempt.

Second, two trade groups initially maintained that periodic statements are unnecessary when a consumer is making all payments on the mortgage loan through a Chapter 13 trustee (and not directly to the servicer), though one of the groups stated in subsequent comments that all consumers in Chapter 13 should receive statements. Chapter 13 trustees strenuously argued that statements are necessary in all cases to determine whether servicers are correctly applying plan payments. Several servicers took the position that there should be a uniform approach in all Chapter 13 cases so that servicers do not have to implement different protocols depending on the procedures governing a particular Chapter 13 case.

Third, commenters were divided on whether a trustee overseeing a consumer's Chapter 13 case should receive periodic statements. Bankruptcy trustees argued that a trustee's access to periodic statements is vital because it would enable the trustee to monitor how servicers are applying payments and engage servicers to correct payment application errors early on. Some trustees suggested that servicers be required to provide statements upon a trustee's request. Similarly, a law professor commented that there are compelling reasons to provide statements to trustees, particularly in those cases where a consumer is required to send periodic payments to a trustee and the trustee acts as a disbursing agent by remitting the payments to the servicer.

Industry participants objected on several grounds to providing statements to trustees. First, they maintained that trustees do not need statements because they receive all the information they need pursuant to the Federal Rules of Bankruptcy Procedure. Two trade groups argued that in the event that a trustee needs a periodic statement during the bankruptcy case, a trustee may simply request a copy from the consumer. Second, industry participants objected to the burden imposed by providing additional statements to trustees, either on a regular or as-needed basis. Finally, industry participants argued that privacy concerns are implicated by sending statements to a trustee who is not a fiduciary of the consumer. For example, some servicers that are also banks use combined statements that provide information not only related to the mortgage loan, but also related to other accounts a consumer has with the bank. Industry participants argued that, in those circumstances, the bank would need to redact the information pertaining to the consumer's other accounts, leading to further burden and costs to produce the statements.

Benefits to Consumers in Bankruptcy of Receiving Periodic Statements

Based upon the comments outlined above, continued outreach and monitoring efforts, and further analysis, the Bureau believes that certain consumers in bankruptcy will benefit from receiving periodic statements (or coupon books, in the case of servicers that provide them instead of periodic statements under § 1026.41(e)(3)). Since the January 10, 2014 effective date, the Bureau has received complaints from consumers who are debtors in bankruptcy and have requested to receive periodic statements or other written information regarding upcoming payments, but have had their requests denied by servicers. Consumers have complained that, as a result, they may inadvertently fall behind on payments or at a minimum lack basic information about the status of their loans. Case law indicates that bankruptcy courts have heard similar complaints and that consumers are often frustrated by the lack of payment information provided to them.[240] To that end, the Bureau

[240] *See, e.g., Henry* v. *Assocs. Home Equity Servs., Inc. (In re Henry),* 266 B.R. 457, 471 (Bankr. C.D. Cal. 2001) (''A secured creditor should be encouraged to send out payment coupons, envelopes and periodic statements if a debtor has filed a statement that the debtor plans to keep property subject to secured debt and to make payments. Debtors frequently complain to the court that they want to make their payments, but their creditors do not cooperate by providing payment coupons.''); *In re Freeman,* 352 B.R. 628 (Bankr. N.D. W. Va. 2006) (overruling creditor's objection to the debtor's request for periodic statements that

understands that nearly 30 bankruptcy courts have adopted local rules permitting or requiring servicers to provide periodic statements or coupon books under certain circumstances.[241]

The Bureau does not believe that a consumer's status in bankruptcy should act as a bar to receiving fundamental information about the mortgage loan account. The Bureau believes that, like all consumers, those in bankruptcy may benefit from information regarding the application of their payments to principal, interest, escrow, and fees. As the Bureau noted in the 2013 TILA Servicing Final Rule, the explanation of amount due, transaction activity, and past payment breakdown give consumers the information they need to identify possible errors on the account and enable consumers to understand the costs of their mortgage loan.[242]

The Bureau understands that in the absence of a requirement that servicers provide periodic statements, however, consumers in bankruptcy often lack such crucial information about their mortgage loan account. The Bureau understands that, for example, consumers in Chapter 7 bankruptcy or those who have discharged personal liability for a mortgage loan often do not receive written information regarding their mortgage payments. This lack of information is particularly troubling for consumers in Chapter 7 bankruptcy who use the so-called ''ride-through'' option—that is, consumers who discharge personal liability for the mortgage loan through bankruptcy but continue making mortgage payments to forestall foreclosure, which enables them to remain in their home. In that instance, the lien is unaffected by bankruptcy, such that a consumer's post-bankruptcy failure to stay current on the mortgage would enable a servicer to foreclose on the property, but the servicer could not pursue collection efforts or a deficiency judgment against the consumer personally.[243] The Bureau understands that in many cases, using this option may be a strategic decision by a consumer to avoid a future deficiency judgment, but that, in some instances, courts will not permit consumers to reaffirm a mortgage loan, forcing them to use the ride-through option despite a willingness to reaffirm. Because the ride-through option discharges a consumer's personal liability, current § 1026.41(e)(5) exempts a servicer from providing periodic statements for the life of the mortgage loan—even if the maturity date is years away. The Bureau does not believe that this is an optimal result for consumers, nor is it the result Congress may have intended when it amended the Bankruptcy Code in 2005 to expressly provide that a mortgage creditor does not violate the discharge injunction by seeking to obtain periodic payments on a discharged mortgage loan in the ordinary course of its relationship with a debtor in lieu of pursuing foreclosure.[244] In light of a Bankruptcy Code provision apparently contemplating that consumers will use the ride-through option with respect to their principal residence,[245] as well as the fact that in some circumstances courts will not permit a consumer to reaffirm a mortgage loan, the Bureau believes that consumers who continue making payments after discharging a mortgage loan should not be denied periodic statements or coupon books. The Bureau therefore declines to follow the suggestion that periodic statements or coupon books be conditioned on a consumer reaffirming the mortgage loan.

The Bureau also believes that consumers in Chapter 13 would benefit from receiving the information set forth in periodic statements or coupon books provided under § 1026.41. The Bureau understands that, effective December 1, 2011, the Federal Rules of Bankruptcy Procedure require servicers to disclose certain mortgage loan information to consumers whose Chapter 13 plans provide that the consumer will cure pre-bankruptcy arrearages and maintain regular periodic payments.[246] Thus, a consumer with a Chapter 13 plan may receive more information and greater protections than a consumer in a Chapter 7 case. The Bureau understands, however, that these disclosure requirements were motivated by pervasive and documented servicer failures to make accurate filings or disclose fees during Chapter 13 cases.[247]

were normally required by State law); *cf. Payne* v. *Mortg. Elec. Registration Sys., Inc. (In re Payne),* 387 B.R. 614, 626 (Bankr. D. Kan. 2008) (''[The servicer]'s representative testified [that the servicer] does not send payments books to mortgagors in bankruptcy because [the servicer] cannot present a true and accurate accounting of the loan payments [the servicer] is receiving from the Trustee as opposed to debtors' payments history.'').

[241] *See, e.g.,* LBR 4001–2, Bankr. M.D. Ala.; LBR 4072–1, Bankr. N.D. Ala.; Model Chapter 13 Plan, Bankr. S.D. Ala.; Bankr. D. Colo. LBR 4001–4; Bankr. S.D. Ill. Model Chapter 13 Plan; Bankr. E.D. La. General Order 2012–1 (adopting model Chapter 13 plan); Bankr. D. Md. L.R. 4001–5; Bankr. D. Mass. L.R. 4001–3; Bankr. E.D. Mich. Model Chapter 13 Plan; Bankr. E.D. Mo. L.R. 3021; Bankr. W.D. Mo. L.R. 4001–4; Mont. LBR 4001–3; D. Kan. Bk. S.O. 08–4; District of New Jersey Local Bankruptcy Rules, D.N.J LBR 4001–3; Bankr. N.D.N.Y. Model Chapter 13 Plan; E.D.N.C. LBR 4001–2; Bankr. M.D.N.C Standing Order, *In re Terms and Provisions Available for Incorporation into Chapter 13 Confirmation Orders;* W.D.N.C. LBR 4001–1; Bankr. D.N.H. L. Form 3015–1A, Model Chapter 13 Plan; Bankr. N.D. Ohio Admin. Order 13–02, *In re Form Chapter 13 Plan;* Bankr. D. Or. L.R. 3015–1; R.I. LBR 4001–1; SC LBR 3015–1 (adopting model Chapter 13 plan); Bankr. N.D. TX General Order 2010–1, *In re Amended Standing Order Concerning All Chapter 13 Cases;* Bankr. S.D. TX Uniform Plan and Motion for Valuation of Collateral; Bankr. W.D. TX (Austin Div.), *Consolidated Standing Order for Chapter 13 Case Administration for Austin Division* (adopting model Chapter 13 plan); Bankr. W.D. TX (San Antonio Div.), Model Chapter 13 Plan; Vt. LBR 3071–1; Bankr. W.D. Wash. L. Form 13–4; Bankr. E.D. Wis. Model Chapter 13 Plan.

[242] 78 FR 10901, 10964–67 (Feb. 14, 2013).

[243] *See Henry,* 266 B.R. at 476 (discussing the ride-through option and disagreement among courts as to whether the Bankruptcy Code permits it); *In re Covel,* 474 B.R. 702, 708 (Bankr. W.D. Ark. 2012) (holding that Congress eliminated the ride-through option for personal property in 2005, but ''[b]y not making corresponding changes concerning real property, Congress appears to tacitly recognize a ride through option for real property.''); *Kibler* v. *WFS Fin., Inc. (In re Kibler),* No. 00–2604, 2001 WL 388764, at *5 (Bankr. E.D. Cal. Mar. 19, 2001) (''In jurisdictions that recognize the 'ride-though' option, debtors may want to preserve their property, yet not incur the potential personal liability imposed by a reaffirmation agreement. These debtors . . . need to receive normal monthly billings to avoid a contract default and potential foreclosure.'').

[244] 11 U.S.C. 524(j) (''Subsection (a)(2) does not operate as an injunction against an act by a creditor that is the holder of a secured claim, if—(1) such creditor retains a security interest in real property that is the principal residence of the debtor; (2) such act is in the ordinary course of business between the creditor and the debtor; and (3) such act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.'').

[245] *See* 4 *Collier on Bankruptcy* ¶ 524.09 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014) (''Section 524(j) clarifies that when a debtor does not reaffirm a mortgage debt secured by real estate that is the debtor's principal residence, the creditor may continue to send statements to the debtor in the ordinary course of business and collect payments made voluntarily by the debtor. The provision makes clear that debtors do not have to reaffirm such debts in order to keep paying them. In fact, it has long been the practice that mortgage debts are not reaffirmed.'').

[246] Fed. R. Bankr. P. 3002.1 (requiring, among other things, servicers to provide 21-day advance notice of a change in payment amount and notice within 180 days after a servicer incurs a fees or expense for which the consumer is liable, and also providing for a reconciliation process at the end of the case to determine if a servicer disputes whether the consumer is current on the mortgage loan).

[247] Fed. R. Bankr. P. 3002.1 Advisory Committee's Notes (2011) (''[Rule 3002.1] is added to aid in the implementation of § 1322(b)(5), which permits a chapter 13 debtor to cure a default and maintain payments on a home mortgage over the course of the debtor's plan. It applies regardless of whether the trustee or the debtor is the disbursing agent for postpetition mortgage payments. In order to be able to fulfill the obligations of § 1322(b)(5), a debtor and the trustee have to be informed of the exact amount needed to cure any prepetition arrearage, *see* Rule 3001(c)(2), and the amount of the postpetition payment obligations.''); *In re Sheppard,* No. 10–33959–KRH, 2012 WL 1344112, at *2 (Bankr. E.D. Va. Apr. 18, 2012) (''Bankruptcy Rule 3002.1 was adopted to resolve significant and often hidden problems encountered by Chapter 13 debtors who utilized § 1322(b)(5) of the Bankruptcy Code to cure mortgage defaults in their confirmed plans. While debtors could cure an arrearage on their principal residence under § 1322(b)(5), they often incurred

Continued

Consumers would often successfully make all payments required under their Chapter 13 plan, only to find that the servicer claimed substantial additional amounts were still owed.[248]

The Bureau understands from its outreach that some servicers have a long history of misapplying payments in Chapter 13 cases and that consumers often lack information about how servicers are applying payments during bankruptcy. With respect to mortgage loans, Chapter 13 contains unique provisions that allow a consumer to repay pre-bankruptcy arrearages over a reasonable period of time while also making the regular periodic payments as they come due under the mortgage loan.[249] Under Chapter 13, servicers may need to adopt special accounting practices for consumers with these ''cure and maintain'' plans and separately track payments made on the pre-bankruptcy arrearages and the regular periodic payments.[250] These accounting practices differ from a servicer's usual practice because, so long as a consumer is timely making all the payments due under the plan, a servicer should not treat a consumer as delinquent by, among other things, assessing late fees.

Courts have detailed some servicers' failure to properly credit payments made pursuant to Chapter 13 plans, noting that servicers' systems and accounting practices often fail to adjust to the needs of Chapter 13, and courts have sanctioned servicers or disallowed fees.[251] These difficulties were also documented in and formed the basis of part of the National Mortgage Settlement, which required, among other things, that the subject servicers properly account for payments received in bankruptcy.[252]

In light of these documented concerns about servicers not properly applying payments in Chapter 13 cases, the Bureau agrees with consumer advocacy groups and Chapter 13 trustees that periodic statements would benefit consumers in Chapter 13 cases. The Bureau believes that, as with all consumers, those in bankruptcy may be able to use the information set forth in the explanation of amount due, transaction activity, and past payment breakdown to understand their payments obligations and identify possible servicer errors.[253] This information may be particularly valuable to a consumer in Chapter 13, given the greater risk of payment application errors. The Bureau also agrees with commenters that in cases where a consumer was current as of the date of the bankruptcy petition or is making periodic payments directly to a servicer, a monthly reminder of amounts due may help a consumer make timely payments.

The Bureau understands and appreciates the concerns expressed by many servicers that their systems are not currently set up to easily track how payments are applied in Chapter 13 cases and that, in order to be able to disclose this information on a periodic statement, they may need to incur significant costs to upgrade their systems. Servicers and trade groups also argued that consumers may not understand the complexities of accounting for payments made under a

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significant fees and other costs as a result of postpetition defaults or from interest or escrow fluctuations under the terms of the original loan documents. Fearful that any attempt to address these fees and charges could be construed as a violation of the automatic stay, many creditors would not inform debtors that these charges had been incurred until after the Chapter 13 case was closed. As the fees and charges were postpetition obligations not included in the plan and thus not discharged at the conclusion of the case, these debtors would emerge from bankruptcy only to face a substantial and previously undisclosed arrearage. This outcome was inconsistent with the goal of providing debtors with a fresh start.''); *In re Thongta,* 480 B.R. 317, 319 (Bankr. E.D. Wis. 2012) (similar).

[248] *See, e.g., Sheppard,* 2012 WL 1344112, at *2; *Thongta,* 480 B.R. at 319.

[249] 11 U.S.C. 1322(b)(5).

[250] *See, e.g., Boday* v. *Franklin Credit Mgmt. Corp. (In re Boday),* 397 B.R. 846, 850–51 (Bankr. N.D. Ohio 2008) (''Section 1322(b)(5), by splitting a claim, means that a creditor is no longer permitted to allocate payments according to the terms of its contract. Instead, its effect is to require that any prepetition arrearage claim must be paid separately, according to the terms of the debtor's confirmed plan, based upon the creditor's allowed claim. The remaining debt, consisting of those payments which become due after the petition is filed, is then paid according to the terms of the parties' contract and original loan amortization as if no default ever existed . . . . From an accounting standpoint, this requires that a creditor allocate a debtor's loan payments in the following manner: First, the creditor must apply the arrearage payments it receives during the plan's duration in accordance with the terms of the plan, so that upon completion of the plan the debtor is deemed current on the prepetition amortization schedule. Second, payments received from the debtor to service those payments which contractually accrue postpetition[] must be allocated according to the terms of the parties' contract as if no default had occurred.''); *In re Wines,* 239 B.R. 703, 708 (Bankr. D.N.J. 1999) (''Crediting payments outside the plan to the installments due contemporaneously according to the original schedule is the only way to put the debtors in the same position as if default had never occurred.''); *In re Collins,* No. 07–30454, 2007 WL 2116416, at *13 (Bankr. E.D. Tenn. July 19, 2007) (holding that Chapter 13 cure and maintain plan can include provisions requiring servicer to apply payments separately and stating that such a provision ''is not only reasonable but required''); *see also* Fannie Mae, *Fannie Mae Single Family 2012 Servicing Guide,* at 705–35 through 705–36 (Mar. 14, 2012), *available at https://www.fanniemae.com/content/guide/svc031412.pdf* (''The servicer must maintain detailed records of any payments it receives during the confirmation process—the type of payment (pre-petition or post-petition), the amount received, the receipt date, the source of the payment, and the allocation of the payment (principal, interest, late charges, etc.). The servicer should generally hold any pre-petition payments it receives as 'unapplied' funds until an amount equal to the full monthly (or biweekly) payment that is due under the mortgage note is available for application to the mortgage loan balance. However, if the court requires the payments to be applied under the terms of the repayment plan, the servicer must apply the payments in its records as required.'').

[251] *See, e.g., In re Jones,* 366 B.R. 584, 594–98 (Bankr. E.D. La. 2007) (sanctioning servicer that applied all amounts received to pre- and post-petition charges, interest, and non-interest bearing debt, resulting ''in such a tangled mess'' that neither the CPA debtor nor the servicer could explain the accounting, and stating that ''[i]n this Court's experience, few, if any, lenders make the adjustments necessary to properly account for a reorganized debt repayment plan.''); *In re Hudak,* No. 08–10478–SBB, 2008 WL 4850196, at *5 (Bankr. D. Colo. Oct. 24, 2008) (''Many courts have noted that mortgage lenders simply do not accommodate for the accounting intricacies created by Chapter 13.''); *Payne* v. *Mortg. Elec. Registration Sys., Inc. (In re Payne),* 387 B.R. 614, 627 (Bankr. D. Kan. 2008) (''[The servicer] admitted their computer system does not allow debtors who make all their payments in a timely manner to exit bankruptcy current on their mortgage obligation.''); *In re Myles,* 395 B.R. 599, 606 (Bankr. M.D. La. 2008) (holding that debtors stated claim for stay violation where creditor allegedly treated a Chapter 13 debtor as in default due to improper payment application and applied payments to improper fees as a result); *Boday,* 397 B.R. at 850–51 (holding that creditor violated plan and § 1322(b)(5) by applying plan payments to interest rather than principal under daily simply interest loan); *In re Rathe,* 114 B.R. 253, 256–57 (Bankr. D. Idaho 1990) (''[The servicer]'s accounting procedure applied payments to the earliest payments due and not to the payments due and owing during the pendency of the plan. The purpose of a Chapter 13 plan is to allow a debtor to pay arrearages during the pendency of the plan while continuing to make payments at the contract rate. Payments made during the pendency of the Chapter 13 plan should have been applied by [the servicer] to the current payments due and owing with the arrearage amounts to be applied to the back payments. [The servicer] cannot utilize its accounting procedures to contravene the terms of a confirmed Chapter 13 plan and the Bankruptcy Code.''); *In re Stewart,* 391 B.R. 327 (Bankr. E.D. La. 2008) (sanctioning servicer for misapplying payments and noting that ''[t]he reconciliation of Debtor's account took [the servicer] four months to research and three hearings before this Court to explain,'' that ''[a]n account history was not produced until two months after the filing of the Objection,'' and that ''[a]n additional two months were spent obtaining the necessary information to explain or establish the substantial charges, costs, and fees reflected on the account''), *vacated in part,* 647 F.3d 553 (5th Cir. 2011).

[252] *See, e.g.,* Exhibit A at 9, *United States* v. *Bank of Am.,* (2014) (No. 12–361 (RMC), 2014 WL 1016286 (National Mortgage Settlement)), *available at https://d9klfgibkcquc.cloudfront.net/Ocwen-Consent-Judgment-Ex-A.pdf* (providing that, among other things, ''[i]n active chapter 13 cases, Servicer shall ensure that: a. prompt and proper application of payments is made on account of (a) pre-petition arrearage amounts and (b) postpetition payment amounts and posting thereof as of the successful consummation of the effective confirmed plan; b. the debtor is treated as being current so long as the debtor is making payments in accordance with the terms of the then effective confirmed plan and any later effective payment change notices'').

[253] 78 FR 10901, 10964–67 (Feb. 14, 2013).

Chapter 13 plan. As the Bureau noted in the 2013 TILA Servicing Final Rule, however, it is precisely this complexity that necessitates providing a consumer with a periodic statement. The Bureau believes that providing this information will enable consumers to make payments, detect errant payment application, and understand the costs of their mortgage loans. In addition, the Bureau notes that while the Bankruptcy Rules provide for a reconciliation procedure once the consumer completes all payments under a Chapter 13 plan, most Chapter 13 cases are dismissed prior to completion.[254] As a result, most consumers in Chapter 13 bankruptcy will not have a trustee or court oversee and ultimately determine whether a servicer correctly applied payments. For these consumers, having a record of payments made and applied may help resolve disputes once the bankruptcy case is over.[255] Accordingly, the Bureau believes that all consumers in Chapter 13 cases who intend to retain the property, including those making payments through a trustee, would benefit from receiving periodic statements (or coupon books in the case of servicers that provide them instead of periodic statements under § 1026.41(e)(3)).

Scope of Exemption

The Bureau is proposing to limit the scope of the exemption in § 1026.41(e)(5) to consumers in bankruptcy who have made a determination to surrender the property or avoid the lien securing the mortgage loan or who have requested that a servicer cease providing periodic statements or coupon books. The Bureau believes that drawing a distinction between consumers who intend to retain the property and those who intend to surrender the property may strike an appropriate balance between consumers' need for information about their mortgage loans and the burden on servicers to provide information to such consumers while also avoiding violations of bankruptcy law.

The Bureau believes that this approach, favored by many commenters, also is consistent with bankruptcy case law. Courts have observed that whether periodic statements are appropriate in bankruptcy typically depends on whether ''the debtor needed the information contained in the statements when the statements were sent'' and that debtors need information about their mortgage loan when they intend to retain property, not when they intend to surrender it.[256] Indeed, some courts have found that a periodic statement was permissible when the debtor planned to retain the property, but that the same form of periodic statement violated the automatic stay after the same debtor changed his mind and decided to surrender his home.[257]

Using this framework, courts have held that periodic statements are appropriate for Chapter 7 debtors if the Statement of Intention identifies an intent to retain the property[258] or if a consumer otherwise continues to make voluntary payments after the bankruptcy case.[259] Similarly, courts have found that Chapter 13 debtors who have not yet proposed a plan of reorganization may benefit from periodic statements because they need information about the amount of their mortgage loan debt in order to formulate a plan of reorganization[260] and that Chapter 13 debtors also benefit from periodic statements if their proposed or confirmed plan provides that they will retain the property and continue making payments.[261]

Conversely, bankruptcy courts have determined that periodic statements can constitute impermissible collection attempts in violation of the automatic stay when a consumer has indicated an intent to surrender the property, either through the Statement of Intention in a Chapter 7 case or a plan of reorganization in a Chapter 13 case.[262] Similarly, courts have held that a Chapter 13 consumer with a plan of reorganization that provides for ''avoiding'' a junior lien—that is, rendering the lien unenforceable and treating the mortgage debt as an unsecured claim—has no need for statements regarding the amounts due under the mortgage loan.[263] Finally, courts have found that consumers do not need statements when they have actually surrendered or vacated the

[254] *See* Ed Flynn, *Chapter 13 Revisited: Can It Help Solve the Judiciary's Fiscal Problems?,* 32 a.m. Bankr. Inst. J. 20, 20 (Dec. 2013).

[255] The Bureau further notes that in instances where bankruptcy courts have local rules expressly permitting periodic statements or coupon books, the rules predominantly apply when the consumer is a debtor under Chapter 13. *See supra,* note 241.

[256] *Connor* v. *Countrywide Bank NA (In re Connor),* 366 B.R. 133, 136, 138 (Bankr. D. Haw. 2007)); *see also Henry,* 266 B.R. at 471 (collecting cases).

[257] *Connor,* 366 B.R. at 138 (debtor failed to state a claim for stay violation related to periodic statements received prior to Chapter 13 plan confirmation, but debtor did state a claim related to statements received after conversation to Chapter 7 because debtor had indicated his intent to surrender the property); *In re Joens,* No. 03–02077, 2003 WL 22839822, at *2–3 (Bankr. N.D. Iowa Nov. 21, 2003) (creditor violated automatic stay by sending collection letters and periodic statements to Chapter 7 debtor who intended to surrender, but noting that it would have been proper to send statements if the debtor had intended to retain).

[258] *Henry,* 266 B.R. at 471 (holding that creditor did not violate the automatic stay by sending periodic statements and notice of default to debtors who retain their property by continuing to make payments without reaffirming the mortgage loan); *Kibler* v. *WFS Fin., Inc. (In re Kibler),* No. 00–2604, 2001 WL 388764 (Bankr. E.D. Cal. Mar. 19, 2001) (noting that borrowers who retain their property by continuing to make payments without reaffirming the mortgage loan ''need to receive normal billings to avoid a contract default and potential foreclosure'').

[259] *See* 4 Collier on Bankruptcy ¶ 524.04 (''Section 524(j) clarifies that when a debtor does not reaffirm a mortgage debt secured by real estate that is the debtor's principal residence, the creditor may continue to send statements to the debtor in the ordinary course of business and collect payments made voluntarily by the debtor.'') (citing *Jones* v. *Bac Home Loans Servicing, LP (In re Jones),* No. 09–50281, 2009 WL 5842122, at *3 (Bankr. S.D. Ind. Nov. 25, 2009)); *cf. Ramirez* v. *Gen. Motors Acceptance Corp. (In re Ramirez),* 280 B.R. 252, 257–58 (C.D. Cal. 2002) (holding that creditor did not violate discharge injunction by sending periodic statements and a ''summary of voluntary payments'' to a debtor who his vehicle without reaffirming the loan).

[260] *Connor,* 366 B.R. at 138 (holding that debtor failed to state a claim for stay violation related to periodic statements received prior to Chapter 13 plan confirmation); *Pultz* v. *NovaStar Mortg., Inc. (In re Pultz),* 400 B.R. 185, 190–92 (Bankr. D. Md. 2008) (noting that sending of single loan statement was useful to the debtor for forecasting the amount of the unsecured debt she could pay through her Chapter 13 plan); *Schatz* v. *Chase Home Fin. (In re Schatz),* 452 B.R. 544 (Bankr. M.D. Pa. 2011) (''I also recognize that such information could assist a Chapter 13 debtor in drafting his Chapter 13 plan.'').

[261] *Henry,* 266 B.R. at 471 (''A secured creditor should be encouraged to send out payment coupons, envelopes and periodic statements if a debtor has filed a statement that the debtor plans to keep property subject to secured debt and to make payments.''); *Cousins* v. *CitiFinancial Mortg. Co. (In re Cousins),* 404 B.R. 281, 286–87 (Bankr. S.D. Ohio 2009) (stating in dicta that periodic statements can be helpful to Chapter 13 debtors making direct payments to understand amounts due).

[262] *Joens,* 2003 WL 22839822, at *2–3 (holding that creditor violated automatic stay by sending several collection letters and periodic statements to Chapter 7 debtor who had indicated an intent to surrender); *Connor,* 366 B.R. at 138 (holding that debtor stated a claim related to periodic statements and demand letter received after conversion to Chapter 7 because he had indicated his intent to surrender the property).

[263] *Curtis* v. *LaSalle Nat'l Bank (In re Curtis),* 322 B.R. 470, 484–85 (Bankr. D. Mass. 2005) (holding that wholly unsecured junior lienholder violated automatic stay by, among other things, sending a RESPA transfer letter demanding payment to a Chapter 13 debtor whose plan provided for avoiding the lien).

property,[264] or requested that the servicer not send periodic statements.[265]

Therefore, the Bureau is proposing to revise the scope of the exemption in § 1026.41(e)(5). Consistent with most comments the Bureau received and the case law discussed above, proposed § 1026.41(e)(5) limits the scope of the exemption to those consumers who no longer need the information in the periodic statement. Specifically, proposed § 1026.41(e)(5)(i) limits the exemption to when two conditions are satisfied. First, the consumer must be a debtor in a bankruptcy case, must have discharged personal liability for the mortgage loan through bankruptcy, or must be a primary obligor on a mortgage loan for which another primary obligor is a debtor in a Chapter 12 or Chapter 13 case. The purpose of this requirement is to limit the exemption to consumers who may be protected by the Bankruptcy Code's automatic stay or discharge injunction provisions.

Second, one of the following circumstances must also apply: (1) the consumer requests in writing that the servicer cease providing periodic statements or coupon books;[266] (2) the consumer's confirmed plan of reorganization provides that the consumer will surrender the property securing the mortgage loan, provides for the avoidance of the lien securing the mortgage loan, or otherwise does not provide for, as applicable, the payment of pre-bankruptcy arrearages or the maintenance of payments due under the mortgage loan; (3) a court enters an order in the consumer's bankruptcy case providing for the avoidance of the lien securing the mortgage loan, lifting the automatic stay pursuant to 11 U.S.C. 362 with respect to the property securing the mortgage loan, or requiring the servicer to cease providing periodic statements or coupon books; or (4) the consumer files with the overseeing bankruptcy court a Statement of Intention pursuant to 11 U.S.C. 521(a) identifying an intent to surrender the property securing the mortgage loan. As commenters noted, in each of these situations, a consumer is no longer retaining the property, is no longer making regular periodic payments on the mortgage loan, or has affirmatively requested not to receive statements or coupon books. As a result, the Bureau believes that the statement's value is diminished and may be outweighed by a correspondingly increased risk of a court finding that a servicer violated the automatic stay by sending periodic statements or coupon books in this circumstance.

With respect to joint obligors who are not in bankruptcy, proposed § 1026.41(e)(5)(i) effectively limits the exemption to those joint obligors who (i) share primary liability with a consumer who is a debtor in a Chapter 12 or Chapter 13 case, and (ii) have requested that a servicer cease providing periodic statements or coupon books. As discussed in the section-by-section analysis of § 1024.39(d)(1), a non-debtor joint obligor is protected by the Bankruptcy Code's automatic stay provisions only in Chapter 12 or Chapter 13 cases.[267] The Bureau understands from outreach that these joint obligors generally have a need to continue receiving periodic statements or coupon books. Moreover, these joint obligors are not bound by a debtor's decision to surrender the property securing the mortgage loan. Accordingly, the Bureau believes that it is appropriate for the non-debtor joint obligors to continue receiving periodic statements or coupon books unless non-debtor joint obligors have requested that the servicer cease providing them.

Proposed comment 41(e)(5)(i)–1 clarifies the exemption's applicability with respect to joint obligors. The proposed comment states that when two or more consumers are primarily liable on a mortgage loan, an exemption under § 1026.41(e)(5)(i) with respect to one of the primary obligors does not affect the servicer's obligations to comply with § 1026.41 with respect to the other primary obligors. The Bureau believes that the proposed comment will serve to eliminate ambiguity concerning whether a servicer must continue to provide statements or coupon books to joint obligors when an exemption under § 1026.41(e)(5)(i) applies to one of the obligors. The proposed comment also references § 1026.41(f), explaining that if one of the joint obligors is in bankruptcy and no exemption under § 1026.41(e)(5)(i) applies, the servicer would be required to provide periodic statements or coupon books with certain bankruptcy-specific modifications set forth in § 1026.41(f). In that instance, the servicer could provide the periodic statements or coupon books with the bankruptcy-specific modifications to any of the primary obligors on the mortgage loan, even if not all of them are in bankruptcy.

Proposed comment 41(e)(5)(i)–2 also clarifies that, for purposes of § 1026.41(e)(5), the term ''plan of reorganization'' refers to a consumer's plan of reorganization filed under applicable provisions of the Bankruptcy Code and confirmed by a court with jurisdiction over a consumer's bankruptcy case. The proposed comment is intended to avoid confusion about the meaning of the term ''plan of reorganization'' and whether the term refers to a proposed plan or one that has been confirmed by a court.

Finally, proposed comment 41(e)(5)(i)(B)(*4*)–1 further clarifies that, for purposes of determining whether a servicer is exempt under § 1026.41(e)(5)(i) based on a consumer's Statement of Intention filed in the consumer's bankruptcy case, a servicer must rely on a consumer's most recently filed Statement of Intention. Thus, under the proposed rule, if a consumer originally filed a Statement of Intention identifying an intent to retain the property, but the consumer then files an amended Statement of Intention identifying an intent to surrender the property, a servicer must rely on the amended filing to determine that the exemption applies. The Bureau believes that the proposed comment will avoid uncertainty about whether the exemption applies when a consumer has filed multiple or amended Statements of Intention.

Proposed § 1026.41(e)(5)(ii) states when a servicer must resume providing periodic statements or coupon books in compliance with § 1024.41. First, proposed § 1026.41(e)(5)(ii)(A) provides that a servicer is not exempt from the requirements of § 1024.41 with respect to a consumer who submits a written request to continue receiving periodic statements or coupon books, unless a court enters an order requiring otherwise. The Bureau believes that consumers should have the right to receive information regarding their mortgage loan. Further, allowing consumers to opt-in will enable consumers to receive statements or coupon books when their intent with regard to retaining the property changes. The Bureau understands that, for example, some Chapter 7 debtors will file a Statement of Intention that initially discloses an intent to surrender

[264] *In re Roush,* 88 B.R. 163, 164–65 (Bankr. S.D. Ohio 1988) (holding that creditor violated the discharge injunction when it sent a collection letter to debtor three years after debtor surrendered property); *In re Bruce,* No. 00–50556 C–7, 2000 WL 33673773, at *4 (Bankr. M.D.N.C. Nov. 7, 2000) (holding that creditor violated the discharge injunction by sending periodic statements and calling the debtor at his place of employment after receiving notice that the debtor had vacated the property).

[265] *In re Draper,* 237 B.R. 502, 505–06 (Bankr. M.D. Fla. 1999) (holding that creditor violated the stay by sending periodic statements to Chapter 13 debtor who had asked not to receive them).

[266] The Bureau understands from its outreach that at least one large national bank that provides periodic statements to all of its consumers in bankruptcy, except those who opt-out, has not encountered problems with the automatic stay.

[267] *See* 11 U.S.C. 1201, 1301.

the property but subsequently decide to keep the property. In that case, the Bureau believes a consumer should be able to receive periodic statements or coupon books. Proposed comment 41(e)(5)(ii)–1 clarifies that a servicer must comply with a consumer's most recent written request to cease or to continue, as applicable, providing periodic statements or coupon books.

Second, proposed § 1026.41(e)(5)(ii)(B) provides that a servicer must resume compliance with § 1026.41 within a reasonably prompt time after the next payment due date that follows the earliest of the following outcomes in either the consumer's or the joint obligor's bankruptcy case, as applicable: (1) the case is dismissed; (2) the case is closed; (3) the consumer reaffirms the mortgage loan under 11 U.S.C. 524; or (4) the consumer receives a discharge under 11 U.S.C. 727, 1141, 1228, or 1328. Proposed § 1026.41(e)(5)(ii)(B) largely tracks current comment 41(e)(5)–2.i, and the Bureau believes that a bankruptcy exemption is no longer necessary once the borrower has exited bankruptcy or reaffirmed personal liability for the mortgage loan. One commenter requested that the obligation to resume providing periodic statements should be triggered only upon a servicer's receipt of a proper notice indicating that the case has been dismissed, closed, or discharged. The Bureau understands that servicers ordinarily receive notice of the dismissal, closing, or discharge, as applicable, and it has not received comments indicating that servicers often fail to receive the required notices. The Bureau also believes that the ''reasonably prompt'' standard is flexible enough to account for instances in which a servicer had no reason to know that the consumer's bankruptcy case was terminated. Additionally, reaffirmation agreements require a creditor's consent, and the Bureau understands that a servicer should be aware of when such an agreement is entered into and approved.

In combination, proposed § 1026.41(e)(5)(ii)(A) and (B) require a servicer to resume providing periodic statements or coupon books within a reasonably prompt time after the next payment due date following receipt of a consumer's written request, the case closing or dismissal, the consumer's reaffirmation of the mortgage loan, or the consumer receiving a discharge. Proposed comment 41(e)(5)(ii)–2 clarifies that delivering, emailing or placing the periodic statement or coupon book in the mail within four days after the next payment due date, or within four days of the close of any applicable courtesy period, generally would be considered reasonably prompt. (With respect to coupon books, resuming compliance requires providing a new coupon book only to the extent the servicer has not previously provided the consumer with a coupon book that covers the upcoming billing cycle(s); duplicate coupon books are not required.) This interpretation of ''reasonably prompt'' is consistent with the Bureau's interpretation currently set forth in comment 41(b)–1.

Finally, proposed comment 41(e)(5)–1 clarifies that, if an agent of a consumer submits a request to cease or to continue providing periodic statements or coupon books, the request is deemed submitted by the consumer. The Bureau understands that attorneys or housing counselors often communicate with a servicer on a consumer's behalf, and the Bureau believes that it is important to clarify that a servicer must comply with a request to cease or commence providing periodic statements or coupon books by such an agent of a consumer.

The Bureau has also considered, but declines to propose at this time, four suggestions regarding the scope of § 1026.41(e)(5). First, the Bureau declines to propose to require a consumer in Chapter 7 bankruptcy to opt-in affirmatively to receiving periodic statements or coupon books. As explained above, the Bureau believes that servicers should provide statements or coupon books to consumers in Chapter 7 unless one or more of the specified exceptions applies. The Bureau is concerned that requiring a consumer to affirmatively opt-in may disrupt the flow of periodic statements or coupon books shortly after the bankruptcy filing and may cause a consumer to fail to make a timely mortgage loan payment. Additionally, the Bureau is concerned that consumers, particularly those not represented by counsel, may not be aware of the right to request periodic statements or coupon books.

Second, the Bureau declines to adopt a consumer advocacy group's suggestion that a consumer should continue receiving periodic statements unless the consumer discloses an intent to surrender the property, is in default, *and* has been denied for all loss mitigation options. The Bureau appreciates that this approach would ensure that a consumer would receive statements until all retention options have been exhausted, but the Bureau is concerned that it may unduly burden servicers. The Bureau believes that a more simple test based on the consumer's intent to retain or surrender the property may provide a less ambiguous standard and assist servicers in determining whether the exemption applies.

Third, the Bureau does not believe that it would be appropriate to create a special exemption from the periodic statement requirement for servicers with a limited number of consumers in bankruptcy or a limited percentage of their portfolio subject to bankruptcy proceedings. The Bureau believes that the existing small servicer exemption in § 1026.41(e)(4) sufficiently balances the potential costs of providing periodic statements with the potential burden on smaller servicers. Furthermore, the Bureau notes that an exemption based upon the number of customers a servicer has in bankruptcy (rather than total number of loans in a servicer's portfolio) would lead to uncertainty, as factors outside of the servicer's control—for example, regional economic conditions—may cause a servicer to lose the exemption for a given year.

Finally, at this time, the Bureau does not believe that servicers should be required to provide Chapter 13 trustees with periodic statements, either as a matter of course or upon a trustee's request. The Bureau is concerned that requiring a servicer to send statements to a trustee may unduly increase the burden on servicers. The Bureau also recognizes the privacy concerns raised by servicers. If servicers were in some cases required to redact certain information based on privacy concerns, this could further increase costs to servicers. Additionally, the Bureau understands that there may be other ways for trustees to obtain copies of periodic statements, such as requesting them from a consumer or obtaining a court order requiring them in a particular case. The Bureau seeks comment on whether a servicer should be required to provide periodic statements to a Chapter 13 trustee overseeing a consumer's case and, if so, under what circumstances. The Bureau also seeks comment on whether trustees have sufficient alternative means of obtaining periodic statements or similar information from consumers or servicers.

In addition, the Bureau seeks comment on the scope of the proposed exemption, the requirements for qualifying for the exemption, and when servicers must resume sending periodic statements or coupon books. In particular, the Bureau solicits comment on whether consumers in bankruptcy should be required to opt-in to receive periodic statements or coupon books and, if so, whether documents filed with

the bankruptcy court, such as a Statement of Intention or plan of reorganization, are sufficient to qualify as a request to receive periodic statements or coupon books. The Bureau further requests comment on how consumers in bankruptcy may be made aware of their ability to opt-in or opt-out of receiving periodic statements or coupon books, whether such requests must be made in writing, whether oral requests should be sufficient, and whether servicers should be able to designate an exclusive mailing address for receiving written requests. With respect to resuming compliance after the case closing or dismissal or borrower's discharge, as applicable, the Bureau solicits comment on whether servicers ordinarily receive sufficient notice of these events.

Legal Authority

The Bureau is proposing to exercise its authority under sections 105(a) and (f) of TILA and section 1405(b) of the Dodd-Frank Act to exempt servicers from the requirement in section 128(f) of TILA to provide periodic statements for a mortgage loan in certain bankruptcy-related circumstances. For the reasons discussed above, the Bureau believes this exemption is necessary and proper under section 105(a) of TILA to facilitate compliance. In addition, consistent with section 105(f) of TILA and in light of the factors in that provision, the Bureau believes that imposing the periodic statement requirement for certain consumers in bankruptcy may not currently provide a meaningful benefit to those consumers in the form of useful information. Consistent with section 1405(b) of the Dodd-Frank Act, the Bureau also believes that the modification of the requirements in section 128(f) of TILA to provide this exemption is in the interest of consumers and in the public interest.

41(e)(6) Charged-off Loans

The Bureau is proposing to add a new exemption from the requirement to provide periodic statements under § 1026.41. The proposed exemption would apply to a mortgage loan that a servicer has charged off in accordance with loan-loss provisions if the servicer will not charge any additional fees or interest on the account, provided that the servicer must provide the consumer a final periodic statement within 30 days of charge off or the most recent periodic statement.

The periodic statement rule set forth in § 1026.41 requires the creditor, assignee, or servicer of a closed-end consumer credit transaction secured by a dwelling (a mortgage loan) to provide the consumer, for each billing cycle, a periodic statement meeting certain time, form, and content requirements.[268] The Bureau's February 2013 TILA Servicing Final Rule and October 2013 IFR provide certain exemptions from the periodic statement rule. Specifically, the current exemptions apply to reverse mortgage transactions, timeshare plans, fixed-rate loans if the servicer provides the consumer a coupon book, small servicers, and mortgage loans while the consumer is a debtor in bankruptcy under Title 11.[269]

The Bureau understands that a servicer, pursuant to certain accounting standards and at a creditor's direction, may be required to charge off a delinquent mortgage loan in accordance with applicable loan-loss provisions. Charge off is an accounting practice that indicates that the creditor or servicer no longer considers the mortgage loan to be an asset. However, charge off does not release the consumer from liability for the mortgage loan. In some cases, although the mortgage loan has been charged off, the underlying lien secured by the dwelling remains in place. Therefore, even after charge off, the credit transaction is still secured by a dwelling. It is the Bureau's position that under the current rule, unless the lien is released, the periodic statement is required for all charged-off mortgage loans, regardless of whether the mortgage loan was charged off prior to the effective date of the rule (January 10, 2014).

The Bureau has learned that the manner in which charged-off mortgage loans are serviced may differ from the manner in which non-charged-off mortgage loans are serviced. The Bureau understands that a servicer's software, systems, and platforms may treat charged-off mortgage loans distinctly, such that providing a periodic statement for a charged-off mortgage loan may be more burdensome, and therefore more costly, than providing a periodic statement for a non-charged-off mortgage loan. The Bureau also understands, however, that even after charge off, a servicer may pass along various fees to the consumer, such as attorney's fees, court costs, filing fees, garnishment fees, property maintenance fees, taxes, insurance, and fees for maintaining the lien. The Bureau believes that where a servicer continues to charge a consumer fees and interest, the periodic statement may provide significant value to a consumer. As the Bureau stated in the February 2013 TILA Servicing Final Rule, the Bureau carefully considered concerns expressed about circumstances in which the periodic statement should not be required (*e.g.,* after acceleration), and acknowledged that some circumstances could make providing a periodic statement more complicated. However, the Bureau noted that ''such circumstances are often precisely when a consumer most needs the periodic statement,'' as the Bureau ''believes an important role of the periodic statement is to document fees and charges to the consumer; as long as such charges may be assessed, the consumer is entitled to receive a periodic statement.''[270]

The Bureau has considered the competing concerns posed by the costs to a servicer to provide periodic statements for charged-off mortgage loans and the benefits to a consumer to continue to be informed of fees and charges that a servicer may assess after charge off. Although the periodic statement rule provides important consumer protections, the Bureau believes that if a servicer will not charge any additional fees or interest on the account, the benefit to a consumer of receiving a periodic statement may be outweighed by the potential for increased costs passed on to consumers. Therefore, when the servicer will assess no further fees or interest, the Bureau believes that it may be appropriate to exempt a servicer from the requirements of § 1026.41 for a mortgage loan that a servicer has charged off in accordance with loan-loss provisions.

Accordingly, the Bureau is proposing to add a new exemption from the periodic statement requirement for certain mortgage loans that a servicer has charged off. Specifically, proposed § 1026.41(e)(6) provides that a servicer is exempt from the requirements of § 1026.41 for a mortgage loan if the servicer has charged off the loan in accordance with loan-loss provisions and will not charge any additional fees or interest on the account, provided that the servicer must, within 30 days of charge off or the most recent periodic statement, provide a final periodic statement, clearly and conspicuously labeled ''Final Statement—Retain This Copy for Your Records.'' The Bureau is also proposing that the final periodic statement convey, in simple and clear terms, additional information to the

[268] For purposes of § 1026.41, ''servicer'' includes the creditor, assignee, or servicer, as applicable. 12 CFR 1026.41(a)(2).

[269] 12 CFR 1026.41(e)(1) through (5). For loans serviced by a small servicer, a creditor or assignee is also exempt from the Regulation Z periodic statement requirements. 12 CFR 1026.41(e)(4)(i). The proposal provides amendments to the periodic statement exemption for a consumer that is a debtor in bankruptcy. *See* section-by-section analysis of § 1026.41(e)(5).

[270] 78 FR 10901, 10960 (Feb. 14, 2013).

consumer. The Bureau believes that providing this final periodic statement with the additional consumer information may provide important consumer protections that outweigh any potential burden on servicers associated with providing this one-time, final statement.

The proposed exemption is similar to existing § 1026.5(b)(2)(i), which provides an exemption for certain charged-off accounts from the periodic statement requirement in § 1026.7 for open-end credit transactions. Section 1026.5(b)(2)(i) states, in relevant part, that ''[a] periodic statement need not be sent for an account . . . if the creditor has charged off the account in accordance with loan-loss provisions and will not charge any additional fees or interest on the account. . . .''[271] In finalizing this exemption under § 1026.5(b)(2)(i), the Board weighed the costs and benefits and determined that ''the value of a periodic statement does not justify the cost of providing the disclosure because the amount of a consumer's obligation will not be increasing,'' while reiterating that ''this provision does not apply if a creditor has charged off the account but continues to accrue new interest or charge new fees.''[272] The Bureau agrees with the Board's reasoning and believes that a similar analysis may apply with respect to the proposed exemption from the periodic statement requirement in § 1026.41 for a mortgage loan that a servicer has charged off in accordance with loan-loss provisions if the servicer will not charge any additional fees or interest on the account.

However, because closed-end consumer credit transactions secured by a dwelling are distinct from unsecured, open-end credit transactions by virtue of the underlying lien, the Bureau believes that it is appropriate to impose additional requirements in this context. Specifically, proposed § 1026.41(e)(6) provides that for a servicer to take advantage of the exemption, the servicer must, within 30 days of charge off or the most recent periodic statement,[273] provide a final periodic statement, clearly and conspicuously labeled ''Final Statement—Retain This Copy for Your Records.'' Under proposed § 1026.41(e)(6), the final periodic statement may be the last piece of information or documentation that a consumer receives with respect to the charged-off mortgage loan. Consumers may need this information for further tax-reporting and other financial accounting purposes. Additionally, the Bureau believes that consumers may need to later demonstrate the status of the loan to the servicer or a subsequent purchaser, assignee, or transferee. Consequently, the Bureau believes that a consumer should be advised to retain the final periodic statement for record-keeping purposes.

Further, the Bureau is concerned that consumers may misconstrue the charge off to mean that the mortgage loan obligation or lien has been released, or the debt forgiven, when in fact this is generally not the case. Therefore, the Bureau believes that the proposed final periodic statement must also convey, in simple and clear terms, important information to the consumer about what it means for a mortgage loan to be charged off. Proposed § 1026.41(e)(6) provides that the final periodic statement must explain in simple and clear terms that: the mortgage loan has been charged off and the servicer will not charge any additional fees or interest on the account; the lien on the property remains in place and the consumer remains liable for the mortgage loan obligation; the consumer may be required to pay the balance on the account in the future, for example, upon sale of the property; the balance on the account is not being cancelled or forgiven; and the loan may be purchased, assigned, or transferred.

The Bureau is aware that mortgage loans may be purchased, assigned, or transferred after charge off. The Bureau recognizes that such situations may pose special accounting challenges for both servicers and consumers. The Bureau notes that nothing in this proposal is intended to impact a debt collector's obligations under the FDCPA, including, for example, the requirement to send a consumer a written notice validating the debt under section 809 of the FDCPA. Additionally, the Bureau is proposing comment 41(e)(6)–1 to explicate the relationship between proposed § 1026.41(e)(6) and § 1026.39, which requires certain disclosures upon the purchase, assignment, or transfer of a mortgage loan. First, the proposed comment reiterates that if a charged-off mortgage loan is subsequently purchased, assigned, or transferred, a covered person, as defined in § 1026.39(a)(1), must provide the transfer disclosure required by § 1026.39. Second, the proposed comment provides that a covered person, as defined in § 1026.39(a)(1), who would otherwise be subject to the requirements of § 1026.41, may take advantage of the exemption in § 1026.41(e)(6) as long as it treats the mortgage loan as charged off and will not charge any additional fees or interest on the account. Third, the proposed comment further explains that if the consumer previously received a final periodic statement, a covered person (the purchaser, assignee, or transferee) is not also required to provide a final periodic statement, unless it began sending the consumer periodic statements and then later met the criteria under proposed § 1026.41(e)(6). The Bureau seeks comment on whether proposed comment 41(e)(6)–1 appropriately addresses circumstances under which a charged-off mortgage loan may be purchased, assigned, or transferred, and whether there are additional considerations related to purchase, assignment, or transfer of a charged-off mortgage loan for which the Bureau should account.

The Bureau is also proposing comment 41(e)(6)–2 to clarify that the obligation to provide a periodic statement for a charged-off mortgage loan resumes if a servicer or a covered person, as defined in § 1026.39(a)(1), who would otherwise be subject to the requirements of § 1026.41, fails to treat the mortgage loan as charged off at any time or charges any additional fees or interest on the account. Proposed comment 41(e)(6)–2 further provides that the servicer or covered person may not retroactively assess fees or interest on the account for the period of time during which the exemption in § 1026.41(e)(6) applied. If the servicer or covered person were to at any time no longer treat the mortgage loan as charged off, begin charging fees or interest on the account, or retroactively assess fees or interest on the account, such conduct would contravene the purpose of the proposed exemption from the otherwise applicable periodic statement requirement for charged-off mortgage loans.

The Bureau has narrowly tailored the proposed new exemption from the requirements of § 1026.41. The proposed exemption applies only to mortgage loans that have been charged off in accordance with loan-loss provisions and only if the servicer will not charge any additional fees or interest on the account. Additionally, the proposed exemption requires that the servicer provide the consumer a final periodic statement within 30 days of charge off or the most recent periodic statement, that such statement includes basic consumer information about the

[271] 12 CFR 1026.5(b)(2)(i).

[272] 74 FR 5244, 5276 (Jan. 29, 2009).

[273] The proposal provides that a servicer may provide the final periodic statement within 30 days of the most recent periodic statement. This would allow servicers that appropriately complied with the periodic statement requirement for previously charged-off mortgage loans to now take advantage of the proposed exemption.

nature of the charge off, and that the obligation to make periodic statements resumes if a servicer or covered person charges fees or interest on the account in the future. The Bureau believes that limiting the proposed exemption in this fashion reduces the risk that this proposed exemption will be used to circumvent the servicing rules. The Bureau seeks comment on whether limiting the proposed exemption for charged-off mortgage loans as described above is appropriate. Additionally, the Bureau seeks comment on whether mortgage loans that were charged off prior to the rule's effective date (January 10, 2014) should be granted a grandfather period to provide servicers additional time to comply with either the proposed exemption for charged-off mortgage loans or the otherwise applicable periodic statement rule. Finally, the Bureau seeks comment on whether there are alternatives to periodic statements for charged-off mortgage loans, such as an annual reminder to the consumer of a loan's status, including what might be the associated benefits to consumers and costs to servicers of such alternatives.

Legal Authority

The Bureau is proposing to exempt from the periodic statement requirement under section 128(f) of TILA a mortgage loan that a servicer has charged off in accordance with loan-loss provisions if the servicer will not charge any additional fees or interest on the account, provided that the servicer must provide the consumer a final periodic statement within 30 days of charge off or the most recent periodic statement. The Bureau is proposing this exemption pursuant to its authority under section 105(a) and (f) of TILA and section 1405(b) of the Dodd-Frank Act.

For the reasons discussed above, the Bureau believes that the proposed exemption is necessary and proper under section 105(a) of TILA to facilitate TILA compliance. As discussed above, the Bureau believes that the proposal to exempt certain mortgage loans that a servicer has charged off facilitates compliance with TILA by allowing servicers to service loans cost effectively in compliance with applicable regulatory requirements.

In addition, consistent with section 105(f) of TILA and in light of the factors in that provision, for servicers that are required to charge off mortgage loans in accordance with loan-loss provisions, the Bureau believes that requiring them to comply with the periodic statement requirement in section 128(f) of TILA would not provide a meaningful benefit to consumers in the form of useful information or protection. The Bureau believes, as noted above, that requiring provision of periodic statements would impose significant costs and burden. Specifically, the Bureau believes that the proposal will not complicate, hinder, or make more expensive the credit process. In addition, consistent with section 1405(b) of the Dodd-Frank Act, for the reasons discussed above, the Bureau believes that exempting a mortgage loan that a servicer has charged off in accordance with loan-loss provisions if the servicer will not charge any additional fees or interest on the account, provided that the servicer must provide the consumer a final periodic statement within 30 days of charge off or the most recent periodic statement, from the requirements of section 128(f) of TILA would be in the interest of consumers and in the public interest.

In addition, the Bureau relies on its authority pursuant to section 1022(b) of the Dodd-Frank Act to prescribe regulations necessary or appropriate to carry out the purposes and objectives of Federal consumer financial law, including the purposes and objectives of Title X of the Dodd-Frank Act. Specifically, the Bureau believes that the proposed rule is necessary and appropriate to carry out the purpose under section 1021(a) of the Dodd-Frank Act of ensuring that all consumers have access to markets for consumer financial products and services that are fair, transparent, and competitive, and the objective under section 1021(b) of the Dodd-Frank Act of ensuring that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.

41(f) Modified Periodic Statements and Coupon Books for Certain Consumers in Bankruptcy

The Bureau is proposing § 1026.41(f) to modify the periodic statement and coupon book requirements with respect to certain consumers who are in bankruptcy or have discharged personal liability for a mortgage loan through bankruptcy. As discussed in the section-by-section analysis of § 1026.41(e)(5), proposed § 1026.41(e)(5) exempts servicers from the requirement to provide periodic statements or coupon books to such consumers in some but not all circumstances. When no exemption under proposed § 1026.41(e)(5) applies, proposed § 1026.41(f) specifies various clarifications and modifications to the periodic statements or coupon books provided to such consumers. The following discussion first addresses the proposed clarifications and modifications to the periodic statement requirements. It then addresses proposed changes with respect to coupon books provided instead of periodic statements under § 1026.41(e)(3).

The Bureau is proposing two sets of modifications to the required layout and content for periodic statements provided to consumers in bankruptcy. The first set of modifications, in proposed § 1026.41(f)(1) and (2), applies to periodic statements provided to any consumer who is a debtor in a case under any chapter of the Bankruptcy Code, as well to a consumer who has discharged personal liability for a mortgage loan through bankruptcy. Proposed § 1026.41(f)(1) provides that servicers may exclude from the periodic statement the amount of any late fee and the date on which that fee will be imposed if payment has not been received. Proposed § 1026.41(f)(1) also provides that servicers may exclude the delinquency-related disclosures set forth in § 1024.41(d)(8)(i), (ii), and (v)—that is, the date on which the consumer became delinquent; a notification of possible risks, such as foreclosure and expenses, that may be incurred if the delinquency is not cured; and a notice of whether the servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, if applicable. Proposed § 1026.41(f)(2) requires the periodic statement to include on the first page a statement acknowledging the consumer's bankruptcy case or the discharged nature of the mortgage loan and a statement that the periodic statement is for informational purposes only.

The second set of modifications, in proposed § 1026.41(f)(3), applies specifically to periodic statements provided to a consumer who is a debtor in a case under Chapter 12 or Chapter 13 of the Bankruptcy Code. Proposed § 1026.41(f)(3)(i) provides that, in addition to the information identified in proposed § 1026.41(f)(1), a servicer may also omit the remainder of the delinquency information normally required by § 1026.41(d)(8). Proposed § 1026.41(f)(3)(ii) through (v) clarify and modify certain disclosures required by § 1026.41(d), including the amount due, explanation of amount due, past payment breakdown, and transaction activity. The changes are intended to ensure that these disclosures accurately portray the consumer's payment obligations while in bankruptcy. Proposed § 1026.41(f)(3)(vi) and (vii) require a servicer to include new disclosures related to a consumer's pre-bankruptcy arrearage (if any), as well as

disclaimers related to the consumer's status in bankruptcy and the accuracy of the information provided in the periodic statement.

Proposed § 1026.41(f)(4) addresses the situation where more than one consumer is primarily obligated on a mortgage loan and a servicer is required to provide at least one of the primary obligors with a modified periodic statement pursuant to § 1026.41(f). Proposed § 1026.41(f)(4) provides that a servicer may provide the modified version of the periodic statement to any or all of the primary obligors instead of periodic statements not including the bankruptcy-specific modifications, even if not all primary obligors are debtors in bankruptcy. On the other hand, as proposed comment 41(e)(5)(i)–1 and the section-by-section analysis of § 1026.41(e)(5) explain, if a servicer were exempt under proposed § 1026.41(e)(5)(i) from providing periodic statements to the obligor in bankruptcy, the servicer would continue to provide regular periodic statements, without any of the bankruptcy-specific modifications, to the obligors who are not in bankruptcy.

Proposed § 1026.41(f)(5) provides that the modifications set forth above also apply to coupon books provided instead of periodic statements under § 1026.41(e)(3). Specifically, proposed § 1026.41(f)(5) provides that the modifications set forth in proposed § 1026.41(f)(1) and (3)(i) through (v) and (vii) apply to coupon books and other information a servicer provides to the consumer under § 1026.41(e)(3). Proposed § 1026.41(f)(5) permits the servicer to put the disclosures required under proposed § 1026.41(f)(2) and (3)(vii) anywhere in the coupon book or give them on a separate page enclosed with the coupon book provided to the consumer. The servicer must also make available upon request the pre-petition arrearage information set forth in proposed § 1026.41(f)(3)(vi).

As discussed in the section-by-section analysis of § 1026.41(e)(5), the Bureau sought comment in the October 2013 IFR as to how the content of periodic statements might be tailored to meet the particular needs of consumers in bankruptcy. The Bureau received written comments in response to that solicitation during the official comment period. Since then, the Bureau has continued to receive comments and, as part of its Implementation Plan, has consulted with servicers, trade groups, consumer advocacy groups, bankruptcy attorneys, bankruptcy trustees, and bankruptcy judges regarding how periodic statements may be tailored for purposes of bankruptcy, including hosting the roundtable discussion on June 16, 2014. Accordingly, the following discussion of proposed § 1026.41(f) contains discussion of the comments received during the official comment period, as well as discussion of ex parte comments received after that period ended. The following discussion first addresses the proposed clarifications and modifications to the periodic statement requirements; it then addresses proposed changes with respect to coupon books provided instead of periodic statements under § 1026.41(e)(3). The clarifications and modifications proposed for periodic statements generally apply to coupon books as well.

Modified Statements for Consumers in Bankruptcy

Commenters agreed that the required content and layout of the periodic statement, which is governed by § 1026.41(d), would need to be clarified or modified for at least some consumers in bankruptcy. Commenters suggested different modifications depending on whether a consumer is a debtor in a liquidation case under Chapter 7 or a reorganization case under Chapter 13 of the Bankruptcy Code. Most commenters did not specifically address how the § 1026.41(d) disclosures should be modified with respect to a consumer in a Chapter 11 or Chapter 12 case.[274] As discussed in more detail below, comments focused on whether certain language or disclosures—such as past due amounts or delinquency information—could be construed as an impermissible attempt to collect a debt in violation of the Bankruptcy Code's automatic stay, as well as whether other disclosures—such as the amount due and past payment breakdown—could be adjusted to reflect the payment terms of a consumer's bankruptcy plan. Commenters were also concerned about whether periodic statements could accurately reflect amounts due and paid under a bankruptcy plan or whether the disclosures would be unavoidably confusing or inaccurate. Finally, industry commenters expressed concern about the potential operational challenges and costs associated with providing periodic statements to consumers in bankruptcy.

Based on the comments received, the Bureau's outreach, and the Bureau's understanding of periodic statements that some servicers use for consumers in bankruptcy, the Bureau believes that it is appropriate to modify or omit certain of the disclosures required by § 1026.41(d) with respect to periodic statements provided to consumers in bankruptcy. As explained in more detail in the section-by-section analyses of § 1026.41(f)(1) through (3), the Bureau believes that the modifications and omissions are necessary to ensure that servicers do not violate the Bankruptcy Code's automatic stay by providing periodic statements and to ensure that periodic statements accurately reflect the payments made by consumers in bankruptcy. The Bureau further believes that it is appropriate to require certain modifications to the periodic statement specifically for consumers who have filed under Chapter 12 or Chapter 13. The Bureau believes different forms may be appropriate in part because of the special treatment of mortgage loans secured by a consumer's principal residence under Chapter 12 and Chapter 13, which permit a consumer to repay pre-bankruptcy arrearages over a reasonable time while continuing to make monthly periodic payments due under the loan.[275]

Accordingly, proposed § 1024.41(f) provides that unless a servicer is exempt under § 1026.41(e), a servicer must comply with the requirements of § 1024.41 with respect to a consumer who is a debtor in bankruptcy or has discharged personal liability for a mortgage loan through bankruptcy, subject to certain modifications set forth in § 1026.41(f)(1) through (3), as applicable. Briefly stated, proposed § 1026.41(f)(1) permits servicers to exclude from periodic statements certain of the disclosures ordinarily required by § 1026.41(d), and proposed § 1026.41(f)(2) requires servicers to include statements identifying the consumer's status in bankruptcy and advising that the periodic statement is for informational purposes. While the modifications sets forth in proposed

[274] The lack of comments about Chapter 11 and Chapter 12 is consistent with the fact that relatively few consumers seek to reorganize their debts under those chapters. In 2013, for example, only 1,320 nonbusiness cases were filed under Chapter 11, and just 495 cases were filed under Chapter 12. By comparison, in the same year, approximately 705,000 nonbusiness cases were filed under Chapter 7 and another 330,000 under chapter 13. *See* Administrative Office of the U.S. Courts, *U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2013,* available at *http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2013/1213_f2.pdf.*

[275] *See* 11 U.S.C. 1222(b)(5), 1322(b)(5) (both stating that a plan ''may provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.''). Under Chapter 12, moreover, a court may modify the terms of a mortgage loan secured by a principal residence. 11 U.S.C. 1222(b)(2).

§ 1026.41(f)(1) and (2) apply to any periodic statement provided to a consumer in bankruptcy (or who has discharged personal liability for a mortgage loan through bankruptcy), proposed § 1026.41(f)(3) specifies additional modifications required for consumers in Chapter 12 or Chapter 13 bankruptcy.

Proposed comment 41(f)-1 clarifies that a servicer must resume providing regular periodic statements in accordance with § 1026.41 if the consumer's bankruptcy case is closed or dismissed. The comment also clarifies that the requirements of § 1026.41(f) continue to apply, however, if the consumer has discharged personal liability for the mortgage loan. The purpose of this comment is to clarify when a servicer is no longer required to provide periodic statements with the modifications set forth in proposed § 1026.41(f)(1) through (3).

Terminology and Other Modifications

Commenters agreed on the need to allow servicers to use alternative terminology on periodic statements for consumers in bankruptcy. Two trade groups stated that bankruptcy courts sometimes disfavor language such as ''amount due,'' ''payment due date,'' and ''overdue'' or ''past due payments,'' as those terms call to mind an attempt to collect a debt. These groups suggested that servicers be allowed to use alternatives, such as ''payment amount,'' ''payment date,'' or ''unpaid past payments.'' Servicers, trustees, and consumer advocacy groups had similar suggestions, noting that terms like ''voluntary payment amount'' or ''contractual payment date'' are more consistent with the notion that the periodic statements would be informational in nature.

Commenters also agreed that alternative terminology is necessary in Chapter 13 cases, in which a borrower may make two streams of payments. Commenters suggested that servicers be able to refer to the payments as ''pre-petition payments'' (to describe pre-bankruptcy arrearages) or ''post-petition payments'' (to describe periodic payments), or use other terms that reflect that dual stream of payments. A consumer advocacy group noted that such terminology is pervasive in bankruptcy and that, while a normal consumer may not be familiar such terms, a consumer in bankruptcy usually would be.

The Bureau agrees with the comments that servicers may need to use alternative terminology in periodic statements provided to consumers in bankruptcy. Commenters' concerns about collection language appear to be borne out by court decisions that have occasionally focused on the precise language of the terms used on periodic statements.[276] Similarly, the Bureau believes that the need to distinguish between pre-petition and post-petition payments in a Chapter 13 case may require different terminology than that used on other periodic statements. The Bureau further notes that it intends to conduct consumer testing on sample forms and will attempt to discern whether any particular terminology is more or less understandable for consumers.

Accordingly, the Bureau is proposing comment 41(f)–2, which provides that servicers may use terminology other than that found on the sample periodic statement in appendix H–30, so long as the new terminology is commonly understood. Current comment 41(d)–3 provides similar flexibility with respect to, for example, regional differences, but the Bureau believes that it is important to clarify that, for purposes of § 1026.41(f)(1) through (3), servicers may use terminology specific to the circumstances of bankruptcy.

Commenters, particularly servicers and trade groups, also emphasized the need for general flexibility in the periodic statement requirements for consumers in bankruptcy. They stated that many bankruptcy courts and trustees have their own local rules and procedures, and industry commenters argued that servicers need to be able to modify statements to reflect these local practices or the unique circumstances of a consumer's individual bankruptcy case. Two trade groups further argued that servicers should be permitted to craft disclosures they believe are necessary to convey to consumers that a servicer is not attempting to collect a debt or to explain how a consumer can request to not receive further statements and that the Bureau should not prescribe a ''one size fits all'' disclosure regime.

The Bureau agrees with the commenters that servicers may need flexibility to modify the periodic statement's content to comply with applicable rules and guidelines. The Bureau understands that many local bankruptcy rules already have certain requirements in place regarding periodic statements, and the Bureau believes that servicers should be able to comply with both those rules and Regulation Z. The Bureau further believes that giving servicers the flexibility to include disclosures related to a consumer's status in bankruptcy is important and necessary to permit servicers to comply with local practice or rules.

Accordingly, the Bureau is proposing comment 41(f)–3, which states that a periodic statement provided under § 1026.41(f) may be modified as necessary to facilitate compliance with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, court orders, and local rules, guidelines, and standing orders. Proposed comment 41(f)–3 further provides that servicers may include additional disclaimers related to a borrower's status in bankruptcy or that advise a consumer how to submit a written request to cease receiving periodic statements. The Bureau seeks comment on proposed comment 41(f)–3, including whether it may afford servicers too little or too much flexibility with respect to the required content of periodic statements.

41(f)(1) Requirements Not Applicable

Section 1026.41(d) requires periodic statements to disclose information related to a consumer's failure to make timely payments. Section 1026.41(d)(1)(ii) sets forth one such disclosure, requiring a periodic statement to include the amount of any late fee and the date on which the fee will be imposed if payment has not been received. Section 1026.41(d)(8) requires that a periodic statement include certain information for consumers who are 45 days or more delinquent on a mortgage loan. Specifically, § 1024.41(d)(8)(i), (ii), and (v) require the disclosure of the date on which the consumer became delinquent; a notification of possible risks, such as foreclosure and expenses, that may be incurred if the delinquency is not cured; and a notice of whether the servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, if applicable. Section 1026.41(d) also contains certain layout requirements, including the requirement in § 1026.41(d)(1)(iii) that the amount due be displayed more prominently than other disclosures on the page.

Proposed § 1026.41(f)(1) provides that certain of § 1026.41(d)'s disclosures and layout requirements do not apply to periodic statements provided to consumers in bankruptcy under proposed § 1026.41(f). Servicers may exclude the disclosures set forth in § 1026.41(d)(1)(ii) and (8)(i), (ii), and (v), and servicers do not need to comply

[276] *See, e.g., In re Draper,* 237 B.R. 502, 505–06 (Bankr. M.D. Fla. 1999) (statement listed the ''total amount due''); *Butz* v. *People First Fed. Credit Union (In re Butz),* 444 B.R. 301 (Bankr. M.D. Pa. 2011) (statement requested immediate payment of an ''amount due''); *Harris* v. *Mem'l Hosp. (In re Harris),* 374 B.R. 611, 614 (Bankr. N.D. Ohio 2007) (statement advised that the ''account is past due'').

with § 1026.41(d)(1)(iii)'s requirement to display the amount due more prominently than other disclosures on the page.

Industry commenters maintained that certain disclosures required by § 1026.41(d) could be interpreted as a violation of the Bankruptcy Code's automatic stay because they threaten consequences for non-payment or emphasize past due amounts. Specifically, some industry participants commented that the notice of potential late fees required by § 1026.41(d)(1)(ii) and the delinquency information required by § 1026.41(d)(8) could be viewed as collection attempts. Additionally, two trade groups objected to the amount due being the most prominent disclosure on the page, as required by § 1026.41(d)(1)(iii), arguing that servicers should be allowed to make bankruptcy disclaimers the most prominent disclosures on the page. Consumer advocacy groups objected to removing the delinquency information, stating that it is valuable information for consumers to receive and that a court would not find that a servicer violated the automatic stay by including this on a statement that also contained appropriate bankruptcy disclaimers.

Proposed § 1026.41(f)(1) addresses these concerns by modifying the required content and layout of periodic statements for consumers in bankruptcy. The proposal provides that the requirement set forth in § 1026.41(d)(1)(iii) that the amount due be the most prominent disclosure on the page would not apply when a consumer is in bankruptcy or has discharged personal liability for a mortgage loan through bankruptcy. Consistent with the flexibility the Bureau would afford servicers in modifying the periodic statement as necessary, discussed above, the Bureau believes it is appropriate for other disclosures, such as a disclaimer acknowledging the consumer's bankruptcy case and advising that the statement is for informational purposes only, to be the most prominent disclosures on the page.[277] The Bureau notes that the amount due disclosures required by § 1026.41(d)(1) would still be required to be located at the top of the first page of the statement.[278]

The Bureau believes that receiving information regarding the consequences of late payments or continued delinquencies, such as disclosures regarding potential fees and possible foreclosure, provides tangible benefits to consumers.[279] Nonetheless, the Bureau understands that, in certain instances, bankruptcy courts have found that statements regarding potential late fees or foreclosure and other language that could be construed as threatening consequences for a failure to make payments could violate the automatic stay.[280] Furthermore, the Bureau believes that a consumer in bankruptcy may already be aware of the consequences of non-payment and may have filed for bankruptcy precisely to avoid those consequences. The Bureau therefore believes that it may be appropriate to permit servicers to exclude from the periodic statement certain information regarding consequences of late payment or continued non-payment.

As such, for consumers in bankruptcy or who have discharged personal liability for a mortgage loan through bankruptcy, proposed § 1026.41(f)(1) permits servicers to exclude from the periodic statement the amount of any late payment fee that will be imposed and the date on which that fee will be imposed if payment has not been received.[281] Proposed § 1026.41(f)(1) also permits servicers to exclude the delinquency-related disclosures set forth in § 1024.41(d)(8)(i), (ii), and (v)—that is, the date on which the consumer became delinquent; a notification of possible risks, such as foreclosure and expenses, that may be incurred if the delinquency is not cured; and a notice of whether the servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, if applicable. While the Bureau believes that this is valuable information for any consumer, including a consumer in bankruptcy, the Bureau is concerned that courts or consumers may interpret a periodic statement containing such disclosures as attempting to compel payment of a debt, rather than simply providing information to a consumer.

On the other hand, the Bureau believes that the remainder of the delinquency disclosures required by § 1026.41(d)(8) may be appropriate for consumers in a Chapter 7 or Chapter 11 case, and for consumers who have discharged personal liability for a mortgage loan. For example, references to any loss mitigation program to which the consumer has agreed[282] or to homeownership counselor information[283] do not relate to amounts owed, nor do they threaten consequences for non-payment. No commenter specifically identified this information as problematic and none cited case law indicating that providing it would cause a servicer to violate the automatic stay.

Additionally, the Bureau believes that consumers in Chapter 7 or Chapter 11 bankruptcy (or those who have discharged personal liability for a mortgage loan through bankruptcy) who are intending to retain their homes have a need for information regarding recent account activity[284] and the amount needed to bring the loan current.[285] As the Bureau stated in the 2013 TILA Servicing Final Rule, the accounting associated with mortgage loan payments is complicated and can be even more so in delinquency situations.[286] The account history helps a consumer better understand the exact amount owed on the loan and how that total was calculated and it enables a consumer to better identify errors in payment application. Moreover, the Bureau understands that many housing counselors believe that this information is vital when trying to assist a consumer to pursue home retention options and cure prior defaults because it enables the counselor to understand the circumstances of a consumer's delinquency. The Bureau believes that this information may have unique benefits for a consumer in bankruptcy because such a consumer may be facing an immediate decision whether to retain or surrender a home and in that situation the consumer needs accurate information about the amounts they owe.

The Bureau further notes that the disclosures in § 1026.41(d)(8) do not require a servicer to use any specific

[277] *Compare Pearson* v. *Bank of Am.,* No. 3:12–cv–00013, 2012 WL 2804826, *5–6 (W.D. Va. July 10, 2012) (holding that creditor did not violate discharge injunction because, among other things, the periodic statements included a prominent bankruptcy disclaimer noting that creditor could not collect debt or pressure debtor for payment) *with Harlan* v. *Rosenberg & Assocs. (In re Harlan),* 402 B.R. 703, 716 (Bankr. W.D. Va. 2009) (holding that Chapter 7 debtors stated a plausible claim for violation of the discharge injunction where, among other things, creditor's letters stated that ''this is an attempt to collect a debt'' and had bankruptcy disclaimers in regular-sized font in the middle of the page).

[278] 12 CFR 1026.41(d)(1) (stating that the (d)(1) disclosures must be ''[g]rouped together in close proximity to each other and located at the top of the first page of the statement'').

[279] 78 FR 10901, 10971–72 (Feb. 14, 2013).

[280] *Compare Brown* v. *Bank of Am. (In re Brown),* 481 B.R. 351, 360 (Bankr. W.D. Pa. 2012) *with Schatz,* 452 B.R. at 550 (no stay violation where among other things, creditor did not threaten any late fees); *see also Duke,* 79 F.3d at 45 (''[T]he respite provided by § 362 'is not from communication with creditors, but from the threat of immediate action by creditors, such as a foreclosure or a lawsuit.'''') (*quoting Brown* v. *Pa. State Emps. Credit Union,* 851 F.2d 81, 86 (3d Cir. 1988)).

[281] 12 CFR 1026.41(d)(1)(ii).

[282] 12 CFR 1026.41(d)(8)(iv).

[283] 12 CFR 1026.41(d)(8)(vii).

[284] 12 CFR 1026.41(d)(8)(iii).

[285] 12 CFR 1026.41(d)(8)(vi).

[286] 78 FR 10901, 10971 (Feb. 14, 2013).

language.[287] A servicer is therefore permitted to describe those disclosures in any numbers of ways to avoid concerns about the account history appearing to be a collection attempt rather than simply providing useful information.

The Bureau solicits comment on the modifications to the periodic statement set forth in proposed § 1026.41(f)(1). Specifically, the Bureau solicits comment on whether the proposed modifications are appropriate and whether additional modifications are necessary. Further, the Bureau solicits comment on whether the proposed modifications or additional modifications would be necessary if the Bureau required a consumer in Chapter 7 or Chapter 11 (or a consumer who has discharged personal liability for the mortgage loan through bankruptcy) to opt-in to receiving periodic statements by submitting a written request to a servicer.

41(f)(2) Bankruptcy Notices

All commenters suggested that a periodic statement provided to a consumer in bankruptcy should contain a disclaimer acknowledging, at a minimum, that the consumer is in bankruptcy and that the statement is for informational purposes only. As noted above, two trade groups commented that this should be the most prominent disclosure on the page. Bankruptcy courts have frequently cited servicers' inclusion, or failure to include, this type of disclaimer as a factor in determining whether servicer has violated the automatic stay,[288] and some bankruptcy courts have adopted local rules permitting or requiring periodic statements so long as they clearly identify that they are for informational purposes and are not attempts to collect a debt.[289]

The Bureau therefore believes it may be appropriate to require servicers to include a similar disclaimer on periodic statements provided to consumers in bankruptcy or who have discharged personal liability for a mortgage loan through bankruptcy. Proposed § 1026.41(f)(2) requires the periodic statement to include on the first page a statement acknowledging the consumer's bankruptcy case or the discharged nature of the mortgage loan and a statement that the periodic statement is for informational purposes only. The Bureau understands that this requirement is consistent with the practice of servicers that currently provide periodic statements to consumers in bankruptcy. The Bureau seeks comment on whether servicers should be permitted to include the disclosures under proposed § 1026.41(f)(2) on a separate page enclosed with the periodic statement, whether the disclosures under proposed § 1026.41(f)(2) should be permissive rather than mandatory, and whether there are other appropriate disclosures that should be permitted or required.

41(f)(3) Chapter 12 and Chapter 13 Consumers

Proposed § 1026.41(f)(3) sets forth additional modifications for periodic statements provided to consumers in Chapter 12 or Chapter 13 cases. Proposed § 1026.41(f)(3)(i) provides that, in addition to the information identified in proposed § 1026.41(f)(1), a servicer may also omit the remainder of the delinquency information normally required by § 1026.41(d)(8). Proposed § 1026.41(f)(3)(ii) through (v) clarify and modify certain disclosures required by § 1026.41(d), including the amount due, explanation of amount due, past payment breakdown, and transaction activity. Finally, proposed § 1026.41(f)(3)(vi) and (vii) require a servicer to include new disclosures related to the pre-petition arrearage (if any), as well as disclaimers related to the consumer's status in bankruptcy and the accuracy of the information provided in the statement.

The Bureau is proposing three comments to clarify the meaning of certain terms used in proposed § 1026.41(f)(3) and related commentary. First, proposed comment 41(f)(3)-1 clarifies that for purposes of § 1026.41(f)(3), the term ''plan of reorganization'' refers to a consumer's plan of reorganization filed under the applicable provisions of Chapter 12 or Chapter 13 of the Bankruptcy Code and confirmed by a court with jurisdiction over the consumer's bankruptcy case. The Bureau believes that this comment will help avoid any confusion about the meaning of the term ''plan of reorganization'' and whether the term refers to a proposed plan or one that has been confirmed by a court.

Second, proposed comment 41(f)(3)-2 clarifies that for purposes of § 1026.41(f)(3), ''pre-petition payments'' are payments made under a plan of reorganization to cure the consumer's pre-bankruptcy defaults, if any, and that ''post-petition payments'' are payments made under a plan of reorganization to satisfy the mortgage loan's periodic payments as they come due after the bankruptcy case is filed. The Bureau believes that these terms are appropriate because the Bureau understands that they are commonly used to describe these two primary types of payments made under a plan of reorganization.

Third, proposed comment 41(f)(3)-3 clarifies that for purposes of § 1026.41(f)(3), post-petition fees and charges are those fees and charges incurred after the bankruptcy case is filed. In light of proposed § 1026.41(f)(3)'s requirement (discussed below) that servicers make certain disclosures about the amount of post-petition fees and charges, this proposed comment is intended to clarify the distinction between fees and charges imposed before the bankruptcy case was filed and those imposed after filing.

In addition, the Bureau is also proposing comment 41(f)(3)–4 to address the disclosures that must be made on the first periodic statement provided to a consumer under proposed § 1024.41(f)(3) after an exemption under § 1026.41(e) expires. Section

[287] *Id.* at 10972 (''[T]he Bureau notes that specific language is not required by the regulation. * * *'').

[288] *Compare Jones* v. *Bac Home Loans Servicing, LP (In re Jones),* No. 09–50281, 2009 WL 5842122, at *3 (Bankr. S.D. Ind. Nov. 25, 2009) (no discharge violation where letter acknowledged the discharge and uncollectability of the debt); *Pearson* v. *Bank of Am.,* No. 3:12–cv–00013, 2012 WL 2804826, at *5–6 (W.D. Va. July 10, 2012) (holding that creditor did not violate discharge injunction for debtor who had intent to surrender by sending a statement asking for payment and noting late charge because the statement included prominent bankruptcy disclaimer noting that creditor could not collect debt or pressure debtor for payment and an opt-out clause); *Schatz* v. *Chase Home Fin. (In re Schatz),* 452 B.R. 544, 550 (Bankr. M.D. Pa. 2011) (holding that creditor did not violate the stay where the disclaimer was located in the center of the first page, ''not buried in boilerplate language, nor hidden on the backside of the document'') *with Brown* v. *Bank of Am. (In re Brown),* 481 B.R. 351, 360 (Bankr. W.D. Pa. 2012) (holding that the creditor violated the discharge injunction by sending periodic statements that lacked any bankruptcy disclaimers, threatened late fees, and listed amounts past due); *Harlan* v. *Rosenberg & Assocs., LLC (In re Harlan),* 402 B.R. 703, 716 (Bankr. W.D. Va. 2009) (finding stay violation where bankruptcy disclaimer was in regular-sized font in the middle of the page rather than more prominent than other disclosures); *Sipe* v. *Conseco Fin. Servicing Corp. f/k/a Green Tree Fin. Servicing Corp. (In re Sipe),* No. 99–40166, 2001 WL 35672616, at *4 (Bankr. W.D.N.C. July 18, 2001) (finding a stay violation in part because ''[t]here is nothing in 'bold letters' across the front of the statements to indicate that their sole purpose is to advise the debtor of the receipt of funds from the Chapter 13 Trustee''); *Curtis* v. *LaSalle Nat'l Bank (In re Curtis),* 322 B.R. 470, 484 n.18 (Bankr. D. Mass. 2005) (finding a stay violation where the bankruptcy disclaimers were ''[o]n the backside of the first page of the . . . letter, and without the capital letters and bold print employed for other sections of the letter'').

[289] *See, e.g.,* Bankr. D. Colo. L.B.R. 4001–4(a)(1) (''In order for communication to be protected under this [local rule], the communication must indicate it is provided for information purposes and does not constitute a demand for payment.''); D. Kan. Bk. S.O. 08–4, ¶ (c)(2) (''In order for communication to be protected under this provision, the communication must indicate it is provided for information purposes and does not constitute a demand for payment.'').

1026.41(f)(3)(iii) through (vi) require the disclosure of the total sum of any post-petition fees or charges imposed, the total of all post-petition payments received and how they were applied, the total of all payments applied to post-petition fees or charges imposed, a list of all transaction activity, and the total of all pre-petition payments received ''since the last statement.'' For purposes of the first periodic statement provided to the consumer following termination of an exemption under § 1026.41(e), proposed comment 41(f)(3)–4 clarifies that the disclosures required by § 1026.41(f)(3)(iii) through (vi) may be limited to account activity since the last payment due date that occurred while the exemption was in effect. Proposed comment 41(f)(3)–4 tracks proposed comment 41(d)–5, discussed in the section-by-section analysis of § 1026.41(d), and is intended to ensure that the disclosures required under § 1026.41(f)(3)(iii) through (vi) cover the same time period as the disclosures normally required by § 1026.41(d).

41(f)(3)(i) Requirements Not Applicable

Proposed § 1026.41(f)(3)(i) provides that, in addition to the information a servicer may omit from the periodic statement under proposed § 1026.41(f)(1), a servicer may also omit the remainder of the delinquency information required by § 1026.41(d)(8) (*i.e.,* a servicer may also omit the information required by § 1026.41(d)(8)(iii), (iv), (vi) and (vii)). Several servicers and trade groups argued that delinquency information is particularly inappropriate for Chapter 13 consumers because these consumers can be contractually delinquent but still have made all payments due under the plan of reorganization. Those commenters suggested that reminding these consumers about their contractual delinquency could be confusing and provide limited value. Several industry commenters also argued that delinquency information related to failures to make plan payments is unnecessary, as the bankruptcy court is in a position to resolve matters related to post-petition defaults. Two consumer advocacy groups and other industry participants agreed that delinquency information may be confusing or provide little value to consumers in Chapter 13 bankruptcy. The two consumer advocacy groups recommended, in lieu of delinquency information, that the periodic statement should contain statements indicating that the consumer had not made all of the required payments and encouraging the consumer to contact an attorney or the trustee. Finally, an industry participant favored requiring a periodic statement to include a more general disclosure that the consumer must continue to make payment in order to retain the property.

The Bureau agrees with commenters that the delinquency information may be confusing or of little value to consumers in a Chapter 13 case. As commenters noted, information related to pre-bankruptcy defaults may not be helpful, and in fact may be confusing, to a consumer whose plan of reorganization is designed to repay those defaults over time. Further, the Bureau understands that a consumer who fails to make several plan payments will likely face immediate consequences in bankruptcy, such as a trustee's motion to dismiss or a servicer's motion for relief from the automatic stay, and the delinquency information may serve less value in that scenario. Accordingly, proposed § 1026.41(f)(3)(i) provides that a servicer may omit the delinquency information required by current § 1026.41(d)(8).

41(f)(3)(ii) and (iii) Amount Due and Explanation of Amount Due

Under § 1026.41(d)(1), a periodic statement must disclose, among other things, the payment due date and the amount due. Section 1026.41(d)(2) requires disclosure of an explanation of amount due, including (a) the monthly payment amount, including a breakdown showing how much, if any, will be applied to principal, interest, and escrow; (b) the total sum of any fees or charges imposed since the last statement; and (c) any payment amount past due.

Proposed § 1026.41(f)(3)(ii) and (iii) modify the requirements of § 1026.41(d)(1) and (2) for purposes of periodic statements provided to consumers in Chapter 12 or Chapter 13 bankruptcy. The proposal states that the amount due and explanation of amount due disclosures may be limited to the monthly post-petition payments due under the mortgage loan and any post-petition fees or charges imposed since the last periodic statement. Proposed comments 41(f)(3)(ii)–1 and (iii)–1 further clarify that these disclosures would not be required to include the amounts of any payments on account of a consumer's pre-petition arrearages or that are due under a court order.

Commenters raised three concerns about the amount due, payment due date, and explanation of amount due disclosures required by § 1026.41(d)(1) and (2) in the bankruptcy context. First, industry participants and bankruptcy trustees requested clarification about what payments and due dates should be included in these disclosures. These commenters stated that listing the amount owed under the contract, including all pre-petition arrearages, would conflict with the terms of a bankruptcy plan, which allows the consumer to repay those arrearages over time. They also noted that in Chapter 13 cases, consumers may be making two sets of payments that may be due on two different dates (and potentially due to two different parties), and they requested clarification about whether the amount due must include one or both of these payments. These commenters further noted that additional amounts may be due pursuant to specific court orders and they inquired whether those additional amounts must be included in the amount due and explanation of amount due.

Industry, consumer advocacy groups, and bankruptcy trustees agreed that the amount due should reflect the post-petition payments—that is, the periodic payments due after the bankruptcy filing—and should not include amounts attributable to the pre-petition arrearage or amounts due under individual court orders. Commenters noted that the amount of the post-petition payments is determined by the mortgage loan contract and thus is information within a servicer's control, while the pre-petition payments and amounts owed under a court order are determined by the plan of reorganization or the court order. Industry commenters further stated that that it would be difficult to accurately capture these additional amounts and argued that they are unnecessary in a periodic statement, given that the plan or court order identifies the payment schedule and amount. During the bankruptcy roundtable discussion that the Bureau held on June 16, 2014, participants agreed that the amount due and explanation of amount due could be limited to post-petition payments and that a servicer should include a disclaimer advising that the plan may require the consumer to make additional payments.

As the Bureau stated in the 2013 TILA Servicing Final Rule, the Bureau believes that it may be appropriate to tailor the amount due disclosures to the amounts due under a consumer's plan of reorganization.[290] Additionally, in light of the comments received, the Bureau believes that it is appropriate to allow servicers to limit the amount due and explanation of amount due disclosures to include only post-petition payments. In addition to the reasons

[290] 78 FR 10901, 10966 (Feb. 14, 2013).

provided by commenters, the Bureau understands that some local rules adopted by bankruptcy courts that address periodic statements provide that the statements should reflect the post-petition payments, and that these local rules would not require a servicer to include pre-petition payments or amounts due under a court order in the amount due field.[291] Accordingly, proposed § 1026.41(f)(2)(ii) and (iii) require a servicer to include post-petition payments in the amount due and explanation of amount due, including any past due post-petition payments, but do not require a servicer to include pre-petition payments that may be due under the plan of reorganization.

The second concern that commenters raised pertained to the explanation of amount due. Specifically, industry requested that the explanation of amount due not include a breakdown of how much, if any, of the post-petition payment will be applied to principal, interest, and escrow, as would normally be required under § 1026.41(d)(2)(i). Two trade groups argued that this breakdown would confuse a consumer because a servicer must apply the post-petition payment to the oldest outstanding unpaid periodic payment, which often has a different breakdown of principal and interest than the current month's payment. The trade groups commented that consumers would not understand why the allocation under the explanation of amount due would not correspond to how the servicer actually applied the payment. The trade groups and a servicer further commented that servicers cannot always discern how a trustee may allocate payments to principal, interest, and escrow, so the breakdown on the periodic statement may not match the trustee's records, which could foster further confusion.

Comments from bankruptcy trustees and consumer advocacy groups took the opposing view, arguing that disclosing how payments will be allocated (and how they were applied, as discussed below) is vital to ensuring that servicers are correctly applying payments. These commenters stated that servicers have particular difficulty accounting for escrow payments in bankruptcy and that disclosing the amount to be applied to escrow is crucial to ensuring compliance with the bankruptcy plan. Bankruptcy trustees noted that a breakdown of principal and interest is helpful for determining whether servicers correctly applied payments due under a daily simple interest loan. The trustees and consumer advocacy groups also strongly disagreed with industry's legal premise, arguing that Chapter 13 plans can in fact require a servicer to apply a post-petition payment to the current month rather than to the oldest outstanding debt.

Although the Bureau understands industry commenters' concerns about the potential for consumer confusion, the Bureau believes that this concern may be outweighed by the benefits of disclosing the breakdown of the post-petition payments by principal, interest, and escrow. This breakdown is intended to give a consumer a snapshot of why the consumer is being asked to pay the amount due.[292] Without an explanation of, for example, the amount attributable to escrow, a consumer and the consumer's attorney may be unable to discern how a servicer calculated the amount due. Furthermore, as described in the section-by-section analysis of § 1026.41(f)(3)(vii), to address the potential for borrower confusion, proposed § 1026.41(f)(3)(vii) requires a servicer to include a statement that the application of payments on the periodic statement may not reflect the trustee's allocations and a statement encouraging the consumer to contact the consumer's attorney or trustee with any questions. Moreover, the Bureau notes that it intends to conduct consumer testing on a proposed sample statement for Chapter 13 consumers and that it will test whether consumers are in fact confused by any discrepancy between the allocation in the amount due and the allocation in the past payment breakdown. Accordingly, proposed § 1026.41(f)(3)(iii) leaves in place § 1026.41(d)(2)(i)'s requirement to include a breakdown of the amount of the monthly payment, if any, that will be applied to principal, interest and escrow.

Finally, commenters inquired about whether post-petition fees and charges—that is, fees and charges imposed after the bankruptcy filing—are required or permitted to be included in the amount due and explanation of amount due. Two consumer advocacy groups maintained that no law prevents servicers from advising consumers of fees or charges that have been assessed during a bankruptcy case and that consumers would benefit from being informed of these fees and charges when they are imposed, rather than later in the bankruptcy case. One large servicer agreed that consumers would benefit from learning about fees as they are incurred. A trade group, two large servicers, and an industry representative stated in joint comments that most servicers would prefer to include fees and charges on a periodic statement so that they could collect the fees shortly after assessing them and that operationally it would be easier to include fees and charges on a periodic statement than to not include them. These commenters noted, however, that a minority of servicers are concerned that they should first disclose any post-petition fees and charges to the bankruptcy court through the procedures outlined in Federal Rule of Bankruptcy Procedure 3002.1.

The Bureau agrees with the comments that consumers, including those in bankruptcy, benefit from learning of fees and charges that have been imposed on their account. The Bureau believes that this would assist consumers' efforts to budget their finances and timely pay fees and charges. The Bureau further believes that a servicer also benefits from fees or charges being disclosed on the periodic statement because it enables the servicer to quickly collect the fees or charges. The Bureau appreciates the concern of some servicers that they would prefer to first disclose the fees and charges to a bankruptcy court through the procedures set forth in Federal Rule of Bankruptcy Procedure 3002.1. In the bankruptcy context, however, a servicer that defers collecting a fee or charge until after complying with the Federal Rule of Bankruptcy Procedure 3002.1 procedures, and thus after a potential court determination on the allowability of the fee or charge, is not required to disclose the fee or charge until complying with such procedures. For these reasons, proposed § 1026.41(f)(2)(ii)(A) and (B) require a servicer to include in the explanation of amount due the total sum of any post-petition fees or charges imposed since the last periodic statement. A servicer that defers collecting a fee or charge until after complying with the Federal Rule of Bankruptcy Procedure 3002.1 procedures, and thus after a potential court determination on the allowability of the fee or charge, is not required to disclose the fee or charge until complying with such procedures.

Proposed comment 41(f)(3)(ii)–1 is intended to clarify the amounts that must be included in the amount due and the amounts that may be included in the amount due at a servicer's

[291] *See, e.g.,* Mont. LBR 4001–3 (stating that if a mortgage creditor provides periodic statements to a Chapter 13 debtor, the ''statements shall contain at least the following information concerning postpetition mortgage payments to be made directly to the mortgagee * * * (A) the date of the statement and the date the next payment is due; (B) the amount of the current monthly payment''); Vt. LBR 3071–1 (similar).

[292] *See* 78 FR 10901, 10965 (Feb. 14, 2013).

discretion. The proposed comment clarifies that, for a consumer in Chapter 12 or Chapter 13 bankruptcy, the amount due is not required to include any amounts other than the post-petition payments or post-petition fees and charges that a servicer has imposed. Additionally, the proposed comment explains that a servicer has not imposed a fee or charge if it will comply with Federal Rule of Bankruptcy Procedure 3002.1 before attempting to collect a fee or charge. The comment further explains that while only post-petition payments and post-petition fees and charges are required to be included in the amount due, a servicer has the flexibility to include other amounts, such as the amount owed under an agreed court order, in the amount due, so long as those other amounts are also disclosed in the explanation of amount due and transaction activity.

Proposed comment 41(f)(3)(iii)–1 provides similar clarification with respect to the explanation of amount due. It states that the explanation of amount due is not required to include any amounts other than the post-petition payments and post-petition fees and charges that a servicer has imposed. A servicer nonetheless has the flexibility to include other amounts, such as amounts payable under an agreed court order, in the explanation of amount due, so long as those other amounts are disclosed in the amount due and transaction activity. The Bureau believes that proposed comments 41(f)(3)(ii)–1 and (iii)–1 will assist servicers in understanding what amounts must be, and are permitted to be, included in the amount due and explanation of amount due.

The Bureau solicits comment on whether the explanation of amount due should include a breakdown of the amount of the monthly payment that will be applied to principal, interest and escrow, or whether a more limited disclosure is appropriate, such as listing the monthly payment as a lump sum or listing the principal and interest as a combined figure with the escrow amount disclosed separately. Additionally, the Bureau requests comment on whether a servicer should be permitted or required to include post-petition fees and charges in the amount due disclosure.

41(f)(3)(iv) Past Payment Breakdown

Proposed § 1026.41(f)(3)(iv) is intended to provide a consumer with a snapshot of how their payments have been applied, much the same as § 1026.41(d)(3). Specifically, proposed § 1026.41(f)(3)(iv) requires the periodic statement to include the total of all post-petition payments received since the last statement and a breakdown of the amounts, if any, applied to principal, interest, and escrow, as well as the amount, if any, currently held in any suspense or unapplied funds account and a total of all payments applied to post-petition fees or charges since the last statement. Proposed § 1026.41(f)(3)(iv) also requires the periodic statement to include the total of all post-petition payments received since the beginning of the calendar year and a breakdown of the amounts, if any, applied to principal, interest, and escrow, as well as a the amount, if any, currently held in any suspense or unapplied funds account and total of all payments applied to post-petitions fees or charges since the beginning of the calendar year.

Industry commenters objected to the requirement that a periodic statement must contain a past payment breakdown including a breakdown of payments by the amount applied to principal, interest, and escrow, maintaining that this could confuse consumers because it may not be consistent with the trustee's records. Industry commenters requested that the post-petition payments received be disclosed as a lump sum total. A credit union commented that, although it tracks the amounts applied to post-petition fees and charges, its systems are not currently configured to display that total on a periodic statement. The credit union further commented that similar smaller entities would need to upgrade their systems to disclose this information.

Consumer advocacy groups and bankruptcy trustees commented that receiving a breakdown of how post-petition payments were applied to principal, interest, and escrow is vital to determining whether a servicer is correctly applying payments due under a plan of reorganization. These commenters stated that a lump sum disclosure would be of significantly less value.

The Bureau understands servicers' concerns about borrower confusion, but as discussed in the section-by-section analysis of 41(f)(3)(ii) with respect to the explanation of amount due, the Bureau believes that these concerns may be outweighed by the benefits of disclosing the breakdown of the post-petition payments by principal, interest, and escrow. This breakdown allows a consumer to identify potential errors in payment application, including any misapplication of payments to escrow or fees. The Bureau believes that this breakdown also plays an important role in educating a consumer. The Bureau also believes that the information pertaining to payments received since the last statement inform consumers of how much their outstanding principal has decreased, while the year-to-date information educates consumers about the costs of their mortgage loan.[293] Furthermore, as set forth below, to address the potential for borrower confusion, proposed § 1026.41(f)(3)(vii) requires a servicer to include a statement that the application of payments on the periodic statement may not reflect the trustee's allocations, as well as a statement encouraging the consumer to contact the consumer's attorney or trustee with any questions. Therefore, the Bureau is proposing § 1026.41(f)(3)(iv) to require a servicer to include a breakdown of the amount of the post-petition payments that was applied to principal, interest and escrow.

The Bureau solicits comment on whether the past payment breakdown should include a breakdown of the amount of the post-petition payments that were applied to principal, interest and escrow, or whether a more limited disclosure is appropriate, such as listing the amounts applied as a lump sum or listing the principal and interest as a combined figure with the escrow amount broken out separately.

41(f)(3)(v) Transaction Activity

Proposed § 1026.41(f)(3)(v) provides that the transaction activity information required to be disclosed on a periodic statement under § 1026.41(d)(4) must include any post-petition payments, pre-petition payments, and payments of post-petition fees or charges the servicer has received since the last statement.

Consumer advocacy groups and bankruptcy trustees commented that the transaction activity should include both pre-petition payments and post-petition payments received by the servicer so that a consumer and the trustee have a record of which payments a servicer has received and when. Industry commenters did not object to disclosing these amounts, though they commented that it would be extremely difficult for a servicer to identify the source of any payments—whether a payment came from a trustee, a consumer, or a third-party–and that the source of payment is not important to the consumer. During the bankruptcy roundtable that the Bureau held on June 16, 2014, representatives from consumer advocacy groups and bankruptcy trustees agreed that the source of payments is not as important as simply identifying the amount of the payment received. Additionally, consumer

[293] *Id.* at 10966 (Feb. 14, 2013).

advocacy groups stated that there is no prohibition on disclosing post-petition fees or charges that have been imposed on a consumer, and that a consumer would benefit from having those fees disclosed on a periodic statement. Several servicers stated that their preference would be to disclose fees and charges as they are imposed so that they can be collected on a real-time basis.

As discussed in the 2013 TILA Servicing Final Rule, the Bureau believes that it is important for consumers to understand account activity that credits or debits the amount due, including any fees or charges that have been assessed.[294] The Bureau believes that consumers in bankruptcy would similarly benefit from these disclosures. Additionally, the Bureau believes that consumers in bankruptcy may benefit if the transaction activity includes pre-petition payments. Although those payments would not affect the amount due (which would be limited to post-petition payments and fees), the pre-petition payments do reduce a consumer's pre-petition arrearage and thus serve to reduce a consumer's delinquency. Generally, the Bureau believes that having an accurate picture of a delinquency is essential for consumers to engage in financial planning. Moreover, the Bureau understands that there may be a significant delay between when a consumer sends a pre-petition payment to a trustee and when a servicer ultimately receives that payment, and the Bureau believes it may benefit consumers to have a record of when such payments are received. Accordingly, proposed § 1026.41(f)(3)(v) provides that the transaction activity information set forth in § 1026.41(d)(4) must include any post-petition payments, pre-petition payments, and payments of post-petition fees or charges the servicer has received since the last statement.

Proposed comment 41(f)(3)(v)–1 clarifies that the brief description of the transaction activity required by § 1026.41(d)(4) does not need to identify the source of the payments received by the servicer. The Bureau believes that this clarification is necessary in light of servicers' comments that they are not able to provide this information on a periodic statement.

The Bureau solicits comment on whether the transaction activity should including post-petition payments, pre-petition payments, and post-petition fees and charges, or whether it should disclosure different or additional types of activity.

[294] 78 FR 10901, 10967 (Feb. 14, 2013).

41(f)(3)(vi) Pre-petition Arrearage

For consumers in Chapter 12 or Chapter 13 bankruptcy, proposed § 1026.41(f)(3)(vi) requires a servicer to disclose, if applicable, the total of all pre-petition payments received by the servicer since the last periodic statement, the total of all pre-petition payments received by the servicer since the beginning of the current calendar year, and the current balance of the consumer's pre-petition arrearage.

As discussed in the section-by-section analyses of § 1026.41(f)(3)(ii) through (iv), some industry representatives submitted ex parte comments objecting to a requirement to break down payment application by principal, interest, and escrow, and industry commenters voiced a stronger objection to doing so for pre-petition payments. Industry commenters stated that the pre-petition arrearage is treated essentially as a lump sum claim in bankruptcy, and that each payment received goes to reduce the amount of that claim. They maintained that, as a result, it is unnecessary to disclose whether a portion of a payment is being applied to principal or pre-petition escrow shortages, and that it is equally unnecessary and unhelpful to advise the consumer if any portion of the payment is being held in suspense. These commenters further stated that a Chapter 13 trustee and a servicer may allocate a different portion of the pre-petition payments to, for example, principal or fees, and that the differing allocations would be extremely difficult to reconcile. Several servicers stated that they could disclose the amount of any pre-petition payments received as well as the current balance the pre-petition arrearage. A credit union commented that it and other smaller-sized entities currently lack the capacity to export information about pre-petition payments onto a periodic statement, however, and that any requirement to do so would require them to modify their systems.

Consumer advocacy groups and bankruptcy trustees commented that breaking down pre-petition payments by principal, interest, and escrow would be unnecessary for purposes of periodic statements because the arrearage is treated as a lump sum claim in bankruptcy. They expressed comfort with the idea of servicers disclosing the amount of pre-petition payments received and the current balance of pre-petition arrearage.

The Bureau believes that consumers need a record of payments received by a servicer, including pre-petition payments, in order to better understand the status of their mortgage loans and any delinquencies. The Bureau also believes that, in light of the comments from industry, consumer advocacy groups, and bankruptcy trustees, servicers should not be required to break down pre-petition payments by principal, interest, and escrow and that consumers would benefit from disclosure of the aggregate amounts of these payments. Although the Bureau understands that some servicers may not be currently equipped to identify the amount of the pre-petition arrearage on a periodic statement, the Bureau understands that servicers keep records of this information and believes that, with an appropriate implementation period, servicers would be able to provide it on a periodic statement. Accordingly, proposed § 1026.41(f)(3)(vi) requires a servicer to disclose, if applicable, the total of all pre-petition payments received since the last periodic statement, the total of all pre-petition payments received since the beginning of the current calendar year, and the current balance of the consumer's pre-petition arrearage.

The Bureau understands that, in some instances, such as before a servicer files a proof of claim in a consumer's bankruptcy case or if a consumer or trustee objects to a servicer's claim, the amount of the pre-petition arrearage may not be determined or may be in dispute. In that instance, the Bureau believes that it may be appropriate for the periodic statement to reflect the unresolved nature of the arrearage. Accordingly, proposed comment 41(f)(3)(vi)–1 provides that to the extent the amount of a consumer's pre-petition arrearage is subject to dispute or has not yet been determined, the periodic statement may include a statement acknowledging the unresolved nature of the pre-petition arrearage.

The Bureau solicits comment on whether periodic statements should be required to disclose the pre-petition payments received and applied and the balance of the pre-petition arrearage, and whether there are alternative avenues for apprising consumers of this information.

41(f)(3)(vii) Additional Disclosures

Proposed § 1026.41(f)(3)(vii) requires a servicer to include four additional statements on the periodic statement, as applicable, when a consumer is in Chapter 12 or Chapter 13 bankruptcy. First, § 1026.41(f)(3)(vii)(A) requires a statement that the amount due includes only post-petition payments and does not include other payments that may be due under the terms of the consumer's bankruptcy plan. The purpose of this disclosure is to ensure that a consumer

understands that there may be additional amounts due under the plan that relate to the mortgage debt. Several industry participants and consumer advocacy groups recommended that periodic statements include such a disclaimer, and the Bureau believes that it may be appropriate to avoid consumer confusion.

Second, proposed § 1026.41(f)(3)(vii)(B) requires a statement that if the consumer's bankruptcy plan requires the consumer to make the post-petition mortgage payments directly to a bankruptcy trustee, the consumer should send the payment to the trustee and not to the servicer. This proposed disclosure is intended to avoid consumer confusion about whether to send a post- petition payment to the trustee or servicer. Several industry participants and consumer advocacy groups stated that such a disclosure would be helpful to avoid confusion and that some servicers already include such a disclosure on their periodic statement. The Bureau believes that such a disclosure is appropriate.

Third, proposed § 1026.41(f)(3)(vii)(C) requires a statement that the information disclosed on the periodic statement may not reflect payments the consumer has made to the trustee and may not be consistent with the trustee's records. Finally, proposed § 1026.41(f)(3)(vii)(D) requires a statement that encourages the consumer to contact the consumer's attorney or the trustee with questions regarding the application of payments. Several industry participants stated that these disclosures would be helpful because there can be a delay between when a trustee receives a payment from a consumer and when the trustee remits that payment to a servicer, and a consumer may wonder why the statement does not reflect all payments the consumer has made. For pre-petition payments, in particular, the Bureau understands that the delay can be weeks or even months as a trustee may not distribute payments on pre-petition claims until the creditor files a proof of claim or until higher priority claims have been paid in full. Additionally, the Bureau understands that a trustee may allocate payments differently than a servicer, and until the allocations are reconciled, a periodic statement provided by a servicer may reflect different allocations than a trustee's records. Based on these timing and allocation issues, the Bureau believes that it is appropriate to advise consumers of the differences between a servicer's records and a trustee's records and that encouraging consumers to contact their attorney of the trustee may be a helpful disclosure.

The Bureau solicits comment on whether servicers should be permitted to include the disclosures under proposed § 1026.41(f)(3)(vii) on a separate page enclosed with the periodic statement, whether the disclosures under proposed § 1026.41(f)(3)(vii) should be permissive or mandatory when applicable, and whether there are other disclosures that a servicer should be required to include in a periodic statement under proposed § 1026.41(f).

41(f)(4) Multiple Obligors

Proposed § 1026.41(f)(4) addresses the situation where more than one consumer is primarily obligated on a mortgage loan and a servicer is required to provide at least one of the primary obligors with a modified periodic statement pursuant to § 1026.41(f). Proposed § 1026.41(f)(4) provides that the servicer may provide the modified version of the periodic statement to any or all of the primary obligors instead of any statements not including the bankruptcy-specific modifications, even if not all primary obligors are debtors in bankruptcy. On the other hand, as proposed comment 41(e)(5)(i)–5 and the section-by-section analysis of § 1026.41(e)(5) explain, if a servicer were exempt under proposed § 1026.41(e)(5)(i) from providing periodic statements to the obligor in bankruptcy, the servicer would continue to provide regular periodic statements, without any of the bankruptcy-specific modifications, to the obligors who are not in bankruptcy.

During the bankruptcy roundtable discussion, representatives from industry and consumer advocacy groups agreed that if a servicer is required to provide a periodic statement with bankruptcy-specific information to a consumer, the servicer should be permitted to send the same modified form of statement to any or all of the consumer's co-obligors on the mortgage loan, even if not all the obligors are debtors in bankruptcy. One large servicer noted that sending one type of statement to all joint obligors on a mortgage loan reflects its current practice when one or more obligors is a debtor in bankruptcy. Industry representatives stated that sending one type of statement per mortgage loan account would be less burdensome and would be easier to administer than sending different types of statements to different obligors on the same account.

The Bureau agrees with the bankruptcy roundtable participants that a servicer should be permitted to provide only one type of periodic statement per mortgage loan account. The Bureau believes that it would impose an undue burden on servicers to have to send one version of the periodic statement to a consumer in bankruptcy and a different version to the consumer's non-bankrupt co-obligors. Moreover, the Bureau believes such a result would be inconsistent with comment 41(a)–1, which clarifies that when more than one consumer is primarily obligated on a mortgage loan, a servicer may send the periodic statement to any one of the primary obligors; the servicer is not required to provide periodic statements to all primary obligors, let alone different versions of the periodic statement.

Accordingly, proposed § 1026.41(f)(4) provides that if a servicer is required to provide periodic statements with the modifications set forth in proposed § 1026.41(f) in connection with a mortgage loan for which more than one consumer is primarily obligated, the servicer may provide the modified statements to any or all of the primary obligors instead of any statements not including the bankruptcy-specific modifications, even if not all of the primary obligors are debtors in bankruptcy.

Proposed comment 41(f)(4)–1 provides an illustration of a servicer's obligations with respect to a mortgage loan where two spouses are obligors on a mortgage loan, and only one spouse files for Chapter 13 bankruptcy. In this example, the plan of reorganization for the spouse in bankruptcy provides for the retention of the property securing the mortgage loan by making pre-petition and post-petition payments, thus requiring the servicer to provide a periodic statement with the modifications set forth in proposed § 1026.41(f)(1) through (3). Proposed comment 41(f)(4)–1 clarifies that the servicer can provide the periodic statements with the modifications set forth in proposed § 1026.41(f)(1) through (3) to either spouse, even though one spouse is not in bankruptcy.

41(f)(5) Coupon Books

Proposed § 1026.41(f)(5) provides that certain modifications in proposed § 1026.41(f)(1) and (3) apply to coupon books provided instead of periodic statements under § 1026.41(e)(3). Proposed § 1026.41(f)(5) permits the servicer to put the disclosures required under proposed § 1026.41(f)(2) and (3)(vii) anywhere in the coupon book or provide them on a separate page enclosed with the coupon book provided to the consumer. The servicer also must make available upon request

to the consumer by telephone, in writing, in person, or electronically, if the consumer consents, the pre-petition arrearage information listed in proposed § 1026.41(f)(3)(vi), as applicable. Lastly, proposed § 1026.41(f)(5) provides that the modifications set forth in proposed § 1026.41(f)(1) and (3)(i) through (v) and (vii) apply to coupon books and other information a servicer provides to the consumer under § 1026.41(e)(3).

The Bureau believes that proposed § 1026.41(f)(5) will not impose significant burdens on servicers that use coupon books. The statements set forth in proposed § 1026.41(f)(1) and (3)(vii) are the only new, bankruptcy-specific disclosures that a servicer must include in a coupon book. These are standardized statements—servicers will not need to craft language for individual borrowers. Additionally, the Bureau is proposing to allow servicers to include these statements anywhere in the coupon book or on a separate page enclosed with the coupon book. The remainder of the modifications set forth in proposed § 1026.41(f)(1) and (3)(i) through (v) and (vii) do not require a servicer to modify any of the disclosures in the coupon book or provide new information to a consumer. Rather, these modifications provide that certain disclosures (such as a description of late payment fees) are not required when a consumer is in bankruptcy and clarify the requirements for certain other disclosures (such as amount due) in a manner that is consistent with the information already provided in a coupon book. Thus, while a servicer has the option to modify its coupon books to omit certain disclosures that are not required when a consumer is in bankruptcy, the proposal does not require servicers to redesign their coupon books specifically for consumers in bankruptcy, and servicers can determine the most cost-efficient method of providing the required information. Moreover, proposed § 1026.41(f)(5) permits a servicer to provide modified coupon books according to its normal schedule. For example, if a servicer provided a 12-month coupon book to a consumer in January and the consumer filed for bankruptcy in March, the servicer would not need to issue a new, modified coupon book accompanied by the proposed § 1026.41(f)(1) and (3)(vii) disclosures until the following January.

Providers of coupon books will also, at the consumer's request, have to provide the pre-petition arrearage information set forth in proposed § 1026.41(f)(3)(vi). The Bureau understands, however, that servicers already maintain internal records regarding pre-petition payments and the balance of the pre-petition arrearage; therefore, the Bureau does not believe that the cost of providing this information upon a consumer's request will impose significant new burdens.

The Bureau solicits comment on applying the modifications set forth in proposed § 1026.41(f)(1) and (3)(i) through (v) and (vii) when a servicer provides coupon books under § 1026.41(e)(3). In particular, the Bureau solicits comment on whether there may be alternative means to providing consumers with substantially the same information regarding the mortgage loan account while they are in bankruptcy. Additionally, the Bureau solicits comment on whether servicers should be required to issue a new coupon book or other disclosures immediately upon a consumer's bankruptcy filing. Finally, the Bureau solicits comment on servicers' current practices with respect to providing coupon books to consumers in bankruptcy.

Sample Forms

Proposed sample forms for periodic statements are provided in proposed appendices H–30(E) and (F). Section 1026.41(c) specifies that sample forms for periodic statements are provided in appendix H–30 and that proper use of these forms complies with the form and layout requirements of § 1026.41(c) and (d). The Bureau believes that sample forms are appropriate to provide servicers with guidance for complying with the requirements of § 1026.41(c) and (d) as modified by proposed § 1026.41(f). The Bureau therefore exercises its authority under, among other things, section 128(f) of TILA to propose sample forms for § 1026.41(c) and 1026.41(d), as modified by § 1026.41(f). Proposed appendix H–30(E) provides a sample form for complying with the requirements of § 1026.41(f) with respect to a consumer in a Chapter 7 or Chapter 11 bankruptcy case or a consumer who has discharged personal liability for a mortgage loan. This form includes the delinquency information required by § 1026.41(d)(8) as an example; a servicer is not required to include this information if it is not applicable to a consumer. Proposed appendix H–30(F) provides a sample form for complying with the requirements of proposed § 1026.41(f) with respect to a consumer in a Chapter 12 or Chapter 13 bankruptcy case. The Bureau notes that these are not required forms and that any arrangements of the information that meet the requirements of § 1026.41 would be considered in compliance with the section.

The Bureau intends to conduct consumer testing on the sample forms in proposed appendices H–30(E) and H–30(F) following publication of this proposed rule. Prior to finalizing any such sample forms, the Bureau will publish and seek comment on a report summarizing the methods and results of the consumer testing.

Legal Authority

The Bureau is proposing § 1026.41(f)—which contains content and layout requirements for periodic statements in bankruptcy—to implement section 128(f) of TILA as well as section 105(a) of TILA and section 1032(a) of the Dodd-Frank Act. Section 128(f)(1)(e) of TILA requires the periodic statement to include a description of any late payment fees. For the reasons discussed above, the Bureau is proposing to use its authority under section 105(a) and (f) of TILA to exempt servicers from having to include this information in periodic statements provided to consumers who are in bankruptcy or have discharged personal liability for a mortgage loan. This proposed exemption is additionally authorized under section 1405(b) of the Dodd-Frank Act.

Appendix H—Closed-End Model Forms and Clauses

Appendix H—4(C) to Part 1026

The 2013 TILA Servicing Final Rule revised the commentary to § 1026.19(b) to reflect the revised § 1026.20(c) and revised § 1026.20(d) ARM notices. This proposal modifies the Variable-Rate Model Clauses in appendix H—4(C) to reflect the language in the revised commentary. No change to the table of contents of appendix H is necessary.

Appendix H—14 to Part 1026

The 2013 TILA Servicing Final Rule changed the commentary to § 1026.19(b) to reflect the revised § 1026.20(c) and revised § 1026.20(d) ARM notices. This proposal modifies the Variable-Rate Mortgage Sample form in appendix H—14 to reflect the language in the revised commentary. No change to the table of contents of appendix H is necessary.

Appendix H—30(C) to Part 1026

This proposal makes a minor technical revision to the entry for H—30(C) in the table of contents at the beginning of this appendix and republishes sample form H—30(C). The technical change amends ''Sample Form of Periodic Statement for a Payment-Options Loan (§ 1026.41)'' to ''Sample Form of Periodic Statement for a Payment-Option Loan (§ 1026.41).''

Appendices H—30(E) and H—30(F) to Part 1026

This proposal provides proposed sample forms for periodic statements for certain consumers in bankruptcy in proposed appendices H—30(E) and H—30(F) and makes corresponding additions to the table of contents for appendix H. Section 1026.41(c) specifies that sample forms for periodic statements are provided in appendix H—30 and that proper use of these forms complies with the form and layout requirements of § 1026.41(c) and (d). The Bureau believes that sample forms may be appropriate to provide servicers with guidance for complying with the requirements of § 1026.41(c) and (d) as modified by proposed § 1026.41(f). The Bureau therefore exercises its authority under, among other things, section 128(f) of TILA to provide sample forms for § 1026.41(c) and (d), as modified by § 1026.41(f). Appendix H—30(E) provides a sample form for complying with the requirements of § 1026.41(f) with respect to a consumer in a Chapter 7 or Chapter 11 bankruptcy case or a consumer who has discharged personal liability for a mortgage loan. Appendix H—30(F) provides a sample form for complying with the requirements of § 1026.41(f) with respect to a consumer in a Chapter 12 or Chapter 13 bankruptcy case. They would not be required forms, however, and any arrangements of the information that meet the requirements of § 1026.41 would be considered in compliance with the section.

The Bureau intends to conduct consumer testing on the sample forms in proposed appendices H—30(E) and H—30(F) following publication of this proposed rule. Prior to finalizing any such sample forms, the Bureau will publish and seek comment on a report summarizing the methods and results of the consumer testing.

VI. Dodd-Frank Act Section 1022(b)

A. Overview

In developing the proposed rule, the Bureau has considered the proposed rule's potential benefits, costs, and impacts.[295] The Bureau requests comment on the preliminary analysis presented below as well as submissions of additional data that could inform the Bureau's analysis of the benefits, costs, and impacts. In developing the proposed rule, the Bureau has consulted, or offered to consult with, the prudential regulators, the Securities and Exchange Commission, HUD, the Federal Housing Finance Agency, the Federal Trade Commission, and the Department of the Treasury, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies.

The Bureau is now proposing several additional amendments to the Mortgage Servicing Rules to revise regulatory provisions and official interpretations relating to the Regulation X and Z mortgage servicing rules. The proposals cover nine major topics, summarized below generally in the order they appear in the proposed rule. More details can be found in the proposed rule.

1. Successors in interest. The Bureau is proposing three sets of rule changes relating to successors in interest. First, the Bureau is proposing to apply all of the Mortgage Servicing Rules to successors in interest once a servicer confirms the successor in interest's identity and ownership interest in the property. Second, the Bureau is proposing rules relating to how a mortgage servicer confirms a successor in interest's status. Third, the Bureau is proposing that, to the extent that the Mortgage Servicing Rules apply to successors in interest, the rules apply with respect to all successors in interest who acquire an ownership interest in a transfer protected from acceleration, and therefore foreclosure, under Federal law.

2. Definition of delinquency. The Bureau is proposing to add a general definition of delinquency that would apply to all of the servicing provisions of Regulation X and the provisions regarding periodic statements for mortgage loans in Regulation Z. Under the proposed definition, a borrower and a borrower's mortgage loan obligation are delinquent beginning on the date a payment sufficient to cover principal, interest, and, if applicable, escrow, becomes due and unpaid.

3. Requests for information. The Bureau is proposing amendments that would change how a servicer must respond to requests for information asking for ownership information for loans in trust for which Fannie Mae or Freddie Mac is the trustee, investor, or guarantor.

4. Force-placed insurance. The Bureau is proposing to amend the required disclosures to account for when a servicer wishes to force-place insurance when the borrower has insufficient, rather than expiring or expired, hazard insurance coverage on the property. Additionally, the Bureau is proposing to give servicers the option to include a borrower's mortgage loan account number on the notices required under § 1024.37. The Bureau is also proposing several technical edits to correct discrepancies between the model forms and the text of § 1024.37.

5. Early intervention. The Bureau is proposing to clarify generally the early intervention live contact obligations and written early intervention notice obligations. The Bureau is also proposing to require servicers to provide written early intervention notices to certain borrowers who are in bankruptcy or who have invoked their cease communication rights under the FDCPA.

6. Loss mitigation. The Bureau is proposing to: (1) Require servicers to meet the loss mitigation requirements more than once in the life of a loan for borrowers who become current after a delinquency; (2) Modify the existing exception to the 120-day prohibition on foreclosure filing to allow a servicer to join the foreclosure action of a senior lienholder; (3) Clarify that servicers have significant flexibility in setting a reasonable date by which a borrower must return documents and information to complete an application, so long as the date maximizes borrower protections and allows borrowers a reasonable period of time to return documents and information; (4) Clarify that servicers must take affirmative steps to delay a foreclosure sale, even where the sale is conducted by a third party; clarify the servicer's duty to instruct foreclosure counsel to take steps to comply with the dual-tracking prohibitions; and indicate that a servicer who has not taken, or caused counsel to take, all reasonable affirmative steps to delay the sale, is required to dismiss the foreclosure action if necessary to avoid the sale; (5) Require that servicers promptly provide a written notice once they receive a complete loss mitigation application; require that the notice indicate that the servicer has received a complete application but clarify that the servicer might later request additional information if needed; require that the notice provide the date of completion and a disclosure indicating whether a foreclosure sale was scheduled as of that date, the date foreclosure protections began, a statement informing the borrower of applicable appeal rights, and a statement that the servicer will complete its evaluation within 30 days from the date of the complete

[295] Specifically, section 1022(b)(2)(A) of the Dodd-Frank Act requires the Bureau to consider the potential benefits and costs of the regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products and services; the impact of proposed rule on insured depository institutions and insured credit unions with less than $10 billion in total assets as described in section 1026 of the Dodd-Frank Act; and the impact on consumers in rural areas.

application; (6) Address and clarify how servicers obtain information not in the borrower's control and evaluate a loss mitigation application while waiting for such third party information; prohibit servicers from denying borrowers based upon delay in receiving such third party information; require that servicers promptly provide a written notice to the borrower if the servicer lacks third party information 30 days after receiving the borrower's complete application; and require servicers to notify borrowers of their determination in writing promptly upon receipt of the third party information; (7) Permit servicers to offer a short-term repayment plan based upon an evaluation of an incomplete application; (8) Clarify that servicers may stop collecting documents and information from a borrower pertaining to a loss mitigation option after receiving information confirming that the borrower is ineligible for that option; and (9) Address and clarify how loss mitigation procedures and timelines apply to a transferee servicer that receives a mortgage loan for which there is a loss mitigation application pending at the time of a servicing transfer.

7. Prompt payment crediting. The Bureau is proposing to clarify how servicers must treat periodic payments made by consumers who are performing under either temporary loss mitigation programs or permanent loan modifications. Under the Bureau's proposal, periodic payments made pursuant to temporary loss mitigation programs would continue to be credited according to the loan contract and could, if appropriate, be credited as partial payments, while periodic payments made pursuant to a permanent loan modification would be credited under the terms of the permanent loan agreement.

8. Periodic statements. The Bureau is proposing to: (1) Clarify certain periodic statement disclosure requirements relating to mortgage loans that have been accelerated, are in temporary loss mitigation programs, or have been permanently modified, to conform generally the disclosure of the amount due with the Bureau's understanding of the legal obligation in each of those circumstances; (2) Require servicers to send modified periodic statements to consumers who have filed for bankruptcy, subject to certain exceptions, with content varying depending on whether the consumer is a debtor in a Chapter 7 or Chapter 13 bankruptcy case; and to conduct consumer testing on proposed sample periodic statement forms that servicers could use for consumers in bankruptcy to ensure compliance with § 1026.41; and (3) Exempt servicers from the periodic statement requirement for charged-off mortgage loans if the servicer will not charge any additional fees or interest on the account and provides a final periodic statement.

9. Small servicer. The proposal would make certain changes to the small servicer definition. The small servicer definition generally applies to servicers who service 5,000 or fewer mortgage loans for all of which the servicer is the creditor or assignee. The proposal would exclude certain seller-financed transactions from being counted toward the 5,000 loan limit, allowing servicers that would otherwise qualify for small servicer status to retain their exemption while servicing those transactions.

The proposed rule also makes technical corrections to several provisions of Regulations X and Z.

B. Provisions to Be Analyzed

The analysis below considers the potential benefits, costs, and impacts to consumers and covered persons of key provisions of the proposed rule (proposed provisions), which include:

1. Requirements related to successors in interest.
2. A new definition of ''delinquency'' for purposes of Regulation X's mortgage servicing rules.
3. Early intervention written notice requirements for certain consumers.
4. Changes to loss mitigation procedures, including:
   - Requiring a notice of complete application for loss mitigation applications;
   - Requirements applicable when determination of what loss mitigation options to offer a borrower is delayed because information outside the borrower's control is missing;
   - Clarifications to the Mortgage Servicing Rules' dual-tracking protections;
   - Requiring review of multiple loss mitigation applications from the same borrower in some circumstances;
   - Clarification of how loss mitigation timelines apply in the case of servicing transfers; and
   - Permitting evaluation for short-term repayment plans based on incomplete applications.
5. Periodic statement requirements applicable to consumers in bankruptcy.
6. An exemption from the servicing rule's periodic statement requirement for loans that have been charged off.
7. Revisions to the small servicer definition.

In addition to the proposed changes listed above, the Bureau is proposing to modify or clarify other provisions of the Mortgage Servicing Rules. These other changes include: proposed commentary relaxing certain information provision requirements under § 1024.36(a) when a borrower requests information about the owner of a GSE loan; a proposed amendment to the force-placed insurance notice described in § 1024.37(c) through (e) to require the notice to state that coverage is insufficient (rather than expiring), when applicable, and to allow inclusion of the account number on the notice; a proposed policies and procedures requirement under § 1024.38(b)(2)(vi) regarding identifying and obtaining documents not in the borrower's control that a servicer requires to determine what loss mitigation options, if any, to offer a borrower; proposed commentary regarding a servicer's flexibility in collecting documents and information to complete a loss mitigation application under § 1024.41(b)(1); proposed commentary relevant to the reasonable date for return of documents under § 1024.41(b)(2)(ii); proposed amendments to § 1024.41(c)(2)(iv) clarifying when a loss mitigation application is considered facially complete; a proposed exception to § 1024.41(f)(1)'s 120-day pause for circumstances in which a subordinate lienholder joins the foreclosure action of a senior lienholder; proposed commentary clarifying the effect of § 1026.36(c)'s and § 1026.41(d)'s prompt crediting and periodic statement requirements with regard to loan modifications; proposed commentary to clarify the information that must be included in a periodic statement pursuant to § 1026.41(d) following a period when the servicer was exempt from sending periodic statements; a proposal to remove the phrase ''creditor or assignee'' from the description of voluntarily serviced loans that may be excluded in applying the small servicer exemption under § 1026.41(e)(4), and certain other minor changes. The Bureau believes these proposed modifications and clarifications would generally benefit consumers and/or covered persons and impose minimal new costs on consumers or covered persons.

C. Data Limitations and Quantification of Benefits, Costs and Impacts

The discussion in this part relies on data that the Bureau has obtained from industry, other regulatory agencies, and publicly available sources. The Bureau has done extensive outreach on many of the issues addressed by the proposed rule, including discussions with several servicers of different sizes, consultations with other stakeholders, and convening

a roundtable on the application of the Mortgage Servicing Rules in the case of bankrupt borrowers. However, as discussed further below, the data are generally limited with which to quantify the potential costs, benefits, and impacts of the proposed rule.

Quantifying the benefits of the rule for consumers presents particular challenges. As discussed further below, certain proposed provisions may directly save consumers time and money while others may benefit consumers by, for example, facilitating household budgeting, supporting the consumer's ability to obtain credit, and reducing default and avoidable foreclosure. Many of these benefits are qualitative in nature, while others are quantifiable but would require a wide range of data that is not currently available to the Bureau. The Bureau continues to seek data from available sources regarding the benefits to consumers of the proposed rule.

In addition, the Bureau believes, based on industry outreach, that many servicers already follow procedures that comply with at least some provisions of the proposed rule. However, the Bureau does not have representative data on the extent to which servicer operations currently comply with the proposed rule, which means the Bureau is unable to quantify the benefits to consumers or the costs to servicers of the proposed rule. The Bureau continues to seek data from available sources regarding the extent to which servicer operations currently comply with the proposed rule. Even with this data, the Bureau would need information on the cost of changing current servicer practices in order to quantify the cost of closing any gaps between current practices and those mandated by the proposed rule. The Bureau continues to seek data from available sources regarding the costs of improving servicer operations, as specified by the proposed rule, in order to quantify the costs to covered persons of the proposed rule.

In light of these data limitations, the analysis below generally provides a qualitative discussion of the benefits, costs, and impacts of the proposed rule. General economic principles, together with the limited data that are available, provide insight into these benefits, costs, and impacts. The Bureau requests additional data or studies that could help quantify the benefits and costs to consumers and covered persons of the proposed rule.

D. Small Servicer Exemption

Small servicers—generally, those that service 5,000 or fewer mortgage loans, all of which the servicer or affiliates own or originated—are exempt from many of the provisions of the Mortgage Servicing Rules, including most of the provisions affected by the proposed rule.[296] Therefore, most of the discussion of potential benefits and costs below generally does not apply to small servicers or to consumers whose mortgage loans are serviced by small servicers. The two exceptions among the provisions discussed in this part are (1) the proposed provisions related to successors in interest, which would extend the protections of the Mortgage Servicing Rules, including certain provisions from which small servicers are not exempt, to successors in interest and (2) the proposed definition of delinquency in § 1024.31, which may affect the scope of the 2013 RESPA Servicing Final Rule's prohibition on initiating foreclosure proceedings unless a borrower's mortgage loan obligation is more than 120 days delinquent.

E. Potential Benefits and Costs to Consumers and Covered Persons

The Bureau believes that, compared to the baseline established by the Mortgage Servicing Final Rules, an important benefit of many of the proposed provisions to both consumers and covered persons is an increase in clarity and precision of the servicing rules and an accompanying reduction in compliance costs. Other benefits and costs are considered below.

1. Successors in Interest

The Bureau is proposing new requirements on mortgage servicers with respect to successors in interest. For purposes of the proposed provisions, successors in interest include individuals who receive an ownership interest in a property securing a mortgage loan in a transfer protected by the Garn-St Germain Act, including individuals who acquired an ownership interest in the property securing a mortgage loan in transfers resulting from the death of the borrower or through transfers to the borrower's spouse or children, transfers incident to divorce, and certain other transfers. As described in more detail below, the proposed provisions would relate to how mortgage servicers confirm a successor in interest's identity and ownership interest in the property, and would apply the Mortgage Servicing Rules to successors in interest whose identity and ownership interest in the property have been confirmed by the servicer.

Proposed § 1024.36(i) requires a servicer to respond to a written request that indicates that the person making the request may be a successor in interest by providing that person with information regarding the documents the servicer requires to confirm the person's identity and ownership interest in the property. Proposed § 1024.38(b)(1)(vi) requires servicers to maintain certain policies and procedures with respect to successors in interest, which are generally intended to facilitate the process of confirming a person's status as a successor in interest and communicating with the person about the status.

Proposed § 1024.30(d) provides that a successor in interest shall be considered a borrower for the purposes of Regulation X's mortgage servicing rules once a servicer confirms the successor in interest's identity and ownership interest in the property. Similarly, proposed § 1026.2(a)(11) provides that a confirmed successor in interest is a consumer with respect to Regulation Z's mortgage servicing rules. Under the proposed rule, the Mortgage Servicing Rules apply with respect to a confirmed successor in interest regardless of whether that person has assumed the mortgage loan obligation (*i.e.,* legal liability for the mortgage debt) under State law.

Potential benefits and costs to consumers. As described in more detail below, the proposal would benefit successors in interest by permitting them to protect and manage their interest in the property, and to make key decisions about that interest, without unnecessary delays and associated costs.

The Bureau understands, based on discussions with certain large servicers, that only a small number of properties for which they service mortgage loans are transferred to successors in interest in any given year.[297] The Bureau does

[296] Section 1026.41(e)(4)(ii) defines the term ''small servicer'' as a servicer that either: (1) Services, together with any affiliates, 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee; or (2) is a Housing Finance Agency, as defined in 24 CFR 266.5.

[297] One large servicer indicated that in recent years the number of successors in interest applying to assume a mortgage loan each year represented less than 0.03 percent of the total loans it services. However, this number does not include successors in interest that did not apply to assume the loan but nonetheless might have benefitted from the proposed rule (for example, because they would have been able to obtain more information about the loan before deciding whether to apply to assume the loan). Data from the American Housing Survey indicate that in 2011, 239,000 homeowners (approximately 0.5 percent of those with a mortgage) had assumed the mortgage loan on their home; however, these data do not indicate whether the homeowner was a successor in interest as defined in the proposed rule at the time the loan was assumed. HUD Office of Policy Dev. and

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not have representative data on current servicer policies toward such successors in interest. Because the Garn-St Germain Act prevents foreclosure solely on the basis that a home was transferred to a successor in interest, the Bureau expects that servicers currently are servicing loans for successors in interest, even before such successors in interest assume the mortgage loan. The Bureau does not have representative information on the standards servicers use in servicing loans for successors in interest; however, as discussed below, the Bureau believes, based on information it has received from consumers and other stakeholders, that in many cases successors in interest would benefit from additional protections.

The proposed revisions to the ''policies and procedures'' requirements in § 1024.38(b)(1)(vi), together with the requirement in proposed § 1024.36(i) that servicers respond to written requests regarding what documents the servicer requires to confirm the person's identity as a successor in interest, would benefit consumers that succeed to ownership of a home that is subject to a mortgage by reducing the time and effort required to establish their status in the eyes of the servicer. The Bureau believes, based on information it has received from consumers, consumer advocacy groups, and other stakeholders, that successors in interest often have difficulty demonstrating their identity and ownership interest in the property to servicers' satisfaction, and that some servicers currently require successors in interest to submit documents that are unreasonable in light of the particular situation of that successor in interest or in light of the laws of the relevant jurisdiction. The Bureau has also heard repeated reports that some servicers have taken a long time to confirm the successor in interest's status, even after receipt of appropriate documentation. The Bureau has also heard reports that servicers may fail to communicate to the successor in interest whether the servicer has confirmed the successor in interest's status. Unnecessary delays and other difficulties can harm successors in interest because successors in interest that have not been confirmed by the servicer may not be able to obtain information about the mortgage, and in some instances servicers may be unwilling to accept payment from the unconfirmed successor in interest. These problems may lead the successor in interest to incur unnecessary costs related to the mortgage or deprive the person of rights to which he or she would otherwise be entitled, and may even lead to unnecessary foreclosure on the property.

The Bureau's proposal extends the protections of the Mortgage Servicing Rules to confirmed successors in interest, even prior to such time as they may assume the obligations of the mortgage loan under State law. The benefits of the Mortgage Servicing Rules to consumers generally are discussed in the 2013 RESPA Servicing Final Rule and the 2013 TILA Servicing Final Rule, in which the Bureau noted that the need for the Mortgage Servicing Rules arises in part from the fact that, because borrowers generally do not choose their servicers, it is difficult for consumers to protect themselves from shoddy service or harmful practices.[298] This reasoning is particularly applicable to successors in interest because they may not be parties to the mortgage loan. In addition, successors in interest may find that they have a particular need for access to information about the mortgage loan secured by the property that they now own, which may help them avoid unwarranted or unnecessary costs and fees on the mortgage loan and prevent unnecessary foreclosure.

Furthermore, successors in interest may benefit in particular from Regulation X's rules relating to loss mitigation procedures, particularly when deciding whether to assume the obligations of the mortgage loan. Successors in interest may often experience a disruption in household income due to death or divorce and therefore may be more likely than other homeowners to need loss mitigation to avoid foreclosure. If the servicer does not evaluate the successor in interest promptly for loss mitigation options, or if the servicer requires the successor in interest to assume the mortgage obligation before evaluating the successor in interest for loss mitigation options, the successor in interest will be required to decide whether to assume the mortgage obligation without knowing whether a loan modification will be available and, if so, what terms will be offered. The proposal would allow the successor in interest to make a fully informed decision about whether to accept the mortgage obligation.

Potential benefits and costs to covered persons. The costs of complying with the proposed provisions related to successors in interest depend on servicers' current policies and procedures. Because the Garn-St Germain Act protects successors in interest from foreclosure after transfer of homeownership to them, servicers are effectively required to continue servicing loans following their transfer to successors in interest. Thus, the Bureau believes that servicers likely already have some policies and procedures in place for confirming a successor in interest's identity and ownership interest in the property (and thereby determining whether the Garn-St Germain Act is applicable) and for servicing a loan secured by property that has been transferred to a successor in interest. The proposed provisions establish certain standards for the performance of these activities. To the extent to which some servicers are meeting these standards already, the costs for these servicers may be minimal. However, many servicers may need to significantly alter certain of their policies and procedures to comply with the proposed provisions.

The proposed revisions to § 1024.38(b)(1)(vi) and proposed § 1024.36(i) may require servicers to develop and implement new policies and procedures for confirming a successor's interest in a property and communicating with potential successors in interest about documents the servicer requires to confirm the person's status. Under current § 1024.38(b)(1)(vi), servicers must maintain policies and procedures designed to identify and facilitate communication promptly with the successor in interest of a deceased borrower. As discussed above, the Bureau believes that, because the Garn-St Germain Act protects successors in interest from foreclosure, servicers likely already have some policies and procedures in place for confirming the identity and ownership interest in the property of a successor in interest following transfers covered by the proposed rule. However, the Bureau does not have data on the extent to which servicers' current policies and procedures may comply with the proposed provisions or the extent of the changes that would be required to bring policies and procedures into compliance with the proposed provisions. The Bureau requests additional information about servicers' current policies and procedures for confirming a successor in interest's status and the incremental cost to servicers of complying with the proposed requirements.

Proposed §§ 1024.30(d) and 1026.2(a)(11), which extend the

Research and U.S. Census Bureau, *American Housing Survey for the United States: 2011*, at 79 (Sept. 2013), *available at http://www.census.gov/content/dam/Census/programs-surveys/ahs/data/2011/h150–11.pdf.*

[298] See 78 FR 10695, 10842–61 (Feb. 14, 2013); 78 FR 10901, 10978–94 (Feb. 14, 2013).

protections of the Regulation X and Z mortgage servicing rules to confirmed successors in interest, would not require servicers to develop new policies and procedures, but rather to continue to apply existing policies and procedures to a set of loans that were subject to the Mortgage Servicing Rules prior to being transferred to the successor in interest. As discussed above, the Bureau expects that such loans make up a small fraction of the total loans serviced by any particular servicer. For these reasons, the Bureau expects that the cost to servicers of complying with the Mortgage Servicing Rules with respect to confirmed successors in interest will be small.

The Bureau acknowledges that, due to the unique circumstances of a successor in interest who has recently obtained an interest in the property, there may be additional costs associated with complying with the Mortgage Servicing Rules with respect to successors in interest. For example, successors in interest may have experienced a disruption in household income due to death or divorce and therefore may be more likely to seek loss mitigation to avoid foreclosure, thereby possibly delaying the foreclosure process. Successors in interest may also be more likely to seek information regarding the loan that is secured by the property in which they now hold an interest. Nonetheless, because the Bureau believes that the number of successors in interest serviced at any given time is small and that many servicers are already performing servicing tasks with respect to successors in interest, the Bureau expects that servicers would not incur significant additional costs as a result of the proposed provisions. The Bureau requests additional information about the benefits to successors in interest of the proposed requirements and the incremental cost to servicers of applying the Mortgage Servicing Rules to these loans.

2. Definition of ''Delinquency''

The Bureau is proposing to add a general definition of delinquency in § 1024.31 that would apply to all sections of subpart C of Regulation X, replacing the existing definition of delinquency for purposes of §§ 1024.39 and 1024.40(a). Under the proposal, delinquency is defined as a period of time during which a borrower and the borrower's mortgage loan obligation are delinquent, and a borrower and a borrower's mortgage loan obligation are delinquent beginning on the day a periodic payment sufficient to cover principal, interest, and, if applicable, escrow, became due and unpaid, until such time as the payment is made. Proposed comment 31 (Delinquency)-2 clarifies that, if a servicer applies payments to the oldest outstanding periodic payment, the date of the borrower's delinquency must advance accordingly. The Bureau understands from its outreach that the majority of servicers credit payments made to a delinquent account to the oldest outstanding periodic payment. The Bureau also understands that some servicers that use this method may be concerned about how to calculate the length of a borrower's delinquency without increased certainty from the Bureau.[299]

The Bureau believes that the proposed provision will clarify the application of the servicing rules without imposing significant new burdens on servicers. The Bureau recognizes that, in principle, the proposed provision could affect the circumstances under which a servicer may initiate foreclosure proceedings, because the definition of ''delinquency'' affects the application of § 1024.41(f)(1)'s prohibition on initiating foreclosure proceedings unless ''a borrower's mortgage loan obligation is more than 120 days delinquent.'' In particular, the proposed commentary clarifies that a servicer that otherwise applies payments to the oldest outstanding periodic payment may not initiate foreclosure proceedings unless the borrower has missed the equivalent of four monthly payments. Absent this clarification, § 1024.41(f)(1) could be interpreted to permit the servicer to commence foreclosure even if the borrower has missed only one payment, so long as the payment was missed at least 120 days ago and the borrower has not become current since. However, information gathered in industry outreach indicates that servicers generally would not treat borrowers who are behind by three or fewer payments as seriously delinquent. More specifically, servicers contacted by the Bureau during outreach, when asked about policies for referring a loan for foreclosure, uniformly told the Bureau that they generally would not initiate foreclosure in cases where a borrower is making regular payments, even if such a borrower has a long-standing delinquency of up to three months' payments. In addition, Fannie Mae and Freddie Mac guidelines generally prevent servicers from initiating foreclosure if a loan is delinquent by fewer than four monthly payments. Therefore, the Bureau expects that the proposed provision will not impose meaningful new constraints on servicers.

3. Early Intervention Written Notices

The Bureau is proposing to revise the scope of the exemptions from the ''early intervention'' requirements in § 1024.39(d) for two groups of borrowers: those who are debtors in bankruptcy and those who have exercised their ''cease communication'' rights under the FDCPA. Servicers are currently exempt from each of § 1024.39's early intervention requirements with respect to these two groups of borrowers. Under the proposed provisions, servicers would generally remain exempt from the ''live contact'' requirement of § 1024.39(a) with respect to these borrowers. However, if loss mitigation options are available to borrowers who are debtors in bankruptcy or who have exercised cease communication rights under the FDCPA, the proposed provisions require that a servicer, with certain exceptions, provide them with the written early intervention notice that is generally required by § 1024.39(b). With respect to consumers that have exercised their cease communication rights under the FDCPA, the proposal provides that servicers must provide a modified written notice that may not contain a request for payment and prohibits a servicer from providing the modified written notice more than once during any 180-day period.

Potential benefits and costs to consumers. As discussed in more detail below, the proposed provision may benefit borrowers who are in bankruptcy or who have exercised their cease communication rights under the FDCPA by providing them with information about loss mitigation options that could enable them to remain in their homes or avoid other costs associated with default on their mortgages.

The Bureau recognizes that many borrowers affected by this provision will have already received early intervention communications prior to filing for bankruptcy or invoking FDCPA protections. Most homeowners that file for bankruptcy have become delinquent on their mortgage payments prior to filing for bankruptcy, in which case their servicers frequently will have been required to send early intervention communications prior to the filing.[300]

[299] See Am. Bankers Ass'n. Letter to Consumer Fin. Prot. Bureau (Oct. 24, 2014), *available at http://www.aba.com/Advocacy/commentletters/Documents/ABALetterRollingDelinquencies102414.pdf.*

[300] One study found that among homeowners that file for bankruptcy, more than 60 percent of

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However, many borrowers filing for bankruptcy are not delinquent on their mortgages at the time of filing, and so under the current rule will not receive required communications about loss mitigation options if they become delinquent while in bankruptcy. Even borrowers who do receive an early intervention written notice prior to their bankruptcy filing may benefit from information about available loss mitigation options after filing for bankruptcy, given that the borrower's servicer may have changed or new options may have otherwise become available since the borrower initially became delinquent. Information regarding loss mitigation may have unique value for borrowers in bankruptcy as they make decisions about how best to eliminate or reorganize their debts.

Borrowers have FDCPA protections only with respect to debt collectors, and a servicer generally is considered a debt collector for purposes of the FDCPA only if the servicer acquires servicing rights to a mortgage loan after the mortgage loan is in default. Therefore, at the time borrowers first become delinquent on a mortgage loan they do not have rights under the FDCPA and their servicers are thus generally obligated to provide early intervention communications. When servicing of borrowers' loans is subsequently transferred while the loans are in default, the borrowers have FDCPA protections with respect to the new servicer and may exercise cease communication rights. Because the initial early intervention communications came from a different servicer that may have offered different loss mitigation options, such borrowers may still benefit from information about loss mitigation options available from the new servicer. Because borrowers who have FDCPA protections will generally have a longer history of delinquency, they may be more likely to face difficulty making mortgage payments and therefore to benefit from information about loss mitigation options.

The proposal also may impose costs on some borrowers in both groups who would prefer not to receive any servicer communications regarding their mortgage loan. Both the Bankruptcy Code's automatic stay and the FDCPA's cease communication right are intended to protect borrowers from being harassed by creditors while the borrowers are attempting to work through difficult financial circumstances. By requiring servicers to send early intervention written notices to such borrowers, the proposal may cause some borrowers to receive unwanted communications. However, the Bureau notes that the proposed provision limits the content and frequency of such communications so as to reduce any perceived harassment. Specifically, the written notice is required to be sent only once in any 180 day period, and in the case of borrowers who have exercised cease communications rights under the FDCPA, the written notice may not contain a request for payment. Furthermore, the written notice is not required to be sent to consumers in bankruptcy if they indicate that they intend to surrender the property.

Potential benefits and costs to covered persons. The proposal to require servicers to send notices to borrowers who are in bankruptcy or who have sent a cease communication request under the FDCPA will result in certain compliance costs for non-exempt servicers. These servicers will incur one-time costs from changing their systems to provide early intervention notices to these groups of borrowers and will incur ongoing costs from distributing these notices to an additional population. The Bureau believes that most if not all servicers are likely to service at least some mortgages for homeowners in bankruptcy. Fewer servicers are likely to service mortgage loans for borrowers who have FDCPA rights with respect to the mortgage loan, because these rights are triggered only if the servicer acquired the servicing rights at a time when the mortgage loan was delinquent. Servicers that do not have a practice of acquiring servicing rights from others would therefore never become subject to the FDCPA and are not affected by the proposed changes.

The Bureau expects that the one-time costs of the proposed provision will be small with respect to borrowers in bankruptcy. Servicers currently are required to identify borrowers in bankruptcy, and under the proposal servicers may send the same written early intervention notice to borrowers in bankruptcy that they send to any other borrower. Therefore, the Bureau expects that servicers will need to make only minor changes to their procedures to begin sending early intervention written notices to borrowers in bankruptcy. For servicers that are subject to the FDCPA with respect to some borrowers, up-front costs may be somewhat greater, because the modified written notice for such borrowers includes additional disclosures that are not required for other borrowers. These servicers would need to develop a separate form of notice that complies with the proposed provision and change their systems to insure that this form is sent to borrowers who have exercised their cease communication rights. The Bureau notes that the proposal would mitigate these costs by providing a model clause for the specific disclosures required in the modified written notice.

Servicers will also incur ongoing costs from the requirement to distribute notices to these additional groups of borrowers. However, the Bureau believes that the number of additional notices that would be required as a result of the proposal is relatively small. With respect to borrowers in bankruptcy, FHFA data indicate that for homeowners with GSE loans, between 0.4 percent and 0.5 percent of borrowers were in bankruptcy during 2013.[301] Based on information from industry and other Federal agencies, the Bureau believes that the percentage of homeowners with non-GSE loans in bankruptcy may be higher, but that the overall percentage of homeowners with mortgage loans in bankruptcy is less than 1 percent. The Bureau expects that the share of borrowers who have exercised the FDCPA cease communication right is likely relatively small, since the right is available only to borrowers for whom the servicer acquired servicing rights after the loan is in default.

4. Loss Mitigation Procedures

Notice of Complete Loss Mitigation Application

Proposed § 1024.41(c)(3) requires a servicer to provide a borrower a written notice promptly upon receiving the borrower's complete loss mitigation application, subject to certain limitations discussed below. The required notice would inform the borrower that the application is complete; the date the servicer received the complete application; whether a foreclosure sale was scheduled as of the date the servicer received the complete application and, if so, the date of that scheduled sale; the date the borrower's foreclosure protections began under § 1024.41(f)(2) and (g); and certain other information regarding the borrower's

homeowners with prime mortgages and more than 75 percent of homeowners with subprime mortgages became delinquent on their mortgages prior to filing for bankruptcy. Wenli Li and Michelle White, *Mortgage Default, Foreclosure, and Bankruptcy* (Nat'l Bureau of Economic Research, Working Paper No. 15472, Nov. 2009), *available at http://www.nber.org/papers/w15472.*

[301] Fed. Housing Fin. Agency, Foreclosure Prevention Report, at 6 (January 2014), *available at http://www.fhfa.gov/AboutUs/Reports/ReportDocuments/ForeclosurePreventionReportJan2014FINAL.pdf.*

rights under the servicing rules. Under the proposal, a notice is not required if the application was not complete or facially complete more than 37 days before a scheduled foreclosure sale; the servicer has already notified the borrower under § 1024.41(b)(2)(i)(B) that the application is complete and the servicer has not subsequently requested additional documents or information from the borrower to complete the application; or the servicer has already provided a notice approving or denying the application.

Potential benefits and costs to consumers. Under the existing rule, servicers are not required to notify a borrower that a loss mitigation application is complete unless it is complete at the time the servicer provides the notice acknowledging receipt of an application under § 1024.41(b)(2)(i)(B). The Bureau understands based on its outreach that many servicers currently notify borrowers in writing once their applications are complete. However, such notices may not include all the information borrowers need to determine when the application was considered complete for purposes of determining their protections under Regulation X's mortgage servicing rules. The proposed provision is intended to benefit borrowers by providing them with more information about their application status, thereby allowing them to better protect their interests during the loss mitigation application process. Borrowers who have not yet received a notice will be able to infer that their applications are not yet complete and, if necessary, to follow up with the servicer to determine what remains missing. Once borrowers have received the notice, they will know that the servicer is prohibited from completing the foreclosure process until the application has been evaluated and will be able to plan based on the expectation that a decision will be reached within 30 days (unless the servicer determines that more information is needed). The notice will also provide the borrower, the servicer's compliance function, regulators, and courts with a written record that can help them evaluate a servicer's compliance with § 1024.41(c)(1)'s 30-day evaluation requirement.

The Bureau notes that several servicers informed the Bureau during outreach efforts that they already provide a notice informing the borrower that an application is complete. To the extent that servicers are already providing a notice that includes some of the information required by the proposed notice, the incremental benefit to borrowers of the proposed provision may be reduced.

Potential benefits and costs to covered persons. Servicers will incur costs associated with changing their policies and procedures to ensure that they are sending notices in compliance with the proposed provision, and in addition will incur distribution costs associated with sending notices to borrowers. However, the Bureau expects that these costs may be less than those associated with some other disclosure requirements, for two reasons. First, the existing rules already require servicers to determine the time at which an application is complete; thus, servicers will not be required to make any new determinations in order to comply with the requirement. Second, based on industry outreach, the Bureau understands that many servicers are already sending a written notification informing applicants that their applications are complete, so the costs of the proposed provision will be limited for these servicers.

In addition, the Bureau notes that certain provisions of the proposal are intended to prevent servicers from incurring unnecessary costs in connection with the proposed requirement. The proposal provides that the notice be sent ''promptly'' rather than within a prescribed timeframe (and states in commentary that five days would generally be considered reasonably prompt), thereby allowing servicers some flexibility in cases where it would be particularly burdensome to send the notice immediately. Furthermore, the notice is not required under certain circumstances in which a borrower would not benefit from the notice, including when the servicer is able to notify the borrower of the outcome of its evaluation before the notice is sent.

The Bureau requests data and other information regarding servicers' current practices for informing borrowers that a loss mitigation application is complete and the incremental cost to servicers of complying with the proposed requirement.

Information Outside of the Borrower's Control

The Bureau is proposing to amend § 1024.41(c)(1) and add § 1024.41(c)(4) to address a servicer's obligations with respect to information not in the borrower's control that the servicer requires to determine which loss mitigation options, if any, it will offer the borrower. The proposed provision requires a servicer to exercise reasonable diligence in obtaining such information. The proposed provision also prohibits a servicer from denying a borrower's complete application due to a lack of information not in the borrower's control; requires that a servicer inform a borrower in writing if the servicer is unable to complete its evaluation within 30 days of receiving a complete application because it lacks information from a party other than the borrower or the servicer; and requires that a servicer promptly provide the borrower written notice stating the servicer's determination upon receipt of missing information from a party other than the borrower or the servicer.

Potential benefits and costs to consumers. Under the existing rule, if a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, the servicer must, within 30 days of receipt, determine what loss mitigation options, if any, it will offer a borrower, regardless of whether it has received required information not in the borrower's control. The proposed provision would benefit borrowers applying for loss mitigation in situations in which the servicer cannot determine what loss mitigation options to offer within 30 days because it has not received necessary information from a party other than the servicer or the borrower, such as homeowner association payoff information or approval of the loan owner, investor, or mortgage insurance company. The proposal would reduce the impact on the borrower of such delays by preventing the borrower's application from being denied on the basis of missing information outside the borrower's control and ensuring that the borrower is aware of the application's status.

The Bureau understands from industry outreach that servicers currently follow different practices in the event they have not received information that is outside the borrower's control 30 days after receipt of a complete loss mitigation application. Some servicers have informed the Bureau that they exceed the 30-day evaluation timeframe in § 1024.41(c)(1) and wait to receive the information before making any decision on the application. One servicer informed the Bureau that it sends a denial notice to borrowers but also informs them that the servicer will reevaluate the application upon receipt of the third-party information. As a result, borrowers may be receiving confusing or conflicting messages from servicers about the status of their applications, and in some cases borrowers' applications for loss mitigation may be denied because the

servicer has experienced a delay in receiving required information that is not in the borrower's control. The proposed provision would give borrowers clearer information about their application status.

Potential benefits and costs to covered persons. The proposed provision would benefit servicers by clarifying servicer responsibilities when non-borrower information has not been received within 30 days of receiving a complete application from the borrower and prevent servicers from risking non-compliance with the evaluation requirement in order to provide a benefit to borrowers seeking loss mitigation options. The proposed changes would also require servicers to review and perhaps change their policies applicable to gathering information from parties other than the borrower and informing borrowers of their loss mitigation decisions, which would impose one-time costs of revising policies and systems in addition to the ongoing cost of providing the new notices required by the proposed provision.

The proposed provision also may impose costs on servicers because the requirement not to make a determination until information outside of the borrower's control is obtained may delay the foreclosure process for a servicer that would otherwise deny an application without having received such information. The Bureau notes, however, that servicers are not required to wait for non-borrower information to make a determination with respect to an application if a decision can be made without such information. Furthermore, the Bureau understands from industry outreach that, in cases where investor approval has not been delegated to the servicer, the missing non-borrower information is frequently investor approval of the application. Because the investor ultimately bears the cost of any delay in a foreclosure proceeding, the investor is in the best position to weigh the cost of expediting its approval process against the potential delay in a foreclosure proceeding.

The Bureau requests additional information regarding the frequency with which non-borrower information is not available to a servicer within 30 days of a servicer's receipt of a complete loss mitigation application, the types of information that may be missing at that point, the consequences for borrowers when this occurs, and the incremental cost to servicers of complying with the proposed requirement.

Clarification of the 2013 RESPA Servicing Final Rule's Dual-tracking Protections

The Bureau is proposing revised commentary to § 1024.41(g) that would clarify servicers' obligations with respect to § 1024.41(g)'s prohibition against moving for foreclosure judgment or order of sale, or conducting a sale, during evaluation of a complete loss mitigation application received more than 37 days before a foreclosure sale. As revised, proposed comment 41(g)–1 clarifies that if, upon receipt of a complete loss mitigation application, a servicer or its foreclosure counsel fails to take reasonable steps to avoid a ruling on a pending motion for judgment or the issuance of an order of sale, the servicer must dismiss the foreclosure proceeding if necessary to avoid the sale. Proposed new comment 41(g)-5 would clarify that § 1024.41(g) prohibits a servicer from conducting a foreclosure sale even if a person other than the servicer administers or conducts the foreclosure sale proceedings and that servicers must take reasonable steps to delay the sale until one of the conditions under § 1024.41(g)(1)–(3) is met. The Bureau also proposing to revise comment 41(g)-3 to clarify servicers' obligations under § 1024.41(g) when acting through foreclosure counsel. Similarly, the Bureau is proposing comment 38(b)(3)(iii)–1 to clarify that policies and procedures required under § 1024.38(b)(3)(iii) to facilitate sharing of information with service provider personnel responsible for handling foreclosure proceedings must be reasonably designed to ensure that servicer personnel promptly inform service provider personnel handling foreclosure proceedings that the servicer has received a complete loss mitigation application. The proposed comments, taken together, would clarify that, when a foreclosure sale has been scheduled but the servicer is evaluating a complete loss mitigation application received more than 37 days before the scheduled foreclosure sale, the servicer must take all reasonable steps to delay the foreclosure sale.

Section 1024.41(g) is intended to protect borrowers by preventing a foreclosure sale from going forward while review of a complete loss mitigation application is pending. The proposed commentary would clarify the steps that servicers must take to protect borrowers from foreclosure when a complete loss mitigation application is pending late in the foreclosure process. The proposed commentary would also reduce servicer compliance costs by adding clarity regarding the application of § 1024.41(g) when a foreclosure sale has been scheduled. At the same time, servicers would bear costs in confirming that their policies and procedures for foreclosures, including communication with counsel, meet the requirements of § 1024.41(g) in light of the revised commentary. However, the Bureau does not believe that the proposed revisions would impose significant burdens on servicers because § 1024.41(g) and its existing commentary already require servicers to take reasonable steps to prevent a scheduled foreclosure sale from going forward when a timely loss mitigation application has been received. The proposed commentary is intended to aid servicers in complying with § 1024.41(g) by elaborating upon and clarifying a servicer's obligations under the existing requirement, but does not impose new obligations on servicers.

The proposed revision to comment 41(g)–1 contemplates dismissal of the foreclosure action if the servicer has not taken, or caused its foreclosure counsel to take, all reasonable affirmative steps to delay the foreclosure sale when a timely loss mitigation application is pending. The costs of dismissal may be significant in the context of a particular mortgage. However, the Bureau does not believe that the proposed comment would impose significant overall costs on servicers because servicers are already obligated to take reasonable steps to delay a foreclosure sale when a timely loss mitigation application is pending. Thus, servicers generally will be able to avoid the costs of dismissal so long as they comply with existing requirements.

Review of multiple loss mitigation applications

Currently, § 1024.41(i) requires a servicer to comply with the requirements of § 1024.41 for only a single complete loss mitigation application for a borrower's mortgage loan account. The Bureau is proposing to revise § 1024.41(i) to require servicers to comply with the requirements of § 1024.41 each time a borrower submits a complete loss mitigation application, unless the servicer has previously complied with § 1024.41 for a borrower's complete loss mitigation application and the borrower has been delinquent at all times since the borrower submitted the application.

Potential benefits and costs to consumers. Section 1024.41's loss mitigation procedures are intended to protect borrowers from harm in connection with the process of evaluating a borrower for loss mitigation options and proceeding to foreclosure. As discussed in the 2013 RESPA Servicing Final Rule, benefits to these borrowers include a period of 120 days

in which to submit a loss mitigation application before foreclosure can commence, restrictions on dual tracking, an appeals process for denials of loss mitigation applications, and consideration for all available loss mitigation alternatives.[302] The proposed provision would make these benefits available to borrowers who complete a loss mitigation application, become (or remain) current following the initial submission of a loss mitigation application, and subsequently encounter difficulties making payments and desire to apply for loss mitigation again. The provision would thereby benefit borrowers in two general circumstances: First, borrowers who have previously applied for and received a loan modification, then subsequently have difficulty making payments on the modified loan (perhaps due to an unrelated hardship months or years after the modification), will be able to apply for loss mitigation under § 1024.41's procedures. Second, borrowers who have previously applied for loss mitigation but were not offered an option that they chose to accept will be able to apply for loss mitigation under § 1024.41's procedures if they become (or remain) current on their loan following the application.

With regard to the first group, a significant percentage of the borrowers who receive loan modifications subsequently becomes delinquent. The OCC Mortgage Metrics Report indicates that for modifications completed since the fourth quarter of 2012, 11.5 to 13.8 percent of modified loans were 60 or more days delinquent six months after modification, and 16.8 to 18.5 percent were 60 or more days delinquent after one year.[303] For the HAMP program, the FHFA reports that as of May 2014, of 625,199 permanent modifications that became effective between April 2009 and May 2014, 173,791 (27.8 percent) had defaulted by the end of the period.[304] These numbers suggest that a significant fraction of borrowers receiving loan modifications could potentially benefit from the proposed provision, because they would have the protection of § 1024.41's loss mitigation procedures in the wake of these subsequent delinquencies. On the other hand, the large number of borrowers who become delinquent as soon as six months after completing a loan modification suggests that in many cases the subsequent delinquency may reflect not a new adverse event, but instead the failure of the modification to achieve an affordable monthly payment for the borrower in light of the circumstances that preceded the modification. To the extent that a borrower's circumstances have not changed significantly, a subsequent loss mitigation application may not yield a new option for which the borrower is eligible and that the borrower finds more beneficial.

The Bureau does not have data indicating the number of borrowers in the second group—that is, those who apply for loss mitigation, are not approved for any option that they choose to accept, and subsequently become or remain current on their mortgage. The Bureau notes that the proposed provision may provide additional flexibility to borrowers who are current on their mortgage but might benefit from a loss mitigation option, because such borrowers could apply and determine whether they are eligible for loss mitigation without losing the opportunity to apply for loss mitigation in the future. For example, homeowners who are able to make their mortgage payments but would like to determine whether a short sale is possible would be able to apply for a short sale without losing the protection of § 1024.41's loss mitigation procedures in connection with any future application for loss mitigation.

The benefits to borrowers of the proposal depend on whether and under what circumstances investors make loss mitigation options available to borrowers who have completed an earlier loss mitigation application and perhaps received a loan modification. Section 1024.41 does not require a servicer to make any loss mitigation options available to a borrower, but only governs a servicer's evaluation of a borrower for any loss mitigation option that is available. Many borrowers may not realize benefits from the proposed provision because, even though it may entitle them to apply for a second loan modification, they are not eligible to receive one. For example, Fannie Mae and Freddie Mac's servicing guidelines generally do not permit a subsequent loan modification under certain circumstances, including when a borrower has become 60 days delinquent within the 12 months after a borrower receives a prior loan modification.[305] The Bureau notes, however, that for some borrowers affected by the proposal, any loss mitigation option provided as a result of the proposed revision may be the first loss mitigation option offered to that borrower, even if it is not the first evaluation of a complete application.

Potential benefits and costs to covered persons. The proposed provision will impose costs on servicers by requiring them to evaluate certain borrowers for subsequent loss mitigation applications in accordance with § 1024.41's requirements. Costs of complying with § 1024.41's requirements include those arising from the requirements to send specific notices, comply with the rule's timelines for evaluation of loss mitigation applications, evaluate the borrower for all loss mitigation options, and under certain circumstances to delay initiation of foreclosure proceedings. The extent to which these requirements impose additional costs on servicers depends on their current policies with respect to subsequent loss mitigation applications. The Bureau has learned through its outreach efforts that many servicers already reevaluate borrowers who reapply for loss mitigation using the procedures set forth in § 1024.41. To the extent that servicer practices already meet the requirements of the rule, the burden on servicers will be reduced.

The costs imposed by the rule are also mitigated by the fact that servicers can determine whether any loss mitigation options are available to borrowers and set the eligibility criteria for any second loss mitigation application. To the extent that the cost of providing subsequent loss mitigation opportunities is significant, servicers and creditors will have the opportunity to revise eligibility criteria for borrowers who have previously been evaluated for loss mitigation pursuant to the servicing rules, which will reduce the cost of complying with the proposed provision. In addition, the requirement that the borrower bring the loan current before § 1024.41's loss mitigation procedures apply to a subsequent application mitigates the costs of the proposed revision for servicers by limiting the risk that a borrower will use multiple loss mitigation applications as a way to postpone foreclosure.

[302] See 78 FR 10695, 10857–60 (Feb. 14, 2010).

[303] Fed. Reserve Sys., Office of the Comptroller of the Currency, *OCC Mortgage Metrics Report: Disclosure of Nat'l Bank and Fed. Savings Ass'n Mortgage Loan Data,* at 30 (Q1 2014), *available at http://www.occ.gov/publications/publications-by-type/other-publications-reports/mortgage-metrics-2014/mortgage-metrics-q1–2014.pdf.*

[304] Fed. Housing Fin. Agency, Foreclosure Prevention Report, at 3 (May 2014), *available at http://www.fhfa.gov/AboutUs/Reports/ReportDocuments/ForeclosurePreventionReportMay2014FINAL.pdf.*

[305] *See* Fannie Mae Single Family 2012 Servicing Guide, § 602.05, Redefault, *available at https://www.fanniemae.com/content/guide/svc031412.pdf*; Freddie Mac Single Family Servicing Guide, § B65.14, Ineligibility for Freddie Mac Standard Modification, available at *http://www.allregs.com/tpl/Main.aspx.*

Loss Mitigation Timelines and Servicing Transfers

The Bureau is proposing § 1024.41(k) to address the requirements applicable to loss mitigation applications pending at the time of a servicing transfer. Proposed § 1024.41(k) clarifies that, subject to certain exceptions, a transferee servicer must comply with § 1024.41's requirements within the same timeframes that were applicable to the transferor servicer. The proposed exceptions include a five-day extension of time for a transferee servicer to provide the written notification required by § 1024.41(b)(2)(i)(B), and a provision ensuring that a transferee servicer that acquires servicing through an involuntary transfer has at least 15 days after the transfer to evaluate a borrower's pending complete loss mitigation application. The proposal also provides that if a borrower's appeal under § 1024.41(h) is pending as of the transfer date, a transferee servicer must evaluate the appeal if it is able to determine whether it should offer the borrower the loan modification options subject to the appeal; a transferee servicer that is unable to evaluate an appeal must treat the appeal as a complete loss mitigation application and evaluate the borrower for all loss mitigation options available to the borrower from the transferee servicer.

Potential benefits and costs to consumers. The proposed provision is intended to benefit borrowers who have loss mitigation applications in process at the time their mortgage loan is transferred to another servicer by ensuring that the transfer does not unnecessarily delay the evaluation of their applications. Delays in the processing of loss mitigation applications can prolong a borrower's delinquency, during which time fees and other costs may accrue, making it more difficult for the borrower to recover from financial distress.

The Bureau does not have representative data on how quickly servicers currently comply with the various loss mitigation requirements in the event of a servicing transfer, but believes that timelines vary significantly across servicers. The Bureau understands that, while some servicers may already be complying with the proposed timelines, others may not. To the extent that servicer practices already comply with the proposed provision, consumer benefits from the proposal will be lower.

Potential benefits and costs to covered persons. The proposed provision is intended to reduce the costs to servicers that engage in servicing transfers of complying with the proposed provision by clarifying the application of loss mitigation timelines in the context of a servicing transfer. At the same time, while transferor and transferee servicers are currently required under § 1024.38 to have policies and procedures in place to ensure the timely transfer and receipt of accurate data, including through the devotion of appropriate personnel and resources, the proposed provision would impose incremental costs on servicers to the extent that under their current transfer procedures their transfers do not comply with the proposed timelines. Transferor and transferee servicers both may be required to devote more personnel and other resources in the days or weeks before and after a transfer to ensure that the data is accurately transferred in a way that permits the transferee servicer to comply with the timelines with respect to all loss mitigation applications in process.

The proposed exceptions, including extended timelines in connection with the initial notice confirming receipt of a loss mitigation application and in connection with involuntary servicing transfers, are intended to mitigate the costs to servicers of complying with the proposal in specific circumstances in which the Bureau understands that complying with the timelines that are otherwise applicable would be especially difficult. Additionally, the Bureau understands that due to the unique circumstances and complications that may arise in connection with a transfer, there may be times when, despite the transferee servicer's good faith efforts, it may be impracticable to comply with the requirements of § 1024.41(c)(1) and (4) within 30 days of when the transferor servicer received the borrower's complete loss mitigation application. The proposal mitigates compliance costs in such circumstances by allowing that, where complying with the timelines with respect to evaluating complete loss mitigation applications is impracticable under the circumstances, the servicer must comply with the requirements within a reasonably prompt time, while stating in commentary that, in general, a reasonably prompt time would be within an additional five days.

The Bureau requests data and information regarding servicer timelines for complying with loss mitigation requirements following a servicing transfer, the extent to which consumers are affected by delays in the loss mitigation process that result from servicing transfers, and the costs to servicers of complying with the proposed requirement.

Evaluation for Repayment Plans Based on Incomplete Applications

The Bureau is proposing to revise § 1024.41(c)(2)(iii) to permit a servicer to offer short-term repayment plans based upon an evaluation of an incomplete loss mitigation application. The proposal would be an exception to the general rule under § 1024.41(c)(2)(i) that a servicer may not evaluate a borrower for loss mitigation options based on an incomplete application, and would parallel the existing exception to this rule which permits a servicer to offer a short-term payment forbearance program based upon an incomplete application. Borrowers who are evaluated for a short-term repayment plan based on an incomplete application would not lose their protections under § 1024.41 with respect to a subsequent loss mitigation application.

As with the existing exception for short-term payment forbearance plans, the proposal is intended to benefit borrowers and servicers by permitting servicers to offer a short-term loss mitigation option to address a temporary financial setback, while preserving borrowers' loss mitigation protections, in situations in which completing an application would be time-consuming or burdensome or would significantly delay a decision. The proposal would not impose costs on borrowers because a borrower would always have the option to reject a short-term repayment plan based on review of an incomplete loss mitigation application, provide a complete loss mitigation application, and be reviewed for all loss mitigation options available to the borrower (and receive other protections) under § 1024.41. Similarly, the proposal would impose no costs on servicers because it does not impose any new obligations on servicers.

5. Periodic Statement Requirements Applicable to Consumers in Bankruptcy.

The Bureau is proposing to revise § 1026.41(e)(5) to limit the circumstances in which a servicer is exempt from the periodic statement requirements with respect to a consumer who is a debtor in bankruptcy. Currently, § 1026.41(e)(5) provides that a servicer is exempt from the requirement to provide periodic statements for a mortgage loan while the consumer is a debtor in bankruptcy. In general, the proposed revisions to § 1026.41(e)(5) limit the exemption to consumers in bankruptcy who are surrendering the property or avoiding the lien securing the mortgage loan, to

consumers who have requested that a servicer cease providing periodic statements or coupon books, and in certain other circumstances. Notwithstanding meeting the above conditions for an exemption, the proposal requires servicers to provide periodic statements or coupon books if the consumer requests them in writing (unless a court has entered an order requiring otherwise) and to resume providing periodic statements when the consumer exits bankruptcy with respect to any portion of the mortgage debt that is not discharged through bankruptcy.

Potential benefits and costs to consumers. The periodic statement requirements in § 1026.41 are intended to benefit consumers by providing accurate information about payments that consumers can use to monitor the servicer, assert errors if necessary, and track the accumulation of equity so that they can effectively determine how to allocate income and consider options for refinancing. The proposal is intended to make these benefits available to consumers in bankruptcy who own a home subject to a mortgage and intend to retain the home post-bankruptcy, subject to the constraints of the Bankruptcy Code's automatic stay. The Bureau does not have representative data describing the number of consumers in the bankruptcy process that own a home and intend to retain it through the bankruptcy process. The FHFA reports that of the mortgage loans serviced for Fannie Mae and Freddie Mac, between 0.4 percent and 0.5 percent were in bankruptcy during 2013.[306] However, based on information the Bureau has received from servicers and other Federal agencies, the Bureau believes that the percentage of non-GSE loans in bankruptcy may be significantly higher.

There are at least two reasons to expect that consumers who are in bankruptcy and intend to retain their homes are particularly likely to benefit from receiving periodic statements. First, consumers in bankruptcy have demonstrated difficulties in managing their financial obligations and face unique challenges in rehabilitating their finances. Such consumers may derive particular benefit from a reminder of their payment obligations and information about the status of their mortgages that enables them to allocate income and make other decisions about their finances. Second, as discussed in the section-by-section analysis of § 1026.41(e)(5), there is evidence that some servicers may be especially prone to error in applying payments of consumers in bankruptcy, particularly in the context of Chapter 13 cases. This evidence indicates that it may be especially important for consumers in bankruptcy to be able to monitor how servicers apply their payments.

Potential benefits and costs to covered persons. The proposed provision would impose costs on servicers by requiring them to modify systems to provide statements that show how payments are applied for consumers in bankruptcy, particularly those in Chapter 13 bankruptcy. The Bureau understands from industry outreach that the principal systems some servicers currently use to process and apply mortgage payments are not designed to accommodate payments from consumers in Chapter 13 bankruptcy and that many servicers account for payments from consumers in Chapter 13 bankruptcy using a separate system or process. Servicer systems for producing periodic statements are generally not designed to produce statements for consumers in Chapter 13 bankruptcy, and accounting for payments from consumers in Chapter 13 bankruptcy currently may not be done on a timeline that permits statements to be produced on a regular billing cycle. The proposed provision will require servicers either to modify the systems they use to process payments and produce periodic statements for non-bankrupt consumers so that those systems can accommodate consumers in Chapter 13 bankruptcy or to modify the systems they currently use to process payments on behalf of bankrupt consumers to permit them to produce periodic statements for consumers in Chapter 13 bankruptcy. Servicers will also incur additional vendor costs associated with distributing statements. With respect to servicers that provide consumers with coupon books, the proposed provision will require servicers to provide transaction activity and past payment application information to consumers upon a consumer's request, consistent with current § 1026.41(e)(3)(iii). The Bureau does not believe that providing this information will impose significant new costs on servicers that provide coupon books because the Bureau understands that the vast majority of servicers would already be required to provide such information in response to a consumer's written information request pursuant to § 1024.36.

The Bureau is proposing to reduce the burden of complying with the proposed provision by providing model forms for periodic statements in bankruptcy. Model forms would lower costs to servicers by eliminating the need to develop compliant forms of periodic statements, and may also increase the overall usefulness to consumers of the periodic statements.

6. Periodic Statements Following Charge Off

The Bureau proposes to add a new exemption from the requirement to provide periodic statements under § 1026.41. The proposed exemption would apply to a mortgage loan that a servicer has charged off in accordance with loan-loss provisions if the servicer will not charge any additional fees or interest on the account, provided that the servicer must provide the consumer a final periodic statement within 30 days of charge off or the most recent periodic statement. The proposed final periodic statement must convey in simple and clear terms that: the mortgage loan has been charged off and the servicer will not charge any additional fees or interest on the account; the lien on the property remains in place and the consumer remains liable for the mortgage loan obligation; the consumer may be required to pay the balance on the account in the future, for example, upon sale of the property; the balance on the account is not being canceled or forgiven; and the loan may be purchased, assigned or transferred.

Potential benefits and costs to consumers. The periodic statement requirements in § 1026.41 are intended to benefit consumers by providing accurate information about payments that consumers can use to monitor the servicer, assert errors if necessary, and track the accumulation of equity. Where a consumer's loan has been charged off and the servicer will no longer charge any additional fees or interest on the account, these benefits are significantly decreased. So long as the consumer is aware that no additional fees or interest will be charged, monthly statements will include no new information useful to the consumer, and the consumer may find it confusing and bothersome to continue to receive identical monthly statements. A final notice, on the other hand, could provide consumers with important information about the ongoing status of the loan and the significance of its status. The proposed final statement would clarify that, although the mortgage loan has been charged off, the obligation remains in place and describe the implications of the remaining lien for the consumer.

Although periodic statements would not provide new information to consumers where accounts have been

[306] Fed. Housing Fin. Agency, Foreclosure Prevention Report, at 6 (Jan. 2014), *available at http://www.fhfa.gov/AboutUs/Reports/ReportDocuments/ForeclosurePreventionReportJan2014FINAL.pdf.*

charged off and fees and interest will no longer accrue, they may provide a benefit to some consumers as a reminder that the lien on the property remains in place. It is possible that, particularly years after a charge-off, a consumer (or successor in interest to the property securing the loan) may not realize that the obligation remains outstanding and the lien is still in place. A final statement that details the status could mitigate this issue but may not completely address it in all cases. This represents a potential cost of the proposal to some consumers. The Bureau requests additional information regarding the benefits to consumers of receiving periodic statements or other communications from the servicer about a mortgage loan, such as an annual reminder to the consumer of a loan's status, after the loan is charged off and will no longer accrue fees or additional interest.

Potential benefits and costs to covered persons. Because the provision does not impose any new requirements on servicers, it would not impose any new costs. The proposal would benefit servicers by giving them the option to send a final periodic statement in lieu of continuing to send periodic statements for charged-off mortgage loans when they find it less costly to do so.

7. Small Servicer Exemption

The Bureau is proposing to amend certain criteria for determining whether a servicer qualifies for the small servicer exemption set forth under § 1026.41(e)(4). The proposal provides that transactions serviced by the servicer for a seller financer that meet certain criteria would not be considered in determining whether a servicer qualifies as a small servicer. Under the Mortgage Servicing Rules, small servicers (generally, those that service, together with any affiliates, 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee) are exempt from certain mortgage servicing requirements, including Regulation Z's requirement to provide periodic statements for residential mortgage loans and several of Regulation X's requirements, including certain provisions related to force-placed insurance, general servicing policies and procedures, and communicating with borrowers about, and evaluation of applications for, loss mitigation options. The proposal would permit small servicers to maintain their small servicer status if they service transactions for a limited class of seller financers: those that provide seller financing for only one property in any 12-month period for the purchase of a property that they own, so long as they did not construct a residence on the property in the ordinary course of business and the financing meets certain restrictions.

The Bureau believes that the proposed changes would have little or no effect on consumers that are not parties to seller-financed transactions, because the Bureau expects that, in the absence of the proposed changes, small servicers would generally choose not to service seller-financed transactions in order to maintain their status as small servicers. The Bureau understands that the practice of servicing seller-financed transactions is not widespread and that depository institutions offering this service do not obtain significant revenue from the practice, but instead offer the service as an accommodation to depository customers that are seller financers. Thus, the Bureau does not expect that servicers' status as small servicers will ultimately be affected by the rule, meaning that the proposal would not have any significant effect on the number of consumers whose servicer qualifies for the small servicer exemption.

Given the limited nature of servicing loans for seller financers, and given the Bureau's understanding that these services are offered by depository institutions to their customers when alternative service providers are generally not available, the Bureau believes that if seller financers are unable to obtain servicing from the depository institution where they do their banking then, in many cases, they are likely to instead service the loan themselves. Consumers who purchase homes from seller financers may benefit from the servicing of the loan by a small servicer rather than directly by the seller financer. Purchasers of seller-financed residential real estate, who may be unable to secure credit through traditional means, may benefit from a bank receiving scheduled periodic payments and providing an independent accounting as a third party to the transaction. In addition, small servicers may be able to process payments and perform other servicing activities at a lower cost than seller financers, and this cost savings may be passed on to purchasers of seller-financed residential real estate.

F. Potential Specific Impacts of the Proposed Rule

Depository Institutions and Credit Unions with $10 Billion or Less in Total Assets, As Described in Section 1026

The Bureau believes that a large fraction of depository institutions and credit unions with $10 billion or less in total assets that are engaged in servicing mortgage loans qualify as ''small servicers'' for purposes of the Mortgage Servicing Rules because they service 5,000 or fewer loans, all of which they or an affiliate own or originated. The Bureau estimates that 96 percent of insured depositories and credit unions with $10 billion or less in total assets service 5,000 mortgage loans or fewer.[307] The Bureau believes that servicers that service loans that they neither own nor originated tend to service more than 5,000 loans, given the returns to scale in servicing technology. The impact of the proposed rule on small servicers, which are exempt from many of the provisions of the servicing rules that would be affected by the proposed rule, is discussed below in connection with the Regulatory Flexibility Act.

With respect to servicers that are not small servicers as defined in the Mortgage Servicing Rules, the Bureau believes that the consideration of benefits and costs of covered persons presented above provides a largely accurate analysis of the impacts of the proposed rule on depository institutions and credit unions with $10 billion or less in total assets that are engaged in servicing mortgage loans.

Impact of the Proposed Provisions on Consumer Access to Credit and on Consumers in Rural Areas

The Bureau believes that the additional costs to servicers from the final rule are not likely to be extensive enough to have a significant impact on consumer access to credit. The exemption of small servicers from many provisions of the proposed rule will help maintain consumer access to credit through these providers.

Consumers in rural areas may experience benefits from the proposed rule that are different in certain respects from the benefits experienced by consumers in general. Consumers in rural areas may be more likely to obtain mortgages from small local banks and credit unions that either service the loans in portfolio or sell the loans and retain the servicing rights. These servicers may already provide most of

[307] Based on an analysis of March 2014 Call Report data as compiled by SNL Financial.

the benefits to consumers that the proposed rule is designed to provide. It is also possible, however, that a lack of alternative lenders in certain rural areas may make it possible for the proposed rule to provide rural consumers with greater benefits than consumers elsewhere.

The Bureau will further consider the impact of the proposed rule on consumers in rural areas. The Bureau therefore asks interested parties to provide data, research results and other factual information on the impact of the proposed rule on consumers in rural areas.

VII. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[308] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[309]

An IRFA is not required for this proposal because the proposal, if adopted, would not have a significant economic impact on a substantial number of small entities.

A. Application of the Proposed Rule to Small Entities

The analysis below evaluates the potential economic impact of the proposed rule on small entities as defined by the RFA.[310] The analysis uses as a baseline the Mortgage Servicing Final Rules as currently in effect. The Bureau has identified five categories of small entities that may be subject to the proposed rule for purposes of the RFA: Commercial banks/savings institutions (NAICS 522110 and 522120), credit unions (NAICS 522130), firms providing real estate credit (NAICS 522292), firms engaged in other activities related to credit intermediation (NAICS 522390), and small non-profit organizations. Commercial banks, savings institutions, and credit unions are small businesses if they have $550 million or less in assets. Firms providing real estate credit are small businesses if average annual receipts do not exceed $38.5 million, and firms engaged in other activities related to credit intermediation are small businesses if their average annual receipts do not exceed $20.5 million. A small non-profit organization is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

The Bureau estimates that there are approximately 11,323 insured depositories (banks, thrifts and credit unions) and 1,388 non-depositories that engage in mortgage servicing and are therefore subject to the Mortgage Servicing Rules.[311] Of these, the Bureau estimates that approximately 9,724 depositories and 1,370 non-depositories are ''small entities'' as defined in the RFA.[312]

The large majority of these small entities qualify as ''small servicers'' for purposes of the Mortgage Servicing Rules: Generally, servicers that service 5,000 or fewer mortgage loans, all of which the servicer or affiliates own or originated. The Bureau estimates that, among 11,094 small entities subject to the Mortgage Servicing Rules, all but approximately 19 depositories and all but approximately 55 non-depositories (collectively, approximately 0.6% of all small entities subject to the Mortgage Servicing Rules) service 5,000 loans or fewer.[313] The Bureau does not have data to indicate whether these institutions service loans that they do not own and did not originate. However, as discussed in the 2013 RESPA Servicing Final Rule, the Bureau believes that a servicer that services 5,000 loans or fewer is unlikely to service loans that it did not originate, because a servicer that services loans for others is likely to see servicing as a stand-alone line of business and would likely need to service substantially more than 5,000 loans to justify its investment in servicing activities.[314]

Small servicers are exempt from many of the servicing provisions of Regulation X and Regulation Z. Pursuant to § 1024.30, small servicers are exempt from Regulation X's general servicing policies and procedures requirements (§ 1024.38), early intervention and continuity of contact requirements (§§ 1024.39 and 1024.40), and all loss mitigation procedures requirements of § 1024.41 other than § 1024.41(j), which makes applicable to small servicers § 1024.41(f)(1)'s prohibition on initiating foreclosure proceedings unless a borrower is more than 120 days delinquent and prohibits servicers from initiating foreclosure proceedings while a borrower is performing pursuant to the terms of an agreement on a loss mitigation option. Similarly, pursuant to § 1026.41(e)(4), small servicers are exempt from Regulation Z's requirement to provide periodic statements for residential mortgage loans pursuant to § 1026.41.

Given the Bureau's estimate that all but approximately 0.6 percent of small entities subject to the rule are small servicers, the proposed provisions that amend sections of Regulation X and Regulation Z from which small servicers are exempt will not have any economic impact on a substantial number of small entities. Most provisions of the proposed rule would amend §§ 1024.38 through 1024.41 and § 1026.41, and would therefore not affect small servicers.

In addition, certain provisions of the proposed rule would apply to small servicers but would reduce servicer compliance costs by relaxing the existing rules. This includes changes to the commentary to § 1024.36 to reduce disclosure requirements when a borrower requests information about ownership of a GSE loan; an additional exception to § 1024.41(f)(1)'s 120-day

[308] 5 U.S.C. 601 *et seq.*

[309] 5 U.S.C. 609.

[310] For purposes of assessing the impacts of the proposed rule on small entities, ''small entities'' is defined in the RFA to include small businesses, small not-for-profit organizations, and small government jurisdictions. 5 U.S.C. 601(6). A ''small business'' is determined by application of Small Business Administration regulations and reference to the North American Industry Classification System (''NAICS'') classifications and size standards. 5 U.S.C. 601(3). A ''small organization'' is any ''not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' 5 U.S.C. 601(4). A ''small governmental jurisdiction'' is the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000. 5 U.S.C. 601(5).

[311] The estimated number of insured depositories engaged in mortgage servicing is based on the March 2014 Call Report data as compiled by SNL Financial, and the estimated number of non-depositories is based on a special analysis of 2011 data from the Nationwide Mortgage Licensing System and Registry.

[312] The estimated number of insured depositories engaged in mortgage servicing that are small entities is based on the March 2014 Call Report data as compiled by SNL Financial, and the estimated number of non-depositories that are ''small entities'' as defined in the RFA is based on data on servicer rank and portfolio size from Inside Mortgage Finance. Non-profits and small non-profits engaged in mortgage loan servicing would be included in this estimate if their primary activity is originating or servicing loans. The Bureau has not been able to separately estimate the number of non-profits and small non-profits engaged in loan servicing.

[313] For insured depositories, the estimate is based on an analysis of the March 2014 Call Report data as compiled by SNL Financial. For depository institutions that are ''small entities'' as defined in the RFA, the Bureau estimates that all but 4 percent service 5,000 loans or fewer. Assuming a similar relationship between servicing revenue and loan counts holds for non-depository servicers, all but 4 percent of non-depository servicers that are small entities, or approximately 55 entities, would service 5,000 loans or less. The Bureau's methodology for these estimates is described in more detail in the 2013 RESPA Servicing Final Rule, 78 FR 10695, 10866 (Feb. 14, 2013).

[314] 78 FR 10695, 10866 (Feb. 14, 2013).

pause on initiating foreclosure proceedings for a servicer joining the foreclosure action of a senior lienholder; and revisions to the definition of small servicer in § 1026.41(e)(4)(iii) that would permit small servicers to service loans for seller financers under certain circumstances.

There are three provisions of the proposed rule that do apply to small servicers and could potentially impose new costs on a substantial number of small entities: (1) Proposed provisions related to successors in interest, which would extend the protections of all the Mortgage Servicing Rules, including certain provisions from which small servicers are not exempt, to successors in interest; (2) the definition of delinquency in proposed § 1024.31, which may affect the scope of the 2013 RESPA Servicing Final Rule's prohibition on initiating foreclosure proceedings unless a borrower's mortgage loan obligation is more than 120 days delinquent; and (3) a minor revision to the content of force-placed insurance notices required by § 1024.37(c). The following sections of this part discuss in greater detail the potential impact of these three provisions of the proposed rule on small servicers.

B. Successors in Interest

The Bureau is proposing rule changes that would impose new requirements on mortgage servicers with respect to successors in interest. For purposes of the proposed provision, successors in interest would include individuals who acquired property securing a mortgage loan in a transfer protected by the Garn-St Germain Act, including individuals who acquired an ownership interest in the property securing a mortgage loan in transfers resulting from the death of the borrower or through transfers to the borrower's spouse or children, transfers incident to divorce, and certain other transfers. The proposed provisions relate to how mortgage servicers confirm a successor in interest's identity and ownership interest in the property, and apply the Mortgage Servicing Rules to successors in interest whose identity and ownership interest in the property have been confirmed by the servicer.

Small servicers currently must comply with some, but not all, of the Mortgage Servicing Rules, and the proposed changes would require small servicers to comply with that same set of rules with respect to confirmed successors in interest. Small servicers must comply with Regulation X's requirements regarding general disclosure requirements (§ 1024.32), mortgage servicing transfers (§ 1024.33), timely escrow payments and treatment of escrow account balances (§ 1024.34), error resolution procedures (§ 1024.35), requests for information (§ 1024.36), and force-placed insurance (§ 1024.37) and the prohibition on initiating foreclosure proceedings if a borrower's mortgage loan obligation is not more than 120 days delinquent or if a borrower is performing pursuant to the terms of an agreement on a loss mitigation option (§ 1024.41(f)(1) and (j)), and with Regulation Z's requirements regarding ARM disclosures (§ 1026.20(c) and (d)) and regarding payment processing, the prohibition on pyramiding of late fees, and the requirement to provide payoff statements (§ 1026.36(c)). The proposed provision requires small servicers to comply with each of these provisions with respect to successors in interest once a servicer has confirmed the successor in interest's identity and ownership interest in the property.

The Bureau does not believe that the application of these requirements to confirmed successors in interest would have a significant impact on the small entities subject to the Mortgage Servicing Rules. While the Bureau does not have representative data on the number of loans that are serviced by small servicers and for which the underlying property has been transferred to a successor in interest, the Bureau expects that such loans make up a small fraction of the total loans serviced by any small servicer. The proposed provision would not require small servicers to develop new policies and procedures, but rather to continue to apply existing policies and procedures for servicing loans subject to the servicing rules to what the Bureau believes is a relatively small set of loans previously subject to the Mortgage Servicing Rules before the interest in the property was transferred to a successor in interest.

In addition, given that under the Garn-St Germain Act small servicers are effectively obligated to service loans secured by property that has been transferred to a successor in interest, there are reasons to expect that many small servicers are servicing such loans using the same policies and procedures that they use to service other mortgage loans that are already subject to the Mortgage Servicing Rules. Given that there are fixed costs associated with developing servicing policies and procedures and systems to implement those policies and procedures, it may be less costly for servicers to apply the same policies and procedures with respect to successors in interest that they apply to all other loans they service, rather than developing separate policies, procedures and systems to service loans for successors in interest. Moreover, as discussed in the 2013 RESPA Servicing Final Rule and the 2013 TILA Servicing Final Rule, the Bureau believes that small servicers generally depend on a ''relationship''-based business model that depends on repeat business and could suffer significant harm from any major failure to treat customers properly because small servicers are particularly vulnerable to ''word of mouth.'' [315] A servicer that had a practice of servicing loans for confirmed successors in interest using lower standards than those used to service other loans would risk reputational harm and an associated loss of business.

Small servicers would also be subject to proposed § 1024.36(i), which requires a servicer to respond to a written request that indicates that the person making the request may be a successor in interest by providing the person with information regarding the documents the servicer requires to confirm the person's identity and ownership interest in the property. Small servicers would be required to treat the person making the request as a borrower for the purposes of the procedural requirements of § 1024.36(c) through (g)—that is, for instance, the servicer would be required to acknowledge receipt of the request within five days and respond within 30 or 45 days without charge. However, because small servicers are exempt from § 1024.38, they would not be subject to proposed § 1024.38(b)(1)(vi), which requires servicers to have policies and procedures in place to identify and facilitate communication promptly with potential successors in interest, to provide promptly upon request a description of what documents the servicer reasonably requires to confirm the person's status, and, upon the receipt of such documents, notify the person promptly, as applicable, that the servicer has confirmed the person's status, has determined that additional documents are required (and what those documents are), or has determined that the person is not a successor in interest. Therefore, the proposal would not require small servicers to make any changes to their policies and procedures for identifying successors, but only to communicate to potential successors, using the same procedures they use to respond to other borrower requests, what documents they require to confirm a person's status as a successor in interest. Because small servicers will typically already know what documents

[315] 78 FR 10696, 10843 (Feb. 14, 2013); 78 FR 10902, 10978 (Feb. 14, 2013).

they require, are not subject to the requirement only to request documents that are reasonably required to determine a person's status, and will already have procedures in place for responding to borrower requests generally, the Bureau believes that the costs to small servicers of complying with § 1024.36(i) will be minimal.

C. Definition of Delinquency

The Bureau is proposing to add a general definition of delinquency in § 1024.31 that would apply to all sections of subpart C of Regulation X, replacing the existing definition of delinquency for purposes of §§ 1024.39 and 1024.40(a). Under the proposal, delinquency is defined as a period of time during which a borrower and the borrower's mortgage loan obligation are delinquent, and a borrower and a borrower's mortgage loan obligation are delinquent beginning on the day a periodic payment sufficient to cover principal, interest, and, if applicable, escrow, became due and unpaid, until such time as the payment is made. Proposed comment 31 (Delinquency)-2 clarifies that, if a servicer applies payments to the oldest outstanding periodic payment, the date of the borrower's delinquency must advance accordingly. The Bureau understands from its outreach that the majority of servicers credit payments made to a delinquent account to the oldest outstanding periodic payment. The Bureau also understands that some servicers that use this method may be concerned about how to calculate the length of a borrower's delinquency without increased certainty from the Bureau.[316]

The Bureau believes that the proposed provision will clarify the application of the servicing rules—thereby reducing the costs to small servicers of complying with the rules—without imposing significant new burdens on servicers. The Bureau recognizes that, in principle, the proposed provision could affect the circumstances under which a servicer may initiate foreclosure proceedings, because the definition of ''delinquency'' affects the application of § 1024.41(f)(1)'s prohibition on initiating foreclosure proceedings unless ''a borrower's mortgage loan obligation is more than 120 days delinquent.'' [317] In particular, the proposed provision would prohibit a servicer that otherwise applies payments to the oldest outstanding periodic payment from initiating foreclosure proceedings unless the borrower has missed the equivalent of four monthly payments. In contrast, the existing rule could be interpreted to permit the servicer to commence foreclosure even if the borrower has missed only one payment, so long as the payment was missed at least 120 days ago and the borrower has not become current since. However, information gathered in industry outreach indicates that the majority of servicers generally do not initiate foreclosure proceedings in the case of consumers that are behind by three or fewer payments. In addition, Fannie Mae and Freddie Mac servicing guidelines generally prevent servicers from initiating foreclosure if a loan is delinquent by fewer than four monthly payments. For servicers that do not apply payments to the oldest outstanding periodic payment, the proposal would not affect their application of the 120-day rule.

In addition, the Bureau believes that it is particularly unlikely that a small servicer would initiate foreclosure proceedings with respect to a borrower who is not at least four payments behind. As the Bureau stated in the 2013 RESPA Servicing Final Rule, the vast majority of small servicers are community banks and credit unions that generally maintain a ''relationship'' model that depends on repeat business and are particularly vulnerable to reputational harm from a failure to treat customers well. The Bureau believes that such servicers would be particularly unlikely to initiate foreclosure proceedings in a case where a consumer had fallen behind by a few mortgage payments but continued to make regular payments going forward. For these reasons, the Bureau expects that the proposed provision will not impose meaningful new constraints on servicers.

D. Changes to Force-Placed Insurance Notices

The Bureau is proposing changes to force-placed insurance notices, which pursuant to § 1024.37(c) servicers must deliver to borrowers before they can charge borrowers for force-placed insurance, to modify the prescribed notices slightly to accommodate the circumstance where a consumer's hazard insurance coverage is insufficient, rather than expiring. The proposed rule is intended to reduce the burden on servicers and borrowers by providing greater clarity in circumstances where the form of notice that is currently required does not accurately describe the deficiency in the borrower's insurance coverage. The proposed change represents a minor amendment to the required force-placed insurance notice and the Bureau does not believe that it will impose any significant burden on servicers.

Certification

Accordingly, the undersigned certifies that this proposal, if adopted, would not have a significant economic impact on a substantial number of small entities. The Bureau requests comment on the analysis above and requests any relevant data.

VIII. Paperwork Reduction Act

Certain provisions of this notice of proposed rulemaking contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (Paperwork Reduction Act or PRA). The collection of information contained in this notice of proposed rulemaking, and identified as such, has been submitted to OMB for review under section 3507(d) of the PRA. Notwithstanding any other provision of law, under the PRA, the Bureau may not conduct or sponsor, and a person is not required to respond to, this information collection unless the information collection displays a currently valid control number.

This proposed rule would amend 12 CFR 1024 (Regulation X), which implements the Real Estate Settlement Procedures Act (RESPA), and 12 CFR 1026 (Regulation Z), which implements the Truth in Lending Act (TILA). Regulations X and Z currently contain collections of information approved by OMB. The Bureau's OMB control number for Regulation X is 3170–0016 and for Regulation Z is 3170–0015. Information collections for the proposed rule would be authorized under OMB control numbers 3170–0027 for Regulation X and 3170–0028 for Regulation Z.

The Bureau is proposing six new information collection requirements, or changes to existing information collection requirements, in Regulation X:

1. Proposals to require servicers to communicate with potential successors in interest about their requirements for confirming a successor in interest's identity and interest in the property and to treat successors in interest as borrowers for purposes of Regulation X's mortgage servicing rules.

2. Minor changes to force-placed insurance notices to address the circumstance in which a borrower's hazard insurance coverage is

[316] *See* Am. Bankers Ass'n. Letter to Consumer Fin. Prot. Bureau (Oct. 24, 2014), *available at http://www.aba.com/Advocacy/commentletters/Documents/ABALetterRollingDelinquencies102414.pdf.*

[317] Small servicers, while otherwise exempt from the provisions of § 1024.41, are not exempt from § 1024.41(f)(1) pursuant to § 1024.41(j).

insufficient (rather than expired) and permit the consumer's account number to be included on the notice.

3. Provisions requiring servicers to provide early intervention written notices to consumers in bankruptcy and to consumers who have provided the servicer with a cease communications notice under the FDCPA.

4. Requirement that servicers provide a notice to consumers when a loss mitigation application is complete.

5. Requirement that servicers provide a notice to consumers if their determination with respect to a loss mitigation application is delayed beyond a date that is 30 days after receipt of a complete loss mitigation application because information from third parties required to evaluate the application has not been submitted.

6. Requirement that servicers comply with the loss mitigation provisions of RESPA with respect to multiple loss mitigation applications from the same borrower. Servicers that offer loss mitigation options in the ordinary course of business are required to follow certain procedures when evaluating loss mitigation applications, including (1) providing a notice telling the borrower if the loss mitigation application is incomplete, approved, or denied (and, for denials of loan modification requests, a more detailed notice of the specific reason for denial and appeal rights), (2) providing a notice of the appeal determination, and (3) providing servicers of senior or second liens encumbering the property that is the subject of the loss mitigation application copies of the loss mitigation application.

The Bureau is also proposing two new information collection requirements, or changes to existing information collection requirements, in Regulation Z:

7. Proposals requiring servicers to treat successors in interest as consumers for purposes of Regulation Z's mortgage servicing rules.

8. Requirement that servicers provide periodic statements to consumers in bankruptcy.

These information collections would be required to provide benefits for consumers and would be mandatory. *See* 15 U.S.C. 1601 *et seq.*; 12 U.S.C. 2601 *et seq.* Because the Bureau does not collect any information, no issue of confidentiality arises. The likely respondents would be federally insured depository institutions (such as commercial banks, savings banks, and credit unions) and non-depository institutions (such as mortgage brokers, real estate investment trusts, private-equity funds, *etc.*) that service consumer mortgages.[318]

Under the proposed rule, the Bureau accounts for the entire paperwork burden for respondents under Regulation X. The Bureau generally also accounts for the paperwork burden associated with Regulation Z for the following respondents pursuant to its administrative enforcement authority: Insured depository institutions with more than $10 billion in total assets, their depository institution affiliates, and certain nondepository institutions. The Bureau and the FTC generally both have enforcement authority over nondepository institutions for Regulation Z. Accordingly, the Bureau has allocated to itself half of the estimated burden to nondepository institutions. Other Federal agencies are responsible for estimating and reporting to OMB the total paperwork burden for the institutions for which they have administrative enforcement authority. They may, but are not required to, use the Bureau's burden estimation methodology.

Using the Bureau's burden estimation methodology, the Bureau believes the total estimated industry burden under Regulation X for the approximately 12,711 respondents subject to the proposed rule would be approximately 67,000 hours for one time changes and 64,000 hours annually. Using the Bureau's burden estimation methodology, the total estimated industry burden under Regulation Z for the approximately 12,711 banks, savings institutions, credit unions, and mortgage companies subject to the proposed rule, including Bureau respondents,[319] is approximately 2,900 hours for one-time changes and 8,300 hours annually. The estimates presented in this part VIII represent weighted averages across respondents. The Bureau expects that the amount of time required to implement each of the changes for a given institution may vary based on the size, complexity, and practices of the respondent. The estimated burdens in this PRA analysis represent averages for all respondents. The Bureau expects that the amount of time required to implement each of the proposed changes for a given institution may vary based on the size, complexity, and practices of the respondent.

For purposes of this PRA analysis, the Bureau estimates that there are 11,323 depository institutions and credit unions subject to the proposed rule, and an additional 1,388 non-depository institutions. Based on discussions with industry, the Bureau assumes that all depository respondents except for one large entity and 95% of non-depository respondents (and 100% of small non-depository respondents) use third-party software and information technology vendors. Under existing contracts, vendors would absorb the one-time software and information technology costs associated with complying with the proposal for large- and medium-sized respondents but not for small respondents.

A. Information Collection Requirements—Regulation X

The Bureau believes the following aspects of the proposed rule would be information collection requirements under the PRA.

1. Successors in Interest

Under the Bureau's proposal, servicers would be required (1) to respond to a written request from a person that indicates that the person may be a successor in interest by providing that person with information regarding what documents the servicer requires to confirm the person's identity and ownership interest in the property and (2) to have policies and procedures to ensure that the servicer can provide promptly upon request a description of what documents the servicer reasonably requires to confirm the person's identity and ownership interest in the property, and, upon the receipt of such documents, notify the person promptly, as applicable, that the servicer has confirmed the person's status, has determined that additional documents are required (and what those documents are), or has determined that the person is not a successor in interest. Servicers would also be subject to Regulation X's requirements, including loss mitigation requirements, with respect to successors in interest.

All respondents would have a one-time burden under this proposed

[318] For purposes of this PRA analysis, references to ''creditors'' or ''lenders'' shall be deemed to refer collectively to commercial banks, savings institutions, credit unions, and mortgage companies (*i.e.*, non-depository lenders), unless otherwise stated. Moreover, reference to ''respondents'' shall generally mean all categories of entities identified in the sentence to which this footnote is appended, except as otherwise stated or if the context indicates otherwise.

[319] For purposes of this PRA analysis, the Bureau's depository respondents with respect to the proposed changes to Regulation Z are 120 depository institutions and depository institution affiliates that service closed-end consumer mortgages. The Bureau's non-depository respondents are an estimated 1,388 non-depository servicers. Unless otherwise specified, all references to burden hours and costs for the Bureau respondents for the collection requirements under the proposed changes to Regulation Z are based on a calculation of the burden from all of the Bureau's depository respondents and half of the burden from the Bureau's non-depository respondents.

requirement associated with reviewing the regulation. Certain respondents will have one-time burden in hours from training personnel in compliance with the proposed requirement. The Bureau estimates that one-time hourly burden to comply with the proposed disclosure requirements to be four hours and forty minutes, on average, per respondent.

Respondents would have ongoing burden in hours and/or vendor costs associated with the information technology used in producing the disclosure. All respondents would have ongoing vendor costs associated with distributing (*e.g.*, mailing) the disclosure and some will have production costs associated with the new disclosure. The Bureau estimates this ongoing burden to be 10 minutes and $0.37, on average, for each respondent.

2. Changes to Force-Placed Insurance Disclosures

The proposed rule makes minor changes to the content of required force-placed insurance notices, which are required before a servicer may charge a borrower for force-placed insurance.

All respondents would have a one-time burden under this requirement associated with reviewing the regulation. All respondents will also have one-time burden in hours or vendor costs from changing existing systems to accommodate the required new disclosure. The Bureau estimates that one-time hourly burden to comply with the proposed disclosure requirements to be 20 minutes and $70, on average, per respondent.

Because the content of the required notices would not change substantially under the proposed rule and the circumstances under which the disclosures are required would not change, there would not be an ongoing burden under the proposed rule.

3. Early Intervention Written Notices

The proposed rule requires that servicers send written early intervention notices to consumers in bankruptcy and consumers who have exercised their cease communication rights under the FDCPA. For consumers in bankruptcy, the servicer would be required to send the same early intervention notice that is required to be sent to other consumers. However, for notices sent to consumers who have exercised their FDCPA cease communication rights, the notices would be subject to certain additional requirements. Note that consumers have rights under the FDCPA only with respect to accounts that were delinquent at the time the servicer acquired the servicing rights. Therefore, servicers that do not acquire servicing rights in the course of their business would not be subject to the rule's requirements.

All respondents would have a one-time burden under this requirement associated with reviewing the regulation. Certain respondents will have one-time burden in hours or vendor costs from changing existing systems to accommodate the required new disclosure. The Bureau estimates that one-time hourly burden to comply with the proposed disclosure requirements to be one hour and 40 minutes, on average, per respondent.

Respondents would have ongoing burden in hours and/or vendor costs associated with the information technology used in producing the disclosure. All respondents would have ongoing vendor costs associated with distributing (*e.g.*, mailing) the disclosure and some will have production costs associated with the new disclosure. The Bureau estimates this ongoing burden to be four hours and $446, on average, for each respondent.

4. Notice of Complete Loss Mitigation Application

The Bureau's proposal requires a servicer to provide a written notice to a borrower promptly upon receiving the borrower's complete application. The Bureau understands that the practice of providing borrowers with a written notice informing them that their loss mitigation application is complete is a common business practice (*i.e.*, a ''usual and customary'' business practice) today for most mortgage servicers. However, the Bureau understands that the specific content of the proposed notices may not reflect common practices.

All respondents would have a one-time burden under this requirement associated with reviewing the regulation. In addition, while the Bureau considers borrower notifications that loss mitigation applications are complete as the normal course of business, institutions may still have to incur one-time costs associated with modifying their existing disclosures to comply with the Bureau's proposed disclosure provisions. As a result, the Bureau's one-time burden incorporates these costs. The Bureau estimates this one-time burden to be three hours, on average, for each respondent.

5. Notice Regarding Outstanding Third-Party Information

The proposed rule requires written notice to borrowers if, thirty days following submission of a complete loss mitigation application, the servicer has not received information from a party other than the servicer or the borrower and is necessary to evaluate the application.

All respondents would have a one-time burden under this requirement associated with reviewing the regulation. Certain respondents will have one-time burden in hours or vendor costs from creating software and information technology capability to produce the proposed disclosure. The Bureau estimates that one-time hourly burden to comply with the proposed disclosure requirements to be three hours, on average, per respondent.

Respondents would have ongoing burden in hours and/or vendor costs associated with the information technology used in producing the disclosure. All respondents would have ongoing vendor costs associated with distributing (*e.g.*, mailing) the disclosure and some will have production costs associated with the new disclosure. The Bureau estimates this ongoing burden to be 10 minutes and $13, on average, for each respondent.

6. Requirement To Evaluate Multiple Loss Mitigation Applications

Currently, servicers (other than small servicers) are required to comply with the loss mitigation provisions of § 1024.41 only once during the life of a loan, including the provision of up to three notices per loss mitigation application. Under the proposed rule, servicers would be required to comply with the loss mitigation provisions of § 1024.41 for borrowers who have previously completed a loss mitigation application, so long as the borrower has become current in the period following the completion of the application.

All respondents would have a one-time burden under this requirement associated with reviewing the regulation. Certain respondents would have one-time burden from revising their systems to provide for evaluation of borrowers for subsequent loss mitigation applications. The Bureau estimates this one-time burden to be 40 minutes, on average, for each respondent. The Bureau estimates the ongoing burden to be 121 hours and $213, on average, for each respondent.

B. Information Collection Requirements—Regulation Z

1. Successors in Interest Under Regulation Z

Under the Bureau's proposal, servicers would be subject to Regulation Z's requirements with respect to successors in interest. All respondents would have a one-time burden under this proposed requirement associated with reviewing the regulation. The

Bureau estimates that one- time hourly burden to comply with the proposed disclosure requirements to be 10 minutes, on average, per respondent.

Certain respondents would have ongoing vendor costs associated with distributing (*e.g.*, mailing) the disclosure and some will have production costs associated with the new disclosure. The Bureau estimates this ongoing burden to be 10 minutes and $7, on average, for each respondent.

2. Periodic Statements

Under the proposed rule, all respondents would be required to provide periodic statements to certain borrowers in bankruptcy.

All respondents would have a one-time burden under this requirement associated with reviewing the regulation. Certain respondents will have one-time burden in hours or vendor costs from changing existing systems to produce the required new disclosure. The Bureau estimates that one-time hourly burden to comply with the proposed disclosure requirements to be 18 hours, on average, per respondent.

Respondents would have ongoing burden in hours and/or vendor costs associated with the information technology used in producing the disclosure. Certain respondents would have ongoing vendor costs associated with distributing (*e.g.*, mailing) the disclosure and some will have production costs associated with the new disclosure. The Bureau estimates this ongoing burden to be 53 hours and $5,270, on average, for each respondent.

C. Summary of Burden Hours—Regulation X

The estimated burden on Bureau respondents from the proposed changes to Regulation X is summarized below. Under the proposed rule, the Bureau accounts for the entire paperwork burden for respondents under Regulation X.

	Respondents	Disclosures per respondent	Hours burden per disclosure	Total burden hours	Total vendor costs
Ongoing					
Successors in Interest—Regulation X	12,711	6	0.013	1,086	$4,731
Force-Placed Insurance	12,711	0	0	0	0
Early Intervention Written Notices	502	1,487	0.003	2,239	223,890
Notice of Complete Loss Mitigation Application	502	0	0	0	0
Third-Party Information	502	52	0.003	67	6,681
Loss Mitigation—Subsequent Applications	502	837	0.144	60,571	107,100
One-Time					
Successors in Interest—Regulation X	12,711	1	4.7	59,742	0
Force-Placed Insurance	12,711	1	0.269	3,418	879,048
Early Intervention Written Notices	502	1	1.695	851	0
Notice of Complete Loss Mitigation Application	502	1	2.640	1,326	0
Third-Party Information	502	1	2.690	1,351	0
Loss Mitigation—Subsequent Applications	502	1	0.578	290	0

Totals may not be exact due to rounding.

D. Summary of Burden Hours—Regulation Z

The estimated burden on Bureau respondents from the proposed changes to Regulation Z is summarized below. The Bureau accounts for the paperwork burden associated with Regulation Z for the following respondents pursuant to its administrative enforcement authority: Insured depository institutions with more than $10 billion in total assets, their depository institution affiliates, and certain nondepository institutions. The Bureau and the FTC generally both have enforcement authority over nondepository institutions for Regulation Z. Accordingly, the Bureau has allocated to itself half of the estimated burden to nondepository institutions.

	Bureau respondents	Disclosures per bureau respondent	Hours burden per disclosure	Total burden hours for bureau respondents	Total vendor costs for bureau respondents
Ongoing					
Successors in Interest—Regulation Z	814	24	0.003	56	$5,678
Periodic Statements in Bankruptcy	157	29,521	0.002	8,247	$824,670
One-Time					
Successors in Interest—Regulation Z	814	1	0.05	41	$0
Periodic Statements in Bankruptcy	157	1	17.835	2,791	$0

Totals may not be exact due to rounding.

E. Comments

Comments are specifically requested concerning: (1) Whether the proposed collections of information are necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (2) the accuracy of the estimated burden associated with the proposed collections of information; (3) how to enhance the quality, utility, and clarity of the information to be collected; and (4) how to minimize the burden of complying with the proposed collections of information, including the application of automated collection techniques or other forms of information technology. Comments on the collection of information requirements should be sent to the Office of Management and Budget (OMB), Attention: Desk Officer for the Consumer Financial Protection Bureau, Office of Information and Regulatory Affairs, Washington, DC 20503, or by the Internet to *http://oira_submission@omb.eop.gov*, with copies to the Bureau at the Consumer Financial

Protection Bureau (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552, or by the Internet to *CFPB_Public_PRA@cfpb.gov*.

List of Subjects

12 CFR Part 1024

Condominiums, Consumer protection, Housing, Mortgage servicing, Mortgages, Reporting and recordkeeping requirements.

12 CFR Part 1026

Advertising, Consumer protection, Credit, Credit unions, Mortgages, National banks, Reporting and recordkeeping requirements, Reporting, Savings associations, Truth in lending.

Authority and Issuance

For the reasons set forth in the preamble, the Bureau proposes to amend 12 CFR parts 1024 and 1026 as follows:

PART 1024—

REAL ESTATE SETTLEMENT PROCEDURES ACT (REGULATION X)

■ 1. The authority citation for part 1024 continues to read as follows:

Authority: 12 U.S.C. 2603–2605, 2607, 2609, 2617, 5512, 5532, 5581.

Subpart C—

Mortgage Servicing

■ 2. Section 1024.30 is amended by adding paragraph (d) to read as follows:

§ 1024.30 Scope.

* * * * *

(d) *Successors in interest.* A successor in interest shall be considered a borrower for the purposes of this subpart once a servicer confirms the successor in interest's identity and ownership interest in a property that secures a mortgage loan covered by this subpart.

■ 3. Section 1024.31 is amended by adding definitions of *Delinquency* and *Successor in interest* in alphabetical order to read as follows:

§ 1024.31 Definitions.

* * * * *

Delinquency means a period of time during which a borrower and a borrower's mortgage loan obligation are delinquent. A borrower and a borrower's mortgage loan obligation are delinquent beginning on the date a periodic payment sufficient to cover principal, interest, and, if applicable, escrow became due and unpaid, until such time as the outstanding payment is made.

* * * * *

Successor in interest means a person to whom an ownership interest in a property securing a mortgage loan is transferred from a prior borrower, provided that the transfer falls under an exemption specified in section 341(d) of the Garn-St Germain Depository Institutions Act of 1982, 12 U.S.C. 1701j-3(d).

* * * * *

■ 4. Section 1024.36 is amended by adding paragraph (i) to read as follows:

§ 1024.36 Requests for information.

* * * * *

(i) *Successors in interest.* With respect to any written request from a person that indicates that the person may be a successor in interest and that includes the name of the prior borrower and information that enables the servicer to identify that borrower's mortgage loan account, a servicer shall respond by providing the potential successor in interest with information regarding the documents the servicer requires to confirm the person's identity and ownership interest in the property. With respect to the written request, a servicer shall treat the person as a borrower for the purposes of the requirements of paragraphs (c) through (g) of this section. If a servicer has established an address that a borrower must use to request information pursuant to paragraph (b) of this section, a servicer must comply with the requirements of this paragraph only for requests received at the established address.

■ 5. Section 1024.37 is amended by revising paragraphs (c)(2)(v) and (c)(4), (d)(2)(ii) introductory text, (d)(2)(ii)(B), (d)(3) and (4), and (e)(4) to read as follows:

§ 1024.37 Force-placed insurance.

* * * * *

(c) * * *

(2) * * *

(v) A statement that:

(A) The borrower's hazard insurance is expiring, has expired, or provides insufficient coverage, as applicable;

(B) The servicer does not have evidence that the borrower has hazard insurance coverage past the expiration date or evidence that the borrower has hazard insurance that provides sufficient coverage, as applicable; and

(C) If applicable, identifies the type of hazard insurance for which the servicer lacks evidence of coverage;

* * * * *

(4) *Additional Information.* Except for the mortgage loan account number, a servicer may not include any information other than information required by paragraphs (c)(2) of this section in the written notice required by paragraph (c)(1)(i) of this section. However, a servicer may provide such additional information to a borrower on separate pieces of paper in the same transmittal.

(d) * * *

(2) * * *

(ii) *Servicer not receiving demonstration of continuous coverage.* A servicer that has received hazard insurance information after delivering to a borrower or placing in the mail the notice required by paragraph (c)(1)(i) of this section, but has not received, from the borrower or otherwise, evidence demonstrating that the borrower has had sufficient hazard insurance coverage in place continuously, must set forth in the notice required by paragraph (c)(1)(ii) of this section the following information:

* * * * *

(B) The information required by paragraphs (c)(2)(ii) through (iv), (ix) through (xi), and (d)(2)(i)(B) and (D) of this section;

* * * * *

(3) *Format.* A servicer must set the information required by paragraphs (d)(2)(i)(B) and (D) of this section in bold text. The requirements of paragraph (c)(3) of this section apply to the information required by paragraph (d)(2)(i)(C) of this section. A servicer may use form MS–3B in appendix MS–3 of this part to comply with the requirements of paragraphs (d)(1) and (d)(2)(i) of this section. A servicer may use form MS–3C in appendix MS–3 of this part to comply with the requirements of paragraphs (d)(1) and (d)(2)(ii) of this section.

(4) *Additional information.* Except for the borrower's mortgage loan account number, a servicer may not include any information other than information required by paragraph (d)(2)(i) or (ii) of this section, as applicable, in the written notice required by paragraph (c)(1)(ii) of this section. However, a servicer may provide such additional information to a borrower on separate pieces of paper in the same transmittal.

* * * * *

(e) * * *

(4) *Additional information.* Except for the borrower's mortgage loan account number, a servicer may not include any information other than information required by paragraph (e)(2) of this section in the written notice required by paragraph (e)(1) of this section. However, a servicer may provide such additional information to a borrower on separate pieces of paper in same transmittal.

* * * * *

■ 6. Section 1024.38 is amended by revising paragraph (b)(1)(vi) and adding paragraph (b)(2)(vi) to read as follows:

§ 1024.38 General servicing policies, procedures, and requirements.

* * * * *

(b) * * *

(1) * * *

(vi)(A) Upon notification of the death of a borrower or of any transfer of the property securing a mortgage loan, promptly identify and facilitate communication with any potential successors in interest regarding the property;

(B) Upon identification of a potential successor in interest, including through any request made by a potential successor in interest under § 1024.36(i) or any loss mitigation application received from a potential successor in interest, promptly provide to the potential successor in interest a description of the documents the servicer reasonably requires to confirm that person's identity and ownership interest in the property and how the person may submit a written request under § 1024.36(i) (including the appropriate address); and

(C) Upon the receipt of such documents, promptly notify the person, as applicable, that the servicer has confirmed the person's status, has determined that additional documents are required (and what those documents are), or has determined that the person is not a successor in interest.

(2) * * *

(vi) Promptly identify and obtain documents or information not in the borrower's control that the servicer requires to determine which loss mitigation options, if any, to offer the borrower in accordance with the requirements of § 1024.41(c)(4).

* * * * *

■ 7. Section 1024.39 is amended by revising paragraphs (a), (b)(1), and (d) to read as follows:

§ 1024.39 Early intervention requirements for certain borrowers.

(a) *Live contact.* A servicer shall establish or make good faith efforts to establish live contact with a delinquent borrower not later than the 36th day of a borrower's delinquency, and again no later than 36 days after each payment due date so long as the borrower remains delinquent. Promptly after establishing live contact, the servicer shall inform such borrower about the availability of loss mitigation options if appropriate.

(b) *Written notice*—(1) *Notice required.* Except as otherwise provided in this section, a servicer shall provide to a delinquent borrower a written notice with the information set forth in paragraph (b)(2) of this section not later than the 45th day of the borrower's delinquency, and again no later than 45 days after each payment due date so long as the borrower remains delinquent. However, a servicer is not required to provide the written notice more than once during any 180-day period. If the borrower is or becomes 45 days delinquent after any 180-day period, a servicer must provide the written notice again no later than 45 days after the payment due date.

* * * * *

(d) *Exemptions*—(1) *Borrowers in bankruptcy*—(i) *Live Contact.* A servicer is exempt from the requirements of paragraph (a) of this section for a borrower if:

(A) The borrower is a debtor in bankruptcy;

(B) Any borrower on the mortgage loan is a debtor in Chapter 12 or Chapter 13 bankruptcy; or

(C) The borrower has discharged personal liability for the mortgage loan through bankruptcy.

(ii) *Written notice.* A servicer is exempt from the requirements of paragraph (b) of this section for a borrower if:

(A) Any of the conditions identified in paragraph (d)(1)(i) of this section are satisfied and no loss mitigation options are available;

(B) The borrower is a debtor in bankruptcy and the borrower's confirmed plan of reorganization provides that the borrower will surrender the property securing the mortgage loan, provides for the avoidance of the lien securing the mortgage loan, or otherwise does not provide for, as applicable, the payment of pre-bankruptcy arrearage or the maintenance of payments due under the mortgage loan;

(C) The borrower is a debtor in bankruptcy and the borrower files with the court a Statement of Intention pursuant to 11 U.S.C. 521(a) identifying an intent to surrender the property securing the mortgage loan; or

(D) The borrower is a debtor in bankruptcy and a court enters an order in the bankruptcy case providing for the avoidance of the lien securing the mortgage loan or lifting the automatic stay pursuant to 11 U.S.C. 362 with respect to the property securing the mortgage loan.

(2) *Fair Debt Collection Practices Act.* With regard to a mortgage loan for which a borrower has sent a notification pursuant to the Fair Debt Collections Practices Act (FDCPA) section 805(c) (15 U.S.C. 1692c(c)), a servicer subject to the FDCPA with respect to that borrower's loan:

(i) Is exempt from the requirements of paragraph (a) of this section; and

(ii) Is exempt from the requirements of paragraph (b) of this section if no loss mitigation options are available; but

(iii) Must comply with the requirements of paragraph (b) of this section, as modified herein, if loss mitigation options are available:

(A) In addition to the information required pursuant to paragraph (b)(2) of this section, the written notice must include a statement that the servicer may or intends to invoke its specified remedy of foreclosure. Model clause MS–4(D) in appendix MS–4 to this part may be used to comply with this requirement.

(B) The written notice may not contain a request for payment.

(C) A servicer is prohibited from providing the written notice more than once during any 180-day period.

■ 8. Section 1024.41 is amended by revising paragraph (c)(1) introductory text and paragraphs (c)(2)(iii) and (iv), adding paragraphs (c)(3) and (4), revising paragraph (f)(1)(iii) and paragraph (i), and adding paragraph (k) to read as follows:

§ 1024.41 Loss mitigation procedures.

* * * * *

(c) * * *

(1) *Complete loss mitigation application.* Except as provided in paragraph (c)(4)(ii) of this section, if a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, then, within 30 days of receiving a borrower's complete loss mitigation application, a servicer shall:

* * * * *

(2) * * *

(iii) *Payment forbearance.* Notwithstanding paragraph (c)(2)(i) of this section, a servicer may offer a short-term payment forbearance program or a short-term repayment plan to a borrower based upon an evaluation of an incomplete loss mitigation application. A payment forbearance program or a repayment plan offered under this paragraph must be provided to the borrower in writing before the program or plan begins and must clearly specify the payment terms and duration. A servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, and shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of a payment forbearance program or

repayment plan offered pursuant to this section. A servicer may offer a short-term forbearance program in conjunction with a short-term repayment plan under this paragraph.

(iv) *Facially complete application.* A loss mitigation application shall be considered facially complete when a borrower submits all the missing documents and information as stated in the notice required under paragraph (b)(2)(i)(B) of this section, no additional information is requested in such notice, or when the servicer is required under paragraph (c)(3) of this section to send the borrower a notice of complete application. If the servicer later discovers additional information or corrections to a previously submitted document are required to complete the application, the servicer must promptly request the missing information or corrected documents and treat the application as complete for the purposes of paragraphs (f)(2) and (g) of this section until the borrower is given a reasonable opportunity to complete the application. If the borrower completes the application within this period, the application shall be considered complete as of the date it first became facially complete, for the purposes of paragraphs (d), (e), (f)(2), (g), and (h) of this section, and as of the date the application was actually complete for the purposes of paragraph (c). A servicer that complies with this paragraph will be deemed to have fulfilled its obligation to provide an accurate notice under paragraph (b)(2)(i)(B).

(3) *Notice of complete application.* (i) Subject to paragraph (c)(3)(ii) of this section, upon receiving a borrower's complete loss mitigation application, the servicer shall promptly provide the borrower a written notice including the following information:

(A) That the loss mitigation application is complete;

(B) The date the servicer received the complete application;

(C) Whether a foreclosure sale was scheduled as of the date the servicer received the complete application and, if so, the date of that scheduled sale;

(D) The date the borrower's protections began under paragraph (f)(2) and (g) of this section, as applicable, and a concise description of those protections;

(E) That the servicer expects to complete its evaluation within 30 days of the date it received the complete application;

(F) A statement that, although the application is complete, the borrower may need to submit additional information at a later date if the servicer determines that it is necessary; and

(G) If applicable, that the borrower will have the opportunity to appeal the servicer's determination to deny the borrower for any trial or permanent loan modification pursuant to paragraph (h) of this section.

(ii) A servicer is not required to provide the notice under paragraph (c)(3)(i) of this section if:

(A) The servicer has already provided the borrower a notice under paragraph (b)(2)(i)(B) of this section informing the borrower that the application is complete and the servicer has not subsequently requested additional information or a corrected version of a previously submitted document from the borrower pursuant to paragraph (c)(2)(iv) of this section;

(B) The application was not complete or facially complete more than 37 days before a foreclosure sale; or

(C) The servicer has already provided the borrower a notice under paragraph (c)(1)(ii) of this section.

(4) *Information not in the borrower's control*—(i) *Reasonable diligence.* If a servicer requires documents or information not in the borrower's control to determine which loss mitigation options, if any, it will offer to the borrower, the servicer must exercise reasonable diligence in obtaining such documents or information.

(ii) *Effect in case of delay.* (A) A servicer shall not deny a complete loss mitigation application solely because the servicer has not received documents or information not in the borrower's control.

(B) If, 30 days after a complete application is received, the servicer is unable to make a determination as to which loss mitigation options, if any, it will offer to the borrower because the servicer lacks documents or information from a party other than the borrower or the servicer, the servicer must promptly provide the borrower a written notice stating:

(*1*) That the servicer has not received documents or information not in the borrower's control that the servicer requires to determine which loss mitigation options, if any, the servicer will offer on behalf of the owner or assignee of the mortgage;

(*2*) The specific documents or information that the servicer lacks;

(*3*) The date on which the servicer first requested that documentation or information during the current loss mitigation application process; and

(*4*) That the servicer will complete its evaluation of the borrower for all available loss mitigation options promptly upon receiving the documentation or information.

(C) If, due to a lack of documents or information from a party other than the borrower or the servicer, a servicer is unable to determine which loss mitigation options, if any, to offer a borrower within 30 days of receiving a complete application, upon receiving such documents or information, the servicer must promptly provide the borrower written notice stating the servicer's determination in accordance with paragraph (c)(1)(ii) of this section.

* * * * *

(f) * * *

(1) * * *

(iii) The servicer is joining the foreclosure action of a superior or subordinate lienholder.

* * * * *

(i) *Duplicative requests.* A servicer must comply with the requirements of this section for a borrower's loss mitigation application, unless the servicer has previously complied with the requirements of this section for a complete loss mitigation application submitted by a borrower and the borrower has been delinquent at all times since the same borrower submitted the complete application.

* * * * *

(k) *Servicing Transfers*—(1) *In general*—(i) *Timing of compliance.* Except as provided in paragraphs (k)(2) through (4) of this section, if a transferee servicer acquires the servicing of a mortgage loan for which a loss mitigation application is pending as of the transfer date, the transferee servicer must comply with the requirements of this section for that loss mitigation application within the timeframes that were applicable to the transferor servicer based on the date the transferor servicer received the loss mitigation application. Any protections under paragraphs (e) through (h) of this section that applied to a borrower before a transfer continue to apply notwithstanding the transfer.

(ii) *Transfer date defined.* For purposes of this paragraph (k), the transfer date is the date on which the transfer of the servicing responsibilities from the transferor servicer to the transferee servicer occurs.

(2) *Acknowledgement notices.* If a transferee servicer acquires the servicing of a mortgage loan for which the period to provide the notice required by paragraph (b)(2)(i)(B) of this section has not expired as of the transfer date, the transferee servicer must provide the notice within 10 days (excluding legal public holidays, Saturdays, and Sundays) of the date the transferor servicer received the loss mitigation application.

(3) *Complete loss mitigation applications pending at transfer*—(i) *In general.* Except as provided in paragraph (k)(3)(ii) and (iii) of this section, if a transferee servicer acquires the servicing of a mortgage loan for which a complete loss mitigation application is pending as of the transfer date, the transferee servicer must comply with the applicable requirements of paragraphs (c)(1) and (4) of this section within 30 days of the date the transferor servicer received the complete loss mitigation application.

(ii) *Involuntary transfers*—(A) *Timing of evaluation.* Except as provided in paragraph (k)(3)(iii) of this section, if a transferee servicer, as a result of an involuntary transfer, acquires the servicing of a mortgage loan for which a complete loss mitigation application is pending as of the transfer date, the transferee servicer must comply with the applicable requirements of paragraphs (c)(1) and (4) of this section within 30 days of the date the transferor servicer received the complete loss mitigation application or within 15 days of the transfer date, whichever is later.

(B) *Involuntary transfer defined.* For purposes of § 1024.41(k)(3)(ii), a transfer is involuntary when an unaffiliated investor or a court or regulator with jurisdiction requires, with less than 30 days advance notice, the transferor servicer to transfer servicing to another servicer and the transferor servicer is in breach of, or default under, its servicing agreement for loss mitigation related-servicing performance deficiencies or is in receivership or bankruptcy.

(iii) *Compliance not practicable.* If compliance with the time periods set forth in paragraph (k)(3)(i) or (k)(3)(ii)(A) of this section, as applicable, is not practicable under the circumstances, a transferee servicer must complete the evaluation of the complete loss mitigation application and provide the applicable notices required by paragraphs (c)(1) and (4) of this section within a reasonably prompt time after the expiration of the applicable time period in paragraph (k)(3)(i) or (k)(3)(ii)(A) of this section.

(4) *Applications subject to appeal process.* If a transferee servicer acquires the servicing of a mortgage loan for which, as of the transfer date, a borrower's appeal pursuant to paragraph (h) of this section is pending or a borrower's time period to appeal pursuant to paragraph (h) of this section has not expired, the transferee servicer must evaluate the appeal if it is able to determine whether it should offer the borrower the loan modification options subject to the appeal.

(i) *Evaluating appeal.* If a transferee servicer is able to evaluate the borrower's appeal but compliance within 30 days of when the borrower made the appeal is not practicable under the circumstances, a transferee servicer must complete the evaluation and provide the notice required by paragraph (h)(4) of this section within a reasonably prompt time after expiration of the 30-day period.

(ii) *Servicer unable to evaluate appeal.* A transferee servicer that is unable to evaluate an appeal must treat the borrower's appeal as a pending complete loss mitigation application and comply with the requirements of this section for such application, including evaluating the borrower for all loss mitigation options available to the borrower from the transferee servicer. For purposes of paragraphs (c) or (k)(3) of this section, as applicable, such a pending complete loss mitigation application shall be considered complete as of the date the appeal was received. For purposes of paragraphs (e) through (h) of this section, the transferee servicer must treat such a pending complete loss mitigation application as facially complete as of the date it was facially complete with respect to the transferor servicer.

(5) *Pending loss mitigation offers.* A transfer does not affect a borrower's ability to accept or reject a loss mitigation option offered under § 1024.41(c) or (h). If a transferee servicer acquires the servicing of a mortgage loan for which the borrower's time period under § 1024.41(e) or (h) for accepting or rejecting a loss mitigation option offered by the transferor servicer has not expired as of the transfer date, the transferee servicer must allow the borrower to accept or reject the offer during the unexpired balance of the applicable time period.

■ 9. In Appendix MS–3 to part 1024, MS–3(A), MS–3(B), MS–3(C), and MS–3(D) are revised to read as follows:

Appendix MS—Mortgage Servicing

Appendix MS–3 to Part 1024

Model Force-Placed Insurance Notice Forms

* * * * *

MS–3(A)—Model Form for Force-Placed Insurance Notice Containing Information Required By § 1024.37(c)(2)

[Name and Mailing Address of Servicer]
[Date of Notice]
[Borrower's Name]
[Borrower's Mailing Address]
Subject: Please provide insurance information for [Property Address]

Dear [Borrower's Name]:

Our records show that your [hazard] [Insurance Type] insurance [is expiring] [expired] [provides insufficient coverage], and we do not have evidence that you have obtained new coverage. Because [hazard] [Insurance Type] insurance is required on your property, [we bought insurance for your property] [we plan to buy insurance for your property]. You must pay us for any period during which the insurance we buy is in effect but you do not have insurance.

You should immediately provide us with your insurance information. [Describe the insurance information the borrower must provide]. [The information must be provided in writing.]

The insurance we [bought] [buy]:

- May be significantly more expensive than the insurance you can buy yourself.
- May not provide as much coverage as an insurance policy you buy yourself.

If you have any questions, please contact us at [telephone number].

[If applicable, provide a statement advising a borrower to review additional information provided in the same transmittal.]

MS–3(B)—Model Form for Force-Placed Insurance Notice Containing Information Required By § 1024.37(d)(2)(i)

[Name and Mailing Address of Servicer]
[Date of Notice]
[Borrower's Name]
[Borrower's Mailing Address]
Subject: Second and final notice — please provide insurance information for [Property Address]

Dear [Borrower's Name]:

This is your second and final notice that our records show that your [hazard] [Insurance Type] insurance [is expiring] [expired] [provides insufficient coverage], and we do not have evidence that you have obtained new coverage. Because [hazard] [Insurance Type] insurance is required on your property, [we bought insurance for your property] [we plan to buy insurance for your property]. You must pay us for any period during which the insurance we buy is in effect but you do not have insurance.

You should immediately provide us with your insurance information. [Describe the insurance information the borrower must provide]. [The information must be provided in writing.]

The insurance we [bought] [buy]:

- [Costs $[premium charge]] [Will cost an estimated $[premium charge]] annually, which may be significantly more expensive than insurance you can buy yourself.
- May not provide as much coverage as an insurance policy you buy yourself.

If you have any questions, please contact us at [telephone number].

[If applicable, provide a statement advising a borrower to review additional information provided in the same transmittal.]

MS–3(C)—Model Form for Force-Placed Insurance Notice Containing Information Required By § 1024.37(d)(2)(ii)

[Name and Mailing Address of Servicer]
[Date of Notice]
[Borrower's Name]
[Borrower's Mailing Address]
Subject: Second and final notice — please provide insurance information for [Property Address]

Dear [Borrower's Name]:

We received the insurance information you provided, but we are unable to verify coverage from [Date Range].

Please provide us with insurance information for [Date Range] immediately.

We will charge you for insurance we [bought] [plan to buy] for [Date Range] unless we can verify that you have insurance coverage for [Date Range].

The insurance we [bought] [buy]:

• [Costs $[premium charge]] [Will cost an estimated $[premium charge]] annually, which may be significantly more expensive than insurance you can buy yourself.

• May not provide as much coverage as an insurance policy you buy yourself.

If you have any questions, please contact us at [telephone number].

[If applicable, provide a statement advising a borrower to review additional information provided in the same transmittal.]

MS–3(D)—Model Form for Renewal or Replacement of Force-Placed Insurance Notice Containing Information Required By § 1024.37(e)(2)

[Name and Mailing Address of Servicer]
[Date of Notice]
[Borrower's Name]
[Borrower's Mailing Address]
Subject: Please update insurance information for [Property Address]

Dear [Borrower's Name]:

Because we did not have evidence that you had [hazard] [Insurance Type] insurance on the property listed above, we bought insurance on your property and added the cost to your mortgage loan account.

The policy that we bought [expired] [is scheduled to expire]. Because [hazard][Insurance Type] insurance] is required on your property, we intend to maintain insurance on your property by renewing or replacing the insurance we bought.

The insurance we buy:

• [Costs $[premium charge]] [Will cost an estimated $[premium charge]] annually, which may be significantly more expensive than insurance you can buy yourself.

• May not provide as much coverage as an insurance policy you buy yourself.

If you buy [hazard] [Insurance Type] insurance, you should immediately provide us with your insurance information.

[Describe the insurance information the borrower must provide]. [The information must be provided in writing.]

If you have any questions, please contact us at [telephone number].

[If applicable, provide a statement advising a borrower to review additional information provided in the same transmittal.]

■ 10. In Appendix MS–4 to part 1024, MS–4(D) is added to read as follows:

Appendix MS–4—Model Clauses for the Written Early Intervention Notice

MS–4(D)—Written Early Intervention Notice for Servicers Subject to FDCPA (§ 1024.39(d)(2)(iii))

This is a legally required notice sent to borrowers who are at least 45 days delinquent. We have a right to invoke foreclosure. Loss mitigation or other alternatives may be available to help you avoid losing your home.

■ 11. In Supplement I to Part 1024—Official Bureau Interpretations:

■ A. Under *Section 1024.30—Scope:*

■ i. The heading *30(d) Successors in interest* is added, and paragraphs 1 and 2 under that heading are added.

■ B. Under *Section 1024.31—Definitions:*

■ i. The heading *Delinquency* is added, and paragraphs 1 through 3 under that heading are added.

■ C. Under *Section 1024.36—Requests For Information:*

■ i. Under *36(a) Information request,* paragraph 2 is revised.

■ ii. The heading *36(i) Successors in interest* is added, and paragraph 1 under that heading is added.

■ D. Under *Section 1024.37—Force-Placed Insurance:*

■ i. The heading *37(d)(4) Updating notice with borrower information* is redesignated as heading *37(d)(5) Updating notice with borrower information.*

■ ii. Under *37(d)(5) Updating notice with borrower information,* paragraph 1 is revised.

■ E. Under *Section 1024.38— General Servicing Policies, Procedures, and Requirements:*

■ i. Under *38(b) Objectives:*

■ a. Under *38(b)(1) Accessing and providing timely and accurate information,* the heading *Paragraph 38(b)(1)(vi)* is added, and paragraphs 1 through 3 under that heading are added.

■ b. The heading *38(b)(3) Facilitating oversight of, and compliance by, service providers* is added.

■ c. Under *38(b)(3) Facilitating oversight of, and compliance by, service providers,* the heading *Paragraph 38(b)(3)(iii)* is added, and paragraph 1 under that heading is added.

■ F. Under *Section 1024.39—Early Intervention Requirements for Certain Borrowers:*

■ i. Under *39(a) Live contact,* paragraphs 1 and 2 are revised, paragraphs 3 and 4 are redesignated as paragraphs 4 and 5, respectively, and paragraphs 3 and 6 are added.

■ ii. Under *39(b) Written notice:*

■ a. Under *39(b)(1) Notice required,* paragraph 2 is revised, and paragraphs 5 and 6 are added.

■ b. Under *39(b)(2) Content of the written notice,* paragraph 4 is added.

■ iii. The heading *39(d) Exemptions* is added.

■ iv. Under *39(d) Exemptions:*

■ a. Under *39(d)(1) Borrowers in bankruptcy,* paragraphs 1 and 3 are removed and paragraph 2 is redesignated as paragraph 1 and revised.

■ b. The heading *39(d)(1)(i) Live contact* is added, and paragraph 1 under that heading is added.

■ c. The heading *39(d)(1)(ii) Written notice* is added, and paragraphs 1 and 2 under that heading are added.

■ v. The heading *39(d)(2)(iii) Fair Debt Collection Practices Act* is added, and paragraphs 1 and 2 under that heading are added.

■ G. Under *Section 1024.41—Loss Mitigation Procedures:*

■ i. Under *41(b) Receipt of a loss mitigation application,* paragraph 1 is added.

■ a. Under *41(b)(1) Complete loss mitigation application,* paragraphs 1 and 4.iii are revised.

■ b. Under *41(b)(2) Review of loss mitigation application submission:*

■ c. Under *41(b)(2)(i) Requirements,* paragraph 1 is added.

■ d. Under *41(b)(2)(ii) Time period disclosure,* paragraph 1 is revised, and paragraphs 2 and 3 are added.

■ ii. Under *41(c) Evaluation of loss mitigation applications:*

■ a. Under *41(c)(2) Incomplete loss mitigation application evaluation:*

■ b. Under *41(c)(2)(iii) Payment forbearance,* paragraphs 1 through3 are revised, and paragraph 4 is added.

■ c. The heading *41(c)(3) Notice of complete application* is added.

■ d. The heading *Paragraph 41(c)(3)(i)* is added, and paragraphs 1 through 3 under that heading are added.

■ e. The heading *41(c)(4) Information not in the borrower's control* is added.

■ f. The heading *41(c)(4)(i) Diligence requirements* is added, and paragraphs 1 and 2 under that heading are added.

■ g. The heading *41(c)(4)(ii) Effect in case of delay* is added, and paragraph 1 under that heading is added.

■ h. The heading *41(c)(4)(ii)(C) Providing notification of determination to borrower in case of delay* is added, and paragraph 1 under that heading is added.

■ iii. Under *41(g) Prohibition on foreclosure sale,* paragraphs 1 and 3 are revised, and paragraph 5 is added.

■ iv. Under *41(i) Duplicative requests,* paragraph 1 is revised and paragraph 2 is removed.

■ v. The heading *41(k) Servicing transfers* is added, and paragraph 1 under that heading is added.

■ a. The heading *41(k)(1) In general* is added.

■ b. The heading *41(k)(1)(i) Timing of compliance* is added, and paragraphs 1 through 3 under that heading are added.

■ c. The heading *41(k)(1)(ii) Transfer date defined* is added, and paragraph 1 under that heading is added.

■ d. The heading *41(k)(3) Complete loss mitigation applications pending at transfer* is added.

■ e. The heading *41(k)(3)(i) In general* is added, and paragraphs 1 and 2 under that heading are added.
■ f. The heading *41(k)(3)(iii) Compliance not practicable* is added, and paragraph 1 under that heading is added.
■ g. The heading *41(k)(4) Applications subject to appeal process* is added, and paragraphs 1 and 2 under that heading are added.
■ h. The heading *41(k)(5) Pending loss mitigation offers* is added, and paragraph 1 under that heading is added.

The additions and revisions read as follows:

Supplement I to Part 1024—Official Bureau Interpretations

Subpart C—Mortgage Servicing

Section 1024.30—Scope

* * * * *

30(d) Successors in interest.

1. *Treatment of successors in interest.* Under § 1024.30(d), a successor in interest must be considered a borrower for the purposes of this subpart once a servicer confirms the successor in interest's identity and ownership interest in the property. For example, if a servicer receives a loss mitigation application from a successor in interest after confirming the successor in interest's identity and ownership interest in the property, the servicer must review and evaluate the application and notify the successor in interest in accordance with the procedures set forth in § 1024.41. However, see § 1024.36(i), which provides that a servicer must respond to written requests for certain information from a potential successor in interest in accordance with the requirements of § 1024.36(c) through (g) before confirming that person's status.

2. *Treatment of prior borrowers.* Even after a servicer's confirmation of a successor in interest's identity and ownership interest in the property, the servicer is still required to comply with the requirements of this subpart with respect to the prior borrower, unless that borrower also has either died or been released from the obligation on the mortgage loan. The prior borrower retains any rights under this subpart that accrued prior to the confirmation of the successor in interest to the extent these rights would otherwise survive the prior borrower's death or release from the obligation.

Section 1024.31—Definitions

Delinquency.

1. *Length of delinquency.* A borrower's delinquency begins on the date an amount sufficient to cover a periodic payment of principal, interest, and, if applicable, escrow became due and unpaid, and lasts until such time as the payment is made, even if the borrower is afforded a period after the due date to pay before the servicer assesses a late fee.

2. *Application of funds.* If a servicer applies payments to the oldest outstanding periodic payment, a payment by a delinquent borrower advances the date the borrower's delinquency began. For example, assume a borrower's mortgage loan obligation provides that a periodic payment sufficient to cover principal, interest, and escrow is due on the first of each month. The borrower fails to make a payment on January 1 or on any day in January, and on January 31 the borrower is 30 days delinquent. On February 1, the borrower makes a periodic payment. The servicer applies the payment it received on February 1 to the outstanding January payment. On February 2, the borrower is one day delinquent.

3. *Payment tolerance.* For any given billing cycle for which a borrower's payment is less than the periodic payment due, a servicer that elects to advance the missing funds to the borrower's mortgage loan account may elect not to treat the borrower as delinquent. If a servicer chooses not to treat a borrower as delinquent for purposes of any section of subpart C, that borrower is not delinquent as defined in section 1024.31.

* * * * *

Section 1024.36–Requests for Information

* * * * *

36(a) Information request.

* * * * *

2. *Owner or assignee of a mortgage loan.* i. When a loan is not held in a trust for which an appointed trustee receives payments on behalf of the trust, a servicer complies with § 1024.36(d) by responding to a request for information regarding the owner or assignee of a mortgage loan by identifying the person on whose behalf the servicer receives payments from the borrower. A servicer is not the owner or assignee for purposes of § 1024.36(d) if the servicer holds title to the loan, or title is assigned to the servicer, solely for the administrative convenience of the servicer in servicing the mortgage loan obligation.

ii. When the loan is held in a trust for which an appointed trustee receives payments on behalf of the trust, a servicer complies with § 1024.36(d) by responding to a borrower's request for information regarding the owner, assignee, or trust of the mortgage loan with the following information, as applicable:

A. If the request for information expressly requested the name or number of the trust or pool: the name of the trust, and the name, address, and appropriate contact information for the trustee. Assume, for example, a mortgage loan is owned by Mortgage Loan Trust, Series ABC–1, for which XYZ Trust Company is the trustee. The servicer complies with § 1024.36(d) by identifying the owner as Mortgage Loan Trust, Series ABC–1, and providing the name, address, and appropriate contact information for XYZ Trust Company as the trustee.

B. If the request for information did not expressly request the name or number of the trust or pool: the name of the trust, and the name, address, and appropriate contact information for the trustee, as in comment 36(a)–2.ii.A above, unless the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation is the investor, guarantor, or trustee. In that case, the servicer may respond to such a request by providing only the name and contact information for the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, as applicable, without also providing the name of the trust. Other investors or guarantors, including the Government National Mortgage Association, are not the owners or assignees for purposes of such requests for information solely as a result of their roles as investors or guarantors.

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36(i) Successors in interest.

1. *Other information.* For the purposes of requests under § 1024.36(i), before the servicer has confirmed the identity and ownership interest of the potential successor in interest, a servicer is only required to provide information regarding the documents the servicer requires to confirm the person's identity and ownership interest in the property. The servicer is not required to provide any other information that may also be requested by the person.

Section 1024.37—Force-Placed Insurance

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37(d)(5) Updating notice with borrower information.

1. *Reasonable time.* A servicer may have to prepare the written notice required by § 1024.37(c)(1)(ii) in advance of delivering or placing the notice in the mail. If the notice has already been put into production, the servicer is not required to update the notice with new insurance information received about the borrower so long as the written notice was put into production within a reasonable time prior to the servicer delivering or placing the notice in the mail. For purposes of § 1024.37(d)(5), five days (excluding legal holidays, Saturdays, and Sundays) is a reasonable time.

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Section 1024.38—General Servicing Policies, Procedures, and Requirements

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38(b) Objectives.

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Paragraph 38(b)(1)(vi).

1. *Documents reasonably required.* The documents a servicer requires to confirm a potential successor in interest's identity and ownership interest in the property must be reasonable in light of the laws of the relevant jurisdiction, the specific situation of the potential successor in interest, and the documents already in the servicer's possession. The required documents may, where appropriate, include, for example, a death certificate, an executed will, or a court order.

2. *Examples of reasonable requirements.* Subject to the relevant law governing each situation, the following examples illustrate documents that a servicer may require to confirm a potential successor in interest's identity and ownership interest in the property and that generally would be reasonable:

i. *Tenancy by the entirety or joint tenancy.* A potential successor in interest indicates (or the servicer knows from its records or other sources) that the prior borrower and the potential successor in interest owned the

property as tenants by the entirety or joint tenants and that the prior borrower has died. To demonstrate that the potential successor in interest has sole interest in the property upon the death of the prior borrower, applicable law does not require a probate proceeding, but requires only that there be a prior recorded deed listing both the potential successor in interest and the prior borrower as tenants by the entirety (*e.g.,* married grantees) or joint tenants. Under these circumstances, it would be reasonable for the servicer to require the potential successor in interest to provide documentation of the recorded instrument, if the servicer does not already have it, and the death certificate of the prior borrower. Because in this situation a probate proceeding is not required under applicable law, however, it would not be reasonable for the servicer to require documentation of a probate proceeding.

ii. *Affidavits of heirship.* A potential successor in interest indicates that he or she acquired an ownership interest in the property upon the death of the prior borrower as a result of an affidavit of heirship. To demonstrate that the potential successor in interest has an interest in the property upon the death of the prior borrower, applicable law does not require a probate proceeding, but requires only an appropriate affidavit of heirship upon death. Under these circumstances, it would be reasonable for the servicer to require the potential successor in interest to provide the affidavit of heirship and the death certificate of the prior borrower. Because a probate proceeding is not required under applicable law, however, it would not be reasonable for the servicer to require documentation of a probate proceeding.

iii. *Divorce or legal separation.* A potential successor in interest indicates that he or she acquired an ownership interest in the property from a spouse who is a borrower as a result of a property agreement incident to a divorce proceeding. Under applicable law, transfer from the borrower spouse is demonstrated by a final divorce decree and accompanying separation agreement executed by both spouses. Applicable law does not require a deed conveying the interest in the property. Under these circumstances, it would be reasonable for the servicer to require the potential successor in interest to provide documentation of the final divorce decree and an executed separation agreement. Because applicable law does not require a deed, however, it would not be reasonable for the servicer to require documentation of a deed.

iv. *Living spouses or parents.* A potential successor in interest indicates that he or she acquired an ownership interest in the property from a living spouse or parent who is a borrower by quitclaim deed or act of donation. Under these circumstances, it would be reasonable for the servicer to require the potential successor in interest to provide the quitclaim deed or act of donation. It would not be reasonable, however, for the servicer to require additional documents.

3. *Prompt confirmation and loss mitigation.* A servicer's policies and procedures must be reasonably designed to ensure that the servicer can promptly notify the potential successor in interest that the servicer has confirmed the person's status. Upon the receipt of documents required by a servicer to confirm a successor in interest's identity and ownership interest in the property, the servicer's confirmation and notification must be sufficiently prompt so as not to interfere with the successor in interest's ability to apply for loss mitigation options according to the procedures provided in § 1024.41. In general, a servicer's policies and procedures must be reasonably designed to ensure that the servicer confirms a successor in interest's status and notifies the person of the servicer's confirmation at least 30 days before the next applicable milestone provided in comment 41(b)(2)(ii)-2.

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38(b)(3) Facilitating oversight of, and compliance by, service providers.

Paragraph 38(b)(3)(iii).

1. *Sharing information with service provider personnel handling foreclosure proceedings.* A servicer's policies and procedures must be reasonably designed to ensure that servicer personnel promptly inform service provider personnel handling foreclosure proceedings the servicer has received a complete loss mitigation application and to instruct promptly foreclosure counsel to take any step required by § 1024.41(g) sufficiently timely to avoid violating the prohibition against moving for judgment or order of sale, or conducting a foreclosure.

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Section 1024.39—Early Intervention Requirements for Certain Borrowers

39(a) Live contact.

1. *Delinquency.* Section 1024.39 requires a servicer to establish or attempt to establish live contact not later than the 36th day of such a borrower's delinquency. This provision is illustrated as follows:

i. Assume a loan mortgage obligation with a monthly billing cycle and monthly payments of $2000 representing principal, interest and escrow due on the first of each month.

A. The borrower fails to make a payment of $2000 on, and makes no payment during the 36-day period after, January 1. The servicer must establish or make good faith efforts to establish live contact not later than 36 days after January 1—*i.e.,* on or before February 6.

B. The borrower fails to make a payment of $2000 on January 1, February 1, and March 1, making the borrower 90 days delinquent as of April 1. The servicer can time its attempts to establish live contact such that a single attempt will meet the requirements of § 1024.39(a) for two missed payments. To illustrate, the servicer complies with § 1024.39(a) if the servicer makes a good faith effort to establish live contact with the borrower, for example, on February 5, and again on March 25. The February 5 attempt meets the requirements of § 1024.39(a) for both the January 1 and February 1 missed payments.

2. *Establishing live contact.* Live contact provides servicers an opportunity to discuss the circumstances of a borrower's delinquency. Live contact with a borrower includes telephoning or conducting an in-person meeting with the borrower, but not leaving a recorded phone message. A servicer may, but need not, rely on live contact established at the borrower's initiative to satisfy the live contact requirement in § 1024.39(a). Servicers may also combine contacts made pursuant to § 1024.39(a) with contacts made with borrowers for other reasons, for instance, by telling borrowers on collection calls that loss mitigation options may be available in accordance with the rule.

3. *Good faith efforts.* Good faith efforts to establish live contact consist of reasonable steps under the circumstances to reach a borrower and may include telephoning the borrower on more than one occasion or sending written or electronic communication encouraging the borrower to establish live contact with the servicer. The length of a borrower's delinquency, as well as a borrower's failure to respond to a servicer's repeated attempts at communication pursuant to § 1024.39(a), are relevant circumstances to consider. For example, whereas ''good faith efforts'' to establish live contact with regard to a borrower with two consecutive missed payments might require a telephone call, ''good faith efforts'' to establish live contact with regard to an unresponsive borrower with six or more consecutive missed payments might require no more than including a sentence requesting that the borrower contact the servicer with regard to the delinquencies in the periodic statement or in an electronic communication. Such efforts might be sufficient where there is little or no hope of home retention, such as may occur in the later stages of foreclosure. See additional examples set forth in comment 39(a)–6.

4. *Promptly inform if appropriate.* i. *Servicer's determination.* It is within a servicer's reasonable discretion to determine whether informing a borrower about the availability of loss mitigation options is appropriate under the circumstances. The following examples demonstrate when a servicer has made a reasonable determination regarding the appropriateness of providing information about loss mitigation options.

A. A servicer provides information about the availability of loss mitigation options to a borrower who notifies a servicer during live contact of a material adverse change in the borrower's financial circumstances that is likely to cause the borrower to experience a long-term delinquency for which loss mitigation options may be available.

B. A servicer does not provide information about the availability of loss mitigation options to a borrower who has missed a January 1 payment and notified the servicer that full late payment will be transmitted to the servicer by February 15.

ii. *Promptly inform.* If appropriate, a servicer may inform borrowers about the availability of loss mitigation options orally, in writing, or through electronic communication, but the servicer must provide such information promptly after the servicer establishes live contact. A servicer need not notify a borrower about any particular loss mitigation options at this time; if appropriate, a servicer need only inform

borrowers generally that loss mitigation options may be available. If appropriate, a servicer may satisfy the requirement in § 1024.39(a) to inform a borrower about loss mitigation options by providing the written notice required by § 1024.39(b)(1), but the servicer must provide such notice promptly after the servicer establishes live contact.

5. *Borrower's representative.* Section 1024.39 does not prohibit a servicer from satisfying the requirements § 1024.39 by establishing live contact with and, if applicable, providing information about loss mitigation options to a person authorized by the borrower to communicate with the servicer on the borrower's behalf. A servicer may undertake reasonable procedures to determine if a person that claims to be an agent of a borrower has authority from the borrower to act on the borrower's behalf, for example, by requiring a person that claims to be an agent of the borrower provide documentation from the borrower stating that the purported agent is acting on the borrower's behalf.

6. *Compliance with § 1024.41.* A servicer complies with § 1024.39(a) and need not otherwise establish or make good faith efforts to establish live contact if the servicer has established and is maintaining ongoing contact with the borrower with regard to the borrower's completion of a loss mitigation application or the servicer's evaluation of the borrower's complete loss mitigation application, or if the servicer has sent the borrower a notice pursuant to § 1024.41(c)(1)(ii) that the borrower is not eligible for any loss mitigation options. However, the servicer must resume compliance with the requirements of § 1024.39(a) for a borrower who cures a prior default but becomes delinquent again.

39(b) Written notice.

39(b)(1) Notice required.

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2. *Frequency of the written notice.* A servicer need not provide the written notice under section 1024.39(b) more than once during a 180-day period beginning on the date on which the written notice is provided. For example, a borrower has a payment due on March 1. The amount due is not fully paid during the 45 days after March 1 and the servicer provides the written notice within 45 days after March 1—*i.e.,* by April 15. Assume the servicer provides the notice on April 15. If the borrower subsequently fails to make a payment due April 1 and the amount due is not fully paid during the 45 days after April 1, the servicer need not provide the written notice again during the 180-day period beginning on April 15—*i.e.,* no sooner than on October 12. If the borrower is delinquent on October 12, however, the servicer must again provide the written notice 45 days from the date the most recently missed payment was due. For example, if the amount due on October 1 is not fully paid during the 45 days after October 1, the servicer will need to provide the written notice again 45 days after October 1—*i.e.,* by November 15.

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5. *Successors in interest.* Where a servicer has already provided a written notice to a prior borrower under § 1024.39(b) before confirming a successor in interest's identity and ownership interest in the property, the servicer is not required also to provide that notice to the successor in interest, but after confirming the successor in interest's identity and ownership interest in the property, the servicer must provide the successor in interest with any additional written notices required under § 1024.39(b) after confirming the successor in interest's identity and ownership interest in the property.

6. *Servicing transfers.* A transferee servicer is required to comply with the requirements of § 1024.39(b) regardless of whether the transferor servicer provided a written notice to the borrower in the preceding 180-day period. However, a transferee servicer is not required to provide written notice under § 1024.39(b) that the transferor servicer provided prior to the transfer. For example, a borrower has a payment due on March 1. The transferor servicer provides the notice required by § 1024.39(b) on April 10. The loan is transferred on April 12. Assuming the borrower remains delinquent, the transferee servicer is not required to provide another written notice until 45 days after the next payment due date—*i.e.,* by May 16.

39(b)(2) Content of the written notice.

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4. *Availability of loss mitigation options.* If loss mitigation options are available, a servicer must include in the written notice the disclosures set forth in § 1024.39(b)(2)(iii) and (iv). Loss mitigation options are available if the owner or assignee of a borrower's mortgage loan offers an alternative to foreclosure that is made available through the servicer. The availability of loss mitigation options does not depend upon a borrower's eligibility for those options, but simply depends upon whether the owner or assignee of a borrower's mortgage loan generally offers loss mitigation options through the servicer.

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39(d) Exemptions.

39(d)(1) Borrowers in bankruptcy.

1. *Resuming compliance.* i. With respect to a borrower who has not discharged the mortgage debt, a servicer must resume compliance with § 1024.39(a) and (b), as applicable, as of the first delinquency that follows the earliest of the following outcomes in the bankruptcy case: the case is dismissed, the case is closed, the borrower reaffirms the mortgage loan under 11 U.S.C. 524, or the borrower receives a discharge under 11 U.S.C. 727, 1141, 1228, or 1328. However, this requirement to resume compliance with § 1024.39 does not require a servicer to communicate with a borrower in a manner that would be inconsistent with applicable bankruptcy law or a court order in a bankruptcy case. To the extent necessary to comply with such law or court order, a servicer may adapt the requirements of § 1024.39 as appropriate.

ii. Compliance with § 1024.39(a) is not required for any borrower who has discharged the mortgage debt under applicable provisions of the U.S. Bankruptcy Code. If the borrower's bankruptcy case is revived—for example if the court reinstates a previously dismissed case or reopens the case—the servicer is again exempt from the requirements of § 1024.39(a).

39(d)(1)(i) Live contact.

1. *Live contact.* The requirements of § 1024.39(a) do not apply once a petition is filed under the U.S. Bankruptcy Code, commencing any case in which the borrower is a debtor or a Chapter 12 or Chapter 13 case in which any borrower on the mortgage loan is a debtor. The requirements of § 1024.39(a) also do not apply if the borrower has discharged personal liability for the mortgage loan under 11 U.S.C. 727, 1141, 1228, or 1328.

39(d)(1)(ii) Written notice.

1. *Plan of reorganization.* For purposes of § 1024.39(d)(1)(ii), ''plan of reorganization'' refers to a borrower's plan of reorganization filed under the applicable provisions of Chapter 11, Chapter 12, or Chapter 13 of the U.S. Bankruptcy Code and confirmed by a court with jurisdiction over the borrower's bankruptcy case.

2. *Fair Debt Collections Practices Act.* If the FDCPA applies to a servicer's communications with a borrower in bankruptcy and the borrower has sent a notification pursuant to FDCPA § 805(c), see comment 39(d)(2)(iii)–2.

39(d)(2)(iii) Fair Debt Collection Practices Act.

1. *Communications under the FDCPA.* To the extent the FDCPA applies to a servicer's communications with a borrower, a servicer does not violate FDCPA section 805(c) by providing the written notice required by § 1024.39(d)(2)(iii) after a borrower has sent a notification pursuant to FDCPA section 805(c) with respect to that borrower's loan. In providing the borrower the written notice, the servicer must continue to comply with all other applicable provisions of the FDCPA, including prohibitions on unfair, deceptive, and abusive practices as contained in FDCPA sections 805 through 808 (15 U.S.C. 1692c through 1692f).

2. *Borrowers in bankruptcy.* To the extent the FDCPA applies to a servicer's communications with a borrower and the borrower has sent a notification pursuant to FDCPA section 805(c), a servicer is not required to provide the written notice required by § 1024.39(d)(2)(iii) if the borrower is in bankruptcy and is not represented by a person authorized by the borrower to communicate with the servicer on the borrower's behalf. If the borrower is represented by a person authorized by the borrower to communicate with the servicer on the borrower's behalf, however, the servicer must provide the written notice required by § 1024.39(d)(2)(iii) to the borrower's representative. *See* comment 39(a)–4.

Section 1024.41—Loss Mitigation Procedures

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41(b) Receipt of a loss mitigation application.

1. *Successors in interest.* i. If a servicer receives a loss mitigation application, including a complete loss mitigation application, from a potential successor in interest before confirming that person's identity and ownership interest in the property, the servicer may, but is not required to, review and evaluate the loss mitigation application in accordance with the

procedures set forth in § 1024.41. If a servicer complies with the requirements of § 1024.41 for a complete loss mitigation application submitted by a potential successor in interest before confirming that person's identity and ownership interest in the property, § 1024.41(i)'s limitation on duplicative requests applies to that person, provided that confirmation of the successor in interest's status would not affect the servicer's evaluation of the application.

ii. If a servicer receives a loss mitigation application from a potential successor in interest and elects not to review and evaluate the loss mitigation application before confirming that person's identity and ownership interest in the property, upon such confirmation the servicer must review and evaluate that loss mitigation application in accordance with the procedures set forth in § 1024.41. For purposes of § 1024.41, the servicer must treat the loss mitigation application as if it had been received on the date that the servicer confirmed the successor in interest's status.

41(b)(1) Complete loss mitigation application.

1. *In general.* A servicer has flexibility to establish its own application requirements and to decide the type and amount of information it will require from borrowers applying for loss mitigation options. In the course of gathering documents and information from a borrower to complete a loss mitigation application, a servicer may stop collecting documents and information for a particular loss mitigation option after receiving information confirming that the borrower is ineligible for that option. For example, if a particular loss mitigation option is only available for military servicemembers, once a servicer receives documents or information confirming that the borrower is not a military servicemember, the servicer may stop collecting documents or information from the borrower that the servicer would use to evaluate the borrower for that loss mitigation option. Making such a determination does not affect the servicer's obligation to exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application; the servicer must continue its efforts to obtain documents and information from the borrower that pertain to all other available loss mitigation options. A servicer may not stop collecting documents and information for any loss mitigation option based solely upon the borrower's stated preference for a particular loss mitigation option.

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4. * * *

iii. A servicer offers a borrower a short-term payment forbearance program or a short-term repayment plan based on an incomplete loss mitigation application; the servicer notifies the borrower that he or she is being offered a payment forbearance program or repayment plan based on an evaluation of an incomplete application, and that the borrower has the option of completing the application to receive a full evaluation of all loss mitigation options available to the borrower. If a servicer provides such a notification, the borrower remains in compliance with the payment forbearance program or repayment plan, and the borrower does not request further assistance, the servicer could suspend reasonable diligence efforts until near the end of the payment forbearance program or repayment plan. Near the end of the program or plan, and prior to the end of the forbearance or repayment period, if the borrower remains delinquent, a servicer should contact the borrower to determine if the borrower wishes to complete the application and proceed with a full loss mitigation evaluation.

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41(b)(2) Review of loss mitigation application submission.

41(b)(2)(i) Requirements.

1. *Foreclosure sale not scheduled.* For purposes of § 1024.41(b)(2)(i), if no foreclosure sale has been scheduled as of the date a loss mitigation application is received, a servicer must treat the application as having been received 45 days or more before any foreclosure sale.

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41(b)(2)(ii) Time period disclosure.

1. *Affording the borrower a reasonable period of time.* In setting a reasonable date for the return of documents and information under § 1024.41(b)(2)(ii), the servicer must allow a reasonable period of time for the borrower to obtain and submit documents and information necessary to make the loss mitigation application complete. Generally, a reasonable period of time would not be less than seven days.

2. *Maximizing protections.* A servicer must preserve maximum borrower rights under § 1024.41 in setting a reasonable date under § 1024.41(b)(2)(ii). Subject to comment 41(b)(2)(ii)–1, a servicer generally should not set a reasonable date that is further away than the nearest remaining milestone from the following list:

i. The date by which any document or information submitted by a borrower will be considered stale or invalid pursuant to any requirements applicable to any loss mitigation option available to the borrower;

ii. The date that is the 120th day of the borrower's delinquency;

iii. The date that is 90 days before a foreclosure sale;

iv. The date that is 38 days before a foreclosure sale.

3. *Flexibility in setting a reasonable date.* Subject to comments 41(b)(2)(ii)–1 and 2, a servicer has flexibility in selecting a reasonable date for the return of documents and information under § 1024.41(b)(2)(ii). A servicer may select any date that it determines both maximizes borrower rights under § 1024.41 and allows the borrower a reasonable period of time to obtain and submit documents and information necessary to make the loss mitigation application complete. For example, a servicer may set a reasonable date that is earlier than the nearest remaining milestone listed in comment 41(b)(2)(ii)–2 and does not need to select that milestone as the reasonable date itself.

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41(c) Evaluation of loss mitigation applications.

41(c)(2) Incomplete loss mitigation application evaluation.

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41(c)(2)(iii) Payment forbearance.

1. *Short-term payment forbearance program.* The exemption in § 1024.41(c)(2)(iii) applies to, among other things, short-term payment forbearance programs. A payment forbearance program is a loss mitigation option pursuant to which a servicer allows a borrower to forgo making certain payments or portions of payments for a period of time. A short-term payment forbearance program allows the forbearance of payments due over periods of no more than six months. Such a program would be short-term regardless of the amount of time a servicer allows the borrower to make up the missing payments.

2. *Payment forbearance and incomplete applications.* Section 1024.41(c)(2)(iii) allows a servicer to offer a borrower a short-term payment forbearance program or a short-term repayment plan based on an evaluation of an incomplete loss mitigation application. Such an incomplete loss mitigation application is still subject to the other obligations in § 1024.41, including the obligation in § 1024.41(b)(2) to review the application to determine if it is complete, the obligation in § 1024.41(b)(1) to exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application (see comment 41(b)(1)–4.iii), and the obligation to provide the borrower with the § 1024.41(b)(2)(i)(B) notice that the servicer acknowledges the receipt of the application and has determined the application is incomplete.

3. *Payment forbearance and complete applications.* Even if a servicer offers a borrower a short-term payment forbearance program or a short-term repayment plan based on an evaluation of an incomplete loss mitigation application, the servicer must still comply with all the requirements in § 1024.41 if the borrower completes his or her loss mitigation application.

4. *Short-term repayment plan.* The exemption in § 1024.41(c)(2)(iii) applies to, among other things, short-term repayment plans. A repayment plan is a loss mitigation option pursuant to which a servicer allows a borrower to repay past due payments over a specified period of time until the mortgage loan account is current. A short-term repayment plan allows for the repayment of no more than three months of payments due and allows a borrower to repay the arrearage over future payments for a period lasting no more than six months.

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41(c)(3) Notice of complete application.

Paragraph 41(c)(3)(i).

1. *Prompt notification.* Section 1024.41(c)(3)(i) requires that a servicer promptly provide a borrower with written notice that the servicer has received a complete loss mitigation application. Generally, a servicer complies with this requirement by providing the written notice within five days of receiving the complete application.

2. *Date that foreclosure protections began.* Notifications sent under § 1024.41(c)(3)(i) must state, among other things, the date on

which the borrower's protections began under § 1024.41(f)(2) and (g), as applicable. This date must be the date on which the application became either complete or facially complete, as applicable.

3. *Additional notices.* Section 1024.41(c)(3)(i) requires a servicer to provide a notification, subject to the exceptions under § 1024.41(c)(3)(ii), every time a loss mitigation application becomes complete. If, after providing a notice under § 1024.41(c)(3)(i), a servicer requests additional information or a corrected version of a previously submitted document required to complete the application in accordance with § 1024.41(c)(2)(iv), the servicer might have to provide an additional notice under § 1024.41(c)(3)(i) if the borrower completes the application. For example, when a borrower submits a complete application and the servicer provides the notice under § 1024.41(c)(3)(i), a servicer might later discover that it requires additional information regarding a source of income that the borrower previously identified to complete the application. In accordance with § 1024.41(c)(2)(iv) (and subject to that section's additional requirements), the servicer must request this additional information. If the borrower submits the additional information to complete the application, the servicer must provide another notice of complete application under § 1024.41(c)(3)(i).

41(c)(4) Information not in the borrower's control.

41(c)(4)(i) Diligence requirements.

1. *Within 30 days of receiving a complete application.* A servicer must act with reasonable diligence to collect information not in the borrower's control that the servicer requires to determine which loss mitigation options, if any, it will offer to the borrower. Further, a servicer must request such information from the appropriate person, at a minimum and without limitation:

i. Promptly upon determining that the servicer requires the documents or information to determine which loss mitigation options, if any, the servicer will offer the borrower; and

ii. To the extent practicable, by a date that will enable the servicer to complete the evaluation within 30 days of receiving the complete application as set forth under § 1024.41(c)(1).

2. *After the first 30 days.* If a servicer has not received documents or information not in the borrower's control within 30 days of receiving a complete loss mitigation application, the servicer acts with reasonable diligence by attempting to obtain the documents or information from the appropriate person as quickly as possible.

41(c)(4)(ii) Effect in case of delay.

1. *Third-party delay.* Various third parties, such as mortgage insurance companies, guarantors, owners, or assignees, might impose requirements on servicers pertaining to the loss mitigation evaluation process. A servicer must complete all possible steps in the evaluation process within 30 days of receiving a complete application, including by taking all steps mandated by such requirements, notwithstanding delay in receiving information from any third party. For example, if a servicer can determine a borrower's eligibility for all available loss mitigation options based upon the borrower's complete application subject only to approval from the mortgage insurance company, it must do so within 30 days of receiving the complete application notwithstanding the need to obtain such approval before offering any loss mitigation options to the borrower.

41(c)(4)(ii)(C) Providing notification of determination to borrower in case of delay.

1. *Timing.* If, due to a lack of documentation or information from a party other than the borrower or the servicer, a servicer is unable to determine which loss mitigation options, if any, to offer a borrower within 30 days of receiving a complete application, the servicer should not provide the borrower a written notice stating the servicer's determination until the servicer receives the documentation or information.

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41(g) Prohibition on foreclosure sale.

1. *Dispositive motion.* The prohibition on a servicer moving for judgment or order of sale includes making a dispositive motion for foreclosure judgment, such as a motion for default judgment, judgment on the pleadings, or summary judgment, which may directly result in a judgment of foreclosure or order of sale. A servicer that has made any such motion before receiving a complete loss mitigation application has not moved for a foreclosure judgment or order of sale if the servicer takes reasonable steps to avoid a ruling on such motion or issuance of such order prior to completing the procedures required by § 1024.41, even if the servicer's reasonable steps are unsuccessful in avoiding a ruling on a dispositive motion or issuance of an order of sale. Where a servicer or counsel retained by the servicer fails to take reasonable steps to avoid a ruling on such motion that was pending at the time a complete loss mitigation application is received or issuance of an order with respect to such a motion, the servicer must dismiss the foreclosure proceeding if necessary to avoid the sale.

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3. *Interaction with foreclosure counsel.* The prohibitions in § 1024.41(g) against moving for judgment or order of sale or conducting a sale may require a servicer to take steps through foreclosure counsel retained by the servicer in foreclosure proceedings. Thus, a servicer is not relieved of its obligations because the foreclosure counsel's actions or inaction caused a violation. If a servicer has received a complete loss mitigation application, the servicer must promptly instruct counsel not to make a dispositive motion for foreclosure judgment or order of sale; to take reasonable steps, where such a dispositive motion is pending, to avoid a ruling on the motion or issuance of an order of sale; and to take reasonable steps to delay the conduct of a foreclosure sale until the servicer satisfies one of the conditions in § 1024.41(g)(1) through (3). These instructions may include instructing counsel to move for a continuance with respect to the deadline for filing a dispositive motion or to move for or request that the foreclosure sale be stayed, otherwise delayed, or removed from the docket, or that the foreclosure proceeding be placed in any administrative status that stays the sale.

* * * * *

5. *Conducting a sale.* Section 1024.41(g) prohibits a servicer from conducting a foreclosure sale, even if a person other than the servicer administers or conducts the foreclosure sale proceedings. Where a foreclosure sale is scheduled, and none of the conditions under § 1024.41(g)(1) through (3) are applicable, the servicer must take reasonable steps to delay the foreclosure sale until one of the conditions under § 1024.41(g)(1) through (3) is met. Reasonable steps include, but are not limited to, requesting that a court or the official conducting the sale re-schedule or delay the sale or remove the sale from the docket, or place the foreclosure proceeding in any administrative status that stays the sale. If a servicer, or counsel retained by the servicer, fails to take reasonable steps to delay the foreclosure sale, or if a servicer fails to instruct counsel retained by the servicer to take such reasonable steps to delay a sale (see comment 41(g)-3), the servicer must dismiss the foreclosure proceeding.

* * * * *

41(i) Duplicative requests.

1. *Servicing transfers.* A transferee servicer is required to comply with the requirements of § 1024.41 regardless of whether a borrower received an evaluation of a complete loss mitigation application from a transferor servicer.

* * * * *

41(k) Servicing transfers.

1. *Pending loss mitigation application.* For purposes of § 1024.41(k), a loss mitigation application is pending if it was subject to § 1024.41 and had not been fully resolved before the transfer date. For example, a loss mitigation application would not be considered pending if a transferor servicer had denied a borrower for all options and the borrower's time for making an appeal, if any, had expired prior to the transfer date, such that the transferor servicer had no continuing obligations under § 1024.41 with respect to the application. A pending application is considered a pending complete application if it was complete as of the transfer date under the transferor servicer's criteria for evaluating loss mitigation applications.

41(k)(1) In general.

41(k)(1)(i) Timing of compliance.

1. *Obtaining loss mitigation documents and information.* i. In connection with a transfer, a transferee servicer must obtain from the transferor servicer documents and information submitted by a borrower in connection with a loss mitigation application, consistent with policies and procedures adopted pursuant to § 1024.38. A transferee servicer must comply with the applicable requirements of § 1024.41 with respect to a loss mitigation application received as a result of a transfer, even if the transferor servicer was not required to comply with § 1024.41 with respect to that application (for example, because § 1024.41(i) precluded applicability of § 1024.41 with respect to the transferor servicer). If an application was not subject to

§ 1024.41 prior to a transfer, then for purposes of § 1024.41(b) and (c), a transferee servicer is considered to have received a loss mitigation application on the transfer date.

ii. A transferee servicer must, in accordance with § 1024.41(b), exercise reasonable diligence to complete a loss mitigation application received as a result of a transfer. In the transfer context, reasonable diligence includes ensuring that a borrower is informed of any changes to the application process, such as a change in the address to which the borrower should submit documents and information to complete the application, as well as ensuring that the borrower is informed about which documents and information are necessary to complete the application.

2. *Determination of protections.* For purposes of § 1024.41(e) through (h), a transferee servicer must consider documents and information that constitute a complete loss mitigation application for the transferee servicer to have been received as of the date such documents and information were received by the transferor servicer. An application that was facially complete with respect to the transferor servicer remains facially complete with respect to the transferee servicer as of the date it was facially complete with respect to the transferor servicer. If an application was complete with respect to the transferor servicer, but is not complete with respect to the transferee servicer, the transferee servicer must treat the application as facially complete as of the date the application was complete with respect to the transferor servicer.

3. *Duplicative notices not required.* A transferee servicer is not required to provide notices under § 1024.41 with respect to a particular loss mitigation application that the transferor servicer provided prior to the transfer. For example, if the transferor servicer provided the notice required by § 1024.41(b)(2)(i)(B) prior to the transfer, the transferee servicer is not required to provide the notice again for that application. For example, if the transferor servicer provided the notice required by § 1024.41(b)(2)(i)(B) prior to the transfer, the transferee servicer is not required to provide the notice again for that application.

41(k)(1)(ii) Transfer date defined.

1. *Transfer date.* Section 1024.41(k)(1)(ii) provides that the transfer date is the date on which the transfer of the servicing responsibilities from the transferor servicer to the transferee servicer occurs. The transfer date corresponds to the date the transferee servicer will begin accepting payments relating to the mortgage loan, which must be disclosed on the notice of transfer of loan servicing pursuant to § 1024.33(b)(4)(iv). The transfer date may not necessarily be the same date as the sale date identified in a servicing transfer agreement.

41(k)(3) Complete loss mitigation applications pending at transfer.

41(k)(3)(i) In general.

1. *Additional information or corrections to a previously submitted document.* If a transferee servicer acquires the servicing of a mortgage loan for which a complete loss mitigation application is pending as of the transfer date and the transferee servicer determines that additional information or a correction to a previously submitted document is required based upon its criteria for evaluating loss mitigation applications, the application is considered facially complete under § 1024.41(c)(2)(iv) as of the date it was first facially complete or complete, as applicable, with respect to the transferor servicer. Once the transferee servicer receives the information or corrections necessary to complete the application, § 1024.41(c)(3) requires the transferee servicer to provide a notice of complete application. An application that was complete with respect to the transferor servicer remains complete even if the transferee servicer requests that a borrower resubmit the same information in the transferee servicer's specified format or make clerical corrections to the application. A borrower's failure to resubmit such information or make such clerical corrections does not extend the time in which the transferee servicer must complete the evaluation of the borrower's complete application.

2. *Applications first complete upon transfer.* If the borrower's loss mitigation application was incomplete based on the transferor servicer's criteria prior to transfer but the transferee servicer determines that the application is complete based upon its own criteria, the application is considered a pending loss mitigation application complete as of the transfer date for purposes of § 1024.41(k)(3). For purposes of § 1024.41(e) through (h), the application is complete as of the date the transferor servicer received the documents and information constituting the complete application. *See* comment 41(k)(1)-2. In such circumstances, § 1024.41(c)(3) requires a transferee servicer to provide a notice of complete application.

41(k)(3)(iii) Compliance not practicable.

1. *Reasonably prompt time.* Section 1024.41(k)(3)(iii) requires that if compliance with the time periods set forth in § 1024.41(k)(3)(i) or (ii)(A), as applicable, is not practicable under the circumstances, a transferee servicer must complete the evaluation of the complete loss mitigation application and provide the applicable notices required by § 1024.41(c)(1) and (4) within a reasonably prompt time. In general, completing the evaluation and providing the applicable notices within an additional five days after the expiration of the time periods set forth in § 1024.41(k)(3)(i) or (ii)(A) would be considered reasonably prompt.

41(k)(4) Applications subject to appeal process.

1. *Servicer unable to evaluate appeal.* A transferee servicer may be unable to evaluate an appeal when, for example, the transferor servicer denied a borrower for a loan modification option that the transferee servicer does not offer or when the transferee servicer receives the mortgage loan through an involuntary transfer and the transferor servicer failed to maintain proper records such that the transferee servicer lacks sufficient information to evaluate the appeal. In that circumstance, the transferee servicer is required to treat the appeal as a pending complete application and it must permit the borrower to accept or reject any loss mitigation options offered by the transferor servicer, in addition to the loss mitigation options, if any, that the transferee servicer determines to offer the borrower based on its own evaluation of the borrower's complete loss mitigation application. For example, assume a transferor servicer denied a borrower for all loan modification options but offered the borrower a short sale option, and assume that the borrower's appeal of the loan modification denials was pending as of the transfer date. If the transferee servicer is unable to evaluate the borrower's appeal, the transferee servicer must evaluate the borrower for all available loss mitigation options in accordance with § 1024.41(c) and (k)(3). At the conclusion of such evaluation, the transferee servicer must permit the borrower to accept the short sale option offered by the transferor servicer in addition to any loss mitigation options the transferee servicer determines to offer the borrower based upon its own evaluation.

2. *Reasonably prompt time.* Section 1024.41(k)(5) requires that if a servicer is able to determine the outcome of an appeal, but compliance within 30 days of when the borrower made the appeal is not practicable under the circumstances, a transferee servicer must complete the determination and provide the notice required by § 1024.41(h)(4) within a reasonably prompt time. In general, completing the evaluation and providing the notice within an additional five days after the expiration of the original 30-day evaluation period would be considered reasonably prompt.

41(k)(5) Pending loss mitigation offers.

1. *Obtaining evidence of borrower acceptance.* A transferee servicer should expect that a borrower may provide an acceptance to the transferor servicer after the transfer date, and, in accordance with policies and procedures maintained pursuant to § 1024.38(b)(4), a transferee servicer must obtain information or documents reflecting such acceptances from the transferor servicer and provide the borrower with the accepted loss mitigation option.

PART 1026—TRUTH IN LENDING (REGULATION Z)

■ 12. The authority citation for part 1026 continues to read as follows:

Authority: 12 U.S.C. 2601, 2603–2605, 2607, 2609, 2617, 5511, 5512, 5532, 5581; 15 U.S.C. 1601 *et seq.*

Subpart A—General

■ 13. Section 1026.2 is amended by revising paragraph (a)(11) and adding paragraph (a)(27) to read as follows:

§ 1026.2 Definitions and rules of construction.

* * * * *

(a) * * *

(11) *Consumer* means a cardholder or natural person to whom consumer credit is offered or extended. However, for purposes of rescission under §§ 1026.15 and 1026.23, the term also

includes a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person's ownership interest in the dwelling is or will be subject to the security interest; and for purposes of §§ 1026.20(c) through (e), 1026.36(c), and 1026.41, the term includes a successor in interest once a servicer confirms the successor in interest's identity and ownership interest in the dwelling.

* * * * *

(27) *Successor in interest* means a person to whom an ownership interest in a dwelling securing a closed-end consumer credit transaction is transferred from a prior consumer, provided that the transfer falls under an exemption specified in section 341(d) of the Garn-St Germain Depository Institutions Act of 1982 (12 U.S.C. 1701j-3(d)).

* * * * *

Subpart E—Special Rules for Certain Home Mortgage Transactions

■ 14. Section 1026.36 is amended by revising paragraphs (c)(1) introductory text and (c)(2) introductory text to read as follows:

§ 1026.36 Prohibited acts or practices and certain requirements for credit secured by a dwelling.

* * * * *

(c) * * *

(1) *Payment processing.* In connection with a closed-end consumer credit transaction secured by a consumer's principal dwelling:

* * * * *

(2) *No pyramiding of late fees.* In connection with a closed-end consumer credit transaction secured by a consumer's principal dwelling, a servicer shall not impose any late fee or delinquency charge for a payment if:

* * * * *

■ 15. Section 1026.41 is amended by revising paragraphs (d)(8)(i) and (e)(4)(iii)(A), adding paragraph (e)(4)(iii)(D), revising paragraph (e)(5), and adding paragraphs (e)(6) and (f) to read as follows:

§ 1026.41 Periodic statements for residential mortgage loans.

* * * * *

(d) * * *

(8) * * *

(i) The length of the consumer's delinquency, as of the date of the periodic statement;

* * * * *

(e) * * *

(4) * * *

(iii) * * *

(A) Mortgage loans voluntarily serviced by the servicer for a non-affiliate of the servicer and for which the servicer does not receive any compensation or fees.

* * * * *

(D) Transactions serviced by the servicer for a seller financer that meet all of the criteria identified in 12 CFR 1026.36(a)(5).

(5) *Certain Consumers in Bankruptcy*—(i) *Exemption.* A servicer is exempt from the requirements of this section, except as provided in paragraph (e)(5)(ii) of this section, with respect to a consumer if:

(A) The consumer is a debtor in a case under the U.S. Bankruptcy Code; the consumer is a primary obligor on a mortgage loan for which another primary obligor is a debtor in a Chapter 12 or Chapter 13 case under the U.S. Bankruptcy Code; or the consumer has discharged personal liability for the mortgage loan pursuant to 11 U.S.C. 727, 1141, 1228, or 1328; and

(B) One of the following conditions is satisfied:

(*1*) The consumer requests in writing that the servicer cease providing periodic statements or coupon books;

(*2*) The consumer's confirmed plan of reorganization provides that the consumer will surrender the dwelling securing the mortgage loan, provides for the avoidance of the lien securing the mortgage loan, or otherwise does not provide for, as applicable, the payment of pre-bankruptcy arrearage or the maintenance of payments due under the mortgage loan;

(*3*) A court enters an order in the consumer's bankruptcy case providing for the avoidance of the lien securing the mortgage loan, lifting the automatic stay pursuant to 11 U.S.C. 362 with respect to the dwelling securing the mortgage loan, or requiring the servicer to cease providing periodic statements or coupon books; or

(*4*) The consumer files with the court overseeing the consumer's bankruptcy case a Statement of Intention pursuant to 11 U.S.C. 521(a) identifying an intent to surrender the dwelling securing the mortgage loan.

(ii) *Resuming compliance*—(A) *Consumer request.* Notwithstanding paragraph (e)(5)(i) of this section, a servicer must comply with the requirements of this section if the consumer requests in writing that the servicer continue providing periodic statements or coupon books, unless a court enters an order in the consumer's bankruptcy case requiring the servicer to cease providing periodic statements or coupon books. A servicer must resume providing periodic statements or coupon books in compliance with paragraph (f) of this section within a reasonably prompt time after the next payment due date that follows a servicer's receipt of a consumer's written request.

(B) *Termination of bankruptcy case.* With respect to any portion of the mortgage debt that is not discharged pursuant to 11 U.S.C. 727, 1141, 1228, or 1328, a servicer must resume providing periodic statements or coupon books in compliance with this section within a reasonably prompt time after the next payment due date that follows the earliest of the following outcomes in either the consumer's or the joint obligor's bankruptcy case, as applicable: the case is dismissed, the case is closed, the consumer reaffirms the mortgage loan under 11 U.S.C. 524, or the consumer receives a discharge under 11 U.S.C. 727, 1141, 1228, or 1328.

(6) *Charged-off loans.* A servicer is exempt from the requirements of this section for a mortgage loan if the servicer:

(i) Has charged off the loan in accordance with loan-loss provisions and will not charge any additional fees or interest on the account; and

(ii) Provides, within 30 days of charge off or the most recent periodic statement, a final periodic statement, clearly and conspicuously labeled ''Final Statement—Retain This Copy for Your Records.'' The final periodic statement must explain in simple and clear terms that: the mortgage loan has been charged off and the servicer will not charge any additional fees or interest on the account; the lien on the property remains in place and the consumer remains liable for the mortgage loan obligation; the consumer may be required to pay the balance on the account in the future, for example, upon sale of the property; the balance on the account is not being cancelled or forgiven; and the loan may be purchased, assigned, or transferred.

(f) *Modified periodic statements and coupon books for certain consumers in bankruptcy.* With respect to a consumer who is a debtor in a case under the U.S. Bankruptcy Code or has discharged personal liability for a mortgage loan under 11 U.S.C. 727, 1141, 1228, or 1328, the requirements of this section are subject to the following modifications:

(1) *Requirements not applicable.* The periodic statement may omit the information set forth in paragraphs (d)(1)(ii) and (d)(8)(i), (ii), and (v) of this section. The requirement in paragraph (d)(1)(iii) of this section to show the

amount due more prominently than other disclosures on the page shall not apply.

(2) *Bankruptcy notices.* The periodic statement must include the following on the first page:

(i) A statement identifying the consumer's status as a debtor in bankruptcy or the discharged nature of the mortgage loan; and

(ii) A statement that the periodic statement is for informational purposes only.

(3) *Chapter 12 and Chapter 13 consumers.* With respect to a consumer who is a debtor in a Chapter 12 or Chapter 13 bankruptcy case, the requirements of this section are subject to the following additional modifications:

(i) *Requirements not applicable.* In addition to omitting the information set forth in paragraph (f)(1) of this section, the periodic statement may also omit the information set forth in paragraphs (d)(8)(iii), (iv), (vi), and (vii) of this section.

(ii) *Amount due.* The amount due information set forth in paragraph (d)(1) of this section may be limited to the date and amount of the post-petition payments due and any post-petition fees and charges imposed by the servicer.

(iii) *Explanation of amount due.* The explanation of amount due information set forth in paragraph (d)(2) of this section may be limited to the post-petition payments and any post-petition fees and charges imposed by the servicer.

(iv) *Past payment breakdown.* The items required by paragraph (d)(3) of this section must include the following:

(A) The total of all post-petition payments received since the last statement, including a breakdown showing the amount, if any, that was applied to principal, interest, and escrow, and the amount, if any, sent to any suspense or unapplied funds account;

(B) The total of all post-petition payments received since the beginning of the current calendar year, including a breakdown of that total showing the amount, if any, that was applied to principal, interest, escrow, and the amount, if any, currently held in any suspense or unapplied funds account;

(C) The total of all payments applied to post-petition fees or charges since the last statement; and

(D) The total of all payments applied to post-petition fees or charges since the beginning of the current calendar year.

(v) *Transaction activity.* The transaction activity information set forth in paragraph (d)(4) of this section must include any post-petition payments, pre-petition payments, and payments of post-petition fees or charges the servicer has received since the last statement.

(vi) *Pre-petition arrearage.* If applicable, a servicer must include the following, grouped in close proximity to each other:

(A) The total of all pre-petition payments received since the last statement;

(B) The total of all pre-petition payments received since the beginning of the current calendar year; and

(C) The current balance of the consumer's pre-petition arrearage.

(vii) *Additional disclosures.* The periodic statement must include the following, as applicable:

(A) A statement that the amount due includes only post-petition payments and does not include other payments that may be due under the terms of the consumer's bankruptcy plan;

(B) A statement that, if the consumer's plan of reorganization requires the consumer to make the post-petition mortgage payments directly to a bankruptcy trustee, the consumer should send the payment to the trustee and not to the servicer;

(C) A statement that the information disclosed on the periodic statement may not reflect payments the consumer has made to the trustee and may not be consistent with the trustee's records; and

(D) A statement that encourages the consumer to contact the consumer's attorney or the trustee with questions regarding the application of payments.

(4) *Multiple obligors.* If a servicer is required to provide periodic statements with the modifications set forth in § 1026.41(f) in connection with a mortgage loan with more than one primary obligor, the servicer may provide the modified statements to any or all of the primary obligors and need not provide any statements that do not include the modifications set forth paragraphs (f)(1) through (3) of this section, even if not all of the primary obligors are debtors in bankruptcy.

(5) *Coupon books.* A servicer that provides a coupon book instead of regular periodic statement under paragraph (e)(3) of this section must include in the coupon book the disclosures set forth in paragraph (f)(2) and (f)(3)(vii) of this section, as applicable. The servicer may include these disclosures anywhere in the coupon book provided to the consumer or on a separate page enclosed with the coupon book. The servicer must make available upon request to the consumer by telephone, in writing, in person, or electronically, if the consumer consents, the information listed in paragraph (f)(3)(vi) of this section, as applicable. The modifications set forth in paragraph (f)(1) and (f)(3)(i) through (v) and (vii) of this section apply to coupon books and other information a servicer provides to the consumer under paragraph (e)(3) of this section.

■ 16. Appendix H to part 1026 is amended by:

■ A. Revising the entry for H–30(C) in the table of contents at the beginning of the appendix;

■ B. Adding entries for H–30(E) and H–30(F) in the table of contents at the beginning of the appendix;

■ C. Revising H–4(C);

■ D. Revising H–14;

■ E. Republishing H–30(C); and

■ F. Adding H–30(E) and H–30(F).

The additions, republication, and revisions read as follows:

Appendix H to Part 1026— Closed-End Model Forms and Clauses

* * * * *

H–30(C) Sample Form of Periodic Statement for a Payment-Option Loan (§ 1026.41)

* * * * *

H–30(E) Sample Form of Periodic Statement for Consumer in Chapter 7 or Chapter 11 Bankruptcy

H–30(F) Sample Form of Periodic Statement for Consumer in Chapter 12 or Chapter 13 Bankruptcy

* * * * *

H–4(C)—Variable Rate Model Clauses

This disclosure describes the features of the adjustable-rate mortgage (ARM) program you are considering. Information on other ARM programs is available upon request.

How Your Interest Rate and Payment Are Determined

• Your interest rate will be based on [an index plus a margin] [a formula].

• Your payment will be based on the interest rate, loan balance, and loan term.

—[The interest rate will be based on (identification of index) plus our margin. Ask for our current interest rate and margin.]

—[The interest rate will be based on (identification of formula). Ask us for our current interest rate.]

—Information about the index [formula for rate adjustments] is published [can be found] _____.

—[The initial interest rate is not based on the (index) (formula) used to make later adjustments. Ask us for the amount of current interest rate discounts.]

How Your Interest Rate Can Change

• Your interest rate can change (frequency).

• [Your interest rate cannot increase or decrease more than ____ percentage points at each adjustment.]

• Your interest rate cannot increase [or decrease] more than ____ percentage points over the term of the loan.

How Your Payment Can Change

• Your payment can change (frequency) based on changes in the interest rate.

• [Your payment cannot increase more than (amount or percentage) at each adjustment.]

• [You will be notified at least 210, but no more than 240, days before first payment at the adjusted level is due after the initial interest rate adjustment of the loan. This notice will contain information about the adjustment, including the interest rate, payment amount, and loan balance.]

• [You will be notified at least 60, but no more than 120, days before first payment at the adjusted level is due after any interest rate adjustment resulting in a corresponding payment change. This notice will contain information about the adjustment, including the interest rate, payment amount, and loan balance.]

• [For example, on a $10,000 [term] loan with an initial interest rate of ____ [(the rate shown in the interest rate column below for the year 19 ____)] [(in effect (month) (year)], the maximum amount that the interest rate can rise under this program is ____ percentage points, to ____%, and the monthly payment can rise from a first-year payment of $____ to a maximum of $____ in the ____ year. To see what your payments would be, divide your mortgage amount by $10,000; then multiply the monthly payment by that amount. (For example, the monthly payment for a mortgage amount of $60,000 would be: $60,000 ÷ $10,000 = 6; 6 × ____ = $____ per month.)]

[Example

The example below shows how your payments would have changed under this ARM program based on actual changes in the index from 1982 to 1996. This does not necessarily indicate how your index will change in the future.

The example is based on the following assumptions:

Amount	$10,000
Term	
Change date	
Payment adjustment	(frequency)
Interest adjustment	(frequency)
[Margin]*	

Caps ____ [periodic interest rate cap]
____ [lifetime interest rate cap
____ [payment cap]
[Interest rate carryover]
[Negative amortization]
[Interest rate discount]**
Index(identification of index or formula)

*This is a margin we have used recently, your margin may be different.

**This is the amount of a discount we have provided recently; your loan may be discounted by a different amount.]

Year	Index (%)	Margin (percentage points)	Interest rate (%)	Monthly payment ($)	Remaining balance ($)
1982					
1983					
1984					
1985					
1986					
1987					
1988					
1989					
1990					
1991					
1992					
1993					
1994					
1995					
1996					

Note: To see what your payments would have been during that period, divide your mortgage amount by $10,000; then multiply the monthly payment by that amount. (For example, in 1996 the monthly payment for a mortgage amount of $60,000 taken out in 1982 would be: $60,000 ÷ $10,000 = 6; 6 × ____ = $____ per month.)

* * * * *

H–14—Variable-Rate Mortgage Sample

This disclosure describes the features of the adjustable-rate mortgage (ARM) program you are considering. Information on other ARM programs is available upon request.

How Your Interest Rate and Payment Are Determined

• Your interest rate will be based on an index rate plus a margin.

• Your payment will be based on the interest rate, loan balance, and loan term.

—The interest rate will be based on the weekly average yield on United States Treasury securities adjusted to a constant maturity of 1 year (your index), plus our margin. Ask us for our current interest rate and margin.

—Information about the index rate is published weekly in the Wall Street Journal.

• Your interest rate will equal the index rate plus our margin unless your interest rate ''caps'' limit the amount of change in the interest rate.

How Your Interest Rate Can Change

• Your interest rate can change yearly.

• Your interest rate cannot increase or decrease more than 2 percentage points per year.

• Your interest rate cannot increase or decrease more than 5 percentage points over the term of the loan.

How Your Monthly Payment Can Change

• Your monthly payment can increase or decrease substantially based on annual changes in the interest rate.

• [For example, on a $10,000, 30-year loan with an initial interest rate of 12.41 percent in effect in July 1996, the maximum amount that the interest rate can rise under this program is 5 percentage points, to 17.41 percent, and the monthly payment can rise from a first-year payment of $106.03 to a maximum of $145.34 in the fourth year. To see what your payment is, divide your mortgage amount by $10,000; then multiply the monthly payment by that amount. (For example, the monthly payment for a mortgage amount of $60,000 would be: $60,000÷$10,000=6; 6×106.03=$636.18 per month.)]

• [You will be notified at least 210, but no more than 240, days before first payment at the adjusted level is due after the initial interest rate adjustment of the loan. This notice will contain information about the adjustment, including the interest rate, payment amount, and loan balance.]

• [You will be notified at least 60, but no more than 120, days before first payment at the adjusted level is due after any interest rate adjustment resulting in a corresponding payment change. This notice will contain information about the adjustment, including the interest rate, payment amount, and loan balance.]

[Example

The example below shows how your payments would have changed under this ARM program based on actual changes in the index from 1982 to 1996. This does not necessarily indicate how your index will change in the future. The example is based on the following assumptions:

Amount	$10,000
Term	30 years
Payment adjustment	1 year
Interest adjustment	1 year
Margin	3 percentage points

Caps____2 2 percentage points annual interest rate

____5 5 percentage points lifetime interest rate Index____W Weekly average yield on U.S. Treasury securities adjusted to a constant maturity of one year.

Year (as of 1st week ending in July)	Index (%)	Margin * (percentage points)	Interest rate (%)	Monthly payment ($)	Remaining balance ($)
1982	14.41	3	17.41	145.90	9,989.37
1983	9.78	3	** 15.41	129.81	9,969.66
1984	12.17	3	15.17	127.91	9,945.51
1985	7.66	3	** 13.17	112.43	9,903.70
1986	6.36	3	*** 12.41	106.73	9,848.94
1987	6.71	3	*** 12.41	106.73	9,786.98
1988	7.52	3	*** 12.41	106.73	9,716.88
1989	7.97	3	*** 12.41	106.73	9,637.56
1990	8.06	3	*** 12.41	106.73	9,547.83
1991	6.40	3	*** 12.41	106.73	9,446.29
1992	3.96	3	*** 12.41	106.73	9,331.56
1993	3.42	3	*** 12.41	106.73	9,201.61
1994	5.47	3	*** 12.41	106.73	9,054.72
1995	5.53	3	*** 12.41	106.73	8,888.52
1996	5.82	3	*** 12.41	106.73	8,700.37

* This is a margin we have used recently; your margin may be different.
** This interest rate reflects a 2 percentage point annual interest rate cap.
*** This interest rate reflects a 5 percentage point lifetime interest rate cap.
Note: To see what your payments would have been during that period, divide your mortgage amount by $10,000; then multiply the monthly payment by that amount. (For example, in 1996 the monthly payment for a mortgage amount of $60,000 taken out in 1982 would be: $60,000÷$10,000=6; 6×$106.73=$640.38.)]

• [You will be notified at least 210, but no more than 240, days before first payment at the adjusted level is due after the initial interest rate adjustment of the loan. This notice will contain information about the adjustment, including the interest rate, payment amount, and loan balance.]

• [You will be notified at least 60, but no more than 120, days before first payment at the adjusted level is due after any interest rate adjustment resulting in a corresponding payment change. This notice will contain information about the adjustment, including the interest rate, payment amount, and loan balance.]

* * * * *

H–30(C) Sample Form of Periodic Statement for a Payment-Option Loan

BILLING CODE 4810–AM–C

Springside Mortgage
Customer Service: 1-800-555-1234
www.springsidemortgage.com

Mortgage Statement
Statement Date: 3/20/2012

Jordan and Dana Smith
4700 Jones Drive
Memphis, TN 38109

Account Number		**1234567**
Payment Due Date		**4/1/2012**
Amount Due	**Option 1 (Full):**	**$1,829.71**
	Option 2 (Interest-Only):	**$1,443.25**
	Option 3 (Minimum):	**$1,156.43**

If payment is received after 4/15/12, $160 late fee will be charged.

Account Information	
Outstanding Principal	$260,000.00
Interest Rate (Until October 2012)	4.75%
Prepayment Penalty	Yes

Explanation of Amount Due

	Option 1 (Full)	Option 2 (Interest-Only)	Option 3 (Minimum)
Principal	$386.46	$0	$0
Interest	$1,048.07	$1,048.07	$761.25
Escrow (Taxes and Insurance)	$235.18	$235.18	$235.18
Regular Monthly Payment	**$1,669.71**	**$1,283.25**	**$996.43**
Total Fees and Charges	$160.00	$160.00	$160.00
Total Amount Due	**$1,829.71**	**$1,443.25**	**$1,156.43**
If you make this payment...	... your principal balance will decrease, and you will be closer to paying off your loan.	... your principal balance will stay the same, and you will not be closer to paying off your loan.	... **your principal balance will increase.** You will be borrowing more money and losing equity in your home.

Transaction Activity (2/20 to 3/19)

Date	Description	Charges	Payments
3/16/12	Late Fee (charged because payment was received after 3/15/2012)	$160.00	
3/19/12	Payment Received -- Thank you		$1,669.71

Past Payments Breakdown

	Paid Last Month	Paid Year to Date
Principal	$384.93	$1,150.25
Interest	$1,049.60	$3,153.34
Escrow (Taxes and Insurance)	$235.18	$705.54
Fees	$0.00	$0.00
Total	**$1,669.71**	**$5,009.13**

Springside Mortgage

Springside Mortgage
P.O. Box 11111
Los Angeles, CA 90010

Amount Due		
Due By 4/1/2012:	❑ **Option 1 (Full):**	**$1,829.71**
	❑ **Option 2 (Interest-Only):**	**$1,443.25**
	❑ **Option 3 (Minimum):**	**$1,156.43**
	$160 late fee will be charged after 4/15/12	
Additional Principal	$	.
Additional Escrow	$	.
Total Amount Enclosed	**$**	**.**

Make check payable to Springside Mortgage.

1234567 34571892 342359127 P

* * * * *

H–30(E) Sample Form of Periodic Statement for Consumer in Chapter 7 or Chapter 11 Bankruptcy

Springside Mortgage
Customer Service: 1-800-555-1234
www.springsidemortgage.com

Mortgage Statement
Statement Date: 3/20/2015

Jordan and Dana Smith
4700 Jones Drive
Memphis, TN 38109

Account Number	**1234567**
Payment Date	**4/1/2015**
Payment Amount	**$4,339.13**

Bankruptcy Notice

Our records reflect that you are presently a debtor in an active bankruptcy case or you previously received a discharge in bankruptcy. This statement is being sent to you for informational and compliance purposes only. It should not be construed as an attempt to collect a debt against you personally.

Explanation of Payment Amount

Principal	$386.46
Interest	$1,048.07
Escrow (Taxes and Insurance)	$235.18
Regular Monthly Payment	**$1,669.71**
Total Fees and Charges	$410.00
Unpaid past payments	$2,259.42
Total Payment Amount	**$4,339.13**

Account Information

Outstanding Principal	$264,776.43
Interest Rate (Until October 2015)	4.75%
Prepayment Penalty	Yes

Transaction Activity (2/20 to 3/19)

Date	Description	Charges	Payments
3/13/15	Partial Payment Received*		$1,000.00
3/16/15	Late Fee (charged because full payment not received by 3/15/2015)	$160.00	
3/19/15	Property Inspection Fee	$250.00	

Past Payments Breakdown

	Paid Last Month	Paid Year to Date
Principal	$0.00	$383.31
Interest	$0.00	$1,051.22
Escrow (Taxes and Insurance)	$0.00	$235.18
Fees	$0.00	$410.00
Partial Payment (Unapplied)*	$1,000.00	$1,490.00
Total	**$1,000.00**	**$3,569.71**

Important Messages

***Partial Payments:** Any partial payments that you make are not applied to your mortgage, but instead are held in a separate suspense account. If you pay the balance of a partial payment, the funds will then be applied to your mortgage.

****Account History****

Recent Account History

- Payment due 12/1/14: Fully paid on time
- Payment due 1/1/15: Fully paid on 2/3/15
- Payment due 2/1/15: Unpaid balance of $589.71
- Payment due 3/1/15: Unpaid balance of $2,079.71
- Current payment date 4/1/15: $1,669.71
- **Total: $4,339.13 unpaid amounts.**

If You Are Experiencing Financial Difficulty: See back for information about mortgage counseling or assistance.

Springside Mortgage

Springside Mortgage
P.O. Box 11111
Los Angeles, CA 90010

If you are currently a party in a bankruptcy case and you choose to make a voluntary payment, detach and return bottom remittance portion with your payment. Make any checks payable to Springside Mortgage.

Payment Amount

Payment Date:	**4/1/2015**
Payment Amount:	**$4,339.13**
Additional Principal	$.
Additional Escrow	$.
Total Amount Enclosed	$.

1234567 34571892 342359127 DN

H–30(F) Sample Form of Periodic Statement for Consumer in Chapter 12 or Chapter 13 Bankruptcy

Springside Mortgage
Customer Service: 1-800-555-1234
www.springsidemortgage.com

Mortgage Statement
Statement Date: 3/20/2015

Jordan and Dana Smith
4700 Jones Drive
Memphis, TN 38109

Account Number	**1234567**
Post-Petition Payment Date	**4/1/2015**
Post-Petition Payment Amount	**$1,939.94**

Under your bankruptcy plan, the Trustee may be making payments on your mortgage and other debts. You should contact the Trustee or your attorney if you have any questions about who is responsible for your mortgage payments.

Bankruptcy Notice

Our records reflect that you are presently a debtor in an active bankruptcy case or you previously received a discharge in bankruptcy. This statement is being sent to you for informational and compliance purposes only. It should not be construed as an attempt to collect a debt against you personally.

The information disclosed on the periodic statement may not reflect payments you have made to the Trustee and may not be consistent with the Trustee's records. Please contact the Trustee or your attorney if you have any questions regarding this matter.

Explanation of Payment Amount

Principal	$501.63
Interest	$1,063.31
Escrow (Taxes and Insurance)	$375.00
Regular Monthly Payment	**$1,939.94**
Total Fees and Charges	$0.00
Unpaid post-petition payments	$0.00
Total Post-Petition Payment Amount	**$1,939.94**

Account Information

Outstanding Principal	$271,043.06
Interest Rate (Until October 2015)	4.75%
Prepayment Penalty	Yes

Transaction Activity (2/20 to 3/19)

Date	Description	Charges	Payments
3/4/15	Payment Received		$1,939.94
3/17/15	Payment Received		$336.43

Post-Petition Payments Breakdown

	Paid Last Month	Paid Year to Date
Principal	$499.65	$1,493.04
Interest	$1,065.29	$3,201.78
Escrow (Taxes and Insurance)	$375.00	$1,125.00
Fees	$0.00	$0.00
Partial Payment (Unapplied)	$0.00	$0.00
Total	**$1,939.94**	**$5,819.82**

Pre-Petition Arrearage Payments

Paid Last Month	Paid Year to Date	Current Balance of Pre-Petition Arrearage
$336.43	$1,009.29	$10,093.00

Springside Mortgage

Springside Mortgage
P.O. Box 11111
Los Angeles, CA 90010

If your bankruptcy plan requires you to make your ongoing post-petition mortgage payments directly to a bankruptcy Trustee, then do not send your payment to us. Rather, send your payment to the Trustee as directed in your bankruptcy plan.

Payment Amount

Post-Petition Payment Date:	**4/1/2015**
Post-Petition Payment Amount:	**$1,939.94**
Additional Principal	$
Additional Escrow	$
Total Amount Enclosed	**$**

1234567 34571892 342359127 DN

BILLING CODE 4810–AM–P

* * * * *

■ 17. In Supplement I to part 1026:

■ A. Under *Section 1026.2—Definitions and Rules of Construction:*

■ i. Under *2(a)(11) Consumer,* paragraph 4 is added.

■ B. Under *Section 1026.36—Prohibited Acts or Practices and Certain Requirements for Credit Secured by a Dwelling:*

■ i. Under *36(c) Servicing practices:*

■ a. Under *Paragraph 36(c)(1)(i),* paragraphs 4 and 5 are added.

■ C. Under *Section 1026.41—Periodic Statements for Residential Mortgage Loans:*

■ i. Under *41(a) In general,* paragraph 5 is added.

■ ii. Under *41(d) Content and layout of the periodic statement,* paragraph 1 is revised and paragraphs 4 and 5 are added.

■ a. The heading *41(d)(1) Amount due* is added, and paragraphs 1 through 3 under that heading are added.

■ b. The heading *41(d)(2) Explanation of amount due* is added, and paragraphs 1 and 2 under that heading are added.

■ c. The heading *41(d)(8) Delinquency information* is added, and paragraphs 1 and 2 under that heading are added.
■ iii. Under *41(e)(5) Consumers in bankruptcy,* the heading is revised.
■ iv. Under revised heading *41(e)(5) Certain consumers in bankruptcy,* paragraph 1 is revised and paragraphs 2 and 3 are removed.
■ a. The heading *41(e)(5)(i) Exemption* is added, and paragraphs 1 and 2 under that heading are added.
■ b. The heading *Paragraph 41(e)(5)(i)(B)(4)* is added, and paragraph 1 under that heading is added.
■ c. The heading *41(e)(5)(ii) Resuming compliance* is added, and paragraphs 1 through 3 under that heading are added.
■ v. The heading *41(e)(6) Charged-off loans* is added, and paragraphs 1 and 2 under that heading are added.
■ vi. The heading *41(f) Modified periodic statements and coupon books for certain consumers in bankruptcy* is added, and paragraphs 1 through 3 under that heading are added.
■ a. The heading *41(f)(3) Chapter 12 and Chapter 13 consumers* is added, and paragraphs 1 through 4 under that heading are added.
■ c. The heading *41(f)(3)(ii) Amount due* is added, and paragraph 1 under that heading is added.
■ d. The heading *41(f)(3)(iii) Explanation of amount due* is added, and paragraph 1 under that heading is added.
■ e. The heading *41(f)(3)(v) Transaction activity* is added, and paragraph 1 under that heading is added.
■ f. The heading *41(f)(3)(vi) Pre-petition arrearage* is added, and paragraph 1 under that heading is added.
■ g. The heading *41(f)(4) Multiple obligors* is added, and paragraph 1 under that heading is added.

The additions and revisions read as follows:

Supplement I to Part 1026—Official Interpretations

* * * * *

Subpart A—General

* * * * *

Section 1026.2— Definitions and Rules of Construction

* * * * *

2(a)(11) Consumer.

* * * * *

4. *Successors in interest.* Even after a servicer's confirmation of a successor in interest's identity and ownership interest in the dwelling, the servicer is still generally required to comply with the requirements of §§ 1026.20(c) through (e), 1026.36(c), and 1026.41 with respect to the prior consumer. However, a servicer is not required to comply with the requirements of §§ 1026.20(c) through (e) and 1026.41 if the prior consumer also has either died or has been released from the obligation on the mortgage loan, and a servicer is not required to comply with the requirements of § 1026.36(c) if the prior consumer also has been released from the obligation on the mortgage loan. The prior consumer retains any rights under §§ 1026.20(c) through (e), 1026.36(c), and 1026.41 that accrued prior to the confirmation of the successor in interest to the extent these rights would otherwise survive the prior consumer's death or release from the obligation.

* * * * *

Subpart E—Special Rules for Certain Home Mortgage Transactions

* * * * *

Section 1026.36—Prohibited Acts or Practices and Certain Requirements for Credit Secured by a Dwelling

* * * * *

36(c) Servicing practices.

Paragraph 36(c)(1)(i).

* * * * *

4. *Temporary loss mitigation programs.* If the loan contract has not been permanently modified but the consumer has agreed to a temporary loss mitigation program, a periodic payment under § 1026.36(c)(1)(i) is the amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle under the loan contract, irrespective of the payment due under the temporary loss mitigation program.

5. *Permanent loan modifications.* If the loan contract has been permanently modified, a periodic payment under § 1026.36(c)(1)(i) is an amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle under the modified loan contract.

* * * * *

Section 1026.41—Periodic Statements for Residential Mortgage Loans

* * * * *

41(a) In general.

* * * * *

5. *Successors in interest.*

i. *Treatment of successors in interest.* Under § 1026.2(a)(11), a successor in interest is a consumer for purposes of this section once a servicer confirms the successor in interest's identity and ownership interest in the dwelling. Accordingly, a servicer of a transaction subject to this section must provide a successor in interest with a periodic statement meeting the requirements of this section once the servicer confirms the successor in interest's identity and ownership interest in the dwelling.

ii. *Multiple periodic statements unnecessary.* If a servicer sends a periodic statement meeting the requirements of § 1026.41 to another consumer, the servicer need not also send a periodic statement to a successor in interest; a single statement may be sent. Also, if a servicer confirms more than one successor in interest's identity and ownership interest in the dwelling, the servicer need not send periodic statements to more than one of the successors in interest.

* * * * *

41(d) Content and layout of the periodic statement.

1. *Close proximity.* Paragraph (d) requires several disclosures to be provided in close proximity to one another. To meet this requirement, the items to be provided in close proximity must be grouped together, and set off from the other groupings of items. This could be accomplished in a variety of ways, for example, by presenting the information in boxes, or by arranging the items on the document and including spacing between the groupings. Items in close proximity may not have any unrelated text between them. Text is unrelated if it does not explain or expand upon the required disclosures.

* * * * *

4. *Temporary loss mitigation programs.* If the consumer has agreed to a temporary loss mitigation program, the disclosures required by § 1026.41(d)(2), (3), and (5) regarding how payments will be and were applied should identify how payments are applied according to the loan contract, irrespective of the loss mitigation program.

5. *First statement after exemption terminates.* Section 1026.41(d)(2)(ii), (d)(3)(i), and (d)(4) require the disclosure of the total sum of any fees or charges imposed, the total of all payments received, a breakdown of how payments were applied, and a list of all transaction activity ''since the last statement.'' For purposes of the first periodic statement provided to the consumer following termination of an exemption under § 1026.41(e), the disclosures required by § 1026.41(d)(2)(ii), (d)(3)(i), and (d)(4) may be limited to account activity since the last payment due date that occurred while the exemption was in effect. For example, if mortgage loan payments are due on the first of each month and the servicer's exemption under paragraph (e) terminated on January 15, the first statement provided to the consumer after January 15 may be limited to the total sum of any fees or charges imposed, the total of all payments received, a breakdown of how the payments were applied, and a list of all transaction activity since January 1.

41(d)(1) Amount due.

1. *Acceleration.* If the balance of a mortgage loan has been accelerated but the servicer will accept a lesser amount to reinstate the loan, the amount due under § 1026.41(d)(1) should identify only the lesser amount that will be accepted to reinstate the loan.

2. *Temporary loss mitigation programs.* If the consumer has agreed to a temporary loss mitigation program, the amount due under § 1026.41(d)(1) may identify either the payment due under the temporary loss mitigation program or the amount due according to the loan contract.

3. *Permanent loan modifications.* If the loan contract has been permanently modified, the amount due under § 1026.41(d)(1) should identify only the amount due under the modified loan contract.

41(d)(2) Explanation of amount due.

1. Acceleration. If the balance of a mortgage loan has been accelerated but the servicer will accept a lesser amount to

reinstate the loan, the explanation of amount due under § 1026.41(d)(2) should include both the reinstatement amount and the accelerated amount, but not the monthly payment amount that would otherwise be required under § 1026.41(d)(2)(i). The statement should also include an explanation that the reinstatement amount will be accepted to reinstate the loan. The explanation should be on the front page of the statement or, alternatively, may be included on a separate page enclosed with the periodic statement or in a separate letter.

2. *Temporary loss mitigation programs.* If the consumer has agreed to a temporary loss mitigation program and the amount due identifies the payment due under the temporary loss mitigation program, the explanation of amount due under § 1026.41(d)(2) should include both the amount due according to the loan contract and the payment due under the temporary loss mitigation program. The statement should also include an explanation that the amount due is being disclosed as a different amount because of the temporary loss mitigation program. The explanation should be on the front page of the statement or, alternatively, may be included on a separate page enclosed with the periodic statement or in a separate letter.

* * * * *

41(d)(8) Delinquency information.

1. *Length of delinquency.* For purposes of § 1026.41(d)(8), a consumer's delinquency begins on the date an amount sufficient to cover a periodic payment of principal, interest, and escrow (if applicable) became due and unpaid, even if the consumer is afforded a period after the due date to pay before the servicer assesses a late fee. A consumer is delinquent if one or more periodic payments of principal, interest, and escrow (if applicable) are due and unpaid.

2. *Application of funds.* For purposes of § 1026.41(d)(8), if a servicer applies payments to the oldest outstanding periodic payment, a payment by a delinquent consumer advances the date the consumer's delinquency began. For example, assume a mortgage loan obligation under which a consumer's periodic payment sufficient to cover principal, interest, and escrow is due on the first of each month. A consumer fails to make a payment on January 1, but makes a periodic payment on February 1. The servicer applies the payment received on February 1 to the outstanding January payment. On February 2, the consumer is one day delinquent, and the following periodic statement should disclose the length of the consumer's delinquency using February 2 as the first day of delinquency.

* * * * *

41(e)(5) Certain consumers in bankruptcy.

1. *Consumer's representative.* If an agent of the consumer submits a request under § 1026.41(e)(5)(i)(B)(*1*) or (ii), the request is deemed to be submitted by the consumer.

41(e)(5)(i) Exemption.

1. *Multiple obligors.* When two or more consumers are primarily liable on a mortgage loan, an exemption under § 1026.41(e)(5)(i) with respect to one of the primary obligors does not affect the servicer's obligations to comply with § 1026.41 with respect to the other primary obligors. For example, assume that two spouses jointly own a home and are both liable on the note, and one of the spouses files Chapter 7 bankruptcy. That spouse files a Statement of Intention in the bankruptcy case identifying an intent to surrender the home. The servicer is exempt under § 1026.41(e)(i) from providing periodic statements with respect to the spouse in bankruptcy, but the servicer is required to comply with § 1026.41 with respect to the other spouse. As a result, the other spouse would continue to receive regular periodic statements, which would not include any of the modifications set forth in § 1026.41(f). On the other hand, if the spouse in bankruptcy had instead filed a Statement of Intention identifying an intent to retain the property and reaffirm the mortgage loan, the servicer would not be exempt under § 1026.41(e)(i) with respect to that spouse. In that case, the servicer would have to provide periodic statements with the modifications required under § 1026.41(f)(1) and (2). As comment 41(f)(4)-1 explains, the servicer could provide a periodic statement with the modifications set forth in § 1026.41(f)(1) and (2) to either of the two spouses, even though only one of the spouses is in bankruptcy.

2. *Plan of reorganization.* For purposes of § 1026.41(e)(5), ''plan of reorganization'' refers to a consumer's plan of reorganization filed under the applicable provisions of Chapter 11, Chapter 12, or Chapter 13 of the U.S. Bankruptcy Code, and confirmed by a court with jurisdiction over the consumer's bankruptcy case.

Paragraph 41(e)(5)(i)(B)(4).

1. *Statement of intention.* A servicer must rely on the consumer's most recently filed Statement of Intention to determine whether the exemption under § 1026.41(e)(5)(i) applies. For example, if a consumer files a Statement of Intention on June 1 identifying an intent to retain the dwelling securing the mortgage loan, but the consumer files an amended Statement of Intention on June 15 identifying an intent to surrender the dwelling, the servicer must rely on the June 15 Statement of Intention to determine that it is exempt under § 1026.41(e)(5)(i) with respect to that consumer.

41(e)(5)(ii) Resuming compliance.

1. *Multiple requests.* A servicer must comply with a consumer's most recent written request to cease or to continue, as applicable, providing periodic statements or coupon books.

2. *Reasonably prompt time.* Section 1026.41(e)(ii) requires that a servicer resume providing periodic statements or coupon books within a reasonably prompt time after the next payment due date that follows a servicer's receipt of a consumer's written request, the closing or dismissal of a bankruptcy case, the consumer's reaffirmation of the mortgage loan, or the consumer's discharge of the mortgage loan. Delivering, emailing or placing the periodic statement or coupon book in the mail within four days after the next payment due date, or within four days of the close of any applicable courtesy period, generally would be considered reasonably prompt.

3. *Bankruptcy case revived.* If the consumer's bankruptcy case is revived—for example if the court reinstates a previously dismissed case or reopens the case—§ 1026.41(e)(5) may be applicable again.

41(e)(6) Charged-off loans.

1. *Change in ownership.* If a charged-off mortgage loan is subsequently purchased, assigned, or transferred, a covered person, as defined in § 1026.39(a)(1), must provide the transfer disclosure required by § 1026.39. A covered person, who would otherwise be subject to the requirements of § 1026.41, may take advantage of the exemption in § 1026.41(e)(6) as long as it treats the mortgage loan as charged off and will not charge any additional fees or interest on the account. If the consumer previously received a final periodic statement, a covered person is not also required to provide a final periodic statement, unless it began sending the consumer periodic statements and then later met the criteria under § 1026.41(e)(6).

2. *Resuming compliance.* If a servicer or a covered person, as defined in § 1026.39(a)(1), who would otherwise be subject to the requirements of § 1026.41, fails to treat the mortgage loan as charged off at any time or charges any additional fees or interest on the account, the obligation to provide a periodic statement pursuant to § 1026.41 resumes. The servicer or covered person may not retroactively assess fees or interest on the account for the period of time during which the exemption in § 1026.41(e)(6) applied.

41(f) Modified periodic statements and coupon books for certain consumers in bankruptcy.

1. *Application of 41(f) if case is closed or dismissed.* A servicer must resume providing regular periodic statements or coupon books in accordance with § 1026.41 if the consumer's bankruptcy case is closed or dismissed or the consumer reaffirms the mortgage loan. However, the requirements of § 1026.41(f) continue to apply if the consumer has discharged personal liability for the mortgage loan.

2. *Terminology.* With respect to a periodic statement provided under § 1026.41(f), a servicer may use terminology other than that found on the sample periodic statements in appendix H–30, so long as the new terminology is commonly understood. *See* comment 41(d)-3. For example, a servicer may take into account terminology appropriate for consumers in bankruptcy and refer to the ''amount due'' identified in § 1026.41(d)(1), as the ''payment amount,'' ''voluntary payment amount,'' or ''regular payment amount.'' Similarly, a servicer may refer to amounts past due as ''unpaid post-petition payments'' or ''prior unpaid amounts.'' Additionally, a servicer may refer to the delinquency information required by § 1026.41(d)(8) as an ''account history,'' and to the amount needed to bring the loan current, referred to in § 1026.41(d)(8)(vi) as ''the total payment amount needed to bring the account current,'' as ''unpaid amounts.''

3. *Further modifications.* A periodic statement or coupon book provided under § 1026.41(f) may be modified as necessary to facilitate compliance with the U.S. Bankruptcy Code, Federal Rules of Bankruptcy Procedure, court orders, and local rules, guidelines, and standing orders. A periodic statement or coupon book may

include additional disclosures or disclaimers not required under § 1026.41(f) but that are related to the consumer's status as a debtor in bankruptcy or that advise the consumer how to submit a written request under § 1026.41(e)(5)(i)(B)(*1*).

41(f)(3) Chapter 12 and Chapter 13 consumers.

1. *Plan of reorganization.* For purposes of § 1026.41(f)(3), ''plan of reorganization'' refers to a consumer's plan of reorganization filed under the applicable provisions of Chapter 12 or Chapter 13 of the U.S. Bankruptcy Code, and confirmed by a court with jurisdiction over the consumer's bankruptcy case.

2. *Pre-petition payments and post-petition payments.* For purposes of § 1026.41(f)(3), pre-petition payments are payments made under a plan of reorganization to cure the consumer's pre-bankruptcy defaults, if any. Post-petition payments are payments made under a plan of reorganization to satisfy the mortgage loan's periodic payments as they come due after the bankruptcy case is filed. For example, assume a consumer has $3,600 in arrears as of the bankruptcy filing date with respect to a mortgage loan requiring monthly periodic payments of $2,000. The consumer's plan of reorganization requires the consumer to make payments of $100 each month for 36 months to pay the pre-bankruptcy arrearage, and $2,000 each month to satisfy the monthly periodic payments. In this example, the $100 payments are the pre-petition payments and the $2,000 payments are the post-petition payments.

3. *Post-petition fees and charges.* For purposes of § 1026.41(f)(3), post-petition fees and charges are those fees and charges imposed after the bankruptcy case is filed. To the extent that the court overseeing the consumer's bankruptcy case requires such fees and charges to be included as an amendment to a servicer's proof of claim, such fees and charges are not considered post-petition fees and charges for purposes of § 1026.41(f)(3) but should be included in the balance of the pre-petition arrearage under § 1026.41(f)(3)(vi)(C).

4. *First statement after exemption terminates.* Section 1026.41(f)(3)(iii) through (vi) requires the disclosure of the total sum of any post-petition fees or charges imposed, the total of all post-petition payments received and how they were applied, the total of all payments applied to post-petition fees or charges imposed, a list of all transaction activity, and the total of all pre-petition payments received ''since the last statement.'' For purposes of the first periodic statement provided to the consumer following termination of an exemption under § 1026.41(e), the disclosures required by § 1026.41(f)(3)(iii) through (vi) may be limited to account activity since the last payment due date that occurred while the exemption was in effect. *See* comment 41(d)-5.

41(f)(3)(ii) Amount due.

1. *Amount due.* The amount due under § 1026.41(d)(1) is not required to include any amounts other than the post-petition payments the consumer is required to make under the terms of plan of reorganization and post-petition fees and charges that a servicer has imposed. The servicer is not required to include in the amount due any pre-petition payments due under the plan of reorganization or other amounts payable pursuant to a court order. With respect to post-petition fees and charges, the amount due may be limited to including those post-petition fees and charges that a servicer has imposed. A servicer that defers collecting a fee or charge until after complying with the Federal Rule of Bankruptcy Procedure 3002.1 procedures, and thus after a potential court determination on the allowability of the fee or charge, is not required to disclose the fee or charge until complying with such procedures. However, a servicer may include in the amount due other amounts due to the servicer, such as amount due under an agreed order, provided those amounts are also disclosed in the explanation of amount due and transaction activity.

41(f)(3)(iii) Explanation of amount due.

1. *Explanation of amount due.* The explanation of amount due under § 1026.41(d)(2) is not required to include any amounts other than the post-petition payments and post-petition fees and charges that a servicer has imposed. Consistent with § 1026.41(d)(3)(i), the post-petition payments must be broken down by the amount, if any, that will be applied to principal, interest, and escrow. The servicer is not required to disclose, as part of the explanation of amount due, any pre-petition payments or the amount of the consumer's pre-bankruptcy arrearage. However, a servicer may identify other amounts due to the servicer provided those amounts are also disclosed in the amount due and transaction activity. *See* comment 41(d)(4)–1.

41(f)(3)(v) Transaction activity.

1. *Transaction activity.* The transaction activity under § 1026.41(d)(4) must include all payments the servicer has received since the last statement that constitute post-petition payments, pre-petition payments, and payments of post-petition fees or charges. The brief description of the activity does not need to identify the source of the payments.

41(f)(3)(vi) Pre-petition arrearage.

1. *Pre-petition arrearage.* To the extent that the amount of the pre-petition arrearage is subject to dispute or has not yet been determined, the periodic statement may include a statement acknowledging the unresolved amount of the pre-petition arrearage.

41(f)(4) Multiple obligors.

1. *Modified statements.* When more than one consumer is primarily obligated on a closed-end consumer credit transaction secured by a dwelling, subject to § 1026.41, the periodic statement may be sent to any one of the primary obligors. *See* comment 41(a)–1. Section 1026.41(f)(4) specifies that, if a servicer is required to provide periodic statements with the modifications set forth in § 1026.41(f) in connection with a mortgage loan with multiple obligors, the servicer may provide the modified statements to any or all of the primary obligors instead of any statements not including the modifications, even if not all primary obligors are debtors in bankruptcy. For example, assume two spouses own a home, and only one spouse files for Chapter 13 bankruptcy. That spouse's Chapter 13 plan of reorganization provides that the same spouse will retain the home by making pre-petition and post-petition payments. The servicer is thus required to provide periodic statements with the modifications set forth in § 1026.41(f)(1) though (3). The servicer may provide periodic statements with the modifications set forth in § 1026.41(f)(1) through (3) to either of the two spouses, even though only one of the spouses is in bankruptcy. On the other hand, if the spouse in bankruptcy had a plan of reorganization providing for that spouse to surrender the home, the servicer would be exempt under § 1026.41(e)(5)(i) from providing periodic statements to that spouse. In this circumstance, the servicer would be required to provide regular periodic statements, without any of the modifications set forth in § 1026.41(f), to the spouse not in bankruptcy. *See* comment 41(e)(5)(i)–1.

Dated: November 19, 2014.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

[FR Doc. 2014–28167 Filed 12–12–14; 8:45 am]

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Part III

National Labor Relations Board

29 CFR Parts 101, 102, and 103

Representation—Case Procedures; Final Rule

NATIONAL LABOR RELATIONS BOARD

29 CFR Parts 101, 102, and 103

RIN 3142–AA08

Representation—Case Procedures

AGENCY: National Labor Relations Board.

ACTION: Final rule.

SUMMARY: The National Labor Relations Board (the Board) has decided to issue this final rule for the purpose of carrying out the provisions of the National Labor Relations Act which ''protect[ ] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.'' While retaining the essentials of existing representation case procedures, these amendments remove unnecessary barriers to the fair and expeditious resolution of representation cases. They simplify representation-case procedures, codify best practices, and make them more transparent and uniform across regions. Duplicative and unnecessary litigation is eliminated. Unnecessary delay is reduced. Procedures for Board review are simplified. Rules about documents and communications are modernized in light of changing technology. In various ways, these amendments provide targeted solutions to discrete, specifically identified problems to enable the Board to better fulfill its duty to protect employees' rights by fairly, efficiently, and expeditiously resolving questions of representation.

DATES: This rule will be effective on April 14, 2015.

FOR FURTHER INFORMATION CONTACT: Gary Shinners, Executive Secretary, National Labor Relations Board, 1099 14th Street NW., Washington, DC 20570, (202) 273–3737 (this is not a toll-free number), 1–866–315–6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Background on the Rulemaking

The National Labor Relations Board administers the National Labor Relations Act, which, among other things, governs the formation of collective-bargaining relationships between employers and groups of employees in the private sector. Section 7 of the Act, 29 U.S.C. 157, gives employees the right to bargain collectively through representatives of their own choosing and to refrain from such activity.

When employees and their employer are unable to agree whether the employees should be represented for purposes of collective bargaining, Section 9 of the Act, 29 U.S.C. 159, gives the Board authority to resolve the question of representation. As explained in the NPRM, the Supreme Court has repeatedly recognized that ''Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.'' *NLRB* v. *A.J. Tower Co.,* 329 U.S. 324, 330 (1946). ''The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone.'' *NLRB* v. *Waterman Steamship Co.,* 309 U.S. 206, 226 (1940); see also *Southern Steamship Co.* v. *NLRB,* 316 U.S. 31, 37 (1942).

Representation case procedures are set forth in the statute, in Board regulations, and in Board caselaw.[1] In addition, the Board's General Counsel has prepared a non-binding Casehandling Manual describing representation case procedures in detail.[2]

The Act itself sets forth only the basic steps for resolving a question of representation.[3] These are as follows. First, a petition is filed by an employee, a labor organization, or an employer. Second, if there is reasonable cause, an appropriate hearing is held to determine whether a question of representation exists, unless the parties agree that an election should be conducted and agree concerning election details. Hearing officers are authorized to conduct pre-election hearings, but may not make recommendations as to the result. Third, if there is a question of representation, an election by secret ballot is conducted in an appropriate unit. Fourth, the results of the election are certified. The statute also permits the Board to delegate its authority to NLRB regional directors. The statute provides that, upon request, the Board may review any action of the regional director; however, such requests do not stay regional proceedings unless specifically ordered by the Board.

Underlying these basic provisions is the essential principle that representation cases should be resolved quickly and fairly. ''[T]he Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily.'' *A.J. Tower Co.,* 329 U.S. at 331. Within the framework of the current rules—as discussed at length in the NPRM—the Board, the General Counsel[4] and the agency's regional directors have sought to achieve efficient, fair, uniform, and timely resolution of representation cases. In part, the final rule codifies best practices developed over the years. This ensures greater uniformity and transparency.

But the Board's experience has also revealed problems—particularly in fully litigated cases—which cannot be solved without changing current practices and rules. For example, pre-election litigation has at times been disordered, hampered by surprise and frivolous disputes, and side-tracked by testimony about matters that need not be decided at that time. Additionally, the process for Board review of regional director actions has resulted in unnecessary delays. Moreover, some rules have become outdated as a result of changes in communications technology and practice. The final rule addresses these and other problems as discussed below.

II. List of Amendments

This list provides a concise statement of the various ways the final rule changes or codifies current practice, and the general reasoning in support. It is not ''an elaborate analysis of [the] rules or of the detailed considerations upon which they are based;'' rather, it ''is designed to enable the public to obtain a general idea of the purpose of, and a statement of the basic justification for, the rules.''[5] As this list shows, the amendments provide targeted solutions to discrete, specifically identified problems.[6] All of these matters are

[1] The Board's binding rules of procedure are found primarily in 29 CFR part 102, subpart C. Additional rules created by adjudication are found throughout the corpus of Board decisional law. See, *NLRB* v. *Wyman-Gordon Co.,* 394 U.S. 759, 764, 770, 777, 779 (1969).

[2] NLRB Casehandling Manual (Part Two) Representation Proceedings. The relevant sections of the Casehandling Manual are Sections 11000 through 11886. Unless otherwise noted, all references to the Casehandling Manual are to the August 2007 edition, which predated the NPRMs.

[3] A question of representation is often referred to as a ''question concerning representation.'' See, *e.g.,* Casehandling Manual Section 11084.

[4] The General Counsel administratively oversees the regional directors. 29 U.S.C. 153(d).

[5] S. Rep. No. 752, at 225 (1945).

[6] In accordance with the discrete character of the matters addressed by each of the amendments listed, the Board hereby concludes that it would adopt each of these amendments individually, or in any combination, regardless of whether any of the other amendments were made, except as expressly noted in the more detailed discussion of the particular sections below. For this reason, the amendments are severable.

discussed in greater detail below, along with responses to the comments.

1. Representation petitions may be filed with the Board electronically. The prior rules required hard-copy or facsimile filing, which should not be necessary under contemporary litigation practice and technological advancements.

2. Representation petitions (and related documents) must be served by the petitioner, which will afford the other parties the earliest possible notice of the petition. The Board's prior rules did not require the petitioner to serve a copy of its petition on the other parties.

3. At the same time the petition is filed with the Board, the petitioner must also provide evidence that employees support the petition (the ''showing of interest''). Petitioner must also provide the name and contact information of its representative. The prior rules gave the petitioner 48 hours after the petition to file the showing of interest. This delay is unnecessary.

4. When a petition is filed, the employer must post and distribute to employees a Board notice about the petition and the potential for an election to follow. Under prior practice, such notice was voluntary (and less detailed). The employees will benefit from a uniform notice practice, which provides them, equally and at an earlier date, with meaningful information about the petition, the Board's election procedures and their rights, and employers will benefit from more detailed Board guidance about compliance.

5. The pre-election hearing will generally be scheduled to open 8 days from notice of the hearing. This largely codifies best practices in some regions, where hearings were routinely scheduled to open in 7 days to 10 days. However, practice was not uniform among regions, with some scheduling hearings for 10 to 12 days, and actually opening hearings in 13 to 15 days, or even longer. The rule brings all regions in line with best practices.

6. The pre-election hearing will continue from day to day until completed, absent extraordinary circumstances. Prior practice did not address the standard for granting lengthy continuances, and sometimes continuances unnecessarily delayed the hearing.

7. Non-petitioning parties are required to state a position responding to the petition in writing 1 day before the pre-election hearing is set to open. The statement must identify the issues they wish to litigate before the election; litigation inconsistent with the statement will not be permitted. Timely amendments to the statement may be made on a showing of good cause. The employer must also provide a list of the names, shifts, work locations, and job classifications of the employees in the petitioned-for unit, and any other employees that it seeks to add to the unit. The statement must also identify the party's representative for purposes of the proceeding. Prior practice requested parties to state positions and provide a list of employees and job classifications before the hearing, but did not require production of such information prior to the hearing. Prior best practices required parties to take positions on the issues orally at the hearing. But practice was not uniform, and in some cases hearing officers have permitted parties to remain silent on their position or to take shifting positions during the hearing, unnecessarily impeding the litigation. Finally, our experience has demonstrated that clear communication about the specific employees involved generally facilitates election agreements or results in more orderly litigation.

8. At the start of the hearing, the petitioner is required to respond on the record to the issues raised by the other parties in their statements of position. Litigation inconsistent with the response will not be permitted. If there is a dispute between the parties, the hearing officer has discretion to ask each party to describe what evidence it has in support of its position, *i.e.,* make an offer of proof. This codifies current best practices, ensuring greater uniformity and orderly litigation.

9. The purpose of the pre-election hearing, to determine whether there is a ''question of representation,'' 29 U.S.C. 159, is clearly identified. Prior rules did not expressly state the purpose of the hearing and, as discussed in item ten below, sometimes litigation on collateral issues resulted in substantial waste of resources.

10. Once the issues are presented, the regional director will decide which, if any, voter eligibility questions should be litigated before an election is held. These decisions will be made bearing in mind the purpose of the hearing. Generally, only evidence that is relevant to a question that will be decided may be introduced at the pre-election hearing. Prior rules required, *e.g.,* litigation of any voter eligibility issues that any party wished to litigate, even if the regional director was not going to be deciding that question, and even if the particular voter eligibility question was not necessary to resolving the existence of a question of representation. This practice has resulted in unnecessary litigation. Once it is clear that an issue need not be decided, and will not be decided, no evidence need be introduced on the matter.

11. The hearing will conclude with oral argument, and no written briefing will be permitted unless the regional director grants permission to file such a brief. Prior rules permitted parties to file briefs which were often unnecessary and delayed the regional director's decision in many cases.

12. The regional director must decide the matter, and may not *sua sponte* transfer it to the Board. The prior transfer procedure was little used, ill advised, and a source of delay; Board decisions are generally improved by obtaining the initial decision of the regional director.

13. Absent waiver, a party may request Board review of action of a regional director delegated under Section 3(b) of the Act. Requests will only be granted for compelling reasons. Requests may be filed any time during the proceeding, or within 14 days after a final disposition of the case by the regional director. The prior rules included a variety of means for asking for Board review, including a ''request for review'' which only applied to the direction of election; a complex set of interlocking mechanisms for post-election review which varied depending upon the type of procedure chosen by the regional director or the form of election agreement; and a catchall ''special permission to appeal.'' Review of the direction of the election had to be sought before the election, even though the vote itself might moot the appeal. The final rule improves the process for Board review by giving parties an option to wait and see whether election results will moot a request for review that prior rules required to be filed before the election, and recognizes that Board review is not necessary in most cases. This will best serve Congress's purpose of ensuring that the regional director can promptly resolve disputes unless there is reason to interrupt proceedings in a particular case.

14. A request for review will not operate as a stay unless specifically ordered by the Board. Stays and/or requests for expedited consideration will only be granted when necessary. The prior rules included an automatic stay of the count of ballots (''impounding the ballots'') in any case where a request was either granted or pending before the Board at the time of the election. A stay should not be routine, but should be an extraordinary form of relief.

15. Elections will no longer be automatically stayed in anticipation of requests for review. The prior rules generally required the election which

followed a Decision and Direction of Election to be held between 25 and 30 days after the direction of election. The stated purpose of this requirement was to permit requests for review to be ruled on by the Board in the interim. This delay served little purpose, as few requests were filed, and only a very small fraction of these requests were granted. Even where a request was granted, the 25–30 day waiting period in the prior rules did nothing to prevent unnecessary elections as the vote was generally held as scheduled notwithstanding the grant of the request.

16. The regional director will ordinarily specify in the direction of election the election details, such as the date, time, place, and type of election and the payroll period for eligibility. Parties will take positions on these matters in writing in the statement of position and on the record before the close of the hearing. Under prior practice, election details were typically addressed after the direction of election was issued, which required further consultation about matters that could easily have been resolved earlier.

17. The long-standing instruction from the Casehandling Manual that the regional director will set the election for the earliest date practicable is codified. The statute was designed by Congress to encourage expeditious elections, and the rules require the regional director to schedule the election in a manner consistent with the statute.

18. The regional director will ordinarily transmit the notice of election at the same time as the direction of election. Both may be transmitted electronically. Previously, the notice was transmitted by mail after the direction of election.

19. If the employer customarily communicates with its employees electronically, it must distribute all election notices to employees electronically, in addition to posting paper notices at the workplace. Prior rules required only paper notices. This change recognizes that modern technology has transformed many workplaces into virtual environments where paper notices are less effective.

20. Within 2 business days of the direction of election, employers must electronically transmit to the other parties and the regional director a list of employees with contact information, including more modern forms of contact information such as personal email addresses and phone numbers if the employer has such contact information in its possession. The list should also include shifts, job classifications, and work locations. The list may only be used for certain purposes. Prior caselaw gave employers 7 days to produce a list of names and home addresses and send it to the Board, which then served the list on the parties. In addition to simplifying and expediting service by cutting out the middle man, the amendments update the rules to leverage the ways in which modern technology has transformed communications, recordkeeping and record transmission. For instance, the changes make information that is routinely maintained in electronic form more quickly available to the parties. Recognizing the potential sensitivity of the information, however, the rules also restrict its use in order to guard against potential abuse.

21. When a charge is filed alleging the commission of unfair labor practices that could compromise the fairness of the election, the regional director has discretion to delay (or ''block'') the election until the issue can be resolved. Any party seeking to block the election must simultaneously file an offer of proof and promptly make witnesses available. This rule largely codifies what had been best practice while adding an offer-of-proof requirement that will expedite investigation and help weed out meritless or abusive blocking charges.

22. After the election, parties have 7 days to file both objections and offers of proof in support. Objections, but not offers, must be served by the objector on other parties. Prior rules gave 7 days for objections but 14 days for evidence in support of the objections. The change is made because unsupported objections should not be filed, and 7 days is typically adequate for the parties to marshal their evidence.

23. If necessary, a post-election hearing on challenges and/or objections will be scheduled to open 21 days after the tally of ballots or as soon as practicable thereafter. Prior rules set no timeline for opening the hearing, and this rule will give adequate time for the region to weed out unsupported and frivolous objections while making the process more transparent and uniform.

24. In every case, the regional director will be required to issue a final decision. Where applicable, the regional director's decision will be subject to requests for review under the procedure described in item 13 above. The prior rules were unduly complex, and frequently did not involve a final regional director decision. Regional directors can and should issue final decisions because they are delegated authority to do so pursuant to Section 3(b) and the Board's rules, and are in the best position to initially assess the facts. Where necessary, Board decisions on review are improved by first obtaining the final decision of the regional director.

25. Finally, the rule eliminates a number of redundancies and consolidates and reorganizes the regulations so that they may be more easily understood.

III. The Rulemaking Process

As the NPRM explains, the Board has amended its representation case procedures repeatedly over the years as part of a continuing effort to improve the process and eliminate unnecessary delays. Indeed, the Board has amended its representation case procedures more than three dozen times without prior notice or request for public comment.

In fact, the Board has seldom acted through notice-and-comment rulemaking on any subject. The Board typically makes substantive policy determinations in the course of adjudication rather than through rulemaking, although this practice has occasionally drawn the ire of academic commentators and the courts.[7]

The Board has thus asked for public comments on few proposed rules of any kind. A review of prior Board

[7] See R. Alexander Acosta, *Rebuilding the Board: An Argument for Structural Change, over Policy Prescriptions, at the NLRB,* 5 FIU L. Rev. 347, 351–52 (2010); Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act,* 79 Yale L.J. 571, 589–90, 593–98 (1970); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking,* 37 Admin. L. Rev. 163, 170 (1985); Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB,* 5 FIU L. Rev. 411, 414–17, 435 (Spring 2010); Kenneth Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication,* 21 UCLA L. Rev. 63, 84 (1973); Charles J. Morris, *The NLRB in the Dog House—Can an Old Board Learn New Tricks?,* 24 San Diego L. Rev. 9, 27–42 (1987); Cornelius Peck, *The Atrophied Rulemaking Powers of the National Labor Relations Board,* 70 Yale L.J. 729, 730–34 (1961); Cornelius J. Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making,* 117 U. Pa. L. Rev. 254, 260, 269–72 (1968); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy,* 78 Harv. L. Rev. 921, 922 (1965); Carl S. Silverman, *The Case for the National Labor Relations Board's Use of Rulemaking in Asserting Jurisdiction,* 25 Lab. L.J. 607 (1974); and Berton B. Subrin, *Conserving Energy at the Labor Board: The Case for Making Rules on Collective Bargaining Units,* 32 Lab. L.J. 105 (1981); see also *NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 295 (1974); *NLRB* v. *Wyman-Gordon Co.,* 394 U.S. 759, 764, 770, 777, 779, 783 n.2 (1969). The Portland Cement Association (PCA) contends, as it did in another recent Board rulemaking, that the Board should place these and other law review articles discussed in the NPRM online for the public to read for free on *regulations.gov.* Just as the Board replied in that prior rulemaking, 76 FR 54014, the Board has placed these articles in the hard copy docket, but has not uploaded these articles to the electronic docket because such an action could violate copyright laws. It should also be noted that these materials are generally available in libraries.

rulemaking procedures reveals that, until this proceeding commenced, the Board had not held a public hearing attended by all Board members for at least half a century.[8]

A. Procedural History of This Rule

On June 22, 2011, the Board issued a Notice of Proposed Rulemaking. The Notice provided 60 days for comments and 14 additional days for reply comments. The Board issued press releases about the proposals and placed summaries, answers to frequently asked questions, and other more detailed information on its Web site (*www.nlrb.gov*). The Board held a public hearing during the comment period, on July 18 and 19, 2011, where the Board members heard commentary and asked questions of the speakers.

On November 30, 2011, the Board members engaged in public deliberations and a vote about whether to draft and issue a final rule, and, on December 22, 2011, a final rule issued. 76 FR 80138. A Federal court later held that the Board had lacked a quorum in issuing the final rule. See *Chamber of Commerce of the U.S.* v. *NLRB,* 879 F. Supp. 2d 18, 28–30 (D.D.C. May 14, 2012). However, because the court did not reach the merits, the court also ''emphasize[d] that its ruling need not necessarily spell the end of the final rule for all time * * *. [N]othing appears to prevent a properly constituted quorum of the Board from voting to adopt the rule if it has the desire to do so.''

The Board then issued a proposed rule on February 6, 2014 under the same docket number as the prior NPRM and containing the same proposals. 79 FR 7318 *et seq.* The Board again issued press releases and placed supporting documents on its Web site. This was ''in essence, a reissuance of the proposed rule of June 22, 2011.'' *Id.* The purpose of this NPRM was to give a properly constituted quorum of the Board a ''legally appropriate, administratively efficient, and demonstrably fair process for considering all the issues and comments raised in the prior proceeding, while giving an opportunity for any additional commentary.'' *Id.* at 7335.

The Board provided 60 additional days for the submission of any new comments, and 7 days for replies. The Board advised commenters that it was not necessary to ''resubmit any comment or repeat any argument that has already been made.'' *Id.* at 7319. During the reply period, on April 10 and 11, 2014, the Board held another public hearing, at which the Board members again heard commentary and asked questions of the speakers.

In sum, the Board has accepted comments on these proposals for a total of 141 days, and held a total of 4 days of oral hearings with live questioning by Board members. Tens of thousands of people have submitted comments on the proposals, and Board members have heard over one thousand transcript pages of oral commentary.

The sole purpose of these procedures was to give the Board the benefit of the views of the public. To be clear, none of this process was required by law: The Board has never engaged in notice and comment rulemaking on representation case procedures, and all of the proposed changes could have been made without notice and comment—in part by adjudication, and in part by simply promulgating a final rule.[9]

Nonetheless, a number of comments have criticized the Board's process, both in 2011 and again in 2014. At bottom, the claim is that the process was inadequate to meaningfully engage with the public, and that the Board already had its mind made up. We disagree.

1. Advanced NPRMs and Consultation Under E.O. 13563

The 2011 comment of the Chamber of Commerce of the United States of America (the Chamber) provides a representative example of criticism of the 2011 pre-NPRM process. The Chamber believes that the Board missed ''an opportunity to explore whether a consensus could have been reached'' on the rule among stakeholder groups through forums such as the American Bar Association's Labor and Employment Law Section. The Chamber concedes that stakeholders ''have widely divergent views,'' but argues that a consensus on at least some changes might have been reached. The Chamber suggests that the Board should withdraw the NPRM and publish a more open-ended Advanced Notice of Proposed Rulemaking.

The Chamber cites Executive Order 13563 Section 2(c) (''Improving Regulation and Regulatory Review''), 76 FR 51735, as support. Section 2(c) of the Executive Order states that ''[b]efore issuing a proposed regulation, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected * * *.'' *Id.* In the NPRM, the Board explained the decision to issue a set of specific proposals, rather than a more open-ended Advanced NPRM, by stating that ''public participation would be more orderly and meaningful if it was based on * * * specific proposals.'' 76 FR 36829. The Chamber incorrectly suggests the Board conceded that it violated the Executive Order, and questions whether the comment process actually was more orderly or meaningful. Some other comments suggest that the Board should have engaged in negotiated rulemaking, or that the pre-NPRM process was insufficiently transparent.[10]

These arguments were repeated by the Chamber and a number of other commenters in 2014, most notably the American Hospital Association (AHA II)[11] and their counsel at the public hearing, (Testimony of Curt Kirschner II) who contended that the Board should have issued an Advanced NPRM or consulted with stakeholders before reissuing the NPRM in February 2014.

An agency generally has discretion over its pre-NPRM procedures, including whether to use advanced NPRMs, negotiated rulemaking, or other pre-NPRM consultation. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council,* 435 U.S. 519, 543–44 (1978). Moreover, as recognized by the AHA, the Board is not directly subject to Executive Order 13563, nor is its language pertaining to pre-NPRM procedures mandatory in any event.

As explained in both NPRMs, in this instance, the Board concluded that beginning the process of public comment by issuing NPRMs would be the most effective method of proceeding. The Board continues to believe that following the notice-and-comment procedures set forth in the Administrative Procedure Act (APA)—and thereby giving formal notice of specific proposals to all members of the public at the same time in the **Federal Register** and permitting all members of

[8] In the rulemaking proceedings that resulted in adoption of rules defining appropriate units in acute care hospitals, the Board directed an administrative law judge to hold a series of public hearings to take evidence concerning the proposed rules, but no Board members participated in the hearings.

[9] The rule is primarily procedural as defined in 5 U.S.C. 553(b)(B), and therefore exempt from notice and comment. To the extent portions of the rule are substantive—for example, relating to information in the voter lists—these changes could have been made by adjudication, which is also exempt from notice and comment. *Wyman Gordon, supra.*

[10] See, *e.g.,* joint comment of HR Policy Association and Society for Human Resource Management (collectively, SHRM); Greater Easley Chamber of Commerce; Georgia Association of Manufacturers (GAM).

[11] The preamble to the final rule uses the roman numeral II to signify that a cited comment was received during the second notice and comment period in 2014. Comments cited without the roman numeral II were received during the first notice and comment period in 2011.

the public to comment on those proposals through the same procedures and during the same time periods—was the fairest and soundest method of proceeding.

The contents of the comments themselves have also demonstrated the doubtfulness of the Chamber's suggestion that a broad consensus might have been reached through a different process. As the Chamber concedes, the labor-management bar is polarized on many of the relevant issues. Given the degree of polarization reflected at both the public hearings and in the comments—notwithstanding the 3 intervening years for members of the bar to consider and consult on possible improvements—consensus seems unlikely.

Nor would an Advanced NPRM have been an improvement on the present process. Indeed, in this proceeding the Board has already benefited from something similar to the iterative commenting process of an Advanced NPRM. From the 2011 hearing, to the 2011 comment period, to the 2011 reply period, to the 2014 comment period, to the 2014 hearing and reply period, the commenters have had the opportunity to consider and respond to each other's views on many occasions. And, in contrast to the typical Advanced NPRM, the specificity of the proposals in the NPRM encouraged many commenters to focus on important details. With the benefit of this repeated cross analysis and close attention to detail, the Board has modified its proposals in a number of significant respects in this final rule. We see no merit in the speculative retrospective claim that something better might have been achieved by another process.

In sum, the Board's pre-NPRM process was lawful and appropriate.

2. The 2014 NPRM

A variety of inconsistent claims were made by commenters about the significance of the Board's reissuing the NPRM in 2014. Some argued that the Board should have considered the 2011 comments before reissuing the NPRM.[12] By contrast, some said that the Board had considered and implicitly rejected the 2011 comments, and that this rejection required re-submitting the same comments again, or that it suggested that a final rule identical to the NPRM was a *fait accompli*.[13] Some faulted the Board for not addressing the prior final rule of December of 2011.[14]

These arguments are misplaced, and many are predicated on an unsupportable and mistaken interpretation of the NPRM. In early 2014, the recently appointed and confirmed Board members had a choice to make. Significant public effort had been expended in commenting on a proposed rule that—according to one court—the Board had not yet lawfully acted on. Thus, the questions posed by the NPRM remained unanswered by the Board. As years had passed since the comment period had closed, the new Board members were interested to know whether the public had anything further to say about the proposals.

That is why the Board reissued the NPRM and reopened the comment period. This process allowed the new Board members an opportunity to consider new comments and old comments together in a single proceeding.

This is reasonable. To consider and analyze all the material submitted in the 2011 final rule—without considering whether anyone's views might have changed in the intervening years—and only then issuing a new proposed rule, would have been substantially less efficient. Where possible, it is far better, in the Board's judgment, to respond to the comments once, rather than twice.

The 2014 NPRM reflected absolutely no Board judgment about the 2011 comments. As the Board explained in the NPRM, the purpose was simply to re-raise, not resolve, the questions posed and to allow the Board to make its decisions about the final rule in light of all the comments received.

The AHA claimed that the Board was ''hiding the ball from the public regarding its current views of what should be changed, in light of the comments previously received and its analysis of those comments. The implication of the Board's reissuance of the same NPRM is that the public comment process is, from the Board's perspective, largely perfunctory.'' AHA II.

This statement misses the point. There was no ball to hide. The Board reissued the NPRM because it wanted to hear yet again from the public before forming its views. This manifests a greater respect for the public comment process. As Member Hirozawa said in responding to this point at the public hearing:

> Curt, if it makes you feel any better, we don't know where we're headed, either. There are a lot of difficult decisions that are going to have to be made, a lot of questions where there are significant considerations on both sides, and there will be a lot of discussion among the members during the coming period of time * * *. But in terms of the views of the public, I think that I speak for all five of the members here that we all consider them very important and [an] essential part of this process.

A similar point applies to the Board's consideration of the December 2011 final rule. Of course, the court held that the rule itself is a legal nullity; without the requisite vote (in the court's analysis), the Board never took action. Although the various statements associated with that publication are important, and represent the carefully considered views of three individual Board members (two of whom are no longer on the Board), it would be strange, to say the least, if the Board were somehow bound to consider and respond to this non-action before it could issue a proposed rule. Indeed, although the Board has considered those views in issuing the present final rule, their function here is persuasive, not authoritative.

In sum, the Board's decision to consider the 2011 comments, 2011 hearing testimony, 2011 final rule, and 2012 Board Member statements, together and at the same time as the 2014 comments and 2014 hearing testimony, is not only a reasonable manner of proceeding, but clearly the fairest and most efficient manner of proceeding given the procedural posture of this matter as it stood in early 2014.

3. The Length, Timing, and Location of the Hearings

In 2011, the Board members held a 2-day public hearing in Washington, DC, approximately halfway through the initial comment period, *i.e.,* about 1 month after publication of the NPRM and 1 month before the initial comment period closed. All Board members heard 5-minute statements from speakers representing diverse organizations and groups, and then actively questioned the speakers for an additional period of time. This hearing was not legally required.

Then, in 2014, the Board members held another 2-day public hearing in Washington, DC, in the week after the close of the 2014 initial comment period, *i.e.,* during the reply period.[15]

[12] See, *e.g.,* Chamber II; International Franchising Association (IFA) II; AHA II. Along the same lines, some argued that the Board should have clarified the proposals in light of questions raised in the 2011 comments. See, *e.g.,* Association of the Nonwoven Fabrics Industry (INDA) II.

[13] See, *e.g.,* Association of Equipment Manufacturers (AEM) II; INDA II.

[14] See, *e.g.,* Senator Lamar Alexander and 17 Republican Senators (Senator Alexander and Republican Senators) II.

[15] After each public hearing in 2011 and 2014, the transcripts containing each speaker's testimony

The Board first solicited requests to speak, and instructed requesters to clearly identify the particular proposed changes and issues they wished to address, and to summarize the statements they wished to make. This process enabled the Board to schedule the speakers addressing similar issues to speak in adjacent time slots. Everyone who requested to speak was given an opportunity to address the Board, and, as time allowed, those who wished to speak about multiple issues were given an opportunity to address the Board more than once.

The AHA compares this proceeding to the hospital unit rulemaking and essentially argues that the Board should have held 14 days of hearings instead of 4. AHA II.

Agencies are not bound to use the same procedures in every rulemaking proceeding. Otherwise, agencies could neither learn from experience, *e.g.,* what rulemaking procedures are helpful and what procedures are simply wasteful, nor adopt procedures suited to the precise question at stake.[16] This learning process is shown in the changing nature of the hearings used by the Board from the hospital rulemaking, to the 2011 hearing, to the 2014 hearing. At each phase the hearing process became more meaningful and efficient.

This point was recognized by counsel for the AHA itself, who ''commend[ed] the Board on this public hearing process,'' particularly in comparison to the 2011 hearing, and described the exchange with Board members as ''gratifying,'' ''valuable,'' and ''productive.'' Kirschner II. The Board agrees. The 5 minutes that speakers were given on each issue was supplemented by substantial time for questioning and the opportunity for written comments. Some speakers gave 2,000 words or more of well-informed testimony during their allotted time. The Board found that the speakers provided informed, thorough, and thoughtful analysis, and the back-and-forth dialogue with the Board members demonstrated the familiarity of the speakers with the proposals. Again, there was no such dialogue with Board members in the hospital rulemaking hearings—regardless of their length—simply because the Board members did not participate in those hearings.[17]

The Board believes that the hearings exceeded the requirements of the APA and were fair, appropriate, and useful. Holding the hearings in Washington, DC, was appropriate because many of the Board's major stakeholders are either headquartered in Washington or are represented by counsel in the city or who frequently appear in the city.

Both hearings were properly noticed and appropriately timed. The two hearings served two different functions. The first hearing was scheduled half-way through the first comment period. This gave the public time to develop their positions before the hearing, while also allowing the public to get a preview of the arguments at issue, so that written comments could be framed more responsively. The subsequent written comments were more informed, thoughtful, and technically sophisticated as a result, and many commenters in 2011, such as the Chamber, took the opportunity to cite extensively from the hearing transcripts for support and to respond to arguments made at the hearing. The Board believes the chosen sequence—the hearing followed by the close of the initial comment period and then the reply period—produced more meaningful public comments in 2011.

In 2014, of course, all of the 2011 comments were available for the public to engage, as was the transcript of the 2011 hearing. Thus the second hearing served a different purpose, and was therefore scheduled at a different time. By scheduling the hearing after the close of the comment period, but during the reply period, the Board members were able to engage with the speakers deeply and in detail on the substance of both their 2011 and 2014 comments, while giving time for speakers who wished to supplement or clarify their remarks after the hearing the ability to do so with additional written comments to the record.

In sum, the Board believes that the four days of public hearings, attended by all Board members, was highly valuable, was of an appropriate length, and was held at appropriate times and in appropriate locations.

4. The Length and Timing of the Comment Periods

The Board provided an initial comment period of 60 days beginning June 22, 2011, followed by a reply comment period of 14 days that ended on September 6, 2011. The Board then provided an additional comment period of 60 days beginning February 6, 2014, followed by a reply comment period of 7 days that ended on April 14, 2014.

The APA provides no minimum comment period, and many agencies, including the Board in some recent rulemaking proceedings, have afforded comment periods of only 30 days. The agency has discretion to provide still shorter periods, and is simply ''encouraged to provide an appropriate explanation for doing so.'' Administrative Conference of the United States (ACUS), Recommendation 2011–2 at 3 (June 16, 2011).

Yet, in 2011, many commenters criticized the length of the comment period. The Council on Labor Law Equality (COLLE) described the NLRB's comment period as ''the bare-minimum 60-day[s],'' and SHRM characterized the comment period as ''hurried, abridged and clandestine.''

It would be reasonable to expect that these arguments would not be repeated in 2014, considering that the public had a cumulative total of 141 days in which to submit comments. Yet they were from time to time, most notably by the Chamber II, AHA II, and NAM II.[18]

Although the desire for additional time to gather support and develop arguments is understandable, agencies must set some end to the comment

along with any Board questioning of the speaker were made part of the record of the rulemaking. Any such testimony discussed in this final rule is cited as follows: ''Testimony of [name of speaker] on behalf of [name or organization, if any].'' As with the written comments, the roman numeral II follows testimony citations from the 2014 comment period.

[16] As one scholar noted, the hospital unit rulemaking could be described as ''procedural overkill,'' see Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism,* 41 Duke L. J. 274, 319 (1991).

[17] In light of the extensive process provided in 2014, comments arguing that the 2011 process was ''rushed'' or gave ''an inadequate opportunity for stakeholders to address the merits of the rules'' are no longer salient. See National Association of Manufacturers (NAM). The parties have had a total of 141 days to comment on both NPRMs, (74 with respect to the 2011 NPRM and 67 for the 2014 NPRM), and to consider the proposals and data in submitting their comments. Some have published law review articles in the interim, and it is quite clear that the topics have remained relevant questions of public concern during this period. See Joseph P. Mastrosimone, *Limiting Information in the Information Age: The NLRB's Misguided Attempt to Squelch Employer Speech,* 52 Washburn L. J. 473, 501–06 (2013).

[18] In each of its reply comments, the Chamber also complained that the reply period was too short to read and respond to all of the comments. But the purpose of the reply period was not to afford interested parties an opportunity to read and reply to *all* of the comments submitted, but to provide an opportunity to read the most significant comments and respond to the arguments raised in them. This the Chamber and others did quite successfully. For example, in 2011 the Service Employees International Union (SEIU) cited and replied to over twenty unique, detailed, and lengthy comments submitted by other parties. Others, such as the Association of Corporate Counsel (ACC), took the opportunity to focus on elaborating one particular issue of special importance. Both approaches were quite helpful, and served the purpose for which the Board afforded the reply period.

A lengthy additional reply period in this context would have served little purpose, particularly after a post-comment hearing in which the parties and the Board had the opportunity to engage with and reply to the comments in great detail. All of which is in addition to the fact that neither the APA nor any other law requires *any* opportunity to reply to public comments.

period: ''Agencies should set comment periods that consider the competing interests of promoting optimal public participation while ensuring that the rulemaking is conducted efficiently.'' ACUS 2011–2 at 3.

The Montana Chamber of Commerce—though opposing the rule—stated that the NPRM provided ''a very reasonable time frame to allow ample comments and statements from all interested parties, whether they are supportive of these sweeping changes or not.'' And a supportive comment noted that the Board was providing far more time for comments than required by law. Chairman Tom Harkin of the Senate Committee on Health, Education, Labor and Pensions, Senior Democratic Member George Miller of the House Committee on Education and the Workforce, and Democratic Senators and Members of the House of Representatives (Chairman Harkin, Senior Member Miller and Congressional Democrats) at 5.

The tens of thousands of comments submitted and the depth of analysis they provided are ample testament to the adequacy of the opportunities for public participation in the rulemaking process.

5. Post-Rulemaking Procedures and Review

One comment urges the Board to ''incorporate[] plans for retrospective review'' into the rule pursuant to Executive Orders 13,563 and 13,579. Sofie E. Miller. Executive Order 13,563, however, is directed to executive branch agencies, not independent agencies, which are only encouraged, by Executive Order 13,579, to comply with Executive Order 13,563. Moreover, both of the aforementioned Executive Orders apply only to ''significant'' regulatory actions, as defined by Section 3(f) of E.O. 12,866. This rulemaking does not fall into any of the definitions of a ''significant regulatory action'' set forth in Section 3(f). Nevertheless, the Board developed and disseminated a preliminary plan for retrospective review of significant regulations in May 2011 (*http://www.whitehouse.gov/files/documents/2011-regulatory-action-plans/NationalLaborRelationsBoardPreliminaryRegulatoryReformPlan.pdf*). In addition, the Board will continue its longstanding practice of incrementally evaluating and improving its processes going forward.

IV. Comments on General Issues

Before turning to comments on specific provisions of the final rule, the Board addresses a number of general issues: (a) the Board's rulemaking authority; (b) the need to amend the regulations generally; (c) the opportunity for free debate under the regulations; and (d) the effects on employee representation and the economy.

A. Board Authority To Promulgate Representation-Case Procedure Rules

Congress delegated both general and specific rulemaking authority to the Board. Generally, Section 6 of the National Labor Relations Act, 29 U.S.C. 156, provides that the Board ''shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act * * * such rules and regulations as may be necessary to carry out the provisions of this Act.'' In addition, Section 9(c), 29 U.S.C. 159(c)(1), specifically contemplates rules concerning representation case procedures, stating that elections will be held ''in accordance with such regulations as may be prescribed by the Board.''

The Board's well-established rulemaking authority is recognized by comments both opposing and supporting the proposed rule. For example, NAM states that ''it is undisputed that the Board has the authority to promulgate rules and regulations,'' and the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) states that ''[t]he NLRB has specific and express statutory authority to engage in rule-making to regulate its election process.''

The Supreme Court unanimously held in *American Hospital Association* v. *NLRB,* 499 U.S. 606, 609–10 (1991), that the Act authorizes the Board to adopt both substantive and procedural rules governing representation case proceedings. The Board's rules are entitled to deference. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843–44 (1984); *NLRB* v. *A.J. Tower Co.,* 329 U.S. 324, 330 (1946). Representation case procedures are uniquely within the Board's expertise and discretion, and Congress has made clear that the Board's control of those procedures is exclusive and complete. *See NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 290 n.21 (1974); *AFL* v. *NLRB,* 308 U.S. 401, 409 (1940). ''The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone.'' *NLRB* v. *Waterman S.S. Corp.,* 309 U.S. 206, 226 (1940); see also *Magnesium Casting Co.* v. *NLRB,* 401 U.S. 137, 142 (1971).

In *A.J. Tower,* 329 U.S. at 330, the Supreme Court noted that ''Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representative by employees.'' The Act enshrines a democratic framework for employee choice and, within that framework, charges the Board to ''promulgate rules and regulations in order that employees' votes may be recorded *accurately, efficiently and speedily.'' Id.* at 331 (emphasis added). ''[T]he determination of whether a majority in fact voted for the union must be made in accordance with such formal rules of procedure as the Board may find necessary to adopt in the sound exercise of its discretion.'' *Id.* at 333. As the Eleventh Circuit stated:

> We draw two lessons from *A.J. Tower:* (1) The Board, as an administrative agency, has general administrative concerns that transcend those of the litigants in a specific proceeding; and, (2) the Board can, indeed must, weigh these other interests in formulating its election standards designed to effectuate majority rule. In *A.J. Tower,* the Court recognized ballot secrecy, certainty and finality of election results, and minimizing dilatory claims as three such competing interests.

Certainteed Corp. v. *NLRB,* 714 F.2d 1042, 1053 (11th Cir. 1983). As explained above, the final rule is based upon just such concerns. Some comments allege that the Board lacks authority to issue these rules.[19] As discussed, the Supreme Court's interpretation of Section 6 clearly forecloses this argument.

The Board also received dueling comments from two different groups of members of Congress on this topic: One group claimed that the changes would ''fundamentally alter the balance of employee, employer and union rights that Congress so carefully crafted and that only Congress can change;'' the other group claimed that the changes are ''commonsense and balanced'' and ''a positive step toward fixing a broken system'' and are consistent with ''the NLRB['s] broad authority under the NLRA to promulgate election regulations.'' Compare Senator Alexander and Republican Senators; with Chairman Harkin, Senior Member Miller and Congressional Democrats.

The Act delegated to the Board the authority to craft its procedures in a manner that, in the Board's expert judgment, will best serve the purposes of the Act. Various members of Congress

[19] See, *e.g.,* Testimony of Harold Weinrich on behalf of Jackson Lewis LLP; ACC; American Trucking Associations II.

may have divergent views, but Article I of the Constitution prescribes the method that Congress must use to enact its policies, and the Act as written gives the Board broad authority in this area. Here the Board is acting pursuant to its clear regulatory authority to change its own representation case procedures in a manner that will better serve the purposes and text of the Act—a question about which the Board remains the congressionally delegated expert authority.

In sum, the Board clearly has authority to amend its election rules.

B. The Need for the Final Rule

The Board's experience demonstrates that although the fundamentals are sound, many of the technical details of representation case procedures suffer from a variety of deficiencies. Especially as to contested cases, current procedures result in duplicative, unnecessary and costly litigation. Simplifying, streamlining and, in some cases, bolstering these procedures will reduce unnecessary barriers to the fair and expeditious resolution of representation disputes and result in more fair and accurate elections. The rule also codifies best practices to ensure that our procedures are more transparent and uniform across regions. Changes to the representation case procedures are also necessary to update and modernize the Board's processes in order to gain the advantages of and make effective use of new technology, especially affecting communications and document retrieval and transmission. These changes will enhance the ability of the Board to fulfill its statutory mission.

Some comments received in response to the Board's NPRM argue that the Board failed to present sufficient justification for the proposed amendments. For example, SHRM asserts that the Board ''failed to articulate a legitimate justification for the significant changes set forth in the NPRM'' and that the proposed amendments are therefore arbitrary and capricious.[20] Numerous comments contend generally that there is no need for revision of the Board's representation procedures because, as argued by NAM, there is no evidence contradicting the Board's own data showing that the present time frames for processing representation cases are among the most expeditious in the Board's history, and further that the Board currently meets its own internal time targets for processing representation cases.[21] As one speaker stated ''the Board is just looking to solve a problem that doesn't exist'' and ''the NPRM has failed to identify a single problem to which the proposed solution is responsive.'' Testimony of Kara Maciel on behalf of National Grocers Association (NGA) II. See also Testimony of Ross Freidman on behalf of CDW II (''the proposed rules are in large part a solution in search of a problem'').

These arguments appear to rest on a number of mistaken assumptions. (1) The sole purpose of the rule is to have faster representation proceedings; but (2) those proceedings are (generally) fast enough already; and, in any event, (3) the changes do not identify or address the true sources of delay. We will address each of these assumptions in turn.

1. The Amendments Address Efficiency, Fair and Accurate Voting, Transparency, Uniformity, and Adapting to New Technology; Speed Is Not the Sole or Principal Purpose

First, the focus on speed fails to consider all the reasons for which the various amendments are being made. Many of the changes have little to do with the timing of procedures. Indeed, there is no single problem that this rule addresses: Rather, as summarized in the list of changes above, there are a host of discrete problems addressed by a host of discrete amendments. We will amplify the particular rationale for each change in the discussion of specific sections below. However, in light of the common misconception that the rule is focused on speed, we will briefly describe other important principles of sound administration at issue.

Efficiency: The importance of efficiency should be self-evident. If a particular procedure serves no purpose, or is unduly complex or wasteful, that is reason enough to change it, regardless of whether it also causes delay. Thus, for example, rules that permit unnecessary litigation, circuitous service of documents and mandatory interlocutory appeals are plainly inefficient and should be changed.

Fair and Accurate Voting: This rationale gets to the heart of Section 9, and is always under consideration in any revision of representation case procedures. Here, for example, the Board provides employees with notice of the petition for election sooner in the process, and provides more detailed, meaningful notices about the unit at issue, and the voting itself, throughout the process. The notices are also transmitted more effectively. As explained further below, the amendments provide a better process for identifying voters properly subject to challenge, which should reduce the number of ballots improperly commingled with unit ballots by oversight, or improperly challenged out of ignorance. These changes will all provide better guarantees of a fair voting process.

Transparency and Uniformity: Transparency allows the public to understand the process and uniformity allows the parties to form reasonable expectations. These two related principles also ensure that the protection of statutory rights does not vary arbitrarily from case to case or region to region. Again, these basic procedural principles should be beyond cavil. Cf. *Dorsey* v. *United States,* 132 S. Ct. 2321, 2326 (2012) (written sentencing guidelines ''increase transparency [and] uniformity''). These are adequate reasons to ensure that Board best practices are written into the regulations where appropriate, even if they do not address delay. Thus, for example, describing the best-practices hearing date in the rules will promote uniformity and transparency.

Changed Technology: Society changes rapidly, and new technology can quickly make old rules obsolete. Of particular relevance here, communications technologies developed in the last half-century have changed the way litigation, workplace relationships, and representation campaigns function. As the Supreme Court has stated in another context, ''the responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board,'' and we would be remiss in leaving unchanged procedures which are predicated on out-of-date facts or assumptions, even where there is no consequent delay. *NLRB* v. *J. Weingarten, Inc.,* 420 U.S. 251, 266 (1975). Thus, for example, providing for electronic documents, filing, and transmission as well as updating the forms of employee contact information are important adaptations to changed technological circumstances. In addition, the Board is mindful that changes in technology have also raised concerns about privacy, and the final rule addresses those concerns.

In sum, timeliness is one of many reasons proffered for the amendments; some changes clearly reduce unnecessary delays; for other changes, timeliness is only a collateral benefit and by no means a primary purpose;

[20] See also SHRM; Klein, Dub & Holleb (Klein) II.

[21] This point was also advanced by the AHA; American Council on Education (ACE); COLLE; CDW; Associated Oregon Industries; National Marine Manufacturers Association (NMMA); The Bluegrass Institute; and the Chamber.

and sometimes it plays no role whatsoever. The need for the rule cannot be assessed without grappling with these specific, articulated reasons underlying each of the amendments.

2. The Board Can and Should Address Delays in the Current Rules

The second premise is also flawed: Nothing in the statute, the General Counsel's current time targets, or any other source establishes that current procedures are ''fast enough.''

Section 9 is animated by the essential principle that representation cases should be resolved quickly and fairly. ''[T]he Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily.'' *NLRB* v. *A.J. Tower Co.,* 329 U.S. 324, 331 (1946). As the Supreme Court noted, discussing Section 9(d), the policy in favor of speedy representation procedures ''was reaffirmed in 1947, at the time that the Taft-Hartley amendments were under consideration.'' *Boire* v. *Greyhound Corp.,* 376 U.S. 473, 479 (1964). Senator Taft stated that the Act should not ''permit dilatory tactics in representation proceedings.'' *Id.* In discussing the APA, Congress again exempted representation cases because of the ''exceptional need for expedition.'' [22] Finally, the purpose of Congress in 1959 in permitting delegation of representation case proceedings to regional directors under Section 3(b) was to '' 'speed the work of the Board.' '' *Magnesium Casting Co.* v. *NLRB,* 401 U.S. 137, 141–142 (quoting legislative history). Congress did not define any ''time targets'' for elections; indeed, in fashioning the LMRDA, Congress considered and expressly rejected a proposed amendment to the statute which would have imposed a 30-day minimum speed limit on the time from petition to election.[23]

In short, every time Congress has amended laws governing representation cases, it has reaffirmed the importance of speed. This is essential both to the effectuation of Section 7 rights of employees, and to the preservation of labor peace.[24]

The timeliness concerns of Congress in 1935, 1947 and 1959 remain salient today, as the comments show. Unduly lengthy campaigns cause voter participation to drop. Testimony of Glenn Rothner II; Testimony of Gabrielle Semel on behalf of CWA II. ''[D]elay can create a sense of futility among workers.'' Testimony of Brian Petruska on behalf of Laborer's International Union of North America Mid-Atlantic Regional Organizing Coalition (LIUNA MAROC) II; see also Testimony of Jody Mauller on behalf of the International Brotherhood of Boilermakers (IBB) II. As one employee testified at the hearing, significant delay in the NLRB's process causes employees to think that there is nothing the government can do to protect them. Testimony of Donna Miller II. This is precisely what Congress was worried about: that employees would think the NLRA's procedures were ineffectual and be tempted to take disruptive action instead. *Boire, supra.* The purpose of the Act is to protect with Federal power the free exercise of Section 7 and Section 9 rights. In one organizer's experience, most workers want elections faster than current procedures permit regardless of where the workers stand on the union. Testimony of Martin Hernandez on behalf of UFCW II.

To be clear, the problems caused by delay have nothing to do with employer speech.[25] As discussed *infra,* the statute encourages free debate, and neither Congress nor the Board in this rulemaking has cited limiting debate as a reason for speed. It is not the speech, but the delay itself which causes the ills identified by Congress and the Board. Nor is the problem with delay related to unfair labor practices. Though many commenters and academics have argued that lengthy campaigns encourage unfair labor practices,[26] this is not a reason that either Congress or the Board have cited in amending representation procedures in pursuit of timely elections and it does not underlie the final rule.

As shown, delay itself is the problem this rule addresses—not employer speech or unfair labor practices—and eliminating unnecessary delay is therefore unquestionably a valid reason to amend these regulations. In recognition of this fundamental principle, the Board has noted ''the Act's policy of expeditiously resolving questions concerning representation.'' [27] ''In . . . representation proceedings under Section 9,'' the Board has observed, ''time is of the essence if Board processes are to be effective.'' [28] Indeed, the Board's Casehandling Manual stresses that ''[t]he expeditious processing of petitions filed pursuant to the Act represents one of the most significant aspects of the Agency's operations.'' [29]

Many comments argue that current procedures are fast enough because they meet the Board's time targets. The reliance on current time targets is mistaken. For decades the Board has continually strived to process representation cases more expeditiously, and the targets have accordingly been adjusted downward over time. 79 FR 7319–20.[30] Under the commenters' reasoning, in any given year when the agency was meeting its then-applicable time targets, the agency should have left well enough alone and should not have engaged in any analysis about how the process might be improved. This is clearly wrong. Past improvements do not and should not

[22] Senate Committee on the Judiciary, comparative print on revision of S. 7, 79th Cong., 1st Sess. 7 (1945). It is for this reason that 5 U.S.C. 554(a)(6) specifically exempts representation cases from even the minimal requirements of the APA.

[23] Various legislative efforts to impose particular timelines on Board elections have failed repeatedly over the decades. See, *e.g.,* 124 Cong. Rec. 7652–54 (1978) (side-by-side comparison of House and Senate versions of one proposal, accompanied by analysis and criticism by Senator Jesse Helms); ''National Labor Relations Fair Elections Act'' H.R. 4800 (1990), 101st Cong, 2d Session; H.R. 503, 102nd Cong., 1st Session (1991); H.R. 689, 103rd Cong., 1st Session (1993); ''Labor Relations Representative Amendment Act'' S. 1529, 103rd Cong., 1st Session (1993); S. 778, 104th Cong., 1st Session (1995).

[24] The importance of prompt resolutions of questions of representation is heightened by their perishable nature. ''[U]nlike court judgments, [they] do not bind the parties for all time.'' *Manhattan Center Studios, Inc.,* 357 NLRB No. 139, slip op. at 5 (2011). ''In the absence of employer unfair labor practices, a Board certification of a representative will bar a new election for only 1 year if no contract is agreed to, and for no more than an additional 3 years if an agreement is reached.'' *Id.*

[25] Some have claimed that the Board has a secret mission ''to restrict, as far as possible, the participation of employers in the union organizing campaign and representation election process.'' *E.g.,* COLLE II at 4–5. No credible evidence has ever been mustered in support of this claim by any of its proponents, and the Board expressly affirms that limiting debate is not a reason for any of the amendments.

[26] See John Logan, Ph.D., Erin Johansson, M.P.P., and Ryan Lamare, Ph.D. (summarizing their study, ''New Data: NLRB Process Fails to Ensure a Fair Vote,''). See also SEIU; National Employment Law Project (NELP); and Senior Member George Miller and Democratic Members of the U.S. House of Representatives Committee on Education and the Workforce (Senior Member Miller and Democratic House Members) (citing Logan, Johanson, and Lamare study).

[27] See, *e.g., Northeastern University,* 261 NLRB 1001, 1002 (1982), *enforced,* 707 F.2d 15 (1st Cir. 1983).

[28] *Tropicana Products, Inc.,* 122 NLRB 121, 123 (1958).

[29] Pt. 2, Representation Proceedings, Section 11000.

[30] The amendments the Board has chosen to adopt represent a continuation of this incremental process, rather than a radical departure from Board practice as asserted by, for example, the Coalition for a Democratic Workplace (CDW) and Associated Builders and Contractors (ABC). ABC II asserts that the proposals are far more radical than the Board admits, but their contention is stated as *ipse dixit* and remains unsupported. See also AHA II (proposed rules are a ''very radical departure'' from December 2011 final rule).

preclude the Board's consideration and adoption of further improvements.

The Chamber responds by claiming ''[t]he Board cannot set goals regarding acceptable times for elections and then, without justification, disregard those benchmarks. Presumably some rational approach has been taken to develop the benchmarks over the years.'' Chamber II.

There is a rational approach: the General Counsel sets benchmarks by trying to figure out what would be possible—in spite of structural delays identified under the rules—if the regions did their very best work. Thus, meeting those benchmarks shows only that the regions are doing the best they can in spite of the rules, not that the rules are incapable of improvement. That the Board seeks to, and does, meet those targets in most instances is irrelevant to whether additional improvements should be made by amending the rules.

In addition to the time targets, some commenters point to a number of other extrinsic facts which they claim are ''strong evidence that the present system works fairly for all parties.'' Testimony of Arnold Perl on behalf of the Tennessee Chamber of Commerce (TN Chamber) II. For example, they cite the rate of union success in elections as evidence that the current procedures are fair and not in need of revision. Associated General Contractors of America (AGC); Skripko II. From the Board's perspective, this argument is close to tautological. The purpose of the election is to find out what the employees want; if we knew this a priori, the election would be unnecessary. Whether the union win rate is 75% or 25% tells us nothing about whether the elections were fair. Either result might accurately reflect the employees' free choice. The results are therefore unhelpful in determining whether representation case procedures are fulfilling their statutory purpose as fully and efficiently as possible. On that question, we must look to the procedures themselves, and to the policies and purposes of the statute.

Many comments acknowledge that the expeditious resolution of questions of representation is a central purpose of the Act, but argue that the Board did not consider other statutory policies in proposing the amendments.[31] In fact, the Board did do so, both in proposing amendments to its rules in the NPRM and in issuing this final rule. As discussed, the Board considered the statute as a whole, as well as the various policies underlying its enactment and amendment. Specifically, the Board considered the statutory requirement that the pre-election hearing be an ''appropriate hearing'' and the parties' constitutional, statutory, and regulatory rights in relation to the hearing. As explained in detail below, the final rule makes the hearing more, not less, ''appropriate'' to its statutory purpose. The final rule also fully respects the procedural rights of the parties. In fact, it permits the parties to fully exercise their procedural rights more efficiently and with less burden and expense. The final rule promotes a more informed electorate by providing an improved process for informing the unit about election procedures, the appropriate unit for bargaining and the voting procedure for individuals who may properly vote subject to challenge. Similarly, the Board considered employees' statutory right under Section 7 to ''bargain collectively through representatives of their own choosing'' and ''to refrain from any or all such activities.'' 29 U.S.C. 157. As explained in detail below, the amendments adopted in the final rule do not establish inflexible time deadlines or mandate that elections be conducted in a set number of days after the filing of a petition. Further, the amendments honor free speech rights; they do not in any manner alter existing regulation of parties' campaign conduct or restrict freedom of speech. In this connection, the Board has carefully considered the possibility that the amendments might reduce the time between the filing of the petition and the election so as to threaten the communication, association, and deliberation needed by employees in order to truly exercise freedom of choice. It has concluded the amendments pose no such risk, as more fully explained below.

In sum, the Board is charged by Congress with eliminating unnecessary delays, and nothing about the current process suggests that it is ''fast enough'' such that no further improvements are justifiable.

3. The Amendments Which Are Intended To Address Delay Will in Fact Do So

Finally, the commenters are also mistaken in claiming that the Board has not identified the subset of cases where unnecessary delay is prevalent, and has not designed rules responsive to the particular delays identified. Again, many of the changes address other purposes, but where delay is at issue, the Board clearly identifies problems, and the amendments supply sensible and reasonable solutions. Most of the changes apply to only a very small subset of Board cases, and those cases are the very ones most likely to suffer inordinate delays.

For example, it is quite clear from the Board's statistics that fully litigated cases—that is, cases in which the parties are unable to stipulate about pre-election issues—generally take almost twice as long to get to an election. The median for all cases is 38 days, whereas the median for this particular subset of cases is closer to 70 in most years. Clearly, these cases suffer a delay in the time it takes to hold elections.

The Board has identified the primary sources of this delay, and the amendments address them. Under current rules a delay of 25 to 30 days is automatically imposed between the direction of election and the election. There can be absolutely no question that eliminating this waiting period addresses a very significant source of delay that is unique to this subset of demonstrably slower cases.

Other changes to pre-election litigation—such as the 8 to 10 day hearing opening, the standard for continuance, the provision of oral argument rather than briefing, the date to provide voter lists, etc.—will also address less substantial sources of delay in this same small subset of cases. And it is important to bear in mind that many of these changes are aimed at other goals, such as efficiency, uniformity, and adapting to modern technology, and that timeliness is often only a collateral benefit.

Other comments acknowledge that the Board's procedures have been subject to misuse in some cases, but suggest that such cases were rare and do not form an adequate basis for the Board's proposals. The National Retail Federation (NRF) and Printing Industries of America, Inc. (PIA), for example, suggest that the rules should be amended only to address the more egregious cases. Relatedly, many comments cite the high rate of voluntary election agreements (reached in over 90 percent of cases), which obviate the need for pre-election hearings, as evidence that the representation case procedures are working well in the overwhelming majority of cases.

In a way, this argument accords with the Board's own sense of the final rule: many of the amendments are minor changes to the procedure used in the small subset of litigated cases where the problem of delay is demonstrably more severe. The lack of greater ambitions does not mean that the rule is unjustified; rather it means that the amendments provide targeted solutions to specifically identified problems.

In addition, as discussed below, it must be noted that changes to litigation

[31] See, *e.g.,* Assisted Living Foundation of America (ALFA); COLLE; SHRM; Seyfarth Shaw.

procedures can be significant in framing the circumstances for entering stipulations in all cases.[32] Under the former rules, the regional director lacked discretion to limit the presentation of evidence to that relevant to the existence of a question of representation. Thus, the possibility of using unnecessary litigation to gain strategic advantage existed in every case. That specter, sometimes articulated as an express threat according to some comments,[33] had the effect of detrimentally affecting negotiations of pre-election agreements.[34]

Finally, many comments argue that the proposed amendments did not address the most serious causes of delay in Board proceedings. Some comments point to delay in the Board's own adjudication of cases.[35] Other comments point to the Board's blocking charge policy.[36]

The Board is aware that, in too many instances, it has taken too long to decide both representation and unfair labor practice cases. This was a problem in 1959 when Section 3(b) was enacted, and, though the situation is much improved, it remains a problem today. Part of this problem is being addressed by the amendments—namely, by codifying the text of Section 3(b), and by the requirement that regional directors issue a final decision on the hearing officer's post-election recommendations. Giving the Board an authoritative and well-reasoned regional director's decision to consider whenever an appeal is taken will enhance the Board's decision-making on appeals and permit it to deny them where appropriate. To the extent that purely internal Board inefficiencies create additional unnecessary delays, these are not enshrined in the current rules and therefore need not be addressed by rulemaking.

As for the Board's blocking charge policy, the NPRM specifically asked for comments on various proposed revisions. As discussed below, the Board received extensive commentary, particularly in 2014, regarding this matter, and has decided to make changes which will address delay by expediting decision-making on blocking charges.

Of course, an administrative agency, like a legislative body, is not required to address all procedural or substantive problems at the same time. It need not ''choose between attacking every aspect of a problem or not attacking the problem at all.'' *Dandridge* v. *Williams,* 397 U.S. 471, 487 (1970). Rather, the Board ''may select one phase of one field and apply a remedy there, neglecting the others.'' *FCC* v. *Beach Communications,* 508 U.S. 307, 316 (1993) (quoting *Williamson* v. *Lee Optical of Okla., Inc.,* 348 U.S. 483, 489 (1955)). ''[T]he reform may take one step at a time.'' *Id.*[37]

In short, as to those aspects of the final rule where the Board has based its amendments on limiting delays, it has in fact identified the delay at issue specifically, and has crafted amendments rationally designed to address the delay.

C. The Opportunity for Free Speech and Debate

Many comments filed by employers and employer organizations argue that the proposed rule changes in the NPRM would drastically shorten the time between the filing of petitions and elections and thereby effectively reduce employers' opportunity to communicate with their employees concerning whether they should choose to be represented for purposes of collective bargaining. These comments make both legal and policy arguments based on that claim. The Board also considered the matter extensively at the public hearing in 2014, asking questions and taking approximately 175 transcript pages of testimony on this specific issue from a wide variety of speakers with different views.

The Board has concluded that the final rule will facilitate employees' free choice of representative while advancing the statutory objective of promptly resolving questions of representation, and will not impinge on anyone's free speech rights or any statutory mandate or policy. The amendments do not establish any rigid timeline for the conduct of the election itself. Indeed, the Board rejects requests that we set minimum or maximum time limits in which all elections must occur.[38] The election date will continue to vary from case to case. In selecting the election date under the rules, the regional director will continue to consider, among other factors,[39] the desires of the parties, which may include their opportunity for meaningful speech about the election.

1. NLRA Section 8(c) and the First Amendment

Many employer comments contend that the rule changes reflected in the NPRM would be inconsistent with Section 8(c) of the Act[40] and the First Amendment.[41] But neither the proposed rule nor the final rule imposes any restrictions on the speech of any party.

Section 8(c) of the Act provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. 158(c). On its face, Section 8(c)'s stated purpose is to prevent speech from ''constitut[ing] or be[ing] evidence of an unfair labor practice.'' Accordingly, the Board has repeatedly held that Section 8(c) applies only in unfair labor practice and not in representation proceedings. See, *e.g., Hahn Property Management Corp.,* 263 NLRB 586, 586 (1982); *Rosewood Mfg. Co., Inc.,* 263 NLRB 420, 420 (1982); *Dal-Tex Optical Co., Inc.,* 137 NLRB

[32] As another example, consider the new Statement of Position requirement, which assists both parties in making more informed decisions about stipulations. Knowing the issues in dispute will help the parties reach agreement.

[33] See American Federation of Teachers (AFT); International Brotherhood of Electrical Workers (IBEW); LIUNA.

[34] Comments by the United Food and Commercial Workers International Union (UFCW), LIUNA, AFT, NELP, and Retired Field Examiner Michael D. Pearson all point to the impact of that specter of unnecessary litigation on negotiations of pre-election agreements.

[35] See, *e.g.,* NAM; PIA.

[36] See, *e.g.,* AHA; PIA; SHRM; Chamber; CDW; Professor Samuel Estreicher.

[37] These same principles have been applied to administrative action. See, *e.g., United Hosp.* v. *Thompson,* 383 F.3d 728, 733 (8th Cir. 2008) (the equal protection clause does not require the government to attack every aspect of the problem or refrain from regulating at all); *Great American Houseboat Co.* v. *U.S.,* 780 F.2d 741, 749 (9th Cir. 1986) (same). The AHA acknowledges this fact, but states that ''[w]hile this is true, the fact that the Board is declining to revise one of the biggest hurdles to timely elections [blocking charge policy], and at the same time proposing extensive revisions to other aspects of the process that have not proven to hold up elections . . . leaves the Board open to questions about its motives in issuing the NPRM.'' AHA II at 27. Of course, the Board is revising its blocking charge policy, and it is unclear why AHA was under the impression that this matter would not be addressed when the Board specifically proposed a number of potential options in the NPRM and invited comments. And the claim that the other changes do not address delay is equally faulty because, as previously stated, many of the changes have nothing to do with delay, while those that are intended to address delay are in fact related to proven sources of delay.

[38] The Board declines to adopt a suggestion by one commenter, which urged that the election be held within 15 days of the final voter list. See Testimony of Hernandez on behalf of UFCW II. Likewise, the Board declines to set the election date to be the same day the petition is filed, as another commenter urged. See Testimony of Thomas Meiklejohn II. The Board also rejects a suggestion by the dissent to impose 60 days as a maximum period before holding the election.

[39] See Casehandling Manual Section 11302.1.

[40] See, *e.g.,* SHRM; Sheppard, Mullin, Richter & Hampton LLP (Sheppard Mullin); and the National Retail Federation (NRF).

[41] See, *e.g.,* National Grocer's Association (NGA); Waste Connections; ALFA.

1782, 1787 fn. 11 (1962). Because the final rule, which addresses representation case procedures, does not in any way permit the Board to use speech or its dissemination as evidence of an unfair labor practice, the literal language of Section 8(c) is not implicated. Compare *Nat'l Ass'n of Mfrs.* v. *NLRB,* 717 F.3d 947, 956 (D.C. Cir. 2013) (invalidating Board rule that required employers to permanently post a prescribed notice of employee rights ''upon pain of being held to have committed an unfair labor practice''), with *id.* at 959 n.19 (concluding that a Board rule requiring employers to post an election notice immediately before a representation election ''does not implicate § 8(c)'' because violation of that rule does not carry the prospect of unfair labor practice liability).

Nor does the final rule run afoul of the First Amendment. Aside from the accurate statement that speech about unions is protected by the First Amendment,[42] the comments do not appear to argue (except in the most abbreviated fashion)[43] that the proposed amendments would violate the First Amendment. In any event, neither the proposed nor the final rule restricts speech. The rule does not eliminate the opportunity for the parties to campaign before an election, nor does it impose any restrictions on campaign speech. As under the current rules, employers remain free to express their views on unionization, both before and after the petition is filed, so long as they refrain from threats, coercion, or objectionable interference.[44] As the Supreme Court stated in 1941, ''The employer . . . is as free now as ever to take any side it may choose on this controversial issue.'' *NLRB* v. *Virginia Electric & Power Co.,* 314 U.S. 469, 477 (1941). Likewise, the rule does not impose any new limitations on union speech. Accordingly, the Board's effort to simplify and streamline the representation case process does not infringe the speech rights of any party.

The comments do not contend that employers will be prevented from expressing their opinions on unionization, but only that, because there may be less time between petition and election in some cases, employers will have fewer opportunities to express their opinions before the Board concludes its investigation under Section 9. 29 U.S.C. 159. The Board recognizes that ''[t]he First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.' '' *Heffron* v. *Int'l Soc. for Krishna Consciousness, Inc.,* 452 U.S. 640, 655 (1981) (quoting *Kovacs* v. *Cooper,* 336 U.S. 77, 87 (1949) (plurality opinion)). But the rule does not violate this constitutional principle because employers will continue to have ample meaningful opportunities to express their views both before and after a petition is filed, as discussed below.[45]

2. The Final Rule Accords With the Statutory Policy in Favor of Free Debate

Although it is clear that the proposed amendments implicate neither the First Amendment nor the literal language of Section 8(c) of the Act, many comments nevertheless suggest that the amendments would leave employers with too little time to effectively inform their employees about the choice whether to be represented by a union.[46] They contend that the consequences of a union vote are long-lasting and could significantly affect employees' livelihoods and careers, and therefore ensuring that employees have sufficient time to hear from all sides is critical to the statutory objective of ensuring employee free choice.[47] Comments in favor of the amendments contend, on the other hand, that employers can and do communicate their views on unions to employees even before a petition has been filed and will continue to have sufficient time to do so after filing under the proposed amendment.

There is a clear statutory policy in favor of free debate and these amendments recognize, and are fully consistent with that policy.

a. Chamber of Commerce v. Brown

The Supreme Court recognized in *Chamber of Commerce* v. *Brown,* 554 U.S. 60 (2008), that the enactment of Section 8(c) embodies a general ''congressional intent to encourage free debate on issues dividing labor and management.'' *Id.* at 67 (quoting *Linn* v. *Plant Guard Workers,* 383 U.S. 53, 62 (1966) (a defamation case)). The Court further recognized that such debate contemplates advocacy by both labor and management, noting that the inclusion in Section 7 of the right to refrain from joining a union ''implies an underlying right to receive information opposing unionization.'' *Id.* at 68.[48] The Court relied on these features of the Act to invalidate, on preemption grounds, a California law that prohibited the use of state funds to encourage or discourage employees from seeking union representation. As the Court found, ''California's policy judgment that partisan employer speech necessarily 'interfere[s] with an employee's choice about whether to join or to be represented by a labor union' '' was in direct conflict with national labor policy as reflected by the foregoing provisions of the Act. *Id.* at 69.

As recognized by the Court in *Brown* the Act encourages free debate by employers, labor organizations and employees during representation proceedings. But ultimately, it is up to employees to evaluate the campaign information with which they are presented, as Board precedent recognizes. See *Alto Plastics Mfg. Corp.,* 136 NLRB 850, 851 (1962) (''[T]he employees may select a 'good' labor organization, a 'bad' labor organization, or no labor organization, it being

[42] *Thomas* v. *Collins,* 323 U.S. 516, 537–38 (1945).

[43] See, *e.g.,* AEM II; INDA II; Knife River II.

[44] In this regard, the Board agrees with comments stating that the rule does not restrict, let alone prohibit, any form of expression or any particular message. See LIUNA MAROC II; AFL–CIO Reply II.

[45] Some comments draw comparisons to political elections, which typically occur at regularly set intervals, but the Board does not find these comparisons to be apt. See Joseph P. Mastrosimone, *Limiting Information in the Information Age: The NLRB's Misguided Attempt to Squelch Employer Speech,* 52 Washburn L. J. 473, 501–06 (2013); U.S. Poultry & Egg Association, the National Chicken Council, and the National Turkey Federation (U.S. Poultry) II. Although they share certain common features, such as the secret ballot, political elections and representation elections are still quite different. Most notably, as discussed above, Congress has consistently expressed a clear purpose of limiting obstructions to commerce by holding union organizing elections quickly, *Boire* v. *Greyhound Corp.,* 376 U.S. 473, 478 (1964) (quoting legislative history)—a consideration which is unique to elections held in the labor relations context. Another significant difference is the existence of an employment relationship between the electorate and one of the parties to the representation case proceeding; this changes the election in countless ways, from the various parties' relative ease of access to the electorate, to the reasonable implications which can be drawn from employer-specific conduct—none of which finds any parallel in modern political elections. The Board therefore declines to borrow campaign timing principles from the political election context wholesale.

[46] See Chamber; COLLE; SHRM; Seyfarth Shaw; Sheppard Mullin; Baker & McKenzie; John Deere Water; PIA; Senator Alexander and Republican Senators II; Diamond Transportation; Testimony of Peter Kirsanow on behalf of NAM II.

[47] See NGA; Retail Industry Leaders Association (RILA); Society of Independent Gasoline Marketers of America (SIGMA); Ranking Member Michael B. Enzi of the U.S. Senate Committee on Health, Education, Labor & Pensions, and Republican Senators (Ranking Member Enzi and Republican Senators); National Meat Association; NAM II.

[48] This is not to suggest, of course, that employers are required to engage in any campaign speech at all, or to contest evidence of majority status; employers are free to decide whether to express their views on unionization—pro or con or neutral—if done without threat of reprisal or force of promise of benefit. See *Linden Lumber Div., Summer & Co.* v. *NLRB,* 419 U.S. 301, 310 (1974); cf. *Nat'l Ass'n of Mfrs.* v. *NLRB,* 717 F.3d at 956–59 (discussing the employer's right to remain silent). See also *NLRB* v. *Creative Food Design LTD.,* 852 F.2d 1295, 1297, 1299 (D.C. Cir. 1988) (''an employer's voluntary recognition of a majority union also remains 'a favored element of national labor policy.' '') (citation omitted).

presupposed that employees will intelligently exercise their right to select their bargaining representative''); *Handy Andy, Inc.,* 228 NLRB 447, 456 (1977) (declining to withhold certification from unions with records of discriminatory practices); *Midland Nat'l Life Ins. Co.,* 263 NLRB 127, 131–32 (1982) (relaxing the Board's misrepresentation standard on the ground that more reliance on the vigorous campaigning by the parties would reduce dilatory post-election litigation). These decisions confirm that the Act presupposes that all parties to a representation proceeding will have a meaningful opportunity to speak.

But a meaningful opportunity to speak does not mean an unlimited opportunity to speak. As in the First Amendment context, there is no fundamental right for parties to ''publicize their views 'whenever and however and wherever they please.' '' *Wood* v. *Moss,* 134 S. Ct. 2056, 2066 (2014).

The election must be held sometime; therefore, the resource of time to campaign is an inherently limited one.[49] This is particularly significant where, as discussed above, the Act also embodies a very strong countervailing policy in favor of holding elections ''efficiently and speedily.'' [50] In short, the Board is not required to wait for the parties to exhaust all opportunities for speech before holding an election, so long as the opportunity they have is a meaningful one.

As discussed below, the Board concludes that these amendments will not deprive employers of a meaningful opportunity to participate in election campaigns. Many employers are aware of the campaign before the petition is filed, and begin communicating at that time. Indeed, many employers speak to employees about unions in the absence of any particular campaign, and will have laid the foundation for effective campaign speech well in advance. Finally, and most significantly, even where no pre-petition speech whatsoever takes place, these amendments will not eliminate the opportunity for meaningful speech, which will continue to be ample even after the petition is filed.

b. Employer Pre-Petition Knowledge

Numerous comments contend that any shortening of the time period between the petition and election will be detrimental to employers because employers are often unaware that an organizing campaign is underway until the petition is filed.[51] These comments contend that the union will have had a head start in the campaign because it will, necessarily, have already obtained authorization cards from at least 30 percent of employees in the petitioned-for unit, and will have been able to delay filing the petition for whatever amount of time it believed was advantageous in order to communicate with employees.[52] For example, the Chamber comments that union petitions ''catch[] many if not most employers off guard and ill-prepared to immediately respond * * *.'' The Board was presented with no reliable empirical evidence, however, suggesting that employers are frequently unaware of an organizing drive before the filing of a petition.[53] Indeed, the available evidence suggests the contrary.

The Supreme Court's decision in *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 620 (1969), which upheld the Board's authority to order an employer to bargain with a union that had not been certified as the result of an election, is relevant to this issue. In *Gissel,* the employers argued that the Board could not order an employer to bargain with the union, even when the union's majority support was demonstrated through employees' authorization cards and the employer's unfair labor practices had made a free and fair election impossible, because a union could solicit such cards before the employer had an adequate opportunity to communicate with employees. The Court rejected this argument:

> The employers argue that their employees cannot make an informed choice because the card drive will be over before the employer has had a chance to present his side of the unionization issues. Normally, however, the union will inform the employer of its organization drive early in order to subject the employer to the unfair labor practice provisions of the Act; the union must be able to show the employer's awareness of the drive in order to prove that his contemporaneous conduct constituted unfair labor practices on which a bargaining order can be based if the drive is ultimately successful. See, *e.g., Hunt Oil Co.,* 157 NLRB 282 (1966); *Don Swart Trucking Co.,* 154 NLRB 1345 (1965). Thus, in all of the cases here but [one,] the employer, whether informed by the union or not, was aware of the union's organizing drive almost at the outset and began its antiunion campaign at that time; and even in the [one] case, where the recognition demand came about a week after the solicitation began, the employer was able to deliver a speech before the union obtained a majority.

Id. at 603. The Supreme Court has thus recognized that the concern expressed in the comments ''normally'' does not arise even when there is no election and the organizing effort does not proceed beyond the signing of authorization cards. What was true at the time of *Gissel* is still true today.

There is substantial evidence on this point in the rulemaking record. See Testimony, Ole Hermanson on behalf of AFT II, Gabrielle Semel on behalf of CWA II, Thomas Meiklejohn on behalf of Livingston, Adler, Pulda, Meiklejohn & Kelly II, Maneesh Sharma on behalf of AFL–CIO II. In some cases, the employer's knowledge of the campaign is apparent from the fact that the employer committed unfair labor practices targeting employees' organizing activity before the filing of the petition.[54] This is the basis for an empirical study conducted by Professors Kate Bronfenbrenner and Dorian Warren (and submitted with their comment).[55]

[49] In this way time is fundamentally different from other speech resources; by necessity, the government must impose some kind of cap on time. Money, by contrast, is a speech resource with no such inherent cap. This distinction must be taken into account in reading cases such as *McCutcheon* v. *FEC,* 134 S.Ct. 1434, 1441 (2014); *Citizens United* v. *Federal Election Commission,* 130 S.Ct. 876, 898 (2010); *Chamber of Commerce* v. *Brown,* 554 U.S. 60 (2008), which involve regulation of campaign spending. Compare NGA II (eliding this distinction in relying on *McCutcheon*) with Testimony of Thomas Meiklejohn on behalf of Livingston, Adler, Pulda, Meiklejohn & Kelly II (discussing this distinction).

[50] *NLRB* v. *A.J. Tower Co.,* 329 U.S. 324, 331 (1946).

[51] See, *e.g.,* Chamber; CDW; National Ready-Mixed Concrete Association (NRMCA); Greater Raleigh Chamber of Commerce; Landmark Legal Foundation; Vigilant; Food Marketing Institute (FMI) II; Klein II.

[52] NGA; National Meat Association. See also Spartan Motors, Inc.; Cook Illinois Corporation; Arizona Hospital and Healthcare Association; Constangy, Brooks & Smith, LLP (Constangy); Sheppard Mullin; Ranking Member Enzi and Republican Senators; Specialty Steel Industry of North America; International Foodservice Distributors Association; NAM; Chamber; NRTWLDF; Chairman John Kline of the House Committee on Education and the Workforce, and Chairman Phil Roe of the House Subcommittee on Health, Education, Labor and Pensions (Chairmen Kline and Roe) II.

[53] COLLE acknowledges this in its comment.

[54] See, *e.g., Ryder Truck Rental,* 341 NLRB 761, 765 n.9, 767 (2004) (petition filed in December; in November, employer invited employees to report any harassment by union), *enforced,* 401 F.3d 815 (7th Cir. 2005); *Dlubak Corp.,* 307 NLRB 1138, 1141, 1147 (1992) (threats and discriminatory discharges occurred October 5–13; petition filed October 24), *enforced mem.,* 5 F.3d 1488 (3d Cir. 1993); *Spring City Knitting Co.,* 285 NLRB 426, 431, 444, 448–49, 450 (1987) (unfair labor practices occurred March 1, 14, and 29; petition filed May 3); *Well-Bred Loaf, Inc.,* 280 NLRB 306, 311–16 (1986) (threats, interrogation, and unlawful discharges occurred August 22 and 23, at a time when union activity was already common knowledge; petition filed October 6); *Dilling Mechanical Contractors,* 318 NLRB 1140, 1141, 1144, 1155 (1995) (union informed employer of campaign on January 4, but employer had threatened employees with discharge in December if they engaged in union activity), *enforced,* 107 F.3d 521 (7th Cir. 1997), cert. denied 522 U.S. 862 (1997).

[55] The study was based on a random sample of 1000 elections during the period 1999 through 2003

The study concluded that in 47 percent of cases involving serious unfair labor practice allegations against employers that resulted in a settlement or a Board finding that the law was violated, the alleged unlawful conduct occurred before the petition was filed; in 60 percent of cases involving allegations of interrogation and harassment, the conduct occurred before the petition; and in 54 percent of cases involving allegations of threats and other coercive statements, the conduct occurred before the petition. Professor Warren testified at the 2011 public hearing that the researchers' review of the files in these cases indicated that the conduct resulting in the charge, whether it was actually unlawful or not, evidenced the employer's knowledge of the organizing campaign. Critics of the study contend that it inappropriately focuses on mere allegations of misconduct and that the category of ''charges won'' inappropriately includes settlements.[56] The importance of the study's findings for present purposes, however, does not rest on whether or not the charges had merit, but rather on the fact that they were filed based on pre-petition conduct and that available information in the case files suggests the employer had pre-petition knowledge of the organizing campaign. The study's findings in that regard are consistent with the Board's experience, and no contrary study was presented to the Board.

In addition, the AFL–CIO surveyed 57 union-side labor lawyers, and asked whether ''[i]n the organizing drives you have been involved in that resulted in a petition for an election, was the employer aware of the organizing before the petition was filed?'' The vast majority—41 attorneys—gave an unqualified ''yes'' in answer to this question (9 answered ''no'' and 7 gave some answer other than yes or no).[57] AFL–CIO II. Though this does not show with quantitative precision how often employers know about the campaign, it does cast doubt on the Chambers' unsupported statement that ''many if not most'' employers are surprised by the petition.

Board precedent is also replete with cases in which there was clear evidence that the employer was aware of the organizing campaign well before the petition was filed. In many cases, unions give the employer formal notice of the campaign before filing the petition, either by demanding recognition or by providing the employer with a list of employees on the organizing committee.[58] There are many pragmatic reasons for this common practice, which were explained in some detail by one speaker at the hearing: ''[First,] the union, in order to build strength, has to * * * build up the confidence among the employees that they can join together to speak up for themselves. And then, in order to get that message to the larger group of employees, there has to be some committee, some group of people who are willing to go public, have their faces on campaign literature and have their names disclosed as the people who are willing to lead the campaign. Once that happens, the employer knows there is something going on. The second reason for this is quite simply that if you end up in litigation where somebody was discriminated against because of their union activity, you want to be able to show that [the employer knew about their union activity.] If it's been concealed you have a much, much harder time proving that. And then the third reason is because it doesn't work to keep it secret * * *. [W]ord gets to the employer.'' Testimony of Meiklejohn on behalf of Livingston, Adler, Pulda, Meiklejohn & Kelly II.

Finally, the evidence on the record on this point is also consistent with the Board's own experience and expertise in processing representation petitions and unfair labor practice cases.

c. General Employer Communications About Unionization

The foregoing authority casts doubt on the contention that ''many if not most'' employers are unaware of an organizing drive prior to the filing of a petition. But even in the absence of an active organizing campaign, employers in nonunionized workplaces may and often do communicate their general views about unionization to both new hires and existing employees.[59] Some comments suggest that, prior to receiving a petition, employers pay little attention to the issue of union representation, and that general efforts to inform and persuade employees about unionization in the absence of a petition would be time-consuming and expensive.[60] Although some employers may choose not to discuss unionization until a petition is filed, the Board's experience suggests that other employers do discuss unionization with their employees beforehand, often as soon as they are hired. For example,

in units with 50 or more eligible voters and a survey of 562 campaigns from that sample. See Bronfenbrenner & Warren, *supra* at 2. An updated version of the study was discussed by Professor Bronfenbrenner in her 2014 hearing testimony.

[56] The Chamber in particular makes this point, and complains that the 2011 final rule did not respond to the Chamber's criticism. Chamber II. However, again, the Board is not relying on any evidence of increased ULPs during a lengthy campaign, or in any way suggesting that settled charges are meritorious. The essential point is that the case files themselves show that there was evidence that the employer knew about the campaign before the petition was filed.

Other comments argue that the study shows that only about 50–60% of employers have prepetition knowledge. This is a misunderstanding of the study. The study does not survey a statistical sample of campaigns generally, and ask whether the employer had prepetition knowledge; the study surveys campaigns which resulted in ULP charges, and asks whether the ULP occurred before a petition had been filed. Assuming that employers do not commit ULPs at the earliest possible moment, the fact that about half of ULPs surveyed occurred after petition filing does not prove the negative, *i.e.,* that the employers in those cases *lacked* prepetition knowledge.

Thus the Board recognizes that neither the surveyed universe nor the 50–60% rates observed reflect the broader realities of union organizing campaigns. (The rates very likely are substantially higher.) The study merely provides some measure of empirical confirmation of the Board's qualitative conclusion, based on its own experience, that employers are very often aware of the organizing campaign before the petition is filed. Indeed, the study's focus on employer's with bargaining units larger than the Board's historical medians drives home this point. For the Board has long presumed that in smaller workplaces, employers are even more likely to be aware of union organizing activity among their employees. See, *e.g., Wiese Plow Welding Co.,* 123 NLRB 616, 618 (1959).

[57] The Chamber criticizes the statistical rigor and ambiguity of the AFL–CIO's survey. Chamber II reply. It is quite true, as the Chamber notes, that it is unclear how many campaigns in total are represented in this answer, and that, for a variety of reasons, it would not be methodologically sound to draw rigorous statistical inferences. A speaker representing the AFL–CIO conceded as much at the hearing. That is not, however, the purpose for which the survey was taken or submitted, and that is not the purpose for which the Board is citing it. Rather, the ''survey'' is nothing more than a summary of ''what practitioners are reporting that they are experiencing.'' Testimony of Sharma on behalf of AFL–CIO II. In this way, it is like a compilation of comments from experienced labor attorneys, sharing the varieties of their experiences with Board procedures.

[58] See, *e.g., Lucky Cab Co.,* 360 NLRB No. 43, slip op. at 1 (Feb. 20, 2014) (Union filed petition on March 30th, but informed the employer of its organizing activity on February 25th. Board also finds that employer already knew of the organizing drive for months before notice was given.); *Flamingo Hilton-Laughlin,* 324 NLRB 72, 76 (1997) (union informed employer of campaign and committee members on January 26 and filed petition on March 26), enf. granted in part, denied in part 148 F.3d 1166 (D.C. Cir. 1998); *Keco Industries,* 306 NLRB 15, 16 (1992) (union informed employer of campaign in January and filed petition on October 31); *Mariposa Press,* 273 NLRB 528, 533 (1984) (union informed employer of campaign on September 25 and filed petition on October 6); *Comet Corp.,* 261 NLRB 1414, 1418, 1422 (1982) (union informed employer of campaign and committee members on July 23 and filed petition on August 23); *Quebecor Group, Inc.,* 258 NLRB 961, 964 (1981) (union informed employer of campaign on November 17 and filed petition on November 28).

[59] See comments of John Logan, Ph.D., Erin Johansson, M.P.P., and Ryan Lamare, Ph.D.; Center for American Progress Action Fund; LIUNA MAROC II; Testimony of Hermanson on behalf of AFT II; Testimony of Semel on behalf of CWA II.

[60] Fox Rothschild LLP; National Mining Association; NRF.

some employers distribute employee handbooks or show orientation videos to all new employees that express the employer's view on unions or its desire that employees remain unrepresented.[61]

Several comments contend that an employer's general ability to communicate with employees regarding unions is not a complete substitute for the ability to communicate regarding a specific petition and a known petitioner.[62] However, a complete substitute is not necessary in this context; rather, the question is whether the overall speech opportunity in the campaign is meaningful. The opportunity to engage in general speech of this sort is undoubtedly relevant on this question, and must be considered together with the opportunities for later, more specific campaign speech as part of the overall analysis.

Finally, even in the absence of any pre-petition campaign, employees have experience with the existing labor-management regime in their workplace, which informs their choice of whether to seek to alter it through collective bargaining. In unionized workplaces in which the incumbent union faces a decertification petition or a rival union petition, the incumbent union will be appropriately judged by its performance to date. Thus, eligible voters have a preexisting base of knowledge and experience with which to evaluate the incumbent. The same is true in workplaces where employees are unrepresented. Employees there have experience with labor-management relations in the absence of union representation. In both cases, employees base their choice, at least in part, on the relationship they are being asked to change.[63]

d. Employers' Post-Petition Opportunities for Speech

Although the Board has concluded that the record does not establish that pre-petition employer ignorance of an organizing campaign is the norm, the Board accepts that, in at least some cases, employers may, in fact, be unaware of an organizing campaign until a petition is filed. For example, COLLE cites union campaign strategy documents that allegedly call for ''stealth'' campaigns. In such cases, the union may indeed have a ''head start'' in the campaign in the sense that it begins communicating its specific message to the unit employees before the employer does so.[64]

And so the question is presented whether, as a general matter, the rules will provide a meaningful opportunity to campaign under these circumstances. The argument has been presented that a great deal of time is required, weeks and even months, in order to decide on a message and effectively communicate it. Testimony of Kirsanow on behalf of NAM II; Testimony of Edgardo Villanueva on behalf of EMSI Consulting II. This is not consistent with our experience in overseeing Board elections.

Most elections involve a small number of employees. A quarter of elections are held in units with 10 or fewer employees; half of elections are held in units smaller than 25; and three-quarters of all Board elections have 60 or fewer employees in the unit.[65] Given this small size—much, much smaller than even the smallest political elections—effective communication with all voters can be accomplished in a short period of time. Even in much larger units, employers have a meaningful opportunity for speech.

The employer has opportunities to communicate with employees while they are in the workplace, during the workday. It can compel employees to attend meetings on working time at the employer's convenience.[66] Most employers spend more than 35 hours per week in close, in-person contact with the voters. As pointed out at the Board's public hearings in both 2014 and 2011, employers can use as much of that time as they wish communicating with employees about these matters. Testimony of Hermanson on behalf of AFT II; Testimony of Professor Joseph McCartin on behalf of the Kalmanovitz Initiative for Labor and the Working Poor. Both professional ''persuaders'' and employer representatives who testified against the rule were in agreement on this point. See, *e.g.,* Testimony of Villanueva on behalf of EMSI Consulting II. Yet, generally, only three or four such meetings were considered necessary to communicate with employees effectively. *Id.*

Another speaker testified about a recent campaign which aptly illustrates this principle. Testimony of Elizabeth Bunn on behalf of AFL–CIO II. In the

[61] See, *e.g., U-Haul Co. of California,* 347 NLRB 375, 378 (2006) (employee handbook, distributed to all new employees, included a section entitled, ''What about Unions?''; the section stated the employer's preference to be union-free and asserted that employees do not need a union or outside third party to resolve workplace issues); *SNE Enterprises,* 347 NLRB 472, 473 (2006) (employee handbook stated, ''The Company believes a union is not necessary and not in the best interest of either the Company or its Team Members.''), *enforced,* 257 Fed.Appx. 642 (4th Cir. 2007); *Overnite Transportation Co.,* 343 NLRB 1431, 1455 (2004) (employee handbook stated: ''It is important for you to know that the Company values union-free working conditions. We believe that true job security can come only from you and the management of this company working together in harmony to produce a quality product. A union-free environment allows this kind of teamwork to develop.''); *MEMC Electronic Materials, Inc.,* 342 NLRB 1172, 1188 (2004) (employee handbook stated that remaining ''union-free'' is an objective of the company); *Noah's New York Bagels,* 324 NLRB 266, 272 (1997) (section of employee handbook entitled ''Unions'' states: ''At Noah's Bagels we believe that unions *are not necessary.* We believe this for many reasons[.] First, there is no reason why you should have to pay union initiation fees, union dues, and union assessments for what you already have. . . . Second, there is no reason why you or your family should fear loss of income or job because of strikes or other union-dictated activity. Third, we believe that the best way to achieve results is to work and communicate directly with each other without the interference of third parties or unions. . . . The Federal government gives employees the right to organize and join unions. It also gives employees the right to say 'no' to union organizers and not join unions. Remember, a union authorization card is a power of attorney which gives a union the right to speak and act *for* you. If you should be asked to sign a union authorization card, we are asking you to say 'no.'''); *American Wire Products,* 313 NLRB 989, 994 (1994) (employee handbook states, ''Our Company is a non-union organization and it is our desire that we always will be''; the same section also requests employees to direct union-related questions to a supervisor); *Heck's, Inc.,* 293 NLRB 1111, 1114 (1989) (employee handbook's ''Union Policy'' read: ''As a Company, we recognize the right of each individual Employee, their freedom of choice, their individuality and their needs as a worker and a fellow human being. For these reasons and others, we do not want any of our Employees to be represented by a Union. . . . When you thoroughly understand Heck's liberal benefit programs, the desire to assist you in your job progress and willingness to discuss your job-related problems, you surely will agree there is no need for a union or any other paid intermediary to stand between you and your company.'') Thus, employees may be well aware of their employer's views regarding unions even before any campaign begins.

[62] See SHRM; COLLE; NAM; Seyfarth Shaw; ALFA; Testimony of Arnold Perl on behalf of TN Chamber of Commerce.

[63] See Testimony of Darrin Murray on behalf of SEIU II. In contrast to this point, which is unassailable, the AFL–CIO contends that, based upon a study by Getman and Goldberg, the employees' votes are determined *almost entirely* by preexisting attitudes toward working conditions, rather than by campaign speech. AFL–CIO Reply II. Regardless of the empirical reality of this claim, which we strongly doubt, the Act itself is premised on a contrary assumption, as discussed above. The supposed ineffectiveness of employer speech in persuading voters cannot be cited as reason to restrict that speech, and we expressly decline to rely on this rationale.

[64] See also comment of RILA, contending that ''stealth campaigns'' are common in the retail industry.

[65] In FY2013; 99% of elections involved fewer than 500 employees.

[66] A 1990 study of over 200 representation elections found that employers conducted mandatory meetings prior to 67 percent of the elections. John J. Lawler, Unionization and Deunionization: Strategy, Tactics, and Outcomes 145 (1990). A more recent study found that in 89 percent of campaigns surveyed, employers required employees to attend so-called ''captive audience'' meetings during work time and that the majority of employees attended at least five such meetings during the course of the campaign. Bronfenbrenner & Warren, *supra* at 6.

stipulation, the election was set 25 days from the petition; the unit comprised eight employees. The employer held a total of 30 individual, mandatory meetings to communicate with employees about the vote. This demonstrates that, where employers wish to engage in an unusually high amount of communication, they can accomplish that in a short period of time because they control the quantum of work time which is used in conveying their message.

Under current law, employers can compel attendance at meetings at which employees are often expressly urged to vote against representation.[67] There is no limit on either the frequency or duration of such mandatory meetings and the rule imposes none. Employees may be relieved of regular duties and, instead, be required to attend such meetings.

These are examples of how employer speech can be expeditiously accomplished. The rule does not limit any communication methods available to employers. Indeed, that is precisely the point of this discussion: That employers have meaningful opportunities to speak with employees both under the old rules and the new.[68]

The Board considered such factors in its *Excelsior* rule, which requires that the names and addresses of voters be provided to the petitioning union prior to the election. *Excelsior Underwear, Inc.,* 156 NLRB 1236, 1240–41 (1966). The rule was designed, in part, to ensure fairness by maximizing the likelihood that all voters would be exposed to the nonemployer party arguments concerning representation. The rule requires that the petitioner have the opportunity to make use of a list of names and addresses of voters for a minimum of 10 days before the election, effectively allowing the petitioner a minimum of 10 days for such speech. See *Mod Interiors,* 324 NLRB 164, 164 (1997); Casehandling Manual Section 11302.1. ''The *Excelsior* rule is not intended to test employer good faith or 'level the playing field' between petitioners and employers, but to achieve important statutory goals by ensuring that all employees are fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights.'' *Mod Interiors, Inc.,* 324 NLRB 164 (1997). We think a similar analysis is relevant to employers' meaningful opportunity to speak here.

Finally, modern communications technology available in many workplaces permits employers to communicate instantly and on an on-going, even continuous basis with all employees in the voting unit. See, *e.g., Virginia Concrete Corp.,* 338 NLRB 1182, 1182 (2003) (employer sent ''Vote No'' message to ''mobile data units'' in employees' trucks in the final 24 hours before an election); Testimony of Bunn & Sharma on behalf of AFL–CIO II (less time is needed to communicate in the era of communications technology, from text messaging to video presentations on flash drives).[69] Access to information about particular unions, such as news reports, regulatory disclosures, or judicial opinions are readily available on the Internet, both for employees to peruse and for employers who desire to use such information as part of their messaging. See, *e.g.,* Office of Labor-Management Standards (OLMS), *http://www.dol.gov/olms/regs/compliance/rrlo/lmrda.htm.* More general information praising or decrying the effects of union representation is also plentiful. Indeed, now more than ever, parties who wish to immediately participate in an election campaign have the tools to do so at their disposal.

e. No Regulatory Minimum or Maximum Time Should Be Set

Many comments propose that the Board set specific standards for the number of days between the petition and the election. In general, however, none of these proposals agree as to what the standards should be.

Some have contended that the minimum should be 0 days. Testimony of Meiklejohn on behalf of Livingston, Adler, Pulda, Meiklejohn & Kelly II. Or the minimum could be 10 days, paralleling the Union's time with the list of voter contact information, also discussed above. Cook-Illinois Corporation suggests a minimum of 21 days, subject to expansion or contraction by agreement of the parties. The dissent suggests a minimum of 30–35 days and a maximum of 60 days. National Right to Work Legal Defense Foundation (NRTWLDF) II proposes a minimum of 35 days. The Heritage Foundation proposes a minimum of 40 days. Others suggest times longer still.[70] On the other hand, others have suggested imposing a different kind of regulatory maximum on the election date, *i.e.,* that the election should be held within 15 days of the final voter list unless the parties agree to a later date. Testimony of Hernandez on behalf of UFCW II.

As both supporters and opponents of the rule have noted, however, every case will be different, and it would disserve the purposes of the Act to create a procrustean timeline for election speech. Testimony of Professor Samuel Estreicher; Testimony of Petruska on behalf of LIUNA MAROC II; Testimony of Ronald Meisburg on behalf of the Chamber II; cf. Testimony of Kirsanow on behalf of NAM II (there is no ''irreducible point'' where ''logistical First Amendment violation'' takes place). The election will ''vary in size, geography and complexity in just about every way imaginable,'' and various unique situations will present themselves in particular workplaces. Testimony of Petruska on behalf of LIUNA MAROC II.[71] Bearing in mind

[67] See, *e.g., Fontaine Converting Works Inc.,* 77 NLRB 1386, 1387 (1948) (employer did not violate the Act by ''compelling its employees to attend and listen to speeches on company time and property'').

[68] In light of this fact, the dissent's reading of this discussion is particularly perverse. Relying on *Citizen's United,* 130 S.Ct. 876 (2010) and progeny, the dissent claims the Board is using an ''anti-distortion'' theory to limit ''an employer's undue influence,'' and rectify employers' ''upper hand in campaign communications'' by limiting the time employers have to speak. We—yet again—emphatically disclaim any such motivation. As previously discussed, the problems caused by delay have nothing to do with employer speech.

[69] As described in the NPRM, and below, the Board's experience suggests employers are also increasingly using company and personal email to send campaign communications to their employees. 76 FR 36812, 36820 (June 22, 2011).

[70] CDW draws an analogy to the Older Workers Benefit Protection Act, 29 U.S.C. 626, which provides 45 days for employees to sign releases regarding age discrimination claims. CDW argues that this provision demonstrates the impropriety of forcing employees to make a decision on representation in less time than the current 38-day median. The Board does not find it instructive to compare an individual employee's permanent waiver of rights under a completely different statutory scheme with the election procedures at issue here involving groups of employees and, typically, an active campaign by several parties. We also reject NAM's (II) analogy to the 45-day plant-closing or mass layoff notice period under the Worker Adjustment and Retraining Notification Act.

[71] Many commenters argued that their industry or employment situation presented unique speech needs that should be considered.

RILA and NRF argue that sufficient time to campaign is particularly critical in the retail industry, where employees work on different shifts, often are seasonal or part-time, are less accessible during the workday because they are on the sales floor, and often are unavailable outside normal working hours due to other commitments. See also Food Marketing Institute (FMI) II (similar arguments in food retail). NRF contends, however, that more than 98 percent of all retailers employ fewer than 100 workers, and RILA contends that most petitions seek elections in single-store units and that front-line managers typically constitute 10 to 20 percent of the workforce in each store.

NRMCA and construction industry employers (ABC II) make similar arguments, that their various industries have unique features such as isolated plant locations, unpredictable delivery hours, and dispersed employees. But again, the commenters state that the vast majority of employers in the industry are small businesses. Therefore, most bargaining units are likely to be quite small, which should enable employer communication to take

Continued

the general principles articulated above, the regional director will retain a measure of discretion to consider these matters along with other relevant factors in selecting an election date.

As an alternative, some have discussed reserving ''expedited'' procedures for cases where the employer has received advanced notice of the campaign from the union. U.S. Poultry II; Testimony of Perl on behalf of the TN Chamber II. This suggestion would at least partially account for case-by-case variation in employer knowledge of the campaign. However, it would account for none of the other ways that campaigns vary, and would continue to apply inappropriate standards to cases that do not justify them. More fundamentally, as discussed, the petition itself is adequate notice because the procedures under the new rules still provide a meaningful opportunity to campaign.

As another alternative, some have argued that the Board should publish, together with the final rule, revised ''time targets'' for representation case procedures. CDW; Testimony of Joseph Torres on behalf of Winston & Strawn II; Testimony of Ross Friedman on behalf of CDW II. The existing time targets set expectations that facilitate the negotiation of stipulations because ''there is discretion to negotiate an election date anytime within'' the time target. CDW. Time targets have never been published by the Board; rather, the extant time targets were published by the General Counsel, and represent his experience administratively overseeing the regions. The Board declines to publish any such time targets at present, and will continue to leave the matter within General Counsel discretion. We note that experience with the rules will continue to provide the frame of reference for the General Counsel's time targets, and that some time may be necessary before sufficient experience is available to intelligently revise the current targets; however, we think it reasonable to anticipate that time targets will ultimately be revised and published, and that timely completion of this process will serve the Board's objective of encouraging election agreements as parties adjust to the new rule. Any short term difficulties in reaching election agreements, should dissipate quickly, as they have in the past when prior time targets have been adjusted.

The Board believes that its duty is to perform its statutory functions as promptly as practicable consistent with the policies of the Act. The Board has amended its rules in order to facilitate that objective, but even under the amended rules, which leave the ultimate decision about the setting of the election date within the sound discretion of the regional director after consultation with the parties, the Board does not believe it is likely or even feasible that it could perform its statutory functions in such a short period, and a regional director would set an election so promptly, that employee free choice would be undermined. The Board has thus decided to maintain the current practice of not setting either a maximum or a minimum number of days between petition and election via its rules.

f. Timing Under the Rules in Practice

Finally, it must be noted that many of the concerns expressed about the time from petition to election are predicated on erroneous speculation. Citing Member Hayes's dissent from the NPRM, some comments suggest that the amendments will provide for elections in as few as 10 days after the filing of the petition.[72] The practicalities of a regional director's conducting a directed election suggest otherwise. First, it takes at least 8 days to begin the hearing. At least 1 day is required for the hearing and then a decision and direction of election must be drafted and issued; thereafter, the voter list must be produced and the Notice of Election posted for 3 days—all before an election is conducted.

We are also not persuaded by the complaint that the amendments will work a deprivation of employer speech rights in cases where the employer feels pressured to enter an agreement regarding the election date that provides for a very fast election. Testimony of Elizabeth Milito on behalf of National Federation of Independent Business (NFIB) II. If the employer does not want a particular election date, it is free to not sign, state its position in its statement of position, and the regional director can fix the date of the election in the direction of election. If the employer does sign, there cannot have been a deprivation of rights absent evidence of actual duress.

In addition to arguing that the rule fails to give employers sufficient time to deliver their campaign message, some comments contend that the new rules do not give employees sufficient time to receive and evaluate that message and, if they so choose, to organize themselves to oppose union representation.[73] This argument is pressed with particular force in cases where the employer has exercised its statutory right to decline to express any opposition to the union. As a related matter, it is argued that an employer's choice to enter into an election agreement will deny employees an adequate opportunity for free debate among themselves.

This final rule does not change anything about an employer's ability to remain silent and agree to an election on a particular date. The very same scenario occurs under current rules. If the situation were ever such as to truly work a deprivation of employee rights, the Board would of course remain free to address it. But to date no such case has arisen. Indeed, an important change in this final rule—to require an initial notice upon filing of the petition—is likely to obviate any such risk. A representative of NRTWLDF acknowledged as much at the public

place in a relatively short period of time. In addition, as explained in the text, under extant precedent, these employers (and others) can require all employees to attend a meeting or multiple meetings outside their normal work hours, in a central location, in order to ensure they receive the employer's message prior to the election.

AHA II takes a different tack, arguing that large units are common in the healthcare field, where large hospitals average 471 RNs, and that this requires more time for speech. There is no question that a small fraction of the Board's elections take place in larger units: in 2013, for example, approximately 2.5% of elections were held in units of 300 or more. But this does not necessarily mean more time for speech is required; in large units it is generally most likely that the employer will have prepetition notice of the organizing simply because a campaign of that magnitude cannot be kept secret. Moreover, considering all the opportunities for speech available in the particular workplace, the mere size of the unit may not be sufficient to justify lengthening the campaign period in the particular case.

Nor are we persuaded by the suggestion that prompt elections are not possible in work forces with a large number of non-English speakers. See testimony of Villanueva on behalf of EMSI Consulting II. Of necessity employers with linguistically diverse work forces have to find ways to communicate with their employees in order to respond to the day-to-day demands of the business. The press of daily business requires prompt response in other matters, and it is reasonable to believe that employers can respond with equal promptness when questions of representation arise in their workplace. In addition, standardized campaign material has been developed by persuaders in a wide variety of languages.

[72] See Chamber; COLLE.

[73] See NRTWLDF; Seyfarth Shaw; ALFA; ACE; CDW; NRMCA; Indiana Chamber; Con-way; Specialty Steel; Americans for Limited Government; International Foodservice; testimony of C. Stephen Jones, Jr. on behalf of Chandler Concrete Co., Inc.; testimony of Charles I. Cohen on behalf of CDW; testimony of David Kadela on behalf of Littler Mendelson; testimony of Harold Weinrich on behalf of Jackson Lewis LLP; testimony of Brett McMahon on behalf of Miller & Long Construction; NRTWLDF II; testimony of William Messenger on behalf of NRTWLDF II.

Some comments include a related argument that employees who are considered likely to oppose the union, and therefore were not involved in the pre-petition organizing campaign, may not know about the organizing drive until the petition is filed. See Seyfarth Shaw; ALFA.

hearing in 2014. Testimony of Messenger on behalf of NRTWLDF II.

g. Miscellaneous Matters Relating to the Opportunity To Campaign

The Board discounts the argument made in some comments that the proposed rule improperly fails to give the employer sufficient time to refute unrealistic promises or correct any mischaracterizations or errors by union organizers.[74] For 3 decades, Board law has been settled that campaign misstatements—regardless of their timing—are generally insufficient to interfere with an election, unless they involve forged documents that make employees unable to evaluate the statements as propaganda. See *Midland National Life Insurance Co.,* 263 NLRB 127, 132 (1982) (noting that employees are capable of ''recognizing campaign propaganda for what it is and discounting it''). The *Midland* rule applies even if the misrepresentation takes place only a few days before the election. See, *e.g., U-Haul Co. of Nevada, Inc.,* 341 NLRB 195, 195 (2004) (document circulated by union two days before election did not amount to objectionable misrepresentation under *Midland*).

The Board rejects the argument of Vigilant that a shorter period between petition and election will result in a greater number of mail-ballot elections and an accompanying increase in the potential for fraud and coercion. Nothing in the proposed or adopted rules alters the standard for determining when an election should be conducted by mail ballot. A regional director's determination of whether an election should be held manually or by mail is not informed by the number of days between the petition and the election. Rather, it is based on factors such as the desires of the parties and whether employees are ''scattered'' due to their geographic locations or work hours and whether there is a strike, lockout, or picketing in progress. See *San Diego Gas & Electric,* 325 NLRB 1143, 1145 (1998); Casehandling Manual Section 11301.2.

Baker & McKenzie contends that, to the extent the amendments will result in elections being held within 10 to 25 days after the petition, they are inconsistent with the Board's other notice provisions, which provide longer periods. For example, Baker & McKenzie notes that a respondent must post a remedial notice in an unfair labor practice case for 60 days or longer, and that the Board previously promulgated a rule requiring employers to continuously post in the workplace a notice of employee rights under the Act.[75] The Board does not agree that its other posting requirements are or were in any way inconsistent with the final rule, because each serves different purposes in different contexts than the notice rules issued today. First, remedial notices alleviate the impact of unlawful acts by an employer or union, rather than communicate about a specific petition in a specific unit. Thus, the time reasonably necessary for employees to obtain the message from a posted remedial notice, and for that message to dissipate the effects of unfair labor practices, is longer than that necessary for employees to receive information from employers and unions actively campaigning for their support. Second, the Board explained why it required continuous posting of the NLRA rights notice, as opposed to its remedial and election notices, ''[I]t is reasonable to expect that even though some employees may not see the notices immediately, more and more will see them and learn about their NLRA rights as time goes by.'' 76 FR 54005, 54030 (Aug. 30, 2011). Thus, the Board recognized the goal of ''reach[ing] new employees'' (*id.*) could be met by requiring the rights notice to be readily available to employees whenever they chose to examine it. In contrast, employee turnover is unlikely to be of concern during the time between a direction of election and the election itself. Finally, the Board's existing notice-posting provision for elections, unaltered by the final rule, requires that the notice be posted for only 3 working days before the election. Compare 29 CFR 103.20 (2010)[76] with amended 102.67(k). The Board thus rejects the ''one size fits all'' suggestion for maximum and/or minimum time periods for conducting elections under the Act.

Other comments suggest that the amendments will generate litigation because, if a party has less time to campaign between the petition and election, the party will ''assert as many defenses as possible'' or try to obtain a hearing simply to ''buy . . . more time'' before the election. AHA. SEIU's reply comment notes that there was no significant drop in the consent or stipulation rate following former General Counsel Fred Feinstein's initiative aimed at commencing all pre-election hearings between 10 and 14 days after the filing of the petition. Rather than undermining the rationale for the proposals, the suggestion that parties might use the pre-election hearing to delay the conduct of an election reinforces the need for the final rule. Both the ability and incentive for parties to attempt to raise issues and engage in litigation in order to delay the conduct of an election are reduced by the final rule.

Some comments, including that of Professor Samuel Estreicher, suggest that the employer needs sufficient time not only to campaign, but to retain counsel so that the employer understands the legal constraints on its campaign activity and does not violate the law or engage in objectionable conduct.[77] A number of comments specifically argue that any compression of the time period between the petition and election will be particularly difficult for small businesses, which do not have in-house legal departments and may not have ready access to either in-house or outside labor attorneys or consultants to counsel them on how to handle the campaign.[78] Similarly, some comments suggest that, to the extent the amendments result in a shorter period of time between the petition and the election, they will increase objections and unfair labor practice litigation, because employers will not have an opportunity to train managers on how to avoid objectionable and unlawful

[74] Vigilant; Indiana Chamber of Commerce; John Deere Water; PIA; Greater Raleigh Chamber of Commerce; NMMA; Associated Oregon Industries; NAM; testimony of Michael Prendergast on behalf of Holland & Knight; Ohio Grocers Association II; Klein Dub & Holleb II. T&W Block Company makes a related argument, contending that the failure to allow sufficient time would destabilize labor relations because employees would enter bargaining with unrealistic expectations.

[75] Following litigation, that rule was withdrawn by the Board. See 77 FR 25868 (May 2, 2012) (announcing indefinite delay in effective date pending litigation outcome); NLRB January 6, 2014 press release announcing decision not to seek Supreme Court review of the two adverse appeals court decisions, *http://www.nlrb.gov/news-outreach/news-story/nlrbs-notice-posting-rule* (last visited September 26, 2014).

[76] This and subsequent citations to the regulations in 2010 is not meant to suggest that there is a substantive difference between the current regulations and the regulations as they existed in 2010, but rather to emphasize that the relevant language existed in our regulations before the issuance of the first June 22, 2011 NPRM in this rulemaking.

[77] See also testimony of former Board Member Marshall Babson on behalf of Seyfarth Shaw LLP (emphasizing that the rules must balance the various competing interests).

[78] NRMCA; Indiana Chamber; National Automobile Dealers Association (NADA); T&W Block Company; York Society for Human Resource Management; NMMA; Council of Smaller Enterprises (COSE); Bluegrass Institute; Landmark Legal Foundation; American Trucking Associations (ATA); testimony of C. Stephen Jones, Jr. on behalf of Chandler Concrete Co., Inc.; American Fire Sprinkler Association; Leading Age; testimony of Milito on behalf of NFIB II.

conduct. See Con-way Inc.; Bluegrass Institute; ATA.[79]

However, under the final rule, when the petition is served on the employer by the regional office, it will be accompanied by the Notice of Petition for Election, (a revised version of Form NLRB 5492), which will continue to set forth in understandable terms the central rules governing campaign conduct. This provides an immediate explanation of rights and obligations, while an employer who wishes to locate counsel may do so. In any event, the Board does not believe that any shortening of the time between petition and election that results from the final rule will impair employers' ability to retain counsel in a timely manner.[80] In this regard, Russ Brown, an experienced labor-relations consultant, testified at the public hearing that his firm routinely monitors petitions filed in the regional offices and promptly offers its services to employers named in those petitions. In general, the well-documented growth of the labor-relations consulting industry undermines the contention that small businesses are unable to obtain advice quickly. Comments, such as the one cited above, indicate that it is a routine practice for labor-relations consultants to monitor petitions filed with the regional offices, so that the consultants may then approach the employers to offer their services.[81]

3. Congressional Inaction in 1959

ACC points out that Congress, in enacting the Labor-Management Reporting and Disclosure Act (LMRDA) in 1959, rejected a proposal that would have permitted an election to take place before a hearing when there were no issues warranting adjudication, so long as the election was not held sooner than 30 days after the petition was filed (ACC Reply). The proposal, contained in the Senate version of the bill, would have permitted a so-called ''pre-hearing election,'' barred by the 1947 Taft-Hartley amendments to the Act. S. 1555, 86th Cong., 1st Sess. 705 (as passed by Senate, Apr. 25, 1959). At one point Senator Kennedy suggested that this 30-day period would provide a ''safeguard against rushing employees into an election where they are unfamiliar with the issues.'' 105 Cong. Rec. 5984 (April 15, 1959) (statement of Sen. Kennedy). The House bill, however, never contained a parallel provision, and it was not enacted into law.

Nevertheless, ACC (Reply) argues that the proposed amendments described in the NPRM are inconsistent with congressional intent because they do not guarantee a minimum of 30 days between petition and election. To the extent that ACC's argument bears on the final rule, the Board rejects it. Report language and statements of individual legislators on a provision that was not enacted in 1959 are entitled to little if any weight in assessing the meaning of legislation adopted in 1935 and amended in 1947. In fact, the Supreme Court has clearly stated that ''failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute'' because a bill can be proposed or rejected for any number of reasons.[82] *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* 531 U.S. 159, 169–70 (2001) (internal quotation marks omitted); see also *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 187 (1994). Indeed, the rejection of the proposed amendment would more reasonably be understood as an indication that Congress did not believe a minimum time between petition and election is necessary. However, the legislative history of the LMRDA offers no guidance on why the provision was rejected, and Congress imposed no requirements in the LMRDA or at any other time concerning the length of time that must elapse between petition and election. Accordingly, the Board finds no indication in this legislative history that the final rule is in any way contrary to Congress's intent.

D. Effects on Employee Representation and the Economy

Many comments do not address the substance of the proposed amendments, but instead speak generally in favor of, or in opposition to, labor unions and the process of collective bargaining. In response, the Board continues to observe that, by passing and amending the NLRA, Congress has already made the policy judgment concerning the value of the collective-bargaining process; the Board is not free to ignore or revisit that judgment. As explained in the NPRM, the amendments are intended to carry out the Board's statutory mandate to establish fair and efficient procedures for determining if a question of representation exists, for conducting secret-ballot elections, and for certifying the results of secret-ballot elections. Accordingly, the Board will not engage in an analysis, invited by these comments, concerning the general utility of labor unions and the collective-bargaining process.[83]

Other comments assert that the proposed amendments would lead to increased union representation and question the wisdom of adopting rules that would have such an effect on a fragile economy. Again, the Board views these comments as questioning policy decisions already made by Congress.[84] The amendments do not reflect a judgment concerning whether increased employee representation would benefit or harm the national economy.

[79] Other comments, however, cite evidence indicating a positive correlation between the length of a campaign and unfair labor practice allegations. See SEIU; NELP; Senior Member Miller and Democratic House Members; John Logan, Ph.D., Erin Johansson, M.P.P., and Ryan Lamare, Ph.D.; Senators Tom Harkin, Robert Casey, and Patty Murray, and U.S. Representatives George Miller and John Tierney. See also testimony of Professor Ethan Daniel Kaplan (citing similar results from a study in Canada).

[80] Ranking Member Enzi and Republican Senators assert that employers will significantly limit their use of legal counsel during organizing campaigns due to the Department of Labor's recent NPRM interpreting the advice exemption to the ''persuader'' disclosure requirement under the Labor-Management Reporting and Disclosure Act. See 76 FR 36178 (proposed June 21, 2011). However, the DOL's stated goal is publicizing the interactions between employers and covered entities, not stopping those interactions from taking place. See *id.* at 36182, 36190. In any event, the Board views such concerns as more properly directed to the DOL. The Department of Labor has not yet taken action on the proposed rule. See 79 FR 896, 1025 (Jan. 7, 2014). The Board also wishes to make clear that—contrary to COLLE's suggestion—its actions have been in no way influenced by any actions of the DOL.

[81] See testimony of Russ Brown on behalf of the Labor Relations Institute (LRI), noting that the Labor Relations Institute's Web site ''is probably one of the leading sources of keeping up with just about every scrap of paper you guys push.'' The Web site, *www.lrionline.com,* includes a section entitled ''union avoidance'' and advertises online libraries that include a ''daily petition library'' with ''supplemental petition information available daily'' and an ''organizing library'' tracking ''union organizing activity.'' See also testimony of Michael D. Pearson, former field examiner (noting that consultants check the public filings of RC petitions on a daily basis to solicit business from employers); testimony of Professor Joseph McCartin on behalf of the Kalmanovitz Initiative for Labor and the Working Poor (noting that a ''thriving industry of consultants has emerged'').

[82] For this reason, the Board declines COLLE's similar suggestion to find relevant Congress' failure to pass the 1978 Labor Law Reform Act, versions of which provided for varying time frames for representation elections.

[83] Many comments additionally charge that the Board's motives for issuing the rule are improper in that the Board seeks to act as an advocate for unions (rather than as a neutral overseer of the process), to drive up the rates of union representation, and to ''stack the deck'' against employers in union organizing campaigns. No credible evidence has ever been provided in support of this claim. The reasons for issuing the rule are fully set forth in the NPRM and in this preamble; favoritism is not among them.

[84] To the extent that comments suggest that the Board failed to consider the proposed rule's potential to increase the costs on small employers associated with increased unionization as part of its obligations under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* those comments are addressed in the Regulatory Flexibility Act section below.

V. Comments on Particular Sections

Part 102, Subpart C—Procedure Under Sec. 9(c) of the Act for the Determination of Questions Concerning Representation of Employees and for Clarification of Bargaining Units and for Amendment of Certifications Under Sec. 9(b) of the Act

Sec. 102.60 Petitions

The final rule adopts the Board's proposals to permit parties to file petitions electronically and to require that the petitioner serve a copy of the petition on all other interested parties. The final rule also clarifies that parties filing petitions electronically need not also file an original for the Agency's records. The final rule further adopts the Board's proposal to require service of two additional agency documents that will be available to petitioners in the regional offices and on the Board's public Web site. The first document, which will substitute for and be an expanded version of the Board's Form 4812, will describe the Board's representation case procedures. The second document the petitioner will serve along with the petition will be a Statement of Position form, which will include a request for commerce information (such as that solicited by current NLRB Form 5081, the Questionnaire on Commerce Information).[85]

The Board received generally positive comments regarding its proposal to allow parties to file petitions electronically.[86] For instance, the AFL–CIO II noted that the electronic filing of petitions is consistent with general Federal, state and local government practices and is part of the Board's 'gradual and entirely sensible transition' to electronic filing, service and storage of documents. The Center on National Labor Policy (CNLP) commends the proposal as ''excellent'', but apparently misunderstands the proposal as establishing *mandatory* electronic filing, when it does not. The Board's view, echoed by several comments, is that allowing—but not requiring—the electronic filing of petitions is part of its nearly decade-long effort to adapt its procedures to modern methods of communication.[87] This rule recognizes the widely accepted use of email for legal and official communications and more closely aligns Board service procedures with those of the Federal courts.

The final rule's requirement that the petitioner serve a copy of the petition on all other interested parties when it files its petition with the Board further conforms to ordinary judicial and administrative practice. For example, a labor organization filing a petition seeking to become the representative of a unit of employees is required to also serve the petition on the employer of the employees. This will ensure that the earliest possible notice of the pendency of a petition is given to all parties. The few comments to focus on this proposal either affirmatively support it as an improvement over current procedures or find it unobjectionable.[88]

Likewise, the Board received no significant negative comments concerning its proposal to require service of the Statement of Position form and an expanded version of the Board's Form 4812 to inform interested parties about the Board's representation case procedures. The Board agrees with GAM that requiring service of this latter document will aid employers' understanding of representation case procedures and render Board procedures more transparent.

A few comments state that parties may not receive petitions or other relevant documents due to the use of electronic filing. For example, AGC (AGC II) argues that parties' use of spam filters and other computer data protection tools could prevent the delivery of electronically-filed petitions and thereby lead to increased litigation due to their non-receipt of petitions or related documents. And the Cook-Illinois Corporation (Cook-Illinois) contends that the recipient of an emailed petition might unwittingly delete the email as spam. The Board responds that it already permits parties to electronically file most documents in unfair labor practice and representation proceedings and has yet to experience any increase in litigation resulting from the use of such software. Moreover, it is also possible for representation petitions sent via United States mail or facsimile to be misdelivered or to be incorrectly identified by the recipient as junk mail. Also, it is the practice of the regional offices to have a Board agent contact parties as soon as possible after the filing of a petition in order to facilitate regional decision making regarding the petition. See Casehandling Manual Section 11010. In addition, pursuant to § 102.63(a), the regional offices will re-serve a copy of the petition after the petition is docketed, making it even less likely a party will remain ignorant of an electronically-filed petition for any significant period of time. Therefore, the Board does not anticipate that the electronic filing of petitions will lead to litigation due to delivery failure and lack of notice of service.

A number of comments suggest the final rule should provide guidance with respect to what constitutes proper service by identifying the title of the individual who should be electronically served with the petition because this arguably triggers significant deadlines and obligations.[89] The Board's current rules and regulations do not provide guidance with respect to the proper agent for service of a petition (or an unfair labor practice charge). Any issue raised with respect to whether the petition was properly served will continue to be handled consistent with the Board's existing practices in this area. Moreover, the petitioner's simultaneous service of the petition is simply intended to provide all interested parties with the earliest possible notice of the filing of the petition, and does not, by itself, establish any deadlines or obligations related to the processing of the case for the party being served with the petition. The actual date of the hearing and other requirements are set by the regional director (after the filing of the petition) when the director issues the notice of hearing.

Several comments express concern that the electronic filing of petitions could increase opportunities for fraud. For example, NADA and the Chamber argue that the regulations should require a party electronically filing a petition to

[85] The contents and purpose of the Statement of Position form are described further below in relation to § 102.63.

[86] See PIA; American Federation of State, County and Municipal Employees (AFSCME); Chamber; Chairman Harkin, Senior Member Miller, and Congressional Democrats II; United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of US and Canada (Plumbers) II; Bart Bolger II; Testimony of Professor Anne Marie Lofaso.

[87] Also, the Board has decided to clarify, consistent with its current e-filing practice concerning other types of case documents, that petitioners who file their petitions electronically are not required to file an extra copy of the petition in paper form. Upon careful consideration of the NPRM proposal, which would have required extra paper copies to be filed for both faxed petitions and electronically-filed petitions, the Board is of the view that an extra paper copy of an electronically-filed petition would be unnecessary. The Board's experience has been that the legibility of electronically-filed documents does not differ significantly from paper originals, unlike faxes, which are sometimes significantly less legible than their original paper versions. Moreover, original paper-copies could cause administrative difficulties if regional staff were to inadvertently treat the later-arriving paper copy as a new case rather than a courtesy copy of the electronically-filed petition that would have been docketed earlier. However, the Board has concluded that such risks are worth incurring to overcome potential legibility issues regarding faxed petitions.

[88] See Plumbers; Georgia Association of Manufacturers (GAM); PIA.

[89] See, *e.g.,* INDA II and AEM II.

mail the original documents to the Board at a later date.[90] CNLP comments that the Board should establish e-security practices that protect the identity of a party filing a petition and mitigate the possibility that fraudulent documents will be filed. CNLP also suggests that the Board should substantially adopt Federal Rule of Civil Procedure 11(b) and require a party filing a petition to certify that the document is supported by facts and law.

The Board believes that the final rule and current electronic filing procedures adequately address these concerns. As an initial matter, § 102.60 of the final rule continues the Board's practice of requiring that petitions ''shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalty of perjury, that its contents are true and correct.'' The Board already allows parties to maintain password-protected profiles and to redact or protect their sensitive personally identifiable information. To date, there has been no significant interference with election processes resulting from fraudulent petitions. The Board does not expect any change resulting from its decision to permit electronic filing of such petitions. Nonetheless, as mentioned above, a Board agent will contact parties after the filing of a petition and will be able to determine if there has been a fraudulent filing. Further, § 102.177(d) of the existing regulations already allows the Board to sanction an attorney or party representative for misconduct such as the filing of a document that is unsupported by facts and law. See, *e.g., In re David M. Kelsey,* 349 NLRB 327 (2007).

The National Right to Work Legal Defense Foundation (NRTWLDF) proposes that the Board further amend its existing procedures to prevent petitioners from withdrawing otherwise valid petitions before an election occurs. It asserts that allowing such withdrawal unfairly allows petitioners to manipulate the scheduling of elections. The Board declines to adopt this proposal. Continuing to permit the withdrawal of petitions serves the efficiency goals of these amendments by avoiding unnecessary case-processing efforts. Moreover, the Board's existing procedures adequately prevent such manipulation. The regional director or the Board will continue to have discretion to accept or reject a petitioner's request for withdrawal of the petition if the request would run counter to the purposes of the Act. See Casehandling Manual Section 11110.

One commenter noted that the proposal to allow the electronic filing of petitions may have merit, but that the Board should seek further comment and input from stakeholders before implementing this change. Leading Age II. However, the comment did not provide an explanation as to why the periods established to allow comments to the Board's NPRMs in 2011 and 2014 were not sufficient to effectively obtain input from stakeholders on this issue. The Board believes that stakeholders have had an ample opportunity to comment on this proposal and has carefully considered the input offered on this issue in deciding to implement this proposal.

Sec. 102.61 Contents of Petition for Certification; Contents of Petition for Decertification; Contents of Petition for Clarification of Bargaining Unit; Contents of Petition for Amendment of Certification; Use of Electronic Signatures To Support a Showing of Interest

Section 102.61 of the final rule continues to describe the contents of the various forms of petitions that may be filed to initiate a representation proceeding under Section 9 of the Act.[91] The Board will continue to make the petition form available at the Board's regional offices and on its Web site. As proposed in the NPRM, the final rule adds to the contents of the petitions in a few respects. First, the revised petition contains the allegation required in Section 9. In the case of a petition seeking representation, for example, the petition contains a statement that ''a substantial number of employees wish to be represented for collective bargaining . . . .'' 29 U.S.C. 159(c)(1)(a)(i). Second, the petitioner is now required to designate, in the revised petition, the individual who will serve as the petitioner's representative in the proceeding, including for purposes of service of papers. GAM acknowledges that this is a practical requirement that may allow parties to quickly resolve election issues while helping to conserve agency resources. Third, the petitioner is now required to state the type, date(s), time(s) and location(s) of election it seeks.[92] This information will facilitate entry into election agreements by providing the nonpetitioning parties with the earliest possible notice of the petitioner's position on these important matters.

The final rule also requires that the petitioner file with the petition whatever form of evidence is an administrative predicate of the Board's processing of the petition rather than permitting an additional 48 hours after filing to supply the evidence. When filing a petition seeking certification as the representative of a unit of employees, for example, petitioners must simultaneously file the showing of interest supporting the petition. As explained in the NPRM, the Board believes that parties should not file petitions without whatever form of evidence is ordinarily necessary for the Board to process the petition. However, the final rule is not intended to prevent a petitioner from supplementing its showing of interest, consistent with existing practice, so long as the supplemental filing is timely. Also consistent with existing practice, the final rule does not require that the showing of interest be served on other parties.

The Board rejects the Chamber's request that the regional director refrain from serving notice of the filing of a petition on other parties until the region receives the original signatures establishing the showing of interest. Such a requirement would not serve the Board's purpose of encouraging the expeditious resolution of questions concerning representation. The final

[90] Fraud concerns specific to electronic signatures are addressed below in relation to § 102.61.

[91] The following abbreviations are used to refer to the different types of representation petitions filed under Section 9(c) of the Act:

RC (Representation petition)—A petition filed by a labor organization or employee(s) alleging that that there is a question concerning representation and seeking an election to determine whether employees wish to be represented by the petitioner.

RD (Decertification petition)—A petition filed by an employee, employees or a labor organization alleging that there is a question concerning representation and seeking an election to determine whether employees in the appropriate unit wish to continue to be represented by a labor organization that was previously certified and/or is currently recognized by the employer as their collective bargaining representative.

RM (Employer petition)—A petition filed by an employer alleging that there is a question concerning representation and seeking an election to determine if employees in the appropriate unit wish to be represented by a labor organization that has demanded recognition as their collective bargaining representative or that is currently recognized as their collective bargaining representative.

UC (Unit clarification petition)—A petition filed by a labor organization or an employer seeking a determination as to whether certain classifications should or should not be included within an existing unit.

AC (Amendment of certification)—A petition filed by a labor organization or an employer for amendment of an existing certification because of changed circumstances.

[92] The final rule will require the petitioner to identify the type of election it seeks (*e.g.* a manual, mail or a mixed manual-mail election).

rule does not change the Board's longstanding policy of not permitting the adequacy of the showing of interest to be litigated. See, *e.g., Plains Cooperative Oil Mill,* 123 NLRB 1709, 1711 (1959) (''[T]he Board has long held that the sufficiency of a petitioner's showing of interest is an administrative matter not subject to litigation.''); *O.D. Jennings & Co.,* 68 NLRB 516, 517–18 (1946). Nor does the final rule alter the Board's current internal standards for determining what constitutes an adequate showing of interest.

The Board further disagrees with the Chamber's II assertion that § 102.61(f)'s mandate that when showings of interest are filed electronically or by facsimile, the original authorization cards with handwritten signatures must be delivered to the regional director within 2 days, conflicts with the proposed language in § 102.60(a), which explained that the failure to follow an electronic or facsimile-filing of the petition with an original paper copy ''shall not affect the validity of the filing by facsimile or electronically, if otherwise proper.'' First, as discussed in connection with § 102.60 above, the Board has decided not to require an extra paper copy of the petition when it is filed electronically, and as explained in the footnote below, the language in § 102.61 likewise does not require paper copies of electronically-signed cards (if accepting electronic signatures is deemed practicable by the General Counsel). So there is no potential inconsistency in the final rule as to electronically-filed petitions and electronically-signed authorization cards. There is also no inconsistency in the final rule even when focusing solely on facsimile-filed petitions or electronically-filed petitions that do not include electronically-filed authorization cards. Thus, the Board intentionally distinguishes the handwritten signatures that form the showing of interest supporting the petition as items that must be transmitted to the Board in their original form in order for the filing to be proper. In other words, while a regional director will not dismiss a petition filed by facsimile simply because the petitioner failed to follow its facsimile filing by supplying the original paper copy to the regional office, a regional director will dismiss a petition if the facsimile-filed or electronically-filed showing of interest is not followed by original documents containing handwritten signatures within 2 days.[93] The Board therefore declines the Chamber's suggestion to strike or alter the language in § 102.60(a) to conform to the language in § 102.61(f).

GAM argues that requiring petitioners to file a supporting showing of interest simultaneously with the petition will lead to confusion and delays and create an unnecessary burden that may discourage the filing of petitions. GAM maintains that under existing rules, a petitioner could file a petition and then receive useful guidance from the regional office about how to file its showing of interest, thereby suggesting that a petitioner will no longer have the option of seeking such assistance under the amended rules. GAM alleges that the Board's motivation in adopting the amendment is a self-interested desire to improve its case-processing statistics, not to facilitate the holding of elections. The Board believes that parties should not file petitions without whatever form of evidence is ordinarily necessary for the Board to process the petition. If parties are confused about what evidence is necessary to file in support of a petition—or if they are confused about any other aspect of the representation case process—they may continue to contact regional offices for guidance both before and after the filing of a petition, and the continued useful guidance flowing from such contact should mitigate any potential for discouragement felt by individuals who are contemplating filing an election petition. Further, the amendment does not establish inflexible time deadlines for when a petition must be filed.

The Board received a number of comments in response to the question of whether the proposed regulations should expressly permit or proscribe the use of electronic signatures to support a showing of interest under § 102.61(a)(7) and (c)(8) as well as under § 102.84. Based on these comments, we believe that the Board's regulations as currently written are sufficiently broad to permit the use of electronic signatures in this context.[94] We also note that evaluating the showing of interest is an administrative matter within the discretion of the agency. For the reasons discussed below, we find, that the Board should, when practicable, accept electronic signatures to support a showing of interest, and therefore direct the General Counsel to undertake an analysis of whether there exists a practicable way for the Board to accept electronic signatures to support a showing of interest while adequately safeguarding the important public interests involved.

Several comments address the legal and procedural aspects of this potential amendment. Joseph Torres argues that neither the Government Paperwork Elimination Act (GPEA), 44 U.S.C. 3504, nor the Electronic Signatures in Global and National Commerce Act (E–SIGN), 15 U.S.C. 7001 *et seq.,* both of which were cited in the Notice of Proposed Rulemaking, supports changing Board practice. Testimony of Joseph Torres on behalf of Winston & Strawn II. He argues that electronic signatures accepted under either of those acts are distinguishable from the electronic signatures that would be accepted to support a showing of interest. Regarding GPEA, he observes that there are safeguards attendant to submitting information to the government that are not available to the private gathering of electronic signatures. And he observes that E–SIGN allows private parties to litigate the validity of electronic signatures, whereas they cannot under the Board's current procedures. The Chamber (Chamber II) argues that the Board has yet to provide sufficient details about its potential use of electronic signatures and that an advanced notice of proposed rulemaking should therefore precede any action in this area. PIA and AHA II, among others, maintain that the Board has yet to provide any justification for this rule change.

The SEIU II, AFL–CIO II, and Alvin Velazquez (testifying on behalf of SEIU II) argue that GPEA and/or E–SIGN require the Board to accept electronic signatures. Even setting this requirement aside, SEIU observes that the Board's acceptance of electronic signatures would be beneficial and reflect modern changes in technology and methods of communication. SEIU (SEIU II) and the AFL–CIO, among others, also argue that the Board does not have to use the notice-and-comment rulemaking process to accept electronic

[93] To be clear, the language in amended § 102.61(f) is premised upon petitioners who file their petitions electronically providing electronically-scanned copies of authorization cards with handwritten signatures. This would be permitted completely apart from, as discussed below, electronically-signed authorization cards. The language in § 102.61(f) is not applicable to electronic signatures because electronic signatures are not ''original signatures that cannot be transmitted in their original form by the method of filing the petition.'' To the contrary, electronic signatures should be transmittable with electronically-filed petitions in their original form, not triggering a need to later submit ''original documents.''

[94] To be sure, our current regulations are completely silent on the subject of electronic signatures, and, as explained above, we likewise believe that the language in amended § 102.61(f) of the final rule would be consistent with the Board's acceptance of electronic signatures. While the Board's practice has been to accept only handwritten signatures, it may, consistent with its current Rules and Regulations as well as these amended rules, accept electronic signatures.

signatures on showings of interest. For instance, SEIU contends, among other things, that such an amendment would relate to Board practice and procedure and therefore not require public comment. See 5 U.S.C. 553(b)(3)(A) (excepting ''interpretative rules, general statements of policy, or rules of agency organization, [and] procedure, or practice'' from notice-and-comment rulemaking). SEIU and AFL–CIO observe that the Board's Rules and Regulations currently do not limit the form that the showing of interest can take. Further numerous comments, as summarized below, clearly articulate many of the potential benefits of accepting electronic signatures. Velazquez II, for instance, observes that electronic signatures, which typically require an employee also to fill-out an electronic form, are better indicators of an employee's interest in joining a union than paper authorization cards, due to the increased effort required to input additional verification information.

We believe that GPEA and E–SIGN embody a strong policy preference on the part of Congress for the use and acceptance of electronic signatures, when practicable, as a means, along with handwritten signatures, to support a showing of interest. GPEA directs the Office of Management and Budget (OMB) to ensure that ''Executive agencies provide—(1) for the option of the electronic maintenance, submission, or disclosure of information, when practicable as a substitute for paper, and (2) for the use and acceptance of electronic signatures, when practicable.'' GPEA additionally stipulates that ''Electronic records submitted or maintained in accordance with procedures developed under this title, or electronic signatures or other forms of electronic authentication used in accordance with such procedures, shall not be denied legal effect, validity, or enforceability because such records are in electronic form.'' In its guidance on the implementation of GPEA, the OMB observes, ''a decision to reject the option of electronic filing or record keeping should demonstrate, in the context of the particular application and upon considering relative costs, risks, and benefits given the level of sensitivity of the process, that there is no reasonably cost-effective combination of technologies and management controls that can be used to operate the transaction and sufficiently minimize the risk of significant harm.'' OMB, *Procedure and Guidance; Implementation of the Government Paperwork Elimination Act,* 65 FR 25508, 25512 (2000) (OMB Guidance). We feel that the policy underlying this admonition applies equally to the use and acceptance of electronic signatures. Likewise, E–SIGN mandates that, ''with respect to any transaction in or affecting interstate commerce or foreign commerce—(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.'' We believe that both of these statutes clearly evidence Congress's intent that Federal agencies, including the Board, accept and use electronic forms and signatures, when practicable—*i.e.,* when there is a cost-effective way of ensuring the authenticity of the electronic form and electronic signature given the sensitivity of the activity at issue, here the showing of interest.

That Congress should adopt this policy preference is not surprising. After all, the benefits of e-government are widely known. Among other things, electronic forms can ''greatly improve efficiency and speed of government services.'' S. Rep. No. 105–335 (1998). Electronic forms reduce the ''costs associated with such things as copying, mailing, filing and storing forms.'' Id.; see also OMB Guidance, 65 FR at 25515–16. These reductions in transaction costs also benefit the Board's transaction partner. OMB Guidance, 65 FR at 25516–17.

Many comments also address the ability to authenticate the electronic signature. Several of these comments argue that the Board should not allow the use of electronic signatures because they are more difficult to authenticate than handwritten signatures.[95] The Bluegrass Institute argues that, while the Board could allow employees to authenticate their electronic signatures with sensitive personal information such as social security numbers, this apparent solution would create a potential threat of identity theft. Given this problem with authentication, CDW suggests that electronic signatures would effectively nullify the showing of interest requirement. And SHRM accordingly urges the Board to follow the National Mediation Board in refusing to allow electronic signatures to support a showing of interest. In opposition to these comments, the AFL–CIO (AFL–CIO II), SEIU II, and Velazquez II counter that electronic signatures are easily verifiable and commonly used in governmental and commercial dealings. In fact, more tools are available to confirm the authenticity of electronic signatures than are available to confirm physical signatures.

At this point, the weight of evidence appears to agree with the AFL–CIO, SEIU, and Velazquez. ''State governments, industry, and private citizens have already embraced the electronic medium to conduct public and private business.'' S. Rep. No. 105–335. And since the adoption of GPEA and E–SIGN, Federal agencies, including the Board, have also accepted electronic signatures and electronic forms.[96] Electronic signatures can ''offer greater assurances that documents are authentic and unaltered. They minimize the chances of forgeries or people claiming to have had their signatures forged.'' S. Rep. No. 105–335; see also OMB Guidance, 65 FR at 25516. There are numerous forms that electronic signatures can take, each providing additional methods to ensure the authenticity of the signature. See, *e.g.,* S. Rep. No. 105–335; OMB Guidance, 65 FR at 25518–25520. And the technology that makes electronic signatures possible continues to evolve and become ever-more sophisticated, providing even more safeguards.

Some comments claim that the use of electronic signatures to support a showing of interest could encourage petitioner misconduct. Seyfarth Shaw contends that electronic signatures present a greater risk of fraud than handwritten signatures because they do not create any physical evidence of signing. Several comments allege that the use of electronic signatures could lead to deceptive practices by petitioners, such as hiding authorization agreements within seemingly innocuous Web site content.[97] PIA likewise argues that employees might have to rely on the petitioner to instruct them in the use of electronic signatures, creating the possibility of undue influence and coercion. But other comments counter that electronic signatures would actually reduce incidents of intimidation due to lack of personal solicitation.[98]

As stated above, we believe that cost-effective methods may exist to ensure that electronic signatures are authentic,

[95] SHRM; Gary Wittkopp; Seyfarth Shaw; AHA (AHA II); National Council of Investigation & Security Services (NCISS) II; AEM II.

[96] See 79 FR 7323 (discussing the evolution of the Board's electronic filing practice).

[97] Bluegrass Institute; Mary Rita Weissman; Conway.

[98] David Nay II; Lisa Thomas II; Jack Steele II.

and electronic signature technology may provide more methods to authenticate and ensure the validity of the signature as compared to handwritten signatures. Further, the Board already has internal administrative processes to deal with allegations of fraud and misrepresentation regarding manually signed authorization cards and petitions. See Casehandling Manual Sections 11028–11029. We expect that the General Counsel will evaluate whether the Board could employ these or similar processes in connection with electronic signatures.

A few comments argue that the lack of reliability of electronic signatures and the accompanying prospect of petitioner misconduct will lead to more pre-election challenges to the validity of petitions, creating a greater burden on agency resources, and running counter to the goal of eliminating delay.[99] Constangy, Brooks & Smith, LLP (Constangy) contends that the use of electronic signatures would no longer allow the Board to verify authorizations by simply comparing employee signatures to those on handwritten cards. Rather, Constangy argues that the Board would have to allow parties to present testimony to challenge or support contested signatures. Torres argues that, if the Board starts to look underneath the process of obtaining electronic signatures, employers should also be able to examine and, if necessary, challenge the showing of interest. Testimony of Torres on behalf of Winston & Strawn II. UFCW (UFCW II) disagrees, proposing that the Board could verify the authenticity of a showing of interest merely by checking a random sample of individual signatures, as is a current practice. As noted, the Board already has processes in place for resolving allegations of fraud or misrepresentation in connection with showing of interest evidence which the rule does not change and which might be effectively utilized to verify electronic signatures.

For the reasons discussed above, we are not persuaded that the Board's current or similar administrative procedures would necessarily be inadequate to the task of ensuring that there is a sufficient showing of interest to warrant conducting an election. The General Counsel should consider the matter and determine whether electronic signatures can practicably be accepted without such a fundamental change to the Board's procedures as those suggested in the comments.

A few comments address the practical problems with permitting electronically signed authorization cards. Some of these comments are concerned that a petitioner could gather electronic signatures through the employer's own computer system, thereby disrupting work and opening the employer to allegations of unlawful surveillance.[100] Some of these comments further maintain that the use of handwritten authorization cards already leads to confusion among employees, and that allowing electronic signatures would exacerbate these problems.[101] One comment observes that it would be difficult for the Board to impose a unified system of gathering electronic signatures, and thereby ensure the reliability of those signatures, given the number and diversity of petitioning parties. Testimony of Torres on behalf of Winston & Strawn II.

We are doubtful that the use of electronic signatures will present the practical problems raised in these comments. We see no reason why electronic authorization cards would create a greater disruption to an employer's operations or subject an employer to charges of surveillance to a greater extent than would the transmission of other information relating to union or protected concerted activity. Regarding Torres's argument that electronic signatures would be impracticable to administer, we ask the General Counsel to examine the issue and, if administration is practicable, issue guidance.

Based on our review of our current Rules and Regulations, Congressional policy, and the comments, we conclude, as a matter of policy, that the Board should, when practicable, accept electronic signatures to support a showing of interest. Our current rules do not prohibit the acceptance of electronic signatures, and so no change in our rules is necessary to effectuate this policy conclusion. The General Counsel shall promptly determine whether, when, and how electronic signatures can practicably be accepted and shall issue guidance on the matter. In making these decisions, we encourage the General Counsel to follow the framework outlined in the OMB Guidance.

Sec. 102.62 Election Agreements; Voter List; Notice of Election

A. Election Agreements and Board Resolution of Post-Election Disputes

In the NPRM, the Board proposed a number of amendments to § 102.62. The amendments were intended to clarify the terms used to describe the three types of pre-election agreements, to eliminate mandatory Board resolution of post-election disputes under a stipulated election agreement, to codify the requirement of the *Excelsior* list and to alter the content and timing of its provision to the nonemployer parties to the case,[102] and to alter the means of transmittal of the notice of election. The Board has decided at this time to adopt the proposed amendments to § 102.62 clarifying the terms used to describe pre-election agreements and eliminating mandatory Board resolution of post-election disputes under a stipulated election agreement. The Board has also decided to adopt the proposed amendments concerning the *Excelsior* list and the notice of election [103] with the modifications described in the discussion of the voter list below.

The final rule's amendments to § 102.62(b) revise the contents of the stipulated election agreement. The revision eliminates parties' ability to agree to have post-election disputes resolved by the Board. The amendments provide instead that, if the parties enter into what is commonly referred to as a ''stipulated election agreement,'' [104] the regional director will resolve any post-election disputes subject to discretionary Board review. This procedure is consistent with the changes to § 102.69 described below making all Board review of regional directors' dispositions of post-election disputes discretionary in cases where parties have not addressed the matter in a pre-election agreement.[105]

As explained in the NPRM, the amendment makes the process for obtaining Board review of regional

[99] AHA (AHA II); Georgia Mining Association; Con-way; Testimony of Torres II.

[100] NCISS II; AEM II.

[101] Americans for Limited Government (ALG); Labor Relations Institute, Inc. (LRI); PIA; Georgia Mining Association; CAST–FAB Technologies, Inc. II; U.S. Poultry II; NAM II.

[102] See *Excelsior Underwear, Inc.,* 156 NLRB 1236, 1236 (1966) (establishing requirement that employers must file a list of the names and addresses of all eligible voters with the regional director within 7 days after a Board election has been approved by the regional director or directed; the regional director then makes the information available to all parties in the case).

[103] As noted below in connection with §§ 102.63 and 102.67, the final rule retitles the proposed ''Final Notice to Employees of Election'' as the ''Notice of Election.''

[104] Casehandling Manual Section 11084.

[105] The current rules governing Board review of regional directors' dispositions of post-election disputes appear on their face to provide for both mandatory and discretionary review depending on how the regional office processes the case. See 29 CFR 102.69(c)(3) and (4).

directors' dispositions of *post*-election disputes parallel to that for obtaining Board review of regional directors' dispositions of *pre*-election disputes. The Board perceived no reason why pre- and post-election dispositions should be treated differently in this regard, and the comments on this proposal offered no convincing reason.

The Board affirms the vast majority of post-election decisions made at the regional level, and many present no issue meriting full consideration by the Board.[106] In some cases, for example, parties seek review of post-election decisions based on mere formulaic assertions of error below and without pointing to any facts or law in dispute.[107] Review as of right should not be granted in those situations. Others cases present only circumscribed, purely factual issues.[108] Given the highly deferential standard that the Board employs in reviewing a hearing officer's post-election credibility findings,[109] it is reasonable for the Board to require the party seeking review of such a finding to justify that review by showing that the standard for obtaining discretionary review is satisfied. There are other cases in which the regional director assumes the facts asserted by the objecting party but finds that no objectionable conduct occurred,[110] or where there is no dispute about the facts at all.[111] A discretionary system of review will provide parties with a full opportunity to contest those determinations. Another group of cases represent parties' efforts to seek reconsideration, extension, or novel application of existing Board law,[112] and there is equally no reason why a discretionary system of review will not fully provide that opportunity. Still other cases simply involve the application of well-settled law to very specific facts.[113] In short, for a variety of reasons, a substantial percentage of Board decisions in post-election proceedings are unlikely to be of precedential value because no significant question of policy is at issue. The final rule requires the party seeking review to identify a significant, prejudicial error by the regional director or some other compelling reason for Board review, just as the current rules require a party to do when seeking Board review of a regional director's pre-election decision.[114]

In addition, the final rule will enable the Board to devote its limited time to cases of particular significance. This should constitute a significant time savings considering the inefficiency involved in having the multi-member Board engage in a de novo review of the entire record before disposing of a post-election case on exceptions from a hearing officer's report. Indeed, when post-election cases have come before the Board over the past 3 years, the median time for the Board to resolve them has ranged from 94.5 days to 127 days. In comparison, the median time it has taken regional directors to issue pre-election decisions has been 20 days, and the median time for the Board's action to grant or deny review regarding these decisions under the same request for review standard maintained in the final rule has been only 12 to 14 days over the same 3-year period. Under the new rules, it will be possible to have similar efficiency in regional and Board processing of post-election decisions. This will save time and resources, both public and private, and bring finality to representation proceedings in a more timely manner.

Based on all of the considerations listed above, the Board concludes that making review of regional directors' post-election decisions available on a discretionary basis, as is currently the case with pre-election review and some post-election review, will assist the Board in fulfilling its statutory mandate to promptly resolve questions concerning representation.

Several comments argue that if the Board were to adopt these amendments, it would be abdicating its statutory responsibility and function.[115] For example, SHRM and NAM argue that only Board members, because they are appointed by the President and confirmed by the Senate, can make final decisions about these matters and that the regional directors, who are career civil servants, lack comparable authority and political legitimacy. The Chamber II also argues that this proposal will make it possible for elections to be conducted without Board review of any regional action or decision, contrary to Section 3(b) of the Act. Others state that denying aggrieved parties the right to appeal adverse determinations to the Board undermines due process protections.[116] NAM contends that the Board is required to review conduct affecting election outcomes in order to safeguard employees' Section 7 rights. Similarly, other comments argue that conduct that could be the basis for setting aside an election goes to the essence of employee free choice and deserves de novo Board review.[117] Still other comments contend that, although Section 3(b) of the Act permits Board delegation to the regional directors of decisions pertaining to representation issues, those decisions must be reviewed by the Board upon request.[118]

Section 3(b) of the NLRA does not support the conclusion expressed in those comments. Section 3(b) provides in part:

> The Board is . . . authorized to delegate to its regional directors its powers . . . to determine [issues arising in representation proceedings], except that upon the filing of a request therefore with the Board by any interested person, the Board may review any action of a regional director delegated to him . . ., but such review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

29 U.S.C. 153(b).

Since Congress adopted this provision in 1959 and the Board exercised its authority to delegate these functions to its regional directors in 1961, the Board's rules have provided that regional directors' dispositions of pre-election disputes are subject only to discretionary Board review even though a failure to request review pre-election or a denial of review precludes a party from raising the matter with the Board post-election. 29 CFR 102.67(b) and (f).

[106] For example, in FY 2013, parties appealed to the Board in only one third of the 98 total cases involving regional post-election decisions concerning objections or determinative challenges, and the Board reversed the regional decision to set aside or uphold election results in only 3 cases.

[107] See, *e.g., C& G Heating,* 356 NLRB No. 133, slip op. at 1 (2011).

[108] See, *e.g., Ruan Transport Corp.,* 13–RC–21909 (Nov. 30, 2010) (resolving intent of voter who marked an X in two boxes on ballot but ''nearly obliterated'' one of them with pen markings in lieu of erasure); *Multiband, Inc.,* 2011 WL 5101459, slip op. at n.2 (Oct. 26, 2011) (credibility).

[109] See *Stretch-Tex Co.,* 118 NLRB 1359, 1361 (1957).

[110] See, *e.g., Care Enterprises,* 306 NLRB 491 n.2 (1992).

[111] See, *e.g., CEVA Logistics U.S., Inc.,* 357 NLRB No. 60, slip op. at 1–2 (2011) (consequences of regional delay in forwarding *Excelsior* list).

[112] See, *e.g., 1621 Route 22 West Operating Co., LLC d/b/a Somerset Valley Rehabilitation & Nursing Ctr.,* 357 NLRB No. 71, slip op. at 1–2 (2011); *Ace Car & Limousine Service, Inc.,* 357 NLRB No. 43, slip op. at 1–2 (2011).

[113] *Mental Health Ass'n, Inc.,* 356 NLRB No. 151, slip op. at n.4 (2011) (whether employer's particular statements about bonuses constituted objectionable promise of benefit); *G&K Services, Inc.,* 357 NLRB No. 109, slip op. at 2–4 (2011) (whether employer's letter about health coverage constituted objectionable promise of benefit).

[114] See current § 102.67(c) (discussing compelling reasons necessary for a grant of review, including the presentation of a substantial question of law or policy, a clearly erroneous regional director decision on a substantial factual issue prejudicing a party, conduct of the hearing prejudicing a party, or compelling reasons to reconsider an important Board rule or policy).

[115] See Chamber; SHRM; CDW; COLLE; NAM II; AHA II; Testimony of Curt Kirshner on behalf of AHA II.

[116] See, e.g, SHRM and Chamber.

[117] See, *e.g.,* Dassault Falcon Jet.

[118] See, *e.g.,* SHRM and NAM, NAM II.

Notably, none of the comments suggests that the current rules as to pre-election disputes violate Section 3(b) or are otherwise improper.[119]

In fact, the Supreme Court has upheld the Board's decision not to provide parties with a right to Board review of regional director's pre-election determinations, in a holding that clearly permits the Board to adopt the final rule's amendments concerning post-election review. In *Magnesium Casting Co.* v. *NLRB,* 401 U.S. 137 (1971), the employer filed a request for review of the regional director's decision and direction of election holding that certain individuals were properly included in the unit. The Board denied the petition on the ground that it did not raise substantial issues. In the subsequent ''technical 8(a)(5)'' unfair labor practice proceeding, the employer asserted that ''plenary review by the Board of the regional director's unit determination is necessary at some point,'' *i.e.,* before the Board finds that the employer committed an unfair labor practice based on the employer's refusal to bargain with the union certified as the employees' representative in the representation proceeding. 401 U.S. at 140–41. However, the Court rejected the contention that Section 3(b) requires the Board to review regional directors' determinations before they become final and binding. Citing Congress's authorization of the Board to delegate decision-making in this area to its regional directors and the use of the clearly permissive word ''may'' in the clause describing the possibility of Board review, the Court held, ''Congress has made a clear choice; and the fact that the Board has only discretionary review of the determination of the regional director creates no possible infirmity within the range of our imagination.'' *Id.* at 142. Consistent with the purpose of the final rule here, the Supreme Court quoted Senator Goldwater, a Conference Committee member, explaining that Section 3(b)'s authorization of the Board's delegation of its decision-making authority to the regional directors was to ''expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination.'' *Id.* at 141 (citing 105 Cong. Rec. 19770). And undermining the comments' suggestion that regional directors lack authority, status, or expertise to render final decisions in this area, the Court further explained that the enactment of section 3(b) ''reflect[s] the considered judgment of Congress that the regional directors have an expertise concerning unit determinations.'' *Id.*[120]

The Board concludes that the language of Section 3(b), its legislative history, and the Supreme Court's decision in *Magnesium Casting* are dispositive of the statutory objections to the proposed amendment.

Some comments suggest that providing only discretionary review of regional directors' decisions will undermine the uniformity of election jurisprudence, with different regional directors issuing divergent opinions in similar cases and under similar circumstances. The comments contend that if those decisions are not reviewed by the Board as a matter of right, there is a risk that the regional office in which the employer's operations reside, rather than the merits of the parties' positions, will govern how the dispute is resolved. For example, Bluegrass Institute contends that discretionary Board review will result in less uniformity, the denial of due process, and diminished legitimacy in election processes. Other comments argue that discretionary post election review will result in unchecked regional errors [121] and slow the development of binding and authoritative precedent.[122] The Board disagrees.

Since 1961, regional directors have made pre-election determinations, and their decisions have been subject to only discretionary review through the request for review procedure. The same has been true of post-election determinations processed under § 102.69(c)(3)(ii). There is no indication that the quality of decision-making has been compromised by this procedure or that regional directors have reached inconsistent conclusions. Under the final rule, the same review process will apply to all cases involving post-election objections and challenges except where they are consolidated with unfair labor practice allegations before an administrative law judge. As it has done for over 50 years in respect to pre-election disputes, the Board will scrutinize regional directors' post-election decisions where proper requests for review are filed.

One purpose of that review will be to determine if there is an ''absence of'' or ''a departure from, officially reported Board precedent,'' *i.e.,* to ensure uniformity via adherence to Board precedent. See 29 CFR 102.67(c)(1). Accordingly, the final rule provides parties with an opportunity to appeal regional decisions that are inconsistent with precedent or which contain facts that are clearly erroneous and prejudicial under a discretionary standard. The parties may also utilize this discretionary review process if there are substantial questions of law or policy or compelling reasons for reconsidering a Board rule or policy.

For these reasons, the Board does not believe that the final rule will lead to lack of uniformity or quality in decisions or adversely affect the development of the law. In fact, the discretionary standard enables the Board to better focus its resources and attention on those cases that are legally or factually significant and have greater impact on parties and/or the development of law and policy. And, since most of the Board's post election decisions under the existing standard of mandatory review are not published and have no precedential value,[123] this proposed change is not likely to have a significant adverse impact on the precedential value of post election decisions.[124]

A few comments question the competence of regional personnel. For example, COLLE argues that ''Regional Directors can be dictatorial and imprudent to the rights of private parties in disputes before them'' and ''can exhibit irrational and unfair behavior and deprive parties of their rights to go to hearing and litigate legitimate issues under the Act.'' Other comments contend that because hearing officers report directly to regional directors, appeal to the regional directors does not constitute meaningful review.

[119] Moreover, even under the current rules, specifically § 102.69(c)(4), if the regional director issues a decision concerning challenges or objections instead of a report in cases involving directed elections, an aggrieved party's only recourse is a request for review. Thus, the comments' objections apply to the current regulations as well as to the final rule.

[120] See also *St. Margaret Memorial Hosp.* v. *NLRB,* 991 F.2d 1146, 1154 (3d Cir. 1993); *Beth Israel Hosp. and Geriatric Ctr.* v. *NLRB,* 688 F.2d 697, 700–01 (10th Cir. 1982) (en banc); *Transportation Enterprises, Inc.* v. *NLRB,* 630 F.2d 421, 426 (5th Cir. 1980) (finding that ''decisions rendered by the regional offices of the NLRB which are not reviewed by the Board, for whatever reasons, are entitled to the same weight and deference as Board decisions, and will be given such unless and until the Board acts in a dispositive manner.'').

[121] See, AHA II.

[122] See, RILA II.

[123] For instance, in FY 13, the Board published only five of the decisions it issued on post election exceptions.

[124] Nor would the Board agree that a discretionary review process infringes on parties' due process rights. Constitutional due process requires only one fair hearing and does not require an opportunity to appeal. The Supreme Court has so held even with respect to criminal cases. See *Evitts* v. *Lucey,* 469 U.S. 387, 393 (1985) (''Almost a century ago, the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors. *McKane* v. *Durston,* 153 U.S. 684 . . . (1894).'').

The Board's experience in reviewing the work of and supervising its regional directors gives no credence to these comments. Moreover, Congress expressed confidence in the regional directors' abilities when it enacted Section 3(b). As one comment in favor of the rule (Professor Joel Cutcher-Gershenfeld) noted, empowering regional directors to make final post-election rulings, as they now do in respect to pre-election matters, locates decisions with the individuals who have the greatest knowledge about and experience with representation case procedures.[125] Similarly, the Chamber (Chamber II), although it generally opposes the proposals, notes the ''professionalism, experience and integrity'' of the regional directors and their staffs. Rather than detracting from their authority and legitimacy, the Board concludes that the regional directors' career status ensures their neutrality and, in almost all cases, their extended service at the Board and thus extensive experience with and knowledge about representation case procedures and rules.

ALFA argues that regional directors tend to uphold election results, and therefore a right to Board review should be retained if the Board wishes to discourage litigation via refusals to bargain. As noted above, the Board rejects the suggestions that regional directors are systematically biased in this or any other way, and repeats that it will scrutinize regional directors' decisions when proper requests for review are filed.

Some comments contend that, if the proposals are adopted, employers will increasingly refuse to bargain with newly certified representatives in order to obtain judicial review of regional directors' determinations.[126] This argument is, at best, highly speculative. There is no evidence that this happened after the Board delegated adjudication of pre-election disputes to its regional directors in 1961 subject to only discretionary review by the Board, and the Board can see no reason why an increase in refusals to bargain would be more likely if Board review of post-election decisions is similarly made discretionary. The Board does not believe that judicial review through technical refusal to bargain litigation will be more frequent when the Board denies review of a regional director's post-election decision than it is when the Board summarily affirms the same regional decision, as it often does now. See, *e.g., The Pepsi Cola Bottling Company,* 9–RC–110313 (Sept. 18, 2013); *King Soopers,* 27–RC–104452 (Sept. 13, 2013); *Geralex Inc.,* 13–RC–106888 (Sept. 12, 2013).

Several comments argue that the rule is contrary to the preferences of both employers and unions, as shown by the high rate of stipulated election agreements—providing for adjudication of post-election disputes by the Board—and the comparative rarity of consent election agreements—providing for a final decision by the regional director. AHA (AHA II), SHRM, and ACE contend that parties prefer this form of pre-election agreement because it provides for Board disposition of post-election issues. As a corollary to this argument, some comments argue that eliminating automatic Board review will result in fewer pre-election agreements and thus more litigation.[127]

The Board believes for several reasons that the final rule will not create a disincentive for parties to enter into consent or stipulated election agreements. The final rule makes post-election Board review discretionary whether the parties enter into a stipulated election agreement or proceed to a hearing resulting in a decision and direction of election. Thus, parties who prefer Board review of post-election disputes will have no incentive to litigate pre-election issues in order to gain such review. The Board believes that if parties genuinely prefer agreements that permit Board review, they will continue to enter into stipulated rather than consent election agreements in order to preserve their right to seek such review. Whether parties enter into any pre-election agreement or litigate disputes at a pre-election hearing under the final rule will depend on the same calculus that it does at present: the likelihood of success, the importance of the issue, and the cost of litigation. In addition to avoiding the time, expense and risk associated with a pre-election hearing, parties also gain certainty with respect to the unit description and the election date by entering into a stipulated election agreement. In short, parties will continue to have ample reason to enter into stipulated election agreements under the final rule, even though the final rule makes Board review of regional directors' dispositions of post-election disputes discretionary.

Some comments, such as that of Sheppard Mullin II, express confusion about the rule and the request-for-review procedure. The grounds for granting a request for review under § 102.69(c)(2) (referencing § 102.67(d)) of the final rule are nearly identical to the grounds set forth in § 102.67(c) of the existing rules. The Board will continue to review cases involving issues of ''first impression'' or where there is ''conflicting or unsettled'' law in the same manner that it currently does under the pre-election request-for-review procedure. The Board is not aware of any concerns about the way it has evaluated requests for review in representation proceedings, and does not anticipate any in the future.

One comment questions whether ''the denial of review'' is subject to appeal to the Federal courts. Orders in representation cases are not final orders for purposes of judicial review. Rather, an employer must refuse to bargain and commit a ''technical 8(a)(5)'' violation to secure court review of the Board's representation decisions. See 29 U.S.C. 159(d); *Boire* v. *Greyhound Corp.,* 376 U.S. 473, 476–79 (1964). Under the current rules, if an employer refuses to bargain, it may obtain review of a regional director's pre-election rulings even if the Board denied review thereof, and the same will be true of post-election rulings under the final rule. Thus, there are no open questions about the Board's discretionary review process that will undermine confidence in its decisional processes.

Similarly, comments misinterpret the rule with respect to how regional decisions will be reviewed and how that review will affect the law. The final rule simply makes post-election dispositions reviewable under a discretionary standard, rather than as of right. The Board's rulings on post-election requests for review will be public and will be published on the Board's Web site, as will the underlying regional directors' decisions, just as rulings on pre-election requests for review are now. Thus, the public and labor law community will have full access to the Board's rulings.

[125] The Board also notes that regional directors make decisions concerning whether to prosecute charges of unfair labor practices under the Act, and those prosecutorial decisions often involve questions of employee status and questions of whether certain conduct is unlawful, both of which often parallel questions that arise in post-election representation proceedings. The courts have recognized that regional directors have expertise in determining what constitutes objectionable conduct. See, *e.g., NLRB* v. *Chicago Tribune Co.,* 943 F.2d 791, 794 (7th Cir. 1991), cert. denied, 504 U.S. 955 (1992).

[126] See Chamber; Chamber II; AHA; CDW; Baker & McKenzie; Testimony of Curt Kirshner on behalf of AHA II.

[127] See, *e.g.,* Chamber II. Constangy contends that an employer entering into a stipulation will lose any rights to appeal pre-election unit issues and that this will have a negative effect on the Board's stipulation rate. The Board notes, however, that under current procedures, parties who enter into stipulated election agreements, by definition, agree about pre-election issues, and therefore waive any right to bring pre-election issues to the Board. Thus, the final rule does not change that aspect of stipulated election agreements.

In sum, the amendments to § 102.62(b) conform the review provisions of the stipulated election agreement to the amended review provisions for directed elections. Parties should not be entitled to greater post-election Board review simply by virtue of the fact that there are no pre-election disputes. Under the final rule, all Board review of regional directors' dispositions of challenges and objections will be discretionary under the existing request-for-review procedure.

B. Voter List

In *Excelsior Underwear, Inc.,* 156 NLRB 1236, 1239–40 (1966), the Board established the requirement that, 7 days after approval of an election agreement or issuance of a decision and direction of election, the employer must file an election eligibility list—containing the names and home addresses of all eligible voters—with the regional director, who in turn makes the list available to all parties. Failure to comply with the requirement constitutes grounds for setting aside the election whenever proper objections are filed. *Id.* at 1240.

Numerous comments address the Board's multi-part proposal in the NPRM (in § 102.62 as well as in § 102.67(l)) to codify and revise the *Excelsior* requirement, which was approved by the Supreme Court in *NLRB* v. *Wyman-Gordon Co.,* 394 U.S. 759, 767–68 (1969).[128] The proposed revisions to the *Excelsior* requirement were intended to better advance the two objectives articulated by the Board in *Excelsior:* (1) Ensuring the fair and free choice of bargaining representatives by maximizing the likelihood that all the voters will be exposed to the *nonemployer* party arguments concerning representation; and (2) facilitating the public interest in the expeditious resolution of questions of representation by enabling the parties on the ballot to avoid having to challenge voters based solely on lack of knowledge as to the voter's identity. *Excelsior,* 156 NLRB at 1240–41, 1242–43, 1246.[129]

Specifically, the Board proposed that the employer be required to furnish to the other parties and the regional director not just the eligible voters' names and home addresses, but also their available email addresses and telephone numbers as well as their work locations, shifts, and job classifications. In addition, the Board proposed to shorten the time for production of the voter list from the current 7 days to 2 work days, absent agreement of the parties to the contrary or extraordinary circumstances specified in the direction of election. The Board also proposed that the voter list be provided in an electronic format generally approved by the Board's Executive Secretary unless the employer certifies that it does not possess the capacity to produce the list in the required form, and that the employer serve the voter list on the other parties electronically at the same time the employer files the list with the regional director. In order to be timely filed, the list would have to be received by the other parties and the regional director within 2 work days after approval of the election agreement or issuance of the direction of election. The NPRM also proposed that failure to file or serve the list and related information within the specified time and in the proper format would be grounds for setting aside the election whenever proper objections are filed. Finally, the Board proposed a restriction on the use of the voter list, barring parties from using it for any purposes other than the representation proceeding and related proceedings, and sought comments regarding what, if any, the appropriate remedy should be for a party's noncompliance with the restriction.

Comments attacking the proposal criticize the information required to be disclosed, the format of the information to be disclosed, the time period for its production, and the proposed restriction language. Comments praising the proposal claim the proposal would better serve the twin purposes of the original *Excelsior* list requirement and help the Board to expeditiously resolve questions of representation. Positive comments further claim that the proposal would merely update the old disclosure requirement to reflect present day realities regarding how people and institutions communicate with one another and exchange information. Other comments suggest that the Board should require the employer to furnish a broader array of contact information than proposed in the NPRM, and that the contact information should be provided earlier in the process—before the parties enter into an election agreement (or the regional director directs an election).

After careful consideration of the comments, the Board has decided to largely adopt the proposals with certain changes, as outlined below:

(1) The final rule clarifies that in the event that the parties agree that individuals in certain classifications or other groupings should be permitted to vote subject to challenge, or the regional director directs that individuals in certain classifications or other groupings be permitted to vote subject to challenge, the employer shall provide the information about such individuals in a separate section of the voter list.

(2) The final rule does *not* require employers to furnish the other parties or the regional director with the work email addresses and work phone numbers of the eligible voters and the work email addresses and work phone numbers of those individuals whom the parties have agreed may vote subject to challenge (or whom the regional director has directed be permitted to vote subject to challenge). However, the final rule clarifies that the Board retains discretion to require through future adjudication or rulemaking that additional forms of contact information be included on the list.

(3) The final rule clarifies that the Board's General Counsel, rather than the Board's Executive Secretary, will be the official with whom the authority will reside to specify the acceptable electronic format of the voter list.

(4) The final rule clarifies that the employer has 2 *business* days, rather than 2 calendar days, after the regional director approves the parties' election agreement or issues a direction of election to furnish the list to the nonemployer parties to the case and the regional director. Although the NPRM had proposed that the regional director would make the voter list available to the nonemployer parties upon request, that language has not been incorporated into the final rule due to the Board's judgment that it is unnecessary since the rule requires direct service of the voter list from the employer to the nonemployer parties.[130]

[128] Some of the comments concerning the voter list also generally implicate the Statement of Position Form proposal.

[129] In addition, this information will facilitate both the fair and free choice of bargaining representatives and the expeditious resolution of questions of representation by permitting the parties to more efficiently investigate post-election objections and other Board proceedings, such as unfair labor practice charges, arising out of the election.

[130] Given that employers will have responsibility for service of the voter list on nonemployer parties, the final rule includes a requirement that the employer file with the regional director a certificate of service on all parties when the voter list is filed. The final rule also uses the same ''whenever proper *and timely* objections are filed under the provisions of § 102.69(a)'' language in describing the consequences for failure to comply with the voter list amendments that § 103.20 of the prior rules used in describing the consequences for failure to comply with the obligation to post what was previously called the Board's ''official Notice of Election.'' Further, the rule adds language to 102.62(d) and 102.67(l) (similar to that which had been proposed in 102.76(i) regarding the posting of

Continued

(5) The final rule modifies the restriction language to prohibit nonemployer parties from using the voter list information for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.[131]

1. Contact and Job Information

a. Work Email Addresses/Work Phone Numbers

A large number of employer comments oppose the voter list proposals, particularly to the extent that they could be construed as requiring the employer to furnish the other parties with the work email addresses and work phone numbers of its employees.[132] For example, CDW suggests that the Board's proposal is vague and does not clarify whether the rules require production of employees' work phone numbers and email addresses for use by the nonemployer parties. If the rules would so require, then CDW argues that they ''would be irreconcilable with longstanding Board case law'' on solicitation, distribution, and lawful access restrictions,[133] in addition to prompting a huge number of surveillance complaints stemming from employers' routine monitoring of internal phone and email systems. The SEIU disagrees, claiming in reply that under the Board's proposal, employers would still be able to maintain non-discriminatory, restrictive email policies, but that given most employers' permissive attitudes toward employees' use of email, it would be highly unlikely that many such rules would prevent election-related uses of employees' work email by the nonemployer parties. Meanwhile, the AFL–CIO (AFL–CIO II) contends that the Board should address issues surrounding work email through the adjudicatory process, and the Chamber II in reply—while generally opposed to requiring any phone and email information on the voter list—agrees that it would be more appropriate to disclose employees' personal email and phone information than their work email and phone information.

Other comments emphasize the threat of harm to employer email and phone systems and associated productivity concerns that would allegedly flow from the disclosure of employees' work contact information to the nonemployer parties.[134] For example, the Employment and Labor Law Committee of the Association of Corporate Council (ACC), cites the Sixth Circuit's decision in *Pulte Homes* v. *Laborer's Int'l Union,* 648 F.3d 295 (6th Cir. 2011)[135] as evidence of union propensity to misuse this information in order to inflict economic damage on an employer. However, the American Health Care Association and the National Center for Assisting Living II (AHCA)—which also cites *Pulte*—admits that ''a petitioning union might be expected to be more solicitous of employees whose votes it was seeking in an NLRB election.'' CDW also mentions the threat of malicious software and viruses being introduced to employer computer systems, but SEIU (reply) answers that such threats are far-fetched considering that ''riddling an employee's computer [albeit one owned by the employer] with a virus is not likely . . . to encourage her to support the union.'' Furthermore, comments point out that email providers, such as Google and Microsoft, are vigilant about identifying malicious attachments, and that many employer email systems are protected by commercially available software, thus minimizing any potential risks to employer email systems.[136]

Still other comments argue that because the concerns associated with inclusion of work email and work phone numbers on the voter list are so significant, the Board would be breaching its obligation of neutrality in the election process if it were to order the employer to disclose them to a petitioning union.[137]

After careful consideration of all the comments concerning the voter list proposals as they relate to work email addresses and work phone numbers, the Board believes that the issues raised require further study, and so the final rule does *not* require the employer to furnish the other parties (such as the union in an initial organizing context) with either the work email addresses or work phone numbers of eligible voters. If, in the future, the Board decides through adjudication or rule-making that the inclusion of additional contact information on the voter list is warranted, then it will be incumbent on the Board to address concerns appropriately raised at that time. However, at this time, we express no opinion as to the merits of the various concerns raised that are specific to including work email addresses or work phone numbers on the voter list.

b. Personal Email Addresses/Personal Phone Numbers

Although the final rule does not require the employer to furnish the other parties or the regional director with the work email addresses and work phone numbers of the eligible voters, the final rule does require the employer to furnish the other parties and the regional director with the available personal email addresses and available home and personal cellular (''cell'') telephone numbers of the eligible voters to help advance the principal objectives behind the original *Excelsior* requirement. As set forth in the NPRM, in elections conducted under Section 9 of the Act, there is no list of employees or potentially eligible voters generally available to interested parties other than the employer and, typically, an incumbent representative. 79 FR 7322. The Board addressed this issue in *Excelsior Underwear, Inc.,* 156 NLRB 1236, 1239–40 (1966), where it held:

> [W]ithin 7 days after the Regional Director has approved a consent-election agreement . . . or after the Regional Director or the Board has directed an election . . ., the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Although several Justices of the Supreme Court expressed the view that the requirement to produce what has become known as an ''*Excelsior* list'' should have been imposed through rulemaking rather than adjudication, the Court upheld the substantive requirement in *NLRB* v. *Wyman-Gordon Co.,* 394 U.S. 759, 767–68 (1969).

the proposed final notice of election) to clarify that employers will be ''estopped from objecting to the failure to file or serve the list within the specified time or in the proper format'' if the employers are responsible for the failure.

[131] The final rule also conforms the election notice provisions in § 102.62(e) to the election notice provisions that are discussed in relation to §§ 102.67(b),(k). Thus, for example, the text of amended § 102.62(e) explicitly provides, just as the text of amended § 102.67(k) explicitly provides, that ''The employer's failure properly to post or distribute the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a).''

[132] See, *e.g.,* SHRM; ALFA; COLLE.

[133] For other comments to this effect, see, *e.g.,* NAM II; Sheppard-Mullin II; RILA.

[134] See, *e.g.,* ACC; AGC; Indiana Chamber; ABC; Sheppard Mullin II; Mrs. Octavia Chaves II.

[135] In this case, which does not involve a union's use of an *Excelsior* list, the Sixth Circuit denied Pulte's motion for a preliminary injunction, but reversed the district court's dismissal of Pulte's claims against the Laborers union under the Computer Fraud and Abuse Act based upon allegations that the Laborers intentionally transmitted a high volume of email messages and phone calls to several Pulte executives and managers in retaliation for Pulte's firing of several employees concerning which the Laborers filed unfair labor practice charges with the NLRB.

[136] See SEIU II; Testimony of Jess Kutch on behalf of Coworker.org II.

[137] See, *e.g.,* National Association of Wholesaler-Distributors (NAW) II; AEM II.

In *Excelsior,* the Board explained the primary rationale for requiring production of an eligibility list:

> [W]e regard it as the Board's function to conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also free from other elements that prevent or impede a free and reasoned choice. Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice . . ..
>
> As a practical matter, an employer, through his possession of employee names and home addresses as well as his ability to communicate with employees on plant premises, is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation. On the other hand, without a list of employee names and addresses, a labor organization, whose organizers normally have no right of access to plant premises, has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and, as a result, employees are often completely unaware of that point of view. This is not, of course, to deny the existence of various means by which a party *might* be able to communicate with a substantial portion of the electorate even without possessing their names and addresses. It is rather to say what seems to us obvious—that the access of *all* employees to such communications can be insured only if all parties have the names and addresses of all the voters. In other words, by providing all parties with employees' names and addresses, we maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation

156 NLRB at 1240–41 (footnotes omitted). The Supreme Court endorsed this rationale in *Wyman-Gordon,* 394 U.S. at 767, stating that:

> The disclosure requirement furthers this objective [to ensure the fair and free choice of bargaining representatives] by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses. It is for the Board and not for this Court to weigh against this interest the asserted interest of employees in avoiding the problems that union solicitation may present.

Since *Excelsior* was decided almost 50 years ago, the Board has not significantly altered its requirements despite transformative changes in communications technology, including that used in representation election campaigns. Fifty years ago, email did not exist; and communication by United States mail was the norm. For example, the union in *Excelsior* requested a list of names and home addresses to answer campaign propaganda that the employer had mailed to its employees. See *Excelsior,* 156 NLRB at 1246–47. Indeed, if a union wanted to reach employees with its arguments in favor of representation, it frequently resorted to the United States mail or visited employees at their homes because, as the Board recognized in *Excelsior,* the union, unlike the employer, ''normally ha[s] no right of access to plant premises'' to communicate with the employees. *Id.* at 1240. However, as SEIU points out, in 2010, nearly all working adults used email, and indeed, 39.6 billion emails were being sent every day—more than 80 times the number of letters being sent through the U.S. Postal Service.[138] The AFL–CIO II cites to a study released during the 2014 comment period suggesting that up to 87% of U.S. adults have an email address and use the internet.[139] Other comments likewise assert that the voter list requirements should be updated to include email addresses in recognition of how individuals, employees, employers, and institutions now communicate with one another.[140]

The Board believes that the provision of only a physical home address no longer serves the primary purpose of the *Excelsior* list. Communications technology and campaign communications have evolved far beyond the face-to-face conversation on the doorstep imagined by the Board in *Excelsior.* As Justice Kennedy observed in *Denver Area Educational Telecommunications Consortium, Inc.* v. *FTC,* 518 U.S. 727, 802–803 (1996) (Kennedy, J., dissenting) (internal citation omitted):

> Minds are not changed in streets and parks as they once were. To an increasing degree, the most significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media. The extent of public entitlement to participate in those means of communication may be changed as technologies change.

Similarly, in *J. Picini Flooring,* 356 NLRB No. 9, slip op. at 2–3 (2010) (footnotes omitted), the Board recently observed,

> While * * * traditional means of communication remain in use, email, postings on internal and external websites, and other electronic communication tools are overtaking, if they have not already overtaken, bulletin boards as the primary means of communicating a uniform message to employees and union members. Electronic communications are now the norm in many workplaces, and it is reasonable to expect that the number of employers communicating with their employees through electronic methods will continue to increase. Indeed, the Board and most other government agencies routinely and sometimes exclusively rely on electronic posting or email to communicate information to their employees. In short, ''[t]oday's workplace is becoming increasingly electronic.'' [141]

Moreover, our experience with campaigns preceding elections conducted under Section 9 of the Act indicates that employers are, with increasing frequency, using email to communicate with employees about the vote. See, *e.g., Arkema, Inc.,* 357 NLRB No. 103, slip op. at 14 (2011) (employer sent an email to employees broadly prohibiting ''harassment'' with respect to the upcoming election), enf. denied 710 F.3d 308 (5th Cir. 2013); *Humane Society for Seattle,* 356 NLRB No. 13, slip op. at 3 (2010) (''On September 27, the Employer's CEO, Brenda Barnette, sent an email to employees asking that they consider whether ACOG was the way to make changes at SHS. On September 29, HR Director Leader emailed employees a link to a third-party article regarding 'KCACC Guild's' petition and reasons the Guild would be bad for SHS.''); *Research Foundation of the State University of New York at Buffalo,* 355 NLRB 950, 958 (2010) (''On January 12, Scuto sent the first in a series of email's [sic] to all Employer postdoctoral associates concerning the Petitioner's efforts to form a Union at the Employer[,]. . . . explaining the Employer's position on unionization . . . .''); *Black Entertainment Television,* 2009 WL 1574462, at *1 (NLRB Div. of Judges June 5, 2009) (employer notified several employees by email to attend a meeting in which senior vice-president spoke one-on-one with the employees regarding the election scheduled for the following day).[142]

[138] See ''Email vs. snail mail (infographic)'' (Sept. 29. 2010), *http://royal.pingdom.com/2010/09/29/email-vs-snail-mail-infographic.*

[139] Susannah Fox & Lee Rainie, ''The Web at 25 in the U.S.'', Pew Research Center (Feb. 27, 2014), *http://www.pewinternet.org/2014/02/27/the-web-at-25-in-the-U–S/.*

[140] See, *e.g.,* National Nurses Union (NNU); Professor Joel Cutcher-Gershenfeld; SEIU-United Healthcare Workers—West; Southwest Regional Joint Board, Workers United; Testimony of Brenda Crawford II; Testimony of Darrin Murray on behalf of SEIU II.

[141] To be clear, the Board cites *J. Picini Flooring* and related examples simply to demonstrate its view of the changing realities of workplace communication, and not—as suggested in the comments of AHCA—to argue that simply because an employer might use a particular mode of communication that a union should therefore be entitled to use of that same mode as a quid pro quo.

[142] In addition, the rulemaking record reflects that employers sometimes use their employees' personal contact information to communicate about campaign issues. See United Nurses Associations of California/Union of Health Care Professionals

Continued

Disclosure of the employees' personal email addresses, like the disclosure of personal phone numbers discussed below, will allow the nonemployer parties (including unions and decertification petitioners) to promptly convey their information concerning the question of representation to all the eligible voters. Disclosure of this contact information also makes it more likely that nonemployer parties can respond to employee questions, both individually and collectively, including questions that employees have, but may be uncomfortable raising on their own.[143] It also permits the nonemployer parties to engage with employees on campaign issues in a timely manner and specifically, prior to the election, as well as share those responses with other employees, thus making it more likely that employees can make an informed choice in the election. After all, it obviously takes less time for an employee to receive the nonemployer party's campaign communication when that message is sent via email than when it is sent via United States mail.[144] Nurse Brenda Crawford explained the difficulty in organizing off-campus informational meetings when her colleagues work 12-hour shifts and have outside family responsibilities. In her view, modern communication tools, including email, would enhance the ability to provide information in a manner that is convenient to workers and their families. Testimony of Crawford II. The Board agrees, and has concluded that the required disclosure of available personal email addresses of eligible voters will permit the timely give-and-take of campaign information that will increase the likelihood that employees will be placed ''in a better position to make a fully informed and reasonable choice.'' *Excelsior,* 156 NLRB at 1240.[145] And of course, the Board included employees' home and personal cell telephone numbers in the voter list proposals because the use of telephones to convey information orally and via texting is an integral part of the communications evolution that has taken place in our country since *Excelsior* was decided.[146]

However, some comments question the inclusion of phone numbers in the final rule, implying that because the Board chose not to mandate disclosure of phone numbers in 1966, at a time when at least basic telephone technology existed, then it should not do so today.[147] CDW attempts to lend force to this argument by asserting that in the late 1960s ''the United States led the world in telephone usage . . . and . . . the average person had 701 telephone conversations'', while simultaneously arguing that the home addresses disclosed under the current *Excelsior* policy continue to be the ''most reliable and near universal points of contact'' for employees.

The Board believes that comments such as CDW's do not adequately appreciate the way phone communication has changed in the last 45 years. While it may be true that when the Board issued its *Excelsior* decision, many households had at least one telephone, the telephone was not nearly as ubiquitous as it is presently, and those that existed bore little resemblance to the technology we have become accustomed to today. In particular, voicemail service had yet to be invented, and no commercially viable home answering machine had yet entered the marketplace. See ''The History of . . . Answering Machines,'' *http://transition.fcc.gov/cgb/kidszone/history_ans_machine.html* (last updated June 4, 2004). Because answering machine and voicemail technology was uncommon or nonexistent in 1966, a nonemployer party could not leave a message if the employee with whom it intended to speak about the upcoming election was not at home when the union called. By contrast, the employee would receive the nonemployer party's letter even if the employee was not at home when the post office delivered it. Today, however, even if the employee is not home when the call is placed, the caller is virtually always able to leave a voice message—to say nothing of the ability to send written messages via phone texting technology. And, of course, if an employee has a cell phone, the caller can reach the employee even if the employee is not at home when the call is received.

Contrary to CDW, the Board believes that the changes in phone ownership and use make personal phones a universal point of contact today in a way that was unimaginable in 1966. The share of U.S. households possessing a telephone has steadily increased since the 1960s, from 78% in 1960 to 95% in 1990. See Bureau of the Census, Census Questionnaire Content, 1990 CQC–26, ''We asked . . . You told us: Telephone and Vehicle Availability'' 1 (Jan. 1994), *http://www.census.gov/prod/cen1990/*

(UNAC/UHCP) II and testimony of Brenda Crawford II (describing an employer sending text message blasts to employees' personal cell phones as part of its election campaign).

[143] For example, Board caselaw provides examples of campaigns in which employees are presented with hypothetical ''questions'' to ''ask'' the organizing union. See, *e.g. Kellwood Co.,* 178 NLRB 20, 23 (1969) (employer encouraged employees to ask organizing union what would happen when no contract was reached); *Smithtown Nursing Home,* 228 NLRB 23, 26 (1977) (employer encouraged employees to ask the organizing union for a ''guarantee'' of no strikes, and other strike related demands); *World Wide Press, Inc.,* 242 NLRB 346, 357 (1979) (employer distributed leaflets encouraging employees to ask about discontinued pension negotiations at another plant); *Flamingo Hilton-Laughlin,* 324 NLRB 72, 80–83 (1997) (employer distributed leaflets encouraging employees to ask 18 questions of the organizing union including certain ''guarantees''); *Eldorado Tool,* 325 NLRB 222, 224 (1997) (employer distributed leaflet encouraging employees to ask 15 rhetorical questions of the organizing union including whether the union could ''guarantee'' no job loss or facility closure).

[144] We recognize that nonemployer parties can reply by email to any voter who chooses to pose questions by email since the return email address is included in the email itself, but we would find unpersuasive any claim that voluntary disclosures of this sort establish that it is unnecessary to provide nonemployer parties with email addresses of all eligible voters. Looking at the matter so narrowly overlooks that an organizing campaign is not merely a series of discrete individual communications addressed to interested employees with particular questions. Union representatives may seek to answer questions that not all employees may have thought to ask and to provide information about representation issues that not all employees possess. The ability to communicate effectively with all employees is necessary for this purpose. Accordingly, the Board believes that requiring an employer to furnish the available personal email addresses of eligible voters to the nonemployer parties makes it more likely that employees can make an informed choice in the election.

[145] To be sure, the Board believes that requiring the provision of employees' available personal email and phone numbers is a necessary improvement to the existing *Excelsior* policy even in workplaces where employers do not choose to avail themselves of email and phones as a tool of their representation campaign, *i.e.,* its importance and usefulness is not linked to, or dependent on, the employer's use of email or phone communication.

[146] SIGMA and others suggests that many employers do not keep records of employees' personal email addresses and so ''the Board may overestimate the availability or utility'' of personal email addresses as a means for petitioners to reach all employees with their message. Yet, the amendments merely require an employer to furnish its employees' ''available personal email addresses'' (and ''available home and personal cellular (''cell'') telephone numbers''). Accordingly, if the employer does not maintain those addresses and numbers, it does not need to ask its employees for them. As discussed below, the Board recognizes that delays in conducting elections would result if employers (or the Board) were required to collect personal information directly from employees after the parties entered into an election agreement or the regional director directed an election. However, the fact that some employers may not maintain records of their employees' personal email addresses and personal phone numbers does not demonstrate that it is not worthwhile to require those employers who do maintain such information to disclose it in the interests of fair elections and more efficient administrative proceedings. Similarly, the fact that an employer may not possess the personal email addresses and personal phone numbers for each and every one of its employees does not demonstrate that it is not worthwhile to require the employers to disclose those employees' personal email addresses and personal phone numbers that it does possess.

[147] See, *e.g.,* SIGMA; Schnuck Markets, Inc.; INDA II.

cqc/cqc26.pdf. The Census Bureau reports that the numbers of households with no available phone had shrunk to only 2.4% by 2000. See U.S. Census Bureau, 2000 Census of Population and Housing, *Summary Social, Economic, and Housing Characteristics,* PHC–2–1, United States Summary 10 (2003) (Table 10), *http://www.census.gov/prod/cen2000/phc-2-1-pt1.pdf*. And that tiny percentage of households with no phone service appears to have remained nearly unchanged through 2013. See Stephen J. Blumberg and Julian V. Luke, ''Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2013,'' National Center for Health Statistics 2 (December 2013), *http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201312.pdf* (reporting only 2.3% of U.S. households lacking phone service).

In addition, as of January 2014, 90% of American adults had a handheld mobile phone or a cell phone—a non-existent technology at the time of *Excelsior*—and 29% of cell phone owners described their cell phone as ''something they can't imagine living without.'' Pew Research Internet Project, Mobile Technology Fact Sheet (Jan. 2014), *http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/*. In fact, the use of cell phones has increased to the point that it is overtaking the use of landline phones. For example, SEIU's comment cites a 2007 study finding that 85% of adults own cell phones, while only 71% of adults own home phones. And the Bureau of Labor Statistics identifies 2007 as the first year in which spending on cellular phone services exceeded spending on residential phone services. See ''Consumer Expenditure Survey: Spending on Cell Phone Services Has Exceeded Spending on Residential Phone Services,'' *http://www.bls.gov/cex/cellphones2007.htm* (last modified Jan. 14, 2009). In 2010, more than a quarter of adults lived in households with only wireless telephone service, up from less than 5% a mere 7 years earlier. See Stephen J. Blumberg and Julian V. Luke, ''Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2010,'' National Center for Health Statistics 1 (June 2011), *http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201106.pdf*. By 2013, 38% of all adults lived in households with only wireless service, and more than half of adults younger than 35, as well as adults living in poverty, had only wireless phone service in their households. See Blumberg and Luke, ''Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2013,'' National Center for Health Statistics 2–3 (December 2013), *http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201312.pdf*. These statistics validate the hearing comments of Ronald Mikell, speaking on behalf of the Federal Contract Guards of America, that many of his members possess only cell phones, and that Mikell's cell phone was his primary point of contact for both business and personal matters.

The advent of cell phones has expanded communications not only by phone but by other electronic media. Some 55% of cell phone owners use their phones to go online— to browse the internet, exchange emails, or download apps. Pew Research Internet Project, Mobile Technology Fact Sheet (Jan. 2014), *http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/*. In addition, the prevalence of cell phones, which are typically carried with adults on their person whether at home, at work or around town, now allows callers' messages to reliably reach their recipients with speeds that would have been shocking in 1966. This speed and reliability has been enhanced through text messaging, which has seen a dramatic rise in usage in only the past few years, becoming the preferred mode of communication for many young people. In marked contrast to CDW's citation of an average person's 701 annual phone conversations in 1968, more recent statistics show young adults sending an average of 1,630 texts per month. See ''U.S. Teen Mobile Report Calling Yesterday, Texting Today, Using Apps Tomorrow'' (October 14, 2010), *http://www.nielsen.com/us/en/insights/news/2010/u-s-teen-mobile-report-calling-yesterday-texting-today-using-apps-tomorrow.html*.

Additionally, there is a separate rationale for requiring mobile and home phone numbers in addition to email addresses, namely, to reach persons who rely on phone calls and not emails. According to the Pew Research Internet Project, Mobile Technology Fact Sheet (Jan. 2014), *http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/*, over forty percent of phone users do not possess smartphones and therefore would not receive last minute emails responding to campaign issues. Disclosure of personal phone numbers is thus a practical necessity if this significant portion of eligible voters is going to have access to late breaking developments.

In addition to the increased use of personal telephones, text messaging, and email, smartphones have recently emerged as single devices capable of managing all three modes of communication. Even as of 2011, more than two-thirds of Americans 34 years old or younger, and 48% of individuals 15 years old and above, had a smartphone. U.S. Census Bureau, Computer and Internet Use in the U.S. (May 2013). As of January 2014, 58% of American adults had a smartphone. Pew Research Internet Project, Mobile Technology Fact Sheet (Jan. 2014), *http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/*. A smartphone's ability to combine telephone, text message, and email access in one hand-held, portable device is perhaps the most tangible example of how the evolution of communications since 1966 has made the personal phone a universal point of contact and, as indicated above, smartphone users comprise more than half of cell phone owners.[148]

In the face of this revolution in communications technology, it is not surprising that, as SEIU notes, door to door solicitation is nearly extinct, and first class mail is at its lowest volume in 25 years with further profound declines predicted over the next decade. In the experience of union attorney Thomas Meiklejohn, some employers may no longer keep updated home address information on their employees because they do not regularly communicate with them via mail, in contrast to employee telephone lists, which are updated of necessity.[149] Indeed, many comments support adding phone numbers to the voter list disclosures, as a ''common sense'' change, precisely because the disclosures of only home addresses may

[148] See also *Riley* v. *California,* 134 S.Ct. 2473, 2484 (June 25, 2014) (describing cell phones as ''such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy'' and acknowledging that smart phones, and even less sophisticated cell phones ''are based on technology nearly inconceivable just a few decades ago'').

[149] Although, the Board is mindful, as asserted by U.S. Poultry II, that employees may change personal email addresses and phone numbers, it nevertheless disagrees with U.S. Poultry's conclusion that requiring this additional information won't solve the problem of outdated contact information. By requiring these two additional forms of available contact information, the Board believes that the voter list amendments will increase the likelihood that nonemployer petitioners will receive at least one piece of up-to-date contact information (if not more) for eligible voters. Moreover, instantaneous responsive messages commonly utilized by both telephone and email providers—indicating that an email message cannot be delivered to the address entered or that a phone call cannot be completed as dialed—are much more likely to bring inadvertent transcription mistakes to the parties' attention (and allow for potential correction) during the pre-election period than would corresponding returned pieces of U.S. mail indicating that the mailing could not be delivered as addressed.

be ineffective in allowing a petitioner's message to reach eligible voters.[150] Union attorney Caren Sencer testified that in her experience with seasonal workers covered by the NLRA, employers use cell phones to communicate with their employees and have only a P.O. Box for a physical address—which would be of limited utility to a petitioning union. Similarly, NELP stresses that the expanded voter list disclosures are ''especially crucial to low-wage workers, who may not remain at one address for long or may not even have a fixed home.'' The Board shares this perspective, and for that reason believes that the addition of phone numbers is necessary to ensure that messages concerning representation are able to reach the lowest paid sectors of our national workforce.[151]

Like the disclosure of email addresses, disclosure of the employees' home and personal cell phone numbers will allow the nonemployer parties to promptly convey their information concerning the question of representation to the eligible voters. Disclosure of this contact information also makes it more likely that the nonemployer parties can both respond to employee questions prior to the election and share those responses with other employees, thus making it more likely that employees can make an informed choice in the election. After all, it obviously takes less time for an employee to receive the nonemployer party's campaign communication when that message is sent via a telephone call or a text or voice mail message than when it is sent via United States mail. In sum, the Board has also concluded that requiring the employer to furnish the other parties with the available home and personal cell phone numbers of eligible voters will facilitate an informed electorate, thus serving the first purpose of the *Excelsior* rule.

The Board has further concluded that requiring the employer to furnish the available personal email addresses and home and personal cell phone numbers of the eligible voters will also better advance the second rationale articulated by the Board in *Excelsior*: Facilitating the expeditious resolution of questions of representation. As the Board explained in *Excelsior,* in many cases at least some of the names on the employer's list of eligible voters are unknown to the other parties. The parties may not know where the listed individuals work or what they do. Thus, for example, the union may be unable ''to satisfy itself as to the eligibility of the 'unknowns','' forcing it ''either to challenge all those who appear at the polls whom it does not know or risk having ineligible employees vote.'' *Excelsior,* 156 NLRB at 1243. As the Board further explained, ''The effect of putting the union to this choice . . . is to increase the number of challenges, as well as the likelihood that the challenges will be determinative of the election, thus requiring investigation and resolution by the Regional Director or the Board.'' *Id.* at 1243. Only through further factual investigation—for example, consulting other employees who may work with the listed, unknown employees or contacting the unknown employees themselves—can the union potentially discover the facts needed to assess eligibility and avoid the need for election-day challenges based solely on ignorance. And to avoid unnecessary delay, the union must receive the recipient's response in time to be able to determine whether the employer correctly included those names on the list of eligible voters or whether it should challenge those individuals if they come to vote.

The provision of the additional contact information will help the union (or decertification petitioner) investigate the identity of any unknown employees on the employer's voter list in a more timely manner, thereby helping to decrease the chances that the union (or decertification petitioner) will have to challenge voters based solely on ignorance of their identities.[152] Accordingly, the Board concludes that the provision of the additional contact information will advance the second rationale of *Excelsior* as well as the first rationale, and the final rule requires the employer to disclose this additional contact information in amended §§ 102.62(d) and 102.67(l). The Board also reiterates that both rationales will be advanced by permitting nonemployer parties to more promptly and effectively contact employees in relation to post-election objections and other proceedings, such as unfair labor practice charges, that may arise from the representation proceedings. For example, as discussed below in connection with § 102.69, in order to help the Board to more expeditiously resolve election objections and thereby help the Board to more expeditiously resolve questions concerning representation, the Board has decided to require parties filing election objections to simultaneously file with their objections a written offer of proof supporting those objections, unless parties can show good cause to file their offers of proof at a later date. The Board has thereby eliminated the default extra 7-day period parties had to file evidence in support of their objections under the Board's prior rules.[153] Because the voter list amendments require the employer to include the available home and personal cell phone numbers along with the available personal email addresses of the unit employees on the voter list that it provides to the nonemployer parties before the election, the Board believes that unions, as well as employers, ordinarily will have sufficient time to contact potential witnesses and prepare their offers within the allotted time.[154]

Nevertheless, the Board is mindful of comments predicting that communications technology is changing so rapidly that even the proposed expansion of the voter list to include personal email addresses and personal

[150] See, *e.g.,* AFL–CIO; SEIU; Senior Member Miller and Democratic House Members; testimony of Ronald Mikell on behalf of the United Federation of Special Police and Security Officers and Federal Contract Guards of America.

[151] In view of the foregoing discussion, the Board disagrees with PCA's comment that home addresses are sufficient, as well as PCA's claim—shared by CNLP—that the Board should not require disclosure of the additional contact information because there is no evidence that the current requirements hinder union access. Nor is the Board persuaded by RILA's II assertion that new electronic means of communication outreach available to unions via various social media outlets undercuts the need to disclose employee personal email and cell phones. Moreover, the *Excelsior* Board rejected the argument that the Board may not require employer disclosure of employee names and addresses unless the union would otherwise be unable to reach the employees with its message in the particular case at issue. *Excelsior,* 156 NLRB at 1244. As the Board explained, cases addressing the existence of alternative channels of communication are not relevant in this non-unfair-labor-practice context, where the opportunity to communicate made available by the Board does not interfere with a significant employer interest, and the interest in a fair and free choice of bargaining representatives is so substantial. *Id.* at 1245. Thus, even assuming the availability of other avenues by which a union *might* be able to communicate with employees, the Board ''may properly require employer disclosure of [the additional contact information] so as to *insure* the opportunity of all employees to be reached by all parties in the period immediately preceding a representation election.'' *Id.* We repeat that the *Excelsior* rule is designed, first of all, to maximize the likelihood that all of the voters will be exposed to the nonemployer party arguments concerning representation, and the requirement that the additional contact information be disclosed better advances that goal given the changes in how individuals, employees, employers, associations and institutions communicate, and exchange information with, one another.

[152] For comments in agreement, see, *e.g.,* National Union of Healthcare Workers—California Nurses Association (NUHW) II; Nicole Teixeira II.

[153] The regional director may extend the time for filing the written offer of proof in support of the election objections upon request of a party showing good cause.

[154] On a related note, we observe that using modern technology to lessen delays in representation cases is also fully consistent with one of the key goals of the E-Government Act of 2002 (Pub. L. 107–347), ''improv[ing] the ability of the Government to achieve agency missions and program performance goals,'' *id.,* section 2, Dec. 17, 2002, 116 Stat. 2900.

phone numbers may be insufficient to advance *Excelsior's* interest in the near future. For example, Joseph Torres predicted that email—both work and personal—is headed toward obsolescence and that young people are already turning to social media platforms such as Tumblr, Instagram, and Facebook to communicate electronically. Testimony of Joseph Torres on behalf of Winston & Strawn II. In this vein, SEIU II suggests that the Board rules should require employers to provide to petitioners ''all other contact information, such as social media identifiers, used by the employer to communicate with employees[.]'' The Board, however, shares the Chamber's skepticism (Chamber II Reply) that few, if any, employers maintain social media contact information about their employees, and declines to explicitly include it as part of the voter list at this time.[155]

Should the Board's experience administering the expanded voter list requirements suggest that additional forms of contact information should be included in future voter lists, then the Board is open to revisiting its conclusion concerning the contours of the list. For that reason, the Board is adopting a modified version of the language suggested by the AFL–CIO II to phrase the required contents of the voter list as a minimum, to allow for future Boards to require more or different forms of contact information in a particular case (should the peculiar circumstances so warrant), or in all future cases. Thus, the new regulatory language will read, in pertinent part, '' * * * a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular (''cell'') telephone numbers) of all eligible voters.'' Thus, the Board retains discretion to require through adjudication or rulemaking that the list include additional contact information.

c. Work Location, Shift, and Job Classification Information

The final rule also adopts the proposal that the employer furnish the work locations, shifts, and job classifications of all eligible voters in amended §§ 102.62(d), (providing for the final voter list in election agreement cases), and 102.67(l) (providing for the same list in directed election cases). Provision of the information will assist the nonemployer parties in investigating whether the unknown employees on the employer's list are in fact eligible. The Board agrees with the comments advocating that provision of this information will reduce the need for challenges based solely on ignorance of the identity of voters, and thereby help the Board expeditiously resolve questions of representation.[156] In addition, the Board is sympathetic to the view that in some cases, providing employee scheduling and shift information to a petitioning union would allow for more targeted communications either in person or by phone that would be less disruptive to the employee and his or her family. See Testimony of Caren Sencer on behalf of Weinberg, Roger & Rosenfeld II.

d. Employee Privacy Concerns

Many comments argue, however, that the Board should refrain from requiring that the employer furnish the other parties with the employees' personal email addresses, home and personal cell phone numbers, work locations, shifts and job classifications, because, among other things, disclosure of such information could cause harm to the employees, invade their privacy, or conflict with precedent or other laws. Other comments appear to attack even the nearly 50-year old Supreme Court-sanctioned requirement that the employer disclose the home addresses of eligible voters.

Without minimizing the legitimacy of the concerns underlying these comments, we conclude for the reasons that follow that the public interests in the fair and free choice of bargaining representatives and in the expeditious resolution of questions of representation outweigh the interests employees and employers have in keeping the information private. As the Supreme Court has long recognized, it is quintessentially the Board's function to balance the competing interests of employees, employers, and labor organizations in effectuating the policies of the Act. See, *e.g., NLRB* v. *Truck Drivers,* 353 U.S. 87, 96 (1957); *NLRB* v. *Fleetwood Trailer Co., Inc.,* 389 U.S. 375, 378 (1967); *NLRB* v. *J. Weingarten, Inc.,* 420 U.S. 251, 267 (1975). Indeed, in upholding the Board's *Excelsior* rule the Supreme Court noted: ''It is for the Board and not for this Court to weigh against this interest [in the fair and free choice of bargaining representatives] the asserted interest of employees in avoiding the problems that union solicitation may present.'' *NLRB* v. *Wyman-Gordon Co.,* 394 U.S. at 767.[157]

As explained above, the Board has concluded that access to employees' more modern contact information, including available, personal email addresses, and home and personal cell phone numbers is as fundamental to a fair and free election and the expeditious resolution of questions concerning representation in 2014, as was access to employee names and home addresses in 1966 when that requirement was created in *Excelsior,* 156 NLRB at 1243, 1246, and later approved by the Supreme Court in *NLRB* v. *Wyman-Gordon Co.,* 394 U.S. at 768. As further noted above, 50 years ago answering machines, voicemail, email, cell phones, texting, and smart phones did not exist or were not widespread. In this day and age, providing such tools of communication to the nonemployer parties once a regional director has directed an election or all parties have agreed to an election will significantly advance the objectives of the original *Excelsior* policy: Ensuring the fair and free choice of bargaining representatives by maximizing the likelihood that all the voters will be exposed to the *nonemployer* party arguments concerning representation, and helping to expedite resolution of questions of representation by preventing challenges based solely on ignorance of the identities of the voters.

The objections that disclosure of the additional information could lead to harassment and coercion of

[155] The Board does not, however, share the Chamber's concern (Chamber II Reply) that a regulation requiring employers to include on voter lists any additional contact information, such as social media identifiers, that they maintain in their records would start down the ''slippery slope'' of requiring employers to solicit and maintain such information from their employees.

[156] See, *e.g.,* NUHW II; Testimony of Maneesh Sharma on behalf of AFL–CIO II.

[157] The issue of employee privacy rights was also raised in the litigation preceding *Wyman-Gordon,* and the courts called on to consider the issue consistently held that it was within the Board's discretion to conclude that the interests advanced by the *Excelsior* requirement outweighed employee privacy interests. See *British Auto Parts, Inc.* v. *NLRB,* 405 F.2d 1182, 1183 (9th Cir. 1968) (rejecting privacy arguments), *cert. denied sub nom., Teledyne, Inc.* v. *NLRB,* 394 U.S. 1012 (1969); *NLRB* v. *Q–T Shoe Mfg. Co., Inc.,* 409 F.2d 1247, 1250 (3d Cir. 1969) (holding employee privacy rights not infringed by *Excelsior* requirement); *NLRB* v. *J.P. Stevens & Co.,* 409 F.2d 1207, 1209 (4th Cir. 1969); *NLRB* v. *Beech-Nut Life Savers, Inc.,* 274 F. Supp. 432, 437–438 (S.D.N.Y. 1967), *aff'd,* 406 F.2d 253 (2d Cir. 1968), *cert. denied* 394 U.S. 1012 (1969). Although the Motor & Equipment Manufacturers Association (MEMA) II (2–3) criticizes the *Excelsior* Board for its analysis that allegedly did not take account of the then-recent decision by the Supreme Court in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), recognizing a constitutional right to privacy, neither the Supreme Court in its 1969 *Wyman-Gordon* decision affirming the *Excelsior* policy, nor any of the post-*Griswold* circuit court decisions listed above, faulted the *Excelsior* Board for this alleged deficiency.

employees[158] are similar to arguments presented to the *Excelsior* Board. Commenters have failed to persuade us that the Board's response then is any less valid today:

> [W]e reject the argument that to provide the union with employee names and addresses subjects employees to the dangers of harassment and coercion in their homes. We cannot assume that a union, seeking to obtain employees' votes in a secret ballot election, will engage in conduct of this nature; if it does, we shall provide an appropriate remedy. We do not, in any event, regard the mere possibility that a union will abuse the opportunity to communicate with employees in their homes as sufficient basis for denying this opportunity altogether.

156 NLRB at 1244 (footnote omitted). With the benefit of almost fifty years of post-*Excelsior* experience, it is clear that the harm to employees forecast by the decision's opponents did not come to pass. The Board will not make policy based on mere speculation of misconduct and abuse, particularly where, as a matter of the Board's decades of experience, such abuse is unlikely.[159]

Nevertheless, the Board is cognizant that advances in technology since *Excelsior* have created a heightened risk of unauthorized dissemination of personal information, and comments have stressed the public's increased concern with privacy issues due to incidents of identity theft, government surveillance and hacking of retailers' electronic databases.[160] However, here, as in *Excelsior,* and other areas of the law, the risk of harm must be balanced against other legitimate considerations that also warrant protection. Cf. *Canadian American Oil Co.* v. *NLRB,* 82 F.3d 469, 473–75 (D.C. Cir. 1996) (confidentiality interest of employees claiming union threats yielded to union's interest to confront the evidence offered in support of the objection at the hearing); *NLRB* v. *Herbert Halperin Distributing Corp.,* 826 F.2d 287, 293 (4th Cir. 1987) (confidentiality interest of employees claiming union threats did not justify objecting party's transmitting the employees' affidavits to the Board without also serving them on the union); *Seth Thomas Div.*, 262 NLRB 715, 715 n.2 (1982) (same).

Therefore, even assuming that the privacy, identity theft, and other risks may be greater than the Board has estimated—and, in particular, that adding personal email addresses and home and personal cell phone numbers to home addresses may, in combination, result in increased risks, especially as technology changes—nevertheless the Board's conclusion remains the same. These risks are worth taking and as a practical matter, must be taken, if communication about organizational issues is going to take place using tools of communication that are prevalent today. Email and cell phones are ever increasing the modes by which people communicate; this continuing expansion in the use of new electronic media demonstrates that the risks associated with these speedy and convenient tools are part of our daily life.

The Board therefore disagrees with the assertion of Constangy, that the mere potential for misuse of the voter list information outweighs any benefit gained by the disclosures. Nonetheless, we emphasize that if the disclosure of the additional contact information does subject employees to harm, the Board ''shall provide an appropriate remedy'' *Excelsior,* 156 NLRB at 1244, as discussed further below.

Likewise, the Board is not persuaded that SHRM's raw citation of unfair labor practice charges alleging union coercion evidences a problem with communication resulting from current *Excelsior* disclosures. The charges cited are not linked to misuse of *Excelsior* list information but, rather, include the entire range of coercive union conduct, including when that union is already acting as an employees' bargaining representative. The Board is skeptical that a union seeking to persuade employees to select it as a bargaining representative would tend to act coercively toward those employees, and the statistics cited by SHRM—which do not purport to focus on whether the charges were filed in a representational context or had any relationship to the *Excelsior* list information, much less whether they had merit[161]—do not undermine the Board's view on the issue.

Moreover, the dearth of specific and documented incidents of alleged misuse of employee contact information cited in the comments lends additional support to our conclusion that such misuse has not been a significant problem in the past, and is unlikely to be a problem in the future. Thus, in the two rounds of critical commentary on the voter list proposals, several years apart, the Board was presented with no documentation demonstrating misuse of contact information provided in voter lists by petitioning unions during the nearly 50 years in which the Board's *Excelsior* policy has been in place.[162] However, despite the absence of any examples of that kind of abuse, the Board recognizes that the potential for such abuse exists. For example, RILA II mentioned—without citation—one case in which a decertification petitioner allegedly received pornography mailed to his home. Yet, even in that case, Doreen Davis (testifying on behalf of RILA) reported that the NLRB appropriately set aside the subsequent election and ordered it to be rerun.[163] See RILA II. And when William Messenger (testifying on behalf of NRTWLDF) discussed another incident where union members allegedly harassed a dissident coworker by mailing magazine subscriptions to the coworker's home address, he admitted that the employee contact information at issue was not made available pursuant to the Board's *Excelsior* policy. In sum, the Board agrees with comments by the AFL–CIO II,[164] Melinda Hensel

[158] See, *e.g.,* SHRM; CDW; NRF; PIA; ALG.

[159] See also *NLRB* v. *Delaware Valley Armaments, Inc.,* 431 F.2d 494, 499–500 (3d Cir. 1970) (noting that mere possibility of harassment is not enough to invalidate directive to furnish *Excelsior* list), *cert. denied,* 400 U.S. 957 (1970); *NLRB* v. *Q–T Shoe Mfg. Co.,* 409 F.2d 1247, 1250 & n. 9, (3d Cir. 1969) (''it hardly appears likely that union agents will unduly harass any employee, since their objective is to obtain support rather than arouse hostility * * *. The mere possibility of such harassment is surely not a sufficient ground for invalidating a rule designed to achieve greater enlightenment''); *NLRB* v. *Hanes Hosiery Division—Hanes Corp.,* 384 F.2d 188, 191 (4th Cir. 1967) (''every annoyance of the voters is shunned by the seasoned campaigner, and unions are not novices in this area''), *cert. denied,* 390 U.S. 950 (1968).

[160] See, *e.g.,* Chamber II; SHRM II; Brent Jones II; Marna Skripko II.

[161] Over the past 3 years, just over one third of all charges were found to have merit. See NLRB Performance Accountability Reports 2011–2013, *http://www.nlrb.gov/reports-guidance/reports* (reporting merit rates of 35.2% in FY 13, 36.4% in FY 12, and 37% in FY 11).

[162] Indeed, our examination of the data contained in the last decade of the Board's use of its Case Activity Tracking System (CATS) further confirms the lack of evidence that unions are generally coercing and intimidating employees during organizing campaigns, or specifically misusing information from *Excelsior* lists. The data reveals that out of 24,681 representation elections conducted between fiscal years 2000 and 2010, employers filed objections involving allegations of union threats and/or violence in 469 cases, and the election result was set aside by the Board on only 16 occasions. Nothing in the Board's database indicates that any of these 16 cases involved the misuse of *Excelsior* information, but even if the Board were to assume that it did, a record of union coercion sufficient to set aside an election in 0.065% of elections over a recent 10-year span simply does not demonstrate that ''union coercion and intimidation in the context of an organizing campaign is rampant'' as argued by SHRM. (This data has not been updated through 2013 because it is not readily available for 2011–2013 in the Board's new NxGen case tracking software which replaced CATS in 2011.)

[163] We also note that a decertification petitioner's address appears on the face of the petition itself, which is a public document. Thus, there was no allegation that *Excelsior* list information played any role in the case cited by Davis.

[164] The AFL–CIO's 2014 comment asserted that ''despite this extensive experience [with the

(Testimony on behalf of the International Union of Operating Engineers (IUOE), Local 150 II) and Thomas Meiklejohn (Testimony on behalf of Livingston, Adler, Pulda, Meiklejohn & Kelly II) who noted the lack of evidence demonstrating voter list misuse.

In a similar vein, the Board, contrary to Con-way's comment, does not believe that disclosure of employee phone numbers will jeopardize truck drivers' safety by potentially interrupting their mandated work breaks. The final rule does not require the employer to disclose the employees' *work* phone numbers to the nonemployer parties. Nothing in the final rule requires individuals to keep the their home or personal cell phone ringers on ''loud,'' let alone requires them to take calls. Moreover, cell phones are especially effective in showing the identity of the caller, or at least whether the caller is known or unknown, so that the recipient may exercise an informed choice in answering or not. The Board trusts that after the final rule becomes effective, truckers will be able to exercise discretion in fielding incoming union calls during their breaks should any occur, just as they exercise discretion in fielding other kinds of calls now.[165]

The Board acknowledges, however, the concern raised by many comments that the disclosure of the additional contact information could harm employees by impinging on their privacy.[166] To one way of thinking, such privacy concerns should be more pronounced surrounding an employee's home address—long disclosable under *Excelsior*—than for the additional contact information (phone numbers and email addresses) disclosable by virtue of the voter list amendments. After all, disclosure of home addresses may lead to face-to-face contact between union and employee organizers and an employee at the employee's home, whereas disclosure of employee phone numbers or email addresses may simply lead to phone calls or email messages, which are more easily ignored.[167] Indeed, to the extent that disclosure of employee email and phone contact information lessens the likelihood that union organizers will seek to engage them in face-to-face dialogues concerning representation,[168] then those disclosures would arguably mitigate the most serious incursions on employee privacy.

On the other hand, the Board recognizes that some labor organizations may elect to contact employees via telephone and email in addition to, rather than instead of, contacting them at home. Further, the Board acknowledges that some employees will consider disclosure of the additional contact information—particularly email addresses and cell phone numbers which may not be readily accessible through public directories—to invade their privacy, even if they are never contacted.[169] Moreover, at least two commenters make the counterintuitive claim that including personal email addresses and phone numbers on voter lists constitutes a bigger invasion of privacy than including home addresses because employees have less control over unwanted email and phone calls than they do over unwanted visitors at their front door.[170] Although the courts ''have differed in their characterization of the magnitude of the interest[s] implicated,'' *U.S. Dept. of Defense* v. *FLRA* (''*DOD* v. *FLRA*''), 510 U.S. 487, 501 n.8 (1994), the Supreme Court has held, for example, ''that [employees] have [a] nontrivial privacy interest in nondisclosure'' of home address information. *Id.* at 501.[171]

In our view, however, many features of the voter list amendments help to minimize any invasion of employee privacy caused by disclosure of the information. The disclosure of information is limited in a number of key respects. The information itself is limited in scope. It is available only to a limited group of recipients, to use for limited purposes. These limitations persuade us that the substantial public interests—in fair and free elections and in the speedy resolution of questions of representation—served by the voter list amendments outweigh the employees' acknowledged privacy interest in the information that will be disclosed.

First, the information is limited in scope. Plainly, not every piece of personally identifiable information is equally sensitive or entitled to the same weight when balanced against the interests served by disclosure.[172] We do not equate disclosure of employee email addresses and phone numbers, for example, with disclosure of employee medical records. Indeed, in *Detroit Edison Co.* v. *NLRB,* 440 U.S. 301, 318–19 & n.15 (1979), the Supreme Court explicitly noted that the ''interests at stake'' in *Wyman-Gordon*—where the Court upheld the Board's *Excelsior* requirement that an employer disclose the names and addresses of employees to a union in the process of an organizing campaign—were ''far different'' from those at stake when for purposes of arbitrating a grievance an incumbent union seeks highly sensitive information going to an employee's basic competence such as aptitude test scores linked to named employees. While email addresses, phone numbers, work locations, shifts, and job classifications constitute additional pieces of information, they are not fundamentally different in kind from

existing *Excelsior* policy], neither the Board nor any party that commented on the prior NPRM or testified at the prior hearing could point to a single, specific instance where an eligibility list was misused or even used for a purpose unrelated to the representation proceeding.''

[165] The Board likewise disagrees with Fern Netzky's unsupported assertion that the voter list will violate attorney-client privilege. The Board fails to see how the new requirements, any more than the existing *Excelsior* requirements, would force employers to reveal confidential communications made to counsel in order to secure legal advice.

[166] See, *e.g.,* Chairmen Kline and Roe II; Klein II; COLLE; SIGMA; RILA; ACE; COSE; Ann Pomola.

[167] See, *e.g.,* UFCW II; Chairman Harkin, Senior Member Miller and Congressional Democrats; AFL–CIO II; SEIU II; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry (UAJAPPFI) II; Nicole Teixeira II.

[168] As IUOE attorney Melinda Hensel explained: ''The days of union visits to people's homes I think are—I wouldn't say it's over, but I think it's a much less popular manner of organizing these days.'' Testimony II.

[169] Of course, the rule only impacts contact information that the employee has already disclosed to the employer. Any information which the employee kept private from the employer will also be kept private from other parties to the proceeding. As discussed above, if an employee has chosen not to share a personal email address or cell phone number with her employer, the employer will not be able to disclose it to the other parties—and the amendments do not require the employer to ask the employee for it. In this way, employees have some control over whether their contact information is utilized by employers or nonemployer parties concerning the campaign.

[170] See Testimony of Doreen Davis on behalf of RILA II; Testimony of William Messenger on behalf of NRTWLDF II.

[171] Compare *DOD* v. *FLRA,* 510 U.S. at 501 n.8 (noting that courts of appeals have variously characterized employees' privacy interests in their home addresses as ''important,'' ''minimal,'' ''general,'' and ''significant'') and *id.* at 506–07 & n.4 (Ginsburg, J., concurring) (noting that ''most courts'' have found that employees have only a ''relatively modest'' privacy interest in their home addresses) with *Electronic Frontier Foundation* v. *Office of the Director of National Intelligence,* 639 F.3d 876, 888 (9th Cir. 2010) (characterizing agent's privacy interest in his email address as ''minor''). See also *In re Deloitte & Touche, LLP, Overtime Litigation,* 2012 WL 340114 (S.D.N.Y. Jan. 17, 2012) (not reported) (characterizing the disclosure of class member phone numbers as ''routine'', including personal email as not unduly intrusive on employee privacy concerns, and collecting similar cases ordering such disclosures).

[172] Cf. U.S. Department of Commerce, ''Guide to Protecting the Confidentiality of Personally Identifiable Information (PII): Recommendations of the National Institute of Standards and Technology, Special Publication 800–122'' (2010) *http://csrc.nist.gov/publications/nistpubs/800-122/sp800-122.pdf* at E–2 through E–3 (''Organizations should evaluate the sensitivity of each individual PII data field. For example, an individual's SSN or financial account number is generally more sensitive than an individual's phone number or ZIP code.'').

the disclosures discussed in *Wyman-Gordon,* and standing alone, may reasonably be viewed as less private.[173]

Furthermore, disclosure of the employees' email addresses, phone numbers, work locations, shifts, and job classifications reveals nothing about the employees' politics, their religion, their associations, or even their position regarding the labor organization in question.[174] Employees will not have their contact information disclosed because they engaged in any particular expressive activity. Rather, their information will be disclosed solely by virtue of their being employed in a unit in which a question of representation has arisen that will be resolved by a secret ballot election conducted by the Board. The voter list disclosures will not reveal employees' personal beliefs that they might prefer to keep to themselves. Instead, the amendments merely require disclosure of information which will enable the nonemployer parties to contact the employees outside of the workplace to provide information about the voting issues, determine whether the employer properly included such employees on the voter list, and investigate post-election objections and prepare for Board proceedings arising out of the election and related matters.

Second, the voter list information will be provided to a limited set of recipients. It will not be made available to the public at large. Nor will it even be made available to the nonemployer parties in every representation case. Thus, the Board has not, does not, and will not allow ''indiscriminate'' disclosure of employee information to petitioning unions, as charged by NRF. The Board's showing of interest requirement specifically safeguards against such ''indiscriminate'' disclosures. See *Local 3, IBEW* v. *NLRB,* 845 F.2d 1177, 1181 (2d Cir. 1988) (noting that showing of interest requirement was part of *Excelsior*'s balancing of public and private interests); see also *Big Y Foods, Inc.,* 238 NLRB 855, 855 n.4 (1978) (showing of interest requirement safeguards against the indiscriminate institution of representation proceedings). Moreover, the employer is not required to furnish the list to a petitioning union or a decertification petitioner until after the employer admits that a question of representation exists by entering into an election agreement or the regional director finds that a question of representation exists after a pre-election hearing. Indeed, as discussed below in connection with § 102.63, the Board has rejected SEIU's suggestion that employee contact information be provided to the nonemployer parties before an election is directed, as part of the employer's pre-hearing statement of position. In addition, the Agency will continue its current practice of determining voter lists to be categorically exempt from disclosure to non-party FOIA requesters. See *Reed* v. *NLRB,* 927 F.2d 1249, 1252 (D.C. Cir. 1991).[175]

Third, even when the voter list information is disclosed to the nonemployer parties in a particular case, such parties will not be able to use it for whatever purpose they desire. Rather, they will only be allowed to use employee contact information for limited purposes. As discussed below, the final rule provides that ''parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.'' Thus, employees need not fear that their contact information, once disclosed, will be shared with or sold to entities having nothing to do with the representation proceeding. And should such misuse of the list occur, the Board will provide an appropriate remedy, as discussed further below.

Finally, any infringement into employees' personal sphere enabled by the disclosure requirement in the final rule will likely be of relatively limited duration. As discussed below in connection with § 102.67, the final rule also eliminates the mandatory 25-day waiting period between issuance of a decision and direction of election and the holding of the election. Accordingly, the time period between the employer's production of the voter list and the election may be shorter than that which existed prior to the amendments in at least some directed election cases. And parties are likely to agree to a shorter time period between the employer's production of the voter list and the election in at least some stipulated election cases, because bargaining about election details in the election agreement context is influenced by the parties' estimation of how soon the regional director could conduct an election if the parties were to go to a hearing. Thus, while some employees may certainly prefer not to receive calls or emails from the nonemployer parties, we note that such communications may not continue beyond the period of the representation proceeding at issue and Board proceedings arising from that election and related matters.[176]

Accordingly, as previously discussed, just as the Board's longstanding *Excelsior* rule reflects a reasonable balance of the conflicting legitimate interests in the context of that era, so the Board's update of its policies similarly reflects a reasonable balance of risk and benefit that is well adapted to contemporary modes of communication. Moreover, the rule reasonably advances the public interest in the timely resolution of questions of representation by enabling the parties on the ballot to avoid having to challenge voters at the polls based solely on lack of knowledge as to the voter's identity. These important interests are sufficient to counterbalance the interests of those who would prefer to be left entirely alone and not be exposed to the issues raised by an organizing campaign.

Some comments, such as those filed by SHRM, ACE and the NRF, argue that FOIA case law demonstrates that employees have such a substantial privacy interest in their home addresses and email addresses that the Board should abandon the voter list proposals. For example, NRF argues that the Supreme Court recognized in *DOD* v. *FLRA,* 510 U.S. at 501, that ''even though the disclosure of personal email addresses may facilitate union communications, employees nevertheless enjoy a right not to be bothered in their personal environment with work-related matters.''

After careful consideration of the comments, we conclude that *DOD* v. *FLRA* does not undermine the Board's position that it is appropriate to require employers to furnish the voter list information directly to the nonemployer parties. Put simply, the propriety of the

[173] See, *e.g.,* SEIU II (pointing out that per the published standards of the NLRB (*http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1673/electronic_filings.pdf*) and the D.C. Federal courts (*http://www.dcd.uscourts.gov/dcd/civil_privacy_notice; https://ecf.cadc.uscourts.gov/*) individual email addresses are not treated as sensitive personal information that must be deleted from documents before they are filed electronically).

[174] For example, the Supreme Court recently justified requiring police officers to seek warrants before searching arrestees' cell phones by explaining the vast quantity of private information that may now be found on modern cell phones. *Riley* v. *California,* No.13–132, 134 S.Ct. 2473 (June 25, 2014). Yet none of that information would be accessible to petitioners merely through receipt of individual phone numbers.

[175] Thus, we reject the ATA's claim that the voter list amendments create ''difficulties * * * under * * * FOIA.''

[176] Moreover, in only very few cases do employers refuse to bargain in order to test the validity of the certification. From FY 2008 to FY 2013 between 8 and 18 test of certification cases were filed each year in the U.S. Circuit Courts of Appeals. Thus, in the great majority of representation cases which are definitively resolved without resort to the courts of appeals, the nonemployer party is unlikely to use the voter list data after the election in the absence of unfair labor practice or other related proceedings.

Board's requiring employers under its jurisdiction to disclose employee contact information directly to a union after an election has been agreed to or directed under the NLRA—in order to advance the public interests in free and fair elections and the expeditious resolution of questions of representation—was not before the Court in that case. Rather, the issue before the Court there was whether Federal agency employers subject to the Federal Service Labor-Management Relations Statute could lawfully refuse to furnish the home addresses of their employees to the unions which already represented them, because the Privacy Act would otherwise bar the employers, as governmental entities, from disclosing their employees' home addresses. See *id.* at 490–94.

DOD v. *FLRA* involved a ''convoluted path of statutory cross-references.'' *Id.* at 495. As the Court noted, the Privacy Act provides that ''No agency shall disclose any record which is contained in a system of records * * * to any person * * * unless disclosure of the record would be * * * required under section 552 of [FOIA].'' *Id.* at 493–94. The employee addresses that the incumbent unions sought the Federal agencies to disclose were ''records'' covered by the Privacy Act, and therefore the agencies were forbidden from disclosing them by the Privacy Act unless FOIA required release of the addresses. *Id.*

As the Court observed, ''while 'disclosure [of government documents], not secrecy, is the dominant objective of [FOIA],' there are a number of exemptions from the statute's broad reach.'' *Id.* at 494 (citation omitted). The Court then considered Exemption 6, which provides that FOIA's disclosure requirements do not apply to personnel files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. *Id.* at 494–95 (citing 5 U.S.C. 552(b)(6)).

In determining whether disclosure of the home addresses to the incumbent unions would constitute a clearly unwarranted invasion of the personal privacy of the unit employees within the meaning of FOIA, the Court explained that a court must balance the public interest in disclosure against the interest Congress intended the exemption to protect. *Id.* at 495. However, as the Court explained, there is only *one* ''relevant 'public interest in disclosure' to be weighed in this balance'': Namely whether the information to be disclosed would contribute significantly to letting the public know what the government is up to. *Id.* at 495, 497 (citation omitted). By definition, that purpose is not served by disclosure of information about private citizens that is in governmental files but that reveals little or nothing about an agency's own conduct. *Id.* at 496–97.

The Court found that disclosure of employee home addresses ''would reveal little or nothing about the employing agencies or their activities,'' even though it would be useful for the union to have the information for bargaining purposes. *Id.* at 497. In short, because disclosure of the employees' home addresses would not serve ''the only relevant [FOIA-related] public interest in disclosure'' in that case, the ''nontrivial'' privacy interest employees have in their home addresses sufficed to outweigh the ''negligible FOIA-related public interest in disclosure.'' *Id.* at 495, 501–02. Accordingly, the Court concluded FOIA did not require the agencies to divulge the addresses, and the Privacy Act therefore prohibited their release to the unions. *Id.* at 502.

However, the final rule's requirement that a private sector employer disclose voter list information directly to the nonemployer parties to a representation case does not run afoul of the Privacy Act, and the relevant public interests favoring disclosure of the voter list information are entirely different from the only ''relevant'' public interest favoring disclosure in *DOD* v. *FLRA.* As the Court explicitly recognized in *DOD* v. *FLRA,* ''unlike private sector employees, Federal employees enjoy the protection of the Privacy Act'' with respect to their employer's disclosure of information about them.[177] *Id.* at 503. Put simply, *private* sector employers' disclosure of the voter list information to the nonemployer parties does not implicate the Privacy Act because the Privacy Act does not apply to such employers. See also DOJ Overview of the Privacy Act of 1974 at 5 (2012) (DOJ Overview), *http://www.justice.gov/sites/default/files/opcl/docs/1974privacyact-2012.pdf* (''The Privacy Act * * * applies only to a Federal 'agency'.'') Accordingly, unlike in *DOD* v. *FLRA,* the Privacy Act would not otherwise bar private sector employers from disclosing the voter list information to the nonemployer parties to representation cases unless disclosure were required by FOIA.

As also shown, the voter list amendments are designed to advance the public interests in free and fair elections as well as the prompt resolution of questions of representation—interests entirely different from the single relevant public interest FOIA is designed to advance. And the public interests in free and fair elections and in the prompt resolution of questions of representation are indeed advanced by requiring employers to disclose the voter list information to the nonemployer parties to representation cases once elections have been agreed to or have been directed. Thus, the public interests in favor of disclosure of the voter list information are not ''negligible, at best'' as was the case in *DOD* v. *FLRA,* 510 U.S. at 497.

In short, we conclude that nothing in *DOD* v. *FLRA* calls into question the propriety of the voter list amendments requiring employers to furnish information about its employees to the nonemployer parties after an election has been agreed to by the parties or directed by the regional director. To the contrary, the Court recognized there that private sector unions covered by the NLRA occupy a different position from their Federal sector counterparts. *Id* at 503. See also *id.* at 506 (Ginsburg J. concurring) (noting that private sector unions covered by the NLRA ''routinely receive'' employees' home addresses and citing *NLRB* v. *Wyman-Gordon* for the proposition that the Board *may* require an employer ''to disclose [employees'] names and addresses before election[s].'')

Similarly, *Electronic Frontier Foundation* v. *Office of the Director of National Intelligence,* 639 F.3d 876 (9th Cir. 2010), cited by SHRM among others, is, in relevant part, simply a routine FOIA Exemption 6 case, in which disclosure is not required if the information sought does not advance FOIA's interest in government transparency—the sole interest relevant to the court's analysis. That case involved FOIA requests for information relating to governmental discussions with telecommunication carriers about proposals to immunize the carriers for their role in government surveillance activities. *Id.* at 880–81, 885–89. To be sure, the court held that the email addresses of the carriers' lobbyists were exempt from disclosure under Exemption 6, but this was because disclosure of the lobbyists' email addresses—as opposed to the lobbyists' names—would reveal little or nothing about the government's conduct. *Id.* at

[177] The Board notes that the United States Postal Service, as an employer, is uniquely subject to both the Privacy Act and the NLRA. But it has not been exempt from disclosing employee eligibility lists to petitioning unions under *Excelsior,* see *NLRB* v. *U.S. Postal Serv.,* 790 F. Supp. 31, 33 (D.D.C. 1992), and did not provide any comment in this proceeding, much less a suggestion that it would be exempt from the present amendments. We therefore trust that the Postal Service will, in the first instance, seek to harmonize its duties under the two Federal statutes.

888–89. As the court explained, disclosure of the email addresses—as opposed to the names—would not shed light on who the government was meeting with in deciding whether to immunize telecommunication carriers for their role in the government surveillance activities. *Id.* at 888. Accordingly, it was only because the sole relevant public interest in favor of disclosure under FOIA would not be advanced by disclosure that the lobbyists' privacy interest in their email addresses prevailed. *Id.* at 888–89.[178] As noted above, the balancing of privacy and public interests in this context is quite different from that under FOIA.

Nonetheless, given the comments claiming that the Board's proposals violate the Privacy Act,[179] the Board has carefully considered whether and how the Privacy Act could be implicated by the voter list amendments. The Board notes that the voter list amendments require the employer to furnish a copy of the voter list to the regional director. See amended §§ 102.62(d) and 102.67(l). But, as discussed in connection with § 102.67 below, the final rule does not anticipate—contrary to the original NPRM proposal—that the regional director will attempt to serve employees directly with the notice of election. Thus, the agency's use of the list will simply be the traditional one of allowing the Board agent conducting the election to verify individuals' identification as they arrive to vote at the polls. Morever, if the list is retrieved electronically, it will be by the employer's name or case number, and not individual voters' names.

The Privacy Act generally only applies to ''records'' that are maintained by an agency within a ''system of records.'' See, *e.g., Baker* v. *Dep't of Navy,* 814 F.2d 1381, 1383 (9th Cir. 1987). A piece of information is only a ''record'' if it contains information about an individual. And it is generally only considered to be maintained in a ''system of records'' if two conditions are met: (1) the record is maintained in a format that makes it possible for agency employees to locate it by searching according to a name or other personal identifier, and (2) agency employees actually do retrieve records in this manner. DOJ Overview of the Privacy Act of 1974 at 28 (2012) (DOJ Overview), *http://www.justice.gov/sites/default/files/opcl/docs/1974privacyact-2012.pdf.* ''The highly technical 'system of records' definition is perhaps the single most important Privacy Act concept, because * * * it makes coverage under the [Privacy] Act dependent upon the method of *retrieval* of a record rather than its substantive content.'' DOJ Overview at 30. The OMB has provided the following illustration of this concept:

> For example, an agency record-keeping system on firms it regulates may contain ''records'' (*i.e.,* personal information) about officers of the firm incident to evaluating the firm's performance. Even though these are clearly ''records'' ['']under the control of'' an agency, they would not be considered part of a system as defined by the Act unless the agency accessed them by reference to a personal identifier (name, etc.). That is, if these hypothetical ''records'' are never retrieved except by reference to company identifier or some other nonpersonal indexing scheme (*e.g.,* type of firm) they are not a part of a system of records.

OMB Privacy Act Guidelines, 40 FR 28948, 28952 (July 9, 1975).[180]

In short, records are only within a Privacy Act ''system of records'' if ''an agency has an actual *practice* of retrieving information by an individual's name'' or other personal identifier. *Henke* v. *Dep't of Commerce,* 83 F.3d 1453, 1459 (D.C. Cir. 1996). ''[R]etrieval capability is not sufficient to create a system of records.'' *Id.* at 1460. And a ''practice of retrieval by name or other personal identifier must be an *agency* practice to create a system of records and not a practice by those outside the agency,'' *McCready* v. *Nicholson,* 465 F.3d 1, 13 (D.C. Cir. 2006) (internal quotation marks omitted), such as the nonemployer parties to an election.

Applying these principles to the voter list amendments, the Board concludes that it will not retrieve information from voter lists by use of individuals' names or other personal identifiers (rather, it will only be retrieved electronically via the name of the employer or case number), and therefore, although the voter lists will generally be produced in an electronic format that will theoretically be searchable by employees' names, the voters lists are not part of a ''system of records'' within the meaning of the Privacy Act. Accordingly, nothing about the voter list amendments can reasonably be viewed as violating the Privacy Act.

Multiple comments urge a variety of means by which the Board should protect employees' privacy interests: (1) Require that employees must affirmatively indicate that they are willing to have their personal contact information shared with the parties on the ballot before it requires the employer to disclose that information;[181] (2) allow employees the opportunity to opt out of such disclosures;[182] (3) mandate that contact information be obtained directly from employees themselves instead of from the employer;[183] or (4) require that the Board host opportunities for electronic contact between petitioners and employees through some type of protected communications portal.[184] We have consistently rejected similar proposals in the past. In *Excelsior,* the Board was not swayed by the ''argu[ment] that if employees wished an organizing union to have their names and addresses they would present the union with that information.'' 156 NLRB at 1244. And in *British Auto Parts, Inc.,* we rejected an employer's attempt to comply with *Excelsior* by informing its employees that the Board had requested their names and addresses and providing them with ''an envelope addressed to the Regional Director for * * * employee[s'] use in submitting the information should [they] desire to do so.'' 160 NLRB 239, 239 (1966). The Board has recognized that even unsolicited contact by the union remains an important part of the basic Section 9 process. See *Excelsior,* 156 NLRB at 1244. Indeed, a wide open debate cannot take place unless employees are able to hear all parties' views concerning an organizing campaign—even views to which they may not be predisposed at the campaign's inception. And as explained above, we have concluded that

[178] It bears mentioning that, contrary to SHRM's suggestion that the court found that lobbyists have a ''substantial privacy interest'' in their email addresses, the court actually concluded that the lobbyists have only a ''minor privacy interest'' in the email addresses. See *id.* at 888 (''If, however, a particular email address is the *only* way to identify the carriers' agent at issue from the disputed records, such information is not properly withheld under Exemption 6 because this minor privacy interest does not counterbalance the robust interest of citizens' right to know 'what their government is up to.' '' (citation omitted)).

[179] See Allen LeClaire; Robert Mills II.

[180] Subsection (v) of the Privacy Act requires the Office of Management and Budget (OMB) to: (1) ''Develop and, after notice and opportunity for public comment, prescribe guidelines and regulations for the use of agencies in implementing'' the Act; and (2) ''provide continuing assistance to and oversight of the implementation'' of the Act by agencies. 5 U.S.C. 552a(v). Because ''Congress explicitly tasked the OMB with promulgating guidelines for implementing the Privacy Act, [the courts] give the OMB Guidelines the deference usually accorded interpretation of a statute by the agency charged with its administration.'' *Sussman* v. *U.S. Marshals Serv.,* 494 F.3d 1106, 1120 (D.C. Cir. 2007) (internal quotation marks omitted).

[181] See, *e.g.,* ACE; CNLP; Senator Alexander and Republican Senators II; National Grocer's Association (NGA) II.

[182] See, *e.g.,* Baker & McKenzie LLP; COSE; Anchor Planning Group; SHRM II.

[183] See, *e.g.,* Gregg Stackler; Harold Kapaun; Kimberley McKaig; Greg Smith II.

[184] See, *e.g.,* MEMA II; Vigilant II; IFA II.

disclosure of available personal email addresses and telephone numbers is just as critical to the holding of fair and free elections and to the expeditious resolution of questions of representation in 2014 as was disclosure of home addresses in the 1960s. Thus, it would hardly be consistent with the policy underlying *Excelsior*—ensuring that employees receive sufficient information from the nonemployer party to make an educated decision—to begin allowing employees to opt in or opt out of such disclosures.

Nevertheless, the Board is mindful that the disclosures in the final rule go further than those at issue in the original *Excelsior* decision, and so we have considered whether a different balance should be struck. After thoroughly considering the issue, however, we have concluded that notwithstanding the additional information to be disclosed under the amendments, the public interests in fair and free elections and in the prompt resolution of questions of representation outweigh employee privacy interests and that creation of an opt-in or opt-out procedure, or an agency-hosted protected communications portal, would harm those public interests and, in some cases, impose significant administrative burdens on the government and the parties.

Just as was the case under the prior rules, the voter list information is not due until soon after the parties have entered into an election agreement in a unit appropriate for collective bargaining, or the regional director has directed that an election be held in an appropriate unit. In either event, congressional policy is clear that representation elections should be conducted with the utmost expedition.[185] Yet, typical opt-in or opt-out requirements would further delay the election's conduct. Such delay would arise, for example, if extra time were allotted between an election's direction and its conduct for communication with the subject employees concerning their ability to opt in or out of disclosing their email addresses or phone numbers because until the parties agree to any election, or the director directs an election, the unit in which the election is to be conducted is not known. Accordingly, not every relevant employee could be contacted regarding opting in or out until after the election agreement was reached or the director directed an election. Employees would then need some additional reasonable period of time to make their choices.[186] Still more time would be required for compiling those preferences and producing a voter list (which respects those preferences) for use by the nonemployer parties to the case. And of course, the nonemployer parties would have to be afforded time to make use of the information with respect to the employees who have opted in. Such a system could well prove to be administratively difficult,[187] and even if operating smoothly could delay the election by many days or weeks.

Moreover, if the regional director were assigned the responsibility to contact the employees to ascertain whether they wished their contact information to be shared with the union, the regional director could not do so unless and until the employer revealed the employees' contact information to the regional director. Yet, presumably at least some of the employees who object to having their contact information disclosed to the nonemployer parties to the case would similarly object to having their contact information disclosed to the government. And requiring the regional director to contact each and every unit employee to ascertain his or her position regarding disclosure of the voter list information would place a significant administrative burden on the government.

We are also concerned that any opt-in or opt-out process would invite new areas of litigation resulting in additional costs to the parties and the Board. Considering that neither the region, nor the petitioner would be in a position to administer the opt-in or opt-out process until after the employer had disclosed employee contact information, it could be argued that it would be more efficient for the employer to administer the opt-in or opt-out process. It would be curious indeed for the Board to create a process which obligated employers to ask their employees—including those employees who have deliberately chosen to keep their pro or anti-union sentiments private—whether they wish to share their contact information with the union, given that employers could be found to have committed unfair labor practices by interrogating such employees about their union sentiments or contacts with the union.[188]

In the likely circumstance in which nonemployer parties, when receiving a voter list indicating that substantial numbers of employees had chosen not to have their email addresses or phone numbers disclosed, raise accusations of improper employer coercion of their employees regarding their choice, investigations would be triggered. Such proceedings would impose costs on the parties and the government, and could cause significant delay in conducting the election. Even in a process in which the employee choices were shielded from employer knowledge,[189] however, we would still foresee frequent accusations of and opportunities for subtle employer pressure to keep contact information from the petitioning

[185] As the Supreme Court held in *NLRB* v. *A.J. Tower,* the Board must ''promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily.'' 329 U.S. 324, 331 (1946). Again, Congress knew that the Board would need flexibility in crafting procedures, and noted ''the exceptional need for expedition'' in representation cases when exempting them from the APA's adjudication provisions. Senate Committee on the Judiciary, comparative print on revision of S. 7, 79th Cong., 1st Sess. 7 (1945) (discussing 5 U.S.C. 554(a)(6)); see also *NLRB* v. *Sun Drug Co.,* 359 F.2d 408, 414 (3d. Cir. 1966) (Congress insulated representation cases from direct review because ''[t]ime is a critical element in election cases''). Long before the NPRM, Section 11302.1 of the Agency's Casehandling Manual reflected this congressional directive of timely elections, stating that ''[a]n election should be held as early as is practical.'' Similarly, § 102.67(b) of the final rule provides that ''[t]he regional director shall schedule the election for the earliest day practicable consistent with these rules.''

[186] Marvin Kumley suggests that employees be given at least 30 days to opt in, and further suggests that opt-in notices be posted in the **Federal Register** and local newspapers as a matter of course.

[187] The *Excelsior* Board rejected a similar suggestion that employee names and addresses be provided to a third party mailing service for distribution of union campaign literature due, in part, to the ''difficult practical problems'' that would be created by such an arrangement. 156 NLRB at 1246.

[188] Indeed, multiple parties at the public hearing on April 11, 2014, acknowledged this very problem when discussing employer's potentially administering an opt-in or opt-out process. See, *e.g.,* Testimony of Caren Sencer on behalf of Weinberg, Roger & Rosenfeld II.

[189] For example, once all parties have agreed to an election or the regional director has directed an election, the employer could be required to post information including the union's (or decertification petitioner's) email address and phone number to allow employees to directly contact the union (or decertification petitioner) if they desired to share their personal email addresses or phone numbers in order to receive communications from the nonemployer party concerning the upcoming election, without informing the employer of their choice. But, as shown, such a process would require delaying the election to provide sufficient time for employees to opt in and to allow the nonemployer parties to make use of the information with respect to those employees who have opted in.

The Chamber's II similar suggestion of allowing petitioning unions to create a Web site for employees to visit and then sharing site information with employees via U.S. mail after employers shared a traditional voter list of names and home addresses with the petitioner would involve still more delay, and would, of course, reduce the likelihood of employees receiving campaign communication from the petitioning union. Furthermore, the Chamber's proposal presumes not only internet access for all employees, but also a level of technological sophistication (*i.e.* the ability to create and monitor interactive Web sites) that we think is unrealistic for many petitioners—particularly low wage workers and small union locals or individual employees seeking to oust an incumbent union.

union as a fertile area for representation case disputes, requiring the expenditure of additional regional resources to investigate and for the parties to litigate, all with the result of pushing resolution of representation cases further and further into the future.[190]

Moreover, even if employees were questioned whether they wished to share their contact information with the petitioning union in a noncoercive manner and even if such an opt-in or opt-out procedure did not result in additional litigation, we believe that one could conclude that such a process would require the invasion of employee privacy in the name of protecting employee privacy. Thus, the opt-in or opt-out procedure could not be administered in a blind fashion like a secret ballot election in which no one is forced to vote. Rather, each employee would have to be asked whether he or she wished to share his or her contact information with the nonemployer parties, and the questioning would necessarily result in a list indicating which employees had authorized their additional contact information to be shared with the nonemployer parties. In our view, at least some employees would believe that their answering the question would reveal their sentiments about whether they wished to be represented for purposes of collective bargaining by the union. Accordingly, employees could conclude that the process would expose their private beliefs to both the party asking the question and to the nonemployer parties who ultimately receive the voter list.[191]

The Board has also considered whether the rules might mandate that unions provide an opt-out feature, such as an ''unsubscribe'' option in bulk emails. But this union-administered approach would do nothing to allay privacy concerns having to do with the disclosure of contact information in the first place. It would also be of limited utility, given the short period during which contacts are most likely to occur and given that it would be necessary to allow a certain amount of time for the nonemployer party to update its records. Furthermore, as discussed below, if they are applicable, the CAN–SPAM Act and Do-Not-Call Rule may already impose similar requirements in any event. Indeed, some union comments stressed that it was already their organizers' practice to cease contacting employees when so requested,[192] and that unsubscribe features are included in bulk email messages and texts as a matter of course.[193] For all these reasons, the Board's attempting to craft a universally applicable opt-out requirement unique to Board elections would have highly uncertain benefits at a cost of generating new election disputes and possible conflicts with other Federal regulation of the same subject matter. On balance, the existing self help remedy available to anyone who objects to unwanted communications—ignoring calls or letters and deleting emails—seems for the time being to be a more cost-effective option. Of course, should unwanted contacts rise to the level of harassment or coercion, the Board has the remedial authority to craft appropriate remedies, as discussed below in connection with the proposed restriction on use of the voter list.

Agency-hosted communications portals—raised in the NPRM (see 79 FR 7328)—were endorsed by a few comments as an alternative that could possibly avoid some of the problems inherent in the opt-in or opt-out processes discussed above.[194] Yet, we harbor serious doubts about whether such a portal would be feasible for the agency to construct or administer, and the comments did nothing to ease our concerns. To the contrary, the comments analyzing the concept in more depth raised several issues that lead us to believe that the concept is seriously flawed. For example, comments observed that communication between a petitioner and employees becomes less likely, the more steps (or ''clicks'' in internet parlance) that an individual must take to enable the communication.[195] The Board found the testimony of Jess Kutch particularly persuasive on this point, especially as she explained how the potential problems associated with individuals needing to take multiple steps to access or log-in to the agency portal would be exacerbated if those individuals—as can reasonably be expected—would be attempting to access the portal through the comparatively small screens on their cell phones. See Testimony of Jess Kutch on behalf of Coworker.org II. Moreover, Ms. Kutch (relying on her background in online organizing and bulk email delivery) persuaded the Board that designing a system whose success depended on the agency's navigation of spam filters to ensure high rates of email deliverability to the individuals at issue would likely be beyond the agency's technological capacity (or our forseeable budgetary restrictions). *Id.* In addition, the Board finds troubling the suggestions that an agency-sponsored communications portal could destroy legal privileges that might otherwise attach to communications between union attorneys and organizing employees (AFL–CIO II), and that the alternative of providing petitioners with masked emails to use in communicating directly with employees could have the unintended consequence of preventing unions from allowing employees to unsubscribe from bulk messages (SEIU II). In sum, we doubt that we have the resources to effectively implement a protected communications portal, and even if we did, the potential for unintended consequences associated

[190] We see similar problems with designing a system in which the nonemployer parties would, by default, receive only employees' names and addresses as under the current *Excelsior* policy, subject to a showing that email addresses and/or phone numbers are necessary in a particular case for effective and timely communication with the employees. If such a showing were required after the nonemployer parties had already attempted communication via home addresses, then it would necessarily add a substantial amount of time to the election process. In the alternative, if the showing were required preemptively as part of the petition itself, we would be introducing yet another area for litigation that would have to be decided before an election could be directed; likely adding time to the pre-election process, and increasing the chance of post-election appeals by the losing party, which would serve to lengthen the post-election process.

[191] We do note that it would be possible to require all employees to designate a single means by which to be contacted—telephone number, email address, or home address. This approach would be less likely to reveal employees' views on the question of union representation. Delays would result, however, as employers collected employees' designations after the regional director directed an election or the parties entered into an election agreement. Such delays could only be avoided by imposing a duty upon all employers under the Board's jurisdiction to record such employee choices at the time of hire. But nothing in the final rule creates such a widespread burden on small employers nationwide to collect and retain information no matter how remote the possibility may be that such employers will someday be involved in an NLRB representation case, and we are reticent to impose such a burden in this context.

In any event, such an approach would defeat the very purposes identified in *Excelsior,* by reducing the chance that voters would be presented with a nonemployer party's information concerning representation and the likelihood that the nonemployer parties could investigate the eligibility of the unknown employees on the employer's list prior to the election.

[192] See UFCW II.

[193] See Testimony of Katy Dunn on behalf of SEIU II. Also, according to the testimony of Jess Kutch, any union (or third party provider) in the business of sending bulk emails already includes such unsubscribe options in its bulk emails in order to avoid being labeled as spammers with attendant downgrading to their IP server reputation scores. This testimony also demonstrates that effectively administering a mandatory ''opt-out'' requirement would, as a practical matter, likely be beyond the NLRB's capacity, as it might unintentionally come into conflict with the requirements of bulk-emailers already imposed by the market's continuously adapting responses to ''spam.'' Meanwhile, an opt-out mandate would also likely prove inadministrable as applied to individual employees and small independent organizations.

[194] See, *e.g.,* IFA II; Louis Toth II.

[195] See SEIU II; AFL–CIO II.

with that proposal counsel against its pursuit.

Perhaps the most fundamental flaws with the agency-sponsored communications portal, however, are ones that are shared by any paradigm in which the agency would allow employees to opt-in, opt-out, or to pick one mode of communication to be utilized by employees with a nonemployer party. Namely, each of these options would carry the potential to leave nonemployer parties in a worse position to effectively communicate with employees than they are under the current *Excelsior* regime. Instituting an opt-in, opt-out, or a portal system that would apply only to communications between employees and nonemployer parties, would deny employees information from the nonemployer party, a problem the *Excelsior* doctrine seeks to mitigate. Moreover, we are concerned that agency communication with employees concerning each of these alternatives carries an inappropriate implication that those employees have something to fear from nonemployer parties possessing their contact information—contact information that is, at least in some instances, already in the possession of their employers or an incumbent union representative.[196] Each of these alternatives also inappropriately implies that the nonemployer party's message is not important—*i.e.* that paying attention to it is optional to becoming fully informed about the election. This would amount to the Board putting a virtual thumb on the scales in influencing employees' exercise of their rights to decide for themselves whether to seek (or maintain) union representation, and would run directly counter to a core animating purpose of the *Excelsior* doctrine. The Board notes that some comments take the opposite view: that by sponsoring avenues of communication between employees and a petitioning union—via protected portals or opt-out processes—the Board would improperly suggest that it was not neutral, but pro-unionization. This possible interpretation is yet another reason not to pursue these alternative proposals.[197]

In sum, even if we were to judge that a fair election required only that employees be given the option of enabling or disabling email or phone communication channels with the nonemployer parties, we are skeptical that such a system could be put in place without significant negative ramifications for the representation case process. In a rulemaking designed to eliminate unnecessary barriers to the fair and expeditious resolution of questions concerning representation, we are loath to create new barriers in place of the old.[198] Instead, we have concluded that employees' legitimate interest in the confidentiality of their personal email addresses and phone numbers is outweighed by the substantial public interest in disclosure where, as here, disclosure is a key factor in insuring a fair and free election and an expeditious resolution of the question of representation.

In reaching this conclusion, we wish to emphasize that we are mindful of the privacy interests employees have in the information in question. But we reiterate that the Board must balance that privacy interest against the interests served by disclosure. As explained above, the comments do not persuade us that the balance struck in *Excelsior* and approved by the Supreme Court in *Wyman-Gordon* should be struck differently because of the additional information to be disclosed under the voter list amendments.

AHA II, ACE and others complain that the rule may conflict with employer confidentiality policies and that the Board should therefore reject the voter list proposals. But the potential for such conflicts already exists under the current *Excelsior* requirement, and the comments do not cite a single case in which an employer's confidentiality policy has been permitted to stand in the way of *Excelsior* disclosures. Indeed, one of the courts called on to review the original *Excelsior* requirement flatly rejected an employer's claim that it did not have to make the disclosures because it had promised its employees that any contact information would be kept confidential. See *NLRB* v. *British Auto Parts, Inc.,* 266 F. Supp. 368, 373–74 (C.D. Cal. 1967), aff'd, 405 F.2d 1182 (9th Cir. 1967). In a similar context, where employers have refused to disclose requested information to an incumbent collective-bargaining representative, the Board and the courts have repeatedly held that simply invoking a confidentiality policy will not allow an employer to avoid disclosure.[199]

We recognize that some employers strive to preserve the confidentiality of private employee information.[200] But we also note that pledges of confidentiality may provide for exceptions such as when, as here, disclosure would be legally required. See, *e.g., Howard University,* 290 NLRB 1006, 1007 (1988). Employers will be able to point to the Board's published rules should such disclosure be questioned by an employee. Ultimately, we conclude that the substantial public interests in fair and free elections and in the expeditious resolution of questions of representation outweigh whatever legitimate interest an employer may have in keeping confidential his employees' personal email addresses, home and personal cell phone numbers, work locations, shifts and job classifications. See *Excelsior,* 156 NLRB at 1243 (similarly concluding that an employer's interest in keeping

[196] See, *e.g.,* NUHW II.

[197] See Testimony of Kara Maciel on behalf of the NGA II; see also Testimony of Melinda Hensel on behalf of IUOE, Local 150 II (agreeing with the NGA's concerns as to the agency-sponsored communications portal).

[198] We also reject—as inconsistent with the concerns animating *Excelsior*—suggestions that: All individualized contact between unions and employees be eliminated (Dante Fauci II); unions should only be allowed to pass out flyers from parking lots on agreed-upon dates (Charles Lingo II); and unions should only have a right to view, but not copy, a list of employee names and addresses once within 30 days of an election (Testimony of J. Aloysius Hogan on behalf of the Competitive Enterprise Institute II). Similarly, the Board declines Brian Richardson's suggestion that an employer should mail union information to employees if the union bears the costs. At the very least, such a two-step procedure would invite delay, and clearly would not serve the key purpose of the *Excelsior* list: Ensuring that the nonemployer parties have access to the electorate. As the *Excelsior* Board noted in rejecting a similar argument, the union should not be limited to the use of the mails in its efforts to communicate with the entire electorate. 156 NLRB at 1246. It would also invite litigation if employees did not timely receive the union's correspondence. The Board also notes that employers have never had a right to see other parties' campaign propaganda, let alone to see it before the unit employees view it. Nor are we persuaded by comments that the concerns underlying *Excelsior,* or any other relevant concern, would be advanced by providing union officials' or union activists' personal contact information to employers. (See Richard Oakes II and Anonymous Anonymous II). Non-employee union organizers or officials do not cast ballots in representation case proceedings, and so there is no parallel reason that employers should be empowered to communicate with them outside of the official channels listed in the petition. To the extent that union activists are employees, employers already enjoy all of the mandatory means to communicate with them discussed above, and need not be specifically provided with any personal contact information that the employer does not otherwise possess.

[199] See, *e.g., NLRB* v. *Pratt & Whitney Air Craft Div.,* 789 F.2d 121, 131 (2d Cir. 1986) (''Simply asserting that the results should remain confidential because the employees were promised confidentiality does not discharge the employer's burden''); *Holiday Inn on the Bay,* 317 NLRB 479, 482 (1995) (standing by itself, an employer's desire to shield employee information from disclosure on the basis of a confidentiality policy ''cannot suffice to preclude disclosure which promotes statutory policies''); *New Jersey Bell Telephone Co.,* 289 NLRB 318, 319–320 (1988) (noting that *Detroit-Edison* provides no support for employer claim that it should be able to deny requests for relevant information simply because its privacy plan requires employee consent for such disclosures), *enforced mem.,* 872 F.2d 413 (3d Cir. 1989).

[200] We note that the comments do not persuade us that employers routinely pledge to their employees that they will keep confidential such information.

employees' names and addresses confidential was outweighed by the public interest in disclosure).

Some comments attacking the proposals also indicate persistent privacy concerns about the original *Excelsior* policy. For example, GAM asserts that employers already experience significantly distressed employees because their home addresses are currently being disclosed to petitioners without their consent under *Excelsior.* Although some comments predict that disclosure of phone numbers and email addresses will exacerbate this perceived problem,[201] as noted above, the Board takes the opposite view. Indeed, the Board agrees with the views expressed in many comments that contact via phone and email is less invasive than face to face visits with employees at their homes. The Board anticipates that unions, as predicted by Melinda Hensel,[202] in an effort to conserve finite organizing resources, will in some cases make use of phone and email contact information in lieu of visiting employees at home.[203] It follows that to the extent that invasion of privacy concerns persist about the original *Excelsior* policy of home address disclosure, those concerns could be ameliorated by the final rule's provision for the disclosure of personal email addresses and home and personal cell phone numbers.

To the extent that comments focus on the annoyance of unwanted calls or emails,[204] the Board sympathizes with employees who simply wish to reduce the volume of such communications they receive. Even so, however, the Board is not persuaded that the potential for such irritations—which may be dealt with by simply refusing the call, hanging up, scrolling over, or hitting the delete key—should trump the public interest in the fair and free choice of bargaining representatives and in the expeditious resolution of questions of representation. Indeed, the Board agrees with the Fourth Circuit's statement regarding the original *Excelsior* requirement, that ''the mere possibility that employees will be inconvenienced by *telephone calls* or visits to their homes is far outweighed by the public interest in an informed electorate.'' *NLRB* v. *J. P. Stevens & Co.,* 409 F.2d at 1209 (emphasis added). We believe that the advent of caller identification services on many home phones and virtually all cell phones will allow employees to avoid unwanted calls with relative ease, and the typical display of an email's sender and subject should similarly allow employees to disregard organizing messages should they so choose. As explained by Jess Kutch at the Board's April 11, 2014, public hearing, the policies and professional interests of mass emailers utilized by most organizing unions will ensure that employees have an option to unsubscribe from most mass campaign email lists should they so choose, and employees will also enjoy the option of blocking emails from individual senders with whom they no longer desire to communicate. See Testimony of Kutch II. Moreover, we note that as AFL–CIO Organizing Director Elizabeth Bunn explained in her public hearing testimony, organizing unions typically ''find that workers actually prefer to talk to union supporters and their union representatives off work because it's in an environment where the fear at least is taken out of the communication. So we've not experienced that anger and irateness that was discussed yesterday [by employer representatives].'' In short, the Board does not view the potential for annoyance as a sufficient counterweight against an informed electorate and the expeditious resolution of questions of representation to justify keeping the voter list information disclosures as minimal and outdated as they are today.

Additionally, as SEIU (reply) points out, labor law already tolerates encroachment on an employee's time during representation campaigns as employers face no legal impediment to using contact information in their possession (which is to be disclosed on the voter list). Employers may place calls and text messages to the employees' home and personal cell phones and send email messages to their employees' personal email addresses. In short, whether or not employees' phone numbers and email addresses are disclosed to petitioners, there is no guarantee that employees will not receive campaign-related messages on their personal phones and personal email accounts, because their employer may have this information and use it to send campaign information.

Implicitly, however, privacy claims in the comments assume that employees should be able to prevent campaign messages from reaching their personal email and phone. If this perspective were accepted in toto, it would suggest that the Board should also be restricting employer use of personal contact information, in addition to excluding it from the voter list given to nonemployers. Yet, we are not persuaded that the current rulemaking should be used to restrict such currently-lawful campaign speech by employers under the cause of employee privacy. [205] In this regard, the Board also rejects the suggestion by the Chamber II that home visits should be either eliminated or restricted to one visit. As discussed above, no patterns of abuse have emerged since *Excelsior* to support such a restriction on nonemployers' ability to use home visits to communicate about representation issues if they so choose. Moreover, employees can reject attempts at home visits by, for example, not answering the door, closing the door, asking visitors to leave, and through enforcement of state and local trespass laws.

The Board also disagrees with the view expressed by Pinnacle Health System of Harrisburg, Pennsylvania (Pinnacle) that the voter list disclosures are ''particularly problematic considering that the list may contain the information of individuals who are managers and supervisors and whose status will not be determined until after the election by way of post-election challenge.'' [206] As more thoroughly explained in connection with § 102.66 below, this alleged problem existed prior to the NPRM. Thus, prior to the NPRM, supervisory and managerial status determinations could be deferred until after the election. In those cases, regional directors instructed employers to include the disputed individuals on the *Excelsior* list with the understanding that they would vote subject to challenge. And, in any event, the Board does not presume that an alleged supervisor's or manager's contact information being inadvertently

[201] See, *e.g.,* Sheppard Mullin II; Bruce E. Buchanan; ALG; U.S. Poultry II.

[202] See Testimony of Melinda Hensel on behalf of IUOE Local 150 II.

[203] The Board therefore is skeptical of RILA's fear that the expanded disclosure requirements will trample the privacy of nonemployees. Indeed, the ability of organizers to reach employees by personal cell phone or email suggests that organizers will be less likely to interact with non-employees (such as family members of employees) for any length of time. The Board also sees no reason to fear that any serious problems will be created by the potential that employees' children could view union messages when sent to an email address shared by the family. See Testimony of Maciel II.

[204] See, *e.g.,* CBFC; ALG; SSINA.

[205] To be sure, there was some agreement amongst speakers at the Board's April 11, 2014 public hearing that it would be inappropriate to apply the same restrictions to employer communications with their employees on the subject of unionization, as those same speakers advocated should be applied to communications to employees coming from petitioning unions. See, e.g, Testimony of Kara Maciel on behalf of NGA II; Testimony of Joseph Torres on behalf of Winston & Strawn II; Testimony of Fred Wszolek on behalf of Workforce Fairness Institute II.

[206] AHCA shares this concern.

disclosed will lead to any greater dangers than the disclosure of contact information for other coworkers.

The Board also does not share the fears expressed by some commenters that disclosure of cell phone numbers will lead employees to suffer significant unwelcome costs from phone calls and texts that exceed their data plans.[207] As an initial matter, the Board does not believe that a union is likely to act counter to its own organizing self-interests by placing so many calls or sending so many texts as to financially harm those potential voters who lack unlimited calling and text plans. Given that their use will be restricted to the representation proceeding at issue, Board proceedings arising from it, and related matters, the risk that unions' receipt of cell phone numbers will cause financial harm to employees is further lessened. In addition, the Federal Communications Commission has addressed the cell phone ''bill shock'' issue alluded to by CDW, and in 2011 touted its far-reaching agreement with the wireless industry to address the problem. See ''CTIA, Consumers Union and the FCC to Announce New Industry Guidelines'' (Oct. 17, 2011), *http://www.fcc.gov/events/ctia-consumers-union-and-fcc-announce-new-industry-guidelines*. By 2013, the FCC announced that approximately 97 percent of wireless customers across the nation were protected from bill shock as participating U.S. wireless companies met a deadline to provide free, automatic alerts to customers who approach or exceed their wireless plan limits. See ''FCC Marks Milestone in Effort to Eliminate 'Bill Shock'.'' (April 18, 2013), *http://www.fcc.gov/tools/headlines-archive/2013*. The Board trusts that any lingering bill shock concerns—relevant to a great percentage of Americans beyond those who may participate in an NLRB election—will continue to be addressed by the FCC, and need not cause the Board to abandon disclosure of cell phone numbers. Of course, should bill shock nonetheless prove to be a serious problem in the representation case context, the Board has clear authority to create appropriate remedies through adjudication.

e. Purported Conflict With Precedent and Other Laws

The National Ready Mix Concrete Association (NRMCA) and others assert that disclosure of personal email would be inconsistent with the Board's stated concerns about email in *Trustees of Columbia University,* 350 NLRB 574, 576 (2007).[208] We disagree. The Board in that case posed a number of questions ''regarding the potential ramifications * * * of requiring employers to furnish * * * employees' *workplace* email addresses.'' *Id.* at 576 (emphasis added). We noted, for instance, that union mailings to work email addresses could impose costs on employers and raise unlawful surveillance concerns. *Id.* As explained above, however, the final rule does not require the employer to disclose the work email addresses to the nonemployer parties, and therefore it is unnecessary for us to answer questions concerning work email in this rule. And, as we expressed in the NPRM, the Board's limited holding in *Trustees of Columbia University* was only that, ''given the Employer's undisputed compliance with its *Excelsior* obligations as they stood as of the date of the Union's request, we are unwilling, on the facts of this case, to characterize that compliance as objectionable conduct.'' *Id.* In short, we see nothing in that case that precludes us from requiring the provision of personal email addresses as part of the voter list, to the extent that an employer keeps records of employees' personal email addresses.

Several comments also raise the specter of conflicts with circuit court precedent and state privacy law if the Board were to require disclosure of employee contact information. The Board is not persuaded by these comments. Regarding circuit court precedent, ACE for example cites *JHP & Associates, LLC* v. *NLRB,* 360 F.3d 904, 911–912 (8th Cir. 2004), and NRMCA II cites *Chicago Tribune Co.* v. *NLRB,* 79 F.3d 604, 608 (7th Cir. 1996) as possibly at odds with the rule. But those cases are inapposite. The courts found that harassment was a concern in each of those cases because the respective unions sought the home addresses of the individuals hired to replace the employees who had struck in support of the very union seeking the information. See *JHP& Associates,* 360 F.3d at 908, 911–12, and *Chicago Tribune,* 79 F.3d at 606–08.[209] The disclosures mandated by the final rule therefore do not implicate the concerns articulated by the circuit courts in these cases.[210]

Regarding state privacy law, NRMCA for example, cites a case discussing the New Jersey state constitution while Sheppard Mullin II points to several cases explaining the California state constitution. The case NRMCA cites, however, is concerned with privacy expectations under the unreasonable search and seizure provision of the New Jersey state constitution, *State* v. *Reid,* 945 A.2d 26, 31–32 (N.J. 2008), an entirely different privacy interest than any implicated by the final rule. Similarly, the cases involving the California constitution are not in obvious conflict with the final rule, as they involve different types of disclosures and acknowledge that the right to privacy in personal information under the California constitution is not absolute.[211] Indeed, a prior Board, with judicial approval, rejected as ''frivolous'' an employer's contention that it would violate an employee's California constitutional right to privacy by furnishing an employee's address to a labor organization which represents the employee. See *A-Plus Roofing, Inc.,* 295 NLRB 967, 974 (1989), *enf'd. mem.,* 39 F.3d 1410 (9th Cir. July 12, 1990). Moreover, Sheppard Mullin fails to cite the most recent and on point case of *County of Los Angeles* v. *Los Angeles County Employee Relations*

[207] See, *e.g.,* CDW; Buchanan; NRF; Indiana Chamber; Doug Muyres II.

[208] See, *e.g.,* National Mining Association; ACE; Sheppard Mullin.

[209] NRMCA II also cites *East Tennessee Baptist Hospital* v. *NLRB,* 6 F.3d 1139, 1144 (6th Cir. 1993) as possibly at odds with the NPRM, but the court's opinion did not address the question whether an employer should be obligated to disclose employee contact information in any setting, let alone whether an employer should be obligated to provide employee contact information to the union which had petitioned for an election so that it could be certified as their collective-bargaining representative.

[210] See also *Tenneco, Inc.,* 357 NLRB No. 84 (Aug. 26, 2011), *enforced in relevant part, denied in part,* 716 F.3d 640 (D.C. Cir. 2013), where the Board found that the employer's withholding of the replacements' home addresses breached its bargaining duty, because the union represented the replacements after strike's end and there was no ''clear and present danger'' of the union misusing the information; the Board also addressed the ''totality of the circumstances'' standard used by some circuits.

[211] See *White* v. *Davis,* 13 Cal. 3d 757, 760, 775–776 (1975) (holding police posing as students to record classroom activities at university solely for information-gathering purposes violated California constitution); *Belaire-West Landscape, Inc.* v. *Superior Court,* 149 Cal. App. 4th 554, 556–559, 561–562 (Cal. Ct. App. 2007) (holding that plaintiff's request for names, addresses, and phone numbers of defendant's employees did not violate California constitution where plaintiff was trying to identify potential class members in class action and employees were able to opt out of disclosure); *Planned Parenthood Golden Gate* v. *Superior Court,* 83 Cal. App. 4th 347, 352–353, 357, 369 (Cal. Ct. App. 2000) (holding state interest in broad discovery outweighed by nonparties' interest in privacy where plaintiff sought names, addresses, and phone numbers of nonparty supporters of Planned Parenthood without demonstrating need for such information). Sheppard Mullin also cites *Pineda* v. *Williams-Sonoma Stores, Inc.,* 51 Cal. 4th 524, 527 (2011), a case dealing with a statute prohibiting businesses from requesting that cardholders provide personal identification information during credit card transactions and then recording that information. The final rule clearly does not implicate the statute or interests at issue in that case.

Commission, in which the California Supreme Court clarified that an incumbent public sector union's significant interest in communicating with non-members outweighed employees' privacy interests in their home contact information under California's state constitution. 56 Cal.4th 905, 911–12 (2013). More generally, the Board observes that state privacy and confidentiality laws may have exceptions allowing for disclosures where authorized by statute or regulation, in which case there would be no conflict between such laws and the voter list disclosures.[212] See, *e.g., Valley Programs, Inc.,* 300 NLRB 423, 423 fn. 2 (1990); *Kaleida Health, Inc.,* 356 NLRB No. 171, slip op. at 6–7 (2011). Finally, to the extent that the disclosures conflict with any state privacy laws, the state laws may be preempted. See *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959); *Mann Theatres Corp. of California,* 234 NLRB 842, 842–843 (1978) (noting, in context of employer refusal to provide union with employee wage information, that if state public policy in fact required nondisclosure of employee wage information, it would be preempted under *Garmon*).

Some comments also claim that the Controlling The Assault of Non-Solicited Pornography and Marketing Act of 2003 (''the CAN–SPAM Act'') evidences a Federal privacy concern regarding email addresses and that the Board's voter list proposals run afoul of that Federal statute.[213] Among other things, the CAN–SPAM Act makes it unlawful for any person to transmit a commercial electronic mail message that ''contains, or is accompanied by, header information that is materially false or materially misleading'' (15 U.S.C. 7704(a)(1)) and for a person to transmit a commercial electronic mail message that does not contain an opt-out procedure. 15 U.S.C. 7704(a)(3)(A).[214] The statute further provides that if a recipient requests that the sender not send it any more commercial electronic mail messages, then it is unlawful for the sender to send it another commercial electronic mail message more than 10 business days after receipt of such a request. 15 U.S.C. 7704(a)(4)(A)(i). Con-way, Inc. argues that email messages transmitted by a union would be subject to, and potentially in violation of, the CAN–SPAM Act because the ''primary purpose'' of union messages would be ''the commercial advertisement or promotion of a commercial product or service.'' 15 U.S.C. 7702(2)(A). Katy Dunn (Testimony on behalf of SEIU II) disputes that unions are bound by the commercial provisions in CAN–SPAM but nevertheless explains, along with SEIU II, that many unions voluntarily comply.

We need not offer an opinion as to whether the CAN–SPAM Act would apply to a nonemployer party's use of email to investigate voter eligibility issues or to solicit a vote in an upcoming Board election. Simply put, if the CAN–SPAM Act does apply to a nonemployer party's use of email in an organizing campaign, nonemployer parties will have to conform their conduct to the statutory requirements, such as providing header information that is neither ''materially false [n]or materially misleading,'' providing opt out procedures, and honoring opt out requests no more than 10 days after the request is made.

Similarly, PCA and others argue that because union solicitations are subject to the Federal Trade Commission's Do-Not-Call Rule, 16 CFR part 310, a union could not contact individual employees by phone before those employees authorized the union to do so.[215] The regulations were adopted pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101–6108. (See 16 CFR 310.1) in which Congress charged the FTC with prescribing rules prohibiting deceptive and other abusive telemarketing acts or practices. 15 U.S.C. 6102. It further charged the FTC with including in its rules requirements that telemarketers not undertake a pattern of unsolicited telephone calls which a reasonable consumer would consider coercive or abusive of such consumer's privacy and restrictions on the hours when unsolicited telephone calls can be made to consumers. 15 U.S.C. 6102(a)(3)(A), (B).

Again, however, we decline to address the extent to which the FTC's Do-Not-Call regulations may or may not cover nonemployer party solicitations or use of the phones to investigate eligibility issues. Even if these regulations are applicable, the result will be that a nonemployer party will be obligated to comply with Do-Not-Call as it might relate to potential members of the petitioned-for (or existing) bargaining unit. Thus, for example, a nonemployer party would have to refrain from making calls outside certain hours, and making calls to a person when the person previously has stated that he or she does not wish to receive a call from the party or when the person's telephone number is on the do-not-call registry.

In sum, in response to all the comments challenging the propriety of the proposals relating to the disclosure of eligible voters' contact information, the Board emphasizes that nonemployer parties will not have free rein to utilize email addresses and phone numbers in a manner that violates other Federal laws that are found to cover such nonemployer party conduct. Rather, to the extent that any such laws are found applicable to the nonemployer parties' use of the contact information, those parties would be required to conform their conduct to the governing legal standards.[216] In much the same way, a nonemployer party to a representation case who receives home addresses under current *Excelsior* requirements is not excused from complying with other applicable laws, such as trespass.[217]

[212] IFA II and Senator Alexander and Republican Senators II highlight such language in a recently passed privacy statute in Virginia, noting that Virginia employers are prohibited from disclosing employees' personal identifying information to third parties ''unless required by Federal or state law.'' While both comments suggest that the voter list proposal puts the Board's regulations at odds with the general trend of protecting employee privacy rights, neither argues that the Virginia statute's language would trump the Board's regulations.

[213] See, *e.g.,* Con-way; NRTW; Sheppard Mullin; RILA.

[214] As the statute indicates, ''The term 'commercial electronic mail message' means any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service[.]'' 15 U.S.C. 7702(2)(A).

[215] In contrast, NGA II notes that it is unclear whether union calls to employees would fall under the FTC's definition of solicitation for purposes of the Do Not Call Registry. Meanwhile, SEIU II cites the Telephone Consumer Protection Act, 47 U.S.C. 227, as another comprehensive scheme governing calls and texts by autodialers, which among other things, requires an opt-out. In SEIU's view, this statute provides an existing regulatory gloss to any voter list proposals adopted by the Board, making unnecessary any additional restrictions by the Board. We do not agree that the statute renders the proposed restriction unnecessary as detailed in our discussion of the restriction below.

[216] Similarly, to the extent state laws, such as the Washington Commercial Electronic Mail Act, Wash. Rev. Code. 19.190 *et seq.* (cited by RILA), are found to cover nonemployer party use of email or telephone technology and such laws are not preempted, nonemployer parties would be required to conform their conduct to those laws as well.

[217] ACE expresses concern that the proposed voter list requirements may conflict with the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g(a)(5)(A), (B) (Supp. IV 2006). ACE observes that although FERPA allows colleges and universities to release students' ''directory information,'' schools are nevertheless required to provide notice that such information will be released and to give students the opportunity to opt out of the release. However, as ACE also appears to acknowledge, the proposed rule and FERPA could only come into conflict if graduate student employees are permitted to organize under the Act, which is not currently the case. See *Brown University,* 342 NLRB 483 (2004). (This issue is implicated in a case now pending before the Board.

2. Timing

In the NPRM, the Board proposed to shorten the time for production of the voter list from the current 7 calendar days to 2 work days, absent agreement of the parties and the regional director to the contrary in the election agreement, or extraordinary circumstances specified in the direction of election.[218] Many comments argue that the 2-day time period following a regional director's direction of election, or approval of an election agreement, is too brief for an employer to produce the voter list, particularly if the Board requires the additional information—the personal email addresses, home and personal cell phone numbers, work locations, shifts, and job classifications of the eligible voters—to be disclosed on the list.[219]

However, the Board concludes that advances in recordkeeping and retrieval technology as well as advances in record transmission technology in the years since *Excelsior* was decided warrant reducing the time period for production, filing, and service of the list from 7 calendar days to 2 business days.[220] Shortening the time period from 7 calendar days to 2 business days will help the Board to expeditiously resolve questions of representation, because the election—which is designed to answer the question—cannot be held until the voter list is provided. In many cases the list will be produced electronically from information that is stored electronically and then will be served electronically in an instant—a far cry from workplace realities when the Board first established a 7-day time frame for producing the list, when employers maintained their employees' records in paper form, and virtually no employer had access to personal computers, spreadsheets or email. Indeed, the AFL–CIO points out that even in 1966, under the 7 calendar day requirement, many employers were actually producing the list in only 2 work days. The AFL–CIO's comment posits that of the original 7 days, 2 days were lost to the weekend and 3 more days were dedicated to service of the list by regular mail because there was no existing option for priority, express or overnight mail, let alone for instantaneous electronic service via email. The Board views it as significant that while the Chamber specifically replies to the AFL–CIO's *Excelsior* analysis, it does so only to contend that many employers did, and do, work on the list over the weekend. The Chamber's reply does not dispute that even under the technological constraints of the 1960s, employers could and did produce voter lists, at least for deposit into the mails, in 4 calendar days or fewer. Thus, the advent of electronic filing and service via email alone warrants a substantial reduction in the time provided, and in the Board's view, technological advances fully justify the move to 2 business days for production of the final voter list.

Indeed, even some of the comments opposed to the new time frame tacitly admit that, while challenging, it is nonetheless possible. For example, the Indiana Chamber of Commerce (Indiana Chamber) concedes that ''It is not that the manual collection of this information itself would take extreme amounts of time, but it becomes a hardship when imposed concurrently with all of the other, new obligations under the compressed schedule.'' Similarly, the Bluegrass Institute does not argue that employers cannot compile the list under the new time frame, but contends that ''the cumulative effect'' of the new obligations ''on small businesses could very well be devastating.''[221] Yet, the hearing testimony of retired field examiner Michael Pearson implicitly contradicts such concerns by recalling approximately one dozen cases in which employers were able to file *Excelsior* lists on the same day as they signed election agreements—thus demonstrating an ability to simultaneously prepare an *Excelsior* list while resolving all of the issues to be potentially covered in a pre-election hearing. Indeed, as more fully discussed below in reference to § 102.63, the Board does not agree that the obligations imposed on employers in connection with the Statement of Position form vary dramatically from what a reasonably prudent employer would have done in any event to adequately prepare for a pre-election hearing under the prior rules. Likewise, the 8-day time frame for the hearing's opening, which may be extended for up to 2 business days upon request of a party showing special circumstances and even longer upon a showing of extraordinary circumstances, is in line with the best practices of some regions under the prior rules, and in any event, does not differ dramatically from the overall 10-day median for scheduling pre-election hearings, and the 13-day median for opening pre-election hearings under the prior rules.[222]

Additional factors likewise persuade us that the 2-business day time frame is appropriate for production, filing, and service of the list. First, in many cases the employer will have provided a preliminary list of employees in the proposed or alternative units as part of its Statement of Position before the clock ever begins running on the new 2-day deadline for production of the voter list. As discussed below in connection with § 102.63, that initial list will be due no sooner than 7 days after service of the notice of hearing, and so the employer will have the same amount of time to produce the preliminary list as it had under *Excelsior.* Accordingly, to produce the voter list required by § 102.62 (or § 102.67 in directed election cases), the employer need not start from scratch, but need only update that initial list of employee names, work locations, shifts, and job classifications, by adding employees' contact information and making any necessary alterations to reflect employee turnover or changes to the unit.[223] Second, the description of

See *Northwestern University,* Case 13–RC–121359). In any event, if the issue arises, the conclusions expressed above with regard to the CAN–SPAM Act and the Do-Not-Call Rule would apply equally here.

[218] Although the NPRM preamble indicated that employers would have 2 work days to produce the list, the proposed regulatory voter list sections did not explicitly so provide. Compare 79 FR 7333 with 79 FR 7354, 7360.

[219] See, *e.g.,* GAM; AAE; Vigilant; Buchanan; U.S. Poultry II; Testimony of Peter Kirsanow on behalf of NAM II.

[220] As suggested by Nicholas E. Karatinos, the Board will interpret the rule to mean that employers have 2 *business* days (*i.e.,* excluding Saturdays, Sundays, and legal (*i.e.,* Federal) holidays—rather than 2 calendar days—to produce the eligibility list. This interpretation is consistent with § 102.111(a) of the Board's prior rules, which this final rule leaves undisturbed. Thus, § 102.111(a) provides that when computing time periods of less than 7 days in the Board's regulations, intermediate Saturdays, Sundays, and holidays are excluded.

Moreover, in accordance with Karatinos' suggestion, the Board has decided to explicitly provide in §§ 102.62(d) and 102.67(l) of the final rule that the employer has two *business* days after the regional director directs an election or approves the parties' election agreement to furnish the list to the nonemployer parties and the regional director. The Board concludes that adoption of this additional language will provide useful guidance to the parties and render this particular requirement of the rule more transparent.

As noted above, the Board's prior rules indicated that legal holidays were not included in the time calculation for due dates shorter than 7 days. The Board has interpreted legal holidays to mean ''Federal holidays.'' The Board declines Karatinos' additional suggestion to list the particular holidays in the final rule, because the number of Federal holidays may change over time and the Board does not wish to have to amend its rules each time the number of Federal holidays changes.

[221] For similar comments, see GAM; Sheppard Mullin; AHA.

[222] This information concerning FY 2011 through FY 2013 was produced from searches in the Board's NxGen case processing software.

[223] Some employers may have an additional reason to begin compiling at least part of the voter list as soon as they receive a petition. An employer which doubts that the petitioner has enough

Continued

representation case procedures which is served with the petition will explicitly advise employers of the voter list requirement—just as the opening letter does currently—so that employers concerned about their ability to produce the list can begin working immediately; before an election agreement is approved or an election is directed and thus *before* the clock begins running on the 2-business day time period.[224] Third, in the Board's experience, the units for which lists must be produced are typically small— with half of all units containing 28 or fewer employees over the past decade—meaning that even for those small employers which lack computerized records of any kind, assembling the information should not be a particularly time-consuming task, contrary to the comments that suggest otherwise.[225] Finally, the final rule will enable parties to enter into agreements providing more time for employers to produce the list subject to the director's approval, and the final rule will further enable the regional director to direct a due date for the voter list beyond two days in extraordinary circumstances.[226] In sum, the Board is not persuaded that the bulk of employers will be unduly burdened by the final rule's voter list time frames.[227]

Many comments suggest categorical exemptions for various industries. For example, AGC argues that the Board should exempt construction industry employers from the requirement that they produce the voter list 2-days after a direction of election or approval of an election agreement. According to AGC, construction industry employers, who may handle personnel matters on a decentralized basis at the individual jobsite level, cannot timely produce the list, because 2 days is simply not enough time to review 2 years' worth of payroll records as required by the *Daniel/Steiny* construction industry eligibility formula.[228]

The Board does not agree that the *Daniel/Steiny* formula warrants carving out a categorical exemption for construction industry employers in every case. In the first place, construction industry employers will not be required to review 2-years' worth of payroll records to produce the list in all cases. In some cases, the parties may stipulate that formula not be used. See *Steiny,* 308 NLRB 1323, 1328 n.16 (1992); *Signet Testing Laboratories, Inc.,* 330 NLRB 1, 1 (1999). Moreover, as AGC acknowledges elsewhere in its comment, some petitions filed in construction industry cases involve situations where the petitioned-for units are already covered by 8(f) collective-bargaining agreements. Such 8(f) collective-bargaining agreements frequently require the signatory employer to make fringe benefit contributions to benefit funds on behalf of the unit employees and to file reports of its employees' hours with those benefit trust funds. Accordingly, at least in those cases, the employer may have ready access to the information necessary to produce lists complying with the formula. In addition, not every construction industry employer will have intermittently employed large numbers of employees over a two-year period. Those employers who have employed stable workforces will not face the same burden. And while employers may maintain records on different jobsites due to the decentralized hiring claimed by AGC II and other construction industry commenters, we anticipate that they will be able to transmit the records to a central location via modern technology or verbally report the information contained in the records.[229]

The Board also finds it highly significant that, as AGC acknowledges, under the Board's current rules, construction industry employers, whether decentralized or not and whether large or small, already only have 7 days to produce the *Excelsior* list. The Board believes that the same changes that justify the reduction in time to produce the final list in cases outside the construction industry, likewise justify reducing the time in cases involving the construction industry. Thus, given the advances in record-keeping/retrieval technology and in the technology for transmitting documents that have taken place since *Daniel* was decided in 1961 and since *Excelsior* issued in 1966, the Board simply does not believe that as a rule it is ''impossible'' for construction industry employers to comply with the requirement, as suggested by NFIB.

As noted above, employers generally will have more than a week to prepare the voter list, assuming they begin work when they receive the petition and are explicitly advised of the voter list requirement in the description of representation case procedures served with the petition. And, employers will have still more time in those cases where weighty issues are litigated at the pre-election hearing that require resolution by the regional director, because they can continue preparing the list after the hearing closes while they await the decision by the regional director. Finally, it bears repeating that under the final rule, the regional director has discretion to grant an employer more time to produce the list, upon a showing of extraordinary circumstance which may be met by an employer's particularized demonstration that it is unable to produce the list within the required time limit due to specifically articulated

employee support to warrant an election may provide a payroll list to facilitate the regional director's administrative investigation of the issue. See Case Representation Manual Section 11020. Because the payroll list must be submitted promptly, see id., such an employer will likely begin preparing it immediately upon receiving a petition. Furthermore, as noted above, an employer which anticipates filing a statement of position and the accompanying initial employee list will also need to compile much of the information on the voter list for that purpose, prior to the start of the 2-day time frame.

[224] Thus, Casehandling Manual Section 11009.2(c) provides that the initial letter to the employer following the filing of the petition should advise the employer: ''In the event an election is agreed to or directed, the Agency requires that a list of the full names and addresses of all eligible voters be filed by the employer with the Regional Director, who will in turn make it available to all parties in the case. The list must be furnished to the Regional Director within 7 days of the direction of, or approval of an agreement to, an election, and the employer is being advised early of this requirement so that there will be ample time to prepare for the eventuality that such a list may become necessary.''

[225] See, *e.g.,* Ranking Member Enzi and Republican Senators; COSE; CNLP; Testimony of Elizabeth Milito on behalf of NFIB II.

[226] National Mining Association and David A. Kadela complain that ''extraordinary circumstances'' is a vague standard that may be administered differently by different regional directors. However, this standard has been in place since the original *Excelsior* requirements were articulated, and the Board has not experienced the problems forecasted by the comments. See *Excelsior,* 156 NLRB at 1240 fn. 5 (''In order to be timely, the eligibility list must be *received* by the [r]egional [d]irector within the period required. No extension of time shall be granted by the [r]egional [d]irector except in extraordinary circumstances * * *.'') Accordingly, the Board is not persuaded that it should use different language.

[227] In addition, as noted below, the Board has decided to make it presumptively appropriate to produce multiple versions of the list when the data required is kept in separate databases, thereby reducing the amount of time that employers might need to comply with the voter list requirement.

[228] The *Daniel/Steiny* formula, provides that, in addition to those eligible to vote in Board conducted elections under the standard criteria (*i.e.,* the bargaining unit employees currently employed), unit employees in the construction industry are eligible to vote if they have been employed for at least 30 days within the 12 months preceding the eligibility date for the election and have not voluntarily quit or been discharged, or have had some employment in those 12 months, have not quit or been discharged, and have been employed for at least 45 days within the 24-month period immediately preceding the eligibility date. See *Steiny & Co. Inc.* (''*Steiny*''), 308 NLRB 1323, 1326–27 (1992), and *Daniel Construction Co., Inc. (''Daniel''),* 133 NLRB 264, 267 (1961), *modified,* 167 NLRB 1078, 1081 (1967).

[229] For example, if the person responsible for completing the form needs records stored at a separate location, those records can be faxed (or scanned and then emailed) quickly, and failing access to that technology, a phone call would surely suffice for all but the largest bargaining units.

obstacles to its identification of its own employees.

A number of other comments claim that the 2-day requirement is particularly burdensome for other types of employers either because of the nature of their operation, the types of employees they employ, or the size of their workforces. However, these comments fail to offer any persuasive explanations for why their particular circumstances make compliance with the 2-business day deadline unworkable.

For example, the National Mining Association argues it will be difficult for employers in the mining industry to comply with the time frame for producing the final list because they operate on a 24-hour basis. But the fact that shifts of miners rotate through a mine on a 24-hour basis does not render the employer unable to furnish a list in 2 business days. Similarly, ACE argues that colleges and universities will be particularly burdened because they are decentralized, may include multi-site units, and may have difficulty identifying adjunct faculty or graduate students that a petitioner seeks to organize. The mere fact that an employer is decentralized, or that a party may propose a multi-site unit, does not demonstrate that complying with the new rule is unduly burdensome for colleges and universities. Moreover, as noted above, ACE's concerns about graduate student organization are at best premature.[230] And although ACE contends that gathering detailed information on adjunct faculty would be difficult under the new time frames, it does not deny that gathering such information is feasible under the Board's current requirements and offers no explanation for why the new time frames would prove ''nearly impossible'' to comply with.

Con-way argues that the 2-day period is unworkable in those cases where an employer uses employees provided by a temporary agency, because the employer will be dependent on the temporary agency to supply it with the information. However, it is by no means clear that ''temporary employees'' provided by a third party will as a matter of course even be included in a bargaining unit. See *Oakwood Care Center,* 343 NLRB 659 (2004) (employees of staffing agency may not be included in a unit of another employer's employees unless both employers consent).[231] If the temporary employees are not included in the unit, then the fact that an employer uses employees provided by a temporary agency plainly provides no reason to depart from the timeframes in the rule, for the temporary employees will not need to be included on the list. When a third party's employees are included in the unit, the unit may be a multiemployer bargaining unit or the third party may be found to be a joint employer, and the entities may be jointly charged with filing the list or lists. See, for example, *K-Mart, A Div. of S.S. Kresge Co.,* 159 NLRB 256, 262 n.10 (1966). Accordingly, the Board does not believe this circumstance warrants a blanket exemption.[232]

As for employers with large workforces,[233] the fact that a petitioned-for unit is large does not, in and of itself, make compliance with the rule burdensome for the employer.[234] Significantly, the Board's current rules do not grant employers employing large units more time to produce the *Excelsior* list than employers employing small units. The same advances in technology that reduce the time it takes to transmit the lists from days to seconds apply no less to large employers than to small employers.[235] The same holds true with respect to advances in record keeping technology. Indeed, the comments filed by, and on behalf of, small employers suggest or imply that large employers are more likely than small employers to possess the technology to produce the lists quickly.[236] To the extent that the compilation process takes longer in a larger petitioned-for unit, large employers are more likely to have dedicated human resources professionals on the payroll who can more easily devote the longer period of time to completing the task within the amended time frame.[237] Moreover, large employers, like small employers, can begin preparing the list before the director directs an election. Finally, the Board notes that § 102.67(l) permits a regional director in his direction of election to grant more time to produce the final list in extraordinary circumstances, and employers are free to describe those circumstances to the hearing officer before the close of the hearing when they set forth their positions regarding the election details.

Spartan Motors, Inc. complains that the rule requires employers to produce the information on the voter list within 2 days of receiving a petition. Spartan Motors is mistaken. Thus, an employer need only produce the voter list 2 business days after the director approves an election agreement or directs an election. An employer cannot be compelled to enter into an election agreement 2 days after the petition is filed—or ever. And an election cannot be directed until after a hearing closes, which, of course, will be more than 2 (business) days after the filing of the petition. Indeed, absent agreement otherwise, the hearing will open no sooner than 8 days after service of the notice under the amendments.

Several other comments attack the time frame for producing the voter list on the grounds that it will result in more inaccurate lists and thus more post-election litigation.[238] As already discussed, the Board does not view a 2-business day deadline for production of the list in the modern era as a particularly greater burden than was production of the list in 7 calendar days during the 1960s. Accordingly, the Board is unconvinced that the lists produced under the final rule will tend to be any less accurate than lists produced under *Excelsior*'s original formulation.[239] And given the expanded

[230] As noted above, this issue is currently pending before the Board.

[231] However, we note that there is a case currently pending before us, *Bergman Brothers Staffing, Inc.,* Case No. 05–RC–105509, in which a party is seeking to have us overrule *Oakwood.*

[232] Nor does the Board believe that the fact that an employer relies on a third party to perform its payroll functions warrants a blanket exemption from the 2-business day timeframe. The Board notes in this regard that employers frequently hire third parties to handle such administrative tasks precisely because the third parties are able to perform the administrative tasks more efficiently.

[233] See, *e.g.,* AHCA; Sheppard Mullin; AHA.

[234] This is also true of decentralized businesses, which Con-way argues will also be unduly burdened by the new time frame.

[235] As explained above, the Board does not believe that small employers without the best available technology will be particularly burdened by compiling the list.

[236] See, *e.g.,* Chamber; Chamber reply; SIGMA.

[237] See Testimony of Elizabeth Milito on behalf of NFIB II (clarifying that in her experience as the spokesperson for NFIB, employers of more than 50 employees tend to have dedicated human resources staff).

[238] See, *e.g.,* Pinnacle; ALG; Constangy; LRI.

[239] Neither is the Board convinced that expanding the list beyond names and addresses will create any significant problems for employers in complying with the 2-day time frame. To the extent that aspects of particular industries may present challenges in identifying certain types of the newly required information, the Board believes that these issues can be dealt with in the implementation of the voter list (and related initial employee list) amendments. For example, Maurice Baskin explained that construction industry employees frequently change jobs and job sites, and Doreen Davis explained that retail industry employees frequently change departments or shifts. See Testimony of Maurice Baskin on behalf of ABC II and Doreen Davis on behalf of RILA II. It is the Board's preliminary view that there would be no impediment to employers in such circumstances noting that certain employees' classifications, shifts or locations are variable rather than fixed, providing their current classifications, shifts, and locations,

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ability of petitioners to contact voters by phone and email with the new voter lists, the Board rejects the related comments predicting that list inaccuracies will result in petitioners having less access to voters under the final rule than under the current *Excelsior* rules.[240]

3. Format and Service of List

In the NPRM, the Board proposed that the voter list be provided in an electronic format generally approved by the Board's Executive Secretary unless the employer certifies that it does not possess the capacity to produce the list in the required form, and that the employer serve the voter list on the other parties electronically at the same time it is filed electronically with the regional office. The Board received multiple comments supporting the electronic format and service proposals.[241] These proposals are included in the final rule with the slight modification that the General Counsel is substituted for the Board's Executive Secretary.[242] See amended §§ 102.62(d), 102.67(l).

The Board has concluded that requiring production of the list in electronic form (unless the employer certifies that it does not have the capacity to produce the list in the required form) would further both purposes of the *Excelsior* requirement. The Board has further concluded that requiring the employer to electronically serve the voter list directly on the other parties at the same time the employer electronically files the list with the regional office will likewise further both purposes of the *Excelsior* requirement and eliminate an administrative burden. As set forth in the NPRM, the Board's *Excelsior* rule requires only that the employer file the list with the regional director. 156 NLRB at 1239. *Excelsior* further provides that the regional director in turn shall make the list available to all parties. *Id.* at 1240. This two-step process thus requires the regional office to forward to the other parties the list filed in the regional office by the employer. This two-step process has also caused delay in receipt of the list and unnecessary litigation when the regional office, for a variety of reasons, has not promptly made the list available to all parties. See, *e.g., Ridgewood Country Club,* 357 NLRB No. 181 (2012); *Special Citizens Futures Unlimited,* 331 NLRB 160, 160–62 (2000); *Alcohol & Drug Dependency Services,* 326 NLRB 519, 520 (1998); *Red Carpet Bldg. Maintenance Corp.,* 263 NLRB 1285, 1286 (1982); *Sprayking, Inc.,* 226 NLRB 1044, 1044 (1976). Moreover, some comments also complained about their experiences with delay when employers file the list with the regional office after business hours on a Friday, and the regional office subsequently does not forward the list to the petitioner until the following Monday.[243] The final rule eliminates this unnecessary administrative burden—as well as potential source of delay and resulting litigation—by providing for direct service of the list by the employer on all other parties. See amended §§ 102.62(d), 102.67(l).

Spartan Motors complains that small employers might not maintain their data in electronic form, and therefore they will be burdened by having to produce it in electronic form. The rule, however, exempts employers from having to produce the list in the required electronic format if the employer certifies that it does not have the capacity to produce the list in the required form. Baker & McKenzie questions what evidence an employer must provide to show its inability to produce an electronic list and what criteria the Board will apply in evaluating whether it is feasible for an employer to file and serve the list electronically. The Board does not expect this to be a major topic of litigation, and for that reason, the final rule provides for an employer to certify to the regional director its inability to produce the list in the required form, instead of making a special request that it be allowed to produce an alternative form of the list. The Board trusts that the good faith of employers combined with the reasonableness of the format approved by the General Counsel, will lead to the smooth application of this process.

SEIU II suggests that the Board should require employers to provide their lists in a searchable format to ease the burden on petitioning unions in manipulating the list, and NUHW makes the related suggestion that the Board should require employers to provide the list in the same format to all parties—noting the alleged injustice suffered when NUHW received a voter list in a less useful format than that provided to the Board and to a rival incumbent union. The Chamber II specifically replies to SEIU's suggestion by asserting that providing the list in a searchable format may not be feasible for all employers and so the Board should continue to allow flexibility in the format of the voter list. We think that each of these concerns has merit. Thus, the Board agrees that it would be optimal for parties to provide lists in searchable formats, but acknowledges that may be beyond the technical expertise of certain employers. The Board expects that the General Counsel will establish guidelines that require voter lists in searchable formats where feasible to address the concerns expressed by SEIU and to maintain the necessary flexibility as advocated by the Chamber. The Board further expects that the General Counsel's guidance will require, at minimum, that the voter list be provided in the same format to all parties—including the situation where there are rival incumbent and petitioning unions.

Some comments, including those of SIGMA, suggest that it may take some effort to compile an electronic list using information from multiple databases.[244] SIGMA's point is well taken. The Board does not wish to burden employers with the need to merge electronic files that may be kept in distinct forms or potentially on distinct computer programs. Therefore, it will be presumptively appropriate under the final rule to produce multiple lists when the data are kept in separate files, so long as all of the lists link the information to the same employees using the same names, in the same order and are provided within the allotted time.[245] For example, if an employer keeps information about its employees' work locations, shifts, job classifications, phone numbers and email addresses in a different database

and indicating, if known, where they will be going next. The need to make such a notation should not be particularly challenging to determine within the time frames set forth in the final rule. Contrary to the suggestion of Ms. Davis (*Id.*) and the related question raised by Baker & McKenzie, an employer need not continually revise the initial employee list provided with the Statement of Position or the voter list to reflect changes associated with employee information. However, if there is a change (due to employee turnover or transfer) between the time that the initial employee list and the voter list is provided, then it will be incumbent on employers to update the information at that time of the voter list's filing (and at that time only).

[240] See, *e.g.,* Chamber; Sheppard Mullin.

[241] See, *e.g.,* GAM; UNAC/UHCP II; U.S. Poultry II.

[242] Upon further reflection, the Board has concluded that periodic approval of acceptable electronic formats for the voter list would be a more appropriate role for the agency's General Counsel, given the General Counsel's traditional duty of overseeing the agency's regional staff as they carry out the bulk of the Board's representation case procedures, including the handling of the voter list.

[243] See Testimony of Darrin Murray on behalf of SEIU II; SEIU II.

[244] See, *e.g.,* Indiana Chamber; Vigilant; AHA; COSE.

[245] The Board believes that this aspect of the final rule effectively answers AHA's argument that employers in the healthcare industry, who are obligated to upgrade information technology systems and bring down patient costs under other regulations, will be unduly burdened by the voter list timing requirements.

from the database containing its employees' home addresses, then the employer can produce an alphabetized list of employees and their home addresses and a second alphabetized list of employees and their work locations, shifts, job classifications, phone numbers and email addresses so long as both lists are provided within the allotted time.

The Washington Farm Bureau requests that employers be allowed to choose whether to submit the information in electronic or hardcopy form. The Board thinks that the two purposes of *Excelsior* are better served by requiring the electronic form, rather than leaving the choice of format to an employer's discretion, provided of course that the employer has the capacity to produce the list in the required electronic form.

The Board also rejects the Chamber's II prediction that electronic service of the list will ''invite abuse of the system and unauthorized use of the information contained'' on the list.[246] As discussed above, we see no reason for assuming that ''a union, seeking to obtain employees' votes in a secret ballot election, will engage'' in abusive behavior. *Excelsior,* 156 NLRB at 1244. Although the Board recognizes that whenever information is conveyed in an electronic format, there is a heightened risk of inadvertent dissemination or unauthorized access by third parties, in today's modern workplaces, however, it is simple enough to turn any paper document into an email attachment. So, the Board fails to see how any dangers of misuse—real or imagined—will be avoided simply by requiring parties to continue to use slower and more expensive forms of communication when filing the list with the regional director and transmitting it to the petitioner.

The Board likewise rejects Vigilant's suggestion that, rather than have the employer serve the list on the other parties, the Board serve the list on the parties after the employer has filed the list with the Board. Vigilant asserts that such an intermediate step would allow for correction of errors or omissions, but as discussed above, such an intermediate step is currently in place and has caused avoidable delay, administrative burden, and unnecessary litigation. Moreover, the Board is not persuaded that employers generally need the Board's help to ''proof'' the lists they produce from their own records or that the Board could provide meaningful assistance in this regard as it is not the employer of the employees at issue.

The Board also disagrees with INDA II's reasoning for maintaining the current two-step procedure. INDA, and others, alleges that it is appropriate to keep the burden of serving the voter list on petitioners with the regional staff, whose profession is administering the Act, and that more errors and litigation are likely to ensue by shifting the burden to employers, many of whom will have had no prior experience with the Board's representation case processes. While the Board certainly credits the statement that many employers are not repeat players in representation case proceedings and thus may be initially unfamiliar with the requirements, the final rule takes steps to remedy any ignorance on the part of employers by sending out a detailed explanation of those procedures as part of the first official communication that an employer will receive from one of the agency's regional offices. That explanation will cover the employer's eventual responsibility to serve a voter list on the nonemployer parties to the case (using the contact information listed on the face of the petition or provided in a Statement of Position or at the hearing) at the same time the employer files the list with the regional office. Furthermore, the Board believes that employers will typically have a wealth of experience sending important documents to entities outside of their organization, and should not be particularly challenged by emailing the voter list to the nonemployer parties' email addresses at the same time they email the list to the regional offices. Indeed, this task could be completed by transcribing the email address for the nonemployer party onto the recipient line of the same email bound for the regional office.[247]

At least one comment (Sheppard Mullin II) raises the concern that rule language stating that an employer's failure to file a timely list in a proper format ''shall be grounds for setting aside the election whenever proper objections are filed'' signals an inappropriate departure from prior Board law governing whether an employer has sufficiently complied with its *Excelsior* obligations. To the contrary, while the final rule changes an employer's obligations concerning the content, timing, and format of the voter list, the Board does not hereby overrule extant law interpreting whether an employer's efforts at compliance fall sufficiently short to justify setting aside an election's result. The quoted language above is taken directly from the original *Excelsior* decision itself, 156 NLRB at 1240, and has not impeded the Board from adding fact-specific glosses to whether the requirement was sufficiently met. See, *e.g., North Macon Health Care Facility,* 315 NLRB 359 (1994).[248]

Other comments suggest additional alterations to the voter list rules to protect employers who accidentally produce inaccurate lists. For example, ACE submits that the Board should automatically excuse inaccurate lists in large units when petitioners are unable to show an employer's intent to manipulate the process. The Board declines to adopt these suggestions. As discussed above, the Board continues to agree with existing precedent on *Excelsior* compliance, and does not intend to limit the discretion of future Boards to apply adjudicative glosses to the rule based upon a variety of fact patterns yet to arise.[249]

Holland & Knight questions if it will be objectionable for an employer to omit from the voter list the contact and other information of employees whose eligibility is disputed. As discussed more fully below in connection with § 102.67, the answer is ''yes.'' Prior to the NPRM, parties could agree that

[246] Although the Chamber II's comment suggests that service of the eligibility list via email invites abuse, other comments from a cross-section of interested groups applaud the provision for electronic service of the list when feasible. See *e.g.,* GAM, Buchanan.

[247] To the extent that INDA II also argues that the age of the cases cited in the NPRM demonstrate that there are no contemporary problems occasioned by regional service of the voter list following its filing by an employer, the Board notes the recent case of *Ridgewood Country Club,* 357 NLRB No. 181 (2012), where we were again called upon to set aside an election due to regional office failures in transmitting the list to a petitioner.

[248] However, the Board has decided to slightly modify the NPRM language regarding the consequences for noncompliance with the voter list amendments to track the language from pre-existing § 103.20 with respect to the consequences for noncompliance with the obligation to post what was called prior to the NPRM,'' the Board's ''official Notice of Election.'' Thus, amended § 102.62(d) and § 102.67(l) shall provide in pertinent part that ''The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper *and timely* objections are filed.'' (emphasis added)

[249] The Board likewise disagrees with Karatinos' complaint that ''there is no downside [under the proposals] to an employer producing an *Excelsior* list riddled with inaccuracies.'' As noted, just as was the case under the prior rules, the Board may set aside an election in which the union failed to obtain a majority of the valid votes cast if the employer's voter list was ''riddled with inaccuracies.'' See, *e.g., Woodman's Food Markets,* 332 NLRB 503 (2000) (noting that the Board considers the percentage of names omitted, whether the number of omissions is determinative in the election, and the employer's reasons for the omissions); *Automatic Fire Sys.,* 357 NLRB No. 190 (2012) (applying this test and ordering a rerun election).

certain classifications or employees be permitted to vote subject to challenge just as a regional director could direct that certain classifications or employees be permitted to vote subject to challenge. See, *e.g.,* Casehandling Manual Sections 11084.3 and 11338.2(b). In such cases, the employer was advised to provide the names and home addresses for such individuals on the *Excelsior* list. Similarly, the final rule requires the employer to provide the information for such individuals on the voter list. However, as discussed more fully below in connection with § 102.67, in order to ensure that the Board agent and the parties' observers will properly process employees who were directed to vote subject to challenge (or were permitted to vote subject to challenge by agreement of the parties), the final rule requires the employer to provide the names and related information about such employees in a separate section of the list.

4. Restriction and Remedies for Misuse of the Voter List

In the NPRM, the Board proposed a restriction on the use of the voter list—barring parties from using it for any purposes other than the representation proceeding and related proceedings—and sought comments regarding what, if any, the appropriate remedy should be for a party's noncompliance with the restriction.[250]

Many comments address the proposed restriction and potential consequences of noncompliance. At the outset, labor organizations' comments point out that *Excelsior* did not contain any express restriction language and generally agree that the lack of historical evidence of *Excelsior* list abuses undercuts the need for any restriction.[251] In contrast, other comments envision, as discussed above, a wide variety of potential misuses should the Board implement its voter list proposal.[252]

Other concerns are shared by both labor organizations and employer associations. For example, some comments, such as those from the Chamber and SEIU, focus on the lack of clarity as to what activity would be encompassed by the restriction (*i.e.,* what activity falls outside of ''using the list''), while others, such as PCA's and UFCW's, assert that the Board could not effectively police any restriction it imposed, or that any remedy would be de minimis with regard to the damage done (CNLP; NRTW). The National Education Association Staff Organization concludes that the restriction and remedy proposals would simply create more litigation concerning matters which the Board, in contrast to law enforcement and the civil courts, is ill-equipped to handle. Additionally, other comments complain that the proposed restriction is unclear as to what counts as ''the representation proceeding and related proceedings.'' [253] In this regard, the Indiana Chamber worries that this phrase is overbroad, whereas by contrast, SEIU expresses concern that it will prove too narrow and restrictive of lawful union activity.

Nevertheless, many employer associations' comments propose a range of remedies including: Setting aside elections, temporary bans on organizing, letters of apology, monetary penalties, referral to law enforcement where criminal conduct has occurred, and pursuing injunctive relief against the restriction's violators.[254] Meanwhile, labor organizations' comments stress that any sufficiently weighty remedy threatens to unfairly penalize employees for the misdeeds of labor organizations [255] and question whether the Board has ''appropriate remedial authority to address such circumstances.'' [256] In further contrast, the Chamber suggests that remedies should be ''no fault'' (applying to any misuse of the list, regardless of the petitioner's intent), while the UFCW urges that the Board limit any remedy to ''clearly defined circumstances involving willful and egregious noncompliance with the rule.''

After careful consideration of the comments, the Board has slightly modified the proposed restriction language. The final rule shall read in relevant part: ''The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.'' See amended §§ 102.62(d), 102.67(l). This change sufficiently clarifies the circumstances under which unions may use the list, balancing both privacy concerns and the interests, noted above, in the fair and free choice of bargaining representatives and the expeditious resolution of questions concerning representation.

The restriction language will plainly allow the nonemployer parties to use the contact information to provide employees with information regarding the election and to investigate eligibility issues. Parties can also use the information on the list for such purposes as investigating challenges and objections and preparing for any post-election hearings on determinative challenges and/or objections. Parties may likewise use the information on the list in connection with unit clarification proceedings to decide the status of individuals whose status was not determined by the regional director or the Board or who voted subject to challenge in an election but whose ballots were not determinative. See Casehandling Manual Section 11490.1. Parties may also use the information on the list to investigate, and prepare for hearings regarding, unfair labor practice charges concerning the employer's employees that are filed before or after the election takes place. And, just as is the case currently, if post-election objections are filed, a union (or decertification petitioner) could continue to use the list to maintain their support and to campaign for votes in connection with any rerun election that is held. In each of these examples, the nonemployer parties would be using the list for purposes of the representation proceeding, Board proceedings arising from it, and related matters. At the same time, the Board believes it goes without saying that nonemployer parties would run afoul of the restriction if, for example, they sold the list to telemarketers, gave it to a political campaign or used the list to harass, coerce, or rob employees.[257]

[250] Although the NPRM used the term ''sanction,'' this usage was inapt because of its punitive connotation. *See Republic Steel Corp.* v. *NLRB,* 311 U.S. 7, 10–13 (1940) (explaining that the NLRA is essentially remedial).

[251] See, *e.g.,* AFL–CIO II; UFCW; NNU.

[252] See, *e.g.,* PCA (union selling employee information); NRTWLDF (harassment, identity theft, property crime); David Holladay II (threats to spouse or children).

[253] See, *e.g.,* Chamber; UFCW; Testimony of Thomas Meiklejohn on behalf of Livingston, Adler, Pulda, Meiklejohn & Kelly.

[254] See, *e.g.,* Chamber II; SHRM II; AGC; ALG; Indiana Chamber; CDW. Other comments propose less concrete remedies, such as ''affirmative steps to remedy misuse'' (SHRM) or ''severe'' consequences (Anchor Planning Group; LRI). On a slightly different note, in order to prevent misuse to begin with, NRTWLDF suggests that unions not be allowed to withdraw petitions once filed, and Anthony Benish suggests that a union be barred from filing another petition at that employer for one year after withdrawing a petition. The potential for the supposed abuses NRTWLDF and Benish seek to prospectively remedy already exists. Without any evidence of such risks regularly materializing and negatively affecting employees, the Board sees no need to change current practices. As shown, regional directors already have discretion to reject a petitioner's' request to withdraw its petition if the request would run counter to the purposes of the Act or to approve the withdrawal with prejudice to refiling. See Casehandling Manual Sections 11110, 11112, 11113, 11116, 11118.

[255] See, *e.g.,* SEIU (reply); UFCW.

[256] See AFL–CIO. AFL–CIO further points out that non-Board remedies are already available for the possible misuses identified by opponents of the rule.

[257] It is conceivable, as the Indiana Chamber comments, that a party alleged to have misused the list might claim in its defense that it managed to

While the Board thinks it is self-evident that misuse of the voter list that adversely affects unit employees should result in some remedy, the Board has concluded that it would not be appropriate at this time to specify a remedy, or set of remedies, that would be applicable in all situations. The Board notes in this regard that while the *Excelsior* Board stated that it would ''provide an appropriate remedy'' if a union used the list to harass or coerce employees (*Excelsior,* 156 NLRB at 1244), the *Excelsior* Board did not specify the remedies it would provide. Like the *Excelsior* Board, we will leave the question of remedies to case-by-case adjudication.

For example, the Board rejects the notion advanced in some comments [258] that misuse of the voter list should always warrant setting aside the results of an election won by the party misusing the list. As noted below in connection with §§ 102.64 and 102.66, the purpose of the election is to answer the question of representation. For example, the purpose of an election in an initial organizing case is to determine whether employees in an appropriate unit wish to be represented for the purposes of collective bargaining by the petitioner. There is a strong presumption that ballots cast in a secret ballot election reflect the true desires of the participating employees. Accordingly, the burden is on the objecting party to demonstrate that the election results ''did not accurately reflect the unimpeded choice of the employees.'' *Daylight Grocery Co., Inc.* v. *NLRB,* 678 F.2d 905, 909 (11th Cir. 1982). A party seeking to overturn the outcome of an election based on another party's conduct has the burden of showing not only that the conduct complained of occurred, but also that it ''interfered with the employees' exercise of free choice to such an extent that it materially affected the [results of the] election.'' *C.J. Krehbiel Co.* v. *NLRB,* 844 F.2d 880, 882 (D.C. Cir. 1988). Accord *Amalgamated Clothing Workers of America* v. *NLRB,* 424 F.2d 818, 827 (D.C. Cir. 1970). The Board has indeed set aside elections when union coercion resulted in objections to an election that were sustained.

But not every misuse of the list can be said to have interfered with employee free choice in the election, let alone be said to have materially affected the results of the election. For example, if a union misuses the list *after* the election, by, for example selling the list to telemarketers, the misuse could not possibly have affected employee free choice in the election because the misconduct occurred after the election. Even if the union were to sell the list before the election, it could not be said to have impeded employee free choice if no employee knew about it. Setting aside the results of the election in such circumstances would interfere with employee free choice and would be contrary to the Act's policy in favor of industrial stability. Accordingly, while the Board certainly does not wish to convey that a party's misuse of the voter list could never warrant setting aside an election, the Board does not feel that it is appropriate to adopt a rule that would set aside election results in every case where the union chosen by employees misused the list in some way. At the same time, the fact that misuse of the list could not warrant setting aside the results of an election does not mean that the misuse should not be remedied in a manner appropriate to the circumstances.

Similarly, the Board concludes that it would not be appropriate to adopt a per se rule that would bar a labor organization from engaging in future organizational drives whenever (and however) the labor organization misused the list, for such a remedy would interfere with the right of employees to petition for a specific labor organization to represent them.[259]

The Board also declines to adopt a rule that would require the General Counsel to seek injunctive relief in Federal district court whenever a party misuses the list. Injunctive relief is not the norm in our system, and while the Board does not wish to rule out seeking injunctive relief in an appropriate case, it does not believe that seeking such relief as a matter of course would necessarily be appropriate.[260]

AGC suggests that misuse of the voter list should be deemed a violation of Section 8(a)(1) or 8(b)(1). The Board rejects this suggestion at this time for reasons similar to those that led us to reject the suggestion that any misuse should warrant setting aside the election results. There may be situations in which the Board finds that a party has misused the voter list in violation of Section 8(a)(1) or 8(b)(a). Even if no such violation is found, the misuse may constitute objectionable conduct, which could trigger a new election. The Board believes that case-by-case adjudication is the appropriate way to consider circumstances in which a remedial order is appropriate so that it can tailor its order to the specific misuse and ensure that the remedy it imposes is effective. As with all of the foregoing proposals, the point is that in determining the appropriate remedy for a proven misuse, the Board believes that it is appropriate to consider all the circumstances and provide a remedy, where appropriate, which is tailored to the misconduct found to have been committed.

MEMA II argues that any restriction must be accompanied by requiring advanced security protocols to be implemented by petitioning unions, and cites as models the regulatory regimes developed under the Gramm-Leach-

obtain the information independently of the employer's provision of the list, and therefore that it was not ''using'' the list when it engaged in the challenged conduct. That issue, like so many other issues, raises a question of fact for the factfinder.

[258] See, *e.g.,* Chamber; Indiana Chamber.

[259] Nor is it at all clear whether the Board even possesses the requisite statutory authority to ban a union from filing future representation petitions because of previous misbehavior. In any event, the Board has long been loath to restrict employee free choice with respect to union representation on the basis of union misconduct. See *Alto Plastics Mfg. Corp.,* 136 NLRB 850, 851 (1962) (''[I]nitially, the Board merely provides the machinery whereby the desires of the employees may be ascertained, and the employees may select a 'good' labor organization, a 'bad' labor organization, or no labor organization, it being presupposed that employees will intelligently exercise their right to select their bargaining representative.''); *Handy Andy, Inc.,* 228 NLRB 447, 454–56 (1977) (rejecting employer's argument that a union's practice of race discrimination preclude it from being certified as an exclusive bargaining representative).

Nevertheless, § 102.177 of the Board's Rules and Regulations appears broad enough to cover an attorney's or party representative's failure to abide by Board rules, including the rule announced today regarding misuse of the voter list, depending on the facts and circumstances of the violation. See § 102.177(d) (''Misconduct by an attorney or other representative at any stage of any Agency proceeding, including but not limited to misconduct at a hearing, shall be grounds for discipline. Such misconduct of an aggravated character shall be grounds for suspension and/or disbarment from practice before the Agency and/or other sanctions.'') Moreover, if violations of the voter list restrictions should occur that do not fall within the provisions of § 102.177, the Board may look to amend that provision in the future.

[260] Similarly, the Board hesitates to adopt a rule that would require parties in all cases to apologize for misusing the list. An apology would amount to an admission of guilt. Regional Directors, acting on behalf of the General Counsel, regularly approve settlements involving alleged unfair labor practices—even though the settlements contain non admissions clauses—where they conclude that the settlements effectuate the policies of the Act. The Board does not wish to preclude regional directors from resolving cases involving alleged misuse of voter lists in a manner the directors deem acceptable merely because the parties alleged to have misused the lists refuse to admit to having done so.

As for monetary sanctions, the Board observes that while it does have the authority to make employees whole for their losses, it lacks authority to impose penalties, as noted above. Accordingly, the Board does not believe that a monetary sanction will be appropriate in all cases of voter list misuse. Regarding CDW's suggestion that the Board refer criminal conduct to law enforcement authorities, the Board observes that under Casehandling Manual Section 11029.3, the Agency already forwards evidence of forgery to the appropriate law enforcement authorities.

Bliley Act (''GLBA''), 15 U.S.C. 6801, the Health Insurance Portability and Accountability Act (''HIPAA''), 42 U.S.C. 1320d, and the Fair Credit Reporting Act (''FCRA''), 15 U.S.C. 1681a. We disagree. The personal information at issue in those statutes is far more sensitive than what will be disclosed as part of the voter list amendments we announce today. We do not believe that we can rationally equate the financial and health-related information regulated by those statutes with employee contact information, and identification of their work location, shift, and job classification.[261] In addition, MEMA's comment loses sight of the fact that the nonemployer party who receives the list in a given case may not be a large sophisticated institution like an international union, but might be an unsophisticated individual who files a decertification petition. Thus, in addition to the information's relative lack of sensitivity, the Board believes that it would be unrealistic to think that it could require individual employees or small labor organizations to—as advocated by MEMA—designate a security officer or develop a written security program.

Finally, regarding a petitioner's retention of the information after a representation campaign ends, the Board observes that petitioners are currently entitled to retain the list indefinitely under *Excelsior,* and, as shown, there are certainly legitimate reasons why petitioners might use the list after the election. Moreover, the Board does not believe that a petitioner's retention of the information on the list would implicate any privacy concerns beyond those implicated by the initial disclosure under *Excelsior.* The Board therefore declines the suggestion that petitioners be required to destroy voter list information after a set period of time or upon an individual employee's request.[262] We reiterate, however, that the Board will provide an appropriate remedy under the Act if misconduct is proven and it is within the Board's statutory power to do so. In addition, individuals may have recourse in other judicial fora.[263]

5. Waiver

Although the proposed regulatory language did not explicitly so state, the preamble section to the NPRM indicated that consistent with existing practice, reflected in *Mod Interiors, Inc.,* 324 NLRB 164 (1997), and Casehandling Manual Section 11302.1, and as recently noted by the Board in *The Ridgewood Country Club,* 357 NLRB No. 181, n.8 (2012), an election shall not be scheduled for a date earlier than 10 days after the date by which the voter list must be filed and served, unless this requirement is waived by the parties entitled to the list.

SEIU urges that instead of requiring the employer to provide the voter list to the union within 2 days after the direction of election with the ensuing 10-day pre-election period, the Board should require the employer to provide a ''preliminary'' list of employees (including contact information) to the union within 2 days after it receives the union's election petition, and to update this list as necessary at the pre-election hearing. SEIU points out that if this alternative requirement were imposed, the 10-day practice would be largely unnecessary since the union would have obtained the voter list at an earlier point in the process. SEIU also requests that a post-direction period of up to 10 days be available for the union to contact any employees who were added to the list at the pre-election hearing. However, the *Excelsior* Board justified the required disclosure in part because the interest in the fair and free choice of a bargaining representative must be deemed substantial when the regional director has *found* that a question of representation exists or the employer *admits* that such a question exists by entering into an election agreement. See *Excelsior,* 156 NLRB at 1245. Absent an election agreement, however, the director cannot find that a question of representation exists and direct an election until the hearing closes. Under the final rule, the hearing ordinarily will open 8 days after service of the notice. Accordingly, the Board rejects SEIU's request that the employer be required to furnish the other parties with the employee contact information 2 days after the filing of the petition—*i.e.,* before either the director has found that a question of representation exists or the employer has admitted such a question of representation exists.

ALFA and SHRM assert that the waiver of the 10-day period should not be permitted on the grounds that the 10-day period is provided for the benefit of employees rather than unions, and that the 10-day period is always necessary to permit employees to receive information from their employers. In this respect, these comments assert that a waiver of the 10-day period contributes to the overall shortening of the period between the filing of a petition and the election effected by the rule amendments, which they oppose. SHRM, quoting *Excelsior,* emphasizes the priority of avoiding ''a lack of information with respect to one of the [ballot] choices available.''

However, the comments take the quoted language out of context: The Board imposed the requirement on the employer to disclose the list of employee names and addresses in order to maximize the likelihood that the voters will be exposed to the *nonemployer parties' arguments.* Thus, as shown, the *Excelsior* Board observed (156 NLRB at 1240) that in contrast to the union, ''[a]s a practical matter, an employer, through his possession of employee names and home addresses as well as his ability to communicate with employees on plant premises, is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation.'' The Board went on to note that ''by providing all parties with employees' names and addresses, we maximize the likelihood that all of the voters will be exposed to the arguments for, as well as against, union representation.'' *Id.* at 1241. Similarly, in upholding the requirement, the Supreme Court reasoned that the disclosure requirement allows ''unions the right of access to employees that management already possesses.'' *NLRB* v. *Wyman-Gordon Co.,* 394 U.S. at 767. The *Excelsior* rule was accordingly found

[261] The legislative and administrative histories of the GLBA, the HIPAA and the FCRA support our position that financial and medical information is special and requires a closer degree of protection than other types of information. See, *e.g.,* U.S. Sen. Conrad Burns Holds Hearing on Privacy on the Internet Before Sen. Subcomm. on Commc'ns, 106th Cong. 1999 WL 542117 (1999) (''Last week we unanimously testified in favor of legislation that would protect the privacy of financial records, because financial records are different. I would say the same thing about medical records.''); Standards for Privacy of Individually Identifiable Health Information, 64 FR 59918, 59919–20 (proposed November 3, 1999) (codified at 45 CFR parts 160 and 164) (discussing why medical records specifically warrant privacy protections); *Statement of Mr. Stephen Brobeck Before H. Comm. on Fin. Servs.,* 2003 WL 21541527 (2003) (discussing the need for revisiting and expanding the privacy protections in the FCRA because of the exceptional nature of financial information); see also Fact Sheet on Fin. Privacy and Consumer Prot., 1999 WL 270108 (1999) (discussing need to protect medical and financial information due to their particularly private and important natures).

[262] See, *e.g.,* Chamber; Daniel Wroblewski.

[263] To be clear, the Board will not abdicate its responsibility to utilize its statutory authority to remedy any misuse that may occur following implementation of the voter list amendments merely because the possibility of remedial authority exists under a separate civil or criminal statutory scheme. Indeed, the Board remains mindful of the possibility raised by J. Aloysius Hogan (Testimony on behalf of the Competitive Enterprise Institute II) that the voter list amendments could be found by a court to preempt state statutes that might otherwise provide breach of privacy remedies. Nevertheless, the Board is unprepared at this time to say that no set of future circumstances will be appropriate for the Board to defer remediation to another state or Federal judicial forum, and it cannot assume that every statute potentially relevant to misuse of the voter list will be preempted.

necessary to provide the *nonemployer* parties with an opportunity to communicate its message at least to the extent of having access to employees' names and home addresses. Neither the employer's nor the employees' interest is compromised by the union's exercise of the waiver of the 10-day period, since that results in a reduction only of the union's opportunity to further communicate with employees; and the union can be expected to exercise the waiver only when it is confident that employees have heard its message. The objection that a waiver of the 10-day period shortens the opportunity for employers to communicate with employees is therefore relevant not to the union's use of the *Excelsior* list, but rather to the other rule amendments at issue here. That objection is addressed in connection with The Opportunity for Free Speech and Debate above.

SHRM also contends that if the waiver is retained, the waiving party should be treated as also waiving the right to file election objections based on the voter list, any failure of the employer to properly post election notices, ''and any other potential procedural objection.'' We are not persuaded by the suggestion that nonemployer parties should not be permitted to waive all or part of the 10-day period to use the list unless they also agree to waive objections to an employer's failure to fulfill its obligations under the Board representation case rules. For example, the fact that a union believes that it needs only 5 days to communicate with the electorate if the employer furnishes it with an *accurate* list of the eligible voters' contact information certainly does not mean that the union has agreed that it only needs 5 days to communicate if the employer furnishes it with an *inaccurate* list of the eligible voters' contact information. Accordingly, a union should not be deemed to have waived its right to object to an employer's failure to provide an accurate voter list merely because it waived its right to use the list for the full 10-day period. Similarly, that a union agrees to waive part of the time for using the voter list certainly does not mean that a union should be held to have forfeited its right to object if the employer alters, or fails to post, the Board's election notice and thereby misleads, or fails to inform, employees as to the election details. In sum, although the final rule does not so state, we reiterate that consistent with current practice, an election shall not be scheduled for a date earlier than 10 days after the date by which the voter list must be filed and served, unless this requirement is waived by the parties entitled to the list.

Sec. 102.63 Investigation of Petition by Regional Director; Notice of Hearing; Service of Notice; Notice of Petition for Election; Statement of Position; Withdrawal of Notice of Hearing

A. Introduction and Overview of Changes From NPRM

The Board proposed in the NPRM that, absent special circumstances, the regional director would set the hearing to begin 7 days after service of the notice of hearing. The Board further proposed that, with the notice of hearing, the regional director would serve the petition, the ''Initial Notice to Employees of Election,'' the description of procedures in representation cases, and the Statement of Position form on the parties. The NPRM also proposed that the regional director specify in the notice of hearing the due date for Statements of Position, which would be due no later than the date of the hearing. The Board specifically sought comments on the feasibility and fairness of these time periods and the wording and scope of the exceptions thereto. 79 FR 7328.

The Board received a great number of comments about these matters. Comments criticizing the Statement of Position form attacked the scope of the information solicited by the form [264] and the due date for its completion,[265] as well as its binding nature and the consequences of failing to complete it.[266] Comments also criticized the proposed time frame for the pre-election hearing [267] and the wording and scope of the exceptions thereto.[268] Comments praising the proposals argued that the Statement of Position form and proposed time frames largely mirror best existing casehandling practices.[269] However, some of these comments suggested that the Board require completion of the Statement of Position form even earlier.[270]

The Board has carefully considered the comments and, as explained more fully below, has decided to adopt the proposals with certain significant changes:

(1) Except in cases presenting unusually complex issues, the regional director will set the hearing to open 8 days—rather than 7 days—from service of the notice of hearing excluding intervening Federal holidays. However, the regional director may postpone the opening of the hearing up to 2 business days upon request of a party showing special circumstances, and for more than 2 business days upon request of a party showing extraordinary circumstances. Accordingly, parties will have at least 8 days notice of the hearing.

(2) The Statement of Position will be due at noon on the business day before the opening of the hearing if the hearing is set to open 8 days from service of the notice of hearing. Although the regional director may set the due date for the position statement earlier than at noon on the business day before the hearing in the event the hearing is set to open more than 8 days from the service of the notice, parties will have 7 days notice of the due date for completion of the Statement of Position form in all cases. The Statement of Position form will be due no later than at noon on the business day before the hearing so that it may serve its intended purposes of facilitating entry into election agreements and narrowing the scope of any hearing that must be held, thereby enabling the Board to expeditiously resolve questions concerning representation.[271]

(3) In the event the employer contends as part of its Statement of Position that the proposed unit is not appropriate, the employer will not be required to identify the *most similar* unit that it concedes is appropriate or provide information about the employees in such a unit. However, the employer will be required to state the basis for its contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it *an* appropriate unit, and the employer will be required to disclose information about the individuals in the classifications, locations, or other employee groupings that the employer contends must be added to the proposed unit to make it an appropriate unit, so that the petitioner will be able to evaluate the employer's position and decide whether to amend its petition to conform to the unit proposed by the employer.

[264] See, *e.g.,* ACC; Chamber; Chamber II; NAM; NAM II.

[265] See, *e.g.,* COLLE; Indiana Chamber; NAM; Chamber Reply; Chamber II.

[266] See, *e.g.,* Chamber; Chamber II; NRF; MEMA.

[267] See, *e.g.,* Washington Farm Bureau; CDW; ACC.

[268] See, *e.g.,* Testimony of Russ Brown on behalf of LRI; Chamber Reply.

[269] See, *e.g.,* AFL–CIO; AFL–CIO Reply; AFL–CIO II; SEIU; NELP.

[270] See, *e.g.,* SEIU and UFCW.

[271] Just as is the case with respect to the opening of the hearing, the regional director may postpone the due date for filing and service of the Statement of Position up to 2 business days upon request of a party showing special circumstances, and for more than 2 business days upon request of a party showing extraordinary circumstances.

(4) The final rule will not require the employer to disclose as part of its Statement of Position any contact information for employees in the proposed unit or for employees in any alternative unit proposed by the Employer.

(5) The final rule clarifies the required Statements of Positions in RM and RD cases to make them parallel to the required Statement of Positions in RC cases, which will facilitate entry into election agreements and narrow the scope of pre-election hearings in those cases.

(6) The final rule states explicitly that the regional director may permit parties to amend their Statements of Position in a timely manner for good cause.

(7) The final rule also retitles the proposed ''Initial Notice to Employees of Election'' as the ''Notice of Petition for Election,'' and clarifies that within 2 business days after service of the notice of hearing, the employer shall post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and shall also distribute it electronically if the employer customarily communicates with its employees electronically, and that failure to do so may be grounds for setting aside the election.

B. Statement of Position Form

The Board proposed in the NPRM that the Statement of Position form would solicit the parties' positions on the Board's jurisdiction to process the petition; the appropriateness of the petitioned-for unit; any proposed exclusions from the petitioned-for unit; the existence of any bar to the election; the type, dates, times, and location of the election; and any other issues that a party intends to raise at hearing. In those cases in which a party takes the position that the proposed unit is not an appropriate unit, the party would also be required to state the basis of the contention and identify the most similar unit it concedes is appropriate. In those cases in which a party intends to contest at the pre-election hearing the eligibility of individuals occupying classifications in the proposed unit, the party would be required to both identify the individuals (by name and classification) and state the basis of the proposed exclusion, for example, because the identified individuals are supervisors. Finally, parallel to the proposed amendment to the contents of petitions described in relation to § 102.61 above, the non-petitioning parties would be required to designate, in their Statement of Position, the individual who will serve as the party's representative in the proceeding, including for service of papers. 79 FR 7328.

The NPRM also proposed that, as part of its Statement of Position, the employer would be required to provide a list of all individuals employed by it in the petitioned-for unit. The list would include the same information described in relation to proposed § 102.62 except that the list served on other parties would not include contact information. If the employer contends that the petitioned-for unit is not appropriate, the NPRM proposed that the employer also would be required to file and serve a similar list of individuals in the most similar unit that the employer concedes is appropriate. 79 FR 7328–7329.

Under the proposed amendments, the list filed with the regional office, but not the list served on other parties, would also contain available email addresses, telephone numbers, and home addresses. The regional office could then use this additional information to begin preparing the electronic distribution of the Notice of Election discussed in relation to proposed § 102.67. 79 FR 7329.

As set forth in the NPRM, completion of the Statement of Position form would be mandatory only insofar as failure to timely file it would preclude a party from raising issues, such as the appropriateness of the unit, and participating in their litigation. A party would also be precluded from litigating most issues that it failed to raise in a timely filed Statement of Position. However, a party would not be precluded from contesting the Board's statutory jurisdiction to process the petition, or from challenging the eligibility of a particular voter during the election. 79 FR 7328, 7329, 7330, 7358.

The NPRM set forth the Board's view that the information requested by the Statement of Position would facilitate entry into election agreements and narrow the scope of pre-election hearings in the event parties are unable to enter into such agreements. The Statement of Position form would guide prehearing preparation, thereby reducing the time and other resources expended in preparing to participate in representation proceedings. The NPRM also explained that parties who enter into one of the forms of election agreement described in § 102.62 prior to the due date for completion of the Statement of Position would not be required to complete the Statement. 79 FR 7328–29.[272]

The NPRM provided that the Statement of Position would be due no later than the date of the hearing. 79 FR 7328. Some comments in favor of the Statement of Position argue that if the statement is to fulfill its intended purposes, then parties should be required to complete and serve it before the hearing. UFCW; SEIU; Testimony of Melinda Hensel on behalf of IUOE, Local 150 II. We agree. Requiring completion and service of the Statement of Position such that it is received by the parties named in the petition and the regional director at noon on the business day before the opening of the hearing will help facilitate meaningful negotiations concerning election agreements and will narrow the scope of preelection hearings in the event parties are unable to enter into election agreements. If the Statement of Position were not due until the opening of the hearing, then an employer would not need to disclose the information required by the form to the petitioner until the hearing actually opened. As more fully explained below, this would mean that if, as is often the case, the parties attempted to negotiate an election agreement before the opening of the hearing, the petitioner would lack much of the information necessary to intelligently evaluate the merits of the employer's positions. In fact, the parties to a representation case frequently attempt to negotiate election agreements the day before a hearing opens as the immediate prospect of litigation—and its attendant costs—serves to focus the parties' attention on the matter at hand. Accordingly, requiring the filing and service of the Statement of Position at noon on the business day before the opening of the hearing should help the parties negotiate election agreements at a time when they typically are actively engaged in doing that very thing.

Requiring filing and service of the Statement of Position at noon on the business day before the opening of the hearing will also help the parties narrow the scope of the hearing in the event parties are unable to enter into election agreements, thereby saving party and government resources. For example, even if the parties are unable to enter into an election agreement, the Statement of Position will enable the parties to know which issues will actually be contested at the hearing, so that it can run more smoothly and efficiently. In addition, as Caren Sencer testified on behalf of Weinberg, Roger &

[272] The Board believes that parties may be able to enter into election agreements without awaiting completion of the Statement of Position when the petitioned-for unit is presumptively appropriate and when the nonemployer parties to the case are confident they are familiar with all the employees.

Rosenfeld II by enabling the parties to know what the disputed issues are prior to the day the hearing opens, the requirement of a Statement of Position could result in parties' needing to pull fewer employees from the workplace to testify at the preelection hearing, which could result in fewer disruptions to the employer's business.[273]

The *Croft* Board held that 5 days (excluding intervening weekends and holidays) constituted sufficient notice for an employer to prepare for a hearing. *Croft Metal, Inc.,* 337 NLRB 688, 688 (2002). As explained below, the Board believes that the Statement of Position form largely requires parties to do what they currently do to prepare for a pre-election hearing.'' [274] Accordingly, under amended § 102.63(b)(1–3), a party will be provided with 7 calendar days (5 business days) notice of the due date for completion of the form, and the hearing will ordinarily be set for 8 days from service of the notice so that the parties have approximately 1 business day to use the information on the form before the hearing opens.

Although many employer comments attack the time frame for completion of the Statement of Position form, its binding nature, and the consequences of failing to complete it, even the Chamber does not object to the proposal that parties be required to take positions on at least some of the matters addressed by the Statement of Position form. For example, the Chamber states in both its comments regarding the 2011 NPRM and the 2014 NPRM that in general it does not object to the proposed requirement that the employer state whether it agrees that the Board has jurisdiction and provide requested information concerning the employer's relation to interstate commerce, except with respect to the timing and legal effect of the Statement of Position form. Similarly, the Chamber does not object in general to the proposed requirements that the employer state whether it agrees that the proposed unit is appropriate, and if the employer does not so agree, state the basis of its contention that the proposed unit is inappropriate, except with respect to the timing and legal effect of the Statement of Position form. Chamber; Chamber II. Nor does the Chamber object in general to the requirement that the employer raise any election bars, and state the name and contact information of its representative. Chamber; Chamber II.

It is not surprising that the Chamber does not object to the requirement that an employer state whether it agrees that the Board has jurisdiction and provide requested information concerning the employer's relation to interstate commerce; that the employer state whether it agrees that the proposed unit is appropriate, and if the employer does not so agree, state the basis of its contention that the proposed unit is inappropriate; that the employer raise any election bars; and that the employer state the name and the contact information of its representative.[275] After all, requiring the employer to provide such information plainly facilitates entry into election agreements and helps narrow the scope of hearings in the event parties are unable to enter into election agreements. For example, if the employer explains why it believes that the proposed unit is not appropriate before the hearing, the petitioner may decide that the employer is correct and amend its petition to meet the employer's objections, thereby obviating the need for a hearing. Similarly, if the parties are unable to enter into an election agreement but the employer provides the requested commerce information and agrees that the Board has jurisdiction before the start of the hearing, the parties are spared the time and expense of litigating that issue.[276] Moreover, regional employees currently request such information prior to the opening of the pre-election hearing.[277] And, of course, requiring the employer to provide the name of, and contact information (including an email address and fax number) for, its representative will enable the Board and the other parties to utilize modern methods of communication to communicate with the employer to resolve election issues and transmit case-related documents.

To be sure, as comments by the Chamber (Reply) and CDW point out, the Statement of Position form is a departure from current practice because it mandates, rather than simply requests, that employers share such information prior to the hearing. However, the information sharing goals underlying the Statement of Position form are nothing new. Indeed, they are reflected in best practices promoted more than a decade ago, as well as the Casehandling Manual and the Hearing Officer's Guide. A model representation-case opening letter circulated in 1999 and the Casehandling Manual provide that regional personnel should arrange a conference at least 24 hours before the opening of the pre-election hearing, in order to explore entry into election agreements or to narrow the issues for hearing. In conjunction with the prehearing conference, regional office personnel solicit many of the same positions requested by the form, and although not requiring information disclosure, they encourage parties to share all available information at the pre-hearing conference. In particular, they seek the employer's permission to share a list of names and classifications of all employees at issue with all parties because it is ''an excellent aid in resolving many of the eligibility and unit questions that arise during case processing.'' See OM Memo 99–56, *http://www.nlrb.gov/reports-guidance/operations-management-memos;* Casehandling Manual Sections 11012, 11016, 11025.1.

Similarly, the Hearing Officer's Guide provides that the hearing officer should meet with parties' representatives prior to the hearing to discuss the issues they intend to raise, and that in preparation for the hearing, the hearing officer should question the parties regarding jurisdictional facts, unit scope, unit composition, availability of a list of employee classifications, inclusions and exclusions, and the issues that will be raised at the hearing. Hearing Officer's Guide at 2–5. The Guide instructs the hearing officer to encourage the parties at the prehearing conference to share information and documents, and to discuss the nature of the evidence to be presented. Hearing Officer's Guide at 4–5. Put simply, the Board believes that the information at issue is so helpful and important for purposes of facilitating entry into election agreements and narrowing the scope of pre-election hearings that the employer should be required to produce the information or be precluded from litigating certain issues if it refuses.

[273] Other commenters such as UNAC/UHCP likewise complained that when employers refuse to tell unions what their issues are with a petition, unions are forced to prepare for, and find witnesses to testify on, all possible issues. Testimony of Kuusela Hilo on behalf of UNAC/UHCP II.

[274] In some respects, the Statement of Position form requires less than what parties frequently do to prepare for a hearing. For example, completion of the Statement of Position form does not require witness preparation.

[275] Although the final rule provides for Statements of Position from different parties depending upon the type of petition filed, most of the comments focused on employers completing forms in the RC petition context. For simplification of the discussion, we will focus on that context for the remainder of the section.

[276] Because the Board must have statutory jurisdiction, the final rule clarifies in § 102.63(b)(2)(iii) and (b)(3)(i), (iii) that the employer's Statement of Position in RM and RD cases likewise must state whether the employer agrees that the Board has jurisdiction over it and provide the requested information about the employer's relation to interstate commerce.

[277] See Casehandling Manual Sections 11008, 11009, 11012, 11016, 11025, 11030, 11187, 11189, 11217; Guide For Hearing Officers in NLRB Representation and Section 10(k) Proceedings (''Hearing Officer's Guide'') at 2–5, 14–18.

The Board also finds that use of the Statement of Position form is consistent with *Bennett Industries, Inc.,* 313 NLRB 1363, 1363 (1994), where the Board observed,''[I]n order to effectuate the purposes of the Act through expeditiously providing for a representation election, the Board should seek to narrow the issues and limit its investigation to areas in dispute.'' Thus, the amendments give all parties clear, advance notice of their obligations, both in the rules themselves and in the statement of procedures and Statement of Position form. However, the amendments are not intended to preclude any other formal or informal methods used by the regional offices to identify and narrow the issues.

Although the Chamber does not object to some of the information solicited by the Statement of Position form, the Chamber and many others do object to the requirement that the employer provide certain items of information. For example, many comments object to the requirement that the employer: (1) Describe the most similar unit that it concedes is appropriate if it contends that the proposed unit is not appropriate; [278] (2) provide the lists of employees in the proposed unit and in any proposed alternative unit; [279] (3) identify any individuals occupying classifications in the proposed unit whose eligibility to vote the employer intends to contest at the pre-election hearing, and the basis for each such contention; [280] (4) identify all other issues it intends to raise at the hearing; [281] and (5) state its position on election details such as the type, date, time, and location of any election.[282]

Except as noted below, the Board is not persuaded by the comments objecting to the content of the information requested by the Statement of Position form. Thus, the Board believes that the Statement of Position form asks parties to provide information that would facilitate entry into election agreements and narrow the scope of hearings in the event parties are unable to enter into such agreements, so as to eliminate unnecessary litigation and help the Board expeditiously conduct an election if it determines that a question of representation affecting commerce exists. By doing so, the Statement of Position form helps the Board to fairly and expeditiously resolve questions concerning representation.[283] The Board also believes that the Statement of Position largely requires parties to do what they currently do to prepare for a pre-election hearing.'' Amy Bachelder, a former NLRB field attorney of 25 years, agrees. She testified that ''the issues related to the required Statement of Position in the pre-election hearing reflect little more than what is current standard pre-election hearing practice.'' [284]

1. Identification of Alternative Unit

Numerous comments address the Board's proposal (in § 102.63(b)(1)(i)) that, in those cases in which the employer takes the position that the proposed unit is not an appropriate unit, it would be required to ''describe the most similar unit that the employer concedes is appropriate.'' Many comments also address the Board's related proposal (in § 102.63(b)(1)(iii)) that, if the employer contends that the proposed unit is not appropriate, it would be required to file and serve a list of individuals in the ''most similar unit'' that it concedes is appropriate. As discussed in the NPRM, these proposed changes were intended to assist the parties in identifying issues that must be resolved at a pre-election hearing and thereby facilitate entry into election agreements. They were also intended to codify parties' existing practice where they contend that the proposed unit is not appropriate because the smallest appropriate unit includes additional classifications or facilities. See, *e.g., Westinghouse Electric Corp.,* 137 NLRB 332 (1962).

A large number of comments oppose these proposals. In general, those comments argue that an employer should not have to concede the appropriateness of any unit before evidence is presented at a hearing and the petitioner clarifies who specifically it wants included in, or excluded from, the unit. For example, NAM contends that the requirement that an employer posit an alternate appropriate unit ''places the employer, as the *non-petitioning party,* in the extraordinary position of having to concede the appropriateness of a unit where it may oppose the propriety of the unionization effort and where it is without determinative evidence that its employees wish to be unionized.'' SHRM, among others, contend that this proposed requirement is vastly different from the Board's current representation case procedures, which, ''[a]t most * * * require non-petitioning parties to take a position with respect to the appropriateness of the petitioned for unit.''

Other comments, such as SHRM's, question the Board's statutory authority for requiring non-petitioning parties to define the ''most similar unit'' when the current rules permit parties to propose alternative units that merely may be appropriate under the particular circumstances. Those comments further contend that the Board should explain the specific legal framework that it will use to determine whether the alternative units proposed by employers are, in fact, the ''most similar'' to the unit described in the petition. SHRM further seeks clarification that employers will not be required to identify *all* potentially appropriate units or else risk waiver of any arguments regarding such alternative unit descriptions at the hearing given the large number of potentially appropriate bargaining units and the potential difficulty in determining which alternative unit would be the ''most similar.''

Similarly, comments like CDW's object on the ground that the Act does not require that elections occur in the *most* appropriate unit. See *Morand Bros. Beverage Co.,* 91 NLRB 409, 418 (1950) (the Board need not determine ''that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be 'appropriate'") (emphasis in original). CDW further contends that the proposed ''most similar unit'' rule unfairly favors unions by permitting them to choose among the complete array of potential ''appropriate'' units while, at the same time, limiting employers to a single potential unit that is ''most similar'' to what the union has proposed.

The Chamber argues that, unless and until the proposed unit has been subject to examination at a hearing and either been agreed upon by the parties or deemed appropriate by the Board, the proposed ''most similar unit'' requirement poses a significant burden on employers. Other comments, including the Chamber's, argue that the proposed requirement that an employer not only agree or disagree with the union's petitioned-for unit, but go

[278] See, *e.g.,* Chamber; Chamber II; ALFA; SHRM.

[279] See, *e.g.,* SHRM; CDW; Prepared Testimony of David Kadela on behalf of Littler Mendelson.

[280] Chamber; Chamber II.

[281] Chamber; Chamber II.

[282] See, *e.g.,* ALFA; Chamber; Chamber II.

[283] The Board categorically denies the National Small Business Association's accusation that the Statement of Position form is intended to coerce employers into entering into election agreements. We take this opportunity to repeat that the form is designed to facilitate election agreements and to narrow the scope of pre-election hearings in the event parties are unable to enter into election agreements. Thus, the form is intended to help the Board avoid unnecessary litigation and expeditiously resolve questions concerning representation.

[284] See also National Nurses United (NNU) (''The requirement for a prompt Statement of Position simply memorializes what Board Agents assigned to processing petitions already try to do.'')

further and make a proposal itself, ''amounts to a forced pleading and raises serious due process and free speech concerns.''

At least one comment questions the need for the proposed ''most similar unit'' rule in the acute health care field. Thus, AHA asserts that there is no need for an employer in the acute health care field to recommend an alternative unit, as there are only eight appropriate units under the Board's regulations, and unions organizing under those rules are familiar with what constitutes an appropriate unit.

After careful consideration of all the comments concerning the ''most similar unit'' requirement proposed in the NPRM, the Board has decided to modify this aspect of the NPRM. Accordingly, the final rule will not require that, in those cases in which the employer takes the position that the proposed unit is not an appropriate unit, the employer ''describe the most similar unit that the employer concedes is appropriate.'' Rather, in those cases where the employer takes the position that the proposed unit is not an appropriate unit, § 102.63(b)(1)(i) of the final rule will require the employer to ''state the basis for its contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.'' [285]

The Board believes that the final rule will assist the parties in identifying issues—including the appropriateness of the proposed unit—that must either be agreed to by the parties and approved by the regional director, or be resolved at a pre-election hearing. Specifically, identification of the precise objections to the appropriateness of a proposed unit before the pre-election hearing will facilitate entry into election agreements and narrow the scope of hearings in the event parties are unable to enter into such agreements. Accordingly, the Board believes that the requirement will enable it to more promptly resolve questions concerning representation.

To begin, the Board disagrees with comments, including SHRM's, that argue that the proposed unit-appropriateness requirements are vastly different from the Board's current representation-case procedures. Merely by virtue of explaining the alleged problems with the proposed unit, the employer typically must identify the necessary changes to that unit. Thus, for example, if an employer with multiple facilities says that a proposed single facility unit is not appropriate, the only way to explain or support this argument is to point out what it believes is inappropriate about it, i.e, that it excludes the employees of its other facility, located across the street, who do the same work under the same conditions and who frequently transfer back and forth between the two facilities. And the employer is free to later agree to the appropriateness of a different unit if the petitioner alters its position regarding the unit in response to the position taken by the employer. As such, the final rule merely codifies and standardizes the best party practices under the current representation case procedures and, therefore does not differ dramatically from the current procedures.[286] The biggest difference, as explained above, is that employers will be required, rather than requested, to share their positions on unit appropriateness, including inclusions and exclusions of certain job classifications, locations, or other employee groupings at noon on the business day before the hearing.

The Board believes that the change to the final rule language moots comments based on statutory concerns for the proposed ''most similar unit'' requirement since the Act does not require that elections occur in the *most* appropriate unit, only *an* appropriate unit. Some of those comments contend that it could be extremely difficult for non-petitioning parties to determine which possible alternative unit would be the ''most similar'' to the proposed unit, especially where the proposed rules do not define what is meant by ''most similar.'' [287] In response, the final rule makes clear that an employer only has to specify the changes necessary to make *an* appropriate unit. And the Board hereby clarifies, in response to SHRM's comment, that under the final rule, a non-petitioning party that takes the position that the proposed unit is not an appropriate unit does *not* have to identify all potentially appropriate units; rather, it would merely have to specify the basis for its contention, and state the classifications, locations or other employee groupings that it believes must be added to or excluded from, the proposed unit to make it *an* appropriate unit (singular).

The Board concludes that the final rule will not significantly burden employers. As explained above concerning the Statement of Position form more generally, the Board believes that the time and resources expended by employers to determine which classifications, locations or other employee groupings must be added to or excluded from, the proposed unit to make it an appropriate unit are largely the same resources that would be expended in any event by a reasonably prudent employer in preparing to either enter into an election agreement or take contrary positions at a pre-election hearing under the current rules.

The Board also disagrees with AHA's assertion that there is no need for an alternative unit requirement in the acute health care field. Under the final rule, if an employer takes the position that the proposed unit is not an appropriate unit under the Board's regulations that specifically apply to the acute health care field, the employer will simply have to specify the classifications, locations or other employee groupings that it believes must be added to or excluded from, the proposed unit to make it an appropriate unit under those regulations.

Other comments, such as the Chamber's, object that the proposed rules absolve the Board of its responsibility to determine the appropriate unit. To the extent that the rationale of those objections also applies to the amended language of the final rule, the Board believes that they are nevertheless in error. As the Chamber's comment correctly points out, it is the Board's responsibility under Section 9(b) of the Act to make appropriate unit determinations. Nothing in the final rule changes that. Indeed, the final rule ensures that the Board will have sufficient evidence in the record to make an appropriate unit determination even if the employer fails to complete its Statement of Position. Specifically, if the employer fails to take a position regarding the appropriateness of a proposed unit that is not presumptively appropriate, then as discussed below in connection with § 102.66, the regional director may direct the hearing officer to permit the petitioner to introduce evidence regarding the appropriateness of the proposed unit.

Thus, contrary to CDW, the final rule does not permit the Board to direct an election in an inappropriate unit simply because the employer does not suggest an alternative unit in the Statement of Position. Moreover, contrary to comments by ALFA and ACE, among

[285] The amendments thus leave employers ''free to propose any alternative unit that may be appropriate under the particular circumstances.'' ACE II. The final rule also imposes similar requirements on the individual or labor organization in the RM context and on the employer and the certified or recognized representative of employees in the RD context. Amended §§ 102.63(b)(2)(i) and (b)(3)(i).

[286] To the extent that comments perceived that the ''most similar'' language charted a different path from current practice, the change in the final rule should alleviate those concerns.

[287] See, *e.g.,* ACE; SHRM.

others, the Board has not shifted the burden. The final rule is consistent with *Allen Health Care Services,* 332 NLRB 1308 (2000), in which the Board held that even when an employer refuses to take a position on the appropriateness of a proposed unit, the regional director must nevertheless take evidence on the issue unless the unit is presumptively appropriate. The final rule thus permits the petitioner to offer evidence in such circumstances and merely precludes non-petitioners, which have refused to take a position on the issue, from offering evidence or cross-examining witnesses.

Likewise, there is no merit in Littler Mendelson's argument that, under the proposed rules, the unit-appropriateness question will necessarily turn on ''the extent to which employees have organized,'' in violation of Section 9(c)(5) of the Act. Prepared Testimony of David Kadela on behalf of Littler Mendelson. In *NLRB* v. *Metropolitan Life Insurance Co.,* 380 U.S. 438, 441–442 (1965), the Supreme Court made clear that, under Section 9(c)(5), the Board may consider the wishes of a petitioning union as a factor in the making a unit determination, but those wishes cannot be the *only* factor. Accordingly, in cases where the proposed unit is not presumptively appropriate, the Board cannot stop with the observation that the petitioning union proposed a particular unit, but must proceed to determine, based on community-of-interest factors, that the proposed unit is an appropriate unit. Again, nothing in the final rule changes that, and the deletion of the ''most similar'' language removes the application of the rule even further from Littler Mendelson's concern.

2. Initial Employee Lists

The NPRM proposed that the employer provide as part of its Statement of Position a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit, and if the employer contends that the proposed unit is inappropriate, to also provide a list of the full names, work locations, shifts, and job classifications of all employees in the most similar unit that the employer concedes is appropriate. 79 FR 7355. The NPRM also proposed that the initial lists provided to the regional director, but not the parties, also include contact information for such employees. 79 FR 7355. Several comments, such as ALFA's, question why production of such employee lists (without personal contact information) is necessary until an appropriate unit is identified by the regional director. Others, like SHRM's, take issue with the necessity for multiple lists to be provided as part of the Statement of Position form when the employer proposes alternative groupings of employees to those petitioned for by the union. And COLLE claims (Testimony of Deakins on behalf of COLLE II) that the proposal to require employers to disclose names and job classifications as part of the Statement of Position conflicts with the NPRM proposal to defer deciding individual eligibility or inclusion questions under the so-called 20 percent rule. In contrast, SEIU's comment requests a blanket rule that employee lists complete with contact information be provided to the petitioner within 2 days of the petition being filed.

As discussed above, the final rule provides that in the event the employer contends that the proposed unit is not appropriate, the employer shall state the basis for its contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit. Amended § 102.63(b)(1)(i). The Board concludes that requiring the employer additionally to furnish a list of the names, job classifications, work locations, and shifts of the individuals in the proposed unit, a similar list for the individuals that the employer contends must be added to the proposed unit to make it an appropriate unit, and the names of the individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit will help the Board to expeditiously resolve questions of representation by facilitating entry into election agreements, narrowing the scope of the preelection hearing in the event that parties are unable to enter into an election agreement, and reducing the need for election-day challenges based solely on lack of knowledge of the voters' identities.

As an initial matter, the Board concludes that the lists will help ensure that all parties have access to the information they need to resolve disputes concerning the appropriate unit in which to conduct the election. As the comments of Caren Sencer (Testimony of Sencer on behalf of Weinberg, Roger and Rosenfeld II) and Supplemental Written Testimony of Thomas W. Meiklejohn on behalf of Livingston, Adler, Pulda, Meiklejohn & Kelly demonstrate, one of the impediments to reaching an election agreement is that the parties sometimes talk past each other regarding the appropriate unit in which to conduct the election because, unbeknownst to them, they are using different terminology to describe the very same employees.[288] In our experience, parties also sometimes use different terms to describe work locations and shifts. The requirement that employers disclose the names, job classifications, work locations and shifts of employees will enable the parties to discover if that is the problem, and therefore assist the parties in entering into an election agreement.

Requiring employers to furnish this information to the nonemployer parties to the case plainly facilitates entry into election agreements and helps narrow the issues in dispute in the event the parties are unable to enter into election agreements even if the parties do not have a terminology problem. Under the current rules, the names of the individuals occupying classifications (or falling within other employee groupings) that the employer would like added to or excluded from the unit in many cases are unknown to the petitioning union. Often, the union also does not know where and on what shifts individuals in those classifications (or in those employee groupings) work, what they do, or even how many employees in each such classification (or employee grouping) there are. Accordingly, the petitioner cannot make an informed decision about whether it agrees with the employer's objections to the proposed unit and with the employer's proposed alterations to the unit. However, with information from such lists, a petitioner, in consultation with its employee supporters, should be able to make informed decisions about whether to amend its petition to conform in whole or in part to the alternate unit suggested by the employer.[289] Accordingly, the

[288] Sencer testified:

Frequently we have a problem where we talk past each other, The employee identifies themselves as a technician. The employer indentifying [sic] themselves as an associate. We say ''Technicians are in'' and they say, ''We have no technicians, we only have associates.'' And we might actually not have a disagreement, but we're using different language to talk about the same points. So simply having the classifications used by the employer would allow for the easier resolution of issues because everyone would know what they were talking about * * *.

See also Supplemental Written Testimony of Meiklejohn on behalf of Livingston, Adler, Pulda, Meiklejohn & Kelly (''When the Employer finally disclosed the names of the employees in the 'disputed' job classifications, it turned out that we were in agreement on many of the employees. The first two days of hearing had, in large part, been devoted to issues that were not in contention.'')

[289] Similarly, if a petitioner petitions for a single facility unit and the employer contends that the petitioned-for unit is not appropriate because it

requirement that the employer provide the information in question serves the goals of facilitating entry into election agreements which obviates the need for pre-election litigation and by narrowing the number of issues in dispute between the parties in the event the parties are unable to enter into an election agreement.

Indeed, as illustrated by comments like NNU's, without the information contained in the initial lists, petitioning unions are often ''in the dark'' as to the actual contours of any alternative units proposed by an employer, including the alternative unit's size. If parties are to reach reasonable agreements concerning which classifications, locations or employee groupings the bargaining unit should include, then nonemployers should have access to the information that is necessary for them to intelligently evaluate an employer's claim that certain classifications, locations or other employee groupings should be added to or excluded from, the petitioner's proposed unit. The Board is not persuaded that employers should be allowed to keep plainly pertinent information to themselves that would clearly assist parties to knowledgeably reach a voluntary resolution of the issue.

The Board also concludes, in agreement with AFL–CIO II, that the information will serve the salutary function of facilitating entry into *Norris-Thermador* agreements, whereby parties definitely resolve issues of eligibility by constructing a list of eligible voters and including it in their election agreement. See Casehandling Manual Section 11324 (discussing *Norris-Thermador Corp.,* 119 NLRB 1301 (1958)). Such agreements obviously can expedite the period between the conduct of the election and the certification of the results by essentially limiting the potential universe of post-election disputes to those involving election objections. Put simply, it will be easier for the nonemployer parties to enter into a *Norris-Thermador* agreement if the employer is required to disclose as part of its Statement of Position the names, job classifications, work locations and shifts of employees in the proposed unit and for any alternative unit it proposes.

The Board further concludes that the production of employee lists complete with each employee's name, work location, shift, and job classification prior to the opening of the pre-election hearing furthers the second purpose articulated by the Board in *Excelsior.* Thus, production of the initial lists of employees should reduce the need for election-day challenges based solely on lack of knowledge of the voters' identities by giving the nonemployer parties more time to investigate and formulate knowledgeable positions about the eligibility of any such employees.

For all these reasons, amended § 102.63(b)(1)(iii) of the final rule requires the employer to provide a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit, and if the employer contends that the proposed unit is inappropriate, to (1) separately list the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit and (2) indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit.[290] And because, as shown, the information on the lists is useful for purposes beyond resolving individual eligibility issues, we reject COLLE's claim (Testimony of Deakins on behalf of COLLE II) that there is a conflict between the initial list disclosure requirements in § 102.63 and the Board's conclusion discussed below in connection with §§ 102.64 and 102.66 that resolution of disputes concerning the eligibility or inclusion of individual employees ordinarily is not necessary in order to determine if a question of representation exists, and, therefore, that such disputes can be resolved, if necessary, post-election.

To be sure, facilitating agreements and thereby avoiding litigation of these issues might best be served by mandating disclosure of employee list information (including contact information) within 2 days of a petition's filing (and well before the opening of a pre-election hearing), as SEIU suggests. However, as discussed above in connection with § 102.62, the Board does not believe it would be appropriate to require disclosure of employee contact information to the nonemployer parties to the case before the regional director finds that a question of representation exists (or the employer admits that a question of representation exists by entering into an election agreement). Moreover, given employer protests about their abilities to prepare for a hearing in 7 days (when a petition's filing actually takes them by surprise), the Board is hesitant to impose a blanket requirement that such disclosures should occur so quickly after every petition. At a minimum, the Board believes that stipulations concerning the unit will be better facilitated and any pre-election hearings will avoid unnecessary litigation, if the additional information is made available 1 business day before the hearing is set to open. Accordingly, the final rule provides that employee lists complete with full names, job classifications, work locations, and shifts, will be part of the Statement of Position, to be provided to the nonemployer parties to the case at noon on the business day before the opening of the pre-election hearing.

This amendment is yet another effort to build upon the existing best practices in the Board's regional offices. Regional personnel currently request from the employer—early in a representation case's processing—a list of employees' names and job classifications in the petitioned-for unit *and* each other unit that the employer contends is appropriate for purposes of checking the showing of interest *and* resolving potential eligibility and unit issues.[291] Because regions know that the provision of such information to all parties to the case is an excellent aid in resolving many of the eligibility and unit questions that arise during case processing, regions encourage the employer to permit the region to provide the lists to the petitioner and all other parties. See Casehandling Manual Sections 11009, 11025.1, 11030.5; OM Memo 99–56; Hearing Officer's Guide at 2–5. But employers currently are not required to provide such information. Indeed, an employer's refusal to do so currently has no legal consequences beyond inhibiting the Board agent's efforts to resolve eligibility and unit issues. The Board agrees with the AFL–CIO that parties should be able to more promptly resolve disputes if this information is required to be provided to both the Board and the nonemployer parties before any pre-election hearing has begun, and therefore the rule precludes the employer from litigating certain issues if the employer fails to

does not also include the employees at its other facility, the employer must so state and provide the list of employees at the second facility.

[290] Senior Member Miller and Democratic House Members characterize the proposal to give such basic information to the nonemployer parties as a small but important improvement.

[291] For example, Casehandling Manual Section 11025.1 provides that in its initial communication with the employer, the region should request that the employer submit an alphabetized list of the full names and job classifications of the employees in the petitioned-for unit and, as the case develops, in any alternative units proposed by the employer. Casehandling Manual Sections 11025.1 and 11030.5 indicate that the purpose of such lists is not just to check the showing of interest, but also to resolve possible eligibility and unit issues.

share the information.[292] As discussed above, the final rule's provision for the initial employee list(s) being provided to the nonemployer parties no later than at noon on the business day before a pre-election hearing is set to open should, consistent with the AFL–CIO's analysis, make election agreements more likely and, in the event a hearing is required, reduce the issues to be litigated and therefore reduce cost and resources otherwise expended.

The Board rejects the notion, raised by SHRM and others, that the initial employee lists constitute improper unilateral pre-hearing discovery. In fact, as the AFL–CIO points out (Reply), the Statement of Position form—of which the initial employee lists are a part—constitutes the employer's response to positions already taken by a union in its petition, including: a description of the unit it desires to represent, categories of employees it believes should be included in or excluded from the unit, an estimate of the unit's total size, and the type, date(s), time(s) and location(s) of election it seeks. As described more fully in § 102.66 below, immediately after the Statement of Position is received into evidence at the hearing, the petitioning union is required to respond to each position raised in the statement. In the Board's view, there is no additional bilateral discovery that employers would need from a petitioning union to adequately contest unit issues at the hearing. After all, it is nearly always the employer who is in possession of the relevant evidence on virtually all issues likely to be contested at a pre-election hearing concerning the proposed bargaining unit. Thus, as discussed more fully below, the employer knows its employees' terms and conditions of employment because it established them. And, as shown, regions already ask employers for name and classification information.

As noted, the NPRM proposed that the initial lists provided to the regional director, but not the parties, would include employee contact information for the employees on the list(s). 79 FR 7355. Some comments, such as those filed by ACE and the Chamber II, question the need for that information. The NPRM proposed that the regional office would use the email addresses and telephone numbers from this separate list to begin preparing for electronic transmission of the election notice that is issued once the parties enter into an election agreement or the regional director directs an election. 79 FR 7329. ALFA criticizes the proposal on the grounds that the provision of greater information through the vehicle of initial employee lists will generate more issues for litigation.

However, as discussed below in connection with § 102.67, the Board has decided to reject the proposal in the NPRM to require the regional director to serve the affected employees with the election notice. Accordingly, the Board has likewise decided to reject the proposal in the NPRM to require the employer to disclose to the regional director as part of its Statement of Position contact information for employees on the initial lists. Accordingly, employers will not be required to disclose employee contact information to either the regional director or the nonemployer parties to the case as part of its Statement of Position.

Cook Illinois, among others, express concerns about petitioners misusing information received from an initial employee list, and Littler Mendelson fears unions filing petitions simply to acquire employee information concerning units that it has no intention of representing. As expressed in § 102.62 above, the Board has not experienced significant misuse of information long-provided in *Excelsior* lists, and it does not reasonably expect misuse of employee names simply because that information will be provided prior to a direction of election. Nor does the Board expect such misuse simply because the employer will now be required to disclose job classifications, work locations, and shifts. If such misuse occurs, then the Board can provide a remedy. Currently, in appropriate circumstances, a regional director may limit a petitioner's ability to refile a petition as a condition for approving the withdrawal. See Casehandling Manual Section 11118. Similarly, as mentioned in § 102.60, the regional directors and the Board will continue to have discretion to reject a petitioner's request for withdrawal of the petition if the request would run counter to the purposes of the Act. See Casehandling Manual Section 11110.

Some comments argue that it will be particularly burdensome to produce multiple lists, but the Board believes that with modern record-keeping and retrieval technology, the requirement can be easily met by most employers.[293] Whether the employer asserts that the unit should go far beyond what the petitioner proposed is, of course, up to the employer. For example, employers sometimes assert that a proposed unit containing a handful of employee classifications must instead be ''wall-to-wall'' (including every employee classification at the location) in order to be appropriate. If the employer's position on the unit is proven correct, or nearly so, then the full information about all or most of those employees would have to be provided pursuant to an amended petition anyway when the election is directed. If the employer's position is untenable, then the burden of producing a list of employees in that alternative unit is truly self-imposed because the employer chose to take an extreme litigating position. In any event, as discussed above, the final rule language no longer contains a requirement that the employer produce lists corresponding to ''the most similar unit that the employer concedes is appropriate.'' So, to the extent some comments foretold a need to produce multiple alternative unit lists because of a lack of clarity concerning which concededly appropriate iteration was ''most similar'' to the petitioned for unit, that concern should be alleviated. Instead, if the employer contends that the unit described in the petition is inappropriate, the final rule clarifies that the employer need only produce one alternative list containing information about employees in the unit that the employer contends is an appropriate unit. Moreover, as discussed above, the Board has decided to reject the proposal that employers provide separate lists to the regional director containing contact information. In short, employers will be required to produce fewer lists under the final rule than the NPRM proposed, and the employer may file the same list(s) with the regional director that it provides to the nonemployer parties to the case.

We are not persuaded by SHRM's contention that there is little reason to require the initial employee lists because they will not necessarily reflect an accurate list of eligible voters. As already explained above, the initial lists provided to the nonemployer parties to the case should facilitate entry into election agreements and narrow the scope of pre-election hearings in the

[292] The Board believes that the purposes of the form will best be realized if parties are faced with litigation preclusion for failing to complete it. However, the Board is equally persuaded that implementing the Statement of Position form would be an improvement over the status quo even if it were not coupled with the threat of preclusion, because we believe at least some employers would complete and serve the form if the Board's rules explicitly required it, and the form would guide hearing preparation. Thus, the Board would mandate service of the form by petitioners (102.60(a)), completion of the form by the nonpetitioning parties named on the petition (102.63), and introduction of the form at the opening of the hearing (102.66(b)), even if use of the form was not enforced through mandatory litigation preclusion.

[293] SHRM; ACE; ACE II; NAM II.

event parties are unable to enter into election agreements. Moreover, the nonemployer parties to a case may still find it prudent to begin their investigation of the eligibility of any unknown employees notwithstanding the possibility of turnover in the unit—between the date the initial lists are provided and the close of the eligibility period—in which the election is ultimately directed. That the initial lists may not entirely eliminate the need for election-day challenges in all cases certainly does not mean that provision of the lists cannot reduce the need for at least some election-day challenges in some cases. Thus, the Board believes that more information earlier in the process will avoid unnecessary delay in conducting elections and resolving questions of representation.

Baker and McKenzie questions whether the employer will be obligated to update the employee information that it provides in connection with the Statement of Position when it provides the voter list pursuant to § 102.67 after an election is directed. The answer is ''yes.'' To be sure, some of the information required to be produced as part of the Statement of Position is also required to be produced as part of the voter list in the event an election is agreed to or directed. For example, both the Statement of Position and the voter list amendments require employers to furnish the employees' names, job classifications, work locations, and shifts. However, there may be employee turnover between the time the Statement of Position is filed and the eligibility date for voting in the election, even assuming the unit in which the election is conducted does not differ from the petitioned-for unit. It is also possible that employee job classifications, work locations, and shifts may change during this interval. It would hardly serve the purpose of maximizing the likelihood that all eligible voters be exposed to the nonemployer party arguments concerning representation if the employer were permitted to provide the nonemployer parties with an outdated list of employees. Nor would it serve the goal of avoiding challenges based solely on lack of knowledge of the identities of the voters if the employer were permitted to provide the nonemployer parties with a list of eligible voters containing outdated information about them.[294] Moreover, although an employer is not required to furnish the nonemployer parties with employee contact information as part of its Statement of Position, the employer is required to furnish the nonemployer parties with employee contact information shortly after the parties enter into an election agreement or the regional director directs an election. Accordingly, as the amendments to §§ 102.62(d) and 102.67(l) make clear, once an election is agreed to or directed, the employer must furnish the nonemployer parties to the case and the regional director with an (up-to-date) list of the full names, work locations, shifts, job classifications and contact information (including home addresses, available personal email addresses and telephone numbers) of all eligible voters, and in a separate section of the list the same information for those individuals the parties have agreed to permit to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge.[295]

3. Identification of Individual Eligibility and Other Issues

As noted above, the NPRM proposed that as part of its Statement of Position, the non-petitioner identify any individuals occupying classifications in the petitioned-for unit whose eligibility to vote it intends to contest at the pre-election hearing and the basis for each such contention, and describe all other issues the non-petitioner intends to raise at hearing.[296] Comments criticize these requirements as imposing unfair and unrealistic burdens because, for example, it may not be possible to identify all legal issues until testimony is taken.[297]

The Board is not persuaded by these comments. It clearly facilitates entry into election agreements and helps narrow the scope of the hearing if all parties state what they believe the open issues (including eligibility issues) are and what they seek to litigate in the event of a hearing. It is thus not surprising that Board agents currently ask the parties to do precisely that now. For example, prior to the scheduled hearing, Board agents attempt to secure the basic facts with respect to each potential issue, including bargaining unit and eligibility issues, and they use the payroll lists to resolve eligibility and unit issues. Casehandling Manual Sections 11009, 11012, 11016, 11025, 11187. As also shown, the hearing officer attempts to meet with parties' representatives prior to the hearing to discuss the issues they intend to raise, and the hearing officer is instructed to discuss at the pre-hearing conference ''*each* party's position on *each* issue.'' Hearing Officer's Guide, 2–3, 5, 15–18 (emphasis added); OM Memo 99–56.

Given that Board agents are already asking the parties to state the issues (including individual eligibility issues) that they intend to raise at the hearing, we reject the argument that it is unfair and unrealistic for the Board to require the parties to do so as part of their Statements of Position. Some comments, such as the Chamber's and ACC's, complain that it will be difficult to identify individual eligibility questions if the union's petition describes the unit in vague terms. However, that situation could arise under the prior rules and the employer may move to amend its Statement of Position if union clarification of its positions at the hearing calls for more nuanced responses from the employer.[298]

[294] The possibility of having to update employee information already existed under the prior rules. Thus, prior to the NPRM, employers were required to furnish a list of the names and home addresses of all eligible voters once an election was agreed to or directed even though, as noted, the region had previously requested the employer to submit an alphabetized list of the full names and job classifications of the employees in the petitioned-for unit and in any alternative units proposed by the employer. Casehandling Manual Sections 11025.1 and 11030.5.

[295] Consistent with the amendments to § 102.62, the final rule provides that the list(s) of names shall be alphabetized and be in an electronic format approved by the General Counsel, unless the employer certifies that it does not possess the capacity to produce the list(s) in the required form.

The NPRM proposed in § 102.63(b)(1)(v), (2)(v), and 3(v) that the employer would be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing if the employer fails to timely furnish the lists of employees as part of the Statement of Position. 79 FR at 7355–7366. The final rule moves this language to amended § 102.66(d) in the paragraph entitled ''Preclusion.''

[296] The final rule uses the single term ''proposed unit'' in place of the two terms ''proposed unit'' and ''petitioned-for unit'' that the NPRM used in § 102.63 to describe Statement-of-Position obligations. 79 FR at 7355.

[297] See, *e.g.,* Chamber; ACC.

[298] UFCW requests that if an employer intends to contest at the pre-election hearing the eligibility of an individual on the basis of supervisory status, the employer should be required to identify in its Statement of Position the particular indicia of supervisory status that the individual possesses. The Board declines to require the employer to do so. The Board notes in this regard that a union currently is not required to identify on its petition why it believes that the employees in its petitioned-for unit share a community of interest. We think that for purposes of determining whether to enter into an election agreement prior to the opening of a hearing, a union can begin to evaluate the propriety of an employer's contention that a particular individual is a supervisor even if the employer declines to identify the particular indicia of supervisory status in its Statement of Position. For example, the union may consult with its supporters about the authority of the alleged supervisor. The Board notes, however, that in the event a regional director permits litigation of individual eligibility issues, the employer bears the burden of proving that such individuals are in fact supervisors.

4. Election Details

The NPRM also proposed that the Statement of Position form require the non-petitioning party to state its preferences with respect to the type, date(s), time(s), and location(s) of the election and the eligibility period. 79 FR7328, 7355. The final rule adopts this proposal.[299] This requirement eliminates unnecessary barriers to the expeditious resolution of questions concerning representation in two ways. First, it facilitates entry into election agreements. Parties enter into election agreements only if they agree, among other things, on the election details. It plainly serves the goal of making it easier for parties to promptly enter into election agreements if the petitioner is advised of the nonpetitioner's position on those matters prior to the hearing. Second, in cases where the parties are unable to enter into an election agreement, the amendment (in conjunction with the provision in § 102.66(g) that the hearing officer solicit all parties' positions concerning the election details) ordinarily will make it possible for the regional director to specify the election details in the direction of election, and to simultaneously issue the Notice of the Election with the Decision and Direction of Election, because the parties will have provided their positions on the election details prior to, and at, the hearing.

Currently, however, the regional director frequently is unaware of the parties' positions concerning the election details when the director issues the direction of election, and, not surprisingly, the decision and direction of election frequently does not specify those details. Instead, a Board agent must contact the parties after the direction issues to solicit their positions. After obtaining the positions, the regional director must decide those details and then draft and serve the official Notice of Election on the employer for posting. This takes time and can unnecessarily delay the election.

The Chamber objects that until the appropriate unit is determined, an employer cannot develop a reasoned position on the type, date(s), time(s), and location(s) of the election and the eligibility period. To the extent the Chamber is suggesting that the requirement is unreasonable because an employer may have one position on these matters if the petitioned-for unit is found to be appropriate, but another position if the director finds some other unit, such as an employer's alternate unit, appropriate, the Board disagrees. The employer will be permitted to state its preferences in the alternative. And as the amendments to § 102.66(g) indicate, the hearing officer shall solicit the parties' positions on the election details prior to the close of the hearing. Thus, if the petitioner has modified its position on the unit during the hearing in response to the employer's Statement of Position, the employer will be able to present its position regarding any new unit sought by the petitioner. Moreover, given the relatively small size of bargaining units in representation cases, the Board anticipates that it will be the exceptional case, rather than the norm, where differences between the petitioned-for unit and any other unit would cause the employer to feel the need to take such alternative positions regarding the election details.[300]

ALFA characterizes this requirement as indicating a possible ''abandonment of the long-established Board presumption favoring manual ballot elections at employers' premises.'' However, the new requirement is not intended to change Board policy in this respect.

C. Scheduling of Pre-Election Hearing

A great number of comments responded to the Board's call for comments on the feasibility, fairness and proper scope of the proposed exceptions to the NPRM provision that, absent special circumstances, the regional director would set the hearing to begin 7 days after service of the notice of hearing.[301] As explained in the NPRM, this proposal reflects the current practice of some regions, but would make the practice explicit and uniform, thereby rendering Board procedures more transparent and predictable. Under the proposed amendments, parties served with a petition and description of representation procedures, as described in relation to proposed § 102.60, would thus be able to predict with a high degree of certainty when the hearing will commence even before service of the notice. 79 FR 7328.

In the NPRM, the Board proposed that the amendments would be implemented consistent with the Board's decision in *Croft Metals, Inc.,* 337 NLRB 688, 688 (2002), requiring that, ''absent unusual circumstances or clear waiver by the parties,'' parties ''receive notice of a hearing not less than 5 days prior to the hearing, excluding intervening weekends and holidays.'' The amendments would thus not require any party to prepare for a hearing in a shorter time than permitted under current law. Rather, as the Board held in *Croft Metals,* 337 NLRB at 688, ''By providing parties with at least 5 working days' notice, we make certain that parties to representation cases avoid the Hobson's choice of either proceeding unprepared on short notice or refusing to proceed at all.'' [302] Thus, contrary to PCA, the NPRM's choice of a 7-day time frame was not arbitrary. The existing regional best practice is to set the hearing in 7 days, and that practice comports with the minimum notice standard that has governed Board hearings for the last decade.

Several comments directly suggest that the Board should alter the proposed language governing exceptions to the hearing and Statement of Position time frames. Specifically, the Board proposed that the regional director would set a pre-election hearing to open in 7 days ''absent special circumstances.'' Dissatisfied with the standard's perceived leniency, the AFL–CIO argues that ''special circumstances'' should be exchanged for ''unusual circumstances'' consistent with *Croft Metals,* while

[299] The final rule makes explicit in amended §§ 102.63(b)(1)(i), (b)(2)(i), (b)(3)(i) that nonpetitioning parties must state their positions regarding election details in RM and RD cases as well as in RC cases. Amended §§ 102.63(b)(1)(i), (b)(2)(iii), and (b)(3)(iii) also require the employer to state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date, information which Board agents have long requested as it is useful for purposes of setting the eligibility date. See, for example, Casehandling Manual Section 11086.3 (''The payroll period for eligibility should be designated as ''the period ending,'' etc. Normally it should be the last period ending before the Regional Director's approval of the agreement.''); Casehandling Manual Section 11312.1 (''If there is an issue as to an unusual eligibility date, *i.e.,* the use of a date other than the payroll period ending before the approval of the agreement or the Direction of Election, * * * the Board agent * * * should obtain the information necessary for resolution of this issue.'')

[300] In addition, as noted below in connection with § 102.67, the final rule grants regional directors discretion to consult with the parties concerning election details after issuing a direction of election where unusual circumstances warrant, such as when the decision issues substantially after the close of the hearing, or the election is directed in a unit very different from that proposed by either the employer or the union.

[301] See, *e.g.,* King & Ballow; GAM; Chamber; ALG; Arizona Hospital and Healthcare Association; COSE.

[302] To be clear, the date of the petition's filing was irrelevant to the Board's holding in *Croft Metals.* Although the hearing had been scheduled to open 14 calendar days from the petition's filing in that case, it was undisputed that the employer did not receive notice of the hearing until 3 working days before the hearing was scheduled to open. Thus, the Board's holding in *Croft Metals,* just as its proposal in the NPRM, was keyed only to the time from service of the notice of hearing to the opening of the hearing itself.

SEIU advocates that ''extraordinary circumstances'' would be the appropriate descriptor. Attorney Nicholas Karatinos urges the Board to allow regional directors to delay the opening of the hearing by 1–3 days upon a showing of hardship, and the Chamber (reply) submits that the Board should adhere to section 11082.3 of the Casehandling Manual's guidance that ''requests for postponement of the hearing will be granted only for good cause.'' Maury Baskin, testifying on behalf of ABC II, argued that ''sufficient cause, sometimes called good cause,'' is a ''good standard.'' Curiously, COLLE opines that regional directors' rigid adherence to internal time targets make it a fool's errand to consider which exception language would be most appropriate. Thus, in COLLE's view ''the Board's invitation to suggest language to guide exceptions to the target, even if it results in a stated test for doing so that is not unreasonable, is likely to be ignored in practice by the Regional Directors.''

The Board has carefully considered the comments in this area—including COLLE's fatalistic assertion—and believes that the competing interests represented would best be balanced by altering the language in the proposed rules in several ways. First, as shown, consistent with *Croft Metals'* concern for adequate hearing preparation, § 102.63 of the final rule, will guarantee employers (and all nonpetitioning parties) 8 days notice of the hearing and 7 days notice of the due date for completion of the SOP form. Second, as also shown, in order to ensure that the Statement of Position serves its intended purposes of facilitating entry into election agreements and narrowing the scope of any pre-election hearings that must be held, § 102.63(b)(1) of the final rule requires the form to be filed with the regional director and served on all parties such that it is received by them at noon on the business day before the opening of the hearing. Third, to allow for both changes listed above, § 102.63(a)(1) of the final rule provides that except in cases presenting unusually complex issues, the regional directors will set pre-election hearings to open, in 8 days from service of the notice excluding intervening Federal holidays, not 7.[303] (Of course, if the 8th day would fall on a weekend or Federal holiday, then the rule provides that the regional director shall set the hearing to open on the following business day.) Thus, based on the regional director's analysis of the complexity of the issues raised by the petition, a director will have discretion, even without a party filing a motion, to set the opening of the hearing beyond the normal 8-day time frame if the director concludes such extra time is warranted. Fourth, even if the director sets the hearing for the normal 8-day time frame, the director will retain discretion under § 102.63(a)(1) of the final rule to extend the opening of the hearing for up to 2 business days upon request of a party showing special circumstances. By cabining the regional directors' discretion to extend the hearing's opening to 2 business days, the Board trusts that contrary to concerns exhibited in some comments, the exception will not swallow the rule. Finally, because the Board is persuaded that there may be the exceptional case that should not go to hearing within that time frame, regional directors will retain discretion under § 102.63(a)(1) of the final rule to postpone the opening of the hearing for more than 2 business days upon request of a party showing extraordinary circumstances. The Board has concluded that the hearing scheduling amendment will help the Board to expeditiously resolve questions concerning representation because, absent an election agreement, the Board may not conduct an election outside of the 8(b)(7)(C) and 9(e) contexts without first conducting a pre-election hearing. The amendment will also render Board procedures more transparent and uniform across regions.[304]

Some union comments suggest that the Board specify that regional directors serve the notice of hearing immediately.[305] We decline to do so, because the regions, among other things, check the showing of interest prior to serving the notice. However, in our experience, regions currently are promptly serving the notices, and we anticipate that the directors will issue the notices as soon as is practicable. SEIU suggests that the regional director should mark any correspondence regarding the hearing notice as ''urgent'' so as to help ensure that the recipient will pay proper attention to it. The Board agrees, and has so indicated in its statement of the general course.

Many employer comments attack the proposed time frames. Although, as shown, the final rule provides that, except in cases presenting unusually complex issues, the hearing will open in 8 days—not 7 days—from the notice and that parties will always have at least 7 days notice of the due date for completion of the Statement of Position form, we shall assume that all comments opposing the proposed time frames would similarly object to the 8-day hearing/7-day Statement of Position time frames.[306]

A number of comments assert, with little legal analysis, that the time frames for the opening of the pre-election hearing and completion of the Statement of Position violate employer due process rights.[307] However, due process does not require the Board to conduct a pre-election hearing. See *Inland Empire District Council* v. *Millis,* 325 U.S. 697, 707, 710 (1945). But, to be sure, Section 9(c) does require a pre-election hearing in the event parties are unable to reach an election agreement. And, in determining whether the notice given under the amendments is ''due notice'' as required by Section 9(c), the procedural due process case law provides some helpful analogies.

''[T]he timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved.'' *Goss* v. *Lopez,* 419 U.S. 565, 579 (1975). Under *Mathews* v. *Eldridge,* 424 U.S. 319, 335 (1976), three factors are weighed in evaluating the adequacy of the notice: (1) The gravity of the private interest that will be affected by the official action, (2) the value of procedural safeguards, like additional time, in reducing the risk of error, and (3) the public interest—including the burden of additional time on the government.

The Board believes that the 8-day hearing/7-day Statement-of-Position-form time frames provide parties with

[303] Although the Board has selected a hearing-opening baseline of 8 days from service of the notice, in part, to allow parties to use the completed Statement of Position form to explore entrance into election agreements and to try to narrow the scope of the hearing for approximately 1 business day before the hearing, the Board views an 8-day baseline as an independent improvement over the current regional variation in scheduling hearings. Accordingly, the Board would implement an 8-day hearing baseline even in the absence of the final rule's introduction of a Statement of Position form.

[304] The IFA II argues that the timeline is too short in cases where a union's petition raises novel or complex issues. But, as the AFL–CIO II points out (Reply), such cases are relatively rare, and, as discussed above, the final rule permits the regional director on the director's own initiative to schedule the hearing to open at a later date if the case presents unusually complex issues. The final rule also provides a mechanism by which parties can request postponements if they need additional time to prepare for a hearing based on the novelty or complexity of the issues raised by the petition.

[305] UFCW; SEIU.

[306] The ACC, ACE II, and others found it troubling that the NPRM's proposals would seemingly allow the Statement of Position form to be due even sooner than 7 days from the regional director's service of the notice of hearing. As shown, however, under the final rule parties will always have a minimum of 7 days notice of the due date for completion of their Statements of Position.

[307] See, e.g, Seyfarth Shaw; NAM; Senator Alexander and Republican Senators II.

''due notice.'' The final rule provides in amended § 102.60 that the petition, which describes the unit sought, is served upon the employer as soon as it is filed in order to insure that the earliest possible notice of the pendency of a petition is given to all parties. Served together with the petition is an Agency form describing the Board's representation case procedures, and a copy of the Agency's Statement of Position form. Soon thereafter, the regional director serves the notice of hearing, specifically informing the parties of the time, place and subject of the hearing, and the deadline for the position statement. Amended § 102.63(a)(1) provides that except in cases presenting unusually complex issues, the hearing will be ''8 days [after] the date of service of the notice [of hearing] excluding intervening Federal holidays,'' and that the Statement of Position will be due at noon on the business day before the hearing, *i.e.* no sooner than 7 days from the notice of hearing.

The courts have held that less than 8 days notice constitutes due notice even when very substantial interests are at stake. For example, in *Wilkinson* v. *Austin,* 545 U.S. 209, 213, 216 (2005), the Supreme Court addressed the appropriateness of an Ohio procedure for placing prisoners in a ''Supermax'' prison. The procedures involved at least 48 hours written notice of the issues that would be addressed at the hearing. The unanimous Court held that the procedures satisfy due process. *Id.* at 229. In *Wolff* v. *McDonnell,* 418 U.S. 539, 564 (1974), the Court held that before a hearing on inmate discipline, ''[a]t least a brief period of time after the notice, no less than 24 hours, should be allowed to the inmate to prepare for the appearance [at the hearing.]'' This advance notice was required in order to ''give the charged party a chance to marshal the facts in his defense.'' *Id.*

In the Federal context, employees facing termination for criminal conduct have a statutory right to ''a reasonable time, but in any event not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of [their position].'' 5 U.S.C. 7513(b)(2). This provision has been upheld against constitutional attack. *Perez* v. *Dep't of Justice,* 480 F.3d 1309, 1312 (Fed. Cir. 2007) (discussing cases). In *Schapansky* v. *Dep't of Transportation,* 735 F.2d 477, 480, 486–88 (Fed. Cir. 1984), for example, the Federal Circuit upheld the agency's firing of PATCO strikers after 7-days notice. See also *Darnell* v. *Dep't of Transportation,* 807 F.2d 943, 944–46 (Fed. Cir. 1986) (discharges not unlawful where air traffic controllers had 7 days to prepare and respond to notices of termination). And, in some cases, the interests at stake are considered of such minor significance and the value of additional preparation time so small that notice may be provided orally and contemporaneous with the hearing: ''There need be no delay between the time 'notice' is given and the time of the hearing.'' *Goss,* 419 U.S. at 582 (suspension from school of 10 days or less).

Under the first *Mathews* factor, the arguable employer private interest at stake in pre-election litigation typically concerns the contours of the unit in which the election will be conducted, for the employer risks losing the right to deal directly with the unit employees. This interest, though important, is generally not so important to the employer as the question at stake in the election itself—that is, whether the Section 9 relationship will form. To the extent that the employer has a legally cognizable interest in being free to deal with its employees directly, the pre-election hearing cannot deprive the employer of that freedom, because an employer loses the right to deal directly with bargaining unit employees only if the union wins the election. In any event, the time given is sufficient to account for even the serious interests under *Wilkinson, Wolff,* and *Perez.*

The Board also is of the opinion that the time frames in question pose little risk of error, the second *Mathews* factor. The Board has substantial experience applying the NLRA to various industries over the last 7 decades. The factual subject matter that is the focus of the hearing typically is not all that complex to litigate, and is intimately familiar to the employer, permitting very rapid preparation. As discussed, the Board need not direct an election in the most appropriate unit; it need only select *an* appropriate unit. In determining whether a group of employees constitutes an appropriate unit, the Board analyzes whether the employees in that unit share a community of interest by examining the employees' terms and conditions of employment, the employees' job duties, skills, training, and work locations, the employees' supervision, the extent of employee interchange and contact with one another, and the history of collective bargaining. The employer already knows all those things before the petition is even filed. Thus, the employer knows its employees' terms and conditions of employment because it established its employees' terms and conditions of employment. The employer knows its employees' job duties, work locations, and supervision, because it assigned those job duties, work locations, and supervisors to its employees. The employer knows its employees' skills because it sets the skill requirements for its positions, and hires and evaluates its employees. Similarly, the employer is aware of the collective bargaining history of its employees, as well as the level of employee interchange and contact, and the training it provides for its employees.[308] The employer likewise knows its connection to interstate commerce, and whether the petitioned-for employees are covered by a collective-bargaining agreement or participated in a valid election in the preceding 12-month period, thereby barring an election. Even if preparation within ''a few hours'' would not be feasible in some cases, within a few days an employer should reasonably be able ''to gather his thoughts and his evidence and to make an informed decision about the best way to respond'' regarding the community of interest and other issues. *Staples* v. *City of Milwaukee,* 142 F.3d 383, 385–86 (7th Cir. 1998). Furthermore, in those cases where the timeline would be too short, the final rule provides exceptions so that, in practice, there should be no impact on the likelihood of error.

The Board also believes that the proposed time frames serve very important public interests, the third *Mathews* factor. Put simply, permitting a timely choice of representative is of inherent value under the Act; each delay in resolving the question concerning representation causes public harm by denying the employees their right to bargain collectively through representatives of their own choosing—or denying employees their right to rid themselves of an unwanted incumbent

[308] Some attorney commenters contend that when they start asking their clients questions about community-of-interest factors, such as employee interchange, they sometimes are met with ''a blank look'' and are told ''research'' is necessary. See, *e.g.,* Testimony of Maury Baskin, on behalf of ABC II. The Board rejects any suggestion that this anecdotal testimony renders the time frames inappropriate. In the first place, in the case of very small employers where the owner directly supervises, and even works alongside, rank and file employees, it seems unlikely that the owner will lack direct knowledge of the facts necessary to take positions on the relevant issues. In any event, even if the owner or CEO who might meet with an attorney does not have first-hand knowledge of these things, it should not be particularly challenging or time-consuming to identify the manager who would have that information readily available. The Board is also confident that counsel can minimize the likelihood of a ''wasted'' first meeting simply by communicating in advance with the client that counsel needs to meet with someone with first-hand knowledge of such matters as what the petitioned-for employees do and how often they fill in for one another.

representative. Moreover, Congress has already determined that the expeditious resolution of questions concerning representation ''safeguards commerce from injury, impairment or interruption.'' 29 U.S.C. 151. As favorable comments indicate, providing such standard time frames also has the salutary effect of conveying to the employees that the Board, not the parties, is in charge of the process, and reduces chances of manipulation of the process by the parties.[309] The establishment of uniform time frames across the regions also has the salutary effect of affording employees' Section 7 rights the same treatment across the country.[310] The ability to exercise Section 7 rights should not turn on the particular region where the petition is filed. The timeline will also reduce the Board's expenses and make the process more economically efficient by discouraging abusive delays by the parties and encouraging prompt settlement without litigation.

For all the foregoing reasons, the Board believes that the time frames do not run afoul of constitutional due process or statutory due notice requirements. The Board also rejects the argument of many comments that, as a matter of policy, the time frames proposed in the NPRM are wholly insufficient,[311] virtually impossible,[312] draconian,[313] facially absurd,[314] unconscionable,[315] and just too short.[316] A major premise of many of these comments is that employers are completely unaware of any union organizing until the petition is filed, and therefore have not even begun to think about contacting an attorney or other advisor about how to respond to a petition. However, as discussed more fully above in connection with the opportunity for free speech and debate, these comments offer no reliable empirical evidence establishing that employers are frequently blindsided by the petition, and our experience and recent scholarly research suggest the opposite. Put simply, in the multitude of cases where employers are aware of the union drive before the petition, they have more, often much more, than 7 days to contact an attorney or advisor or otherwise begin to consider the issues listed on the Statement of Position form and to prepare for a possible hearing.

But even in cases where employers are caught completely unaware by the petition, we reject the notion that employers will be unable to consult advisors, complete the Statement of Position form, and prepare for the hearing in the allotted time frames. As some of the comments appear to concede, at least some employers facing petitions will have ready access to labor counsel. Although we recognize that some employers may not have labor counsel on retainer, in our experience, employers are able to promptly retain advisers and prepare for the hearing in relatively short order. For example, as the testimony of Russ Brown on behalf of LRI and of Michael Pearson, a retired NLRB field examiner with nearly 34 years of experience, indicate, under the Board's current rules, management consultants regularly survey public notice of the filing of representation petitions to offer their services to employers named in the petition, and they would continue to be able to do so under the final rule. Indeed, this is such a widespread practice that a regional director's model opening letter to employers to accompany service of the petition advises employers that they may be contacted by organizations or persons who seek to represent the employer before the Board in connection with the representation case, but that such persons or organizations do not have any ''inside knowledge'' or ''favored relationship'' with the Board. See OM Memo 99–56.[317] Similarly, the retired field examiner commented that it was his experience that even small employers were able to obtain competent legal counsel in short order. Michael Pearson supplemental statement; Testimony of Pearson.

Indeed, despite the comments to the contrary, the proposed time frames do not constitute a radical change from the status quo. Under the final rule, hearings ordinarily will be scheduled to open 8 days from service of the notice of hearing, but a party may for special circumstances move to postpone the hearing by up to 2 business days and for extraordinary circumstances for more than 2 business days. A 1997 Report of the Best Practices Committee provided that hearings should open between 10 to 14 days of the petition's filing. GC 98–1. A model opening letter in 1999 indicated that the hearing should open no later than 7 days after service of the notice, which should issue no more than 3 days after the filing of the petition. OM 99–56. The 2002 Board held that 5 business days notice was sufficient: ''By providing parties with at least 5 working days notice, we make certain that parties to representation cases avoid the Hobson's choice of either proceeding unprepared on short notice or refusing to proceed at all.'' *Croft Metals, Inc.,* 337 NLRB 688, 688 (2002). And, according to ALFA, ''[m]any Regions now schedule hearings within seven (7) days and are reluctant to grant any postponements.'' Most pre-election representation case hearings last only 1 day. Accordingly, the reality is that under the current rules, employers sometimes must already formulate, assert, and produce supporting evidence for all their positions before a hearing officer within 7 days even though the current rules do not mandate completion of a Statement of Position form.[318] Because the proposed time frames are not radically different from the status quo and the Statement of Position form largely requires an employer to do what it currently does to prepare for a hearing, the Board rejects the Bluegrass Institute's contention that the proposed time frames will result in significantly higher legal fees for employers.[319]

[309] See AFL–CIO; Testimony of Margaret McCann on behalf of AFSCME.

[310] See Joel Cutcher-Gershenfeld.

[311] Chamber; Chamber II.

[312] Ranking Member Enzi and Republican Senators.

[313] COLLE.

[314] NCISS II.

[315] Indiana Chamber.

[316] GAM.

[317] Ranking Member Enzi and Republican Senators assert that employers will significantly limit their use of legal counsel during organizing campaigns due to the Department of Labor's recent NPRM interpreting the advice exemption under the Labor Management Reporting and Disclosure Act. See 76 FR 36178. Other commenters share this view. See, *e.g.,* COLLE II; NRF II. The Board doubts the accuracy of this prediction given DOL's stated goal of publicizing the interactions between employers and anti-union consultants, not stopping those interactions from taking place. See *id.* at 36182, 36190. In any event, the Board views such concerns as more properly directed to DOL and not the NLRB. If changes in the legal landscape prevent parties from obtaining representation in a timely fashion, the Board will take that into consideration in determining whether to grant a party's request to postpone the opening of the hearing and, more generally, whether there is a need to revise the final rule's time frames.

[318] If, as some comments, including Fox Rothschild's, suggest, a party's preferred witnesses are unavailable and no other available witness has comparable knowledge, that party is free to move to postpone the hearing. The fact that special circumstances may exist to postpone some hearings, however, hardly warrants delaying the opening of all hearings. No matter when the hearing is scheduled to open, there is always the possibility that a witness may have a conflict. Similarly, counsel may also adjust the order of his planned presentation if it appears that the hearing may run more than one day and a witness is not available the second day.

[319] To be clear, consistent with the reasoning in *Croft Metals,* the Board would set the baseline due date for the Statement of Position form at 7 days even in the absence of the hearing being scheduled in 8 days. Even if the pre-election hearing were to be held at a point more distant than 8 days from service of the notice, the timely sharing of the information contained in the Statement of Position form should encourage the timely entrance into election agreements and narrow the scope of the

Continued

The Board likewise rejects the notion that the amended scheduling provisions are unfair because if a union does not know the correct individual to serve, the petition might not be received by the proper recipient for a day or more. Cook-Illinois; California Healthcare Association (CHA) II. Thus, the same possibility existed under the prior rules. Moreover, as shown, the region will also serve the petition, the Statement of Position form, and related papers with the notice of hearing (§ 102.63(a)(1)), and it is the practice of the regional offices to have a Board agent contact parties as soon as possible after the filing of a petition in order to facilitate the election process. See Casehandling Manual Section 11010. The Board likewise rejects COLLE's suggestion that the Board is incapable of timely serving the notice of hearing on the person specifically named in the petition as the employer representative to contact. In any event, a nonpetitioning party may move to postpone the opening of the pre-election hearing (and the date for filing the Statement of Position) if it does not receive the notice of hearing (or the Statement of Position form) in a timely manner.

Although many comments complain about the consequences of failing to note something on the Statement of Position form, the fact of the matter is that the Board's prior rules and case precedent already required parties to raise contentions at specified times in the process or face preclusion. Indeed, even taking the preclusion provisions into account, the 7-day time frame for completion of the Statement of Position—which can be extended up to two business days for special circumstances and even further for extraordinary circumstances—does not constitute a material change from what could, and sometimes did, occur under the Board's prior rules and case precedent. Prior to the NPRM, the Board held that a hearing officer may refuse to allow an employer to introduce evidence regarding the supervisory status of employees in certain job classifications if the employer refuses to take a position on their status and their inclusion or exclusion from the unit. *Bennett Industries, Inc.,* 313 NLRB 1363, 1363 (1994). Similarly, under the rules in effect prior to the NPRM, a party could ''not [in a request for review of a regional director's decision and direction of election] raise any issue or allege any facts not timely presented to the regional director.'' 29 CFR 102.67(d) (2010). Accordingly, even under the Board's prior rules, if a party failed to present facts or take a position before the hearing officer at a hearing, including one which opened and closed within 7-days of the notice, it could not do so later.[320]

In view of the foregoing, the Board rejects as unfounded those comments that complain that the proposed time frames are so short as to inevitably cause parties to make mistakes.[321] Moreover, the Board indicated in the preamble to the NPRM that the hearing officer would retain discretion to permit parties to amend their Statements of Position for good cause. 79 FR at 7330. In its reply comment, the Chamber complains (Reply) that the proposed regulations themselves did not so provide.[322] In response to the comment, the Board has modified §§ 102.63 and 102.66 to provide that the regional director may permit parties to amend their Statements of Position in a timely manner for good cause.[323]

The dissent argues that the Statement-of-Position and preclusion provisions should be modified so that a party retains the right to address issues it did not raise in its initial Statement of Position in response to another party's contentions. No modification is necessary. The Statement of Position in large part constitutes a response to positions previously taken by the petitioner in its petition. For example, after a union files a petition which identifies the unit it seeks, the employer is required to state whether it agrees that the petitioned-for unit is appropriate and whether there is a bar to conducting an election in that unit. The final rule also provides that the regional director may permit a party to amend its Statement of Position in a timely manner for good cause. And a party typically will have good cause to timely amend its Statement of Position to raise an issue that is presented by virtue of a petitioner's amending its petition. For example, it would constitute good cause for an employer to amend its Statement of Position to raise for the first time a contract bar issue if a petitioner amended its petition to change the petitioned-for unit from one which is entirely unorganized to one including employees who are covered by an existing collective-bargaining agreement. Contrary to the dissent, the good-cause standard governing amendments of statements-of positions is less strict than the *Pergament* standard governing whether the Board may find a violation that was never alleged in an unfair labor practice complaint. See *Pergament United Sales, Inc.,* 296 NLRB 333, 333–334 (1989) (Board may find a violation even in the absence of a specific complaint allegation if the unalleged violation is closely connected to the subject matter of the complaint and has been fully litigated). Thus, if a union seeks to amend its petition in a fundamental way, an employer may have good cause to amend its Statement of Position even if the amendment is not closely related to the original position taken by the employer. Moreover, it is not clear how many of the retrospective criteria used to determine whether *Pergament*'s fully-litigated prong has been satisfied could have any kind of coherence in the context of the position statement, particularly where amendment is sought early in the process.

At least one comment suggests that the Board should make clear that the Statement of Position is required only to alert the Board to issues that need to be decided during the pre-election stage, not to foreclose legitimate issues that may be raised after the election. The Board believes that the proposed

pre-election hearing in the event parties are unable to enter into such agreements, thereby contributing to the Board's goal of expeditiously resolving questions concerning representation.

[320] There were numerous other examples prior to the NPRM of parties being required to raise contentions at specified times in the process or face preclusion. For example, under the rules in effect prior to the NPRM, a party could not challenge the eligibility of voters for the first time *after* an election by filing an election objection. *HeartShare Human Services of New York, Inc.,* 317 NLRB 611, 611 n.1 (1995), *enforced,* 108 F.3d 467 (2d Cir. 1997). See also *Bennett Industries, Inc.,* 313 NLRB 1363, 1363 (1994) (disagreeing with regional director, Board states that because employer refused to take a position at the pre-election hearing regarding the supervisory status of leadpersons and quality control inspectors and the regional director included those classifications in the unit, the employer may not, absent changed circumstances, challenge their votes on the basis that they are supervisors). Similarly, the courts have held that because the representation proceeding is the forum designed for parties to contest the appropriateness of the unit, any issue that can be raised in the representation case proceeding must be raised there and cannot be raised for the first time in response to a complaint alleging an unlawful refusal to bargain with a newly certified union. See *Pace University* v. *NLRB,* 514 F.3d 19, 20, 23–27 (D.C. Cir. 2008) (employer precluded from justifying its refusal to bargain with the certified union on the ground that the bargaining unit is inappropriate because employer did not raise its contention in the underlying representation case proceeding).

[321] See, *e.g.,* COSE; LRI.

[322] Other commenters, such as U.S. Poultry II also appear to question whether the proposal would permit parties to amend Statements of Position at the hearing.

[323] As discussed below in connection with § 102.66, the Board received a number of comments complaining about the hearing officer's authority under the proposed amendments. Accordingly, the Board has decided that the regional director, rather than the hearing officer, should be the one to decide whether parties may amend their Statements of Position.

Comments addressing the consequences of failing to timely complete the Statement of Position are also addressed below in relation to § 102.66.

language already does so. Certainly, nothing in the NPRM or final rule suggests that a party must raise *post*-election issues, such as objectionable conduct, in its *pre*-election Statement of Position.

Although some employer comments concede that requiring completion of the Statement of Position form is a good idea in theory, many complain that it will be a bad idea in practice because the time frame for completing it—coupled with the preclusion provisions—will cause employers to list every conceivable issue on the form to preserve their right to litigate such issues, which will only lengthen (and increase the number of) hearings.[324] The Board disagrees. As shown, we do not believe that the information sought, time frames and preclusion provision are unreasonable. To the contrary, they are similar to what could occur under the Board's prior rules and case precedent. And, as shown, under existing rules, most hearings currently last only a day, and the Board's current rules and case precedent obviously are not preventing the parties from entering into election agreements.

Moreover, the Board is of the opinion that some of the comments suggest that the Board adopt time frames which bear no relation to reality. For example, NADA suggests that a 30-day period to complete the Statement of Position form is necessary. Other comments suggest a much shorter period is necessary, though not as short as the 7 day period set forth in the amendments. Thus, the Indiana Chamber suggests a period of 14–18 days. Put simply, we categorically reject any notion that the Statement of Position form will routinely require such long periods of time to complete. As shown, the Statement of Position form largely requires parties to do what they currently do to prepare for a pre-election hearing. The *Croft* Board held that 5 days (excluding intervening weekends and holidays) constituted adequate notice of such a hearing, and some hearings are already occurring within 7 calendar days.

We also find it significant that parties commit to enter into stipulated election agreements in 7 days or less. Under current rules, by entering into a stipulated election agreement, a party waives the right to raise issues at a pre-election hearing, and is precluded from later challenging matters such as the appropriateness of the unit. See, *e.g., Micro Pacific Development, Inc.* v. *NLRB,* 178 F.3d 1325, 1335–1336 (D.C. Cir. 1999). As is well known, approximately 90 percent of Board elections are conducted pursuant to election agreements. Frankly, the Board finds it difficult to believe that an employer would commit to enter into a stipulated election agreement—and thereby waive its right to raise issues at a pre-election hearing—before satisfying itself that the Board did in fact have jurisdiction over it, that there were no bars to an election, and that the unit described in the agreement was appropriate. Indeed, as Jonathan Fritts testified on behalf of CDW, ''it's hard to say that negotiating a stip[ulated election agreement] would necessarily take less time than preparing for the hearing[.] I think that everything that precedes the negotiation, at least in my experience, is something that you would do to identify the issues that may be subject to litigation. And so, if you're going to negotiate a stip I think you have to know what the issues are that you might go to hearing on, and then you have to decide if you can resolve them. The process of identifying those issues, what the evidence is, what the circumstances are, that's going to happen I think regardless of whether you go to a hearing or whether you go to a stip. It's only once you've done all that that you really begin the process of negotiating a stip.'' Testimony of Fritts on behalf of CDW II.[325] In other words, the fact that parties currently agree to enter into stipulated election agreements in 7 days constitutes powerful evidence that employers can in fact obtain advisers and have the conversations necessary to formulate positions on the issues covered by the Statement of Position form (and that would be addressed at a pre-election hearing) in the time frames set forth in the final rule. And the Board is confident that, if parties do not enter into election agreements, the offer-of-proof procedures discussed below in connection with § 102.66 provide tools for the region to swiftly dispose of unsupported contentions that a party may set forth in its Statement of Position simply to avoid triggering the preclusion provisions.[326]

The Chamber II argues that the Board should have analyzed the impact of the Board's decision in *Specialty Healthcare and Rehabilitation Center of Mobile,* 357 NLRB No. 83 (2011), *affd sub. nom, Kindred Nursing Centers East, LLC* v. *NLRB,* 727 F.3d 552 (6th Cir. 2013) before making the proposals in the NPRM. However, *Specialty Healthcare* has not had, and is not likely to have, a significant impact on representation case processing by the Board. *Specialty Healthcare* sets forth a clear test for unit determinations when an employer contends that a proposed bargaining unit is inappropriate because additional groups of employees are excluded from the bargaining unit. *Specialty Healthcare,* slip op. at 14. These issues are not addressed by the NPRM, which does not affect the appropriateness of bargaining units. Likewise, *Specialty Healthcare* does not implicate representation-case procedures, which are addressed by the NPRM. Before *Specialty Healthcare,* regional directors were required to determine whether the petitioned-for unit was appropriate prior to directing an election but were not required to resolve all individual eligibility issues in the pre-election decision, and both remain true after *Specialty Healthcare.*

Some comments argue that *Specialty Healthcare* renders the proposed time periods too short.[327] They claim that more time is needed because *Specialty Healthcare* constitutes a dramatic

[324] See, *e.g.,* NADA II; Indiana Chamber; Miners; Pinacle Health Systems of Harrisburg; Vigilant; Associated Oregon Industries; Ohio Grocers Association II; US Poultry II; the Textile Rental Services Association (TRSA) II.

[325] Accordingly, we reject the contention of the NGA that the time spent on the Statement of Position form would be better spent trying to reach an election agreement. Testimony of Kara Maciel on behalf of NGA II. As noted, the final rule gives the parties approximately 1 business day—after completion of the Statement of Position—to negotiate an election agreement. In response to concerns raised by CDW and others, the Board wishes to clarify that parties remain free to file joint postponement requests when they need additional time to finalize election agreements. Nothing in the final rule is intended to deprive regional directors of the discretion they currently enjoy to postpone hearings when they conclude that it is highly probable that the parties will be able to enter into an election agreement.

[326] Contentions that the Statement of Position form is analogous to an appellate brief, such as the one made by the National Meat Association, are wildly off the mark. The Statement of Position form does not require a party to provide any legal citations for its positions. For example, the Statement of Position form requests the employer to state its position regarding election details such as the type, date(s), time(s), and location(s) for the election, and the names of, and information about, the employees in the petitioned-for unit and in any alternative unit proposed by the employer. Providing such information does not require case citations. Similarly, the employer need not provide case citations in providing information about its connection to interstate commerce. Nor does an employer need to provide case citations to support a contention that an election is barred because the petitioned-for unit is covered by a collective-bargaining agreement or participated in a valid election within the preceding 12-month period. The employer likewise need not cite cases to explain why it disagrees that the petitioned-for unit is appropriate. We similarly reject contentions that completing the Statement of Position form should be subject to the same timelines as filing a response to a complaint in Federal court. See Clear Channel Outdoor; MEMA.

[327] See, *e.g.,* Chairmen Kline & Roe II; COLLE II; Chamber II; SHRM II; Acme-McCrary and 56 other representatives of small, medium and large businesses (Acme) II.

change in the law and heightens the employer's burden when it wishes to contest the appropriateness of the petitioned-for unit. However, the premises for that argument were rejected in *Specialty Healthcare* and in the litigation which followed. See *Specialty Healthcare,* slip op. at 14 (''Our dissenting colleague is simply wrong when he says that '[t]oday's decision fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction.' Our decision adheres to well-established principles of bargaining-unit determination, reflected in the language of the Act and decades of Board and judicial precedent.''). Thus, *Specialty Healthcare* holds that ''the traditional community of interest test * * * will apply as the starting point for unit determinations in all cases not governed by the Board's Health Care Rule,'' and sets forth a clear test—''using a formulation drawn from Board precedent and endorsed by the District of Columbia Circuit''—for those cases in which an employer contends that a proposed bargaining unit is inappropriate because additional groups of employees are excluded from the bargaining unit. *Ibid.* In such cases, the Board held, ''the employer must show that the excluded employees share an 'overwhelming community of interest' with the petitioned-for employees.'' *Ibid.*

When the employer subsequently challenged the *Specialty Healthcare* standard in the Sixth Circuit, the employer and amici such as COLLE and the American Health Care Association, raised the same argument that *Specialty Healthcare* had fundamentally changed the standard for determining whether the petitioned-for unit is appropriate. See 2012 WL 1387314 *3, *44 (employer brief); 2012 WL 1494162 * 3–4 (COLLE amicus brief); 2012 WL 1494157 *17 (American Health Care Association amicus brief). The Sixth Circuit squarely rejected the argument. See *Kindred Nursing Centers East, LLC* v. *NLRB,* 727 F.3d 552, 561 (6th Cir. 2013) (''Kindred argues that this overwhelming-community-of-interest standard represents a 'material change in the law' and is not a mere reiteration nor clarification. But this is just not so. The Board has used the overwhelming-community-of-interest standard before, so its adoption in *Specialty Healthcare* II is not new.'').

We also agree with the AFL–CIO that *Specialty Healthcare* makes preparation easier by clarifying the standard. Reply II. As the Board made clear in *Specialty Healthcare,* ''employees in the petitioned-for unit must be readily identifiable as a group and the Board must find that they share a community of interest using the traditional criteria *before* the Board applies the overwhelming-community-of-interest standard to the proposed larger group.'' *Specialty Healthcare,* slip op. at 11 n.25 (emphasis added). And the employer possesses the evidence relevant to whether the petitioned-for employees constitute a readily identifiable group;[328] whether the petitioned-for employees share a community of interest,[329] and whether the employees it seeks to add share an overwhelming community of interest with the petitioned-for employees.[330] Accordingly, we reject the contention that *Specialty Healthcare* renders the proposed time frames unworkable in the typical case. In any event, as discussed above, if a petition raises an unusually complex issue, the regional director has discretion to set the hearing for a later date on the director's own initiative, and parties remain free to file postponement requests themselves.[331]

A number of comments also request exemptions from the time frames proposed in the NPRM for particular employers, industries, or types of petitions. We deal with these in turn.

1. Small Employers

Many comments complain that the time frames are particularly unworkable for small employers because they may not have ready access to labor relations advice and have no experience with Board proceedings.[332] Some of these comments, such as that filed by COSE, also complain that the amendments ''disproportionately harm[] small businesses,'' because they do not have large staffs, and the requirements will distract them from running their businesses.

The Board declines to carve out an exemption for small employers in all cases. Prior to the NPRM, the Board did not have one set of best practices for cases involving small employers and a different set of best practices for cases involving large employers. Moreover, as shown, the timing of the pre-election hearing under these amendments will not be dramatically different from that which existed prior to the amendments. Small employers, no less than large employers, are intimately familiar with the factual subject matter of the Statement of Position form and the hearing. Thus, for example, they know their employees' terms and conditions of employment because they established those terms and conditions. As previously discussed, small employers, like large employers, may learn of the union drive prior to the petition, in which case they may well retain advisors before the filing of the petition. Even when the filing of the petition catches small employers by surprise, they may retain advisors in relatively short order. In some cases, they may well be solicited by firms providing labor relations advice. As we note above in connection with the section discussing the opportunity for free speech and debate, the well-documented growth of the labor relations consulting industry undermines the contention that small businesses are unable to obtain advice quickly. And, small employers, like their larger counterparts, may be members of trade organizations which provide assistance in responding to the petition and in locating counsel. Testimony of Sencer on behalf of Weinberg Roger & Rosenfeld II; Testimony of Maciel on behalf of NGA II. As a former examiner commented, it was his experience that small

[328] For example, employees can be readily identifiable as a group based on job classifications, departments, functions, work locations, skills, or similar factors. *Specialty Healthcare,* slip op. at 12. It is the employer who designates the job classifications and functions of its employees, and it is the employer who assigns its employees to their departments and work locations. The employer knows the skills of its employees because it sets the skill requirements for its positions, interviews applicants, and trains and evaluates its employees.

[329] Thus, it is the employer that establishes the terms and conditions of employment of the petitioned-for employees.

[330] The employer also establishes the terms and conditions of employment of those employees that it wishes to add to the petitioned-for unit. Because the employer establishes the working conditions of all its employees, it also possesses the evidence necessary to determine the extent to which the employees it seeks to add to the petitioned-for unit share a community of interest with the petitioned-for employees. See *Specialty Healthcare,* slip op. at 9 n.19 (''It is highly significant that, except in situations where there is prior bargaining history, the community-of-interest test focuses almost exclusively on how *the employer* has chosen to structure its workplace. * * * * [M]ost of the facts at issue (lines of supervision, skill requirements wage rates, etc) are established by the employer,'' and the employer also typically draws ''the lines across which those facts are compared,'' such as the lines between ''job classifications . . . , departments, functions, facilities, and the like.'').

Employers also possess the evidence necessary to determine whether a union has petitioned for a fractured unit, such as when a union petitions for all employees occupying a nominally distinct classification, but when the employees in that classification do not in fact perform distinct work under distinct terms and conditions of employment. See *id.,* slip op. at 13 & n.31.

[331] Comments about *Specialty Healthcare* are also discussed below in connection with § 102.66.

[332] See, *e.g.,* Chamber; Chamber II; ALG; Arizona Hospital and Healthcare Association; American Feed Industry Association; NAM; NAM II; CDW; Precision Fittings II; NGA II; INDA II; NFIB II.

employers, like their larger counterparts, were able to retain counsel in short order. Pearson supplemental statement; Testimony of Pearson. The rule also provides that parties may move that the opening of the hearing be postponed up to 2 business days based on special circumstances and may move that the hearing be postponed for an even longer period of time based on extraordinary circumstances.[333]

In the final analysis, however, the Board believes that small employers, like their larger counterparts, will be able to appropriately respond to the filing of a petition. Congress deemed it appropriate to grant Section 7 rights to employees, notwithstanding any resulting distractions to employers, even those of relatively small size. The Board is confident that small employers can locate competent advisors, should they choose to do so, within the time frames set forth in the rule.

Nevertheless, the Board emphasizes that the final rule fully protects small employers with respect to the two issues that, in our experience, most concern small employers. First, even if a small employer fails to complete a Statement of Position form, the small employer will be able to challenge the Board's statutory jurisdiction at any time. Second, even if a small employer fails to complete a Statement of Position form, it will be able to challenge the eligibility of a particular individual at the polls. See amended § 102.66(d). Accordingly, we reject as mistaken comments such as the National Meat Association's that argue that a small employer would waive ''even objections to [statutory] jurisdiction'' if they did not raise the issue in a Statement of Position.

2. Faculty Managerial Cases

ACE argues that the Board should exempt institutions of higher education from the Statement-of-Position and hearing time frames. As justification, ACE stresses the difficulty of adequately preparing in such a short period for a hearing to determine whether petitioned-for faculty are employees entitled to the protection of the NLRA or managers without Section 7 rights to organize and bargain collectively. ACE II. The Board declines to carve out a generalized exemption because the parties may be able to complete the Statement of Position form and adequately prepare for hearing in that time frame. For example, where the Board has previously found the faculty at issue to be statutory employees and the faculty are seeking to decertify the union currently representing them, the Board believes that the 7-day Statement of Position, 8-day hearing time frame would be appropriate.

However, the Board recognizes that petitions concerning faculty may sometimes present unusually complex issues prompting regional directors on their own initiative—or upon a party's motion—to set the opening of the hearing beyond the normal time frame. The legal test for determining the managerial status of college faculty involves consideration of ''a long list of relevant factors'' (*LeMoyne-Owen College* v. *NLRB,* 357 F.3d 55, 57 (D.C. Cir. 2004)); requires ''an exacting analysis of the particular institution and faculty at issue * * * [which] is made more difficult by the fact * * * that the Act is not easily applied to labor relations in the university setting'' (*Point Park University* v. *NLRB,* 457 F.3d 42, 48 (D.C. Cir. 2006)); and has met with some criticism in recent years. See *id.* at 47–51; *LeMoyne-Owen College* v. *NLRB,* 357 F.3d at 57, 61. In addition, the nonpetitioner bears the burden of proving that the petitioned-for faculty are managers, and such cases typically involve large units. Accordingly, while the Board declines to carve out an exemption for all faculty managerial cases, the Board recognizes that cases involving numerous or complex factual or legal issues may require additional time and the rules provide a process by which the regional director on the director's own initiative may grant more time as well as a process by which the parties themselves can request additional time.

3. Construction Industry

Some comments argue that the Board should exempt construction industry employers from the time frames governing the hearing and Statement of Position. For example, AGC appears to argue that there is no need to more expeditiously resolve questions concerning representation in the construction industry because, in contrast to typical representation cases, the petitioned-for construction industry unit may already be covered by a collective-bargaining agreement pursuant to Section 8(f) of the NLRA.[334]

The Board disagrees for several reasons that it should carve out an exemption for cases involving construction industry employers. By definition, AGC's argument has no force whatsoever in those cases where the petitioned-for unit is not already covered by an 8(f) collective-bargaining agreement. Moreover, there are important reasons to expeditiously resolve questions concerning representation even in those cases where the petitioned-for employees are already covered by an 8(f) collective-bargaining agreement. Section 8(f) imposes no enforceable obligations in the absence of a collective-bargaining agreement. *Allied Mechanical Services, Inc.,* 351 NLRB 79, 83 (2007), *enforced,* 668 F.3d 758, 761, 771 (D.C. Cir. 2012). Accordingly, as soon as the 8(f) collective-bargaining agreement expires, the employer is free to unilaterally change the existing terms and conditions of employment and withdraw recognition from the union as the representative of its employees. By contrast, an employer that has a Section 9(a) relationship with a union is obligated to maintain the status quo even after expiration of its collective-bargaining agreement. See *American Automatic Sprinkler Systems, Inc.* v. *NLRB,* 163 F.3d 209, 211, 214–15 (4th

[333] In the case of a very small employer with only ''one boss'' who is scheduled to be away on business or a pre-planned vacation on the date of the hearing (CNLP), the employer remains free under the amendments to file a motion for postponement setting forth such matters as the precise nature of the conflict, the harm caused by rescheduling the other matter, and the length of the postponement requested. The same holds true if the only person in charge is away when the notice of hearing issues. We note in this regard that small business owners may be away or have conflicts when notices of hearing are served under the current rules.

RILA suggests that the time frames are inappropriate if the petition is filed during ''holiday season'' when retail stores are busy. The Board is confident that regional directors will continue to exercise their discretion appropriately in the event a retail employer files a motion to postpone a pre-election hearing. We note in this regard that a petition filed just before Christmas concerning the employees of a small, ''mom and pop'' retail store would appear to raise different considerations than a petition filed at the same time concerning the employees of a large department store.

We also reject Elizabeth Milito's testimony that the time frames are unfair because small employers ''wouldn't have a clue'' what to do after they receive an election petition. Just as was the case under the prior rules, employers and their advisors may communicate with the Board agent assigned to the representation case and may consult the Board's Web site which features links to a variety of useful information, including the Casehandling Manual. Moreover, as set forth above, the amendments provide that all employers will be served, along with the petition, documents describing Board representation procedures and providing information about their responsibilities and employee rights. The Statement of Position form will also guide the parties' preparation for any hearing that must be held. We believe that, as a result of these amendments, employers will have more guidance about ''what to do'' than they had under the prior rules.

[334] Section 8(f) of the NLRA (29 U.S.C. 158(f)) permits a construction industry employer and a union to enter into a collective-bargaining agreement even though a majority of the employees have never designated the union to be their collective-bargaining representative. By contrast, it is unlawful for a nonconstruction industry employer to enter into a collective-bargaining agreement with a minority union. See *American Automatic Sprinkler Systems, Inc.* v. *NLRB,* 163 F.3d 209, 214 (4th Cir. 1998).

Cir. 1998). In short, because a Section 9(a) relationship provides much greater protection to the unit employees than a Section 8(f) relationship, a union and the unit employees it represents pursuant to Section 8(f) have ample reason to desire a prompt resolution of the union's 9(a) status through a Board-conducted election. See *M&M Backhoe Service, Inc.* v. *NLRB,* 469 F.3d 1047, 1048–50 (D.C. Cir. 2006). Similarly, employees already covered by an 8(f) collective-bargaining agreement may wish to rid themselves of union representation entirely or change their representative. Indeed, it may be especially important to expeditiously resolve questions concerning representation in the construction industry because construction industry work can be of short duration.

In addition, the Board finds it highly significant that construction industry employers frequently perform services on a common job site alongside many other employers and groups of employees. The Board is all too aware of how quickly labor strife between one employer and a union on a common site can spill over and embroil neutral employers, employees, and the public. See, *e.g., NLRB* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 677–80, 688–92 (1951); *NLRB* v. *International Union of Elevator Constructors,* 902 F.2d 1297, 1303–05 (8th Cir. 1990). Accordingly, the Board is unable to conclude that the public has less of an interest in the expeditious resolution of questions concerning representation in construction industry cases than it does in cases arising outside the construction industry.

Alternatively, AGC, AGC II, ABC, ABC II, and many others argue that the time frames are simply not feasible for construction industry employers because of the complexity of issues arising in that industry and the industry's unique nature.[335] For example, ABC argues that it will not be possible in the allotted time for them to produce the lists of employees in the petitioned-for unit and in their alternative units, because there is a special eligibility formula in the construction industry that requires analysis of 2-years worth of payroll records.[336]

The Board disagrees. As the comment filed by The Building and Construction Trades Department, AFL–CIO (BCTD) notes, the amendments do *not* require the employer to produce a preliminary *Daniel/Steiny* eligibility list as part of its Statement of Position. Instead, it need only produce lists of the individuals employed at the time the petition is filed, and the employer will have 7 days notice of the due date for the Statement of Position. In a contested case, an eligibility list complying with the *Daniel/Steiny* formula need only be produced 2 business days after an election is directed, which will be more than a week after service of the petition. ABC's and AGC's related comment—that they cannot produce the final voter list within the allotted time—is addressed in the sections dealing with the voter list issues generally.

Comments, such as those filed by AGC and ABC, also argue that such an early hearing is not feasible because petitions involving construction industry employees present complex matters, such as the appropriate unit, disappearing and expanding units, craft issues, and the supervisory status of working foremen. However, as BCTD notes, Board precedent on these issues generally is long-standing and settled. Individual supervisory issues may end up being deferred, because, as discussed below in connection with §§ 102.64 and 102.66, disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved prior to the election. And the number and difficulty of the issues presented will vary from case to case. Thus, for example, the issues are likely to be fewer in cases where an incumbent union seeks to convert its relationship from 8(f) to 9(a).[337] Accordingly, the Board disagrees that it should carve out a categorical exemption for all construction industry employers.

4. Businesses Whose Owners or Employees Speak Foreign Languages

CNLP comments that the time frames are unworkable in those cases where English is the not the primary language of the employer or the petitioned-for employees. We decline to carve out a categorical exemption for all such cases. Employers operating in the United States are subject to the laws of this country whether English is the owner's primary language or not. Some business owners and employees can understand English even if English is not their primary language. Even if certain business owners do not understand English at all, they may have advisors or assistants who do. In any event, employers remain free to file motions for postponements based on their particular circumstances. Similarly, employers (and unions) remain free to request that Board notices and ballots be translated into foreign languages based on the needs of unit employees. Casehandling Manual Sections 11315. In short, the Board is confident that regional directors will continue to reasonably exercise their discretion to accommodate the language needs of the public.

5. Other Industries

A host of other comments argue that additional industries, such as the healthcare industry, require exemptions from the standard time frames, but they offer no persuasive justifications.[338] For example, AHA complains that hospitals don't have the capability to focus solely on the completion of the Statement of Position for an entire week, that the rule will place putative supervisors and unit members under a week of scrutiny, and that the accelerated time frames will distract from the employers' primary goal of treating and caring for ill patients. However, they offer no specifics to support any of these assertions. For example, the comments do not show, and the Board does not believe, that hospitals will actually ask the medical professionals who provide direct patient care to complete the employee lists or decide what positions to take regarding a proposed bargaining unit. Nor does the Board believe that the Statement of Position and hearing will require an entire week of preparation that necessitates employer surveillance. The employer already knows what its employees do because it assigns those duties to them, and the employer

[335] See also C.J.M. Services, Inc. II; Sundt Construction II; Knife River Materials.

[336] As discussed above in connection with § 102.62, that formula, commonly known as the *Daniel/Steiny* formula, provides that, in addition to those eligible to vote in Board conducted elections under the standard criteria (*i.e.,* the bargaining unit employees currently employed), unit employees in the construction industry are eligible to vote if they have been employed for at least 30 days within the 12 months preceding the eligibility date for the election and have not voluntarily quit or been discharged, or have had some employment in those 12 months, have not quit or been discharged, and have been employed for at least 45 days within the 24-month period immediately preceding the eligibility date. See *Steiny & Co. Inc.* (''*Steiny*''), 308 NLRB 1323, 1326–27 (1992), and *Daniel Construction Co., Inc.* (''*Daniel*''), 133 NLRB 264, 267 (1961), *modified,* 167 NLRB 1078, 1081 (1967).

[337] Some comments, such as those filed by AGC also suggest that it will be difficult for construction industry employers to comply with the proposed time frames because they have decentralized workplaces. However, the Board is confident that, with modern methods of communication such as email, fax machines, and cell phones, the party responsible for responding to the Statement of Position can obtain the necessary information to complete the form in a timely manner notwithstanding the employer may operate at more than one location. For example, if the person responsible for completing the form needs records stored at a separate location, those records can be faxed (or scanned and then emailed) quickly.

[338] See, *e.g.,* AHA; AHA II; CHA II; Con-way; Testimony of Robert Garbini on behalf of NRMCA.

already knows their terms and conditions of employment because it established them. Indeed, AHA appears to take the position elsewhere in its comment that the Board's healthcare rule (29 CFR 103.30) eases the parties' task by setting forth the appropriate units for cases involving acute care hospitals.[339]

6. Decertification Cases

The SEIU argues that an exception should be created for decertification cases, because, in essence, the interest in expedition is not as strong where an employer is free to withdraw recognition without having to go through the election process. The Board disagrees. The Act makes no distinction as to the importance of expedition in these two situations, and we decline to do so here. Although employer agreement—whether by voluntary recognition, or withdrawal of recognition, or even by procedural election agreements—can eliminate delay in the effectuation of NLRA policies, as discussed elsewhere, this does not alter the NLRA policy in favor of timely representation procedures where no such agreement is forthcoming. The Board takes seriously its responsibility to expeditiously resolve questions concerning representation in the decertification context just as in an initial organizing context.

D. Mandatory Posting of Notice of Petition for Election

The final rule adopts in amended § 102.63(a)(1) the NPRM proposal that, along with the petition, notice of hearing, description of procedures in representation cases, and the Statement of Position form, the regional director will serve a revised version of the Board's Form 5492, currently headed Notice to Employees, on the parties. 79 FR 7328.[340] The revised form will bear the heading ''Notice of Petition for Election,'' (rather than the proposed heading ''Initial Notice to Employees of Election'') to reflect that, as discussed below, although such petitions seek Board-conducted elections, elections do not necessarily occur in all cases after the filing of such petitions. It will specify that a petition has been filed, as well as the type of petition, the proposed unit, and the name of the petitioner; briefly describe the procedures that will follow, and, just as it does currently, it will list employee rights and set forth in understandable terms the central rules governing campaign conduct. The notice will also provide employees with the Board's Web site address, through which they can obtain further information about the processing of petitions. Unlike current Form 5492, which has no posting requirement, the final rule requires employers to post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted,[341] and employers who customarily communicate with their employees electronically will also be required to distribute the notice electronically. The final rule further requires that employers maintain the posting until the petition is dismissed or withdrawn or the Notice of Petition for Election is replaced by the Notice of Election. The Board has concluded that the Notice of Petition for Election will provide useful information and guidance to employees and the parties.

Baker & McKenzie question how soon the employer must post the notice to comply with the proposed requirement that the Employer ''immediately'' post it. While we believe that most employers should be able to comply with this provision by posting the notice on the same day that it is received, the Board will not judge an employer to have failed to comply with this provision so long as the notice is posted within 2 business days of receipt, and, accordingly, the final rule states that the employer shall post the Notice of Petition for Election within 2 business days after service of the notice of hearing. We leave to future case by case adjudication whether some unforeseen set of factual circumstances might justify an employer taking a longer period of time to post the notice. Accordingly, amended § 102.63(a)(2) further provides that the employer's failure properly to post or distribute the Notice of Petition for Election ''may be'' grounds for setting aside the election when proper and timely objections are filed. Just as is the case with respect to the election notice, a party may not object to the nonposting of notices if it is responsible for the nonposting, and likewise may not object to the nondistribution of the Notice of Petition for Election if it is responsible for the nondistribution.

Baker & McKenzie also question whether an employer needs to electronically distribute the notice to all employees in the petitioned-for unit if the employer customarily communicates with only some of the employees through electronic means. If the employer customarily communicates with all the employees in the petitioned-for unit through electronic means, then the employer must distribute the Notice of Petition for Election electronically to the entire unit. If the employer customarily communicates with only some of the employees in the petitioned-for unit through electronic means, then the employer need only distribute the Notice of Petition for Election electronically to those employees.

Few objections were expressed as to the merit of the mandatory posting requirement, and several comments emphasize the importance of timely informing employees of an impending representation proceeding and their related rights.[342] Prompt posting of the Notice of Petition for Election will inform not only the employees whose representation is at issue but also the employer of the rights and protective requirements imposed by the NLRA in the representation context. Such posting will also assist employees in obtaining additional information on a timely basis.

However, GAM expresses concern that the requirement to distribute the notice electronically if the employer customarily communicates with its employees electronically could lead to additional grounds for filing objections to the election and subsequent litigation. The possibility was also raised of unequal treatment of potential voters, since some will have electronic access and some will not.

The Board recognizes that electronic distribution to employees does not, in itself, guarantee that all eligible voters will receive the Notice of Petition for Election. However, electronic

[339] ALFA argues that the time frames are unworkable if the petition is filed when a facility ''is in the middle of a state audit.'' Suffice it to say that the Board believes that a small facility may be able to show special circumstances, and even extraordinary circumstances, for requesting a postponement of a pre-election hearing if the hearing were scheduled during a state audit that required the administrator's attention, depending on the size and particular factors involved.

[340] As discussed above in connection with § 102.60, the Board has concluded that service of the description of representation case procedures will aid non-petitioning parties' understanding of those procedures.

[341] The NPRM proposed that the employer post the proposed Initial Notice (which the final rule retitles as the ''Notice of Petition for Election'') where notices to employees are ''customarily posted,'' and that the proposed final notice (which the final rule accordingly retitles as the ''Notice of Election'') be posted in ''conspicuous places.'' 79 FR 7354, 7359. Upon reflection, the Board has concluded that to help ensure wide dissemination of the important information contained therein, the ''Notice of Petition for Election'' should be posted ''in conspicuous places, including all places where notices to employees are customarily posted,'' and amended § 102.63(a)(2) so provides. The Board has decided to use similar language in amended § 102.67(k) to describe where the ''Notice of Election'' should be posted.

[342] AFL–CIO; SEIU; GAM.

distribution will act in conjunction with the posting of paper notices in conspicuous places, including all places where notices to employees are customarily posted. Unless the employer can be shown to have departed from its customary practice in electronic distribution, there will be no basis for an objection and the requirement will only increase the desired flow of information to employees.

ALFA suggests that the notice should warn employees that final decisions have not been made regarding the unit and whether an election will be conducted. The Board agrees that such warnings would accurately describe the reality when the regional director furnishes the notice to the employer for posting and distribution. Accordingly, the final rule provides in § 102.63(a)(2) that the Notice of Petition for Election shall indicate that no final decisions have been made yet regarding the appropriateness of the petitioned-for bargaining unit and whether an election shall be conducted.

ALFA and the ACC complain that the Board should have included a copy of the proposed Notice in the NPRM to permit the public to comment on it. However, as discussed in the NPRM, it has long been the Board's practice to ask the employer to voluntarily post a generic notice of employee rights—Form 5492—upon the filing of a petition; the NPRM described how the Board proposed to modify the contents of that notice, such as by including a description of the proposed unit and the name of the petitioner (79 FR 7324, 7328); and that notice was available to the public. Accordingly, the Board rejects any suggestion that the public was unable to comment on the proposal to require the employer to post a notice after the filing of a petition but before an election is agreed to by the parties or is directed by the regional director.[343] As it has in the past, the Board will use due care in crafting the notices, the notices will be consistent with the regulations the agency has promulgated, and the notices will comply with all existing laws and regulations governing notices utilized by Federal agencies, including the Paperwork Reduction Act as separately analyzed. Should a party feel there is any error in a notice as promulgated, it can bring that to the attention of the Board.[344]

Sec. 102.64 Conduct of Hearing

As explained in the NPRM, the proposed amendments to § 102.64 were intended to ensure that the pre-election hearing is conducted efficiently and is no longer than necessary to serve the statutory purpose of determining if there is a question of representation. 79 FR at 7329. The final rule largely embodies the proposed amendments.

In amended § 102.64(a), the Board expressly construes Section 9(c) of the Act, which specifies the purpose of the pre-election hearing. The statutory purpose of the pre-election hearing is to determine if there is a question of representation.[345] A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative.[346] If the regional director concludes, based on the record created at the hearing, that such a question of representation exists, the regional director should direct an election in order to resolve the question.[347]

Amended § 102.64(a) makes clear that, as discussed in the NPRM (79 FR at 7322, 7329), resolution of disputes concerning the eligibility or inclusion of individual employees ordinarily is not necessary in order to determine if a question of representation exists, and therefore disputes concerning individual employees' eligibility to vote and inclusion in the unit ordinarily need not be litigated or resolved before an election is conducted. Such disputes can be raised through challenges interposed during the election, if the disputed individuals cast a ballot, and such disputes can be both litigated and resolved, if necessary, post-election. The proposed rule provided in § 102.64(a) (79 FR at 7356):

If, upon the record of the hearing, the regional director finds that such a question

[343] The Chamber II notes that the District of Columbia Circuit and the Fourth Circuit struck down a Board rule requiring all employers subject to the NLRA to post a notice of employee rights in the workplace. The rule also noted that the failure to post could be found to be an unfair labor practice. 76 FR 54006 (August 30, 2011). The Board rejects any suggestion that the litigation over that rule calls into question the validity of the proposal to require an employer to post a notice upon the filing of a representation petition. As the text of amended § 102.63 makes clear, an employer will only be required to post the Notice of Petition for Election if it is the subject of a pending representation petition, and the failure to post the notice will not constitute an unfair labor practice. See *Nat'l Ass'n of Mfrs.* v. *NLRB,* 717 F.3d 947, 959 n.19 (D.C. Cir. 2013) (''Our conclusion here does not affect the Board's rule requiring employers to post an election notice (which similarly contains information about employee rights) before a representation election[.] Because the failure to post the required election notice does not constitute an unfair labor practice but may be a basis for setting aside the election, see *id.* § 103.20(d) [of the Board's prior rules], the rule does not implicate § 8(c).'') *overruled in part, American Meat Institute* v. *U.S. Dep't of Agriculture,* 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc). And the Fourth Circuit specifically distinguished the rule, which applied regardless of the pendency of an NLRA proceeding, from instances in which representation petitions have been filed with the Board. See *Chamber of Commerce* v. *NLRB,* 721 F.3d 152, 154, 156, 161, 163 (4th Cir. 2013).

[344] For much the same reasons, the Board likewise rejects the Chamber's complaint that the Board should have included the proposed Statement of Position form in the NPRM. As discussed, the NPRM set forth at length the specific information that the proposed form would solicit. 79 FR 7328–7329. Indeed, the Chamber concedes that ''the substantive information to be supplied by the employer for the Statement of Position Form is described in the proposed amendments.'' The numerous detailed comments that were submitted on the Statement of Position proposal belie any suggestion that the failure to provide the form itself in the NPRM deprived any party of the ability to comment on the proposal. The Board similarly rejects the Chamber's additional complaint that the Board should have published the proposed description of representation case procedures in the NPRM. As the NPRM indicated, this description is a substitute for and an expanded version of Form 4812—and serves to inform interested parties of their rights and obligations in relation to the representation proceeding. 79 FR 7326, 7328, 7329. Form 4812 was publicly available during the comment period.

[345] Thus, Section 9(c)(1)(A) of the Act provides that the Board must provide for a hearing if it has ''reasonable cause to believe that a question of representation affecting commerce exists,'' and that the Board must direct an election if it finds, based on the record of that hearing, that ''such a question of representation exists.''

[346] A proper petition cannot be filed under Section 9(c)(1) and a question of representation cannot arise under the Act unless the employees in the unit are employed by an employer covered by the Act. Thus, if any party contests the Board's statutory jurisdiction or contends that the Board has declined to exercise its full, statutory jurisdiction over the employer, the regional director must resolve the resulting dispute based on the record of the pre-election hearing. A proper petition cannot be filed under Section 9(c)(1) and a question of representation cannot exist under the Act if there is a bar to an election, so the regional director must rule on the existence of a bar prior to directing an election if any party raises the issue. Similarly, a proper petition can be filed by ''an employee or group of employees or any individual or labor organization.'' Thus, if a petition is filed by an entity and any party contends that the entity is not a labor organization, the regional director must resolve the resulting dispute based on the record of the pre-election hearing. Moreover, the final rule ensures that the nonemployer parties will have the opportunity to present evidence on these issues even if the employer declines to take a position on them. Thus, amended § 102.66(b) makes clear that even if the employer declines to take a position on issues such as the appropriateness of a petitioned-for unit that is not presumptively appropriate, the regional director has discretion to direct the receipt of evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the director determines that record evidence is necessary.

[347] The hearing officer will retain authority to develop the record relevant to any such contention using the ordinary procedures already in use, which are designed to avoid burdening the record with unnecessary evidence. For example, current rules give the hearing officer discretion to require a party to make an offer of proof before admitting evidence.

of representation exists and there is no bar to an election, he shall direct an election to resolve the question and, subsequent to that election, unless specifically provided otherwise in these rules, resolve any disputes concerning the eligibility or inclusion of voters that might affect the results of the election.

The final rule provides in § 102.64(a):

Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted. If, upon the record of the hearing, the regional director finds that a question of representation exists, the director shall direct an election to resolve the question.

The change in language is due to the final rule not adopting the ''20-percent rule'' as discussed below in relation to § 102.66. For that reason, the language, ''unless specifically provided otherwise in these rules,'' has been removed. As more fully explained in relation to § 102.66 below, the amendment expressly preserves the regional director's discretion to resolve or not to resolve disputes concerning individuals' eligibility to vote or inclusion in the unit until after the election. It also grants the hearing officer authority to exclude, at the regional director's direction, evidence concerning such disputes on the grounds that such evidence is not relevant to the existence of a question of representation. In addition, because a question of representation cannot exist under the Act if there is a bar to an election, see, *e.g., Deluxe Metal Furniture Co.,* 121 NLRB 995, 1007 (1958) (contract bar); *Randolph Metal Works, Inc.,* 147 NLRB 973, 974–75 (1964) (election and contract bars); *Seven Up Bottling Co.,* 222 NLRB 278, 279 (1976) (certification bar), the Board has concluded that it is superfluous for the regulatory text to refer to both the existence of a question of representation and the absence of a bar. Accordingly, the final rule provides that if the regional director finds that a question of representation exists, the director shall direct an election to resolve the question. See Section 9(c)(1) of the Act (''If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.'')

The proposed rule provided in § 102.64 (b) (79 FR 7356):

Subject to the provisions of § 102.66 of this subpart, it shall be the duty of the hearing officer to inquire fully into all genuine disputes as to material facts in order to obtain a full and complete record upon which the Board or the regional director may discharge their duties under Section 9(c) of the Act.

The final rule provides in § 102.64(b):

Subject to the provisions of § 102.66 of this subpart, it shall be the duty of the hearing officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under Section 9(c) of the Act.

The Board has removed the ''genuine disputes as to material-facts'' language drawn from Federal Rule of Civil Procedure 56 in order to avoid the confusion evident in some comments concerning the role of the hearing officer. Therefore, amended § 102.64(b) will provide, ''Subject to the provisions of § 102.66 of this subpart, it shall be the duty of the hearing officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under Section 9(c) of the Act.'' However, amended § 102.64(a) more clearly specifies the Board's or regional director's ''duties under Section 9(c) of the Act,'' and thus gives clear guidance to hearing officers concerning what evidence is and is not necessary to develop a ''full and complete record'' upon which the Board or regional director can discharge those duties.

Few comments address the proposed amendments to § 102.64(a) and (b). Those that do, question our construction of Section 9(c) of the Act in § 102.64 on the grounds that litigation of disputes concerning individual employees' eligibility to vote and inclusion in the unit should be permitted pre-election. These comments are addressed below in relation to § 102.66.

The Board's current rules provide that the hearing officer may, in the officer's discretion, continue the hearing from day to day or adjourn it to a later date. Although, as noted above, there was a great deal of comment about the proposal to open the pre-election hearing 7 days from service of the notice absent special circumstances, there were few comments about the proposal that the hearing continue day to day until completed absent extraordinary circumstances. 79 FR at 7356. The AFL–CIO and AFSCME submitted comments in support of this change. The AFL–CIO argues that ''[t]his requirement is critical because the current process, under which a 3-day hearing may extend over several weeks, presents opportunities for manipulating the timing of the election and maximizing the delay before any election is conducted.'' AFSCME adds that the amendment should not be controversial and benefits all parties by injecting certainty into the election process. The AFL–CIO also points out that the proposed amendment would merely codify a ''best practice'' listed in the General Counsel's 1997 ''Report of Best Practices Committee—Representation Cases.'' [348]

However, the AFL–CIO suggests that the Board should require parties to meet a stricter standard when seeking a continuance. Thus, the AFL–CIO suggests that instead of requiring that hearings be conducted on consecutive days ''absent extraordinary circumstances,'' the Board adopt the language ''unless the most compelling circumstances warrant otherwise,'' which is used in Section 11082.3 of the Board's Casehandling Manual. In its reply to the AFL–CIO's comment, the Chamber requests (Reply) at a minimum that the Board not abandon the ''extraordinary circumstances language.'' However, the Chamber also urges the Board to temper the requirement of consecutive day hearings. Thus, it suggests that the Board merely require a moving party to demonstrate ''good cause'' for a hearing's continuance. According to the Chamber (Reply), employers and their counsel will need to reschedule other matters in order to comply with the 7-day hearing and statement-of-position provisions, which will increase the chances of scheduling conflicts if the hearing runs more than 1 day.

After careful consideration, the Board has decided to adopt the proposed amendment with one change in amended § 102.64(c) to make clear that the regional director, rather than the hearing officer, will make the determination in question. The Board concludes that continuing the pre-election hearing from day to day until completed (absent extraordinary circumstances) will remove unnecessary barriers to the expeditious resolution of questions concerning representation because, absent an election agreement, the election that is designed to answer the question of representation cannot be held until the pre-election hearing is completed. Thus, eliminating unnecessary delay in concluding the pre-election hearing helps eliminate unnecessary delay in resolving questions of representation. The amendment also allows the Board, rather than the parties, to control the hearing schedule, and renders hearing scheduling more transparent and uniform across regions.

The Board declines to adopt the Chamber's suggestion—that the Board adopt a good-cause standard for granting

[348] See also Section 11082.3 of the Casehandling Manual, which provides that parties should be advised ''that the hearing, once commenced, will be conducted on consecutive days, until completed, unless the most compelling circumstances warrant otherwise.''

continuances—as largely being unnecessary in light of the final rule's adoption of revised language in § 102.63 regarding the scheduling of the pre-election hearing and the changes to § 102.64 and § 102.66 regarding the conduct of the hearing. As set forth in amended § 102.63, except in cases presenting unusually complex issues, the pre-election hearing will be scheduled to open 8 days from service of the notice, but parties may request that the hearing be postponed up to 2 business days for special circumstances, and for more than 2 business days for extraordinary circumstances. Moreover, the amendments to § 102.64(a), clarifying the purpose of the hearing and that disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted, and the amendments to §§ 102.63 and 102.66, providing for Statements of Position and responses to the Statements of Positions, should serve to streamline the hearing, making it less likely that the hearing will continue over several days.

The Board likewise declines to adopt the AFL–CIO's suggestion. Once the hearing opens, the Board expects that the hearing will continue from day to day until completed. In the Board's view, the ''extraordinary circumstances'' language does not differ significantly from the existing Casehandling Manual guidance of ''the most compelling circumstances,'' and in any event, is more widely used and easily understood by parties who are new to Board processes.

However, the Board has concluded that just as the regional director is the one who decides when the pre-election hearing will open, the regional director, rather than the hearing officer, should be the one to decide whether a pre-election hearing that requires more than 1 day should continue day to day until completed or should be adjourned to a later date. Accordingly, amended § 102.64(c) provides that the hearing will continue from day to day until completed unless the regional director concludes that extraordinary circumstances warrant otherwise.[349]

Sec. 102.65 Motions; Intervention; Appeals of Hearing Officer's Rulings

Consistent with the effort to avoid piecemeal appeals, the NPRM proposed to narrow the circumstances under which a request for special permission to appeal would be granted. More specifically, the NPRM proposed that such an appeal would only be granted under extraordinary circumstances when it appears that the issue will otherwise evade review. To further discourage piecemeal appeals, the NPRM proposed that a party need not seek special permission to appeal in order to preserve an issue for review post-election. Consistent with current practice, the NPRM provided that neither the filing of a request for special permission to appeal nor the grant of such a request would stay an election or any other action or require impounding of ballots unless specifically ordered by the Board. The NPRM also proposed that neither a regional director nor the Board would automatically delay any decision or action during the time permitted for filing motions for reconsideration, rehearing, or to reopen the record. 79 FR at 7329, 7356–7357.

Upon reflection, the Board has decided not to adopt the proposed narrower standard to govern requests for special permission to appeal rulings of a hearing officer to the regional director. In the pre-election hearing, the hearing officer is developing a record upon which the regional director can make a decision. Moreover, the relation between hearing officers and regional directors is, in practice, more informal than that between a trial and appellate court or between a regional director and the Board, with hearing officers not infrequently seeking advice from the regional director during a hearing. For these reasons, the final rule does not apply the proposed narrower standard to requests for special permission to appeal rulings of hearing officers to the regional director. However, to discourage such piecemeal appeals, the final rule makes clear in amended § 102.65(c) that a party need not seek special permission to appeal in order to preserve an issue for later. Consistent with current practice, the amendments provide that the filing of a request for special permission to appeal will not stay the proceedings unless otherwise ordered by the regional director.

Consistent with the interpretation of Section 3(b) of the Act that our colleagues advanced in their dissent to the NPRM (79 FR at 7343 & n.108), the Board has also decided to substitute the request for review procedure, as modified as described below in connection with § 102.67, for the request for special permission to appeal procedure that the NPRM proposed to apply with respect to rulings made by the regional director prior to the close of a hearing in proceedings governed by Subpart C of Part 102. Accordingly, the Board has decided to amend §§ 102.65 and 102.67 to clarify that any party may request Board review of any action taken by the regional director under to Section 3(b) of the Act except where the Board's rules provide otherwise.[350]

Few comments were submitted on the proposed amendments to § 102.65. AHCA contends that the Board provides no examples of issues that would meet the standard for ''otherwise evades review.'' Constangy argues that limiting appeals to extraordinary circumstances, combined with preventing regional directors from staying proceedings to consider motions for reconsideration, will effectively result in the total preclusion of review of pre-election rulings, preventing appeal of legitimate disputes. AHCA and ALFA argue that special permission to appeal serves little purpose because it will not stay proceedings. The Board need not address these comments at length because, as shown, the Board is not adopting the proposed narrower standard to govern requests for special permission to appeal hearing officer rulings to the regional director; the Board likewise has rejected the proposed narrower standard to govern appeals (to the Board) of regional director rulings made prior to the close of the hearing; and, as discussed below in connection with § 102.67, the Board has decided to permit parties to request review of a regional director's post-hearing decision and direction of election prior to the election. Moreover, the final rule does not preclude the regional director or the Board from granting a stay. Rather the final rule merely provides in amended § 102.65(c) and amended § 102.67(c) that such filings will not result in an automatic stay.

The final rule adopts the proposed amendments to § 102.65(e)(3). The Casehandling Manual provides in Section 11338.7 that a Board agent should exercise discretion in deciding whether to allow a vote under challenge

[349] The proposed amendment to § 102.64 (b) also omitted pre-existing language providing that the hearing officer also has discretion to adjourn the hearing ''to a different place, by announcement thereof at the hearing or by other appropriate notice.'' Upon reflection, the Board has decided to reject the proposed amendment, as hearings sometimes need to be relocated. However, consistent with the amendment vesting the regional director, rather than the hearing officer, with the authority to decide whether a hearing that requires more than a day to complete should continue day to day or whether it should be adjourned to a later date, the final rule also provides in amended § 102.64(c) that the regional director has discretion to adjourn the hearing to a different location by appropriate notice.

[350] For example, if a party enters into an agreement pursuant to § 102.62(c) of this subpart, providing for final regional determination of both pre- and post-election disputes, a party may not file a request for review of any regional director action.

when a party claims that changed circumstances justify a challenge to voters specifically excluded, or included, by the decision and direction of election. Accordingly, the final rule adopts the proposal in the NPRM that if a motion for reconsideration based on changed circumstances or to reopen the record based on newly discovered evidence states with particularity that the granting thereof will affect the eligibility to vote of specific employees, the Board agent shall have discretion to allow such employees to vote subject to challenge even if they are specifically excluded in the direction of election and to challenge or to permit the moving party to challenge the ballots of such employees even if they are specifically included in the direction of election in any election conducted while such motion is pending.[351]

The final rule makes a few additional amendments to § 102.65. Under the Board's prior rules, the regional director could rule on motions to intervene and to amend petitions or could refer such motions to the hearing officer. 29 CFR 102.65(a), (b) (2010). As discussed below in connection with § 102.66, the Board received a number of comments criticizing the authority of the hearing officer at the pre-election hearing. Upon reflection, the Board has decided to amend § 102.65(a) and (b) to provide that the hearing officer shall rule on motions to intervene and to amend petitions only as directed by the regional director. Thus, the amendments make clear that it will be the regional director who decides whether a party may intervene and whether a petition may be amended. The final rule also moves a sentence about the record from § 102.65(c) into amended § 102.65(a). The final rule's other amendments to § 102.65 conform the provisions of this section to the remainder of the amendments.[352]

The NPRM also proposed that any person desiring to intervene in a representation case be required to complete a Statement of Position. 79 FR 7329, 7356. Upon reflection, the Board has decided to reject the proposed amendment. Intervention happens in a wide variety of circumstances and so regional directors should have discretion to follow the procedure that best facilitates development of the record in a particular case.

Sec. 102.66 Introduction of Evidence: Rights of Parties at Hearing; Preclusion; Subpoenas; Oral Argument and Briefs

In the NPRM, the Board proposed a number of amendments to § 102.66. The proposed amendments were designed to ensure that issues in dispute would be more promptly and clearly identified and that hearing officers could limit the evidence offered at the pre-election hearing to that which is necessary for the regional director to determine whether a question of representation exists. As explained below, the final rule adopts only some of the proposals.

The NPRM proposed that hearing officers limit the evidence offered at hearings to that evidence which is relevant to a genuine dispute as to a material fact. The proposed amendments further provided that if, at any time during the hearing, the hearing officer determined that the only genuine issue remaining in dispute concerned the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote, the hearing officer would close the hearing, and the director would permit those individuals to vote subject to challenge.

The NPRM proposed that hearing officers would follow a specified process to identify relevant issues in dispute. Thus, the NPRM provided that the hearing officer would open the hearing by reviewing, or assisting non-petitioning parties to complete, statements of position, and then would require the petitioner to respond to any issues raised in the statements of positions, thereby joining the issues. The NPRM further proposed that after the issues were joined, the hearing officer would require the parties to make offers of proof concerning any relevant issues in dispute, and would not proceed to take evidence unless the parties' offers created a genuine dispute concerning a material fact.

The Board proposed that a party would be precluded from raising any issue that it failed to raise in its timely statement of position or to place in dispute in response to another party's statement, subject to specified exceptions.

The Board proposed in the NPRM that parties be permitted to file post-hearing briefs only with the permission of the hearing officer.

Finally, the NPRM proposed, consistent with existing practice, that a party that has been served with a subpoena may be required to file or orally present a motion to quash prior to the 5 days provided in Section 11(1) of the Act.

A. Rights of Parties at Hearing; Disputes Concerning Less Than 20 Percent of the Unit

Section 101.20(c) of the Board's pre-NPRM Statement of Procedures provided in pertinent part, ''The parties are afforded full opportunity [at the pre-election hearing] to present their respective positions and to produce the significant facts in support of their contentions.'' And the Board's pre-NPRM rules provided in § 102.66(a):

> Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the hearing officer shall have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses shall be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of fact may be introduced in evidence with respect to any issue.

As discussed in more detail below, these provisions had been interpreted to give parties a right to produce evidence about issues that are not relevant to whether there is a question of representation.

The NPRM proposed to eliminate § 101.20 (and the rest of Subpart C of Part 101) and to amend § 102.66(a) to state as follows:

> Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the hearing officer shall have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence relevant to any genuine dispute as to a material fact. The hearing officer shall identify such disputes as follows:
>
> * * * * *

The Board also proposed to require the hearing officer to bar litigation of disputes concerning the eligibility or inclusion of individuals comprising less than 20-percent of the unit (the so-called ''20-percent rule''). Thus, § 102.66(d) of the NPRM provided:

> (d) *Disputes concerning less than 20 percent of the unit.* If at any time during the hearing, the hearing officer determines that the only issues remaining in dispute concern the eligibility or inclusion of individuals who would constitute less than 20 percent of the

[351] Upon reflection, the Board has concluded that Board agents should have discretion to challenge individuals who are explicitly included in the direction of election when a party has filed a motion as set forth above instead of having to rely on the moving party.

[352] Because as discussed below in connection with § 102.67, the Board has decided to eliminate the transfer procedure, the final rule also omits references to the transfer procedure that previously appeared in § 102.65. The final rule also omits the now outdated references to ''carbon copies'' in this and other sections, and provides that extra copies of electronically-filed papers need not be filed with the Board. These amendments update the Board's representation case rules to reflect modern methods of communication.

unit if they were found to be eligible to vote, the hearing officer shall close the hearing.[353] The proposed amendments were designed to maximize procedural efficiency by ensuring that hearing officers could limit the evidence offered at the pre-election hearing to that which is necessary for the regional director to determine whether a question of representation exists. As discussed in the NPRM, whether or not a particular individual falls within an appropriate unit and is eligible to vote is not ordinarily relevant to whether a question of representation exists. 79 FR at 7322. The NPRM expressed the Board's ''preliminary view * * * that deferring both the litigation and resolution of eligibility and inclusion questions affecting no more than 20 percent of all eligible voters represents a reasonable balance of the public's and parties' interest in prompt resolution of questions concerning representation and employees' interest in knowing precisely who will be in the unit should they choose to be represented.'' 79 FR at 7331.

As noted below in connection with Part 101, the final rule adopts the proposal to eliminate Subpart C of Part 101, which contained § 101.20(c). The final rule also amends § 102.66(a) to provide:

> Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation. The hearing officer shall also have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses shall be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of fact may be introduced in evidence with respect to any issue.[354]

Rather than the proposed standard ''genuine dispute as to a material fact,'' the Board has adopted the standard ''significant facts that support the party's contentions and are relevant to the existence of a question of representation.'' The proposed standard, which had been borrowed from Federal Rule of Civil Procedure 56, suggested that the hearing officer would be responsible for summary judgment, which struck commenters as a signal that the hearing officer's role would change in a way that was likely to pose administrative and statutory problems. The standard of ''significant facts'' adopted in the final rule comes from current 101.20(c), and preserves the hearing officer's essential role. However, unlike current regulations, the final rule makes clear that the ''significant facts'' that support the party's contentions must *also* be ''relevant to the existence of a question of representation.'' [355] As discussed below, paragraph (d) of proposed § 102.66 is deleted because the final rule does not adopt the 20-percent rule provisions, which would have *required* the hearing officer to exclude evidence regarding individual eligibility or inclusion issues involving less than 20 percent of the unit (and the regional director to defer deciding individual eligibility or inclusion questions involving less than 20 percent of the unit and to vote such disputed individuals subject to challenge). See 79 FR at 7332.

The final rule's amendment of § 102.66(a) together with the modification of the language which previously appeared in § 101.20(c) removes the basis of the Board's holding in *Barre National, Inc.*, 316 NLRB 877 (1995), that a hearing officer must permit full litigation of all eligibility issues in dispute prior to a direction of an election, even though the regional director and the Board need not resolve the issues prior to the election. Together with the amendment of § 102.64(a), the amendment of § 102.66(a) makes clear that, while the regional director must determine that a proposed unit is appropriate in order to find that a question of representation exists, the regional director can defer litigation of individual eligibility and inclusion issues that need not be decided before the election.

In its comment, Baker & McKenzie questioned how a hearing officer would determine whether proffered evidence was relevant to voter eligibility or voter inclusion as opposed to unit appropriateness. The same question arises under current procedures when both the regional director and the Board defer ruling on eligibility or inclusion questions until after the election. Thus, existing case law in which both regional directors and the Board have deferred deciding individual eligibility and inclusion questions until after an election will provide considerable guidance to hearing officers and regional directors.[356] Generally, individual eligibility and inclusion issues concern either (1) whether an individual or group is covered by the terms used to describe the unit, or (2) whether an individual or group is within a particular statutory exclusion and cannot be in the unit. For example, if the petition calls for a unit including ''production employees'' and excluding the typical ''professional employees, guards and supervisors as defined in the Act,'' then the following would all be eligibility or inclusion questions: (1) Whether production foremen are supervisors, see, *e.g., United States Gypsum Co.*, 111 NLRB 551, 552 (1955); (2) whether production employee Jane Doe is a supervisor, see, *e.g., PECO Energy Co.*, 322 NLRB 1074, 1083 (1997); (3) whether workers who perform quality control functions are production employees, see, *e.g., Lundy Packing Co.*, 314 NLRB 1042 (1994); and (4) whether Joe Smith is a production employee, see, *e.g., Allegany Aggregates, Inc.*, 327 NLRB 658 (1999).

One exception concerns professional employees. The regional director must address whether there are any professional employees in an otherwise appropriate unit containing nonprofessionals. Under Section 9(b)(1) of the Act, any professionals in a unit containing both professional and nonprofessional employees must be given the choice of whether they wish to be represented in such a mixed unit. Because this requires special balloting procedures, see *Sonotone Corp.*, 90 NLRB 1236 (1950), the question of whether any employees included in the otherwise appropriate unit are professionals must be answered prior to the election.[357] Similarly, if a party

[353] The NPRM also proposed in § 102.67(a) that ''[i]f the hearing officer has determined during the hearing, or the regional director determines after the hearing that the only issues remaining in dispute concern the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote, the regional director shall direct that those individuals be permitted to vote subject to challenge.''

[354] In the proposed rule, the last two sentences were in a separate paragraph (e).

[355] Although parties also have the right to litigate at the pre-election hearing whether an election is barred, the Board has concluded that it is not necessary to specify this in the regulatory text because a question of representation cannot exist under the Act if there is such a bar. Accordingly, evidence that is relevant to a bar is also relevant to the existence of a question of representation.

[356] As discussed below, the final rule provides in amended § 102.66(c) that the regional director shall direct the hearing officer concerning the issues to be litigated at the hearing.

[357] On the other hand, if the unit description expressly excludes professional employees, then no *Sonotone* balloting question would be presented, and the issue would not have to be addressed. If any party contends that an individual is a professional, and if the individual wishes to vote, he or she can be permitted to vote subject to challenge and the question can be resolved after the election.

Although some comments similarly argue that the question of whether any employees in a unit containing non-guards are guards must be decided prior to the election, the Board disagrees. The Act does not require any special election procedures for guards equivalent to what Section 9(b)(1) requires

contends that, under Board precedent, an eligibility standard different than the Board's ordinary standard [358] should be used, the hearing officer may take such evidence as may be necessary to resolve that question since its resolution is a prerequisite to the conduct of the election.

Some comments on the proposed amendments argue that limiting evidence to that which is relevant to whether a question of representation exists is inconsistent with the statute's requirement that, absent an election agreement, the Board must hold an ''appropriate hearing'' prior to conducting an election.[359] The Board disagrees. Section 9(c)(1) of the Act provides that the Board must provide for a hearing if it has ''reasonable cause to believe that a question of representation affecting commerce exists,'' and that the Board must direct an election if it finds, based on the record of that hearing, that ''such a question of representation exists.'' Thus, as explained above in relation to § 102.64, the statutory purpose of the pre-election hearing is to determine whether a question of representation exists. The amendments to §§ 102.64(a) and 102.66(a) are entirely consistent with Section 9(c)'s requirement that ''an appropriate hearing'' be held before the election is conducted. The two amendments are consistent with Section 9(c) because both permit parties to introduce evidence at the pre-election hearing that is relevant to whether a question of representation exists. Indeed, the amendment to § 102.66(a) expressly vests parties with a right to present evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation. Nothing in Section 9(c) or any other section of the Act requires the Board to permit parties to introduce evidence at a pre-election hearing that is not relevant to whether a question of representation exists.

The final rule's amendment of §§ 102.64(a) and 102.66(a) is also consistent with the final sentence of current § 102.64(a), which the final rule does not amend, though the sentence will now appear in § 102.64(b). That sentence provides that the hearing officer's duty is ''to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director *may discharge their duties under Section 9(c) of the Act.*'' (Emphasis added.) A hearing officer ensures ''a full and complete record upon which the Board or the regional director may discharge their duties under Section 9(c) of the Act'' when he or she permits parties to present evidence of significant facts relevant to the existence of a question of representation. The Board's duty under Section 9(c) is to conduct a hearing to determine if a question of representation exists and, if such a question exists, to direct an election to answer the question and to certify the results. The final rule expressly allows the hearing officer to create a record permitting the regional director to do precisely that.

In short, the effect of the amendments is simply to permit the hearing officer, acting at the behest of the regional director, to prevent the introduction of evidence that is not needed in order to determine if a question of representation exists. By definition, if the hearing officer excludes evidence that is not relevant to whether a question of representation exists, the hearing officer is not impeding the ability of the regional director or the Board to discharge their respective duties under Section 9(c) of the Act.

SHRM, among others, cites *Barre-National, Inc.*, 316 NLRB 877 (1995) for the proposition that both current rules and Section 9(c) of the statute compel litigation of these matters. The *Barre-National* Board cited both §§ 102.66(a) and 101.20(c) in holding that litigation was required. In support of its conclusions that the hearing officer erred by excluding the evidence and the regional director erred by permitting the disputed employees to vote subject to challenge, the Board quoted the portion of § 102.66(a), which then read:

> Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the hearing officer shall have power to call, examine, and cross examine witnesses and to introduce into the record documentary and other evidence.

The Board also quoted the portion of § 101.20(c), which then read:

> The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions.

Based on its reading of those two provisions, the Board reasoned that, ''Section 102.66(a) of the Board's Rules and Section 101.20(c) of the Board's Statements of Procedure entitle parties at such hearings to present witnesses and documentary evidence in support of their positions.'' 316 NLRB at 878. The *Barre-National* Board went on to hold that, ''Under all the circumstances, the pre-election hearing held in this case did not meet the requirements of the Act and the Board's rules and Statements of Procedures.'' *Id.* Because of the use of the conjunctive ''and'' rather than the disjunctive ''or'' and the fact that nothing in Section 9(c) of the Act can possibly be understood to give parties a right to litigate questions of individual eligibility or inclusion prior to an election, as discussed further below, *Barre-National* cannot be read to rest on a construction of the Act. Rather, the *Barre-National* Board based its holding on its reading of §§ 102.66(a) and 101.20(c). In light of the regulatory changes made today, that reliance is no longer relevant.[360]

In addition, as explained in the NPRM, the result in *Barre-National* is not administratively rational. The Board in that case recognized that an entitlement to litigate issues at the pre-election hearing is distinct from any claim of entitlement to a decision on all issues litigated at the hearing, acknowledging that ''reviewing courts have held that there is no general requirement that the Board decide all voter eligibility issues prior to an election.'' *Id.* at 878 n.9. The Board has concluded that it serves no statutory or administrative purpose to require the hearing officer to permit pre-election litigation of issues that both the regional director and the Board are entitled to, and often do, defer deciding until after the election and that are often rendered moot by the election results. It serves no purpose to require the hearing officer at a pre-election hearing to permit parties to present evidence that relates to matters that need not be addressed in order for the hearing to fulfill its statutory function of creating a record upon which the regional director can

for professionals. While Section 9(b)(3) precludes the Board from finding that a ''mixed unit,'' *i.e.*, one containing both guards and nonguards, is appropriate, if any party contends that an individual in an otherwise appropriate unit of nonguards is a guard, the regional director can find the unit ''excluding guards'' appropriate and, if the individual attempts to cast a ballot, he or she can be permitted to vote subject to challenge and the question can be resolved after the election.

[358] For example, in the entertainment industry, given that employees may work intermittently with no expectation of continued employment with a particular employer, the Board may apply a different eligibility standard. See *Kansas City Repertory Theatre, Inc.*, 356 NLRB No. 28 (2010); see also *Alaska Salmon Industry*, 61 NLRB 1508, 1511–12 (1945) (changing eligibility formula for seasonal industries).

[359] See, *e.g.*, ALG; Constangy; NGA II. Other comments argue generally that Section 9(c) requires the Board to conduct a pre-election hearing on issues concerning eligibility and inclusion. See GAM; AHA; ALFA; COLLE; CDW; Testimony of Homer Deakins on behalf of COLLE II.

[360] Reliance on *NLRB* v. *S.W. Evans & Son*, 181 F.2d 427 (3d Cir. 1950), by CDW is similarly mistaken. The Third Circuit expressly limited its holding to an interpretation of the extant regulatory language—in this case regulatory language from 1945 which is long gone today. 181 F.2d at 429–430; see 10 FR 14498 *et seq.* (November 28, 1945).

determine if a question of representation exists. In other words, it is administratively irrational to require the hearing officer to permit the introduction of irrelevant evidence. The final rule eliminates such wholly unnecessary litigation that serves as a barrier to the expeditious resolution of questions of representation.

Thus, the central question is whether Congress intended that the term ''appropriate hearing'' in Section 9(c) compel pre-election litigation of matters that would not be decided before the election—and likely would never need to be decided by the regional director. Commenters, most notably CDW II, argue that the answer is yes. We disagree.

The term ''appropriate hearing'' comes from the original 1935 Wagner Act. As stated by the Supreme Court: ''The section is short. Its terms are broad and general * * *. Obviously great latitude concerning procedural details is contemplated.'' *Inland Empire Council* v. *Millis*, 325 U.S. 697, 706–710 (1945). Although the hearing should provide parties a ''full and adequate opportunity to present their objections,'' [361] nothing in *Inland Empire* suggests that the Board must give a hearing to matters which will not be decided. To the contrary, the phrase ''an appropriate hearing'' was intended to ''confer[] broad discretion upon the Board as to the hearing [required],'' so as to avoid unnecessary litigation delays. *Id.*[362] In 1947, when Congress revised the Act to ensure that a hearing was held before the election, it left this essential language intact.[363] Despite the many comments on this matter, no one has identified any case in any legal or administrative context in which litigation was required regarding issues that were not being decided—except *Barre-National*.

Even assuming that the *Barre-National* Board did look to Section 9(c)—a point previously debated at length, see 76 FR 80165; 77 FR 25550–51; 77 FR 25562–63—the statutory analysis in *Barre-National* is essentially non-existent. There is no meaningful discussion of the statutory language, no analysis of the legislative history or the plain language of Section 9(c), and no explanation for why it would make sense to require litigation of issues that will not be decided—in short, nothing whatsoever to substantively support its supposed interpretation of the statute. On the contrary, the Board, for the reasons discussed above, believes that the legislative history shows the Board is not required to allow pre-election litigation of issues that will not be decided pre-election. It is beyond dispute that ''reviewing courts have held that there is no general requirement that the Board decide all voter eligibility issues prior to an election.'' *Barre-National,* 316 NLRB at 878 n.9. Put plainly, ''deferring the question of voter eligibility until after an election is an accepted NLRB practice.'' *Bituma Corp.* v. *NLRB*, 23 F.3d 1432, 1436 (8th Cir. 1994).[364] This has been so since the early days of the Act. *Brown & Sharp Mfg.*, 70 NLRB 709, 709 (1946); *Humble Oil*, 53 NLRB 116, 126 (1943). As the Supreme Court expressly held in *NLRB* v. *AJ Tower Co.*, 329 U.S. 324, 330–35 (1946), the Board has authority to resolve voter eligibility through the election-day challenge procedure.[365] As discussed below in relation to the rejected ''20-percent rule,'' this rule does not change which issues will be decided.

Therefore, in light of the broad discretion accorded by Section 9, and the express purpose of ensuring that litigation does not unnecessarily delay the proceeding, we do not find the interpretation of Section 9(c) posited by SHRM and CDW, or that of the *Barre-National* Board, to be persuasive. In our considered view, Section 9 does not give parties a right to litigate questions of individual eligibility or inclusion at the pre-election hearing if the regional director will not decide those questions prior to the election. For these reasons, the Board hereby overrules *Barre-National*, together with cases resting solely upon its holding such as *North Manchester Foundry, Inc.*, 328 NLRB 372 (1999).

The Board also concludes that without clear regulatory language giving the regional director authority to limit the presentation of evidence to that relevant to the existence of a question of representation, the possibility of using unnecessary litigation to gain strategic advantage exists in every case.[366] That specter, sometimes articulated as an express threat according to some comments,[367] hangs over all negotiations of pre-election agreements. In other words, bargaining takes place in the shadow of the law, and so long as the law, as embodied in the Board's

[361] In this regard, the rules continue to require the hearing officer ''to inquire fully into all matters and issues necessary to obtain a full and complete record.'' § 102.64(b).

[362] *Inland Empire* held that the Board could hold the hearing after the election. This was changed by the Taft-Hartley amendments, as discussed. Notably, however, the language ''appropriate hearing'' was not changed, and thus *Inland Empire*'s discussion of the broad discretion given by the language remains relevant. Moreover, it should be noted that, in *Inland Empire*, the Board had ''afforded the opportunity [to raise issues] in the proceedings to show cause held prior to the election,'' but the parties ''brought forward nothing which required [the Board] to hold a further hearing for the taking of evidence.'' *Id.* at 708–709. The Court expressly declined to address whether this process ''would have been adequate or 'appropriate.' '' *Id.*

[363] After the vote on the Taft-Hartley amendments in 1947, Senator Taft placed in the record a ''Supplementary Analysis of the Labor Bill as Passed.'' 93 Cong. Rec. 6858, 6860 (June, 12, 1947). In that analysis, Senator Taft explained that the Conference Committee had revised the amendments of Section 9(c)(4) of the Act to eliminate a provision permitting ''pre-hearing elections.'' *Id.* at 6860. The Supplementary Analysis then stated, ''That omission has brought forth the charge that we have thereby greatly impeded the Board in its disposition of representation matters. *We have not changed the words of existing law* providing a hearing in every case unless waived by stipulation of the parties. It is the function of hearings in representation cases to determine whether an election may properly be held at the time, and if so, to decide questions of unit and eligibility to vote.'' *Id.* (emphasis added). CDW cites to the language ''decide questions of unit and eligibility to vote'' as support, but the problems with this approach are manifest. First of all, this is the statement of a single legislator, made after the dispositive vote, describing a term that he expressly admits the Act does not change. This cannot be used to alter the meaning of the language. The same flaw applies to CDW's discussion of still later legislative history of marginal relevance. Second, Senator Taft said ''*decide* questions of unit and eligibility to vote''—not ''litigate''—and where it is undisputed that the Board does not need to ''decide'' the question, Senator Taft's subsequent remarks cannot be read to compel litigation.

[364] The United States Court of Appeals for the Second Circuit similarly held that ''the determination of a unit's composition need not be made before the election.'' *Sears, Roebuck & Co.* v. *NLRB*, 957 F.2d 52, 55 (2d Cir. 1992). As stated in the NPRM, the Board has consistently sustained regional directors' decisions to defer resolution of individual employees' eligibility to vote until after an election (in which the disputed employees may cast challenged ballots). See, *e.g., Sears, Roebuck*, 957 F.2d at 54–55. The Second Circuit has explained that the regional director has ''the prerogative of withholding a determination of the unit placement of [a classification] of employees until after the election.'' *Id.* at 56. In *Northeast Iowa Telephone Co.*, 341 NLRB 670, 671 (2004), the Board characterized this procedure as the ''tried-and-true 'vote under challenge procedure.' '' See also *HeartShare Human Services of New York, Inc.*, 320 NLRB 1 (1995), *enforced*, 108 F.3d 467 (2d Cir. 1997). Even when a regional director resolves such a dispute pre-election, the Board, when a request for review is filed, often defers review of the resolution, permitting the disputed individuals to vote subject to challenge. See, *e.g., Silver Cross Hospital*, 350 NLRB 114, 116 n.10 (2007); *Medlar Elec., Inc.*, 337 NLRB 796, 796 (2002); *Interstate Warehousing of Ohio, LLC*, 333 NLRB 682, 682–83 (2001); *Orson E. Coe Pontiac-GMC Truck, Inc.*, 328 NLRB 688, 688 n.1 (1999); *American Standard, Inc.*, 237 NLRB 45, 45 (1978).

[365] Again, as noted above, the legislative history of the 1947 amendments shows that Congress did not intend to require the Board to allow litigation of voter eligibility matters prior to conducting elections.

[366] See generally Testimony of Roger King on behalf of SHRM II regarding which issues should be litigated at the pre-election hearing (''Yes, there is maneuvering on both sides. We all know that. Good lawyers use procedures to their clients' advantage. You could call it delay. I don't agree with that. My union colleagues take every advantage of the blocking charge procedure. That's their right at this point.'').

[367] See AFT; IBEW; LIUNA.

regulations, does not limit parties to presenting evidence relevant to the existence of a question of representation, some parties will use the threat of protracted litigation to extract concessions concerning the election details, such as the date, time, and type of election, as well as the definition of the unit itself. Comments by the UFCW, LIUNA, AFT, NELP, and Retired Field Examiner Michael D. Pearson all point to the impact of that specter of unnecessary litigation on negotiations of pre-election agreements. Some commenters specifically stressed that the current rules have the effect of disenfranchising statutory employees. According to these commenters, instead of resolving bargaining unit issues on their merits, election agreements are driven by the threat of a hearing devoted to the litigation of unnecessary issues.[368]

The temptation to use the threat of unnecessary litigation to gain such strategic advantage is heightened by both the right under the current rules to take up to 7 days to file a post-hearing brief (with permissive extensions by hearing officers of up to 14 additional days) and the 25-day waiting period, both of which are triggered automatically when a case proceeds to hearing. Every experienced participant in the Board's representation proceedings who wishes to delay the election in order to gain strategic advantage knows that under the current rules, once the hearing opens, at least 32 days (7 days after the close of the hearing and 25 days after a decision and direction of election) will pass before the election can be conducted. The incentive to insist on presenting evidence, even though there are no disputes as to facts relevant to the existence of a question of representation, is thus not simply the delay occasioned by the hearing process, but also the additional mandatory 32-day delay, not to mention the amount of time it will take the regional director to review the hearing transcript and write a decision—a task that has added a median of 20 days to the process over the past decade. Accordingly, the bargaining units and election details agreed upon in the more than 90% of representation elections that are currently conducted without pre-election litigation are unquestionably influenced by the parties' expectations concerning what would transpire if either side insisted upon pre-election litigation.

Of course, distinct aspects of the final rule eliminate the 25-day waiting period and the default position of allowing 7 and up to an additional 14 days to file a post-hearing brief. Yet in the Board's preliminary view at the NPRM stage (79 FR 7331), even without these collateral delays, there remained no persuasive reason to allow parties to lengthen the hearing and decisional process by unnecessarily litigating individual eligibility issues that are not relevant to the question concerning representation.[369] We did not, and do not, view permitting the litigation of individual eligibility issues as a cost-free proposition. Every non-essential piece of evidence that is adduced adds time that the parties and the Board's hearing officer must spend at the hearing, and simultaneously lengthens and complicates the transcript that the regional director must analyze in order to issue a decision. The Board expects that if irrelevant litigation at the pre-election hearing were reduced, then not only would hearings be shorter (with attendant savings to the parties), but also that regional directors would correspondingly have to spend less time writing pre-election decisions, and be able to issue those decisions in less time than the current 20-day median. Thus, the Board viewed its mandatory proposal of barring litigation or resolution of individual eligibility issues regarding less than 20% of a petitioned-for unit as an overall benefit to agency efficiency, in addition to being a reasonable balance of the public's and parties' interest in prompt resolution of questions concerning representation and in employees' interest in knowing who would be in the unit should they choose to be represented.

There is certainly reason to believe that the 20% figure proposed in the NPRM—and upon which the Board has historically relied in terms of deferring resolution of individual eligibility issues—is indeed an administratively appropriate balance. For example, more than 70% of elections in FY 2013 were decided by a margin greater than 20% of all unit employees, suggesting that deferral of up to 20% of potential voters in those cases (and thus allowing up to 20% of the potential bargaining unit to vote via challenged ballots, segregated from their coworkers' ballots) would not have compromised the Board's ability to immediately determine election results in the vast majority of cases.[370] Thus, had any thorny litigation issues concerning individual eligibility been deferred in those cases, it would likely have saved significant party and agency resources in that the pre-election hearings would have been shorter, the director's decisions issued quicker and with less effort, and the representation dispute resolved sooner, all without necessitating another post-election hearing to resolve those issues because they would have been proven by the tally of ballots to be non-determinative of the election outcome. And in the comparatively smaller percentage of cases in which the election margin required resolution of the challenged voters' ballots, the regional director could have committed resources to developing and analyzing the relevant evidence in a post-election hearing with full confidence that the effort would not be wasted.[371]

[368] See CWA II; BCTD; Testimony of Brenda Crawford II; UNAC/UHCP II.

[369] Some commenters challenge the premise that litigation of individual eligibility issues causes delay. For example, Homer Deakins testified on behalf of COLLE II that he could count on one hand the number of times a hearing has gone into the second day because of litigation of a supervisory issue. However, even if in some cases litigation of an individual eligibility issue would not add an extra day or days to the pre-election hearing, we are not persuaded that such litigation would not unnecessarily delay the election in those cases. After all, as shown, during the last decade it has taken regional directors a median of 20 days to issue their decisions following a pre-election hearing. Moreover, litigation of irrelevant issues that the regional director need not resolve imposes unnecessary costs on the parties and the government.

[370] In addition, post-election litigation of these challenges will only take place where the proponent of the challenge is winning after the unchallenged ballots are tallied—otherwise the challenge can simply be withdrawn. This should result in mooting about half of the remaining litigation, even in those cases where the vote margin is narrow. Thus, at most, only 15% of deferred issues will ever have to be addressed.

To be clear, the union win rate is irrelevant because both unions and employers could be contesting the relevant matters. We also wish to emphasize that this does not mean that 15% of all elections will have outcome determinative challenges: This is the maximum number reached by assuming that every election will defer 20% of voter eligibility questions. In reality, the vast majority of cases will involve far fewer such disputes, either because they are resolved by stipulation or because they are never contested at the pre-election hearing.

[371] In this regard we reject the testimony of Elizabeth Milito on behalf of NFIB II who claimed that the Board should abandon the 20% rule because many small business owners would ''concede defeat'' and not be able to afford to litigate deferred individual eligibility issues in a post-election hearing. As shown, deferring individual eligibility issues should reduce pre-election costs for all parties participating in pre-election hearings—including small employers—and in the vast majority of cases, there should never be a need to incur the extra costs of a post-election proceeding to determine the individual's eligibility to vote because the ballots cast by individuals permitted to vote subject to challenge are likely to be nondeterminative. In any event, the final rule grants discretion to the regional director to permit the litigation of individual eligibility issues, and parties are free to make whatever arguments they wish as to why the director should do so.

Nevertheless, the Board is mindful that a one-size-fits-all approach may not be the most desirable or necessary method to accomplish the gains in efficiency sought by the proposed 20-percent rule. Specifically, the changes to 102.64 and 102.66(a) provide regional directors with the tools to defer unnecessary litigation, and it may produce a better outcome on a case-by-case basis if regional directors retain discretion to apply those tools or to provide for litigation and resolution of discrete issues as the regional directors deem appropriate.[372] For example, the regional director may be able to quickly discern that certain eligibility issues—presented by the parties in their offers of proof—could be quickly and easily disposed of, in which case little would be gained from deferring the issue. Moreover, given the mandatory language of the proposed 20-percent rule, parties could argue that elections should be set aside based solely on the ground that the hearing officer and director made a minor computational error in concluding that the individual eligibility or inclusion issues they were deferring involved less than 20 percent of the unit. In our view, having to set aside elections merely because of computational errors (such as deferral of individual eligibility questions involving 21—rather than 20—percent) would be particularly unfortunate when the addition of the disputed employees to the unit would not be unfair to the voters (because it would not materially change the character or scope of the unit). We further conclude that the mandatory proposal could perversely encourage parties to raise frivolous individual eligibility issues that they otherwise would not have raised just so the 20-percent ceiling was breached.

Accordingly, the Board has decided to preserve the discretion that regional directors enjoyed even before the NPRM to defer resolving disputes concerning individuals' eligibility to vote or inclusion in the unit until after the election or to decide such disputes before the election in the decision and direction of election. In the final rule, rather than *require* hearing officers to bar parties from introducing evidence regarding individual eligibility or inclusion issues involving less than 20 percent of the unit, the Board has decided to grant hearing officers the authority, on the instruction of the regional director, to exclude evidence concerning such disputes. However, the regional director is free to direct that such evidence be admitted if the director resolves to decide prior to the election the individual eligibility questions at issue, or if the director is uncertain about whether to decide an issue. In sum, while we continue to believe that individual eligibility disputes ordinarily need not be litigated at the pre-election hearing or resolved in a direction of election, we no longer adhere to the preliminary view expressed in the NPRM that adoption of a bright-line, mandatory 20-percent deferral rule best serves the interests of the parties and the employees as well as the public interest in the effective administration of the representation case process.[373]

Several comments criticize the proposed 20-percent rule on policy grounds. For example, some comments argue that it is unfair to defer resolution of supervisory status questions, because employers need to know who their supervisors are so they know who they can require to campaign against employee representation.[374] Similarly, comments argue that employers need to know which employees are eligible to vote so they know whom to address concerning the question of representation.[375] Numerous comments additionally express the position that deferral of eligibility questions under the 20-percent rule would impair employee rights. More specifically, many comments assert that deferral would deprive employees of knowledge about the precise parameters of the bargaining unit, thereby depriving them of the right to cast an informed ballot[376] or impeding their ability to determine whether they share a community of interest with the other voters.[377] Similarly, a number of comments express the view that deferral of eligibility issues would engender confusion among the voting employees.[378] Other comments generally suggest that the deferral of eligibility issues would increase the likelihood that disputed individuals would refrain from voting in an election. For example, a number of comments express the position that employees, faced with the prospect of having their votes challenged, might simply refrain from voting,[379] some as a result of a concern that–particularly in smaller units–they could be easily identified as the individuals whose votes determined the outcome of the election.[380] Finally, with respect to the deferral of supervisory status questions, several comments generally express concern that employees with disputed supervisory status would not know whether they could appropriately speak in favor of or against union representation, attend union meetings, or sign authorization cards,[381] and SHRM asserts that employees would be

[372] Keeping discretion in the hands of the regional directors is sensible in that it is the directors who are responsible for issuing decisions and directions of elections following pre-election hearings, and it is directors who directly supervise the hearing officers in their conduct of the hearings. Moreover, under the final rule it is the directors who must resolve determinative challenges.

[373] The effect of our decision to reject the proposed 20-percent rule coupled with the amendments leaving to the director's discretion whether to defer litigation and resolution of individual eligibility or inclusion issues until after the election, means that the final rule does not establish any bright-line ceiling beyond which litigation and resolution of individual eligibility or inclusion issues cannot be deferred. We note, however, that the Board has uniformly held that a change affecting no more than 20 percent of the unit does not require a new election. On occasion, the Board has also permitted regional directors to defer resolution of the eligibility of an even higher percentage of potential voters, though we have recognized that allowing 25 percent of the electorate to vote subject to challenge is not optimal. See, *e.g.,* cases cited at 79 FR at 7331& n.54. We are confident that directors will consider that precedent in exercising their discretion under the final rule, and strongly believe that regional directors' discretion would be exercised wisely if regional directors typically chose not to expend resources on pre-election eligibility and inclusion issues amounting to less than 20 percent of the proposed unit. And, as with any other issue that comes before us, we will consider relevant case precedent in evaluating the merits of objections to the regional director's direction of election, the regional director's conduct of the election or the hearing officer's handling of the pre-election hearing. We would further expect regional directors to typically exercise their discretion in favor of approving parties' stipulated election agreements in which up to 20% of the unit is to be voted under challenge.

[374] See, *e.g.,* Seyfarth Shaw; COSE; Indiana Chamber; U.S. Poultry II; CDW II. SHRM also suggests that deferring resolution of supervisory status questions might somehow threaten attorney-client communications if counsel communicates with an individual the employer believes is a supervisor who is later held not to be a supervisor. This same concern exists under the current procedures as explained above. Moreover, the test the Board uses to determine who is a supervisor under the Act is not and need not be the same as the various tests used to determine if attorney communications to an individual employed by the attorney's client are privileged.

[375] See, *e.g.,* PIA.

[376] See, *e.g.,* Testimony of Michael Lotito on behalf of IFA II; AEM II; GAM; Constangy; NRF; Baker & McKenzie. IBEW, in contrast, states that, in its experience, employee voters are motivated primarily by whether they desire representation and not by precisely which employees will be in the unit. See also Testimony of Gina Cooper on behalf of IBEW II (''My experience is that employees are voting for union representation and the unit issue never comes into their decision.'')

[377] See, *e.g.,* Associated Oregon Industries; COSE; Seyfarth Shaw; Kuryakyn; John Deere Water.

[378] See, *e.g.,* NGA II; Leading Age II; SHRM; ACE; AHA.

[379] See, *e.g.,* SHRM II; Pinnacle Health Systems; Arizona Hospital and Healthcare Association.

[380] See, *e.g.,* LRI; Anchor Planning Group; Bluegrass Institute.

[381] See, *e.g.,* Seyfarth Shaw; ACE; Sheppard Mullin II.

chilled in the exercise of their Section 7 and First Amendment rights.

However, in this final rule the Board has determined not to adopt the 20-percent rule, but rather, to retain the existing discretion of regional directors to defer deciding such questions until after the election. Prior to the amendments, regional directors were free to decide individual eligibility and inclusion questions prior to the election if they wished to do so or to defer such decisions until after the election and direct that disputed individuals vote subject to challenge. The same is true under the final rule. Although the amendments permit the hearing officer, at the direction of the regional director, to exclude evidence that is not relevant to determining whether a question of representation exists—and thereby permit the hearing officer to exclude evidence regarding some eligibility and inclusion questions—the regional director is free to direct that such evidence be admitted if the director resolves to consider the eligibility questions at issue.

In any event, the Board is not persuaded by the policy argument that it should permit litigation of all individual supervisory status questions—even though such questions are ordinarily irrelevant to the statutory purpose of the hearing—on the grounds that resolution of such questions is necessary for an employer to effectively campaign against union representation. [382] Most fundamentally, while the question of whether particular individuals are supervisors as defined in the Act has generated considerable litigation, the question exists only at the margin. In the Board's experience, in virtually every case, even where there is uncertainty concerning the supervisory status of one or more individual employees, the employer nevertheless has in its employ managers and supervisors whose status is not disputed and is undisputable.[383]

The policy argument contained in these comments is also based on a set of faulty premises. First, as explained above and in the NPRM, employers have no right to a pre-election decision concerning individual eligibility under the current rules. Second, even under the current rules, a regional director cannot issue a decision on any eligibility question until well after the filing of the petition because a hearing must be noticed (no sooner than 5 business days after the notice), the hearing must be completed, and the regional director must issue a decision. Thus, even where the regional director resolves the individual eligibility issue in the decision and direction of election, the employer will not have the benefit of the decision for a substantial part of any campaign, including a substantial part of the ''critical period'' between the filing of the petition and the election.[384] Third, under the current rules, even if the regional director issues a decision concerning an individual eligibility question, the decision is subject to a request for review by the Board. The Board rarely rules on such requests until shortly before the election and, sometimes, not until after the election. See, *e.g., Mercedes-Benz of Anaheim,* Case 21–RC–21275 (May 18, 2011) (day before the election); *Caritas Carney Hospital,* Case 1–RC–22525 (May 18, 2011) (after the election); *Columbus Symphony Orchestra, Inc.,* 350 NLRB 523, 523 n.1 (2007) (same); *Harbor City Volunteer Ambulance Squad, Inc.,* 318 NLRB 764, 764 (1995) (same); *Heatcraft, Div. of Lennox Indus., Inc.,* 250 NLRB 58, 58 n.1 (1980) (same). Fourth, the problem identified by the employer comments is even more acute for unions, which must obtain a showing of interest prior to filing a petition. If the union asks employees to help gather a showing of interest and the employees are later determined to be supervisors, the Board may find that the showing of interest is tainted and overturn election results favoring union representation on that ground. See *Harborside Healthcare Inc.,* 343 NLRB 906 (2004). That problem cannot possibly be solved through any form of post-petition, pre-election hearing. Fifth, under the Act itself, even if a regional director's decision and final Board decision are issued prior to an election, the Board decision is potentially subject to review in the courts of appeals and the court of appeals' decision cannot be issued pre-election. See 29 U.S.C. 159(d) and 160(e); *Boire* v. *Greyhound Corp.,* 376 U.S. 473, 476–79 (1964).[385] Thus, the uncertainty with which the comments are concerned, which affects all parties, exists under the current rules and cannot be fully eliminated.

Nor does the Board agree that the proposed amendments improperly deprive employees of the ability to make an informed choice in the election. As explained above, under the amendments, as under the current rules, the regional director must determine the unit's scope and appropriateness prior to the direction of the election. Accordingly, at the time they cast their ballots, the voting employees will be fully informed (via the Notice of Election) as to the description of the unit, and will be able to assess the extent to which their interests may align with, or diverge from, other unit employees. Although the employees may not know whether particular individuals or groups ultimately will be deemed eligible or included and therefore a part of the bargaining unit, that is also the case under the Board's current rules, because, as explained above, regional directors were free to defer deciding individual eligibility or inclusion questions prior to directing an election (and parties were free to agree to permit disputed employees to vote subject to challenge in the election agreement context). In addition, as pointed out by SEIU, a similar choice has confronted voters in mixed professional/non-professional units since 1947, when Congress amended the Act to provide that a majority of the professional employees must vote separately for inclusion with a bargaining unit of non-professional employees and the results of that separate vote, which takes place simultaneously with the vote in the non-professional unit, are not known when any of the employees cast their ballots. See Section 9(b)(1); *Sonotone Corp.,* 90 NLRB at 1241–42. In that context, the Board has held: ''Such a procedure * * * presents the employees with an informed choice.'' *Pratt & Whitney,* 327 NLRB 1213, 1218 (1999).

Many comments cite the courts of appeals' decisions in *NLRB* v. *Beverly Health and Rehabilitation Services,* 120 F.3d 262 (4th Cir. 1997) (unpublished per curiam opinion), and *NLRB* v. *Parsons School of Design,* 793 F.2d 503 (2d Cir. 1986). As explained in the

[382] To be sure, it is not the purpose of the pre-election hearing to determine employers' spokespersons in the ongoing representation campaign.

[383] See, *e.g., McAlester General Hospital,* 233 NLRB 589, 589–90 (1977) (noting that even without considering employees whose supervisory status was in dispute, employer employed one supervisor for every eight unit employees and, if the employer filled open supervisory positions, it would employ one supervisor for every three unit employees).

[384] Additionally, as the AFL–CIO II points out in its reply comment, the extant period of uncertainty under the current rules is extended still further when employers begin their campaigns—as they often do—prior to a petition's filing.

[385] FMI II and INDA II, among others, express concern that if an alleged supervisor is permitted to vote subject to challenge, the results of the election might be set aside pursuant to an objection citing the presence of a supervisor in the polling area if the individual is found to be a supervisor after a post-election hearing. As explained above, this scenario can arise under the current procedures. See, *e.g., Sorenson Lighted Controls,* 286 NLRB 969, 989 (1987). The Board is not aware of any case holding such conduct *per se* objectionable under these circumstances, and the existence of the new rules would be a factor the Board would consider if such an objection arises in the future.

NPRM, those two decisions represent the minority view in the courts, and the Board continues to disagree with them. The majority of the courts of appeals have upheld the Board's vote-under-challenge procedures and upheld election results even when the eligibility or inclusion of certain employees was not resolved until after the election.[386] Moreover, under the final rule, the regional director has discretion to permit litigation and to resolve eligibility and inclusion questions, and we expect regional directors to permit litigation of, and to resolve, such questions when they might significantly change the size or character of the unit, thus addressing the courts' concerns in both *Beverly* and *Parsons.* In addition, as explained in the NPRM, the courts' concern in both of those cases was that voters were somehow misled when the regional director defined the unit in one way prior to the election and the Board revised the definition after the election. The final rule would actually help prevent exactly that form of change in unit definition from occurring by codifying regional directors' discretion to defer deciding individual eligibility or inclusion questions until after the election and by providing in amended § 102.67(b) that where the director does defer deciding such questions, the Notice of Election will inform employees prior to the election that the individuals in question ''are neither included in, nor excluded from, the bargaining unit, inasmuch as the regional director has permitted them to vote subject to challenge,'' and that their unit placement ''will be resolved, if necessary, following the election.'' Thus, employees will not in any manner be misled about the unit. Rather, they will cast their ballots understanding that the eligibility or inclusion of a small number of individuals in the unit has not yet been determined. The Board views this alteration to the election notice as meeting the concerns raised by the *Beverly* court and as specifically countenanced by the Second Circuit in *Sears, Roebuck & Co.* v. *NLRB,* 957 F.2d 52, 55 (2d Cir. 1992) (regional director permitted employees in one classification to vote subject to challenge and included section in notice which ''detailed the special voting posture of the automotive floor sales employees and the circumstances for including their votes'').[387]

PIA and Bluegrass Institute suggest that deferring resolution of individual eligibility questions until after the election threatens the secrecy of the ballot and that employees who are permitted to vote subject to challenge are less likely to vote because they fear that the parties will learn how they voted. However, the Board is not persuaded that the final rule threatens the secrecy of the ballot or voter turnout. The courts have upheld the Board's current practice of deferring individual eligibility questions under most circumstances. Moreover, the ballots cast by the employees directed to vote subject to challenge are not counted if they are not determinative.[388] Accordingly, ballot secrecy is preserved in those cases. Even if challenged ballots are determinative, the ballots are not counted if the employees who cast them are ultimately found to be ineligible after the post-election hearing. And, even if the challenged ballots are determinative and a post-election hearing results in the individuals who cast them being found eligible, the ballots are not opened and counted one-by-one, but rather the ballots of all individuals found to be eligible are ''thoroughly mixed'' before being opened and counted. See Casehandling Manual Section 11378. Accordingly, the Board believes that it is only in cases where there is just one determinative challenge, or where all of the potentially determinative challenged ballots are marked in the same way, that the parties will learn how the employees voted. However, that is both rare and unavoidable in any system that permits challenges, including the current system. Thus, even if regional directors were prohibited from deferring individual eligibility issues, which is not the case currently, parties would still have a right to challenge voters for good cause at the polls and the commenters' concern would remain.[389]

The Board is also unaware of any evidence of significant differences between the turnout of employees whose eligibility to vote has not been disputed or has been resolved prior to the election and employees permitted to vote subject to challenge. The case law demonstrates that even in cases where only a single individual is permitted to vote subject to challenge, the individual is not necessarily deterred from voting. See, *e.g., NLRB* v. *Cal-Western Transport,* 870 F.2d 1481, 1483, 1486 (9th Cir. 1989) (regional director permitted single employee to vote subject to challenge and he did so); *NLRB* v. *Staiman Brothers,* 466 F.2d 564, 565 (3d Cir. 1972) (deciding vote cast by single employee permitted to vote subject to challenge by agreement of the parties).

Nor is the Board persuaded by SHRM II's attempt to analogize to scholarly criticism of states' voter challenge laws in political elections as evidence that the Board's challenged ballot procedure does or would lead to reduced participation in NLRB elections. The Board agrees with the AFL–CIO II (Reply) that the significant differences between the political challenge process and the NLRB challenge process undermine SHRM's attempted analogy. In particular, during political elections, voters' veracity is challenged, and they are often subject to questioning and required to swear an oath before voting; whereas during NLRB elections, voters will know in advance via the election notice that although their eligibility to vote—through no fault of their own—has not yet been determined with finality, they will be permitted to cast ballots, they will be advised as to the procedure for their voting, and they will be invited to contact a Board agent with any questions that they may have in advance of the election about the challenge process. The Board also agrees with SEIU II (Reply) that the additional structural safeguards in a Board election—including its supervision by a Board agent, the presence of observers

[386] See, *e.g., Sears, Roebuck & Co.* v. *NLRB,* 957 F.2d 52 (2d Cir. 1992); *Nightingale Oil Co.* v. *NLRB,* 905 F.2d 528, 533–34 (1st Cir. 1990); *NLRB* v. *Clark Distributing,* 917 F.2d 24 (6th Cir. 1990) (unpublished); *Prudential Ins. Co. of America* v. *NLRB,* 832 F.2d 857, 861 (4th Cir. 1987).

[387] CDW II questions how the proposed 20-percent rule can be reconciled with such final notice language because if individual eligibility or inclusion issues need not be identified in the Statement of Position or litigated at the hearing, then the regional director will presumably be unaware of them when the final notice is prepared. As explained above, however, the Board is not adopting the proposed 20-percent rule. Accordingly, because regional directors have discretion to allow individual eligibility issues to be litigated, parties may seek to put the regional director on notice of such issues through their statement of position and at the hearing. While it is true that there may also be election-day challenges that could not have been anticipated in advance by the regional director, this is the case currently, and it is not the situation that concerned the courts in *Beverly* or *Parsons.*

[388] As shown above, deferral of up to 20% of eligible voters would have left the challenged ballots non-determinative in more than 70% of all representation elections conducted in FY 2013. If there were no need to defer as many as 20% of the eligible voters because not that many individual voter eligibility issues were contested, then the percentage of elections where challenged ballots would be non-determinative of the election's outcome would be greater still. For example, in FY 2013 more than 85% of elections had margins greater than 10% of the eligible voters.

[389] The Board also notes that to the extent the amendments do result in more individuals casting challenged ballots than under the current rules, the amendments may well have the effect of making it less likely that parties will be able to discover how particular individuals voted because the pool of determinative ballots would be larger.

for both sides, and the Board agent's duty to disallow argument concerning the merits of the challenge and to explain to the voter the measures that will be taken to protect the secrecy of the challenged ballot[390]—make it unlikely that challenged voters in NLRB elections would decide not to cast a ballot. Furthermore, as both the AFL–CIO and SEIU point out, SHRM cites no evidence of voter suppression in NLRB elections resulting from our longstanding challenge procedures,[391] nor does SHRM attempt to grapple with the differences between the challenge processes in political elections and NLRB elections.

Finally, balanced against any asserted employer or employee interests in pre-election litigation of individual eligibility or inclusion questions is the statutory interest in prompt resolution of questions of representation. As explained above and in the NPRM, permitting the litigation of such matters imposes serious costs, and no comments on the NPRM convinced the Board otherwise. It plainly frustrates the statutory goal of expeditiously resolving questions of representation, and it frequently imposes unnecessary costs on the parties and the government. As explained in the NPRM, it often results in unnecessary litigation and a waste of administrative resources as the eligibility of potential voters is litigated (and in some cases decided), even when their votes end up not affecting the outcome of the election. If a majority of employees votes against representation, even assuming all the disputed votes were cast in favor of representation, the disputed eligibility questions become moot. If, on the other hand, a majority of employees chooses to be represented, even assuming all the disputed votes were cast against representation, the Board's experience suggests that the parties are often able to resolve the resulting unit placement questions in the course of bargaining once they are free of the tactical considerations that exist pre-election and, if they cannot do so, either party may file a unit clarification petition to bring the issue back before the Board. See *New York Law Publishing Co.,* 336 NLRB No. 93, slip op. at 2 (2001) (''The parties may agree through the course of collective bargaining on whether the classification should be included or excluded. Alternatively, in the absence of such an agreement, the matter can be resolved in a timely invoked unit clarification petition.''). As the Eighth Circuit observed, ''The NLRB's practice of deferring the eligibility decision saves agency resources for those cases in which eligibility actually becomes an issue.'' *Bituma Corp.* v. *NLRB,* 23 F.3d 1432, 1436 (8th Cir. 1994). The Sixth Circuit similarly found that ''[s]uch a practice enables the Board to conduct an immediate election.'' *Medical Center at Bowling Green* v. *NLRB,* 712 F.2d 1091, 1093 (6th Cir. 1983).

NRTWLDF argues that application of the 20-percent rule at the hearing might cast into question the regional office's earlier, administrative determination that the petition was accompanied by an adequate showing of interest. Whether or not that is the case, the final rule does not adopt the 20-percent rule. Moreover, the concern expressed in the comment could equally be expressed about the current procedures under which regional directors and the Board routinely defer ruling on eligibility questions without revisiting the adequacy of the showing of interest. Furthermore, the required showing of interest is purely an internal administrative matter, as explained in current § 101.18(a): ''it being the Board's experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees.'' The adequacy of the showing is non-litigable, as discussed in connection with Part 101 below. *The Borden Co.,* 101 NLRB 203, 203 n. 3 (1952) (''the question[] of the sufficiency of the showing of interest * * * [is a matter] for administrative determination and not subject to litigation by the parties); Casehandling Manual Section 11028.3.

In a related vein, Jonathan Fritts on behalf of CDW II raised a series of thoughtful questions concerning exactly how the proposed 20-percent rule would be implemented in the context of several possible hearing contingencies. Of course, the 20-percent rule is not being adopted. Nevertheless, given our expectation that regional directors will consider the relative percentage as a significant factor in deciding whether to decide or defer an issue, we address those questions below.

CDW's first three questions concern how the choice to take evidence would interact with the proposed 20-percent threshold. Specifically, CDW asks:

> If, at the outset of the hearing, there are eligibility and inclusion issues that affect more than 20% of the bargaining unit, will the hearing officer take evidence on all of those issues?
>
> Or will the hearing officer take evidence on only ''just enough'' issues so that the remaining eligibility issues fall below 20%? If so, how will the hearing officer decide which issues to take evidence on in these situations?

As explained more thoroughly in connection with the offer of proof proposal below, the discretion to determine which issues will be deferred or decided will reside with the regional director. Recognizing that there is no mandatory 20-percent rule, if the regional director wished to defer deciding individual eligibility or inclusion questions involving 20% of the unit, the regional director would simply identify a subset of the issues which impacted 20% of the unit and defer them, and would take evidence on the rest. This exercise of discretion is analogous to what currently happens in post-election proceedings involving determinative challenges, where there is a known margin before challenged ballots are opened, and regional directors sometimes decide to resolve only a few of the challenged ballot issues and open the resolved ballots in order to see whether the new tally obviates having to resolve the remaining challenges.[392] We expect that the regional director would consider many of the same factors that the regional directors currently consider in deciding whether to rule on all determinative challenges or just a few. For example, the regional director might consider how long it would take the parties to present their evidence on the disputed individuals, and then decide to take evidence on the individuals who require the least amount of time and defer the remainder. The regional director might also instruct the hearing officer to see whether the parties can agree on which individuals' eligibility should be litigated in order to leave a smaller percentage to be deferred. The regional director might also consider offers of proof and decide which issues would be easiest to resolve or whether a common issue would resolve the eligibility status of multiple individuals, and take evidence accordingly. In sum, regional directors will not be mandated to follow

[390] See Casehandling Manual Section 11338.6.

[391] SHRM II also fails in its attempts to use the results of a 2014 FOIA response from the Board to show that the Board's current use of the challenge ballot procedure is ''limited'' by arguing that in the 1,763 elections conducted during FY 2011–13 in which ballots were challenged, there were ''only 4.5 [challenged ballots] per election.'' Considering that the median size of bargaining units ranged from 24–28 employees over that same period of time, the statistics cited by SHRM do not appear to support the implication that the number of challenged ballots under the final rule (which does not include a mandatory 20-percent rule) would be radically different than under the Board's current practice. Indeed, in reply to SHRM, the AFL–CIO II (Reply) cites to research showing use of challenged ballots in 40% of NLRB elections conducted between 1972 and 2009.

[392] See Casehandling Manual Section 11361.3.

any particular course of decision-making as to the taking of evidence on individual eligibility issues, but will instead retain discretion to use their judgment as to what evidentiary structure will result in the most efficient use of party and agency resources.

CDW next questions how 20% of the unit would be measured if the size of the unit is in dispute, asking specifically:

> If the appropriateness of the bargaining unit is in dispute, how will the 20% be measured? Will it be 20% of the petitioned-for unit?
>
> If the employer asserts that the only appropriate unit is a larger unit, will the rule be applied based on 20% of that larger unit?

If there are significant differences in the sizes of the parties' preferred bargaining units, then regional directors should evaluate the individual eligibility and inclusion issues in dispute relative to the petitioned-for unit, and any other unit in which the petitioner is willing to proceed to an election. For example, if the petitioner asserts at hearing that it would be unwilling to proceed to an election concerning an employer's alternative unit that is larger than the petitioned-for unit, then the regional director need not take into account the employer unit's size in evaluating individual eligibility or inclusion issues to be deferred, because there will either be an election in the petitioned-for unit—if found appropriate by the regional director—or no election at all. If, on the other hand, the petitioner is willing to proceed to an election in a significantly larger unit as proposed by the employer, then the regional director will retain discretion to decide the most efficient means of structuring the litigation of potential individual eligibility issues. In such a situation, the regional director may, of course, consider the relative percentage of individual eligibility issues presented in each of the proposed units. Each such case will present its own complications, and there is no particular litigation structure mandated by the final rule.

CDW also questions whether and how unit appropriateness issues might be deferred under the final rule. The primary answer to these questions is that under the final rule, as under the Board's current regulations, the regional director must always decide on the appropriateness of the unit before directing or conducting an election. So, a regional director will not defer taking evidence or resolving individual eligibility or inclusion issues whose resolution could render inappropriate an otherwise appropriate unit.

However, under the final rule, as under the Board's current regulations, and completely apart from the 20-percent proposal in the NPRM, a hearing officer will be free to require an offer of proof concerning any unit appropriateness arguments raised by an employer.[393] If the evidence sought to be introduced would be insufficient to sustain the employer's position—for example, whether to overcome a presumptively appropriate unit or to show an overwhelming community of interest between petitioned-for classifications and excluded classifications—then the regional director would direct the hearing officer not to allow the evidence to be received.[394] This is distinct from deferring a question to the challenge process: as has always been the case under Board rules only ''significant facts'' can be litigated, and if a party's contentions are meritless they are never entitled to litigate them, nor can these voters be challenged without good cause. Thus, although regional directors cannot defer consideration of unit appropriateness issues under the final rule, they will continue to enjoy discretion to instruct hearing officers to deny the introduction of evidence to ''protect the integrity of [the Board's] processes against unwarranted burdening of the record and unnecessary delay.'' *Laurel Associates d/b/a Jersey Shore Nursing and Rehabilitation Center,* 325 NLRB 603, 603 (1998).

CDW then poses a follow-up question running to whether certain classifications of employees—excluded from the petitioned-for unit by virtue of a legally insufficient offer of proof made by their employer—will nevertheless be eligible to vote in the election, subject to challenge. Generally, no, but the answer will vary from case to case. Thus, the rules do not require the casting of challenged ballots in such circumstances and the Board's policy continues to be that when a regional director has specifically ruled on an employee's inclusion in or exclusion from the unit, then it would generally not be appropriate to vote that employee, even subject to challenge. However, as discussed below in connection with § 102.67, the final rule contains a procedure for requesting segregation and impoundment of ballots, and so challenged ballots concerning unit appropriateness issues may be permitted in a particular case.

Some comments criticize the 20-percent rule on the grounds that it will lead to more post-election litigation and result in more elections being set aside as a result of post-election rulings concerning the eligibility of employees.[395] Similarly, at least two comments raise the concern that because the bargaining obligation attaches at the time of the tally, employers will be required to invest time and money in bargaining with a union that has questionable representative status.[396] These comments misunderstand the proposals. As under the current rules, if decisions concerning individuals' eligibility or inclusion are deferred until after the election, the individuals will vote subject to challenge. If their votes are not potentially outcome determinative, the matter will not be litigated, thus decreasing the total amount of litigation. If their votes are potentially outcome determinative, their eligibility may be litigated and the resolution may affect the results of the election, but it will not lead to the results of the election being set aside. As under the current procedures, post-election proceedings concerning challenged ballots will proceed and conclude promptly at the regional level. As explained above and below in relation to §§ 102.62(b) and 102.69, any Board review of the disposition will be expedited by the final rule.

Finally, a few comments argue that deferral of voter eligibility questions will create more issues for the parties to address during first contract negotiations.[397] AHA makes the related claim that ''leaving the individuals' inclusion or exclusion from the unit to be used as a bargaining chip is unfair to employees and disrespectful of their Section 7 rights and counter to the Act's purposes of promoting labor peace[.]''

[393] In fact, the Board's pre-NPRM regulations permitted hearing officers, on their own volition, to allow or prevent litigation of issues based on offers of proof. But in practice, hearing officers faced with such a decision typically chose to seek guidance from the regional director and we think that this is the better practice. See Testimony of Caren Sencer on behalf of Weinberg, Roger & Rosenfeld II and Gabrielle Semel of behalf of CWA II (discussing current practice of hearing officers pausing to consult with regional directors when necessary).

[394] In this regard, the Board rejects the suggestion of the IBEW II that we create a mechanism to automatically defer litigation challenges to presumptively appropriate units. Rather, in the circumstances that IBEW describes, we would expect hearing officers to typically require an offer of proof from an employer arguing against the appropriateness of a unit considered presumptively appropriate under Board caselaw. If the employer's proffered evidence would be insufficient to rebut the presumption, then it would be appropriate for the regional director to foreclose receipt of the evidence without regard to the proposed 20% rule.

[395] See, *e.g.,* Chairmen Kline and Roe II; CDW II; Leading Age II; U.S. Chamber Workforce Freedom Initiative II; Associated Oregon Industries; Bluegrass Institute.

[396] See COSE; Constangy.

[397] See, *e.g.,* Testimony of Doreen Davis on behalf of RILA II; SHRM II; CDW II.

As explained above, this already happens under the current rules, when the regional director or the Board defers decision on the questions and does not decide them post-election because the votes of the disputed individuals were not potentially outcome determinative. The Board does not believe addressing such questions will complicate bargaining, particularly when the parties can file a timely unit clarification petition if they are unwilling or unable to resolve the matter.[398] Neither does the Board believe that negotiations between the parties concerning employees' inclusion in or exclusion from the bargaining unit is substantively different, vis-à-vis their Section 7 rights, whether the parties are negotiating a first contract or a stipulated election agreement. Both are inherently acceptable mechanisms under the Board's extant procedures, and AHA does not suggest, for example, that the Board cease accepting party stipulations concerning the parameters of proposed bargaining units in deference to employees' Section 7 rights.[399] In any event, we would reject such a suggestion for the same reason that we reject AHA's instant comment: the fundamental design of the Act is to encourage agreement between the parties as much as possible and not to interject the Board's judgments in place of collectively-negotiated terms.[400] So long as parties negotiate terms regarding which individuals or classifications to include in a bargaining unit that do not contravene the Act's provisions or settled Board policies, then it would be inappropriate for the Board to disallow their agreements.[401] In relation to AHA's concerns about the promotion of labor peace, the Board believes that labor peace is more likely if parties are permitted to voluntarily resolve their differences.

Many comments additionally challenge the proposed amendments to 102.66 by arguing against the aggregated effects of the various proposed changes, including the mandatory 20-percent rule. For example, comments question: the hearing officer's role in administering the changed pre-election hearing; whether hearings under the proposed amendments would result in an inadequate record for subsequent appeals; and whether the hearings under the proposed amendments would be inconsistent with Section 9(c) of the Act. We respond to each of these groups of commentary below in connection with the changes regarding joinder and offers of proof.

B. Identification of Issues in Dispute; Discretionary Offers of Proof; Preclusion

In the NPRM, the Board proposed a number of amendments to § 102.66 which were designed to ensure that issues in dispute would be more promptly and clearly identified and that hearing officers could limit the evidence offered at the pre-election hearing to that which is necessary for the regional director to determine whether a question of representation exists. 79 FR 7329–32. The NPRM proposed that hearing officers would follow a specified process to identify relevant issues in dispute. Thus, the NPRM provided that the hearing officer would open the hearing by reviewing, or assisting non-petitioning parties to complete, Statements of Position, and then would require the petitioner to respond to any issues raised in the Statements of Positions, thereby joining the issues. The NPRM further proposed that after the issues were properly joined, the hearing officer would require the parties to make offers of proof concerning any relevant issues in dispute, and would not proceed to take evidence unless the parties' offers created a genuine dispute concerning a material fact, a standard derived from Rule 56 of the Federal Rules of Civil Procedure.

The Board also proposed that a party would be precluded from raising any issue, or presenting any evidence or argument about any issue, that it failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement. However, any party would be permitted to present evidence as to the Board's statutory jurisdiction, and the petitioner would be permitted to present evidence as to the appropriateness of the unit if the nonpetitioning parties declined to take a position on that issue. In addition, consistent with the proposed amendments' intent to defer both litigation and consideration of disputes concerning the eligibility or inclusion of individual employees until after the election, no party would be precluded from challenging the eligibility or inclusion of any voter during the election on the grounds that no party raised the issue in a Statement of Position or response thereto. 79 FR 7329–30.

The Board received a great number of comments about these proposals. As discussed at length in relation to § 102.63, the Board has decided to adopt the proposal requiring nonpetitioners to complete Statements of Position, but has revised the due date for the completion of the Statements so that the Statements can serve their intended purposes of facilitating entry into election agreements and narrowing the scope of pre-election hearings in the event the parties do not enter into such agreements. Thus, amended § 102.63(b) requires nonpetitioners to file and serve their Statements of Position such that they are received by the regional director and all parties identified in the petition by noon on the business day before the scheduled opening of the pre-election hearing.

After careful consideration of the comments, and as more fully discussed below, the Board has decided to require, in amended § 102.66(b), the other parties to respond to each issue raised in a Statement of Position. The same paragraph expressly authorizes the regional director to permit Statements of Position, as well as responses, to be amended in a timely manner for good cause.[402] It then provides that ''[t]he hearing officer shall not receive evidence concerning any issue as to which parties have not taken adverse positions.'' We believe that this amendment will help the Board maximize hearing efficiency by eliminating unnecessary litigation, expeditiously resolve questions of representation and make Board procedures more transparent and uniform across regions. As discussed in relation to § 102.63, although parties currently are asked to provide much of the information requested by the

[398] As SEIU observes:

If the union wins, the parties can negotiate unit inclusion issues through the collective bargaining process, when both parties have an eye towards the appropriate composition of the bargaining unit (rather than maneuvering to exclude or include particular workers to skew the election results). Indeed, in our experience, the unit placement of workers permitted to vote under challenge is almost always resolved, after certification, without the necessity of returning to the Board for clarification.

See also Testimony of Semel on behalf of CWA II.

[399] Indeed, some commenters claim that petitioning unions under the current rules are compelled to modify the parameters of their preferred unit solely to avoid the delay associated with litigating the voter eligibility of certain individuals or classifications—a context that would seem no less ''unfair'' to employees as the post-election negotiations posited by AHA. See, *e.g.,* Testimony of Brenda Crawford II; Testimony of Martin Hernandez on behalf of UFCW II.

[400] Cf. *H.K. Porter Co.* v. *NLRB,* 397 U.S. 99, 106 (1970) (''the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements'').

[401] See, *e.g., Micro Pacific Development, Inc.* v. *NLRB,* 178 F.3d 1325, 1335–36 (D.C. Cir. 1999).

[402] We have thereby adopted the Chamber's suggestion that the regulatory text explicitly provide that parties may timely amend their Statements of Position for good cause, as discussed above in relation to § 102.63(b). Accordingly, we have also explicitly provided in the regulatory text for required responses to any amendments to a Statement of Position.

Statement of Position form, they are not required to do so, and some parties do not disclose the information even though it is needed to ensure efficient hearings and to expeditiously resolve questions of representation. Similarly, parties are not currently required to respond to positions taken by other parties on issues that need to be determined by the regional director. The required Statements of Position and responses will enable the hearing officer and the parties to ascertain at the outset of the hearing the issues in dispute and, conversely, those that are not in dispute. As to the latter, it follows as a matter of administrative efficiency and common sense that litigation would unjustifiably waste the time and resources of the Board and the parties. Thus, the amendment will prevent wasteful litigation of matters that are not in dispute.[403] It also helps to streamline the hearing and ensure that the hearing proceeds in an orderly fashion if parties are precluded from raising issues that they did not raise in their Statements of Position or place in dispute in response to another party's Statement. Absent good cause, parties should not be permitted to raise new issues just prior to the close of the hearing.[404]

The Board declines to adopt the proposed rule's use of the term ''joinder'' in connection with the requirement of responses to issues raised in a Statement of Position. While, as explained above, the important concept of identifying the issues in dispute and precluding litigation of undisputed matters is retained in the final rule, the term ''joinder'' is not necessary to describe the concept and might give rise to a mistaken belief that the body of law concerning civil pleading requirements was intended to be imported and applied to our representation-case proceedings. We believe that would be inappropriate for the relatively informal administrative hearings governed by this rule. The Board has also eliminated the duplicative numbered subdivisions of § 102.66(a), consolidating their provisions, as modified, as § 102.66(b).

The Board adopts in all material respects the ''Preclusion'' paragraph of the proposed rule, numbered here as § 102.66(d). This complements §§ 102.63(b) and 102.66(b), and helps achieve an important objective of those provisions. As explained above, the requirements of the Statement of Position and responses, permitting identification of the issues in dispute, together with the preclusion of evidence of issues not timely raised, substantially improves the Board's procedures by saving the parties and the Board the time and expense of wasteful litigation. As also discussed here and in connection with § 102.63, hearing officers working under the prior rules often sought to obtain this result by soliciting the positions of the parties in order to narrow the issues and avoid unnecessary litigation. However, parties sometimes failed or refused to provide the necessary information, thereby frustrating those efforts. Section 102.66(d) supplies the incentive for parties to comply with the requirements of §§ 102.63(b) and 102.66(b), consistent with Board precedent discussed above, by precluding parties from litigating issues as to which they have failed to take positions required either as part of a Statement of Position or in response to a Statement of Position. Put another way, § 102.66(d) constitutes the enforcement mechanism for §§ 102.63(b) and 102.66(b), in a way that tracks Board precedent. It includes an exception for litigation of the issue of statutory jurisdiction, and it expressly exempts from the preclusive effect of the paragraph a party's ability to challenge the eligibility of any voter during the election.

Upon reflection, the Board has decided not to adopt the proposed mandatory offer-of-proof procedure. Under the proposal, once the issues raised in a party's statement of position were properly responded to by the petitioner, the hearing officer would require the parties to make offers of proof concerning any relevant issues in dispute, and would not proceed to take evidence unless the parties' offers created a genuine dispute concerning a material fact. Thus, the proposed rule provided, in relevant part:

> (b) *Offers of proof; discussion of election procedure.* After identifying the issues in dispute pursuant to paragraph (a) of this section, the hearing officer shall solicit offers of proof from the parties or their counsel as to all such issues. The offers of proof shall take the form of a written statement or an oral statement on the record identifying each witness the party would call to testify concerning the issue and summarizing the witness' testimony. The hearing officer shall examine the offers of proof related to each issue in dispute and shall proceed to hear testimony and accept other evidence relevant to the issue only if the offers of proof raise a genuine dispute as to any material fact. . . .

79 FR at 7358 (§ 102.66(b)). The final rule provides with respect to offers of proof (emphasis added):

> (c) *Offers of proof. The regional director shall direct the hearing officer concerning the issues to be litigated at the hearing.* The hearing officer *may solicit* offers of proof from the parties or their counsel as to any or all such issues. Offers of proof shall take the form of a written statement or an oral statement on the record identifying each witness the party would call to testify concerning the issue and summarizing each witness's testimony. *If the regional director determines that the evidence described in an offer of proof is insufficient to sustain the proponent's position, the evidence shall not be received.*

See amended § 102.66(c).

The final rule thus makes clear that hearing officers will *not* require parties to make offers of proof raising genuine disputes as to material facts before

[403] The sentence—providing that the hearing officer shall not receive evidence concerning any issue as to which the parties have not taken adverse positions—includes an exception that preserves the regional director's discretion to permit the introduction of evidence relating to an issue that is necessary for the director to address even if the parties have not taken adverse positions. For example, if an employer declines to complete a statement of position in a case where the petitioned-for unit is not presumptively appropriate, the director must still determine whether the petitioned-for unit is appropriate in order to determine whether a question of representation exists. Accordingly, the final rule permits the director to instruct the hearing officer to take evidence on this issue. Similarly, if an employer takes no position regarding the Board's jurisdiction over it, the final rule permits the director to instruct the hearing officer to take evidence on that issue as well. In particular, the regional director must find that the Board has statutory jurisdiction over the employer before the director may conduct an election. However, under the final rule, the Board will continue its longstanding practice of presuming that an employer satisfies the Board's *discretionary* jurisdictional standards when the employer refuses to voluntarily provide information requested by the Board in order to apply those standards. See, *e.g., Seaboard Warehouse Terminals, Inc.,* 123 NLRB 378, 382–83 (1959); *Tropicana Products, Inc.,* 122 NLRB 121, 123–24 (1958).

The Board declines to adopt some provisions of a similar proviso that was contained in §§ 102.66(a)(1), (2), and (3) of the proposed rule. With respect to supplementing the record as to issues relating to the appropriateness of the unit that no party has placed in dispute, the proposed proviso called for the petitioner to supply the evidence. It also specifically provided for the use of secondary evidence, such as sworn statements or declarations. We see no need to specify the petitioner or any other party as responsible for supplementing the record in this regard; the means and manner of insuring the adequacy of the record should remain within the discretion of the regional director, or the hearing office on the director's behalf, where it currently resides. Similarly, hearing officers already enjoy discretion to receive secondary evidence in appropriate circumstances, and we see no need to limit that discretion or predetermine the form of evidence that might be appropriate for this purpose.

[404] Moreover, as previously discussed, one purpose of requiring the Statement of Position in advance of the hearing is to narrow the scope of the pre-election hearing by alerting the petitioner as to issues the nonpetitioner is seeking to litigate in the hearing on the petitioner's petition. This will avoid a situation where one party is not prepared to proceed because they did not believe that certain issues required litigation. For all the foregoing reasons, the Board rejects the notion that parties should be able to amend their Statements of Position even in the absence of good cause.

proceeding to hear testimony and accept other evidence. Instead, consistent with pre-existing practice, the Board has decided to leave it to the hearing officer's discretion whether to require parties to submit offers of proof on disputed issues. The Board has also removed the language drawn from Federal Rule of Civil Procedure 56. The substitute language makes clear that in the event the hearing officer decides to require parties to make an offer of proof, the evidence will not be received if the regional director determines that the evidence described in the offer of proof is insufficient to sustain the proponent's position.

The Board believes that codifying hearing officers' discretion to require offers of proof (and regional directors' discretion to determine that the evidence described therein is insufficient to sustain the proponent's position and thus that it will not be received) will help the Board to avoid unnecessary litigation and expeditiously resolve questions of representation in a manner that fully protects the rights of all parties. As discussed above, subject to the provisions of § 102.66, the hearing officer has a duty ''to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under Section 9(c) of the Act.'' Amended § 102.64(b) (which was formerly § 102.64(a)). However, as the Hearing Officer's Guide has long recognized, the hearing officer ''also [has a] duty . . . to keep the record as short as is commensurate with its being complete.'' Hearing Officer's Guide at 1. Thus, the Board has a concomitant ''duty to protect the integrity of its processes against unwarranted burdening of the record and unnecessary delay.'' *Laurel Associates, Inc. d/b/a Jersey Shore Nursing & Rehabilitation Center,* 325 NLRB 603, 603 (1998). See Casehandling Manual Section 11188.1 (''The hearing officer should . . . exclude irrelevant and cumulative material.'').

In order to protect against unwarranted burdening of the record and unnecessary delay, the Board has long sanctioned a hearing officer's authority to require a party to submit an offer of proof summarizing and explaining its proffered evidence as well as a hearing officer's authority to rule on the offer of proof. See *Laurel Associates, Inc.,* 325 NLRB at 603; *Mariah, Inc.,* 322 NLRB 586, 586 (1996). Indeed, because offers of proof can be an effective tool for controlling and streamlining the hearing and achieving an uncluttered record free of irrelevant and cumulative material, the Hearing Officer's Guide expressly encourages the hearing officers to utilize offers of proof. Hearing Officer's Guide at 6, 38 (''the hearing officer should . . . utilize offers of proof in order to achieve an uncluttered record.''). See Casehandling Manual Section 11185, 11188.1. But, we no longer believe that we need insist on a rigid formality by mandating that offers of proof be taken on every potential issue before any evidence is introduced. We think that hearing officers will continue to be capable of judging when offers of proof are likely to be helpful in safeguarding the record, and will continue to require them as appropriate, without removing their discretion to let the hearing proceed organically where pro forma offers of proof might burden, rather than streamline, the hearing record. However, given protests in the comments concerning the hearing officers' role (as discussed below), out of an abundance of caution we clarify that hearing officers must seek the regional director's determination as to whether to receive proffered evidence relating to an issue that the regional director determined should be litigated. This ensures that discretion to foreclose litigation resides with the statutorily appropriate agent of the Board. This comports with current best practices, where hearing officers briefly adjourn hearings to communicate with regional directors to ensure that the record is developed consistent with the regional director's view of the case.[405]

In sum, amended § 102.66(c) does no more than reaffirm and codify the authority of the hearing officer to require parties to make offers of proof if the hearing officer believes it would be useful to do so. See *Laurel Associates, Inc.,* 325 NLRB at 603 & n.1 (hearing officer properly required employer to make an offer of proof in support of its claim that the presumptively appropriate petitioned-for unit was not in fact appropriate and then properly rejected it); *Mariah, Inc.,* 322 NLRB at 586 n.1, 588 (hearing officer properly permitted employer to make, and then properly rejected, an offer of proof regarding the eligibility of strikers because such matters are decided post election if necessary); *Franklin Hospital Medical Center,* 337 NLRB 826, 826–27 & n.2 (2002) (hearing officer properly rejected employer's offer of proof regarding alleged supervisor status of certain individuals); *Colgate-Palmolive Co.,* 120 NLRB 1567, 1568 & n.2 (1958) (hearing officer properly rejected proffered evidence because it was not material); *W.B. Willet,* 85 NLRB 761, 761 n.2 (1949) (hearing officer properly rejected offer of proof in support of party's contract bar claim, because it could not have constituted a bar to the proceeding).

A number of comments criticize the role of, and the authority assigned to, the hearing officer under the proposed rule. Of those comments, several suggest that the Board's proposed procedures represent an unprecedented expansion of the hearing officer's role and vest the hearing officer with too much discretion.[406] Similarly, some comments express the view that the statute prohibits hearing officers from making decisions such as whether disputed issues relate to a material fact, or whether offers of proof are sufficient to establish the existence of a genuine dispute as to a material fact, as Section 9(c) prohibits hearing officers from even making recommendations with respect to the representation hearing.[407] In addition, several comments note that not all hearing officers are attorneys,[408] and numerous comments questioned the competency of hearing officers—particularly in the absence of guidance from the Board—to assess the parties' position statements and offers of proof and to apply the legal standards embodied in Federal civil procedure to make judgments as to what constitutes a disputed issue of material fact.[409] According to several comments, the likely result of such required judgments—which may not be made in a uniform manner among hearing officers—will be an increase in post-election litigation and post-certification challenges.[410]

Responsive comments express the contrary position that the proposed rules grant no greater discretion to hearing officers than that which they

[405] See Testimony of Caren Sencer on behalf of Weinberg, Roger & Rosenfeld II and Gabrielle Semel on behalf of CWA II (discussing current practice of hearing officers pausing to communicate with regional directors when necessary).

[406] See, *e.g.,* SHRM; Bluegrass Institute; ACC; CDW II. In that regard, Baker & McKenzie asserts that the proposed rule changes the role of the hearing officer from that of fact gatherer to gatekeeper/judge, a role for which the hearing officer does not have the requisite experience or training.

[407] See, *e.g.,* ALFA;Testimony of Roger King on behalf of SHRM II; COLLE II.

[408] See, *e.g.,* ACE; SHRM II; Bluegrass Institute; GAM; York SHRM.

[409] See, *e.g.,* SHRM; CNLP; AHCA; National Mining Association; ACE; Bluegrass Institute. AHA further asserts that, should the Board adopt the proposed procedures, it should engage in an open dialogue regarding the standards that the hearing officers would apply, and should invite comments on proposals that provide for more detailed and comprehensive descriptions of the process to be followed by the hearing officers.

[410] See, *e.g.,* National Mining Association; Baker & McKenzie; GAM; NAM II.

already exercise under current Board procedures, as hearing officers have always been responsible for controlling the hearing, assuring that there is a complete record, and excluding evidence that is not material to the case.[411] In addition, SEIU asserts that the proposed rules do not suggest that hearing officers are to weigh the proffered evidence of the parties, or to ascertain whether assertions made in position statements are accurate or reliable; rather, the hearing officer is to examine the position statements and offers of proof to ascertain whether there is conflicting evidence as to any material fact.

Many comments also focus on the use of language similar to that used in Rule 56. The AFL–CIO supports the proposal claiming that it will appropriately eliminate the ability of a party to strategically delay the election by forcing the litigation of undisputed or immaterial issues and provide the hearing officer with the authority to prevent an ''empty show'' hearing, while simultaneously ensuring that the parties are provided the opportunity to present their positions on all issues and to present evidence or offers of proof on all material factual issues. In addition, the AFL–CIO contends that ''most major agencies in the Federal system have opted to make available procedures for the summary disposition of adjudicatory matters,'' and that such procedures are particularly appropriate in the context of an ''informal and nonadversarial'' pre-election hearing. Similarly, several comments assert that the offer-of-proof procedure is consistent with both the Board's current post-election practice and civil litigation in Federal and state courts.[412]

Conversely, several comments express the position that the mandatory offer-of-proof procedure inappropriately deprives the parties of the opportunity to develop a full and complete record.[413] Other comments assert that the procedures proposed in 102.66 deny employers the due process protections to which they are entitled,[414] and that they are inconsistent with the statutory requirement that the Board provide an ''appropriate hearing'' prior to the election. In the latter regard, several comments argue that Section 9(c) of the Act requires a pre-election evidentiary hearing at which the parties are afforded the opportunity to present their evidence and positions, and cross-examine witnesses.[415]

Several responsive comments dispute the claims that the Board's proposed procedures are violative of due process guarantees.[416] These comments assert that there is a notable absence of support for the claim that due process requires the Board to expend resources in connection with the litigation of issues that are neither material nor in dispute, and that due process requires ''something less than a full evidentiary hearing.'' Similarly, several comments express support for the Board's preliminary view in the NPRM that the statutorily-prescribed ''appropriate hearing'' does not mean an evidentiary hearing when there are no issues in dispute or the parties fail to submit an offer of proof demonstrating a genuine dispute as to a material fact.[417] The comments additionally assert that, pursuant to the Supreme Court's interpretation of Section 9(c) of the Act, the Board has discretion to determine the appropriate parameters of the investigatory representation hearing.

In addition to challenging the Board's proposed limitations on the hearing as inconsistent with due process and statutory requirements, many of the comments in opposition to the proposed procedures express the view that, contrary to the Board's suggestion in the NPRM, the summary procedures are not analogous to the summary judgment framework established by Rule 56 of the Federal Rules of Civil Procedure. More specifically, a number of comments contend that a fundamental distinction between the Board's proposed procedures and Rule 56 is the fact that summary judgment under the Federal rule takes place only after the parties have had the opportunity to conduct discovery.[418] According to comments from SHRM and ACE, non-petitioning parties cannot reasonably be expected to articulate and substantiate their positions through an informal summary judgment process in the absence of a full record or, at a minimum, access to all of the relevant evidence. SHRM, ACE, and AHA additionally contend that the Board's analogy to Rule 56 is inapt in that summary judgment procedures are utilized to resolve legal questions only after the facts have been established to the point where no material facts are in dispute; the summary judgment procedure has never been used to determine *whether* to receive and evaluate evidence.

A comment from NAM II additionally asserts that, as the Board's proposal requires the non-moving party to identify issues, submit an offer of proof, marshal arguments, and introduce evidence supporting its position, it completely reverses the burden of proof applicable under Rule 56. In addition, unlike the Federal rule, the Board's procedures do not afford the parties the opportunity for oral argument.

In response to the comments criticizing the Board's reliance on Rule 56, the SEIU (Reply) counters that, under the Board's proposed rules, ''employers may force hearings by producing far less than a litigant must produce under Rule 56, and may easily meet its burden without the discovery that often precedes summary judgment motions.'' Indeed, argues the SEIU, employers would be subjected to a much lower bar than that necessary to overcome a summary judgment motion; whereas a non-moving party under Rule 56 cannot rest on its pleadings, but must submit significant probative evidence in support of its claims, a party seeking to introduce evidence at a representation hearing need only raise an issue in its position statement and, subsequently, submit an offer of proof identifying its likely witnesses and summarizing their anticipated testimony. See FRC.P. 56(e).

We agree with the criticism of the proposed rule's use of Rule 56 of the Federal Rules of Civil Procedure as a model for the procedural rules governing representation cases, based on the substantial differences between the different kinds of proceedings. The Federal Rules are designed for formal judicial actions before a Federal judge or magistrate judge that may address any issue raised in connection with almost the full range of claims cognizable under Federal or state statutory or common law. The Board's representation cases, by contrast, involve informal administrative proceedings that address a narrow subset of the issues arising under a single Federal statute. The range of issues is even narrower in pre-election

[411] See, *e.g.,* AFL–CIO II; SEIU Reply.

[412] See, *e.g.,* NELP; UFCW; Testimony of Peter Ford on behalf of UFCW II.

[413] See, *e.g.,* SHRM; ACE; AHA; CDW II. Moreover, SHRM asserts that the incomplete record resulting from the hearing officer's decision regarding the offers of proof, together with the possibility that the Board might exercise its discretion to deny post-election review, will result in more frequent remands to the Board from the Federal courts of appeals, as the courts will not have an adequate record for review.

[414] See, *e.g.,* SHRM; ACE; U.S. Poultry II.

[415] See, *e.g.,* SHRM; CNLP; AHCA II; CDW II.

[416] See, *e.g.,* AFL–CIO Reply; SEIU Reply.

[417] See, *e.g.,* AFL–CIO Reply; SEIU Reply; UFCW; LIUNA MAROC II.

[418] See, *e.g.,* AHA; ALFA; SHRM; NAM; ACE; National Mining Association. CNLP additionally asserts that when a summary judgment motion is filed as an answer under Rule 56, the non-moving party may request time for additional discovery to provide a response.

In response, a reply comment from the SEIU asserts that, in contrast to Federal court proceedings, the employer in a representation proceeding before the Board has access to, and exclusive control over, all of the relevant information and, accordingly, does not have the same need for discovery.

proceedings. The cases are presided over and decided by hearing officers and regional directors, respectively, some of whom are not lawyers, and it is more common than in district court for parties not to be represented by counsel. We agree that it makes little sense to burden an informal proceeding that performs a simple, narrow function with trappings of full-dress Federal litigation. We therefore have declined to adopt the language of proposed § 102.66(c) that was drawn from Rule 56. Similarly, in §§ 102.64(b) and 102.66(a) we have rejected proposed language imported from Rule 56, and in § 102.66(a) we have eliminated the proposed ''joinder'' nomenclature in connection with the identification of disputed issues through the responses to statements of position.

It is important to recognize, however, that § 102.66 of the final rule, Rule 56, and many other rules governing adjudication of disputes are animated by a common principle of economy and common sense: A tribunal need not permit litigation of a fact that will not, as a matter of law, affect the result, or as to which the party that seeks to litigate the fact cannot identify evidence that would sustain its position. For example, suppose that a party asserts, concerning a petition for a unit including all dispatchers, that dispatchers are supervisors, and suppose that even if all of its witnesses testify credibly as it says they will testify and all of the documents it proposes to introduce show what it says they will show, the party's testimonial and documentary evidence will not, as a matter of law, establish that dispatchers are supervisors. Under such circumstances, there is no need for an evidentiary hearing on the issue. There is no need to require the hearing officer to try the factual issue to find out whether the party's witnesses might by some chance testify to something different from what the party said they would. That would be the definition of unnecessary litigation, and the formalities of summary judgment under Rule 56 are not needed to reach the obvious conclusion that the issue should not be tried.

The Board is confident that hearing officers are fully capable of performing their role under the final rule, including asking petitioners to respond to each position taken by the nonpetitioners and administering the preclusion provision. Put simply, we believe that the amendments to § 102.66(b) codify nothing more than what hearing officers are supposed to do currently. The Hearing Officer's Guide has long provided that at the outset of the hearing, the hearing officer should have the parties clearly state their positions on each issue. Hearing Officer's Guide at 6, 13, 14, 16. Casehandling Manual Sections 11187 and 11188 likewise provided long before the NPRM that the hearing officer should guide, direct and control the hearing, seek responses to issues raised by the parties, and take an active role in exploring all potential areas of agreement and narrowing the issues that remain to be litigated. Similarly, hearing officers have experience precluding parties from presenting evidence relating to an issue if the parties have not taken a position on that issue. See *Bennett Industries, Inc.,* 313 NLRB 1363, 1363 (1994). See also Casehandling Manual Section 11217 (the hearing officer should advise a party that refuses to state its position on an issue that it may be foreclosed from presenting evidence on that issue). Accordingly, we believe that hearing officers are capable of determining when parties are seeking to present evidence about issues they did not raise in their Statements of Position or in response thereto.[419]

Nor would the Board be persuaded by any claim that hearing officers are incapable of administering the amended offer-of-proof procedure. As discussed above, amended § 102.66(c) does not expand the hearing officer's role beyond that which existed under the Board's prior rules; rather, it merely confirms that the hearing officer—in the interests of protecting the record from being burdened by cumulative or unhelpful evidence and preventing unnecessary delay—has the discretion to require the parties to submit an offer of proof. Thus, the hearing officer's role is limited to the traditional one of ''guid[ing], direct[ing], and control[ling] the hearing, excluding irrelevant and cumulative material, and not allowing the record to be cluttered with evidence submitted 'for what it's worth.' '' Hearing Officer's Guide at 6, 38. See Casehandling Manual Section 11188.1. As shown, prior to the NPRM, hearing officers had discretion to require parties to submit offers of proof. Under the final rule, hearing officers continue to have discretion to require offers of proof, subject to the clarification that it is the regional director who will make the ultimate decision on the offer's sufficiency. Nothing in the amendments denies parties the ability to argue orally about whether a particular offer of proof should be rejected. In our experience, hearing officers have been fully capable of requesting offers of proof and seeking direction from regional directors on whether to allow evidence to be received, and there is no reason to think that the amendments will change that.[420]

There will be adequate evidence on the record to decide the relevant issues. To be sure, prior to the NPRM, the Board had construed its rules as granting parties the right to litigate individual eligibility or inclusion questions, whereas the final rule provides that disputes concerning individuals' eligibility to vote or inclusion in the unit found appropriate ordinarily need not be litigated or resolved before an election is conducted. The Board has concluded that, although this provision may operate to exclude evidence from the record concerning individuals' eligibility to vote or inclusion in the unit found appropriate, such evidence is not relevant to the existence of a question of representation. As such, it would be administratively irrational to require that parties be permitted to litigate such issues at the pre-election hearing if the regional director will not be deciding those issues prior to the election. But, under the final rule, regional directors are free to direct that evidence regarding individuals' eligibility to vote or inclusion in the unit be admitted if the director resolves to consider the individual eligibility question at issue prior to the election.[421]

[419] In any event, § 102.66(b) also vests authority in the regional director to permit parties' timely amendments to their Statements of Position or response thereto under a good cause standard, mooting some of the concerns parties had concerning the hearing officer's proposed role.

[420] Regional directors assign either field attorneys or field examiners to serve as hearing officers. Field attorneys must possess a J.D. degree and be an active member of a bar. Field examiners must possess a B.A. degree. The Board has traditionally provided written guidance to hearing officers as well as periodic training. Hearing officers also participate in a video training program that covers the subject of conducting a hearing as well as relevant professional development programs. There is also a lengthy publication entitled Guide for Hearing Officers in NLRB Representation and Section 10(K) Proceedings, which is periodically updated and made available to hearing officers (and the public on the Board's Web site). Hearing officers are also routinely given feedback on their conduct of hearings by the staff members assigned to assist the regional director in drafting the resulting decision as well as by the regional director. The Board intends to continue to provide these types of assistance, feedback, and training. Finally, the qualifications of hearings officers are not set by statute or regulation. To the extent the regional directors or the Board find that the existing hearing officers cannot competently perform the role assigned them under the final rule, the Board will provide necessary training or alter the qualifications for service as a hearing officer.

[421] We also disagree with the suggestion of the IBEW II that the process would be improved if the hearing officer took control of the hearing by subpoenaing witnesses and becoming the primary questioner to develop the record. To say nothing of

Continued

Contrary to some of the comments, the hearing officer's determination to require a party's offer of proof and seeking a ruling from the regional director on whether to receive the described evidence does not constitute a ''recommendation'' or decision for purposes of Section 9(c)(1) of the Act. Thus, in deciding whether to require an offer of proof, and presenting that offer to the regional director, the hearing officer is not recommending, or deciding, whether a question of representation exists or whether an election should be directed to resolve that question. See Casehandling Manual Section 11185 (''The hearing officer's role is to guide, direct, and control the presentation of evidence at the hearing [but] [t]he hearing officer does not make any recommendations or participate in any phase of the decisional process.'')[422] Moreover, as discussed above, the final rule makes clear in amended § 102.66(c) that it is the regional director, not the hearing officer, who will determine the issues to be litigated and whether evidence described in an offer of proof will be admitted.

We would also find unpersuasive any claim that the amendments deprive parties of their right to an ''appropriate'' pre-election hearing under Section 9(c) of the Act. Section 9(c)(1) of the Act states that the Board must provide for ''an appropriate hearing'' if it has ''reasonable cause to believe that a question of representation affecting commerce exists,'' and that the Board must direct an election if it finds, based on the record of that hearing, that ''such a question of representation exists.'' Thus, the statutory purpose of the pre-election hearing is to determine whether a question of representation exists.[423] In the absence of an election agreement, the Board's duty under Section 9(c) of the Act is to conduct a hearing to determine if a question of representation exists and, if such a question exists, to direct an election to answer the question and to certify the results.

Amended § 102.66 does not deprive parties of their right to ''an appropriate [pre-election] hearing'' under Section 9(c) of the Act. After all, as explained above, amended § 102.66(a) expressly provides that parties have the right to introduce evidence ''of the significant facts that support the party's contentions and are relevant to the existence of a question of representation.'' Codifying hearing officers' discretion to require parties to make offers of proof in § 102.66(c) likewise does not deprive parties of their right to ''an appropriate [pre-election] hearing'' or their right to litigate relevant issues. To the contrary, offers of proof are a recurring feature of pre-election hearings under the NLRA (and of administrative and state and Federal court hearings across the land). An offer of proof is simply a tool to enable the regional director to determine whether it is appropriate to receive the evidence a party wishes to introduce. See Hearing Officer's Guide at 38. Thus, for example, if the proffered evidence is not relevant to whether a question of representation exists and the offer is rejected, parties have not been deprived of their right to a pre-election hearing, because parties have no right—under the NLRA, the APA, or the due process clause of the United States Constitution—to present evidence that is not relevant to the statutory purpose of the pre-election hearing.[424] Indeed, as shown, hearing officers had authority under the Board's prior rules to seek responses to party positions and to require parties to make offers of proof.

Moreover, because offers of proof are part of the record as discussed below in connection with amended § 102.68, parties' rights are preserved even if the evidence is rejected in error. Thus, the offer of proof is in the record for the regional director (or the Board or a reviewing court) to review, and if the director (or the Board or a reviewing court) concludes that the evidence was rejected in error and that the error prejudiced the party making the offer, then the director (or the Board or a reviewing court) can order that the record be reopened and the evidence taken. Hearing Officer's Guide at 38.[425]

Nor will the preclusion provisions prevent development of an adequate record upon which the regional director can determine whether there is an appropriate unit in which the Board may properly conduct an election. As explained in the NPRM, hearing officers had authority under the Board's prior rules to preclude parties from presenting evidence when they refused to take positions on issues. See 79 FR 7329–30; *Bennett Industries Inc.,* 313 NLRB 1363, 1363 (1994) (hearing officer properly refused to allow employer to introduce evidence regarding

the hearing officer being the individual least suited to determine, as an initial matter, which witnesses would be best situated to provide the necessary evidence, we are also guided by the principal that the hearing officer is not an advocate for either side and must be impartial in developing the record. As the Casehandling Manual cogently explains, the hearing officer should avoid the appearance of providing undue assistance to one party or another and ''should also exercise self-restraint, should give the parties prior opportunity to develop points, and should refrain from needlessly taking over.'' 11188.1. We think that the tools provided in the final rule will allow the hearing officer and the regional director to adequately control development of the record without taking steps—as suggested by IBEW—that could lead their impartiality to be called into question.

[422] Indeed, hearing officers have long been charged with passing on the admissibility of evidence, and ruling on petitions to revoke subpoenas that are filed after the hearing opens. See §§ 102.64, 102.65, 102.66, 102.68 (2009); Hearing Officer's Guide at 1, 22, 29, 33–39; Casehandling Manual Sections 11188.1, 11185, 11194; 11204, 11207, 11212.

[423] As noted, a question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative. However, a proper petition cannot be filed under Section 9(c)(1) of the Act, and a question of representation cannot arise under the Act, unless the employees in the unit are employed by an employer covered by the Act. Thus, the regional director must determine that a proper petition has been filed in an appropriate unit in order to find that a question of representation exists.

[424] See *Mariah, Inc.,* 322 NLRB at 586 n.1 (hearing officer acted consistent with his role in ensuring that the record is both complete and concise in refusing to permit the introduction of irrelevant evidence at the pre-election hearing); *National Mining Ass'n* v. *DOL,* 292 F.3d 849, 873–74 (D.C. Cir. 2002) (the APA ''empowers agencies to 'exclu[de] * * * irrelevant, immaterial, or unduly repetitive evidence' as 'a matter of policy'") (citation omitted); *U.S.* v. *Maxwell,* 254 F.3d 21, 26 (1st Cir. 2001) (although a criminal defendant ''has a wide-ranging right to present a defense, * * * this does not give him a right to present irrelevant evidence''); *U.S.* v. *Vazquez-Botet,* 532 F.3d 37, 51 (1st Cir. 2008) (same). Accordingly, parties have no right to present irrelevant evidence at a pre-election hearing, which is not governed by the APA's formal adjudication provisions. See 5 U.S.C. 554 (a)(6); *In re Bel Air Chateau Hospital, Inc.,* 611 F.2d 1248, 1252–1253 (9th Cir. 1979) (representation case proceedings exempt from APA formal adjudication requirements); *NLRB* v. *Champa Linen Service Co.,* 437 F.2d 1259, 1262 (10th Cir. 1971) (same).

We also wish to reiterate that if pursuant to the regional director's direction, a hearing officer prevents receipt of evidence regarding an individual eligibility or inclusion question (on the grounds that the proffered evidence is not relevant to determining whether a question of representation exists,) the party remains free to present such evidence at a post-election hearing if that individual casts a determinative challenged ballot. Similarly, if the disputed votes are not determinative, parties can bring the issue back before the Board through a timely filed unit clarification petition if the union wins the election and they cannot resolve the issues through collective bargaining. Thus, the amendments do not limit any party's right to present such evidence, but merely give the regional director discretion to defer introduction of such evidence until after the election.

[425] As noted, hearing officers have long had discretion to require offers of proof at the pre-election hearing. The courts of appeals have not remanded a significant number of cases because of erroneous hearing officer rulings regarding offers of proof, and we see no reason for this to change as a result of the final rule. If anything, the requirement that regional directors determine whether evidence described in the offer of proof should be received lessens the chance of erroneous rulings.

supervisory status of leadpersons and quality control inspectors because employer refused to take a position regarding their status and their inclusion or exclusion from the unit); *Allen Health Care Services,* 332 NLRB 1308 (2000); Casehandling Manual Section 11217. Even if the hearing officer exercises the authority to limit an employer's presentation of evidence when the employer fails to take a position regarding the appropriateness of a petitioned-for unit, the regional director will retain the discretion to direct the receipt of evidence needed to make the required determination concerning a petitioned-for unit which is not presumptively appropriate. That evidence may include testimony adduced from the employer's owners, managers, or supervisors as witnesses, called under subpoena or otherwise, and documents obtained from the employer.

Thus, for example, amended § 102.66(b) contains an exception which explicitly provides that ''this provision shall not preclude the receipt of evidence regarding the Board's jurisdiction over the employer or limit the regional director's discretion to direct the receipt of evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the regional director determines that record evidence is necessary.'' [426] And amended § 102.66(a) provides that the hearing officer ''shall also have the power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence.'' The Board has concluded that employers who are unable or unwilling to take a position concerning the appropriateness of a proposed unit of their own employees are unlikely to provide assistance to the hearing officer in the development of an adequate record upon which to address that question. And we reiterate our further conclusion that not vesting hearing officers with clear authority to limit such employers' participation in the hearings under those circumstances threatens the hearing officer's ability to control the proceedings and avoid burdening the record.

In short, if the parties do not enter into an election agreement, there *will* be a pre-election hearing. But Section 9(c) does not require a full evidentiary hearing in every case. Rather, it requires ''an appropriate hearing.'' The Board concludes that a hearing where irrelevant evidence must be introduced is an inappropriate hearing. Thus, if the parties come to the hearing and the regional director determines that there are no disputes that must be resolved prior to the election (because, for example, all parties agree on the record that the Board has jurisdiction and that the only dispute concerns the supervisory status of one individual in a 10-person unit that all parties agree on the record is appropriate), an appropriate hearing does not require introduction of further evidence. See *United States* v. *Storer Broadcasting,* 351 U.S. 192, 205 (1956); *accord American Airlines, Inc.* v. *Civil Aeronautics Board,* 359 F.2d 624, 628 (en banc), *cert. denied,* 385 U.S. 843 (1966). On the other hand, if, as discussed above, the petitioned-for unit is not presumptively appropriate and the employer refuses to take a position on the appropriateness of the unit, then although the amendments to § 102.66 preclude the employer from presenting evidence and argument about the appropriateness of the unit, the amendments allow the petitioner to demonstrate the appropriateness of the unit at the hearing, or adduce evidence concerning any other issue for which record evidence is necessary. See § 102.66(b). Thus, the amendments are consistent with *Allen Health Care Services,* 332 NLRB 1308, 1308–09 (2000), where the Board held that if the employer refuses to take a position on a unit that is not presumptively appropriate, the hearing officer must take evidence sufficient to allow the regional director to find that the unit is appropriate before the director may direct an election in that unit.[427]

Similarly, unless the employer concedes the Board has jurisdiction, evidence must be taken on the Board's statutory jurisdiction to process the petition. Indeed, amended § 102.66(b) provides that receipt of evidence regarding the Board's jurisdiction will not be precluded even if the employer takes no position on this issue, and amended § 102.66(d) contains language that expressly provides that ''no party shall be precluded from * * * presenting evidence relevant to the Board's statutory jurisdiction to process the petition.''

Many comments specifically claim that the rule's preclusion provision is unfair, biased, or too severe a consequence for an employer's failure to raise an issue in its position statement, particularly in light of the abbreviated period of time permitted for its preparation; [428] one such comment (ACC) additionally questions the Board's authority to preclude litigation of significant issues based on an inadvertent omission from the position statement. In addition, a number of comments argue that the short-time frame will lead employers to file ''pro forma'' position statements and may cause employers to put forward every argument rather than risk preclusion.[429] We have already explained above in relation to § 102.63 why we disagree with the claim that the Statement of Position form due date and the pre-election hearing scheduling provisions render preclusion unfair. We have likewise explained above why we disagree with the notion advanced in some comments that the preclusion proposal will lengthen pre-election hearings and therefore will be counterproductive.

We also disagree with the comments that appear to challenge the very notion of preclusion itself as well as the Board's authority to preclude parties from raising issues that they did not raise in their Statements or in response to another party's Statement. Thus, the fact of the matter is that, as discussed above, prior to the NPRM, parties were required to raise contentions at specified times in the process or face preclusion. Indeed, as shown, Casehandling Manual Section 11217 provided that the hearing officer should advise parties that they may be

[426] The NPRM proposed a slightly different version of this language, keyed only to the need for petitioner to adduce evidence concerning the appropriateness of the petitioned-for unit when the employer refused to take a position on the issue. See 79 FR 7357. However, the Board was persuaded in part by the comment of the AFL–CIO II that the Board's proposed language should be modified to include a reference to evidence concerning jurisdiction, and a catch all covering any issue concerning which record evidence is necessary for those circumstances in which the record might lack other necessary evidence concerning issues that are neither contested, nor stipulated. For example, a petitioner's status as a labor organization could be such an issue in certain cases.

[427] Likewise, because, as the IFA points out, current Board law holds that employees who are jointly employed by two entities cannot be included in the same bargaining unit with employees who are solely employed by one of those entities without the consent of both entities (*Oakwood Care Center,* 343 NLRB 659 (2004)), the Board may not find such a ''mixed unit'' to be appropriate merely on the basis that neither entity submits a Statement of Position. At the same time, it would be inappropriate to dismiss the petition simply based on the failure of the two entities to file Statements of Position, as for example, both entities could consent at the hearing. The petitioner could also amend its petition and seek to represent only the employees who are jointly employed by both employers (see *id.* at 662, 666 (a joint employer unit consisting solely of the jointly-employed employees is appropriate, even absent the employers' consent)), or the union could amend its petition and seek to represent just the employees who are solely employed by one of the two entities.

[428] See, *e.g.,* Cook-Illinois; AGC; Sheppard Mullin; ACC; NRF; Indiana Chamber.

[429] See, *e.g.,* Bluegrass Institute; NMMA; Testimony of Curt Kirschner; GAM; Constangy.

foreclosed from presenting evidence on issues if they refuse to take a position on those issues. Prior to the NPRM, the Board had held that a hearing officer may preclude an employer from introducing evidence regarding the supervisory status of employees in certain job classifications if the employer refuses to take a position on their status and their inclusion or exclusion from the unit. *Bennett Industries, Inc.,* 313 NLRB 1363, 1363 (1994). Similarly, under the rules in effect prior to the NPRM, a party could ''not [in a request for review of a regional director's decision and direction of election] raise any issue or allege any facts not timely presented to the regional director.'' 29 CFR 102.67(d) (2010). Moreover, § 102.65(e)(1) of the prior rules provided that motions for reconsideration or to reopen the record needed to be based on extraordinary circumstances, and that neither the regional director nor the Board would entertain a motion for reconsideration or to reopen the record with respect to any matter which could have been but was not raised pursuant to any other section of the Board's rules. Accordingly, even under the Board's prior rules, if a party failed to present facts or take a position before the hearing officer at a hearing which opened and closed within 7-days of the notice, it could not do so later regardless of whether the failure was inadvertent. In addition, as discussed above in connection with § 102.63 (and § 102.66), we have explicitly provided that parties may seek to amend their Statements of Position either before or during the hearing in a timely manner for good cause.

In view of the foregoing, we categorically reject those comments that contend that we lack authority to impose preclusion, and that preclusion is too severe a consequence, for a party's failure to complete the Statement of Position form. We likewise reject Professor Estreicher's suggestion that the preclusive effect of failing to take a position required by the Statement of Position form should not extend beyond the pre-election period. Put simply, the Board believes, for example, that permitting parties to raise unit appropriateness issues after the election even if they did not raise those issues before the election would be inconsistent with the Board's goal of expeditiously resolving questions of representation, and would thwart the Board's interest in certainty and finality of election results. Moreover, as shown, the Board's prior rules already required parties to raise certain issues before the election in order to preserve their ability to raise those issues subsequent to the election.

Contrary to comments of GAM, the amendments do not operate to preclude challenges to the eligibility of an individual voter at the polls merely because the party seeking to challenge the voter at the polls failed to provide the initial lists of employees as part of its Statement of Position or failed to raise the issue of that individual's eligibility at the hearing. Amended § 102.66(d) merely provides that the employer ''shall be precluded from contesting * * * the eligibility or inclusion of any individuals *at the pre-election hearing*'' if it fails to furnish the lists of employees as part of its Statement of Position. (emphasis added). Similarly, amended § 102.66(d) explicitly provides that ''no party shall be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election.'' In short, as noted above, even if an employer fails to complete a Statement of Position form, it will generally be able to challenge the eligibility of a particular individual at the polls, unless, of course, the regional director specifically ruled on that individual's eligibility prior to the election. Cf. Casehandling Manual Section 11338.7 (''Persons in job classifications specifically excluded by the Decision and Direction of the Election should be refused a ballot, even under challenge, unless there have been changed circumstances.'') GAM argues that the provisions are confusing, but does not provide suggested language for clarifying the provisions. The Board does not view the language as confusing, and thus has determined that no change is necessary.

SHRM argues that the preclusive effect of the rules is unfair because it operates primarily against the employer. We disagree. The preclusion provisions do not just apply in RC cases where the employer is the nonpetitioner and must complete the Statement of Position form. Rather, under amended § 102.66(b) and (d), the preclusion provisions apply in all cases, without distinction, including RD (decertification cases) as well as RM cases, where the individual or labor organization currently representing employees, or seeking to represent employees, is the nonpetitioner and is responsible for completing a Statement of Position form. Moreover, where a labor organization is the petitioner, amended § 102.66(b) and (d) preclude it from seeking to introduce evidence concerning any issue that it did not place in dispute in response to another party's Statement of Position. We also reiterate that, contrary to SHRM's contentions that the amendments favor unions and impose one-sided burdens, if the employer refuses to take a position regarding the appropriateness of a petitioned-for unit that is not presumptively appropriate (or claims that the unit is not appropriate but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from, the petitioned-for unit to make it an appropriate unit), the petitioner cannot simply rest, but must demonstrate the appropriateness of the petitioned-for unit. Similarly, evidence must be taken as to the Board's statutory jurisdiction to process the petition if the employer refuses to concede jurisdiction and fails to provide the commerce information in its Statement of Position form. See amended § 102.66(b). This is so even though the nonpetitioner employer unquestionably has greater access to the relevant information relating to those issues, as the employer established its employees' terms and conditions of employment and knows the extent of the connection between its business and interstate commerce.

C. Subpoenas

The final rule does not adopt the proposed amendment to § 102.66(c) specifying that a party that has been served with a subpoena may be required to file or orally present a motion to quash prior to the 5 days provided in Section 11(1) of the Act. The Board had proposed to codify the existing practice noted in the Casehandling Manual, which provides that case authority ''holds that the 5-day period is a maximum and not a minimum.'' Section 11782.4.[430] Upon reflection, however, the Board does not feel that it would be appropriate to codify the limited caselaw in this area, and instead prefers to allow the continued development of best practices among the Board's regional directors and its administrative law judges concerning motions to quash subpoenas. [431]

D. Discussion of Election Details

The NPRM proposed that prior to closing the hearing, the hearing officer would inform the parties what their obligations under these rules would be

[430] Accord Hearing Officer's Guide at 22; NLRB Administrative Law Judge Bench Book Section 8–220 (2010) (''[T]o avoid unnecessary delay, a party seeking to revoke a subpoena may be required to respond in less than 5 days'').

[431] Because the final rule does not codify any particular practice, Klein II's complaint that the Board is reducing the time for motions to quash is no longer relevant to the final rule.

if the regional director directs an election. The NPRM also proposed that the hearing officer would solicit all parties' positions on the type, dates, times, and location of the election, and the eligibility period. However, the NPRM also made clear that although parties would be solicited to provide their positions on the election details in their statements of position and at the hearing, the resolution of these issues would remain within the discretion of the regional director, and the hearing officer would not permit them to be litigated. 79 FR at 7330, 7358.

The Board has decided to adopt these proposals in amended § 102.66(g), which provoked little comment. The Board believes that parties to a representation proceeding will be provided with useful guidance if the hearing officer advises them what their obligations will be if the director directs an election.

In addition, as noted above in relation to § 102.63, the Board believes that the solicitation of the parties' positions regarding the election details will help the Board to expeditiously resolve questions of representation. Because the parties will have fully stated their positions on the election details either in their statements of position or at the hearing, the regional director will be able to take the parties' positions on those matters into account and ordinarily will be able to specify the election details in the direction of election, instead of needing a series of unnecessary phone calls or emails with the parties to discuss election details after the decision. And, because the director ordinarily will specify the election details in the direction of election, the director ordinarily will be able to issue the Notice of Election simultaneously with the direction. This will avoid unnecessary delay, because the election cannot be conducted until the details of the election are set, and the Notice of Election advises the employees of when, where, and how they may vote. And by enabling the director to let the employees vote sooner, the amendment will help the Board to more expeditiously resolve questions of representation.

As discussed above in connection with § 102.63, the Chamber claims that it is not possible for a party to state its position regarding the election details until the regional director determines the unit. We find this objection unpersuasive in this context as well. Thus, parties are free at the hearing to present their positions on election details in the alternative if they believe that the parties' various unit positions would impact their views on the election details. Moreover, given the small size of bargaining units in representation cases in recent years, the Board anticipates that it will be the exceptional case rather than the norm where differences between the petitioned-for unit and any other unit would cause the employer to feel the need to take such alternative positions regarding the election details. Finally, a regional director has discretion to contact the parties to ascertain their positions regarding the election details if the director ultimately chooses to direct an election in a unit that is materially different from that proposed by either party at the hearing.[432]

GAM questions whether the Board intends to abandon its current practice of taking into account the parties' positions on the election details. The answer is ''no.'' The very purpose of soliciting the parties' positions on these details in the Statement of Position and at the hearing is so the regional director can consider them in setting the election. Contrary to the comment, parties remain free under the final rule to explain the background reasons for their positions regarding the details of the election even though the issue is not litigable at the pre-election hearing. The Board points out, however, that even prior to the NPRM, the Board was not bound by the parties' preferences. See, *e.g.,* Casehandling Manual Section 11302. Accordingly, contrary to GAM, the Board does not believe that the amendment will decrease the likelihood that parties will enter into election agreements. To the contrary, just as was the case prior to the amendments, one of the reasons why parties may want to enter into an election agreement and waive a pre-election hearing is to gain certainty over the election details.

E. Oral Argument and Briefs

The NPRM proposed amending §§ 102.67 and 102.66(h) to vest the hearing officer with discretion to control the filing, subjects, and timing of any post-hearing briefs. The final rule amends this proposal to vest the regional director with discretion to grant a request to file a post-hearing brief in amended § 102.66(h).

The NPRM explained that, given the often recurring and uncomplicated legal and factual issues arising in pre-election hearings, briefs are not necessary in every case to permit the parties to fully and fairly present their positions or to facilitate prompt and accurate decisions. Yet under existing §§ 102.67(a) and 101.21(b), in nearly all cases parties are afforded a right to file briefs at any time up to 7 days after the close of the hearing, with permissive extensions granted by hearing officers of up to 14 additional days.[433] By exercising that right or even by simply declining to expressly waive that right until after the running of the 7-day period, parties could potentially delay the issuance of a decision and direction of election and the conduct of an election unnecessarily.

Various comments, including those of SHRM, AHA, AHA II, AHCA II and ALFA, oppose the proposed amendment on the ground that briefs are needed to sum up the evidence presented at the pre-election hearing. SHRM, ACE, and AHA point out that this cannot be done as effectively in oral argument at the close of the hearing because the full transcript is not yet available and parties need time to conduct research and formulate legal arguments. Bruce E. Buchanan argues that briefs serve to narrow the issues in dispute and identify relevant case law. The AFL–CIO points out that the current Casehandling Manual recognizes that briefs are not necessary or even of assistance in every case. Section 11242 provides, ''Before the close of the hearing, the hearing officer should encourage the parties to argue orally on the record rather than to file briefs.'' [434]

Curt Kirschner opposed the proposed amendment on the ground that hearing officers are not authorized to control briefing under Section 9(c)(1). Testimony on behalf of AHA II. And numerous other comments argue that

[432] According to Casehandling Manual Sections 11842.3(a) and (b), the regional director should provide to both the parties and their designated representatives the election notice to be posted by the employer as well as the decision and direction of election. The final rule clarifies in § 102.66(g)(2) that the hearing officer will solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative, which will aid the regional director in complying with that practice. The final rule also clarifies in § 102.66(g)(3) that the hearing officer will inform the parties that the director will transmit the decision and direction of election to both the parties and their designated representatives.

[433] Despite the current regulations, the Board has denied review of a direction of election when one argument made by the party requesting review was that the hearing officer had refused to permit post-hearing briefs. *Unifirst Corp.,* Case 5–RC–15052 (Aug. 16, 2000). The Board reasoned that the party had showed no prejudice and was able to fully present its substantive argument in the request for review. *Id.* at n.1.

[434] A preference for oral argument in lieu of briefing was among the ''best practices'' identified by the Board's General Counsel in a 1997 report. See G.C. Memo. 98–1, ''Report of Best Practices Committee—Representation Cases December 1997'', at 10, 28 (''It is considered a best practice that the hearing officer should solicit oral argument in lieu of briefs in appropriate cases since in some cases briefs are little, if any, assistance to the Regions and may delay issuance of the decision.'').

elimination of briefing by right denies parties due process.[435]

Having considered these comments, the Board has concluded that post-hearing briefing is not required or even helpful in every case. In this regard, it is important to note that amended § 102.66(h) does not prevent parties from filing post-hearing briefs. Rather, as amended, the final rule simply vests the regional director with discretion to permit or not permit such filings and to otherwise control the content and timing of any post-hearing briefs. Vesting the regional director with the authority and discretion to decide whether post-hearing briefs are necessary in a particular case eliminates any concerns that hearing officers are not permitted to control briefing under Section 9(c)(1). In addition, where complex issues arise, parties can argue to the regional director why briefing is necessary in that particular case. In the majority of representation cases, where briefing is not necessary, the final rule will eliminate unnecessary delay. Moreover, there is no denial of due process because in every case, parties aggrieved by a decision of the regional director will have a right to file a brief in support of their request for review. Thus, in every representation case that proceeds to a pre-election hearing, a party aggrieved by a ruling of a hearing officer or decision of the regional director will have had the opportunity to file at least one and sometimes two briefs before the close of the case. Finally, in relation to the need for a transcript before parties can adequately sum up the evidence, the Board notes that the typical pre-election hearing lasts for one day or less.

It also bears mentioning that, even under the current rules, parties do not enjoy a right to file post-hearing briefs in certain kinds of representation cases. For example, the Board's current rules do not permit the filing of briefs absent ''special permission'' after a pre-election hearing conducted under Sections 8(b)(7) and 9 of the Act. See 29 CFR 101.23(c). Similarly, there is no right to file post-hearing briefs after a hearing on challenges or objections. See Casehandling Manual Section 11430; Hearing Officer's Guide at 167 (''In a hearing on objections/challenges, the parties do not have a right to file briefs. To the extent that briefs are not necessary and would interfere with the prompt issuance of a decision, they should not be permitted.'').

Regarding the arguments that the proposal denies due process, the Board points out that the final rule does not deny any party's right to file at least one post-hearing brief with the Board before the close of the representation proceeding. Moreover, the rule permits the filing of a post-hearing brief with the regional director if such a request is granted. Combined with the right to file a pre-hearing brief or to file a hearing brief before the close of the hearing and to present closing oral argument in every case, the opportunities for the filing of post-hearing briefs provided in the final rule do not deprive any party of due process nor are they inconsistent with the statutory requirement of an ''appropriate hearing.'' In *Morgan* v. *United States,* 298 U.S. 468 (1936), the Supreme Court considered the essential element of the ''full hearing'' required by the Packers and Stockyards Act, 7 U.S.C. 310. The Court held that the requirement of a full hearing was not met if the decision-maker was an individual ''who has not considered evidence or argument.'' *Id.* at 481. However, the Court also made clear that the ''requirements are not technical,'' that ''[e]vidence may be taken by an examiner,'' and that [a]rgument may be oral or written.'' *Id.* See also *Abbott Laboratories* v. *NLRB,* 540 F.2d 662, 665 n.1 (4th Cir. 1976) (''With respect to proceedings before the hearing officer, the Board ruled that its hearing officer was not required, either by statute or the due process clause, to accept posthearing briefs since the parties had the opportunity to express their views in writing both before and after the case was referred to the hearing officer * * * We see no error of fact or law in these rulings.''); *Lim* v. *District of Columbia Taxicab Commission,* 564 A.2d 720, 726 (DC App. 1989) (''there exists no due process right * * * to file a brief'').

The APA and its legislative history contain evidence of Congress's intent not to require that the Board permit post-hearing briefing after every pre-election hearing. Enacted in 1946, Section 8 of the APA, 5 U.S.C. 557(c), provides, in pertinent part, that in formal agency adjudication ''parties are entitled to a reasonable opportunity to submit * * * proposed findings and conclusions * * * and supporting reasons for the * * * proposed findings or conclusions.'' But Section 5(6) of the APA, 5 U.S.C. 554(a)(6), specifically exempts from the category of formal adjudication those cases involving ''the certification of worker representatives.'' The courts have held that this exemption applies to both pre- and post-election hearings. See *In re Bel Air Chateau Hospital, Inc.,* 611 F.2d 1248, 1252–1253 (9th Cir. 1979); *NLRB* v. *Champa Linen Service Co.,* 437 F.2d 1259, 1262 (10th Cir. 1971). The Senate Committee Report explained that the exemption was inserted into the APA because the Board's ''determinations rest so largely upon an election or the availability of an election.'' S. Rep. No. 752, at 202 (1945). The committee also pointed to ''the simplicity of the issues, the great number of cases, and the exceptional need for expedition.'' Senate Committee on the Judiciary Comparative Print on Revision of S. 7, 79th Cong., 1st Sess. 7 (1945).

Congress did not revisit this decision in 1947 when Section 9 of the NLRA was amended, and the APA continues to exempt representation cases from its formal adjudication requirements. In fact, between 1964 and 1966, Congress considered removing all the exceptions contained in Section 5 from the APA, but decided not to do so. In 1965, the Board's Solicitor wrote to the Chairman of the Senate Subcommittee on Administrative Practice and Procedure objecting strenuously to removal of the exemption for representation cases. The Solicitor specifically objected that ''election case handling would be newly freighted and greatly retarded by * * * [s]ubmission to the hearing officer of proposed findings of fact and conclusions of law.'' Administrative Procedure Act: Hearings on S. 1663 Before the Subcomm. on Admin. Practice and Procedure of the Comm. on the Judiciary, 88th Cong., 2d Sess. 532 (1964) (letter submitted by William Feldesman, NLRB Solicitor, May 11, 1965). The Solicitor concluded, ''After Congress has done so much to help speed the processing of election cases to avoid the dangers of delay, this would hardly be the time to inaugurate procedural changes which serve dilatory ends and have the potential to cause that bottleneck the Board has for years been attempting to prevent.'' *Id.* at 534. In 1966, the Senate Committee on the Judiciary reported out a bill containing a provision, not ultimately enacted, that would have removed all the exemptions. But the Committee Report carefully explained, ''It should be noted, however, that nonadversary investigative proceedings which Congress may have specified must be conducted with a hearing, are not to be construed as coming within the provisions of section 5(a) because of the deletion of the exemptions. An example of such a proceeding would be certification of employee representatives proceedings conducted by the National Labor Relations Board.'' S. Rep. No. 1234, 89 Cong., 2d Sess. 12–13 (1966). This history demonstrates that Congress's intent in the APA was to

[435] See GAM; INDA II; AEM II; U.S. Poultry II.

ensure that written briefing was not required in representation cases because of the interest in expedition. Congress has steadfastly maintained this view, and has expressly rejected any written briefing requirement in representation cases whenever the matter has arisen. The change is therefore consistent with the requirements of the law and the intent of Congress.

SEIU suggests amending the proposed rule to require that any briefing be completed within 14 days of the close of the hearing. The Board has considered this suggestion and decided that the regional director who will be writing the decision and considered the parties' request to file a post-hearing brief is in the best position to determine if briefing should be permitted, what subjects any briefing should address, and when briefs should be filed. Accordingly, we decline to set a 14-day limit on post-hearing briefing.

Sec. 102.67 Proceedings Before the Regional Director; Further Hearing; Action by the Regional Director; Appeal From Actions of the Regional Director; Statement in Opposition; Requests for Extraordinary Relief; Notice of Election; Voter List

The NPRM proposed a number of amendments to § 102.67, addressing matters such as the regional director's discretion to transfer a case to the Board before issuing a decision, the contents of the pre-election decision, the final election notice, the voter list, and the pre-election request for review procedure and the accompanying 25-day waiting period. 79 FR at 7332–33, 7358–60. As discussed below, after careful consideration, the Board has decided to adopt some of the amendments as originally proposed, to adopt modified versions of other proposals, and to reject the remainder.

A. Elimination of Transfer Procedure

In the NPRM, the Board proposed to eliminate the regional director's authority to transfer a case at any time to the Board for decision. 79 FR at 7333. This authority has rarely been used and, when it has been used, has led to extended delays in the disposition of petitions. See, *e.g., Centurion Auto Transport, Inc.,* 329 NLRB 394 (1999) (transferred December 1994, decided September 1999); *Roadway Package System, Inc.,* 326 NLRB 842 (1998) (transferred May 1995, decided August 1998); *PECO Energy Co.,* 322 NLRB 1074 (1997) (transferred October 1995, decided February 1997); *Johnson Controls, Inc.,* 322 NLRB 669 (1996) (transferred June 1994, decided December 1996). The Board did not receive any significant comments regarding this proposal, and the final rule adopts it. Accordingly, the final rule eliminates, for example, §§ 102.67 (h), (i), and (j) of the current rules which referenced the transfer procedure, and reletters various subparts of § 102.67.[436]

B. The 20-Percent Rule

As discussed above in connection with § 102.66, the Board has decided to reject the proposed 20-percent rule which in relevant part would have *required* the hearing officer to close the hearing if the only issues remaining in dispute concerned the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote. 79 FR at 7330. The Board has likewise decided to reject the portion of the proposed 20-percent rule which would have required the regional director to defer deciding individual eligibility or inclusion questions involving less than 20 percent of the unit. 79 FR at 7332. Instead, for the reasons discussed above in connection with § 102.66, the Board has decided to preserve the discretion regional directors enjoyed even before the NPRM to defer resolving disputes concerning individuals' eligibility to vote or inclusion in the unit until after the election or to decide such disputes before the election in the decision and direction of election. However, the final rule adopts in § 102.67(b) the NPRM proposal that, in the event a regional director defers deciding individual eligibility or inclusion questions until after the election, the Notice of Election shall explain that the individuals in question ''are neither included in, nor excluded from, the bargaining unit, inasmuch as the regional director has permitted them to vote subject to challenge,'' and the procedures through which their eligibility will be resolved. 79 FR at 7332, 7359.[437] The Board concludes that this provision will ensure that employees will not in any manner be misled about the unit. Rather, they will cast their ballots understanding, if applicable, that the eligibility or inclusion of a small number of individuals in the unit has not yet been determined. The amendment thereby provides guidance to employees and the parties and renders Board procedures more transparent.

GAM asserts that the inclusion in the election notice of an explanation that individuals whose eligibility has not been determined will be permitted to vote subject to challenge precludes employees from ''know[ing] the voting unit,'' and that this violates the Act and due process pursuant to the reasoning in the Fourth Circuit's unpublished decision in *NLRB* v. *Beverly Health and Rehabilitation Services,* 120 F.3d 262 (4th Cir. 1997). However, under the amendments, as under the prior rules, the regional director must determine the unit's scope and appropriateness prior to directing the election, and employees will be informed of the unit via the Notice of Election. Accordingly, as noted in connection with § 102.66, at the time they cast their ballots, the voting employees will be fully informed as to the scope of the unit, and will be able to fully assess the extent to which their interests may align with, or diverge from, other unit employees. Although the employees may not know whether particular individuals ultimately will be deemed eligible or included and therefore a part of the bargaining unit, that was also the case under the Board's current rules, as explained above, because regional directors and the Board have long had the discretion to defer deciding individual eligibility or inclusion questions until after the election, and parties could agree to permit disputed employees to vote subject to challenge. Indeed, Section 11084.3 of the Casehandling Manual in effect prior to the NPRM provided that where the parties agree that certain classifications of employees should vote subject to challenge, the notice of election ''should indicate the classifications that will vote subject to challenge.''

Moreover, the court's concern in *Beverly* was that voters were somehow misled when the regional director defined the unit in one way prior to the election and the Board revised the definition after the election. The final rule would actually help prevent exactly that form of change in unit definition from occurring by codifying regional directors' discretion to defer deciding individual eligibility or inclusion questions until after the election and by

[436] Because § 102.67(j) of the current rules also addressed Board action regarding issues raised by a party's request for review (in addition to Board action regarding issues that had been referred to it by a regional director via the transfer procedure), amended § 102.67(h) clarifies (consistent with current § 102.67(j)) that upon granting a request for review, the Board may provide for oral argument or further hearing, and shall make such disposition of the request for review as it deems appropriate.

[437] The final rule provides for this in § 102.67(b), rather than in § 102.67(a) as proposed in the NPRM, and retitles the proposed ''Final Notice to Employees of Election'' as the ''Notice of Election,'' in light of the final rule's retitling the proposed ''Initial Notice to Employees of Election'' as the ''Notice of Petition for Election.'' The final rule also states in § 102.67(a), rather than in § 102.67(b), that the decision by the regional director shall set forth the director's findings, conclusions, and order or direction.

providing in amended § 102.67(b) that if the direction of election provides for individuals to vote subject to challenge because their eligibility has not been determined, the Notice of Election shall so state, thereby advising employees prior to the election that the individuals in question ''are neither included in, nor excluded from, the bargaining unit, inasmuch as the regional director has permitted them to vote subject to challenge,'' and that their unit placement ''will be resolved, if necessary, following the election.'' As already explained, the Board views this alteration to the Notice of Election as meeting the concerns raised by the *Beverly* court and as specifically countenanced by the Second Circuit in *Sears, Roebuck & Co.* v. *NLRB,* 957 F.2d 52, 55 (2d Cir. 1992).

C. Direction of Election With Statement of Reasons to Follow

In the NPRM, the Board proposed to grant the regional director discretion to issue a direction of election without simultaneously providing a statement of reasons so long as the director provided his findings and statement of reasons prior to tallying the ballots. The Board expressed its tentative view that granting such discretion to the regional director would avoid unnecessary delay in the conduct of elections. 79 FR at 7332.

SEIU praised the proposal, claiming it could be instrumental in facilitating a timely election. On the other hand, GAM claims that the proposed amendment would be unfair because, without knowing the basis for the direction of election, parties could not evaluate whether to request review of the regional director's direction of election. Negative comments also claimed, among other things, that the proposal would lead to poor decision-making by the regional directors (Fox, GAM); could give rise to unhelpful suspicion regarding the basis for the direction of election (Testimony of Curt Kirschner on behalf of AHA II); and could cause regional directors to set later election dates in complex cases (Fox).

Upon reflection, the Board has decided to reject the proposal. The NPRM set forth the Board's tentative view that the proposal to permit the regional director to direct an election without simultaneously providing a statement of reasons would not prejudice any party in light of another proposed amendment which would defer parties' right to request Board review of pre-election rulings until *after* the ballots cast in the election were tallied. 79 FR at 7332. In other words, no party would be prejudiced by the proposal because the regional director would be required to furnish his statement of reasons before the ballots were tallied and because the time for filing a request for review of the direction of election would not start to run until after the tally of ballots. However, as discussed below, the Board has decided to reject that other proposal that would have deferred all parties' right to request review of the regional director's pre-election rulings until after the election. Because, under the final rule, a party may file a request for review of a direction of election *prior* to the election, the Board has likewise decided to reject the proposal that would have permitted the regional director to direct the election without simultaneously providing a statement of reasons. Rejection of this proposal will not create a new source of delay in conducting elections because the pre-NPRM rules already require regional directors to set forth their findings and conclusions in the decision and direction of election. 29 CFR 102.67(b) (2010).[438] Moreover, upon reflection, we conclude, in agreement with the testimony of Kirschner II that the time savings that would have been achieved by adopting the proposal would have been relatively modest because they would have represented only the time it would have taken for the regional director to memorialize the decision. Thus, even under the proposal, the director could not have directed an election without first concluding that a question of representation did indeed exist in the unit in which an election was being directed.

D. Specification of Election Details in Direction of Election; Scheduling of Election

In the NPRM, the Board proposed that in the event the regional director directs an election, the direction of election ''shall specify'' the type, date, time, and place of the election, and the eligibility period. 79 FR at 7359. Under prior practice, these details were resolved after the hearing and decision in sometimes lengthy phone consultations and negotiations with the various parties. As one commenter noted, ''It is really frustrating when you go back to a bargaining unit and say, 'We have your decision and direction of election, and now we'll start the negotiation process about when your election is actually going to be held.' * * * [The rule] eliminates one of the choke points later on in getting to an election in a timely manner * * *.'' Testimony of Gabrielle Semel on behalf of CWA II.

Instead of requiring the regional director to specify the election details in *every* direction of election, the Board has decided to provide in § 102.67(b) of the final rule that the direction of election ''ordinarily will'' specify the election details.[439] Because, as discussed above in connection with §§ 102.63 and 102.66, the parties will have stated their positions on the election details in their petitions, in their Statements of Position and at the hearing, the regional director ordinarily will not need to solicit their positions on the election details yet again after issuing the direction of election, and therefore ordinarily will be able to specify the election details in the direction of election. And, because the director ordinarily will specify the election details in the direction of election, the director ordinarily will be able to issue the Notice of Election for the employer to post and distribute simultaneously with the direction, and amended § 102.67(b) so provides. These amendments will enable the regional director to let the employees vote sooner, because the election cannot be conducted until the details of the election are set and the Notice of Election advises the employees of when, where, and how they may vote. In sum, by enabling the regional director to conduct the election without unnecessary delay, the amendments will help the Board to more expeditiously resolve questions concerning representation.

GAM suggests that some employers might refuse to allow elections on their premises if the regional director simply sets the election details in the direction of election instead of first contacting the employer. This comment misunderstands the rule. The Board hearing officer will ''contact'' the employer at the hearing itself, and there is no reason to think that contact at that time would be less efficacious in obtaining employer consent than contact after the decision.[440] The change

[438] As noted above, the final rule moves this requirement from § 102.67(b) to § 102.67(a).

[439] The Board has changed the language because there may be situations where the regional director concludes that it is appropriate to consult with the parties regarding election details after issuing the direction of election, notwithstanding the prior solicitation of the parties' positions regarding those details.

[440] Thus, when hearing officers solicit the parties' positions, they can tell the parties the approximate time frame in which the regional director expects to issue the decision, and parties can reference that time frame in stating their positions. This is analogous to what happens now when Board agents contact parties after the decision issues and solicit their positions concerning the details of an election which cannot be held for at least 25 days pursuant to § 101.21(d).

will obviate the need for a wasteful post-decision consultation process in favor of more efficient consultations during the hearing itself. Given that all parties will be present at the pre-election hearing, it seems eminently reasonable to solicit the parties' positions at that time, rather than have the Board agent attempt to solicit input individually after the direction issues. In any event, as shown, the final rule leaves the director free to consult with the parties yet again after issuing a direction of election if the director concludes that it is appropriate to do so. For example, if the regional director directs an election in a unit significantly different from the union petitioner's proposed unit and the employer's alternative unit, the regional director should consult with the parties concerning the election details. Moreover, contrary to the suggestion in the comment, regional directors were not bound by the parties' preferences regarding the election details prior to the NPRM. See Casehandling Manual Section 11302.[441]

The final rule also adopts in § 102.67(b) the NPRM proposal that in the event the regional director directs an election, the director ''shall schedule the election for the earliest date practicable consistent with these rules.'' 79 FR at 7332, 7359. Many comments object to the NPRM proposals, claiming (incorrectly) that the Board improperly focused on the need to expeditiously resolve questions concerning representation to the exclusion of other factors. In fact, as discussed above in connection with the need for the rule and the opportunity for free speech and debate, the Board did *not* focus exclusively on the statutory goal of expeditiously resolving questions concerning representation. The Board likewise categorically rejects the notion that the proposed language, which the final rule adopts, constitutes a sea change from the Board's practice which existed prior to the NPRM. In fact, it represents no change. Thus, the Casehandling Manual in effect prior to the NPRM already provided that ''[a]n election should be held as early as is practical[,]'' Casehandling Manual Section 11302.1.[442] The language in the final rule is virtually identical to the Casehandling Manual language which predated the NPRM, going back decades. *See, e.g.,* Casehandling Manual Section 11302.1 (1975). The Board takes this opportunity to reassure the public that, as noted above in connection with the opportunity for free speech and debate, the regional director will continue to consider the various policies protected by the Act—as well as operational considerations and the relevant preferences of the parties—in selecting an election date. *Id.*[443] Thus, for example, the regional director should avoid scheduling the election on dates on which past experience indicates that the rate of attendance will be low. *Id.* At the same time, just as was the case prior to the NPRM, the regional director is not bound by the parties' desires concerning the election date. Casehandling Manual Section 11302.[444] The Board intends to leave the precise scheduling of elections to the discretion of the regional directors under the supervision of the General Counsel.

E. Regional Director Transmission of Direction of Election and Notice of Election; Posting and Distribution of Notice of Election

In the NPRM, the Board proposed that both the decision and direction of election and the election notice be electronically transmitted to the parties' designated representatives when the parties have provided the relevant email addresses to the regional office or the documents would be transmitted by facsimile.[445] If a party provides neither an email address nor a facsimile number, the regional director would transmit the direction of election and the election notice via overnight mail. 79 FR at 7332, 7359. The final rule adopts these proposals in § 102.67(b). The final rule also provides in § 102.67(b) that those documents will also be transmitted in the same manner to the parties themselves. This is consistent with Casehandling Manual Section 11842.3, which provides that the regional director furnish both the parties and their representatives with election notices and representation case decisions. And, because, as discussed above, the director ordinarily will specify the election details in his direction of election, the final rule likewise provides that the Notice of Election will ordinarily be transmitted simultaneously with the direction of election. These amendments permit the Board to use modern methods of communication to transmit important representation case documents and to expeditiously resolve questions of representation in a more cost-efficient manner as electronic mail is cheaper and quicker than more traditional means of transmitting documents.

Section 103.20 of the Board's current rules addresses the posting of the election notices. The NPRM proposed to eliminate § 103.20, the only section of part 103 of the regulations governing procedures in representation proceedings, and to integrate its contents into part 102, as modified in proposed § 102.67. 79 FR at 7334. The final rule adopts this proposal which should make it easier for parties to comply with their obligations by describing the obligations in one place.

The NPRM proposed that employers be required to post copies of the election notice ''in conspicuous places,'' but that the notice to be posted upon the filing of the petition (before an election is agreed to by the parties or directed by the regional director) be posted where notices to employees are customarily posted. 79 FR at 7354, 7359. Upon reflection, the Board has concluded that to help ensure wide dissemination of the important information contained in the Notice of Election, it should be posted ''in conspicuous places, including all places where notices to employees in the unit are customarily posted,'' and the final rule so provides in amended § 102.67(k). This amendment parallels the final rule's amendment to § 102.63(a)(2) concerning the ''Notice of Petition for Election.''

The NPRM also proposed to require the employer to electronically distribute the election notice if it customarily communicates with its employees electronically. 79 FR at 7359–7360. The final rule adopts this proposal in § 102.67(k), which parallels the amendments to § 102.63(a)(2) regarding the Notice of Petition for Election. Thus, if the employer customarily

[441] GAM asks what will happen if the employer refuses to comply with the direction of election. The short answer is that, consistent with current practice, if the employer refuses to comply with the direction of election, then the Board will conduct the election by mail or offsite.

[442] And the Casehandling Manual in effect prior to the NPRM also referenced the Board's prior Statements of Procedures in determining when the election should be scheduled. Thus, it cited the 25-day waiting period provided in § 101.21(d) and stated, ''When the Regional Director directs an election, the election normally should not be scheduled prior to the 25th day thereafter, unless the right to file a request for review has been waived, nor later than the 30th day thereafter Sec 101.21(d), Statements of Procedure.'' Casehandling Manual Section 11302.1.

[443] We reject Vigilant's claim that the scheduling language will result in the Board having to conduct more mail ballot elections because ''it will be nearly impossible to * * * have a Board agent conduct the election in person'' under the ''compressed election time frame[s].'' Just as was the case prior to the NPRM, regional directors will continue to take operational considerations (including Board agent availability) into account in setting the election date. Moreover, the final rule sets no rigid timetables for conducting elections.

[444] We have previously addressed the complaints that the amendments deprive employers of an effective opportunity to campaign against union representation or otherwise interfere with employee free choice.

[445] As discussed above, the final rule retitles the proposed ''Final Notice to Employees of Election'' as the ''Notice of Election.''

communicates with employees in the unit by emailing them messages, it will need to email them the Notice of Election. Similarly, if the employer customarily communicates with its employees by posting messages on an intranet site, it will need to do that. The Board concludes that the amendment will facilitate wider dissemination of the important information in the Notice of Election, thereby providing greater guidance to the employees.

The proposal to require the employer to electronically distribute the election notice was received with little controversy in the comments. Some comments, such as those filed by GAM and U.S. Poultry II, express concern that the requirement to distribute the election notice to employees electronically if the employer customarily communicates with its employees electronically could lead to additional grounds for filing objections to the election and subsequent litigation, particularly if some intended recipients do not receive the transmission. Unless an employer can be shown to have departed from its customary practice in electronic distribution, there will be no basis for an objection. The Board views the possibility of litigation delays, where an employer fails to comply with the final rule's electronic distribution requirement, as outweighed by the expected benefit of more effective distribution of the election details to eligible voters.

GAM also speculates that employees are likely to print and distribute the notices to each other, but it is unclear why it would be objectionable if employees merely distributed copies of the actual election notice. GAM expresses concern that employees may modify the sample ballots on the notice which will lead to objections, but just as was the case prior to the NPRM, the Notice of Election will warn employees that the notice must not be defaced by anyone, that any markings on any sample ballot or on the notice were made by someone other than the National Labor Relations Board, and that the National Labor Relations Board ''does not endorse any choice in the election.'' Form 707. In any event, the possibility of employees marking up the sample ballot on the election notice existed under the prior rules because the employer was required to physically post the notices in ''conspicuous places.'' See 29 CFR 103.20(a)(2010).

The NPRM also proposed to reduce the minimum time for posting of the notice of the election from 3 to 2 working days, because of the provisions for the mandatory posting of a more detailed initial notice of election, for manual and electronic posting of the final notice by employers, and, to the extent practicable, for electronic transmission of the final notice of election to affected employees by the regional director. 79 FR at 7332. However, as discussed below, under the final rule, the regional director will not be transmitting the Notice of Election directly to the affected employees. Accordingly, the Board has decided to maintain the current 3 working-day posting requirement, rather than reduce it to 2 days. The final rule preserves in amended § 102.67(k) the relevant language about the time for posting that previously appeared in § 103.20(a) and (b).[446]

Consistent with the pre-NPRM version of § 103.20(c), and (d), the final rule also provides in § 102.76(k) that the employer's failure properly to post (or distribute) the election notices shall be grounds for setting aside the election whenever proper and timely objections are filed. However, just as was the case prior to the NPRM, the final rule also provides that a party is estopped from objecting to the nonposting if it is responsible for the nonposting, and likewise is estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

The NPRM also proposed that the regional director would electronically transmit the notice to the affected employees to the extent practicable. 79 FR at 7359. Thus, if the employer provided employee email addresses to the regional director, the regional director would transmit the notice to those employees. 79 FR at 7332.

The AFL–CIO praises this proposal as a positive contribution to information-sharing. Some comments, such as those filed by ALFA and GAM object on the grounds that it could cause an increase in the number of objections being filed if, for example, the Board fails to serve employees or the Board's attempts at service are blocked by the recipients' spam filter. Moreover, Ms. Kutch (relying on her background in online organizing and bulk email delivery) explained that navigating spam filters to ensure high rates of bulk email deliverability to the individuals at issue would likely be beyond the agency's technological capacity (or our foreseeable budgetary restrictions). Testimony of Jess Kutch on behalf of Coworker.org II. ALFA also implies that direct notification by the regional office is unnecessary since the NPRM would still require the employer to post paper copies of any election notice.

Upon reflection, the Board has decided to reject the proposal that the regional director transmit the election notice to employees to the extent practicable. Under the final rule, an employer must post the Notice of Election in paper form in conspicuous places, including all places where notices to employees in the unit are customarily posted for at least 3 full working days. In addition, as discussed above, if the employer customarily communicates with its employees by emailing them messages, it will need to email the Notice of Election to them as well. Similarly, if the employer customarily communicates with its employees by posting messages on an intranet site, it will need to post the notice on its intranet site as well. So any transmission by the Board in those circumstances would be largely duplicative. Moreover, given Jess Kutch's testimony that email providers can, and often do, block bulk emails (even if the intended recipients would like to receive the emails in question), it seems highly speculative that regional directors could effectively transmit the Notice of Election to unit employees electronically. In any event, the regional director will not have the information necessary to transmit the Notice of Election to employees at work under the final rule, because the final rule does not require the employer to furnish either the work email addresses or work phone numbers to the regional director. As for personal email addresses, if the employer customarily communicates with its employees via their personal email addresses, it will be required to distribute the notices that way as well under the final rule. And because the employer must furnish the nonemployer parties to the case with the available personal email addresses of its employees, the nonemployer parties will be able to transmit the Notice of Election themselves if they care to do so (even if the employer does not customarily communicate with them via personal email addresses). Accordingly, the Board declines to adopt the proposal to require the regional director to electronically transmit the final election notice to employees.

F. Voter List

The final rule makes the same changes with respect to the content, timing, format and service of the list of eligible voters that the employer must file after a direction of election as were

[446] However, because of the potential unfairness of conclusively presuming that the employer received the notice if it does not inform the region to the contrary within 5 work days, the final rule also adopts the NPRM proposal (79 FR at 7332) to eliminate the provision creating such a conclusive presumption in § 103.20(c) of the prior rules.

described above in relation to § 102.62 after entry into any form of consent or stipulated election agreement. In addition, § 102.67(l) provides that the employer shall also include in a separate section of the list the voter list information for those individuals who, according to the direction of election, will be permitted to vote subject to challenge, including, for example, individuals in classifications or other groupings that will be permitted to vote subject to challenge. The Board concludes that this requirement will serve the goal of ensuring that employee votes are recorded accurately and efficiently and help the Board to expeditiously resolve questions of representation. Thus, if the names of such disputed individuals are put in a separate section of the list, it makes it more likely that the Board agent (and the parties' observers) will realize which employees who show up to vote were directed to vote subject to challenge, and therefore makes it more likely that those employees will be instructed to put their ballots in challenged ballot envelopes before placing them in the ballot box. See Casehandling Manual Sections 11338.2(b), 11338.3.[447] This provision will reduce the chances of objections being filed on the grounds that disputed employees' ballots were comingled with other employees' ballots. This provision is also consistent with the amendments providing that in the event a regional director chooses to defer deciding individual eligibility or inclusion questions until after the election, the Notice of Election shall explain that such individuals are being permitted to vote subject to challenge and what that means.

G. Requests for Review of the Regional Director's Decision and Direction of Election

In the NPRM, the Board proposed amendments to the current pre-election request-for-review procedure. Under the current rules, the parties are required to request Board review within 14 days of a regional director's decision and direction of election or be deemed to have waived any arguments that were or could have been made concerning rulings at the pre-election hearing or in the decision and direction of election. § 102.67(b), (f); see, *e.g., A.S. Horner, Inc.,* 246 NLRB 393, 394–95 (1979). But elections were scheduled no sooner than 25 days after the direction of election, and thus, as a practical matter, parties were required to file a request for review of the direction of election prior to the election. This was the only opportunity for Board review of this decision.

The Board proposed to eliminate the pre-election request-for-review procedure in the NPRM and instead permit parties to file any such request after the election, when it could be consolidated with any request for review of the director's disposition of post-election disputes arising out of challenges or objections. The Board explained that the proposed consolidation of Board review would eliminate unnecessary litigation because many issues raised through pre-election requests for review are either rendered moot by the election results or are resolved by agreement of the parties post-election. In addition, the Board explained, permitting parties to consolidate, in a single filing, requests that the Board review pre- and post-election rulings would result in efficiencies for the parties and the Board. 79 FR at 7329, 7333.

Comments praising the proposal to eliminate the current pre-election request for review procedure point out that it would conform Board procedures with the ordinary rules in both Federal and state courts, which generally disfavor interlocutory appeals as wasteful, piecemeal litigation that can cause delay and which therefore generally require parties to conclude all litigation in a case before filing an appeal or seeking review. See, *e.g.,* AFL–CIO II; Supplemental Testimony of Thomas Meikeljohn; Testimony of Brian Petruska on behalf of LIUNA MAROC II. There is a great deal of force to this argument, which is consistent with sound judicial and administrative policy developed over centuries, and is in the best interest of all parties to representation cases.[448]

However, Section 3(b) states that ''*upon the filing of a request therefor* with the Board by any interested person, the Board may review *any action* of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.'' The argument has been presented that this provision grants parties a right to request interlocutory review.[449] Although we do not agree that the statute compels this result,[450] we have concluded that the Board's objectives are better served by amending the rules in a manner that preserves the opportunity to request review of ''any action of a regional director delegated to him under Section 3(b)'' at any time, and, where necessary, to request a stay.

The final rule is intended to codify the text of the statute. Thus, the relevant portion of the final rule begins by stating, in § 102.67(c):

> Upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under Section 3(b) of the Act *except as the Board's rules provide otherwise,* but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

The emphasized language is the only alteration from the text of the statute, and its purpose is primarily to clarify that parties which waive the right to Board review in an election agreement under § 102.62(a) or (c), or under § 102.67(g) are no longer entitled to request review under this provision.[451] The rule then goes on to state that: ''The request for review may be filed at any

[447] As was the case prior to the NPRM, the Board agent must challenge anyone who has been permitted by the regional director to vote subject to challenge. Casehandling Manual Section 11338.2(b).

[448] As Justice Story stated, ''causes should not come up here in fragments, upon successive appeals. It would occasion very great delays, and oppressive expenses.'' *Canter* v. *Am. Ins. Co.,* 28 U.S. 307, 318 (1830). ''Trial court errors become moot if the aggrieved party nonetheless obtains a final judgment in his favor, and appellate courts need not waste time familiarizing themselves anew with a case each time a partial appeal is taken.'' *Mitchell* v. *Forsyth,* 472 U.S. 511, 544 (1985) (Brennan, J., concurring in part). The final judgment rule was adopted by the common law English courts from at least the 1300s, and in America was enshrined in the Judiciary Act of 1789 and retained in every subsequent revision of the judicial code. *See* C.M. Crick, *The Final Judgment Rule as a Basis for Appeal,* 41 Yale L.J. 539, 539–552 (1932); *see also* T.D. Frank, *Requiem for the Final Judgment Rule,* 45 Texas L. Rev. 292, 292–93 (1966) (''[The rule] effectuates, in general, an efficient utilization of judicial manpower and permits the initial stage of the litigation to operate in a smooth, orderly fashion without disrupting appeals.'').

[449] See Dissenting Views of Members Miscimarra & Johnson to NPRM, 79 FR at 7343 & n.108 (the NPRM proposal is ''directly contrary to Section 3(b) of the Act,'' and the proposed request-for-special-permission-to-appeal ''is qualitatively different from what Section 3(b) requires.''); see also, *e.g.,* COLLE II; Chamber II; Testimony of Curt Kirschner on behalf of AHA II.

[450] The statute does not expressly state that parties are entitled to request review of a regional director's pre-election decision before the election. Moreover, Section 3(b) clearly gives the Board discretion to deny review, see *Magnesium Casting Co.* v. *NLRB,* 401 U.S. 137, 142 (1971), and, just as the Board can exercise its discretion to decide hospital units ''in each case'' by a single rule, see *Am. Hosp. Assn.,* 499 U.S. at 606, 610–613, it seems to us that the Board could also deny review of entire categories of cases by rule. The proposed rule would have merely delayed, rather than denied, review, and logically the greater power should include the lesser.

[451] This exception is also necessary in light of the different procedures for Board review applicable to dismissal of petitions under § 102.71, and procedures for elections which implicate Section 8(b)(7) of the Act, and other specialized circumstances addressed elsewhere in the regulations.

time following the action until 14 days after a final disposition of the proceeding by the regional director. No party shall be precluded from filing a request for review of the direction of election within the time provided in this paragraph because it did not file a request for review of the direction of election prior to the election.'' Finally, a number of other changes are made to carry out and clarify the essential amendments here.

1. The Parties Will Have Greater Latitude to Choose When to File a Request for Review

The first notable change is that the due date for filing requests is relaxed. The Board's current practice of requiring parties to seek such review of directions of election before the election—or be deemed to have waived their right to take issue with the decision and direction of election—not only encourages unnecessary litigation, but actually requires parties to conduct unnecessary litigation. Thus, in the Board's experience, many pre-election disputes are either rendered moot by the election results or can be resolved by the parties after the election and without litigation once the strategic considerations related to the impending elections are removed from consideration.[452] For example, if the regional director rejects an employer's contention that a petitioned-for unit is inappropriate and directs an election in the unit sought by the union, rather than in the alternative unit proposed by the employer, the Board's current rules *require* the employer to request review of that decision prior to the election or be precluded from contesting the unit determination at any time thereafter. But if the union ends up losing an election, even though it was conducted in the union's desired unit, the employer's disagreement with the regional director's resolution becomes moot (because the employer will not have to deal with the union at all), eliminating the need for litigation of the issues at any time. The current rules thus impose unnecessary costs on the parties by requiring them to file pre-election requests for review in order to preserve issues.

Accordingly, the Board has decided to amend the current pre-election request for review procedure and to provide that any party may request review of a regional director decision to direct an election either before the election or after the election. Thus, the final rule provides that the request for review of the direction of election may be filed at any time after the direction of election issues until 14 days after a final disposition of the proceedings by the regional director. Under the amendments, a party can choose to file a request for review of the regional director's decision to direct an election before the election or can choose to wait to file the request for review until after the election.[453] We conclude that this amendment, which relieves parties of the burden of requesting pre-election review in order to preserve issues that may be mooted by the election results, will further the goal of reducing unnecessary litigation because, in our view, rational parties ordinarily will wait to file their requests for review until after the election, to see whether the election results have mooted the basis for such an appeal. The amendment should also reduce the burdens on the other parties to the case and the government, by avoiding the need for the other parties to file responsive briefs and for the Board to rule on issues which could well be rendered moot by the election results.

Some comments also raise policy arguments which could apply to the final rule's provision permitting parties to file requests either before or after the election. For example, SHRM, AHA, and ACE generally commented that in cases where review would otherwise have been granted, the proposed rule would result in elections being run unnecessarily, causing both the Board and the parties to incur unnecessary expense. The comments pose the example of a regional director failing to find a bar to the conduct of an election, and thereby erroneously directing an election. But this example aptly illustrates the flaw in the argument. Even under the current rules, if a regional director finds no contract bar and directs an election, and a party files a request for review that the Board ultimately grants, the election is regularly held anyway and the ballots impounded prior to Board resolution of the issue. See, *e.g., VFL Technology Corp.,* 329 NLRB 458, 458 (1999); *Western Pipeline, Inc.,* 328 NLRB 925, 925 n.1 (1999). Thus, the same expenses may be unnecessarily incurred under current procedures. See, *e.g., Mercy General Health Partners Amicare Homecare,* 331 NLRB 783, 785–86 (2000) (Board directed that impounded ballots not be counted and that second election be held after ruling on pre-election request for review post-election). Moreover, given the small number of requests for review filed each year, and the extraordinarily small percentage of regional directors' decisions that are ultimately reversed,[454] the number of cases of the type described in these comments is likely to be very small. In any event, under the final rule, a party may still file a request for review before the election.

AHA comments that the Board's own failings in timely processing requests is not a basis for eliminating the right of parties to review. This point is no longer applicable because parties will retain the right to seek pre-election review. In addition, the Board is entitled to and must consider its own adjudicative and administrative capacities and past performance in evaluating its procedural rules. The elimination of the requirement that parties file pre-election requests for review should, as explained above, reduce the number of disputes reaching the Board. The Board will, therefore, be able to dispose of those disputes that do reach it more promptly.

Other comments suggest that limiting pre-election review will mean that the parties will be unsure who is a supervisor during the pre-election campaign.[455] This objection is addressed at length above in relation to § 102.66. The current pre-election review procedures do not entitle the parties to a final Board determination on such matters prior to the election and rarely result in such a determination. In addition, under current procedures, even in the very rare cases where the Board both grants review and rules on the merits prior to the election, as explained above, the ruling typically is issued only days before the election, *i.e.,* well into the critical period between petition and election, and thus does not serve the purpose the comments suggest

[452] For this reason, the Board disagrees with comments which contend that the proposed rule would not have expedited commencement of bargaining, but would simply shift review until after the election. See, *e.g.,* Testimony of Michael Prendergast on behalf of Holland & Knight; AHA; Seyfarth Shaw.

[453] The final rule does not change the standard for granting requests for view. Just as was the case prior to the NPRM, the Board will grant a request for review ''only where compelling reasons exist therefor.''

[454] Out of the 6686 RC, RM, and RD elections held from FY10 to FY13, there were only 14 cases in which regional director decisions were reversed.

Relatedly, some comments argue that deferring review of issues that were previously raised in a pre-election request for review until after the election will result in the Board addressing more issues subsequent to the opening of the ballots. See, *e.g.,* PIA; COLLE; ACE. This point is true but not significant because less overall litigation will be required, and because, as discussed, requests for review are so rarely found meritorious by the Board.

[455] See, *e.g.,* Testimony of Harold Weinrich on behalf of Jackson Lewis LLP; Chamber II.

will be thwarted if the pre-election request for review is eliminated.

We also reject any suggestion that the final rule will increase the number of technical 8(a)(5) cases by denying parties ''the palliative of Board review'' of the regional director's pre-election determinations. Chamber II. Under the final rule, parties retain the right to request review of the regional director's decision to direct an election. The change is only that rather than being required to file the request for review prior to the election, parties may request such review either before or after the election, if the election results have not rendered the basis for such an appeal moot. As for parties being able to seek Board review of a regional director's *post*-election determinations, that issue has been addressed above in connection with § 102.62.

2. Ballots Will No Longer Be Automatically Impounded While a Request for Review is Pending

Second, the final rule eliminates the automatic impound procedure. The amendments thereby codify the statute's approach to stays, which will not take place ''unless specifically ordered by the Board.'' The current rules contain the following language on stays:

> The Regional Director shall schedule and conduct any election directed by the decision notwithstanding that a request for review has been filed with or granted by the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the Regional Director: *Provided, however,* That if a pending request for review has not been ruled upon or has been granted ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision.

In amending the rules to codify Section 3(b) as written, the amendments eliminate the segregation and impoundment proviso of the former rules, which appear nowhere in the statute. As Section 3(b) contemplates, the regional director will continue to schedule and conduct elections notwithstanding that a request for review has been filed with or granted by the Board; *however,* the voting and counting of ballots will now *also* proceed notwithstanding the request for review, unless the Board specifically orders otherwise. This is consistent with the purpose of Section 3(b) to prevent delays in the Board's processing from impacting regional Section 9 proceedings.

As discussed above, some comments argue that the proposed rule would result in unnecessarily re-running elections. Of course, impoundment, standing alone, could not and did not prevent rerunning elections. Rather, comments argue that prior procedures for segregating ballots might permit the Board to issue a decision on review which would obviate the need for a rerun, and by postponing requests for review until after the election the proposed amendments-eliminate that possibility. However, as discussed below, the final rule contains a procedure for requesting segregation and impoundment, as well as a pre-election request for review, and so the Board will still have the option to segregate and impound where necessary in a particular case. In addition, if, as discussed above, a regional director has chosen to defer deciding an individual eligibility or inclusion question and to permit such individuals to vote subject to challenge, then those employees will indeed cast challenged ballots and their ballots will be segregated and impounded. Finally, the possibility of reruns is minimized further because the Board rarely reverses the regional director.

3. Motions for Expeditious Consideration, Stays, and Impoundment May Be Filed

Finally, in light of the references in the rules to requests for a stay, a new paragraph (j) in § 102.67 is created. This paragraph states that parties may separately move the Board for expedited consideration; a stay; or impoundment and/or segregation of ballots. The paragraph also clarifies, however, that ''[t]he pendency of a motion does not entitle a party to interim relief, and an affirmative ruling by the Board granting relief is required before the action of the regional director will be altered in any fashion.'' *Id.* As discussed above, the current rules stated that stays would not be granted ''unless otherwise ordered by the Board,'' and the final rules continue and expand this prohibition of stays ''unless specifically ordered by the Board'' in conformity with the statutory text. And yet, notwithstanding this implicit reference to orders by the Board on stays, the current rules provided no specific procedural mechanism for filing a motion for such a stay. In cases where such relief was sought, parties generally cited a catchall ''special permission to appeal'' procedure.

The final rule makes explicit the right to request a stay, or related forms of immediate Board relief such as expeditious consideration, or segregation or impoundment of ballots. This is not intended to reflect any change in the current practice or standards for moving for or granting such relief; however, in light of the changes to the Board's existing automatic impoundment process discussed above, we recognize that this provision is likely to be of increased significance to some parties seeking interlocutory review of regional director actions.

Two additional points should be addressed. First, under current practice, these motions are very rarely granted, and we expect that this will remain true, particularly in light of the strong statutory and regulatory policy against unnecessary stays or litigation delays expressed above. The requirement of a ''clear showing that it is necessary under the particular circumstances of the case'' will not be routinely met.

Second, although we expect that motions under this paragraph will generally be acted upon in a timely fashion, we emphasize that, as is the case with motions more generally, ''the pendency of a motion does not entitle a party to interim relief, and an affirmative ruling by the Board granting relief is required before the action of the regional director will be altered in any fashion.'' Thus, filing a motion for a stay is not the same as having a motion granted, and the proceeding will continue unless and until any such motion is granted.

H. The 25 Day Waiting Period

The Board also proposed eliminating the 25-day waiting period because, even under the current rules, it serves little purpose in light of the vote-and-impound procedure, and its stated purpose would be eliminated by the elimination of the pre-election request for review. 79 FR at 7333.

The Board's current Statements of Procedures provide that elections ''normally'' are delayed for a period of at least 25 days after the regional director directs that an election should be conducted, in order to provide the Board with an opportunity to rule on any request for review that may be filed:

> The parties have the right to request review of any final decision of the Regional Director, within the times set forth in the Board's Rules and Regulations, on one or more of the grounds specified therein. Any such request for review must be a self-contained document permitting the Board to rule on the basis of its contents without the necessity of recourse to the record, and must meet the other requirements of the Board's Rules and Regulations as to its contents. The Regional Director's action is not stayed by the filing of such a request or the granting of review, unless otherwise ordered by the Board. Thus, the Regional Director may proceed immediately to make any necessary arrangements for an election, including the

issuance of a notice of election. However, unless a waiver is filed, the Director will normally not schedule an election until a date between the 25th and 30th days after the date of the decision, to permit the Board to rule on any request for review which may be filed.

29 CFR 101.21(d) (2010).

The final rule adopts the proposal to eliminate the 25-day waiting period. 79 FR at 7333. Elimination of the 25-day waiting period eliminates an unnecessary barrier to the fair and expeditious resolution of questions concerning representation. By definition, the waiting period delays the election, which is designed to answer the question of representation. The 25-day waiting period—which effectively stays the election in *every* contested case for 25 days—is in tension with Congress' instruction in Section 3(b) of the Act that even the grant of review of a regional director's action ''shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.'' Although the 25-day waiting period by its terms only applies to contested cases, the waiting period also has the effect of delaying elections in stipulated-election cases. As discussed above in connection with § 102.66, bargaining takes place in the shadow of the law, and some parties use the threat of insisting on a pre-election hearing—and the resulting 25 day waiting period—to extract concessions concerning election details, such as the date of the election and the unit itself. The 25-day waiting period also serves little purpose under the existing rules. The stated purpose of the 25-day period is merely ''to permit the Board to rule on any request for review which may be filed.'' 29 CFR 101.21(d) (2010). However, such requests are filed in a small percentage of cases, are granted in an even smaller percentage,[456] and result in orders staying the conduct of elections in virtually no cases at all. Thus, if the Board has not yet ruled on the request at the time of the election, as is not infrequently the case, the election is held and the ballots impounded until the Board can rule. Even if the Board grants the request, the Board almost never stays the election and the same vote-and-impound procedure is used.[457] Finally, there is even less reason for the waiting period under the final rule, which should reduce the number of requests for review filed before elections by virtue of the amendment permitting parties to file such requests *after* the election.

Very few comments specifically object to the elimination of the 25-day waiting period. Indeed, there is near consensus that this period serves little purpose.[458] In support of the proposed rule, several comments observe that parties typically do not use the waiting period to request review and that a single post-election review process eliminates use of the Board's processes to achieve tactical delays.[459]

Some comments, such as the hearing testimony of Jay P. Krupin on behalf of NGA, maintain that the 25-day period serves an important purpose because the ''rules of the game'' are not set until the decision and direction of election, so the parties are not sure which voters they need to persuade or which employees can speak on behalf of the employer until the decision issues. However, the stated purpose of the 25-day period is not to give parties an opportunity to campaign. Section 101.21(d) states only that the 25-day waiting period is ''to permit the Board to rule on any request for review which may be filed.'' Moreover, the concern raised in this comment is addressed at length above in § 102.66. Finally, the regional director retains discretion to consider any significant changes in the scope of the unit that result from the decision and direction of election in setting the election date.

A few comments observe that the waiting period serves a purpose in the small minority of cases where the Board finds that a request for review has merit. These comments suggest that a waiting period would be appropriate where a pre-election request for review is actually filed. AHCA and ALFA suggest an alternative to the proposed rule, whereby the Board would ask parties whether they intend to file a request for review. If they answer affirmatively, then and only then would the regional director wait at least 25 days to hold the election. However, their proposal would create a perverse incentive for parties to file a request for review solely to delay the election. Moreover, in many cases, the delay would still be wholly unnecessary when the issue raised in the pre-election request for review is rendered moot by the election results. Under current procedures, even where a request for review is granted and eventually found to have merit, there is little reason that the request should be filed pre-election or that the election should be delayed so that the Board can consider it, because the election almost always proceeds using the vote-and-impound procedures before the Board's decision on the merits issues.

Some comments argue that the elimination of the 25-day waiting period, combined with other proposed amendments, interferes with employers' right to free speech under Section 8(c) of the Act and the First Amendment and undermines the free discussion of the question of representation essential to employee free choice. However, the statute does not provide for a 25-day waiting period, and the 25-day waiting period provided by the Board in the current rules was not intended to give parties an opportunity to campaign. Instead, once again, the stated purpose of the 25-day waiting period was merely to give the Board an opportunity to rule on any request for review which might be filed. The more general point is addressed at length above in connection with the opportunity for free speech and debate.

§ 102.68 Record in Pre-Election Proceeding; What Constitutes; Transmission to Board

The proposed amendments to § 102.68, which currently defines the record in a proceeding conducted pursuant to § 102.67, were quite minor as they were designed merely to conform its contents to the proposed amendments to other sections. First, the Board clarified that Statements of Position would be part of the record. While many comments objected to the requirement that parties make a binding statement of position on various issues, there were no significant comments concerning the proposal to make the Statement of Position a part of the record. Second, the proposed amendment deleted references to the transfer procedure, because the Board proposed eliminating the ability of regional directors to transfer a case to the Board before deciding it. The Board

[456] A comparison of the total number of elections to the total number of grants of review (including grants of review after petitions were dismissed) during the period 2004 to 2013 reveals that review was granted in less than 1 percent of all representation cases in which an election was conducted and in approximately 15 percent of those cases in which a request was filed. See NLRB Annual Reports (Fiscal Years 2004–2009) and NLRB Office of the General Counsel, Summaries of Operations (Fiscal Years 2004–2012). Data for 2010–2013, after publication of the Annual Reports was discontinued, was produced from the NLRB's electronic case processing system.

[457] Accordingly, the Board would adopt the proposal to eliminate the 25-day waiting period even if the Board did not make any change to the request-for-review procedure.

[458] See Testimony of Professor Samuel Estreicher; SEIU reply; Testimony of Arnold Perl on behalf of TN Chamber II (''I think the blocking charge policy is one of those areas, like the 25 day rule you were just discussing eliminating in the request for review procedure, that the Board could and should as a matter of policy deal with, because you're targeting specific problem areas rather than an overall reformulation or representation policies that's contained in the notice of proposed rulemaking.'').

[459] See Professor Joel Cutcher-Gershenfeld; Senior Member Miller and Democratic House Members; IBEW; Thomas Meiklejohn.

received no significant comments regarding that proposed change either. The final rule in § 102.68 adopts those portions of the proposal. The final rule also amends § 102.68 to make responses to Statements of Position part of the record. In the NPRM, the Board also proposed adding language to state that § 102.68 would define the record in proceedings conducted pursuant to § 102.69. Although no significant comments were filed concerning this proposed change, the Board has considered the matter and is now of the view that the proposed addition is unnecessary, because § 102.69(d)(1) defines the record in proceedings conducted pursuant to § 102.69.

GAM and U.S. Poultry II complain that there is no express provision that the record also includes written offers of proof. Prior to the amendments, there was no express provision that the pre-election hearing record include written offers of proof. Yet, prior to the amendments, offers of proof, whether written or oral, could be part of the record of the pre-election hearing. Thus, if the offer of proofs were in written form, they could be received as ''exhibits;'' if oral, they could be part of ''the stenographic report of the hearing.'' In response to the comment, however, the final rule explicitly provides in § 102.68 that offers of proof made at the pre-election hearing are part of the record.

Sec. 102.69 Election Procedure; Tally of Ballots; Objections; Certification by the Regional Director; Hearings; Hearing Officer Reports on Objections and Challenges; Exceptions to Hearing Officer Reports; Regional Director Decisions on Objections and Challenges

The proposed amendments to § 102.69 dealt with a variety of matters including the filing and service of objections, the procedure to be used by the regional director when faced with election objections or determinative challenges, post-election hearing scheduling and procedure, and appeals of decisions and directions of elections and decisions on objections and challenged ballots.

A. Simultaneous Service of Objections on Parties; Simultaneous Filing of Offer of Proof With Election Objections

In the NPRM, the Board proposed to amend § 102.69 to require that a party filing objections simultaneously file a written offer of proof supporting the objections as described above in relation to § 102.66(c) and serve the objections, but not the offer of proof, on the other parties. After carefully considering the proposal in light of the commentary, the Board has decided to adopt it with one modification, which would grant regional directors discretion to permit additional time for filing the offer of proof upon a showing of good cause. The Board has concluded that the amendments will provide the parties with the earliest possible notice of the pendency of election objections, reduce unnecessary litigation, and help the Board to more expeditiously resolve election objections, and thereby help it more expeditiously resolve questions of representation.

The Board's prior rules did not require a party filing objections to simultaneously serve a copy of its objections on the other parties, just as the Board's prior rules did not require a party filing a representation petition to simultaneously serve a copy of its petition on the parties named in the petition. Requiring a party that files election objections to simultaneously serve a copy of its objections on the other parties to the representation case provides the other parties with the earliest possible notice of the pendency of the election objections, just as amended § 102.60's new requirement—that every petitioner simultaneously serve a copy of its representation petition when it files it with the Board—gives the other parties the earliest possible notice of the pendency of the petition.

The final rule maintains the current time period (7 days after the tally) for the filing of objections to the conduct of the election or to conduct affecting the results of the election. The final rule also maintains the current requirement that a party's objections contain a short statement of the reasons therefor. However, the final rule eliminates the extra 7-day period parties currently enjoy to file evidence in support of their objections.[460]

Many employer comments complain that 7 days is an insufficient time both to investigate objections and provide an offer of proof.[461] The Board is not persuaded by these comments. Under the Board's prior rules, a party had only 7 days to file election objections, and those objections had to contain a short statement of the reasons therefor. 29 CFR 102.69(a) (2010). The only change concerns the time to produce the offer of proof in support of the objections. The change is based on the view that objections to a secret-ballot election should not be filed by any party lacking factual support for the objections and, therefore, a filing party should be able to describe the facts supporting its objections at the time of filing. The Board notes in this regard that objections may be filed concerning events that occurred before the election and events that occurred during the election. The Board presumes that a party that becomes aware of objectionable conduct before the election will note such misconduct and begin gathering evidence relating to the misconduct immediately. Accordingly, a party often has more than 7 days to prepare the offer of proof regarding such misconduct. As to misconduct that occurs during the election in the polling area, parties are commonly represented by an equal number of observers, and the parties typically speak with their observers immediately after the election before the tally of ballots even begins. For this reason, the Board believes that parties generally should be aware of both the misconduct and possible witnesses to it shortly after the balloting ends. Accordingly, the Board finds unpersuasive the complaints that 7 days ordinarily will be an insufficient amount of time to produce evidence in support of objections.

Moreover, the amendment furthers the goal of expeditiously resolving questions concerning representation. For example, a question of representation cannot be answered until the election results are certified, which cannot occur until objections and determinative challenges are resolved. And a regional director cannot evaluate the objections until it receives the objecting party's supporting evidence. Because requiring the evidence in support of objections at the same time the objections are filed serves the goal of timely certifications, SEIU supports the proposed amendment even though it believes that the amendment poses a greater burden on unions than employers, who have greater access to the workforce. The amendment is also consistent with the policy articulated in Casehandling Manual Section 11360.1, that ''the prompt resolution of challenges and/or objections should be given priority attention [because] certification of the employees' choice in the election is delayed by challenges and/or objections.''

The AFL–CIO suggests, however, that the Board provide that a party may move for additional time to file the offer of proof in support of its objections in ''unusual circumstances,'' such as when a union finds it difficult to locate and

[460] The amendments also codify existing practice permitting parties to file, but not serve, evidence in support of objections. Amended § 102.69(a) also preserves the pre-existing practice of having the regional director furnish a copy of the objections to each of the other parties to the case.

[461] See, *e.g.,* GAM; Chamber Reply; ACE; SHRM; AHCA; Summa Health Systems (Summa); AHA II; US Poultry II.

contact witnesses in a large unit. The Chamber (Reply) opposes the amendments reducing the period of time to file offers of proof, but argues that if an exception is to be provided, it should be for ''good cause'' rather than ''unusual circumstances.''

Upon reflection, the Board has decided to amend § 102.69(a) to provide that a regional director may extend the time for filing the written offer of proof in support of the election objections upon request of a party showing good cause, as the Chamber suggests. As noted, the Board believes that ordinarily parties should be able to file their offers of proof in support of their election objections simultaneously with the objections. Indeed, the Board concludes that the amendments to §§ 102.62(d) and 102.67(l)—requiring the employer to include the available personal phone numbers and personal email addresses, of the employees on the voter list—makes this likely. However, as noted above in connection with § 102.62, some comments claim that some employers may not maintain records of their employees' personal phone numbers and email addresses, which would require that unions use slower forms of communication to contact potential witnesses to prepare the offers of proof, which in turn could make it more difficult to submit the offer of proof simultaneously with the election objections in some cases. In addition, depending upon the severity of the alleged objectionable misconduct, it may be difficult for a union or employer to persuade employees with knowledge of the relevant facts to come forward. The Board also notes that although the current rules afford parties an additional 7 days to produce the supporting evidence after they file their objections, regional directors have discretion to grant still more time. See 29 CFR 102.69(a) (2010) (''Within 7 days after the filing of objections, or such additional time as the Regional Director may allow, the party filing objections shall furnish * * * the evidence * * * to support the objections.''); Casehandling Manual Section 11392.6. Accordingly, the Board has concluded that a regional director should have discretion to grant additional time for filing the offer of proof when good cause is shown, and amended § 102.69(a) so provides.

In sum, requiring the objecting party to simultaneously serve a copy of its objections on the other parties and to simultaneously file an offer of proof with its election objections will provide the other parties with the earliest possible notice of the objections and help the Board to expeditiously resolve questions of representation because the election results cannot be certified until objections and determinative challenges are resolved. The amendment will also reduce unnecessary litigation and conserve resources for the Agency and the nonobjecting party by reducing the likelihood that a party will file objections that it cannot support. At the same time, when a party has allegedly engaged in conduct which has destroyed a fair election, the alleged abuse of workers' rights should not be disregarded merely because a party justifiably needs additional time to furnish its offer of proof. Accordingly, the final rule provides a good-cause exception to the simultaneous offer-of-proof requirement.

B. Uniform Procedure for Handling Objections and Potentially Determinative Challenges and Requests for Review of Regional Director Post-Election Determinations in Stipulated and Directed Elections

The final rule adopts the NPRM proposals to (1) codify the regional director's discretion to dispose of both determinative challenges and objections through an investigation without a hearing when they raise no substantial and material factual issues, (2) establish a uniform procedure when a hearing is conducted, and (3) make Board review of regional directors' post-election dispositions discretionary in stipulated and directed elections. 79 FR at 7333–34, 7361.

The final rule codifies existing practice permitting the regional director to investigate determinative challenges and objections by examining evidence offered in support thereof to determine if a hearing is warranted.[462] The final rule also creates a uniform procedure in those cases in which there are potentially outcome-determinative challenges or objections which the regional director determines raise substantial and material factual issues that require a hearing. Adopting the procedure currently contained in § 102.69(d) and (e), the final rule provides that, in such cases, the regional director shall provide for a hearing before a hearing officer who shall, after such hearing, issue a report containing recommendations as to the disposition of the issues.[463] Within 14 days after issuance of such a report, any party may file exceptions with the regional director and the regional director will dispose of the exceptions. If no exceptions are filed to such report, the regional director decides the matter upon the expiration of the period for filing such exceptions. Consistent with the changes described above in relation to § 102.62(b), the final rule makes Board review of regional directors' resolutions of post-election disputes discretionary in cases involving directed elections as well as those involving stipulated elections, unless challenges and objections are consolidated with unfair labor practice charges for hearing before an administrative law judge.[464] The Board anticipates that this change will leave a higher percentage of final decisions concerning disputes arising out of representation proceedings with the Board's regional directors.

Some comments question whether the Board will resolve nondeterminative challenges post-election. The final rule maintains the status quo in this regard:

[462] At least one comment argues that the amendments improperly permit regional directors to administratively dismiss objections without a hearing, thereby denying parties the right to a hearing and the ability to create a record for subsequent review. However, regional directors may administratively dismiss objections and challenges without a hearing under the current rules where they do not raise substantial and material issues that would warrant setting aside the election. 29 CFR 102.69(d) (2011). This well-settled practice avoids wasteful litigation, is no different from a trial court granting a motion to dismiss, and has been approved by the courts of appeals. See *NLRB* v. *Bata Shoe Co.,* 377 F.2d 821, 826 (4th Cir. 1967); *NLRB* v. *Air Control Products of St. Petersburg, Inc.,* 335 F.2d 245, 249 (5th Cir. 1964); *Puerto Rico Aqueduct & Sewer Auth.* v. *EPA,* 35 F. 3d 600, 605–06 (1st Cir. 1994) (''To force an agency fully to adjudicate a dispute that is patently frivolous, or that can be resolved in only one way, or that can have no bearing on the disposition of the case, would be mindless * * *.''); Fenn C. Horton III, *The Requirements of Due Process in the Resolution of Objections to NLRB Representation Elections,* 10 J. Corp. L. 493, 495–509 (1985). The amendments specify in § 102.69(d) what constitutes the record in such no-hearing cases, just as they specify what constitutes the record in cases that proceed to a hearing.

[463] Matters such as the scheduling of the post-election hearing and procedure at the post-election hearing are addressed below.

[464] The final rule clarifies that when objections and challenges have been consolidated with an unfair labor practice proceeding for purposes of hearing and the election was conducted pursuant to a stipulated election agreement or a direction of election, (1) the provisions of § 102.46 shall govern with respect to the filing of exceptions or an answering brief to the exceptions to the administrative law judge's decision; and (2) a request for review of the regional director's decision and direction of election shall be due at the same time as the exceptions to the administrative law judge's decision are due. The final rule also clarifies that if the election was conducted pursuant to a consent or full consent agreement, and the objections and challenges have been consolidated with an unfair labor practice proceeding for purposes of hearing, the administrative law judge shall, after issuing a decision, sever the representation case and transfer it to the regional director for further processing, as is done currently.

The final rule uses the single term, ''decision,'' to describe the regional director's disposition of challenges and/or objections in place of the two terms, ''report'' and ''decision,'' used in the current rules.

The Board will not address nondeterminative challenge ballots at a post-election hearing, though parties may bring the matter to the Board by filing a timely unit clarification petition if they are unable to resolve the resulting question of whether particular employees are in the bargaining unit (''unit placement'' questions) by agreement. See, *e.g., Orson E. Coe Pontiac-GMC Truck, Inc.,* 328 NLRB 688, 688 n.1 (1999):

> Under standard Board practice, when a classification of employees votes under challenge and their challenged ballots would not be determinative of the election results, the ensuing certification contains a footnote to the effect that they are neither included nor excluded. Casehandling Manual Section 11474. Even though there was no occasion to resolve the issue in a ballot challenge hearing, the issue need not stay unresolved. If the parties do not subsequently agree on whether to add the car prep/finisher technician to the unit, the matter can be resolved in a timely invoked unit clarification proceeding. *See Kirkhill Rubber Co.,* 306 NLRB 559 (1992); *NLRB* v. *Dickerson-Chapman, Inc.,* 964 F.2d 493, 496–497, 500 fn. 7 (5th Cir. 1992).

AHA argues that permitting parties to resolve such issues in bargaining is ''disrespectful'' of employee Section 7 rights because it makes eligibility a ''bargaining chip.'' This contention has been addressed above in relation to § 102.66.

Many comments criticize the proposal to make Board review of regional directors' post-election determinations discretionary in cases involving directed elections. These comments are fully addressed above in relation to § 102.62, which also addresses discretionary Board review of the regional director's post-election determinations in stipulated election cases.

Bluegrass Institute suggests, however, that the 20-percent rule renders discretionary Board review of the regional directors' post-election determinations inappropriate. It argues that the Board's current rules guarantee parties Board review of eligibility questions deferred in the pre-election decision, and therefore the provision making Board review of the director's post-election determinations discretionary constitutes a material change. However, the final rule does not adopt the proposed 20-percent proposal. To the extent the commenter would raise the same objections to the final rule, the Board would find them unpersuasive. Under the final rule, if eligibility disputes are deferred using the vote-and-challenge procedures, the hearing officer's recommendations on determinative challenges will in all cases be subject to exceptions to the director, and a party may thereafter file a request for review with the Board. This parallels how such matters are handled under the current rules when a hearing officer's recommendations go to the director. Thus, Section 11366.2 of the Board's Casehandling Manual provides with respect to challenges to voters in the context of a directed election, ''If the Regional Director directs that the hearing officer's recommendations be made to the Regional Director, then exceptions to the hearing officer's report will be filed with him/her * * *. The Regional Director must thereafter rule in a supplemental decision upon the hearing officer's report and such exceptions as may be filed. The Regional Director's supplemental decision is subject to a request for review to the Board.''[465] Moreover, under the current rules, if a regional director resolves eligibility questions on the merits in his or her decision and direction of election, the parties are able to challenge the decision only by filing a request for review with the Board. The comment does not explain why a party should have a greater right to Board review if the regional director decides eligibility questions after the election than if the regional director decides them prior to the election, and the final rule corrects this anomaly.

Citing Member Hayes' dissent to the original NPRM, PIA and others argue that the deferral of litigation from the pre-election phase to the post-election phase is likely to lengthen the period between the election and final certification, which will lengthen the period during which the employer is uncertain whether it can unilaterally change its employees' working conditions. See *Mike O'Connor Chevrolet,* 209 NLRB 701, 703 (1974). As shown, however, the Board believes that the final rule will not simply shift litigation from before the election to after the election. Rather, the Board believes that the amendments will significantly reduce the total amount of litigation, because the current rules require parties to litigate issues that are often rendered moot by the election results. Moreover, the Board anticipates that permitting it to deny review of regional directors' resolution of post-election disputes, *i.e.,* when a party's request raises no compelling grounds for granting such review, will eliminate the most significant source of administrative delay in the finality of election results. The Board anticipates that the final rule will thus reduce the period of time between the tally of votes and certification of the results and thus the period during which employers are uncertain about their duty to bargain.

A number of other amendments to this section conform its provisions to the remainder of the amendments. For example, the NPRM proposed to address the procedure for requesting review of the direction of election in § 102.69(b) in line with the proposed amendment deferring all parties' rights to request review of the decision and direction of election until after the election. 79 FR at 7333, 7360. However, as discussed above in connection with § 102.67, the Board has decided to reject that proposal and instead to permit parties to request review of the direction of election prior to the election if they choose to do so. Accordingly, the procedure for filing such requests appears in § 102.67 of the final rule, rather than in § 102.69(b) as proposed in the NPRM. And because parties will not be filing requests for review of the regional director decisions and directions of elections pursuant to proposed § 102.69(b), there is no need for this final rule to provide (as the December 22, 2011 final rule provided (76 FR at 80174, 80188)) in § 102.69(e)(1)(ii)) that the decision and direction of election and the record previously made as defined in § 102.68 will also be part of the record in a proceeding pursuant to § 102.69 in which no hearing is held. In other words, just as was the case prior to the NPRM, under the final rule, the record in a proceeding pursuant to § 102.69 in which no hearing is held will not include the decision and direction of election and the record previously made as defined in § 102.68.

Similarly, prior to the NPRM, § 102.69(b) provided, ''If no objections are filed within the time set forth above, if the challenged ballots are insufficient in number to affect the results of the election, and if no runoff election is to be held pursuant to § 102.70, the regional director shall forthwith issue to the parties a certification of the results of the election, including certification of representative where appropriate, with the same force and effect as if issued by the Board, and the proceeding will thereupon be closed.'' The final rule rejects the NPRM proposal to restyle this paragraph ''§ 102.69(c) and to include a reference to no request for review being filed (proposals which the December 22, 2011 final rule adopted).

[465] It is only when regional directors direct that hearing officer reports go to the Board that parties currently have the right to Board review. See Casehandling Manual Section 11366.2.

79 FR at 7360–7361; 76 FR at 80187.[466] In cases where the election is conducted pursuant to one of the three types of election agreements, there is, by definition, no decision and direction of election about which a party can possibly seek review.[467] And where there are no objections, determinative challenges, or runoffs, the regional director should issue to the parties a certification of the results of the election, including certification of representative where appropriate, notwithstanding the possibility that a party may still file a request for review of any decision and direction of election previously issued. This is not unlike what happened under the prior rules in directed election cases. Casehandling Manual Section 11472.3 (In directed election cases, the regional director's supplemental decision based on an administrative investigation, a hearing or both, ''should include the certification; issuance of the certification should not be delayed until after the expiration of the time for filing a request for review [of that decision].'') Similarly, certifications are issued under the current rules, notwithstanding parties may challenge the validity of the representation case decisions in a technical 8(a)(5) proceeding in the courts of appeals. However, the final rule makes one small change to the text of pre-existing § 102.69(b) by deleting the reference to the closure of proceedings. Because under the final rule a party may choose to wait to file its request for review of the decision and direction of election until after the election, a proceeding cannot necessarily be considered closed in the absence of the election objections, determinative challenges or a runoff election.

C. Post-Election Hearing Scheduling

The NPRM proposed that any post-election hearing on objections and challenged ballots would open within 14 days of the tally of ballots or as soon thereafter as practicable. 79 FR at 7333.

The Board received a number of comments about the proposed scheduling of the post-election hearing. The AFL–CIO supports the hearing-scheduling amendment, noting that Casehandling Manual Sections 11365.3 and 11395.4 already provide that ''[s]ince postelection matters are to be resolved with the utmost dispatch, * * * the hearing should be scheduled at the earliest practical date.'' SEIU likewise supports the amendment outside the context of decertification elections because timely post-election hearings are necessary for timely certifications, which in turn are necessary for labor relations stability. Professor Cutcher-Gershenfeld also supports the amendment, noting that the proposal ''minimizes the risk of process delays being used by either side for tactical advantage,'' and that establishment of consistent timing across regions comports with good administrative practice.

However, many employer comments complain about the time frame for post-election hearings, claiming the proposed schedule provides insufficient preparation time for both the party that filed the election objections and the nonobjecting party.[468] For example, some comments, such as those filed by ACC and AHCA II, complain that 14 days is not sufficient time for the aggrieved party to prepare for a hearing on its objections because it must also prepare its request for review of the decision and direction of election during this same time period. According to these comments, the proposed post-election procedure simply requires ''too much, too soon.'' Other comments, such as those filed by SHRM, complain that 14 days is insufficient time to prepare for the post-election hearing because, in addition to having to prepare to present evidence regarding the objections, parties may also be required to present evidence regarding the eligibility of employees who were permitted to cast challenged ballots pursuant to the proposed 20 percent rule. Buchanan complains that the proposed post-election hearing schedule raises due process issues because the nonobjecting party will have such a short time to prepare for the objections hearing. Buchanan also claims, along with the AHA, that the amendment will be counterproductive because it will leave regional directors with insufficient time to weed out frivolous objections. Thus, Buchanan posits that instead of eliminating wasteful litigation, the amendments will have precisely the opposite effect.

After careful consideration of the comments, the Board has decided to modify its proposal regarding the scheduling of the post-election hearing to provide (in amended § 102.69(c)(1)(ii)) that, unless the parties agree to an earlier date, the post-election hearing on objections and determinative challenges should open 21 days—rather than 14 days—from the tally of ballots or as soon as practicable thereafter, thereby affording all parties an additional 7 days between the due date for the filing of election objections and the opening of the post-election hearing. We believe that providing an additional week's time is appropriate. If a party took the full 7 days to which it is entitled to file its objections under § 102.69(a), the nonobjecting party would receive at most 7 days notice of the hearing if the hearing opened 14 days from the tally of ballots as proposed in the NPRM. Moreover, if a party filed its election objections at the close of business on the 7th day following the tally, the regional director might not be able to issue a notice of hearing until the 8th day following the tally. If the hearing in such a case opened on the 14th day following the tally as provided in the proposal, that would mean that the nonobjecting party received less than 7 days notice of the hearing. Accordingly, we believe that providing an additional week's time is responsive to the concerns raised in some of the comments about parties needing more than 14 days from the tally of ballots (and 7 days from the filing of objections) to prepare for the post-election hearing.[469]

Providing that the post-election hearing open 21 days from the tally (and 14 days from the filing of the objections) is also responsive to the criticism that the proposal might not provide enough time for the regional directors to weed out frivolous objections. By providing

[466] The NPRM had proposed to restyle paragraph (b) as (c) because, as discussed above, the NPRM had also proposed adding a new § 102.69(b) to address requests for reviews of regional director decisions and directions of elections. Because the final rule does not add that new paragraph (b) to § 102.69, the Board has decided to leave the text in question in § 102.69(b) of this final rule.

[467] Thus, when the election is conducted pursuant to a consent election agreement or a stipulated election agreement, the regional director does not issue any pre-election decision at all. See §§ 102.62(a) and (b). Although the regional director does issue a pre-election decision when the parties enter into a full consent election agreement, the parties waive their right to request review of that decision in their agreement. See § 102.62(c).

[468] See, *e.g.,* GAM; ACE; SHRM; AHA; Summa; Buchanan; ACC; AHCA II.

[469] Admittedly, our decision to require that post-election hearings be scheduled to open 21 days from the tally (and 14 days from the filing of objections) depends, in part, on the implementation of the new requirement that parties filing objections simultaneously file their offers of proof supporting those objections with the regional director. Ordinarily, the regional director cannot evaluate whether a hearing is necessary until the director receives the objecting party's offer of proof, which the pre-NPRM version of § 102.69(a) gave parties an extra 7 days to provide. Accordingly, without the amendment requiring the simultaneous filing of offers of proof with the objections, the offer of proof would not be due until 14 days from the tally, in which case a regional director could have no choice but to give parties less than 7 days notice of the post-election hearing in order to meet the 21-day post-election hearing scheduling goal. And that would give rise to the same concerns which our revised post-election timetable seeks to allay.

that the post-election hearing should open 21 days from the tally of ballots or as soon as practicable thereafter, we provide the regional directors with additional time to evaluate the objections and accompanying offers of proof—particularly in cases where they are not filed until the close of the 7th day following the tally, where the objections are voluminous, or where the regional director grants parties more time to file their supporting offers of proof—but still well within a time frame when the directors can issue notices of hearing in compliance with Board practice. And, just as was true under the Board's prior rules, directors may cancel previously scheduled hearings if subsequent developments render the hearing unnecessary.

In sum, we conclude that the revised 21-day post-election hearing schedule takes into account the critical comments in a manner that serves the goals of eliminating unnecessary litigation and expeditiously resolving questions of representation. In addition, the amendments should help make the scheduling of post-election hearings more uniform across regions and provide transparency to the parties.

To the extent that the authors of those critical comments would object that setting the post-election hearing to open 21 days from the tally of ballots (and 14 days from the filing of the objections) is still unfair to the nonobjecting party, the Board would find them to be unpersuasive. In cases where the objections allege that the election should be set aside because of employer misconduct, the union has to prove that the employer was responsible for the misconduct. Under the revised schedule, even if the notice of hearing issues 1 or more days after the objections are filed, the nonobjecting party should still have close to 2 weeks to investigate the objections and prepare its response unless, of course, the parties agree to an earlier hearing date. Thus, under the amendments, as under the prior rules and case law that the amendments leave undisturbed, the party seeking to overturn the election must file its objections within 7 days of the tally, and the objections must contain a specific, nonconclusory statement of the reasons therefor so as to provide notice of the alleged objectionable conduct. The nonobjecting party will promptly learn of the filing of objections, because the objecting party will now be required to simultaneously serve a copy of its objections on all parties when it files its objections with the regional director (and the regional director will continue the practice of furnishing a copy as well). § 102.69(a); Casehandling Manual Sections 11392.5 and 11392.9.

Accordingly, the nonobjecting party need not wait until the notice of the post-election hearing actually issues to begin investigating the objections and preparing its response, but instead can do so as soon as it is served with a copy of the objections, which will be at least 14 days before the opening of the post-election hearing, unless the parties agree to an earlier date. In most cases, given the relatively small median bargaining unit size in recent years, there is likely to be only a relatively limited number of potential witnesses with knowledge of the relevant facts. The employer should have ready access to its supervisors, managers, and agents. And even prior to the amendments, nonobjecting parties were sometimes requested to produce their evidence opposing the objections just 7 days after the objections were filed and, along with the objecting parties, were sometimes advised that the post-election hearing could open 14 days from the filing of objections (*i.e.* 21 days from the tally of ballots).[470] It also bears mentioning that because the hearing on objections only occurs *after* the election, parties desiring a labor attorney or consultant to represent them in connection with the post-election objections hearing in all likelihood will have retained the attorney or consultant before the objections will have even been filed, in contrast to the pre-election scenario painted by some comments of unrepresented employers being taken by surprise by the filing of a representation petition and having to scramble to retain an attorney or consultant.[471]

To the extent that ACC and AHCA would claim that a 21-day post-election hearing schedule is still unfair to the objecting party because the objecting party has to prepare its request for review of the direction of election at the same time it must prepare for the objections hearing, the Board would find such claims unpersuasive. In the Board's view, such claims would reflect a misunderstanding of the amendments. Amended § 102.67(c) makes clear that the request for review of the direction of election is not due until *after* the regional director disposes of election objections and determinative challenges. Accordingly, parties preparing for a post-election hearing on objections and or challenged ballots will not need to simultaneously prepare their requests for review of the decision and direction of election. Moreover, even if no objections are filed, a party seeking to file a request for review of the decision and direction of election will have more time to do so under the final rule than it has under the current rules.

The Board also finds unpersuasive the claim that the revised 21-day post-election hearing schedule is unfair because, in addition to having to prepare to present evidence regarding the objections, parties may also be required to present evidence regarding the eligibility of employees who were permitted to cast challenged ballots pursuant to the 20 percent rule. First of all, the Board has not adopted the 20 percent rule. Thus, the final rule grants the regional director discretion to instruct hearing officers to permit litigation of individual eligibility issues if the director resolves to consider them prior to the election. Accordingly, parties are free under the final rule to request that they be permitted to litigate individual eligibility issues at the pre-election hearing. By definition, if a party requests at the pre-election hearing that it be permitted to litigate an individual's eligibility or inclusion, that means that the party has prepared to litigate it at the pre-election hearing. The comments do not explain just why a party that has prepared to litigate an issue at the *pre*-election hearing should need substantial additional time to prepare to litigate the identical issue at a *post*-election hearing. And if in the direction of election, the regional director directs that particular individuals be permitted to vote subject to challenge, the parties are on notice that the status of such individuals is unresolved, and so they may begin to investigate the facts surrounding the individuals' eligibility at that time even before the election occurs.

Even in cases where election-day challenges take one of the parties by surprise, all parties can begin preparing their cases with respect to the determinative challenges immediately after the tally of ballots, because the

[470] For example, the December 1997 Report of the Best Practices Committee indicates that some regions requested that all parties (both objecting parties and nonobjecting parties) submit their evidence within 7 days of the filing of objections. G.C. Memo. 98–1,''Report of Best Practices Committee—Representation Cases December 1997'' at 22. And a sample letter attached to the Best Practices Committee Report provided for the objections hearing to open 5-to-7 days after the due date for filing evidence in support of objections, which, under the rules then in effect, was 7 days from the filing of the objections. See Attachment J 1–3 (objections filed August 16; evidence in support of (and in opposition to) objections due not later than August 23; objections hearing tentatively scheduled for the period August 28, 29, or 30'').

[471] In our experience, those parties who use attorneys or consultants to represent them in connection with *post*-election hearings frequently use the same attorneys or consultants that they retained to represent them in connection with the *pre*-election hearings or the negotiation of the election agreements.

parties know who cast challenged ballots no later than the tally of ballots.[472] Indeed, informing all parties at the election that they must present their evidence regarding determinative challenges by the date objections are due was labeled a best practice in 1997. See G.C. Memo. 98–1, ''Report of Best Practices Committee—Representation Cases December 1997,'' at 23. And, as was noted in connection with the scheduling of the *pre*-election hearing, the facts surrounding individual eligibility or inclusion questions are peculiarly within the employer's knowledge and control, because the employer established its employees' terms and conditions of employment. Accordingly, we would firmly reject any suggestion that 21 days is generally an insufficient amount of time to prepare for a hearing on objections, simply because the employer might also have to prepare to present evidence regarding challenges. We also note that the amendments grant the regional director discretion to open the hearing at a later date in an appropriate case.[473]

Finally, it bears emphasis that even prior to the NPRM, the post-election hearing could involve both objections and challenge issues. Thus, the regional director has long had discretion to defer deciding eligibility issues until after an election, and parties could always challenge voters for cause at the election.

Retired Field Examiner Michael Pearson suggests (Pearson Supplemental Statement) that the Board should require that post-election hearings on objections and challenged ballots, like pre-election hearings, continue on consecutive days until completed in order to avoid situations where multi-day hearings turn into multi-week affairs. The NPRM proposed to do just that, albeit not explicitly. Thus, proposed § 102.69(d)(1)(iii) provided that the post-election hearing be conducted in accordance with § 102.64 insofar as applicable, and proposed § 102.64(c) provided that the hearing should continue from day to day until completed absent extraordinary circumstances. However, to avoid any possible confusion, the final rule provides in amended § 102.69(c)(1)(iii) that the hearing on objections or on challenged ballots or on both shall continue from day to day until completed unless the regional director concludes that extraordinary circumstances warrant otherwise.[474] This amendment is consistent with the policy set forth in Casehandling Manual Sections 11365.3 and 11395.4, which provide that hearings on determinative challenges and objections ''should be held on consecutive days until completed.'' Conducting post-election hearings on consecutive days until completed serves the goal of expeditiously resolving questions concerning representation because in cases involving post-election hearings, the question concerning representation cannot be resolved until the hearing is completed. The amendment also renders Board procedures more transparent and uniform across regions.

D. Procedure at the Post-Election Hearing on Objections and Challenged Ballots

The NPRM proposed that the post-election hearing would open with the parties stating their positions on any challenges and objections, followed by mandatory offers of proof as described in proposed § 102.66. 79 FR at 7333–34. SHRM complains that such an offer-of proof procedure would deprive parties of their right to a meaningful post-election hearing.

However, as discussed above in relation to § 102.66, the Board has decided not to adopt the proposed mandatory offer-of-proof procedure at the pre-election hearing. The Board has likewise decided not to adopt the proposed mandatory offer-of-proof procedure at the post-election hearing. Instead, we have decided to codify hearing officers' discretion to require parties to make offers of proof and to permit hearing officers to rule on such offers.

To the extent that SHRM would argue that such a discretionary offer-of proof procedure deprives parties of their right to a meaningful post-election hearing, we would find it unpersuasive. While parties have a right to a *pre*-election hearing under the NLRA, they have no right to a *post*-election hearing under the NLRA. See *NLRB* v. *Hood Furniture Mfg. Co.,* 941 F.2d 325, 332 (5th Cir. 1991); *NLRB.* v. *Metro-Truck Body, Inc.,* 613 F.2d 746, 751 (9th Cir. 1979), *cert. denied,* 447 U.S. 905 (1980). As discussed above even prior to the NPRM, regional directors could evaluate a party's objections and challenges and overrule them (without a hearing) if they did not raise substantial material issues. See also 29 CFR 102.69(d) (2009); Casehandling Manual Sections 11394.3, 11395.1. Moreover, hearing officers had discretion prior to the NPRM to require parties to make offers of proof before admitting evidence and to rule on the offers. See Casehandling Manual Section 11424.3(b); Hearing Officer's Guide at 38, 158 (''Offers of proof can be an effective tool for controlling and streamlining a hearing.''). As shown, an offer of proof is simply a tool to enable the hearing officer to determine whether it is appropriate to receive the evidence a party wishes to introduce. Thus, a party has no cause to complain if the hearing officer rejects proffered evidence that is not relevant to or probative of the matters to be determined at the post-election hearing.

Consistent with its complaints about the proposed offer-of-proof procedure to be used at the *pre*-election hearing, SHRM also complains that it is inappropriate for hearing officers, who may not even be attorneys, to administer a mandatory offer-of-proof procedure at the *post*-election hearing as well. Assuming that SHRM would argue that it is likewise inappropriate for hearing officers to administer the discretionary offer of proof procedure, we would find it unpersuasive. Indeed, the persuasive force of this contention is even weaker in this context than it was in the context of the pre-election hearing, because the statutory language regarding pre-election hearings is not controlling with respect to post-election hearings. While Section 9(c)(1) of the NLRA gives parties a right to a pre-election hearing and provides that the hearing officer who

[472] Thus, parties typically are represented by an equal number of observers at the polls; the parties' observers are the ones who either challenge the voters or who observe one of the other parties or the Board agent challenge the voters; and the parties, who usually attend the count, discuss any challenges that were made before the ballots are counted in an attempt to resolve them. See Casehandling Manual Sections 11338.2, 11338.3, 11340.2, 11340.3, 11340.9(a).

[473] Thus, the amendments to § 102.69(c)(1)(ii) do not require that the hearing open 21 days from the tally (and 14 days from the filing of objections) in all cases. Instead, the amendments merely require the director to set the hearing for 21 days from the tally ''or as soon as practicable thereafter.''

[474] As discussed above in connection with § 102.64, we found unpersuasive the Chamber's objection to the proposal that *pre*-election hearings continue on consecutive days until completed. We find equally unpersuasive any opposition to the amendment providing that *post*-election hearings will continue day to day until completed absent extraordinary circumstances. Indeed, we believe that a party and its attorney or consultant will have more lead time to rearrange their schedules, if necessary, to attend a multiday post-election hearing than they have with respect to the pre-election hearing, because under the amendments we are adopting the post-election hearing is supposed to open 21 days after the tally of ballots and 14 days after the filing of objections. And, as noted previously, because the hearing on objections and determinative challenges only occurs after the election, many of the parties desiring labor attorneys or consultants to represent them in connection with the post-election hearings in all likelihood will have retained the attorneys and consultants before the objections will have been filed, in contrast to the pre-election scenario painted by some comments of unrepresented employers being taken by surprise by the filing of the representation petition and having to scramble to retain an attorney or consultant.

presides at the pre-election hearing shall make no recommendations with respect to the question the pre-election hearing is designed to answer, the NLRA contains no similar provisions regarding post-election hearings. Thus, prior to the amendments, hearing officers—whether field attorneys or nonattorney field examiners—could, and did, resolve credibility issues at the post-election hearing and could, and did, make recommendations regarding the ultimate disposition of the objections and determinative challenges. See 29 CFR 102.69(e) (2010) (''[U]pon the close of such a hearing, the hearing officer shall * * * prepare and caused to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues.''). And prior to the amendments, the courts regularly deferred to the hearing officer's evaluation of the evidence. See *Amalgamated Clothing & Textile Workers Union* v. *NLRB,* 736 F.2d 1559, 1562–63, 1564–65 (D.C. Cir. 1984) (''The Hearing Officer was uniquely well-placed to draw conclusions about credibility when testimony was in conflict[.]''). Accordingly, if, as was also true prior to the NPRM, the hearing officer is permitted to make findings of fact and to recommend the ultimate disposition of all issues in the case based on the record of the post-election hearing, we fail to see how it is inappropriate for a hearing officer to require, and rule on, offers of proof at the post-election hearing.[475]

The amendment fully protects the rights of the parties. Offers of proof made at the post-election hearing are part of the record. See amended § 102.69(d)(1)(i). Parties have a right to file exceptions to the hearing officer's decision with the regional director, and thereafter (in stipulated or directed election cases) to file a request for review with the Board. § 102.69(c)(1)(iii), (2). Thus, if the regional director, or the Board, concludes that the hearing officer erred, the director or the Board is free to remand to case to the hearing officer to take additional evidence.

Sec. 102.71 Dismissal of Petition; Refusal To Proceed With Petition; Requests for Review by the Board of Action of the Regional Director

The amendments to this section eliminate the now-outdated reference to carbon copies and clarify that extra copies of electronically-filed papers need not be filed.

Subparts D & E, §§ 102.73 Through 102.88, Procedure for Unfair Labor Practice and Representation Cases Under Sections 8(b)(7) and 9(c) of the Act and Procedure for Referendum Under Section 9(e) of the Act

The amendments in these two subparts merely conform their provisions to amendments in Subpart C described above.[476]

Subpart I—Service and Filing of Papers

Sec. 102.112 Date of Service; Date of Filing

In the NPRM, the Board proposed to correct an omission concerning the effective date of service by electronic mail. The final rule provides that where service is made by electronic mail, the date of service shall be the date on which the message is sent. The Board did not receive any significant comments regarding this provision.

Sec. 102.113 Methods of Service of Process and Papers by the Agency; Proof of Service

The final rule adds electronic mail as an approved method of service of Board papers other than complaints, compliance specifications, final decisions and orders in unfair labor practice cases, and subpoenas. The existing rules include regular mail, private delivery service and facsimile transmission (with consent), along with personal service and certified and registered mail. Related § 102.114 has provided for service of parties' papers by electronic mail since 2009. The amendment thus updates the Board's representation case procedures to reflect modern electronic communications technology.

In general, there is little objection to adding electronic mail as an approved method of service. Of the few comments addressing these changes at all, PIA explicitly favors the service of Board documents by electronic mail,[477] and

[475] As noted, the NPRM proposed that the post-election hearing would be conducted in accordance with §§ 102.64, 102.65, and 102.66, insofar as applicable. 79 FR at 7361. The final rule clarifies in amended § 102.69(c)(1)(iii) that any party at the post-election hearing shall have the right to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the objections and determinative challenges that are the subject of the hearing. In contrast to amended § 102.66(c), amended 102.69(c)(1)(iii) also makes clear that the hearing officer presiding over a post-election hearing may rule on offers of proof without consulting with the regional director. Prior to the NPRM, hearing officers presiding over post-election hearings were not required to consult with regional directors before ruling on offers of proof. Moreover, as discussed above, hearing officers presiding over post-election hearings have greater authority than hearing officers presiding over pre-election hearings, because the former, unlike the latter have long been charged with making factual findings, credibility resolutions, and recommendations as to the ultimate disposition of the case. See, *e.g.,* Casehandling Manual Section 11424.3(b). Furthermore, it will be clear to all parties prior to the opening of the post-election hearing which if any individual eligibility or inclusion questions will in fact be litigated at the post-election hearing. Thus, the post-election hearing, by definition, does not occur until after there are determinative challenges or objections, and the regional director sets the parameters for the post-election hearing on determinative challenges and objections prior to the opening of the post-election hearing. See, *e.g.,* Casehandling Manual Section 11428.1 (''The frame of reference for the hearing on objections/challenges is the notice of hearing and order directing the hearing; the hearing officer must limit the hearing to the matters that the Regional Director has set for hearing.''). Similarly, amended § 102.69(c)(1)(iii) makes clear that briefs following the close of the post-election hearing shall be filed only upon special permission of the hearing officer and within the time and addressing the subjects permitted by the hearing officer. This is consistent with the pre-NPRM practice. See Hearing Officer's Guide at 167.

[476] The final rule's amendments to these two subparts differ in some respects from the amendments made to these subparts by the December 22, 2011 final rule. In some instances, this is because the 2011 final rule deferred for further consideration some of the proposed amendments that the Board has now decided to adopt. For example, because the 2011 final rule deferred for further consideration the proposal to eliminate the transfer procedure (76 FR at 80171), the 2011 final rule did not delete the references to the transfer procedure in §§ 102.77(b) and 102.86. 76 FR at 80188–80189. Now that the Board has decided to eliminate the transfer procedure, the final rule deletes the references to the transfer procedure in §§ 102.77(b) and 102.86. Similarly, the 2011 final rule deferred the proposals (79 FR at 7362–7363) to amend §§ 102.83 and 102.84 to permit electronic filing of petitions and to require the simultaneous filing of the showing of interest with the petition. Now that the Board has decided to permit electronic filing of petitions and to require the simultaneous filing of the showing of interest, the final rule amends those sections to so provide. In other instances, the Board has concluded that certain amendments were not necessary. Because as discussed above in connection with § 102.69, the Board has decided to reject the NPRM proposal (79 FR at 7360), which the 2011 final rule adopted (76 FR at 80187), to add a new paragraph (b) to § 102.69 addressing requests for review of regional director directions of elections, the final rule for example does not adopt the NPRM proposal (79 FR at 7363), which the 2011 final rule adopted (76 FR at 80189), to amend § 102.86 to provide that in cases arising under Subpart E, posthearing procedure would be governed, insofar as applicable, by §§ 102.63 through 102.69. Accordingly, just as was the case prior to the NPRM, the method of conducting the hearing and the procedure following the hearing in cases arising under Subpart E of part 102 will be governed, insofar as applicable, by §§ 102.63 through 102.68. Because the Board has decided to reject the proposal to eliminate Subpart D of Part 101, it is not necessary to, and the final rule rejects the NPRM proposal (79 FR at 7362) to, amend § 102.77(b) to incorporate language from preexisting § 101.23(e) to the effect that if a petition has been filed which does not meet the requirements for processing under Subpart D's expedited procedures, the regional director may process it under the procedures set forth in Subpart C. Under the final rule, that language remains in § 101.23(e).

[477] PIA relatedly contends, however, that because electronic service of documents will speed the election process, there is no need to further speed the process by making other changes. The Board

Continued

the Chamber raises no general objection to electronic service of representation case documents, with the exception of the voter list.[478]

AGC opposes electronic service because it might be defeated by spam filters and similar tools that are used to protect computer data and equipment. AGC surmises that this could lead to an increase in litigation surrounding the election process if parties fail to receive electronically-served documents, which could slow down the Board process. These concerns are, at best, speculative. Electronic service is very common, spam filters notwithstanding. The Board has yet to experience any dramatic increase in litigation due to spam filters intercepting parties' current electronic service of their papers in either representation or unfair labor practice proceedings. Moreover, the Board has received no significant complaints regarding spam filters in connection with its ongoing pilot program to electronically serve published Board and Division of Judges' decisions where parties have registered for such service. Thus, the Board has little reason to believe that spam filter problems will suddenly become pronounced when the Board itself begins serving representation case documents electronically.

Indeed, parties will have provided their email addresses and fascimile numbers to the regional director when they filed their petitions and Statements of Positions and participated in a hearing pursuant to amended §§ 102.61(a)(9), (b)(1), (c)(4), (d)(10), (e)(7); 102.63(b)(1–3)(ii); and 102.66(g)(2). At the time parties are providing this information, they may customize their email settings to ensure that the system does not inadvertently flag official documents as spam when they are sent by regional personnel from ''.gov'' domains.[479] Furthermore, as already discussed in relation to § 102.60, any concerns about spam filters intercepting service of a petition will be mitigated by the practice of the regional offices to have a Board agent contact parties as soon as possible after the filing of a petition in order to facilitate the election process. See Casehandling Manual Section 11010. Upon implementation of this rule, the Board expects regional offices to additionally place follow up phone calls to all parties as soon as a decision and direction of election is sent by email or facsimile, to provide an added safeguard against delivery failures.

In sum, the Board is not persuaded that spam filter interception will be such a significant problem that the agency should continue to use slower and more expensive means to transmit its documents to parties.

Sec. 102.114 Filing and Service of Papers by Parties; Form of Papers; Manner and Proof of Filing or Service; Electronic Filings

The amendments to this section merely conform its provisions to certain amendments in Subpart C described above.

Sec. 103.20 Election Procedures and Blocking Charges; Filing of Blocking Charges; Simultaneous Filing of Offer of Proof; Prompt Furnishing of Witnesses

Under the Board's prior rules, § 103.20 was entitled ''Posting of election notices.'' As discussed above in connection with § 102.67, the final rule adopts the proposal to integrate its contents as modified into § 102.67 of part 102.[480] However, the NPRM also requested comment regarding the Board's blocking charge policy. 79 FR 7334–35. As discussed below, the Board has decided to codify certain revisions to that policy here in § 103.20. Accordingly, the final rule retitles § 103.20 ''Election procedures and blocking charges; filing of blocking charges; simultaneous filing of offer of proof; prompt furnishing of witnesses.''

The NPRM specifically asked for comments on various proposed revisions of the Board's blocking charge policy. As explained in the NPRM, the blocking charge policy is not codified in the current regulations. Rather, it is the product of adjudication and is described in the non-binding Casehandling Manual. See Casehandling Manual Sections 11730 to 11734.

As explained in Section 11730 of the Casehandling Manual, ''The Agency has a general policy of holding in abeyance the processing of a petition where a concurrent unfair labor practice charge is filed by a party to the petition and the charge alleges conduct that would interfere with employee free choice in an election, were one to be conducted.'' This policy is designed to ensure that violations of the Act which interfere with employees' right to vote are remedied before any election is conducted. In other words, it ''blocks'' the election process until such time as a fair and free election can be held. Charges alleging conduct that is inherently inconsistent with the petition itself may also result in a petition being held in abeyance. See *id.* at Section 11730.3. However, there are significant exceptions to the general policy of having a charge ''block'' a petition. See *id.* at Section 11731. Accordingly, the filing of an unfair labor practice charge does not automatically cause a petition to be held in abeyance. Furthermore, ''the policy is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition.'' *Id.* at Section 11730.

Some comments urge that the policy be maintained in order to ensure a free and uncoerced choice in selecting representatives for purposes of collective bargaining.[481] In the view of these commenters, simply holding a rerun election will not fully and completely remedy the employer's unfair labor practices. As the AFL–CIO explains, this is so because there is a substantial risk that the tainted election will compound the effects of the unfair labor practices: an employee who voted against union representation under the influence of the employer's unlawful conduct is unlikely to reconsider the issue and change his or her vote in the rerun election. See *NLRB* v. *Savair Mfg. Co.,* 414 U.S. 270, 277–78 (1973).[482] Moreover, according to the AFL–CIO, ''opening the ballots cast in a tainted election would only compound the effects of the unfair labor practices in the event that a majority votes against representation because it would create

does not agree that just because electronic service will be an improvement, the other changes adopted in the final rule are unnecessary. Indeed, two improvements in efficiency are generally better than one. As discussed at greater length above, one of the goals of the final rule is to remove unnecessary barriers to the expeditious processing of representation cases. Permitting electronic service by itself plainly does not fully accomplish that goal.

[478] The Chamber's prediction of an electronic voter list inviting abuse is discussed in relation to § 102.62.

[479] In addition, the testimony of Jess Kutch on behalf of Coworker.org II concerning potential spam filter problems discussed in connection with § 102.62 above would not implicate these types of service, which would not be attempted via bulk emails.

[480] As noted in § 102.62, the election notice changes also apply in cases where the parties agree to an election.

[481] See SEIU; AFL–CIO (Reply); UFCW; Testimony of Melinda Hensel on behalf of IUOE Local 150 II.

[482] SEIU (Reply) supports this observation by pointing out that it is grounded not only on its own long organizing experience, but also on social psychologists' research into the cognitive dissonance theory. According to SEIU, ''These experts have found that people will try to bring their attitudes in line with their actions, in order to reduce the dissonance in their minds.'' As Leon Festinger, the father of cognitive dissonance theory, explained, a classic example is when a person is forced to do something she may not support; ultimately, researchers have found that her attitude towards that issue becomes more positive than it otherwise would have been. See generally Leon Festinger, *A Theory of Cognitive Dissonance* (1957); Leon Festinger and James M. Carlsmith, *Cognitive Consequences of Forced Compliance,* Journal of Abnormal Psychology, Vol. 58, 203–210 (1959).

the misimpression that the tally reflects the uncoerced choice of the voters.'' SEIU also asserts that holding a tainted election is an inherently coercive event separate and apart from the unfair labor practice giving rise to the taint, because it drills into the unit employees' minds the lesson that engaging in the election process is futile.

Other comments suggest changes in the blocking charge policy, including its elimination.[483] Professor Samuel Estreicher suggests that application of the blocking charge policy be restricted to ''unusual circumstances,'' because it is generally desirable to hold the election and defer consideration of contested matters to the post-election stage. Other comments assert that the policy should be eliminated because it creates opportunities for needless delay of elections—particularly decertification elections.[484] SHRM also points out that blocking charges can result in elections being delayed for many months, and asserts that blocking charges cause much of the significant election delays in representation cases.[485] Some comments assert, specifically with respect to decertification elections, that experience shows that when unions have determined that they are likely to lose the upcoming election they will file unfair labor practice charges in order to block the election and frustrate the employees' efforts to end union representation.[486]

After careful consideration, the Board has decided to continue applying the blocking charge policy and to block elections in circumstances where unfair labor practice charges allege conduct that, if proven, would interfere with employee free choice in an election or would be inherently inconsistent with the petition itself, and no special circumstances are present that would warrant further processing the petition in the face of the charges. The Board is duty bound to ensure that employees can express their choice of representative free of unlawful coercion, and regional directors will therefore not generally process a petition through to an election in the face of a pending charge if they believe employee free choice is likely to be impaired. Furthermore, we agree that holding a tainted election results in damage beyond that caused by the employer's unfair labor practices, which damage cannot be fully remedied simply by conducting a rerun election. As the Fifth Circuit noted in *Bishop* v. *NLRB,* 502 F.2d 1024, 1028 (5th Cir. 1974), the salutary purposes for imposing the blocking charge policy, a policy the Board has followed since 1937, ''do not long elude comprehension.''

Nevertheless, the Board is sensitive to the allegation that at times, incumbent unions may abuse the policy by filing meritless charges in order to delay decertification elections.[487] To that end, the Board notes that the General Counsel already has in place procedures requiring the expedited investigation of blocking charges in an effort to ensure that non-meritorious charges do not delay elections. Under the agency's Impact Analysis system for prioritizing the processing of cases, blocking charge cases are designated as Category III (Exceptional) cases, which have the highest priority and the shortest time goals for disposition. See Casehandling Manual Section 11740.

The Board has also decided to codify several new practices to protect against abuse of the blocking charge policy by those who would use the unfair labor practice procedures to unnecessarily delay the conduct of elections. Parallel to the amendments to § 102.61(a)(7), (b)(8) and (c)(8) providing for the simultaneous filing of the showing of interest with election petitions, and § 102.69(a) providing for the simultaneous filing of offers of proof together with election objections, the Board's amendments to § 103.20 will require any party to a representation proceeding that files an unfair labor practice charge together with a request that it block the processing of the petition to simultaneously file a written offer of proof. The offer of proof must provide the names of the witnesses who will testify in support of the charge, and a summary of their anticipated testimony. If the regional director determines that the party's offer of proof does not describe evidence of conduct that, if proven, would interfere with employee free choice in an election or would be inherently inconsistent with the petition itself, and thus would require that the processing of the petition be held in abeyance absent special circumstances,[488] the regional director will continue to process the petition and conduct the election where appropriate. The party seeking to block the processing of the petition must also promptly [489] make the witnesses identified in its offer of proof available to the regional director so that the director can promptly investigate the charge, as required by Section 11740.1 of the Casehandling Manual.[490] These practices will serve to provide the regional director with the information necessary to assess whether the unfair labor practice charges have sufficient support and involve the kind of

[483] Curiously, the IFA II claims a hindrance in being able to adequately respond to the solicitation for comments on the Board's blocking charge policy because the Board does not publish statistics including ''the number of blocking charges filed per year.'' Yet, the Board provided information to the IFA concerning elections held during the last 3 fiscal years that had previously been blocked for some period of time as part of a joint FOIA request during the comment period, along with the average and median number of days between petitions and election in cases in which blocking charges were filed. (We also provided similar information in response to a FOIA request from commenters in 2011, and additionally provided blocking charge information made publicly available by Professor Estreicher in his 2009 law review article referenced below.) We are thus not sympathetic to IFA's suggestion that lack of additional blocking charge statistics—statistics not included in their FOIA request—should cause the Board to extend the period of time to comment on potential changes to the blocking charge doctrine. In any event, IFA's initial position—that blocking charges delay elections—is unassailable based on the statistics provided to them, those analyzed by Professor Estreicher 5 years ago, and simple logic. We discuss below IFA's policy suggestions flowing therefrom.

[484] See, *e.g.,* AHA II; COLLE; CDW; CNLP; PIA; NRMCA II.

[485] SHRM references a study conducted by Professor Estreicher of data pertaining to blocking charges filed in 2008, in which Professor Estreicher determined that the filing of blocking charges in a case increased the time to an election, on average, by 100 days. Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change,* 25 ABA J. LAB. & EMP. L. 1, 9–10 (2009).

[486] See, *e.g.,* NRTWLDF; Chamber II; COLLE.

[487] See, *e.g.,* NRTWLDF; Chamber.

[488] Our use of the term ''special circumstances'' is merely intended to recognize the longstanding reality that regional directors have discretion to continue to process petitions notwithstanding the pendency of charges that would otherwise result in a petition being held in abeyance. In this way, regional directors will continue to have discretion to engage in a balancing of relative hardships concerning the blocking of an election as requested by comments such as IFA II. See Section 11731.2 of the Casehandling Manual.

[489] Although the NPRM had used the descriptor ''immediately'' in describing when the filer of a blocking charge must make the witnesses identified in its offer of proof available to the regional director, the final rule uses the descriptor ''promptly'' to avoid the connotation that the filer must physically bring the witnesses along with them in order to file a blocking charge in one of the Board's regional offices. We think that the requirement of prompt witness availability will be adequate to ensure an avoidance of unnecessary delay in the investigation of blocking charges.

[490] Similarly, the final rule provides in amended § 103.20 that if a party files a petition after filing an unfair labor practice charge and then subsequently requests that its previously filed unfair labor practice charge block further processing of the petition, the party must likewise simultaneously file an offer of proof and also promptly make available to the regional director the witnesses identified in its offer of proof. The final rule likewise provides that even if a party requests that its previously filed unfair labor practice charge block further processing of the petition, the regional director should continue to process the petition and conduct the election where appropriate if the regional director determines that the party's offer of proof does not describe evidence that, if proven, would interfere with employee free choice in an election or would be inherently inconsistent with the petition itself.

violations that warrant blocking an election, or whether the charges are filed simply for purposes of delay. This information will also be provided within a time frame that will assist the regional director in making a more expeditious decision on whether to hold the petition in abeyance. Of course, even after the initial decision to hold a petition in abeyance, if it is determined that a charge lacks merit, the regional director will resume processing the petition.

Implementation of these new practices is supported by comments representing employer, employee and labor organization interests who agree that requiring simultaneous offers of proof and prompt witness availability will expedite the investigation of blocking charges.[491] And expediting such investigations will necessarily remove an unnecessary barrier to the fair and expeditious resolution of questions concerning representation.

The only significant opposition to either the offer of proof requirement or the production of witnesses requirement was submitted by SEIU, which opposes the offer of proof requirement on the basis that parties are already obligated to cooperate with Board agents, and it is unclear whether SEIU's objection is simply that the requirement is redundant. The Casehandling Manual does generally require petitioners to cooperate with Board agents in processing petitions,[492] and requires charging parties to cooperate with Board agents investigating unfair labor practice charges.[493] We view, however, the addition of both the offer of proof requirement and the production of witnesses requirement to the Rules and Regulations as important explications of the duty to cooperate and not mere redundancies.

We decline to adopt the AFL–CIO's suggestion that the Board proclaim it presumptively appropriate to seek preliminary injunctive relief under 29 U.S.C. 160(j) to remedy an unfair labor practice charge that has blocked an election. Under the express language of Section 10(j) of the Act, the issuance of a complaint is a necessary predicate to any decision to seek injunctive relief in the Federal district courts, and the General Counsel's discretion to issue complaints—and to accept pre-complaint settlements and post-complaint but pre-hearing informal settlements—is unreviewable by the Board. See *NLRB* v. *UFCW, Local 23,* 484 U.S. 112, 118–33 (1987).[494] In addition, injunction litigation obviously involves the expenditure of significant resources by the agency, and obtaining a 10(j) injunction from a district court requires the court to engage in a case-specific inquiry.[495] To be sure, since the 1950s, with limited exceptions, the Board has reserved to itself the privilege of approving any plans by the General Counsel to pursue Section 10(j) injunction proceedings,[496] but no prior Board has sought to exercise greater control over the General Counsels' discretion, even in the face of widely varying use of the preliminary injunction as an enforcement tool.[497] Thus, we decline the invitation to cabin the General Counsel's prosecutorial discretion in making the initial determination whether a particular complaint warrants the agency pursuing Section 10(j) injunctive relief. By declining, however, we do not mean to suggest that it would be inappropriate in a particular case for the General Counsel to seek injunctive relief to remedy unfair labor practices that have blocked an election.

We further decline to adopt AHA II's preferred change to the blocking charge policy, that ''unless the regional director finds that there is probable cause to believe that an unfair labor practice was committed that requires that the processing of the petition be held in abeyance, the regional director shall continue to process the petition.'' 79 FR 7334. SEIU argues that implementing this change would improperly shift the presumption away from the one described in the Casehandling Manual, where a charge can serve to block the processing of a representation case unless the regional director finds that employees' exercise of free choice is possible notwithstanding the charge, to one where the petition is processed unless and until the regional director makes a further determination concerning the likelihood of a complaint issuing and the seriousness of the unfair labor practice involved. As described above, we believe that regional directors should generally continue to process petitions if the directors determine that the charging party's offer of proof does not describe sufficient evidence to warrant blocking an election. On the other hand, in situations where parties have raised sufficient offers of proof, we believe that the presumption should run in favor of holding in abeyance the processing of the petition absent special circumstances. In short, we cannot agree that reversing the presumption to one where the election proceeds in the face of a charge of unlawful conduct unless the regional director makes an additional probable cause determination would be a further improvement. Rather, such a standard could cause a regional director to conduct an election in circumstances where conduct has occurred that has a tendency to interfere with employee free choice, simply because the director was not yet able to make the requisite additional determination.[498]

Part 101, Subpart C—Representation Cases Under Sec. 9(c) of the Act and Petitions for Clarification of Bargaining Units and for Amendment of Certifications Under Sec. 9(b) of the Act

In the NPRM, the Board proposed to eliminate redundant sections of its regulations contained in Subpart C of Part 101 describing representation case procedures. The relevant sections of Subpart C of Part 101 currently include an essentially complete restatement of the representation case procedure established in Subpart C of Part 102. As the Board noted in the NPRM, ''Describing the same representation procedures in two separate parts of the regulations may create confusion.'' 79 FR at 7325.

The final rule eliminates Subpart C of Part 101. A few, non-redundant portions are moved into Part 102. For example, the description of the pre-election conference is moved to § 102.69(a).

[491] See AHA II; NRTWLDF; AFL–CIO; NNU.

[492] Casehandling Manual (Part Two) Representation Proceedings Section 11012.1.

[493] Casehandling Manual (Part One) Unfair Labor Practice Proceedings Section 10054.1.

[494] In contrast, under the Board's existing regulations, parties have long enjoyed an opportunity to request Board review of a decision to hold a petition in abeyance under the blocking charge policy. See § 102.71(b) (''Where the regional director * * * directs that the proceeding on the petition be held in abeyance, and such action is taken because of the pendency of concurrent unresolved charges of unfair labor practices, and the regional director, upon request, has so notified the parties in writing, any party may obtain a review of the regional director's action by filing a request therefor with the Board in Washington, DC . . .'').

[495] See *Chester* v. *Grane Healthcare Co.,* 666 F.3d 87, 93–94 (3d Cir. 2011) (cataloguing the varying standards employed by the circuit courts in deciding whether the facts of a particular unfair labor practice case warrant injunctive relief).

[496] See *Frankl* v. *HTH Corp.,* 650 F.3d 1334, 1352 (9th Cir. 2011).

[497] See Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with its Structure and Function and Suggestions for Reform,* 58 Duke L. J. 2013, 2030 tbl. 1 (2009) (demonstrating the range of 10(j) injunctions filed per year over the last several decades from a high of 78 in 1995 to a low of 10 in 2004); see also NLRB Performance Accountability Report, 5, 38 (Fiscal Year 2013) (reporting that 10(j) injunctions were authorized in 41 cases out of the 1,272 total complaints issued that year).

[498] For the same reason we reject IFA II's suggestion that the Board should require a ''charging party to establish a likelihood of success on the merits'' before a representation petition would be blocked.

The Board received no significant comments opposing this proposal. Comments from a variety of viewpoints supported the Board's effort to eliminate redundant regulations.

As noted in the NPRM, § 101.1 states that the purpose of Part 101 is to provide the public with a statement of ''the general course and method by which the Board's functions are channeled and determined.'' [499] The purpose of a separate statement of the general course ''is to assist the public in dealing with administrative agencies,'' but should not be ''carried to so logical an extreme as to inconvenience the public.'' [500] The NPRM stated that codifying this statement in the Code of Federal Regulations risked confusing the public. Instead, the Board proposed to publish the statement in the **Federal Register** without codification. This accords with general administrative practice.[501] The NPRM contained an uncodified statement of the general course, 79 FR at 7324–7325, and proposed that any final rule that might issue would also include an uncodified statement of the general course. A Statement of the General Course of Proceedings Under Section 9(c) of the Act is provided below.[502]

Prior § 101.18 provided, ''The evidence of representation submitted by the petitioning labor organization or by the person seeking decertification is ordinarily checked to determine the number or proportion of employees who have designated the petitioner, it being the Board's administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees.'' ALFA submits that revised § 102.61 should explicitly state that a proper showing of interest must include authorization cards or signatures from 30 percent of the employees in an appropriate unit. The Board declines to adopt this proposal. The Board's current Rules and Regulations set forth in Part 102 do not specify a precise threshold for the administratively required showing of interest. As explained in former § 101.18, the purpose of the showing of interest on the part of labor organizations and individual petitioners that initiate or seek to participate in a representation case is merely to determine whether there is sufficient employee interest in selecting, changing or decertifying a representative to warrant the expenditure of the agency's time, effort, and resources in conducting an election. See also Casehandling Manual Section 11020. As such, the purpose of the showing of interest is purely an administrative one; the size of the showing of interest in support of certification and decertification petitions that the Board currently requires is not compelled by the Act. As an administrative matter it is not litigable. *The Borden Co.,* 101 NLRB 203, 203 n.3 (1952); Casehandling Manual Section 11028.3. However, at this time, the Board has no intention of changing the size of the required showing of interest and the uncodified statement of the general course that follows states that the required showing remains 30 percent.[503]

Part 101, Subparts D and E— Unfair Labor Practice and Representation Cases Under Secs. 8(b)(7) and 9(c) of the Act and Referendum Cases Under Sec. 9(e)(1) and (2) of the Act

In the NPRM, the Board also proposed to eliminate its statement of procedures contained in Subparts D and E of part 101. The Board received no significant comments regarding the proposal. Upon reflection, however, a unanimous Board has decided to reject the proposal to eliminate Subparts D and E of part 101. Unlike prior Subpart C of part 101, Subpart D of part 101 does not merely address representation case procedures. Rather, it also addresses unfair labor practice charges and procedures. Thus, Subpart D is entitled ''*Unfair Labor Practice* and Representation Cases *Under Sections 8(b)(7)* and 9(c) of the Act.'' (Emphasis added.) Although Subpart D of part 102 likewise discusses procedures for unfair labor practice and representation cases under Sections 8(b)(7) and 9(c) of the Act, the NPRM did not propose eliminating other subparts of part 101 setting forth statements of procedures for unfair labor practice cases, even though certain other subparts of part 102 address the same matters.[504] Thus, the NPRM proposed amendments dealing with, and invited comment about, representation case procedures. The Board concludes that it would be more appropriate to consider eliminating Subpart D of part 101 at such time as the Board may consider eliminating any redundancies in those other subparts of part 101 and part 102 that address unfair labor practice matters. Accordingly, the Board has concluded that it should not eliminate Subpart D of part 101 at this time.

The Board has likewise unanimously decided not to eliminate Subpart E of part 101. Subpart C of part 101 chiefly deals with the Board procedures that govern the filing and processing of petitions to determine whether employees wish to become or remain represented for purposes of collective bargaining with their employer. Unlike Subpart C of part 101, Subpart E deals with a highly specialized type of case—arising under Section 9(e)(1) and (2) of the Act—addressing the issue of whether the Board should conduct an election to determine whether the employees in a bargaining unit covered by an agreement between their employer and a labor organization that requires membership in the labor organization as a condition of employment, desire that such authority be rescinded. Regardless of the outcome of the election conducted pursuant to Subpart E, the unit employees remain represented vis-à-vis their employer. During fiscal years 2010–2013, parties filed fewer than 80 petitions per year of the type addressed in Subpart E of Part 101 and 102. Although Subpart E of part 102 likewise discusses procedures for referendum under Section 9(e) of the Act, the NPRM did not propose eliminating other subparts of part 101 setting forth statements of procedures for other specialized sets of cases that do not deal with ordinary representation case issues, even though other subparts of part 102 address the same matters.[505] The Board has concluded that it would be more appropriate to consider eliminating Subpart E of part 101 at such time as the Board may consider

[499] See 5 U.S.C. 552(a)(1)(B). The original language of this provision stated that the section would ''amplify and supplement the[] rules of procedure.'' 12 FR 5651 (August 22, 1947).

[500] Tom C. Clark, Attorney General's Manual on the Administrative Procedure Act, 17, 19 (August 27, 1947).

[501] See, *e.g.,* 26 CFR 601.702(a)(1)(ii) (''[T[he Commissioner publishes in the **Federal Register** from time to time a statement, which is not codified in this chapter, on the organization and functions of the IRS.'').

[502] The Board will also continue to publish, update, and make available on its Web site the detailed statement of representation case procedures set forth in its Casehandling Manual.

[503] The Board's form petition, Form NLRB 502 also states, and will continue to state, that the required showing of interest is 30 percent (see Form section 6(b)).

In response to comments that erroneously suggest that 30 percent is the threshold for resolving a question of representation, the Board reiterates here that if a question of representation exists, it is resolved by a majority of valid votes cast in an election.

[504] For example, while Subpart B of part 101 describes procedures for unfair labor practice cases under Section 10(a) to (i) of the Act, Subpart B of part 102 also addresses procedures under Section 10(a) to (i) of the Act for the prevention of unfair labor practices.

[505] For example, the NPRM did not propose to eliminate Subpart F, which sets forth statements of procedures for jurisdictional dispute cases under Section 10(k) of the Act, even though Subpart F of part 102 also addresses procedures to hear and determine disputes under Section 10(k) of the Act.

eliminating other redundancies in those other subparts of parts 101 and 102 that address highly specialized sets of cases. Accordingly, the Board has concluded that it should not eliminate Subpart E of part 101 at this time.

The final rule conforms representation and referendum procedures in these two subparts as described therein to amendments set forth below.[506]

VI. Response to the Dissent

In August 2013, for the first time in over 10 years, a full complement of five confirmed members of the National Labor Relations Board was sworn in to office. Soon afterward, the Board took up the long-delayed project of examining and revising its procedural rules for representation cases. With the issuance of this final rule, the project has been completed. At every stage, from establishing the framework for review of existing procedures, to structuring the public comment periods and the full-Board public hearing, to deliberations and voting on specific provisions and issues, to the exchange of drafts of the various parts of the final rule, the Board's work has been marked by the full and earnest engagement of each of the Board's members, and the frank and open exchange of ideas among all of the members. Combined with the extraordinary outpouring of detailed and insightful commentary from the public, during both the most recent comment period and the 2011 period, in written comments and at the full-Board public hearings, the Board members' painstaking efforts have resulted in a remarkably thorough and thoughtful consideration of the proposed amendments. The care with which the issues have been considered is evident throughout the final rule, from the preamble, to the dissent, to the regulatory text itself.

We wish that the Board could have been unanimous as to every amendment contained in the final rule. Perhaps it was inevitable, given the broad range of differing experiences and viewpoints represented on the Board that a full consensus as to every issue would not be reached. However, as to many of the features of the rule, listed below, there is no substantive disagreement among the Board members. Even more importantly, the deliberations, discussions and exchanges of ideas among Board members have proved the value of having a diversity of perspectives and backgrounds on the Board. The final rule differs from the proposed rule in many ways, both large and small, and in virtually every key aspect of the rule. Most of these departures from the original proposal, which are summarized below, were prompted by criticisms and concerns raised by our dissenting colleagues, as well as the public comments. The rule has been greatly improved as a result.

Before we address the specific differences that remain among the Board members, we offer a general observation: The most significant remaining differences among the Board members stem from a difference in approach. The approach of the majority, as explained in the preamble and below, has been to address discrete problems with targeted solutions, while maintaining the essential elements of the existing process. These solutions variously advance the goals of efficiency, fair and accurate voting, transparency, uniformity, and adapting to new technology, totally apart from, or in addition to, fulfilling the Act's mandate of expeditious resolution of questions of representation. Much of the dissent, by contrast, focuses single-mindedly on one issue: the timeline from petition to election. The possible effect of each amendment on this timeline is the main concern of the dissent, to the virtual exclusion of the problem sought to be addressed. Indeed, the dissent proposes the creation of a mandatory timeline for the scheduling of elections. That is something that, over the nearly 80 years of the Act's existence, both Congress and the Board have declined to do. We decline to do so as well. In just the past several years, the Board has conducted elections in units smaller than 5 employees and units of nearly 50,000 employees, in a vast multitude of different industries and geographic locations. To us, the imposition of a one-size-fits-all timeline on our elections makes no sense. Instead, we think that the regional directors should continue to hold elections as soon as practicable in the circumstances of each case. Where there is no need to wait, the election should proceed; where there is a need to wait, the election should not proceed.

This view, that elections should be scheduled for the ''earliest date practicable,'' [507] reflects the settled view of the Board over the course of its history. The current Casehandling Manual states (at 11302.1) that ''election[s] should be held as early as is practical,'' and the same statement is found in similar manuals dating back at least to the 1970s. And while the Act does not include that language, its very structure and relevant provisions demonstrate consistent and repeated support for that goal. Its terse and nontechnical description of procedures,[508] its broad delegation of discretion regarding the ''appropriate hearing,'' [509] its prohibition of any court interference with or direct court review of election procedures,[510] its purpose in authorizing the delegation of decision-making authority to regional directors,[511] and its specific and unique exemption from APA adjudication procedures [512] all manifest a consistent and powerful concern with the expeditious resolution of questions concerning representation, as has been recognized in Supreme Court opinions and in the relevant legislative history.[513]

[506] The final rule's amendments to these two subparts differ in some respects from the amendments made by the December 22, 2011 final rule. In some instances, this is because the 2011 final rule deferred other proposals which the final rule now adopts. For example, the 2011 final rule deferred the proposal to eliminate the transfer procedure. Accordingly, the 2011 final rule did not amend § 101.30(c) to delete the references to the transfer procedure. 76 FR 80182. Now that the Board has decided to eliminate the transfer procedure, the final rule deletes the references to the transfer procedure in § 101.30(c). In other instances, the Board has concluded that certain amendments to Subpart D were not necessary. For example, the 2011 final rule amended § 101.23(b) to provide that if the regional director directed an election without first conducting a hearing, an aggrieved party should file a request for review of that action after the election. 76 FR 80181. However, the NPRM did not propose to amend, and the 2011 final rule did not amend, § 102.80(c), which provides that if the regional director directs an election without first conducting a hearing in a proceeding arising under Subpart D, a party may file a request for special permission to appeal. Accordingly, the final rule preserves the ''special permission to appeal'' language in § 101.23(b) from the pre-NPRM version of that section. The final rule also preserves the pre-existing language to the effect that the regional director's rulings on election objections and challenged ballots are final and binding unless the Board grants a party special permission to appeal from the regional director's rulings. The 2011 final rule provided in § 101.30(c) that in cases arising under Subpart E of Part 101, post-hearing briefs could be filed only upon special permission of the hearing officer. 76 FR 80182. However, as discussed below in connection with § 102.66, the Board has decided that the regional director, not the hearing officer, should be the one to decide whether parties may file posthearing briefs. Accordingly, the final rule amends § 101.30(c) to so provide.

[507] Section 102.67(b).

[508] See Section 9(c) of the Act (29 U.S.C. 159(c)).

[509] See *Id.; Inland Empire Council* v. *Millis,* 325 U.S. 697, 706–710 (1945).

[510] See Section 9(d) of the Act (29 U.S.C. 159(d)); *Boire* v. *Greyhound Corp.,* 376 U.S. 473, 476–480 (1964).

[511] See Section 3(b) of the Act (29 U.S.C. 153(b)); *Magnesium Casting Co.* v. *NLRB,* 401 U.S. 137, 138, 141–142 (1971).

[512] See Section 5(6) of the APA (5 U.S.C. 554(a)(6)); S. Rep. No. 752, 79th Cong., 1st Sess. 16 (1945); Senate Committee on the Judiciary Comparative Print on Revision of S. 7, 79th Cong., 1st Sess. 7 (1945).

[513] Our colleagues note, as they did in their dissent to the NPRM (79 FR at 7341 n.92) that other Board doctrines impose lengthy delays before the Board permits employees to vote on questions of representation, and they contend that the Board is

A. Building on a Sound Foundation

The final rule does not change the essentials of the representation case process. As before, a petition starts the process; it must be supported by a sufficient showing of interest. Upon service of the petition by the regional office, employers are asked to post a notice of employee rights and to provide information in response to the petition. In the event the parties do not enter into an election agreement, there is a pre-election hearing. The hearing enables the regional director to determine whether there is a question of representation and, if so, determine the appropriate voting unit. The parties may seek Board review of the regional director's decision. Prior to the election, the employer provides the voters' contact information to the other parties and posts a notice of the election. The notice permits employees to know the unit in which the election will be conducted and when, where, and how they may vote. There is a secret-ballot election. There is a tally. Any determinative challenges or objections are litigated and resolved. The results are certified and Board review may be sought.

Contrary to our dissenting colleagues, the final rule does not disturb these fundamental elements. Rather, the final rule is a collection of discrete, targeted changes to the technical details. Each of these changes serves a distinct set of purposes, including minimizing unnecessary barriers to the fair and expeditious resolution of questions concerning representation, eliminating unnecessary and duplicative litigation, simplifying representation case procedures and rendering them more transparent and uniform across regions, reducing the cost of such proceedings to the public and the agency, and modernizing the Board's processes, with a particular emphasis on the effective use of new technology. The Board has carefully examined and addressed a number of needed changes in a single rulemaking process in an effort to advance these various goals while preserving the essential steps of the representation case process.

B. Protecting Free Speech and Debate

The final rule does not change any rules regarding speech. And just as existing procedures have never been criticized for limiting speech, we do not think this final rule will create any new free speech issues. Yet the dissent argues that speech, specifically employer speech, will be limited because the final rule will not give the employer enough time to mount an election campaign. But whenever a date for an election is fixed, a limit is necessarily placed on campaign speech. Bearing this fact in mind, the relevant question is whether the procedures will provide a meaningful opportunity for employer, employee and union speech. The preamble includes a far-ranging, thoughtful, and careful consideration of this question, and concludes that the rule provides a meaningful opportunity for campaign speech before the election. Advances in communications technology have made the dissemination of information not only faster, but also more effective and efficient. Also, the scope of the campaigns is often limited, as elections frequently involve small bargaining units of no more than a couple dozen employees. There are also pre-petition opportunities to speak, which the final rule does not affect at all; the parties often know of the campaign in advance.

Regarding employer speech in particular: employers have near-complete and continuous access to employees to engage in various forms of communications, including electronic, print, and in-person—in large and small groups and individually—and may require attention to such communications as a condition of employment.[514] Finally, the regional director will retain discretion to consider these matters in selecting an election date.

We agree with the dissent that these opportunities for free speech and debate ''are part and parcel of *every* employment relationship.'' So much the better. Such structural opportunities for free speech and debate by employees and their employer—which are unique to the workplace environment—are especially persuasive evidence in support of our view that the final rule will not have the effect of creating ''undue restrictions on protected speech'' in Board elections.[515]

Finally, the dissent claims that the rule is ultimately based on an '' 'anti-distortion' theory''—*i.e.,* that it will disadvantage anti-union speech. The dissent notes that some comments expressed a desire to silence employers, and attempt to paint the final rule with the same brush. We do not see why it should matter that someone, somewhere has expressed inappropriate or irrelevant reasons for wanting the Board to issue a sound rule. We do not impute to the dissent the motives or reasoning of all those commenters who opposed the NPRM, and it is equally fallacious to impute the motives or reasoning of other commenters to us.

irrationally reformulating its representation case processing procedures for greater expedition in the initial election context only. However, in the circumstances identified by our colleagues, employees have already had at least one opportunity to choose whether they wish to be represented, and the delay in affording them another opportunity advances the interest in industrial peace and stability. See *UGL–UNICCO Service Co.,* 357 NLRB No. 76 (2011) (successor bar doctrine ''clearly promotes collective bargaining'' and preserves ''stability''); *Lamons Gasket Co.,* 357 NLRB No. 72 (2011) voluntary recognition bar ''advance[s] the statutory purposes of preventing 'industrial strife or unrest' and 'encouraging the practice and procedure of collective bargaining' ''); *Brooks* v. *NLRB,* 348 U.S. 96, 100–101 n.8 (1954) (Section 9(c)(3) provides that after a valid election has been conducted, the Board may not hold a second election in the same unit for 1 year ''in order to impress upon employees the solemnity of their choice . . . . ''); *Auciello Iron Works, Inc.* v. *NLRB,* 517 U.S. 781, 786–87 (1996) (''need for repose'' and ''industrial peace'' underly the presumption that a union is entitled to a conclusive presumption of majority status during the term of a collective-bargaining agreement of 3 years or less); *Fall River Dyeing & Finishing Corp.* v. *NLRB,* 482 U.S. 27, 38–39 (1987) (''develop[ing] stable bargaining relationships'' will ''further industrial peace,'' considerations which underlie presumptions of majority support ''particularly * * * in the successorship situation''); *Terrace Gardens Plaza, Inc.* v. *NLRB,* 91 F.3d 222, 227 (D.C. Cir. 1996) (contract-bar doctrine designed ''to stabilize existing employer-union relationships''). By contrast, in an initial organizing situation the interest of industrial peace is furthered by expedition rather than repose, and thus the Board's approach is rational and accords with statutory policy. Certainly, there is no support for our colleagues' implicit suggestion that the waiting periods were designed to afford employers an opportunity to campaign against union representation, and that the Board should therefore impose a waiting period in the initial election context as well.

[514] The Board considered similar factors when it established the *Excelsior* rule, which requires that the employer provide the names and addresses of voters to the petitioning union at least 10 days prior to the election. 156 NLRB 1236, 1239–41 (1966); see *Mod Interiors,* 324 NLRB 164, 164 (1997); Casehandling Manual Section 11302.1. The Board considered this an adequate time period for previously unreachable voters to be exposed to the nonemployer party arguments concerning representation. That analysis remains relevant in considering employers' opportunity to campaign.

The dissent is also mistaken in its claim that the rule does not consider employee opportunities to speak. The dissent overlooks the final rule's discussion of employee speech and debate. In any event, to the extent the preamble focuses on employer speech, such discussion is for the purpose of responding to relevant comments.

[515] The dissent cites our discussion of whether there is a ''meaningful opportunity for speech'' to argue that our approach is tantamount to ''the government simply determin[ing that more] speech is not necessary,'' which the dissent finds ''the most objectionable aspect of the Rule as it relates to protected speech.'' The dissent's argument proves too much. The selection of an election date necessarily imposes a limit on campaign speech. The dissent's own time targets would cap speech at 60 days, and in many cases would limit it to as few as 30 days. Some comments argue that this is inadequate time for speech. In response, the dissent would be forced to consider whether more than 30 to 60 days are needed for pre-election speech—the very analysis which the dissent calls ''most objectionable.'' Indeed, any election date selected, under any set of rules, would suffer from the same supposed problems identified by the dissent.

In the end, the dissent acknowledges—as it must—that the final rule expressly disclaims any such purpose. The final rule consistently and repeatedly recognizes the employer's valid right to speak and the statutory policy in favor of free debate. The final rule does not rest on any judgment or evaluation for or against any party's speech. Like the *Excelsior* rule, this rule ''is not intended to * * * 'level the playing field' between petitioners and employers, but to achieve important statutory goals by ensuring that all employees are fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights.'' *Mod Interiors, Inc.,* 324 NLRB 164 (1997). The Board is not trying to limit speech.

To the contrary, the final rule includes affirmative provisions to expand and encourage discourse in advance of the election. As an initial matter, it requires that an official Notice of Petition for Election be posted at the workplace so that all employees are timely notified of the initiation of the election process and advised of its procedures and their rights. In the past, posting such a notice was recommended, but not required. As a result, not all employees were equally advised about the filing of the petition and its meaning, and there was no ready access to NLRB-provided information about their rights. The Notice of Election has also been revised to provide employees more information about the election process prior to voting. These efforts are designed to facilitate more, not less, information and debate by and among employees, as well as the parties to the proceeding.

C. The Rule Follows the Same ''Hearing First, Election Thereafter'' Process as Before

The pre-election hearing remains an important part of the Board's representation procedures under the final rule. The dissent's criticism of the changes to the pre-election hearing depend largely on misstatement or misunderstanding of both the prior rules and the new rules.

1. The Hearing Date

Prior caselaw imposed a minimum of 5 working days from notice of the hearing. *Croft Metals, Inc.,* 337 NLRB 688, 688 (2002). The final rule sets a hearing date of 8 days from notice of the hearing.[516] The dissent concedes, as it must, that hearings are currently being scheduled to open in 7 to 12 days.[517] And contrary to the dissent, the final rule gives regional directors flexibility to depart from the normal hearing time frame in appropriate cases. Indeed, the final rule provides that a regional director should, on the director's own initiative, schedule the pre-election hearing to open in more than 8 days when the petition raises unusually complex issues. The final rule also permits the director to grant postponements of up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. Nothing in the final rule deprives regional directors of the discretion they currently exercise to postpone hearings when they conclude that it is highly probable that the parties will be able to enter into an election agreement.

2. The Statement of Position

Our colleagues object to the final rule's requiring nonpetitioning parties to complete written Statements of Position, but the essential new requirement is to write the position down.

The course of the hearing used to be guided by a written petition, an oral statement of other parties' positions at the hearing, and the petitioner's oral response. It will now be guided by a written petition, written statements of the other parties' positions that are filed and served the day before the hearing, and the petitioner's oral response at the hearing. Both the written statements of position and the oral response may be amended for good cause.

The dissent concedes that the information solicited by the form ''routinely'' has been requested from employers by regional personnel under the Board's current practice. The form largely asks parties to take positions on matters that must be addressed by them, one way or another, under both the old rules and the new. The only new burden is to commit the positions to paper and furnish it to the regional director and the parties before the hearing. Nonetheless, the dissent claims that (a) there is no rational basis for requiring nonpetitioning parties to complete a Statement of Position or face being precluded from litigating certain matters, and (b) the requirement imposes one-sided burdens on employers.

We find no merit to our colleagues' objections. The form allows both the Board and all the parties to understand what issues are in dispute and which employees are impacted by these issues, thus facilitating election agreements and making hearings more focused. Preclusion assures that the form is uniformly completed, and done so in good faith.[518] By precluding the parties from raising new issues later without good cause, the rule merely requires the parties to take the matter as seriously as they would an election agreement, which also precludes the raising of new issues afterward. These are plainly rational considerations. And the final rule provides for changes to the Statement of Position upon good cause shown.

As to the latter point, our colleagues are wrong in contending that the final rule's statement-of-position provisions impose one-sided burdens on employers. The representation process in an RC case is initiated by a written petition for election, filed by employees or a labor organization on their behalf. The petition requires the filer to state a position on the appropriate unit, identifying both inclusions and exclusions, and other relevant matters, including recognition and contract bar, election details, possible intervenors, the number of employees, the locations of the facilities involved, and the identities of the petition filer and the employer. All of this information is provided before the employer is required to respond in its Statement of Position. The statement-of-position form seeks essentially the same information from the employer's point of view.

Where the statement-of-position form seeks different or additional information, it is generally because the employer has exclusive access to it. For example, the questions relating to jurisdiction concern the *employer's* dealings in interstate commerce. The names and job titles of an employer's

[516] The dissenters claim that the new statement-of-position and notice requirements are so burdensome that additional time must be given in every case. As noted below, however, the form requires identifying matters that parties generally would have had to review and consider in preparing for a hearing or an election agreement under the current rules. The added burden is merely one of transcription and disclosure. The requirement to post the Notice of Petition for Election does not impose a substantial burden on employers either. Indeed, the regional director will supply the employer with the notice to be posted and with explicit instructions on how to post it.

[517] In practice, in 2013, regional directors scheduled the pre-election hearing to open in 7 to 10 days in 76% of cases. In the small minority of cases that actually went to hearing, short extensions were often granted. Still, 25% opened in 7 to 10 days, and 71% of cases that went to a hearing opened within 14 days. Only 39 total cases opened the hearing after the 15th day.

[518] Although regions routinely ask parties to voluntarily provide this information before the hearing, parties sometimes do not provide the information, let alone permit the regions to share it with the petitioners. Preclusion provides an incentive for parties to complete the form and serve it on the parties, and assures good faith in completing the form.

own employees are typically known only by the employer, and payroll details, including the length of the payroll period and the most recent payroll period ending date, are those established by the employer.[519]

Our colleagues also object that the petition is not constrained by the preclusion and amendment provisions that apply to the statement of position. The final rule makes no change to the well-developed caselaw governing amendments to a petition, because no such change is necessary. Preclusion regarding the statement of position is justified by the rulemaking record and the Board's experience demonstrating that non-petitioning parties sometimes do not share the information solicited by the statement of position form prior to the hearing, or they take shifting positions on the issues at the hearing. Such conduct impedes efforts to reach election agreements or hold orderly hearings. No such problems have been identified with petitions, and so no such change is needed. Moreover, as discussed above in connection with § 102.63, a party will typically have good cause to timely amend its Statement of Position to raise an issue that is presented by virtue of a petitioner amending its petition.

Second, the rules provide that if a petitioner does not respond to a position taken in the statement of position—in most cases the day after the statement of position is filed—the petitioner generally may not present evidence regarding that issue. This limitation is directly parallel to preclusion by the statement of position. See amended § 102.66(d). Similarly, just as a nonpetitioning party must establish good cause if it wishes to amend its Statement of Position, so too must a petitioner establish good cause if it wishes to amend its response to the nonpetitioning party's Statement of Position. See amended § 102.66(b).[520]

It makes more sense to apply preclusion after a party has learned the position of the other party. As noted, non-petitioners learn the petitioner's positions on the relevant issues from the petition, and so preclusion attaches to the Statement of Position in response. Similarly, the petitioner first learns non-petitioner's position from the Statement itself, and so preclusion attaches in replying to the Statement.[521]

3. Issues *Decided* Before the Election

If the parties do not enter into an election agreement and a hearing is conducted, the regional director decides the appropriate unit, but has discretion to defer deciding discrete voter eligibility and inclusion questions. This is unchanged from prior rules, except that the rules now provide more guidance for making deferral decisions.

The dissent acknowledges that the Board has never required that all individual voter eligibility disputes be resolved before the election and that, under current practice, stipulated elections routinely defer up to 10% of the unit to the challenge process. The dissent nevertheless complains that the Board is changing the former 10% standard to 20%, and that this expansion of the practice is a bad idea. The dissent is correct that non-binding guidance issued by the NLRB General Counsel (but not contained in a Board rule) articulated a 10% standard. But Board caselaw allows eligibility and inclusion issues affecting more than 10% of the unit to be deferred.[522] And contrary to the assertions of our dissenting colleagues, the 20% figure is not in the final rule; the Board expressly decided not to adopt the bright-line 20% rule that was proposed in the NPRM. Rather, regional directors have discretion to defer (or not) a different percentage, based on their best judgment as to what would be most administratively efficient.[523]

The dissent engages in a lengthy discussion of legislative history about the pre-election hearing. But the conclusion it reaches—that the Act requires a pre-election hearing absent stipulation—is set forth in the plain text of the Act itself. Nothing in the final rule is inconsistent with this history.

In the 1940s, the Supreme Court decided two relevant cases interpreting Section 9. First, in *Inland Empire,* the Court held that the statute allowed for an ''appropriate'' hearing to come *after* the election. The Court noted that Congress specifically chose that essential word—''appropriate''—in order to give wide latitude to the Board. The Court also noted that the statute did not expressly resolve the question of when the hearing was to take place, and so the Board was free to make that choice for itself.

Second, in *A.J. Tower,* the Court considered a variety of arguments against the Board's practice of litigating and resolving voter eligibility via the election-day challenged-ballot procedure. The Court upheld this procedure. Again, the Court pointed to the wide latitude given to the Board to ensure ''that employees' votes may be recorded accurately, efficiently and speedily.'' *A.J. Tower Co.,* 329 U.S. at 331.

In 1947, Congress decided to revise representation case procedures. Congress could have deleted that essential word—''appropriate''—in order to take discretion away from the Board. It could have required the Board to follow the same APA adjudication processes that all other agencies followed. It could have eliminated the challenged-ballot procedure, and required all voter-eligibility questions to be decided before the election.

It did none of those things. Instead, Congress made one very limited, very specific change to the hearing process: the statute was amended to state that the hearing was to take place before the election.

Congress chose to retain the term ''appropriate''—knowing full well the

[519] Labor organizations must complete Statements of Position in RM and RD cases when an employer or individual decertification petitioner files a petition. The Statements of Position to be completed by labor organizations in RM and RD cases are similar to the Statements of Position that employers must complete in RC cases.

Our colleagues admit that the rule is ''facially neutral,'' but nonetheless insist that because there are more RC petitions filed than RM or RD petitions, the requirement will ''usually'' fall on employers. Notwithstanding the number of petitions of each type filed each year, which is entirely beyond the Board's control, the important point is that the final rule treats nonpetitioning employers the same as nonpetitioning labor organizations.

[520] Our colleagues complain, however, that the petitioner is merely required to respond orally at the hearing to the positions taken the day before the hearing by the nonpetitioning party in its written position statement. But there is no unequal treatment here: The nonpetitioning parties' pre-hearing, written Statement of Position is a response to the positions taken in writing 1 week earlier by the petitioner in its petition. And just as petitioners may respond orally on the record to positions taken by the nonpetitioning parties, so too can the nonpetitioning parties orally move on the record to amend their Statements of Position.

[521] We also disagree with our colleagues' complaint that employers will not understand the issues to be addressed by the Statement of Position. The statement-of-position form itself will help guide parties' prehearing preparation because it identifies relevant issues that they may wish to raise. Should parties have questions, they may contact the regional office for assistance.

[522] This caselaw is discussed in the preamble section on 102.66.

[523] As the rule does not implement a mandatory 20% figure, the dissent's criticism of the deferral provision as ''arbitrary'' is unconvincing. To be sure, as the dissent points out, in the preamble the Board carefully analyzes its statistics and the comments on this point, and concludes in a footnote that 20% may often serve as a sensible benchmark. As shown, deferral of issues affecting such a comparatively small percentage of the electorate will very often avoid unnecessary litigation, a consideration that regional directors can and should take into account in administering cases.

But this is very different from mandating 20% as the rule in every case. The dissent's analysis is predicated on an assumption that 20% of all voters are deferred in every case. In reality the vast majority of cases will involve far fewer such disputes, either because they are resolved by stipulation or because they are never contested at the pre-election hearing.

breadth of discretion that the Supreme Court understood this word to convey to the Board. Congress also preserved the Board's APA exemption. Congress did not touch the challenged-ballot procedure, and the statute continued to allow the Board to defer decisions on voter eligibility until after the election. Thus, the statute's essential view of the purpose of the hearing and the latitude given to the Board was unchanged from 1935—except for the particular fact that the hearing must now precede the election.[524]

The final rule is consistent with this history. It involves no qualitative changes regarding the issues to be decided before the election. Under the final rule, just as before, the regional director will determine both the appropriate unit and the payroll period for voter eligibility (or eligibility formula) before conducting the election. In addition, and without change from the current procedure, the regional director provides a written unit description to the parties and to employees before the election. The notice of election, which the employer is required to post 3 days before the election, will advise employees of the appropriate unit and the voter eligibility period—just as occurs under the current procedures. And under the final rule, regional directors may continue to utilize the challenged ballot procedure to address unresolved questions of voter eligibility and inclusion.

4. Issues *Litigated* Before the Election

If it is known in advance that a matter will not be decided in the direction of election, there is no reason to permit evidence to be introduced on the matter. This is the very definition of irrelevant and unnecessary litigation. And yet the former rules required the hearing officer to allow evidence even on voter eligibility issues that the regional director would defer deciding. Under the final rule, by contrast, if a decision on individual eligibility is going to be deferred, the regional director has discretion to direct the hearing officer to decline to take evidence on that question.

The crux is in the qualification: How can the regional director know in advance whether it would be appropriate to defer resolution of the issue? The answer given in the final rule is a procedural one.

First, the petition and statement of position will allow the regional director to know which issues parties seek to litigate and which potential voters those disputes affect. This will allow an initial assessment of the need to resolve any particular issue when judged in light of the purpose of the pre-election hearing and sound administrative practice. At the hearing, the petitioner and other parties will respond to the issues raised, further illuminating their differences and narrowing the scope of the disputed matters.

Next, the hearing officer may take an on-the-record offer of proof which provides a detailed description of the evidence that would be introduced by the party proffering it. On the basis of these proffers, the regional director will know the quantity and (to some extent) quality of evidence that would be introduced. This will further inform the decision of whether the issue should be litigated or deferred until after the election.

The dissent opines that regional directors will be unable to make reasonable decisions whether to defer voter eligibility disputes without full litigation of each. But under the final rule, if the regional director concludes that is so in a particular instance, evidence can be introduced and the issue can be decided or deferred on the basis of that evidence.

This process is consistent with that routinely used by courts, administrative law judges and hearing officers to make decisions about the order, timing and even permissibility of litigation based on only a description of the issues and evidence.

The dissent argues that such offers of proof have been infrequently utilized and are a poor substitute for oral and written evidence. Yet both the Casehandling Manual and the Hearing Officer's Guide have long encouraged offers of proof as a best practice due to their utility in promoting efficient hearings. The final rule codifies and encourages this best practice because if an offer of proof—where evidence may be characterized in its most advantageous light—cannot establish the underlying evidence's value, then there can be little doubt that party and agency resources would be wasted by taking the evidence at that particular time.[525]

Offers of proof are adequate here—as the everyday experience of trial courts attests. There is no need to clutter the record with irrelevant evidence.[526] It is the dissent's proposed model of mandatory litigation concerning issues that need not and will not be decided that lacks an analogue in other judicial or administrative settings. Neither the Board nor the parties should be saddled with these litigation inefficiencies.

5. Post-Hearing Briefing

Our colleagues freely acknowledge that briefs are not necessary in every case. Our colleagues also do not dispute that although adjudication under the APA requires briefing, 5 U.S.C. 557(c), Congress specifically exempted Board representation cases from these provisions because of the ''simplicity of the issues, the great number of cases, and the exceptional need for expedition.'' Senate Committee on the Judiciary, comparative print on revision of S. 7, 79th Cong., 1st Sess. 7 (1945) (discussing 5 U.S.C. 554(a)(6)).[527] Furthermore, they do not, and cannot, contest that in several other representation case contexts, including—most notably—post-election hearings on election objections and voter challenges, the Board long ago established that discretionary briefing is the better practice. Discretionary briefing accords with the Supreme

[524] At various times, including in 1959, at the time of the Landrum-Griffin amendments to the Act, Congress has considered undoing the 1947 change to allow hearings to come after the election, but to date it has not done so. As such, it is still the intent of the 1935 Congress, as modified by the very limited changes in 1947, which controls the analysis here.

[525] It should also be noted that parties are also free to submit affidavits supporting their proffers.

[526] Contrary to the dissent, the rules do not treat offers of proof as ''evidence'' in decisions ''on the merits.'' Offers of proof are used only to determine whether the evidence they describe is relevant, or whether the benefit of admitting it outweighs the burden.

We also disagree with Member Miscimarra's claim that the final rule conflicts with the Act by allowing off-the-record communications between hearing officers and regional directors in order for hearing officers to report—and regional directors to rule on—offers of proof. As shown in the commentary (and as more fully discussed in connection with § 102.66), this aspect of the final rule codifies a best practice that has been in place for decades. The practice does not run afoul of the statute's requirement that hearing officers not make recommendations as to how the regional director should rule. Contrary to Member Miscimarra, we see no similarity between a hearing officer seeking a regional director's ruling on an offer of proof, and the practice—prohibited in 1947—of trial examiners attending executive sessions of the Board to defend the trial examiner's findings against party exceptions. See S. Rep. No. 80–105, at 10.

In any event, parties retain the right to present their arguments directly to the regional director through a request for special permission to appeal. Amended 102.65(c); see *Laurel Assoc. Inc.,* 325 NLRB at 603 & n. 13 (regional director rules on party's request for special permission to appeal a hearing officer's rejection of its offer of proof).

[527] We disagree with the dissent's claim that ''some measure of complexity is the norm, not the exception'' with respect to representation cases. In the vast majority of cases, the parties resolve all of their issues without resort to a hearing. As for the relatively few cases that do go to hearing, the issues are typically so straightforward that most hearings last less than 1 day. And in those relatively few cases where parties request review of the regional director's decision, the Board usually denies the request in an unpublished decision.

Court's decisions permitting administrative agencies the flexibility to choose between oral argument and written briefing. Compare *Mathews* v. *Eldridge,* 424 U.S. 319, 345 (1976) (written submission without oral hearing), with *Goss* v. *Lopez,* 419 U.S. 565, 581–82 (1974) (oral hearing without written submission). The final rule allows regional directors to decide whether to allow the filing of post-hearing briefs.

The Board clearly has the authority to make the change in question and has a valid reason to do so. Our colleagues argue for a different choice because, in their view, regional directors' decisions will be better reasoned and representation cases processed more expeditiously if briefing is permitted. This is undoubtedly true in some cases, and undoubtedly false in others; we think regional directors can judge whether briefing would be helpful on a case-by-case basis, and so that is what the rule provides. The Casehandling Manual already instructs hearing officers in pre-election proceedings to ''encourage the parties to argue orally on the record rather than to file briefs.'' Section 11242. Indeed, our colleagues' own reference to the drafting guide demonstrates that briefs are often of so little help that the drafters are instructed to begin before the briefs arrive.[528] The dissent claims that the record does not show that this change will speed the process, but in cases where briefs would be unhelpful that is reason enough to dispense with them.[529] Just as in the post-election context, the rule eliminates the one-size-fits-all approach in favor of flexibility to tailor the briefing to the case.

D. Post-Election Board Review

The dissent argues that post-election disputes should be subject to mandatory Board review. Yet Section 3(b) of the Act expressly permits the Board to delegate to its regional directors the power to direct elections and to certify the results, subject to a party's right to request Board review. And in *Magnesium Casting,* the Supreme Court held that the Board may engage in discretionary review of regional directors' decisions. It is rational and appropriate for the Board to continue that practice by making Board review of regional director post-election decisions discretionary.

The Board should not devote more of its resources to processes that—as our colleagues concede—have little discernible effect on case outcomes. Discretionary review is sufficient to allow the parties to bring to the Board's attention those cases which merit review.

The dissent argues that by applying discretionary review to post-election decisions, we are ''improperly diminishing the Board's role'' in a manner inconsistent with Section 9(b)'s admonition for the Board to determine the appropriate unit in each case ''in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act[.]'' Yet, the Board already exercises only discretionary review of unit appropriateness questions. This is unquestionably consistent with the Act, as the Supreme Court has already held.

And in this context, there have been no problems of the sort predicted by the dissent: No dearth of opportunities for clarification or dissent, no breakdown in uniformity of law and policy, no development of ''regional'' precedent, and no increase in test-of-certification cases. The final rule merely applies precisely the same standard to post-election review. The dissent does not explain why its concerns have any greater salience in the post-election context than they have pre-election, where they have proved to be unfounded.

The dissent also argues that the stipulation rate may fall if parties cannot preserve nondiscretionary review of post-election issues under a stipulated election agreement. Their argument supposes that a party enters an agreement it would otherwise not make—thereby waiving the right to contest any and all appropriate unit issues (as well as most voter eligibility issues)—because the party is concerned about the off-chance that outcome-determinative challenges or objections that might arise later would ultimately be resolved against them by the regional director, and that, even though the issue would not be sufficient to merit *discretionary* Board review, it nonetheless would be sufficient to justify *reversing* the regional director's decision if only that party could insist on mandatory Board review. Simply stating the chain of logic here demonstrates its attenuation. In our experience, the possibility that mandatory post-election review will make a difference for a particular party in a particular case is so remote that it would matter little to a party compared to the issues being resolved in the election agreement itself. For this reason we find it extraordinarily unlikely that election agreements are being signed by parties in order to secure post-election Board review.[530]

Under the final rule, the Board will apply the same discretionary standard to review of regional directors' post-election determinations, whether the election was directed by a regional director or agreed to by the parties. And so, again, the choice between stipulation and litigation remains unrelated to the availability of post-election review, as both lead to the same result.

E. Voter List

We are not far apart from our dissenting colleagues as to the content of the voter list, but we disagree on certain significant details. We all agree that the voter list should be expanded. Our colleagues raise no objection to the inclusion of employee work locations, shifts and job classifications; they agree not to mandate the inclusion of employees' work email and phone numbers; they agree that the agency should not further explore hosting a protected communications portal to facilitate nonemployer party-employee communication; and they would conditionally support employee's personal email address and phone numbers as valuable additions to the voter list. Unfortunately, the condition of their support for adding personal email addresses and phone numbers is to add opt-out procedures, a condition that we cannot agree to.

The nub of our disagreement over the need for opt-out procedures may be our differing views of the value of employees' receipt of communications from all parties to the election, as balanced against any risk of harm to those employees. Our colleagues fault us for not taking account of ''statistically proven probabilities'' concerning, presumably, the likelihood of such harm. Yet, our colleagues give no weight to the nearly 50-year absence of

[528] We note that the 1997 Report of Best Practices Committee—Representation Cases, prepared by a committee of primarily NLRB regional directors, deemed it a ''best practice that the hearing officer should solicit oral argument in lieu of briefs in appropriate cases since in some cases briefs are little, if any, assistance to the Regions and may delay issuance of the decision.'' It also urged hearing officers to: ''ensure that the parties state on the record the issues and their position on each issue at the end of the hearing. Such statements will assist the Region in preparing the decision more quickly.'' p. 10. We agree with this advice of NLRB regional directors from almost 17 years ago which is only now being codified.

[529] In any event, we think it abundantly clear that the current right to a 7-day briefing period with permissive hearing officer extensions of up to 14 additional days adds some measure of unnecessary delay to case processing. In sufficiently straightforward cases, therefore, a collateral benefit of this change in the rule is that decisions will issue more promptly.

[530] Most parties prefer stipulated election agreements to consent agreements for that reason, but that preference has nothing to do with the choice between stipulation and litigation.

evidence of voter lists being misused by the nonemployer parties. Given that the rulemaking record shows not a single instance of voter list misuse dating back to the 1960s, their concerns appear to be entirely speculative.

Against any such risk we must weigh the drawbacks and limits of an opt-out procedure. *Excelsior* held explicitly that even unsolicited communication from nonemployer parties remains an important part of the election process, and this would be severely abrogated by an opt-out procedure. Although our colleagues state that they favor a ''wide open debate,'' they are unwilling to mandate the disclosure of the contact information that would ensure that employees hear from a party other than the employer. A wide open debate cannot take place unless employees are able to hear all parties' views concerning an organizing campaign, including views to which they may not be predisposed at the campaign's inception. The *Excelsior* doctrine has long sought to ensure that a two-sided debate is possible by maximizing the likelihood that all the voters will be exposed to nonemployer-party messages concerning representation. If employees are allowed to opt out of nonemployer communication altogether, or even just from the forms of communication that have become most widely used and commonplace, then this interest is severely undercut. Opening channels of communication allows a more informed exchange of ideas and permits all employees to knowledgeably evaluate the claims and counter-claims being made by the parties.[531]

In addition, by offering an opt-out possibility to employees, the agency would be implicitly suggesting to employees that they have something to fear from the nonemployer party's possessing their contact information. Moreover, an opt-out would inappropriately inject the agency into the employees' evaluation of the source of campaign speech by implicitly devaluing nonemployer speech. Our colleagues make little attempt to explain why these fundamental inconsistencies between an opt-out policy and the purposes underlying *Excelsior* should not control the analysis.[532] We think that a free and fair exchange of ideas is much more likely to take place if nonemployer parties have access to modern methods of communication, and are not restricted to door-to-door solicitation and the U.S. mail, as under the *Excelsior* policy dating back to the 1960s.

Our colleagues point to several other concerns discussed in the final rule regarding opt-out procedures generally (delay, increased litigation, and further unavoidable invasions of employee privacy), and assert that those concerns would be irrelevant to their specific opt-out proposal. We disagree. First, our colleagues' proposal can only be said to avoid delay by adhering to the 7-day status quo for production of the voter list—a timeframe that the final rule shows to be unnecessary based on technological developments since the 1960s—and accordingly reduces to 2 business days. Second, their proposal creates the same risks of litigation about employer coercion discussed in the preamble above. Third, and perhaps most notably, the proposal still forces unwilling employees to reveal something about their preferences—undermining the fundamental purpose of the secret ballot in Board elections. Anyone who sees the list—necessarily including a petitioning union to whom it may be addressed—will know which employees opted out.[533]

As to the dissent's position that the time allowed for producing the voter list should remain the same 7 days first announced in the 1960s, when parties most often relied on paper records for assembly and U.S. mail for delivery, we think that the final rule merely recognizes that times have changed, and that the typical employer will easily be able to comply with a 2-business-day timeframe for production of the list using electronic records and email delivery. Of course, an employer may begin the task earlier. Indeed the final rule's statement-of-position requirement will provide employers at least 7 days to produce an initial list of employee names and work locations, shifts, and job classifications; contact information may be compiled at this time in anticipation of the second list. We also note that the rule provides an exception to the usual deadline for extraordinary circumstances, which should mitigate the dissent's concern.

F. Blocking Charges

We disagree with the dissent's concluding assessment that the final rule's changes to the blocking charge policy are not valuable. Our colleagues concede that the final rule's requirement of simultaneous offers of proof and prompt witness availability to speed regional directors' investigation of blocking charges' merits are an improvement over the status quo. In this regard, they share the opinion of comments from both labor organizations and employer associations, as noted in the discussion of § 103.20 above. Our colleagues' real complaint appears to be that the final rule does not go as far as they would like. In our view, our colleagues' suggested changes—even if only for a ''3-year trial period''—would abandon key aspects of a longstanding policy which serves a very important function in protecting employee free choice.

The basic blocking-charge policy that we endorse today has been applied by the Board to protect employee free choice from the early days of the Act to the present. See *U.S. Coal & Coke,* 3 NLRB 398 (1937); *Southern Bakeries*, 26–RD–081637 (March 31, 2014). As the Fifth Circuit explained in 1974:

[531] The dissent argues that the final rule is somehow inconsistent with the Board's recent decision in *Purple Communications*, 361 NLRB No. 126 (2014). In *Purple Communications*, the Board addressed the right of employees under Section 7 of the National Labor Relations Act to effectively communicate with one another at work regarding self-organization and other terms and conditions of employment. The Board held that employers that have chosen to give their employees access to their email systems must ordinarily permit employee use of email for statutorily-protected communications on nonworking time. The dissent quotes a single phrase from the decision, omitting its explanatory context, which follows: ''[S]ocial media, texting, and personal email accounts, however commonly they may be used for communications unrelated to the workplace, simply do not serve to facilitate communication among members of a particular workforce [, as employees may have] no practical way to obtain each others' email addresses, social media account information, or other information necessary to reach each other individually or as a discrete group (as distinct from the general public) by social media, texting, or personal email.'' The differences between the final rule and *Purple Communications* are obvious. The rule addresses campaign communications between the union (or other non-employer parties) and employees, while *Purple Communications* addresses only employee communications among themselves, not necessarily during an election campaign. And it is precisely the problem identified in the quotation from *Purple Communications* that the rule seeks to solve by requiring inclusion of personal email addresses and phone numbers. Indeed, it is the dissent which is inconsistent on this point, suggesting on the one hand that this material is so extremely private an opt-out is necessary, and on the other that this information is so widely available that there is no need to provide it in the first place.

[532] Indeed, the dissent's presumed disagreement with these conclusions is only implicitly addressed through their view that an opt-out requirement would not disrupt the balance struck in *Excelsior* because an opt-out would be unnecessary for employee home addresses—information that is arguably more private, and whose disclosure is potentially more intrusive, than phone numbers or email addresses. In contrast, we are skeptical that an opt-out could rationally be applied to only employee phone and email without also reaching home addresses, and thus clearly disturbing the balance struck in *Excelsior*.

[533] We note our colleagues' agreement that the unsubscribe option that they also advocate—when employed on its own—would do nothing to allay privacy concerns having to do with the disclosure of contact information in the first place. The uncertain benefit attendant to an unsubscribe option cannot counterbalance the costs, not the least of which is an inconsistency with the *Excelsior* doctrine similar to the one from which the opt-out proposal suffers.

If the employer has in fact committed unfair labor practices and has thereby succeeded in undermining union sentiment, it would surely controvert the spirit of the Act to allow the employer to profit by his own wrongdoing. In the absence of the 'blocking charge' rule, many of the NLRB's sanctions against employers who are guilty of misconduct would lose all meaning. Nothing would be more pitiful than a bargaining order where there is no longer a union with which to bargain.

Bishop v. *NLRB*, 502 F.2d 1024, 1029 (1974). We see no reason to forebear codifying a policy applied so consistently and for such a rational purpose. Neither the commenters nor the dissent have identified any change in circumstances that would justify changing the policy, let alone identified any compelling reason to abandon a policy continuously applied since 1937.

The dissenters object that codification would make future changes ''more difficult'' by requiring new notice-and-comment rulemaking. In our view, if codification means that any future change in the policy would involve notice and comment rulemaking, so much the better. We think it makes good sense, before changing a policy of this vintage, to fully air the matter in public and establish good reason for the change. We do not believe that obtaining the comments of the public is a difficulty to be avoided.

In criticizing the final rule's refusal to cut back on the blocking charge's application, the dissent accuses us of paying more attention to the delay caused by permitting litigation of individual eligibility or inclusion issues than to the delay caused by the blocking charge policy. If all we were concerned about was reducing delay between the filing of a petition and the holding of an election, the dissent would have a fair point. But to repeat once again, not only is delay *not* our only concern, but it is not even a primary concern for many of the amendments; indeed, for certain changes, it is not a consideration at all. Unfair labor practice charges that warrant blocking an election involve conduct that is inconsistent with a free and fair election: It advances no policy of the Act for the agency to conduct an election unless employees can vote without unlawful interference. There is no inconsistency between the final rule's preservation of that basic policy and the other changes made by the final rule. Both actions are taken consistent with the Act's purposes, seeking an appropriate balance of efficiency, expedition and fairness in resolving questions of representation.[534]

G. Changes From the NPRM

The final rule embodies numerous and significant modifications to virtually every key aspect of the NPRM, as well as to the limited amendments adopted by the Board in December 2011. These modifications include, for example:

- *Notice of Petition for Election:* The final rule rejects the NPRM proposal that an employer's failure to ''immediately post'' an initial notice about the petition would constitute per se objectionable conduct and provides that the Notice of Petition for Election will make clear that no final decisions have been made yet regarding the appropriateness of the petitioned-for bargaining unit or whether an election will be conducted.
- *Statement of Position:* The final rule rejects the NPRM's requirement that if an employer disagrees that the petitioned-for unit is appropriate, it must describe in its position statement the most similar unit that it concedes is appropriate; clarifies that an employer does not have to supply any employee contact information to the regional director (or nonemployer parties) as part of its Statement of Position; requires that parties will always have no less than 7 days notice of the due date for completion of the Statement of Position form; provides that the Statement of Position ordinarily will be due at noon on the business day before the hearing; and establishes standards for granting requests to postpone the due date for the Statement of Position.
- *Scheduling the pre-election hearing:* Pre-election hearings ordinarily will be set to open 8 days, not 7 days, from service of the notice of hearing by the Regional Director; standards are established for granting requests to postpone the pre-election hearing.
- *Conduct of the pre-election hearing:* The final rule rejects the NPRM's mandatory 20% rule, whereby hearing officers generally would have barred litigation of individual eligibility or inclusion issues involving less than 20% of the unit; rejects the proposed summary judgment standard and mandatory offer-of-proof procedure, whereby hearing officers would only receive evidence if the parties' offers of proof raised genuine disputes as to material facts; and clarifies that the regional director, not the hearing officer, will decide in each case the issues to be litigated, whether petitions may be amended, whether parties may intervene, and whether hearings will continue day to day.
- *Post-hearing briefs:* The final rule rejects the proposal to vest hearing officers with the authority to determine whether parties may file post-hearing briefs, and instead vests that authority with the regional director.
- *Decision and direction of election:* The final rule rejects the portion of the proposed mandatory 20% rule whereby regional directors generally would have deferred deciding individual eligibility or inclusion issues involving less than 20% of the unit; rejects the proposal that would have permitted regional directors to direct elections without simultaneously providing a statement of reasons; and provides, unlike the NPRM, that the direction of election need not specify the election details if the regional director concludes it is appropriate to consult with the parties yet again regarding those details, notwithstanding that the parties' positions will have already been solicited at the hearing.
- *Review of a direction of election prior to the election:* The final rule rejects the proposal to eliminate the pre-election request-for-review procedure, and instead allows parties to choose whether to file their requests for review either before the election or after the election; creates explicit procedures for requesting stays of the election and impoundment and/or segregation of ballots; and rejects the proposal that the Board grant requests for special permission to appeal from regional director rulings only in extraordinary circumstances where it appears that the issue would otherwise evade review.
- *Notice of Election:* The final rule rejects the proposal to reduce the period for posting the notice of election from 3 working days to 2, and likewise rejects the proposal that the regional director transmit election notices directly to employees, if practicable, such as by work email or phone.
- *Voter list:* The final rule clarifies that employers are not required to provide the work email addresses or work phone numbers of its employees as part of a voter list to either the nonemployer parties or the regional director; explains that employers have 2 business days, rather than 2 calendar days, to provide the voter list, unless a longer time is specified in the direction of election or is agreed to by all parties; and clarifies restriction language regarding use of the voter list.
- *Offers of proof in support of election objections:* Unlike the NPRM,

[534] The dissent finds it ''paradoxical'' that a union filing a blocking charge may affect the timing of an election by filing a request to proceed. The true paradox, in our view, would be the converse: Allowing an employer to delay an election over the objections of a union and thereby doubly benefit from its unlawful conduct. In any event, the dissent ignores the fact that an employer, too, may affect the timing of an election through settlement of unfair labor practice allegations.

the final rule provides that regional directors may extend the time for filing offers of proof in support of election objections upon request of a party showing good cause.

• *Post-election hearing:* The final rule provides an additional 1-week period between the tally of ballots and the opening of post-election hearing.

H. Features of the Final Rule as to Which There Is No Substantive Disagreement

• *Petition filing:* Permitting electronic filing of petitions;

• *Showing of Interest:* Requiring the petitioner to simultaneously file its showing of interest with its petition;

• *Notice of Petition for Election:*

○ Requiring the employer to post a more informative notice upon the filing of a petition;

○ triggering the posting requirement by the regional director's service of the notice of hearing;

○ requiring the employer to also electronically distribute the Notice of the Petition for Election if it customarily communicates with its employees electronically;

• *Conduct of the pre-election hearing:*

○ Rejecting the proposed summary judgment standard and mandatory offer-of-proof procedure, whereby hearing officers would only receive evidence if the parties' offers of proof raised genuine disputes as to material facts;

○ making offers-of-proof at the pre-election hearing part of the record in § 102.68 (while omitting any reference in § 102.68 to the record in post-election proceedings);

• *Transfer Procedure:* Eliminating the transfer procedure;

• *Requests for Review:*

○ Eliminating the requirement that parties file a request for review of a decision and direction of election prior to election or be deemed to have waived the right to contest the decision thereafter;

○ providing that requests for review shall not stay regional director actions unless specifically ordered by the Board;

○ providing a procedure for requesting stays of elections and impoundment and/or segregation of ballots;

• *Scheduling of Election:* Eliminating the 25-day waiting period after issuance of the direction of election in contested cases;

• *Decision and Direction of Election:* Rejecting the proposal to permit regional directors to direct elections without simultaneously providing a statement of reasons;

• *Transmittal of Decision and Direction of Election:* Permitting regional directors to transmit the decision and direction of the election and the election notice together and by email, fax or overnight mail;

• *Notice of Election:*

○ Requiring the employer to electronically distribute the Notice of Election if the employer customarily communicates with employees in the unit electronically;

○ rejecting the proposal to reduce the period to post paper copies of the notice from 3 to 2 working days;

○ rejecting the proposal that regional directors transmit election notices directly to employees if practicable, such as by work email or phone;

• *Voter List:*

○ Requiring the employer to include not just employee names and home addresses, but also employee work locations, shifts, and job classifications on the voter list;

○ requiring the employer to produce the voter list in an electronic format approved by the General Counsel unless the employer certifies it does not possess the capacity to do so;

○ rejecting a proposal for the agency to host sealed-off communication portals;

• *Election Objections:*

○ Requiring parties to simultaneously file with their election objections a supporting offer-of-proof

○ providing that regional directors have discretion to grant more time for the filing of offers of proof upon request of a party showing good cause;

• *Post-election Hearings:* Providing that the post-election hearing open 21 days, not 14 days, from the tally of ballots or as soon as practicable thereafter, unless the parties agree to an earlier date;

• *Service:* permitting the Board to serve papers on parties electronically;

• *Streamlining the Rules and Regulations:*

○ Eliminating subpart C of Part 101; and

○ rejecting the proposal to eliminate subparts D & E of Part 101.

VII. Dissenting Views of Members Philip A. Miscimarra and Harry I. Johnson III

Members Philip A. Miscimarra and Harry I. Johnson III, dissenting.

We dissent from this Final Rule, and we have great regret that the Board has not chosen one of the available paths that would have permitted an assessment and resolution of these issues with unanimous support among all Board members and broad-based support among practitioners, scholars and advocates for employees, unions and employers. Much of the problem, but certainly not the main problem, involves the immense scope and highly technical nature of the Final Rule.

The Final Rule has become the Mount Everest of regulations: Massive in scale and unforgiving in its effect. Very few people will have the endurance to read the Final Rule in its entirety. Recognizing that few will survive the climb, we offer the following selective observations at the outset:

• *Rule's Primary Purpose and Effect: Union Elections As Quickly As Possible.* The Final Rule adopts almost all of what was set forth in the February 2014 Proposed Rule, which in turn was nearly identical to what the Board originally proposed in 2011.[535] There are minor changes, but the Rule's primary purpose and effect remain the same: Initial union representation elections must occur as soon as possible. The Rule's defects also remain the same, uncured by the majority's lengthy discussion, which reflects an awareness of criticisms that are far too often summarily rejected.

• *Election Now, Hearing Later.* The Rule would impermissibly conduct expedited representation elections before any hearing addresses fundamental questions like who is eligible to vote, thereby resulting in an ''election now, hearing later.'' This ''election now, hearing later'' approach was twice rejected by Congress, in amending the National Labor Relations Act (NLRA or Act) in 1947 and 1959, and is contrary to the statute's requirement—twice affirmed by Congress—mandating an ''appropriate hearing'' prior to any representation election.

• *Vote Now, Understand Later.* The Rule improperly shortens the time needed for employees to understand relevant issues, compelling them to ''vote now, understand later.'' Regarding these issues, the Rule takes self-contradictory positions that are contrary to common sense, contrary to the Act and its legislative history, and contrary to other legal requirements directed to the preservation of employee free choice, all of which focus on guaranteeing *enough* time for making

[535] In these dissenting views, we refer to the current Final Rule as ''Final Rule'' or ''Rule,'' to the February 2014 Proposed Rule as the ''Proposed Rule'' or ''NPRM,'' to the nearly identical June 2011 proposed rule as the 2011 Proposed Rule, and to the more limited December 2011 final rule adopting elements of the 2011 Proposed Rule as the 2011 Final Rule. The 2011 Final Rule was invalidated by the United States District Court for the District of Columbia, *Chamber of Commerce of the United States* v. *NLRB,* 879 F. Supp. 2d 18, 21, 25, 30 (D.D.C. 2012), appeal dismissed 2013 WL 6801164 (D.C. Cir. 2013), and was subsequently vacated by the Board.

important decisions. The Rule operates in reverse, making the available time as short as possible.

• *Infringing on Protected Speech.* By requiring elections to occur as quickly as possible, the Rule curtails the right of employers, unions and employees to engage in protected speech. We believe this infringement on protected speech is impermissible, but even if it is within the Board's authority, it is ill-advised and poorly serves the Act's purposes and policies.

• *Lack of Need for the Rule.* The Rule leaves unanswered the most fundamental question regarding any agency rulemaking, which is whether and why rulemaking is necessary. Objective evidence demonstrates that the overwhelming majority of existing elections occur without *any* unreasonable delay (substantially more than 90 percent of elections occur within 56 days after petition-filing). Although a small number of elections involve more time, this is not a rational basis for rewriting the procedures governing all elections. The Final Rule does not even identify, much less eliminate, the reasons responsible for those few cases that have excessive delays.

• *Due Process.* The Rule greatly accelerates all deadlines associated with representation elections; it selectively imposes on employers the duty to submit a comprehensive written position statement 7 days after notice of a petition-filing by a union; it permits post-submission ''amendments'' only in narrow circumstances; the new ''pleading'' requirements, while facially neutral, will in practice weigh far more heavily on employers than on unions attempting to organize nonunion employees; the Rule directs the exclusion of evidence regarding important election issues; and it directs hearing officers in most instances not to permit post-hearing briefs (which, currently, adds a mere 7 days to the pre-election timetable); and it codifies and places increased reliance on private consultation and decisionmaking between hearing officers and regional directors, conducted off the record (and thus precluding review by the Board, especially regarding matters that are deferred or excluded from the hearing). In our view, these changes are fundamentally unfair and will predictably deny parties due process by unreasonably altering long established Board norms for adequate notice and opportunity to introduce relevant evidence and address election-related issues.

• *Improperly Diminishing the Board's Role.* The majority not only rewrites nearly all procedures governing elections, it eliminates any mandatory role for Board members in resolving post-election questions that arise from the Rule (relegating this to regional directors and to the courts, with only discretionary and post-election review by the Board). The Final Rule articulates no necessity for a ''hands-off'' policy of Board non-involvement in post-election cases, which we believe is irreconcilable with the statute's requirement that the Board ''*in each case* * * * assure to employees the *fullest freedom* in exercising the rights guaranteed by this Act.'' [536]

• *Disclosures and Employee Privacy.* The Rule imposes new mandatory disclosure requirements obligating employers to disclose personal contact information of unit employees, including all personal email addresses and cell phone numbers in the employer's possession. However, the Final Rule's justification for these expanded disclosure requirements (the importance of personal email and cell phones to protected concerted activity in the workplace, given the ''prevalence'' at ''work'' of ''cell phones,'' which have become ''the preferred mode of communication for many young people'') is irreconcilable with *Purple Communications,* 361 NLRB No. 126 (2014), where the Board majority insists that ''social media, texting, and personal email accounts'' are not even ''germane'' because they ''simply do *not* serve to facilitate communication among members of a particular workforce'' (emphasis added). Moreover, the Final Rule adopts the expanded disclosure requirements without any employee ''opt-out'' right regarding such information. The Rule even rejects privacy-enhancement measures as simple as requiring an ''unsubscribe'' link in election-related texts and emails, notwithstanding the current widespread use of such measures in other third-party communications.

• *The Consensus Path Not Taken.* Most disappointing is the Rule's failure to incorporate reforms that could have had unanimous Board member support, and substantial support among practitioners, scholars, and advocates for employees, unions and employers. We favor (i) making representation procedures more effective; (ii) having most representation elections occur at least within 30 to 35 days after petition-filing; (iii) changing the Board's internal procedures so virtually all elections—disputed or not—would occur within 60 days after petition-filing; and (iv) adopting stricter, more expansive remedies for unlawful election conduct.

As made clear in our dissent to the Proposed Rule,[537] we believe the Board should do everything within its power to ensure that representation elections give effect to employee free choice consistent with the Act. We are not irrevocably committed to the status quo, nor do we criticize our colleagues for their desire to more effectively protect and enforce the rights and obligations of parties subject to the Act. We share the same desire and remain committed to work as a full Board to further our responsibilities to everyone covered by the Act.

Although we might have agreed with certain changes in a different, more limited and focused rulemaking process, we unfortunately must dissent from the Final Rule including all its parts. Its unwholesome ingredients are too numerous and inseparable from the whole, in our view, for any slice to be fit for consumption.

A. The Final Rule's Procedures Contradict Requirements in the Act and Are Otherwise Impermissibly Arbitrary

1. *Background: What the Final Rule Would Change.* It is difficult to summarize the changes reflected in the Final Rule because they are so numerous and implicate so many disparate aspects of the Board's longstanding election procedures. However, the principal thrust of the proposed changes is to greatly reduce the time between a representation petition's filing and the election in all cases. Indeed, the prime objective of the Final Rule is to conduct elections ''sooner'' than under current practices. How much sooner is not disclosed. There is no minimum time period for the pre-election campaign. Regional directors are to schedule the election ''at the earliest date practicable.''

Several features of the Final Rule manifest a relentless zeal for slashing time from every stage of current pre-election procedure in fulfillment of the requirement that an election be scheduled ''at the earliest date

[536] Section 9(b) (emphasis added).

[537] This dissent incorporates passages, often verbatim, from our NPRM dissent, because the Final Rule to a substantial degree reflects the wholesale adoption of many provisions in the Proposed Rule, without regard to our earlier views. Many of our earlier views, therefore, apply with equal force to the Final Rule. We note that the majority likewise repeats many passages from the prior NPRMs and the vacated 2011 Final Rule. Where still appropriate, we also quote from the dissenting opinion of former Member Hayes to the vacated rule. Again, the fact that we do so reflects the circumstance that although the Final Rule varies in certain respects from the NPRM first published in June 2011 and republished in February of this year, far too much remains the same.

practicable,'' [538] but the Final Rule's keystone device to achieve this objective is to have elections occur *before* addressing important election-related issues. The Final Rule would relegate these issues to a post-election hearing, or later.

Ironically, this ''election now, hearing later'' approach involves the deferral of questions about voter eligibility and unit inclusion. Yes, this means the election would take place first, and only later, if at all, would there be a hearing regarding issues as fundamental as (i) who can actually vote, (ii) which employees who cast votes would, in the end, be excluded from the bargaining unit and would not even have their votes counted, (iii) whether people who represent themselves as employee-voters during the campaign may actually be supervisors (*i.e.,* representatives of one of the campaigning parties), (iv) whether other people who appear to be supervisors may actually be employee-voters, and (v) whether the union-represented workforce, if the union prevails, will ultimately exclude important employee groups whose absence would adversely affect the outcome of resulting negotiations.

These are indisputably important issues. Not only are they relevant to the election campaign, they can profoundly affect what type of bargaining relationship would exist after the election if the union prevails, and the inclusion or exclusion of certain groups may positively or negatively affect employee bargaining leverage. For employees, the ''election now, hearing later'' approach would create a new norm where essential issues do not even receive potential pre-election *consideration* by a regional director, much less by the Board. This is in addition to the Final Rule's shortening of the period between petition-filing and election, which creates a situation where employees will be forced to ''vote now, understand later.''

The Final Rule makes other equally dramatic changes in other election procedures. It incorporates in our Rules and significantly expands *Excelsior* list disclosure requirements with more severe time limitations and without adequate protection of legitimate privacy concerns, eliminates the overwhelmingly favored practice of permitting stipulation agreements providing for the automatic right of Board review of post-election issues, and incorporates into our Rules without meaningful change the current blocking charge policy, which impedes the expeditious resolution of questions concerning representation more than any of the processes substantially altered by the Final Rule.

2. *The NLRA's Requirements.* In contrast to the complicated array of changes in the Final Rule, the Act is straightforward: Its fundamental purpose is to guarantee employee free choice when employees vote in elections regarding union representation. Sections 1 and 7 refer to ''the exercise by workers of *full freedom* of association'' encompassing the right of employees to have ''representatives *of their own choosing.*'' [539] Section 7 protects the right of employees to ''*engage* in'' protected activities and ''to *refrain* from any or all of such activities.'' [540] Sections 8(a) and 8(b) prohibit actions by employers and unions that ''restrain'' or ''coerce'' employees in the exercise of protected rights.[541] Section 8(c) and other provisions of the Act protect the free speech rights of employees, employers and unions, consistent with similar guarantees against state-action infringement of free speech afforded by the First Amendment.[542] Section 9(a) provides for unions to represent employees in an appropriate unit to the extent they are ''*designated* or *selected** * * by the majority of the employees in [the] unit.'' [543] And Section 9(b)—specifically pertaining to elections—refers to the Board's obligation ''in each case'' to ''assure to employees the *fullest freedom* in exercising the rights guaranteed by [the] Act.'' [544]

Significantly, *nowhere does the Act contain an express statement that elections should be held at the earliest date practicable.* Rather, when it comes to preserving the ''fullest freedom'' of employees to exercise their protected rights in an NLRB-conducted election, the Act makes other considerations more important than speed:

(a) *Neutrality.* Congress has mandated that the Board remain neutral while preserving employee choice, which is consistent with the Act's protection of employee rights to ''engage in'' concerted activities and to ''refrain from any or all of such activities.'' [545]

(b) *Knowledge of Representation, Bargaining and NLRA Rights.* In 2011, the Board stated that the great majority

[538] Each of these amendments is designed to abbreviate the pre-election time period: (i) petitioners will now be required to provide the requisite showing of interest with the petition, rather than within 48 hours after filing the petition; (ii) any pre-election hearing must now generally be scheduled to open 8 days from the region's notice of petition; (iii) the right to file a post-hearing brief within 7 days of the close of hearing has been eliminated; (iv) regional directors must ordinarily schedule the election in a decision directing one, rather than leaving the date of the election and other details for further consultation with the parties; (v) the 25-day automatic waiting period after a regional director's decision and direction of election has been eliminated; and (vi) employers have only 2 days after the decision and direction, rather than the current 7 days, to produce the expanded list of employees and contact information.

[539] NLRA Sec. 1, 7, 29 U.S.C. 151, 157 (emphasis added).

[540] *Id.* Sec. 7, 29 U.S.C. 157 (emphasis added).

[541] 29 U.S.C. 158(a)(1), 158(b)(1)(A).

[542] Section 8(c) of the Act reads: ''The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.'' Although Section 8(c) does not directly address representation elections, it has long been recognized by the Board and the courts as protecting speech generally, consistent with the First Amendment. See *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 617 (1969) (''[A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the National Labor Relations Board.''); see also *Chamber of Commerce* v. *Brown,* 554 U.S. 60, 67–68 (2008) (Section 8(c) reflects a ''policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes.'') (internal quotation omitted); *Healthcare Ass'n of N.Y. State* v. *Pataki,* 471 F.3d 87, 98–99 (2d Cir. 2006) (Section 8(c) ''serves a labor law function of allowing employers to present an alternative view and information that a union would not present.''); *United Rentals, Inc.,* 349 NLRB 190, 191 (2007) (''[T]ruthful statements that identify for employees the changes unionization will bring inform employee free choice which is protected by Section 7 and the statements themselves are protected by Section 8(c).''). Section 7 of the Act has been interpreted as broadly protecting the right of employees to engage in speech regarding election issues. *Letter Carriers* v. *Austin,* 418 U.S. 264, 277 (1974) (''The primary source of protection for union freedom of speech under the NLRA, however, particularly in an organizational context, is the guarantee in § 7 of the Act of the employees' rights 'to form, join, or assist labor organizations.'''').

The First Amendment is clearly implicated in Board regulations that impermissibly curtail free speech guarantees since Federal regulation constitutes quintessential state action for purposes of the United States Constitution. See *Chamber of Commerce* v. *Brown, supra* at 68 (noting that the Court recognized ''the First Amendment right of employers to engage in noncoercive speech about unionization'' even before Section 8(c) was enacted).

[543] *Id.* Sec. 159(a) (emphasis added).

[544] *Id.* Sec. 159(b) (emphasis added).

[545] NLRA Sec. 7, 29 U.S.C. 157. The Board must be as neutral in its procedures as in its case adjudications. Concern that the Board's procedures detracted from the agency's neutrality was among the reasons Congress adopted the Taft-Hartley amendments in 1947. See S. Rep. 80–105, 80th Cong., at 3, reprinted in 1 NLRB, Legislative History Of The Labor Management Relations Act, 1947 (hereinafter ''LMRA Hist.''), at 407 (Senate report stating that ''as a result of certain administrative practices which developed in the early period of the act, the Board has acquired a reputation for partisanship, which the committee seeks to overcome, by insisting on certain procedural reforms''). The ''procedural reforms'' insisted upon by Congress in 1947, and reaffirmed in 1959, included a repudiation of precisely the type of arrangement incorporated into the Final Rule.

of employees in the United States lack familiarity with important NLRA principles and many complex principles that govern union representation and collective bargaining.[546] It found that ''*nonunion* employees are *especially* unlikely to be aware of their NLRA rights'' [547] and acknowledged that ''to the extent that lack of contact with unions contributed to lack of knowledge of NLRA rights 20 years ago, it probably is *even more of a factor today.''* [548] The Board has also found that many *employers*—and even some *union* officials—lack familiarity with important NLRA principles and many complex principles that govern union representation and collective bargaining.[549]

(c) *Free Speech.* Finally, employers and unions have protected rights to engage in protected speech prior to an election. As noted, the Supreme Court has characterized Section 8(c) as reflecting a ''policy judgment, which suffuses the NLRA as a whole, as 'favoring uninhibited, robust, and wide-open debate in labor disputes,' stressing that 'freewheeling use of the written and spoken word * * * has been expressly fostered by Congress and approved by the NLRB.''' [550]

3. *The Legal Standards for Administrative Agency Action.* Our colleagues state that their views will be given deference to a degree that must result in the Final Rule's approval.[551] We respectfully disagree. ''Reviewing courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'' [552]

The standard for review of agency rulemaking is principally governed by the Supreme Court's *Chevron* decision [553] and by the Administrative Procedures Act (APA).[554] In *Chevron,* the Court articulated a two-step analysis:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[555]

Step two of the *Chevron* test of an agency's statutory construction somewhat overlaps with the APA, which generally governs the quasi-legislative rulemaking function of administrative agencies and related judicial review. The APA provides that a reviewing court shall ''hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'' [556] Under this standard, an agency ''must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.''' *Motor Vehicle Mfrs. Ass'n of the United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168 (1962)). ''Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency * * * .'' *Id.* Courts enforce this ''hard look'' principle with regularity when they set aside agency regulations that, though well within the agencies' scope of rulemaking authority, are not supported by the reasons that the agencies adduce.[557]

In our view, the Final Rule's primary purpose and consequence—shortening the time from the filing of a petition to the conduct of an election—is contrary to clear Congressional intent, which renders it invalid under *Chevron* step one. Moreover, even if one were to find that Congress has not directly addressed issues in a manner contrary to the Final Rule's electoral revisions, we believe the

[546] The Board based this finding on ''several factors,'' including ''the comparatively small percentage of private sector employees who are represented by unions and thus have ready access to information about the NLRA; the high percentage of immigrants in the labor force, who are likely to be unfamiliar with workplace rights in the United States; studies indicating that employees and high school students about to enter the work force are generally uninformed about labor law; and the absence of a requirement that, except in very limited circumstances, employers or anyone else inform employees about their NLRA rights.'' 76 FR 54006, 54014–15 (2011). As a result, the Board has attempted to expand its outreach efforts, including distribution of a mobile app regarding the NLRB and the Act, which we fully support. See ''National Labor Relations Board Launches Mobile App,'' Aug. 30, 2013 (*http://www.nlrb.gov/news-outreach/news-story/national-labor-relations-board-launches-mobile-app*). 76 FR at 54014–15. In fact, we favor having Agency resources directed to a higher profile public relations campaign regarding the NLRB mobile app and other outreach efforts.

In 2011, the Board attempted to increase familiarity with the Act's requirements by adopting a rule requiring employers to post notices advising employees about the Act (*id.*), but this rule has been permanently suspended after appellate courts ruled that it exceeded the Board's authority. *Chamber of Commerce of the United States* v. *NLRB,* 721 F.3d 152 (4th Cir. 2013); *National Ass'n of Mfrs.* v. *NLRB,* 717 F.3d 947 (D.C. Cir. 2013).

[547] 76 FR at 54016 (emphasis added).

[548] *Id.* (emphasis added).

[549] *Id.* at 54017 (emphasis added). In the words of a union official cited by the Board with approval in 2011: ''Having been active in labor relations for 30 years I can assure you that *both employees and employers are confused about their respective rights under the NLRA.* Even *union officers* often do not understand their rights. *Members and non-members rarely understand their rights.* Often labor management disputes arise because one or *both sides are misinformed about their rights.''* *Id.* at 54017 n.88 (emphasis added).

[550] *Chamber of Commerce* v. *Brown,* 554 U.S. 60, 67–68 (2008) (quoting *Letter Carriers* v. *Austin,* 418 U.S. 264, 272–73 (1974)). See also *Thomas* v. *Collins,* 323 U.S. 516, 532 (1945) (''The right * * * to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly.''); *Thornhill* v. *Alabama,* 310 U.S. 88, 102–103 (1940) (''[I]n the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.'').

[551] The court's ruling clearly indicated that it was deferring any consideration of the rule's other potential infirmities. *Chamber of Commerce of the United States* v. *NLRB,* supra, 879 F. Supp. 2d at 18, 21, 25, 30 (''Regardless of *whether* the final rule otherwise complies with the Constitution and the governing statute—let alone whether the amendments it contains are desirable from a policy perspective—the Board lacked the authority to issue it, and, therefore, it cannot stand. * * * Because the final rule was promulgated without the requisite quorum, the Court must set it aside on that ground *and does not reach Plaintiffs' remaining arguments.* * * * The Court *does not reach—and expresses no opinion on—Plaintiffs' other procedural and substantive challenges to the rule.''*) (emphasis added).

[552] *NLRB* v. *Brown,* 380 U.S. 278, 291 (1965).

[553] *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984).

[554] 5 U.S.C. 551 *et seq.*

[555] *Chevron* at 842–43 (footnotes omitted). In determining whether an agency rule is invalid under step one of the *Chevron* test, the Court indicated that reviewing courts should use ''traditional tools of statutory construction.'' *Id.* at 843 n.9. ''For most judges, these tools include examination of the text of the statute, dictionary definitions, canons of construction, statutory structure, legislative purpose, and legislative history.'' Section of Administrative Law and Regulatory Practice, American Bar Association, *A Blackletter Statement of Federal Administrative Law,* 54 Admn. L. Rev. 1, 44 (2002).

[556] 5 U.S.C. 706 (2)(A).

[557] The Supreme Court has applied the *State Farm* articulation of the APA's ''arbitrary and capricious'' standard to judicial review of both Board adjudicatory and rulemaking proceedings. See *Allentown Mack Sales* and *Service, Inc.* v. *NLRB,* 522 U.S. 359, 374 (1998) (adjudicatory), and *American Hosp. Assn.* v. *NLRB,* 499 U.S. 606, 618–20 (rulemaking).

Final Rule is ''arbitrary or capricious,'' which means it does not warrant deference under the APA.[558] Our colleagues have demonstrated a remarkable indifference to the lack of relevant data in support of the Final Rule's extensive revisions. They have failed to address important aspects of the real problems of unacceptable delay in the Board's election process. And, in our view, they have not articulated a rational connection between the facts found and the choices they have made.

4. *General Problems and Deficiencies in the Final Rule.*

(a) *The Final Rule does not articulate a rational reason for substantially rewriting all representation election procedures.* We still do not understand the reason for embarking on the path our colleagues have taken. As described in our Proposed Rule dissent, the Board has a very successful track record of conducting timely elections. See 79 FR at 7320. Casehandling statistics since 2011 indicate no significant variation from those described in the 2011 proposed election rule. See 76 FR at 36813–14. In 1960, the median time from petition to a direction of election was 82 days, with more time obviously elapsing before the elections occurred (*id.* at 36814 n.16). By 1975, only 20.1 percent of all elections occurred more than 60 days after the filing of a petition, and this percentage decreased to 16.5 percent by 1985 (*id.* at 36814 n.19). Since at least 2001, the Board has applied a well-known target to have elections conducted within a median of 42 days after the petition-filing.[559] Over the past decade, elections have actually occurred within a median of approximately 38 days after the filing of a petition, and in fiscal 2010, the average time from petition to an election was 31 days.[560] Another significant Board target is to hold 90% of all elections within 56 days of the filing of the petition. The Board has consistently done better than that standard.[561] In fact, in 2013, 94.3% of elections were held within that 56-day period.[562] Thus, it is fair to conclude that in 2013, by the Board's own measures, less than 6% of elections were unduly ''delayed.'' Some elections take too long to resolve, but in recent years these cases have been few in number.

The Final Rule's focus on limiting the use of pre-election hearings by substantially narrowing their scope, limiting the evidence accepted, and eliminating the rights of parties to submit written legal arguments is predicated on the false assumption that providing parties with an opportunity to be heard and to develop a full factual record at the pre-election hearing is an impediment to efficient, prompt election case processing. This presumption is directly contrary to the foregoing facts showing that all but a very small percentage of Board cases are not unduly delayed.

The facts further show that the pre-election hearing itself accounts for very little of the overall time it takes to process representation cases. When hearings are required, regions hold pre-election hearings promptly, the hearing rarely lasts more than 1 day, and regional directors thereafter issue decisions with impressive celerity, perhaps facilitated by, but certainly not shown to be impeded by, the filing of post-hearing briefs. In FY 2013, regional directors issued 159 pre-election decisions in contested cases in a median of 32 days following the filing of the petition,[563] well below their target of 45 days. Similarly, in FY 2012, regional directors issued 169 pre-election decisions in contested representation cases after hearing in a median of 34 days, and in FY 2011 regional directors issued 203 pre-election decisions in a median time of 33 days.[564]

These figures show that regional directors consistently issue decisions in contested cases with great efficiency. Contrary to the extended explanation offered by our colleagues—in the interest of justifying severe limits on the timing and scope of pre-election hearings, increased evidentiary and procedural burdens on employers, and extremely limited, discretionary Board review of regional directors' decisions—the facts show that pre-election hearings and regional directors' decisions are simply *not* a cause of significant administrative delay or other identifiable deficiencies.

We do not suggest the Board's work here is necessarily done. However, the available data do not provide a rational basis for the Final Rule's wholesale reformulation of election procedures.

The majority also continues to dismiss the utility of agency time targets and performance standards as measures of case processing efficiency, claiming that those standards evolve and only present a measure of what can be accomplished under the existing procedural regime. Yet, they do not even offer an alternative standard, under the Final Rule, regarding what *should* be accomplished *within what period of time.* Our colleagues find it sufficient to brand certain current practices as primary sources of delay. They are because the majority says they are, and the elimination or amendment of these practices will eradicate delay. The objective facts refute this ipse dixit justification.

Further, there are several important rational inconsistencies in the Final Rule's justification for expediting the conduct of elections: (i) A need ostensibly exists for elections to occur more quickly, yet other Board doctrines delay or defer elections for up to several years; [565] (ii) the Final Rule makes elections occur more quickly—by eliminating time for reasonable preparation, by adopting new,

[558] As the D.C. Circuit has observed, inquiry at the second step of *Chevron, i.e.,* whether an agency has made a permissible statutory interpretation, overlaps with the APA's ''arbitrary and capricious standard.'' See *Shays* v. *FEC,* 414 F.3d 76, 96–97 (D.C. Cir. 2005), and cases cited there. However, the same court has explained that meaningful differences exist between the two standards. *Chevron II* looks to whether the agency has made a reasonable interpretation of an ambiguous provision of its governing statute. The APA ''arbitrary and capricious'' standard looks to whether the agency's exercise of rulemaking authority delegated to it in that statute by Congress is invalid because it is ''arbitrary and capricious.'' See *e.g., Continental Airlines, Inc. v Department of Transportation,* 843 F.2d 1444, 1452 (D.C. Cir. 1988). Thus, most of the Final Rule's provisions will be reviewed and found wanting under the APA standard.

[559] NLRB's 2004 Performance and Accountability Report: Protecting Workplace Democracy, 15–17 and 67 (undated), *www.nlrb.gov/reports-guidance/reports/performance-and-accountability.* In the early 1990s, the Agency's articulated goal was to hold elections within a median of 50 days after the filing of the petition. See General Counsel's Memorandum, GC 93–16, ''Major Accomplishments of the Office of the General Counsel for Fiscal Years (1990–1993),'' 3 (Nov. 24, 1993), *www.nlrb.gov/reports-guidance/general-counsel-memos.*

[560] General Counsel's Memorandum, GC–11–09, ''Report on Midwinter ABA PP Committee,'' 19 (March 16, 2011), *www.nlrb.gov/reports-guidance/general-counsel-memos.*

[561] NLRB Summaries of Operations, fiscal years 2007–2012, and Performance Accountability Reports, 2004–2013, *www.nlrb.gov/reports-guidance/reports.* See GC–11–09, *supra* note 25, at 18–19.

[562] NLRB Performance Accountability Report, fiscal year 2013, *www.nlrb.gov/reports-guidance/reports.*

[563] Reported by NLRB Division of Operations Management, August 8, 2014.

[564] FY 2012 Summary of Operations, General Counsel's Memo 13–01 (January 11, 2013), at *http://www.nlrb.gov/reports-guidance/general-counsel-memos.*

[565] For example, as we discuss later in this opinion, the current blocking charge policy, which the Final Rule incorporates without meaningful change, is an identified cause of substantial delay in representation cases. In addition, recent Board decisions also routinely impose delays of 6 months to a year in successorship situations, and as much as 4 years in initial card-based voluntary recognition situations, before a change in employee sentiment regarding union representation may be tested in an election. See *UGL–UNICCO Service Co.,* 357 NLRB No. 76 (2011) (successorship), and *Lamons Gasket Co.,* 355 NLRB 763 (2010) (voluntary recognition).

accelerated pleading requirements applicable only to employers, by dispensing with post-hearing briefs, and by deferring until following the election evidence regarding issues as fundamental as who can vote, for example—but our colleagues do not adequately address the likelihood that the *overall* time needed to resolve post-election issues *will increase,* as will the number of rerun elections; (iii) most importantly, the Act's purposes and objectives are vitally affected by the amount of time between petition-filing and any election (indeed, this is the near-exclusive justification offered for rewriting nearly all election procedures), but our colleagues affirmatively *disclaim* any need to indicate how much time should or will elapse under the Final Rule between petition-filing and election; and (iv) our colleagues adamantly refuse to acknowledge what has been universally understood by Congress when evaluating the NLRA and virtually every other context when parties make important decisions: Some reasonable minimum time is necessary for protected speech and so parties can be familiar with relevant issues. In all of these respects, among others, we believe the reasoning underlying the Final Rule is insufficient to establish a ''rational connection between the facts found and the choice made.'' *Burlington Truck Lines, supra,* 371 U.S. at 168.

(b) *The Final Rule improperly places speed over all other considerations.* We agree that it is desirable to eliminate systemic inefficiency and protracted delays in the election process. However, as discussed below, the Act's detailed provisions *require* Board proceedings and the consideration of evidence regarding important issues. Indeed, in addition to at least twice rejecting the ''election now, hearing later'' and ''vote now, understand later'' approaches reflected in the Final Rule, Congress enacted other amendments requiring the Board to abandon procedures—ostensibly justified by administrative efficiency—because Congress placed primary importance on having issues resolved without administrative shortcuts, so that Board members would do the ''deciding'' to ensure that *all* decisions would reflect ''the considered opinions of the Board members.'' [566]

Our colleagues declare that ''speed is not the sole or principal purpose'' of the Final Rule, but that their amendments address ''efficiency, fair and accurate voting, transparency, uniformity, and adapting to new technology.'' We do not dispute that these other factors can be legitimate considerations in rulemaking. However, speed is the obvious dominant justification for most of the Final Rule's changes, and the Final Rule accelerates virtually every deadline applicable even when doing so is not required by these other factors.[567] The majority states that ''eliminating unnecessary delay is therefore unquestionably a valid reason to amend these regulations.'' One can hardly argue against eliminating unnecessary ''delay'' in the abstract. As noted below, we advocate aggressive measures by the Board to identify and eliminate those cases (involving less than ten percent of elections) where more than 60 days passes between petition-filing and the election. Yet, here again, there must be a ''rational connection between the facts found and the choice made.'' *Burlington Truck Lines, supra,* 371 U.S. at 168. The majority invokes the language of ''eliminating delay'' as if cases involving undue delays are caused by widespread ''dilatory tactics'' (which is contrary to the available evidence).[568] Moreover, in our view, too many of the Final Rule's changes contradict ''the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.'' *NLRB* v. *A.J. Tower Co.,* 329 U.S. 324, 330 (1946). The Act imposes statutory *requirements* on the Board, including an ''appropriate'' pre-election hearing (Section 9(c) of the Act), and the Board is charged with assuring employees the ''fullest freedom'' in their exercise of protected rights in Board-conducted elections (Section 9(b) of the Act). This plain statutory language, and its legislative history, preclude any suggestion that Congress intended for the Board to emphasize ''speedy representation procedures'' over election-related requirements that the statute expressly imposes on the Board.

Understandably, Board and court cases speak favorably about having ''employees' votes * * * recorded accurately, efficiently and speedily.'' *Id.;* see also *AFL* v. *NLRB,* 308 U.S. 401, 409 (1940) (the Wagner Act was designed in part to avoid ''long delays in the procedure * * * for review of orders for elections''); *Northeastern Univ.,* 261 NLRB 1001, 1002 (1982) (referring to ''expeditiously resolving questions concerning representation''); *Tropicana Prods., Inc.,* 122 NLRB 121, 123 (1958) (''[T]ime is of the essence if Board processes are to be effective.''). Yet, nothing in these cases suggests speed or efficiency should be pursued at

[566] H.R. Rep. No. 80–245, at 25 (1947), reprinted in 1 LMRA Hist. 316; S. Rep. 80–105, 80th Cong., at 8–9, 1 LMRA Hist. 415. After the Wagner Act's adoption, the Board created a ''Review Section'' of attorneys to review transcripts and draft decisions, which a Senate report characterized as disposing of cases ''in an institutional fashion.'' *Id.* Congress amended the Act to prohibit the Board even from employing attorneys for the purpose of reviewing transcripts, apart from each Board member's own legal assistants. *Id.* Thus, NLRA Section 4, 29 U.S.C. 154, added to the Act in 1947, states: ''The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts.'' Congress also amended Section 9(c)(1) by adding language prohibiting hearing officers from even formulating ''recommendations.'' See note 622 *infra,* and accompanying text. In 1959, Congress permitted the Board to delegate responsibility to regional directors regarding representation-election issues, but the Act explicitly conditioned this delegation on each party's right to have the Board review ''any action'' by regional directors. *Id.* This delegation did not expand or modify the authority of hearing officers.

[567] For example, the Final Rule argues that ''uniformity'' favors having all pre-election hearings take place 8 days after petition-filing, but this aspect of the Final Rule contrasts with some Regions that currently allow up to 14 days before conducting the pre-election hearing. The Final Rule invokes ''technology'' to expand the disclosure requirements applicable to the voter eligibility (*Excelsior*) list—thereby requiring employers to disclose available personal employee email addresses and phone numbers, for example—while requiring the submission of the *Excelsior* list *2* business days after the regional director directs an election, which contrasts with the current *7* days.

[568] We disagree with our colleagues' interpretation of a statement by the Supreme Court in *Boire* v. *Greyhound Corp.,* 376 U.S. 473, 478 (1964), and a comment by Senator Taft during debates on the 1947 Taft-Hartley amendments adopted as part of the Labor Management Relations Act (LMRA). According to our colleagues, the Supreme Court noted that ''*the policy in favor of speedy representation procedures* 'was reaffirmed in 1947, at the time that the Taft-Hartley amendments were under consideration.' '' (Final Rule, *supra* (emphasis added), quoting *Boire,* 376 U.S. at 478). The Supreme Court in *Boire* addressed the limited question of whether a Federal court injunction could be obtained, in order to block a Board-scheduled election, based on a challenge to an election-related ruling by the NLRB (in *Boire,* the party seeking the court injunction claimed that the Board erroneously found that it was a joint employer). *Id.* at 476–77. Solely addressing whether Board-ordered elections could be enjoined by a pre-election Federal court proceeding, the Supreme Court stated ''Congressional determination *to restrict judicial review in such situations* was reaffirmed in 1947, at the time that the Taft-Hartley amendments were under consideration, when a conference committee rejected a House amendment which would have permitted any interested person to obtain review immediately after a certification because, as Senator Taft noted, '*such provision* would permit dilatory tactics in representation proceedings.' '' *Id.* at 478–79 (emphasis added; footnotes omitted). Nothing in *Boire* states that Congress in 1947 reaffirmed a generalized ''policy in favor of speedy representation procedures.'' Further, it is even more apparent that Senator Taft did not support a generalized ''policy in favor of speedy representation procedures.'' To the contrary, as noted elsewhere in the text, the amendments sponsored by Senator Taft—which were adopted as part of the LMRA—reaffirmed and expanded the ''appropriate hearing'' requirement, contrary to the Board's pre-1947 practice and contrary to the changes adopted in the Final Rule. See text accompanying notes 572–581, *infra.*

the expense of the Act's *express* principal purpose, which is to safeguard the ''fullest freedom'' of employees to vote in elections that determine whether or not they will be union-represented. NLRA Sec. 9(b), 29 U.S.C. 159(b). Indeed, the Court's statement in *A.J. Tower* that ''Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees'' is entirely consistent with this statutory directive. 329 U.S. at 330.

Further, regarding the timing of elections, the Supreme Court precedent cited in the Final Rule deals with entirely different causes of delay than the processes that are amended or eliminated here. *A.J. Tower* was limited to endorsing the Board policy of not permitting post-election challenges to ballots, which would obviously and inevitably delay finality and accuracy in the ballot count. As indicated previously (see note 568, *supra*), the Supreme Court decision in *Boire* v. *Greyhound* involved an employer's attempt to enjoin election proceedings and gain immediate judicial review of a Board determination that it was an employer under the Act. The Court's rejection of pre-election court review had nothing whatsoever to do with delays attributable to the Board's handling of pre-election issues. To the contrary, as further discussed below, there is extensive legislative history demonstrating that Congress *opposed* ''quickie elections,'' which was a central focus when Congress adopted the Taft-Hartley and Landrum-Griffin amendments in 1947 and 1959, respectively.

The Final Rule's emphasis on speed stands in marked contrast to all of the other contexts in which Congress, courts, and Federal agencies have emphasized the need to guarantee *more* time, not less, when individuals are expected to exercise free choice about representation and other significant matters in a group setting. A substantial universe of laws, regulations, and legal decisions specifically address the time needed for people to review and understand important issues before casting a vote or signing on the dotted line.[569] All of these have one thing in common: They require more time, not less. Against the backdrop of these examples, we have difficulty believing that Federal labor law works in reverse. The thrust of the Final Rule—unintended or not—is that employees make better choices when they vote first, and understand later. Congress and other state and Federal regulators have rejected such reasoning. Given that the Board's primary responsibility is to safeguard employee free choice, especially in elections, the Final Rule in this fundamental respect is deficient.

Finally, it is important to note that the Final Rule reflects a preoccupation with speed between petition-filing and the election, while improperly disregarding the increased delays it may cause in the Board's *overall* representation process: The period between petition-filing and the exhaustion of post-election proceedings and appeals. Postponing many employee eligibility and unit placement issues until the post-election period is likely to require *more* time from petition-filing to the final certification of election results, particularly since the Final Rule provides that parties will not even have a right to obtain any Board member decision regarding pre- and post-election determinations. This means the only guaranteed review of regional director decisions will occur if employers refuse to comply with post-election Board certification, which then provides the opportunity for court review. In this regard, limitations imposed on the creation of a full evidentiary record are likely to cause even more substantial delays because the majority directs the exclusion of evidence that is likely to be indispensable to any meaningful review by regional directors, the Board and the courts of appeals. The Final Rule's changes, which create a greatly accelerated pre-election timetable, impose inflexible new ''pleading'' requirements applicable primarily to the employer, largely eliminate post-hearing briefing, and truncate the record, are likely to produce an entirely new class of procedural and due process challenges—with many more remands from courts of appeals to the Board or from the Board to regional directors (in those relatively rare cases where the Board chooses to exercise its discretion to review a particular case). Only in the second stage of Board litigation will parties have the opportunity to present and respond to evidence, arguments and briefing that could not fully and fairly be litigated earlier. This will result in greater delays between petition-filing and any bargaining between employers and unions, which is the most important end result of representation elections in which the union prevails.

(c) *The Final Rule's limits on pre-election litigation—creating an ''election now, hearing later'' and ''vote now, understand later'' election process—contravene clear Congressional intent.* The Final Rule defines the Board's statutory obligation to conduct an ''appropriate'' pre-election hearing as limited to the presentation of evidence necessary to determine whether a question concerning representation exists. This eliminates the parties' right to present evidence concerning properly contested individual eligibility and inclusion issues.[570] As previously stated, this restrictive definition, and the conferral of authority on regional directors and hearing officers to limit

[569] Examples include 60 days required when employees are affected by mass layoffs or plant closings that trigger notice requirements under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. 2101 *et seq.* (WARN); the 45 days required when a group of employees are offered benefits in exchange for signing a waiver of age discrimination claims, based on the Older Workers Benefit Protection Act (''OWBPA''), 104 Stat. 978 (1990), which added Section 7(f) to the Federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. 626(f); the recommended period of 60–90 days, with a minimum of 30 days, when plaintiffs decide whether to opt-out of a Rule 23 class action, see Federal Judicial Center, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide,* 4 (2010), *http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf;* and the 4–6 week period between the nomination of candidates to be local union officials and subsequent elections. See Office of Labor-Management Standards, *Conducting Local Union Officer Elections: A Guide for Election Officials,* 4 (2010), *http://www.dol.gov/olms/regs/compliance/localelec/localelec.pdf.* See generally our dissenting views in the 2014 NPRM, 79 FR 7344–7345 (Feb. 6, 2014) (dissenting views of Members Miscimarra and Johnson).

[570] It is true that the Final Rule does not completely eliminate the pre-election hearing, nor does the Final Rule totally preclude the possibility that a particular hearing officer might permit the introduction of evidence regarding voter eligibility or supervisory status, for example. However, the Final Rule expressly states that it dramatically narrows the scope and duration of pre-election hearings, and it relegates all but the most basic issues to post-election proceedings. Therefore the Final Rule clearly will not result in pre-election hearings where voter eligibility and inclusion issues are regularly addressed. The Final Rule explicitly states otherwise. Further, the inclusion or exclusion of such evidence would be determined by hearing officers, who, under Sec. 9(c)(1), are not even permitted to make ''recommendations'' about relevant issues.

We also recognize that, under existing Board procedures, elections may take place while some questions remain unresolved, and some employees may cast votes that, if challenged, are ruled upon in post-election proceedings. In all such cases, however, the Act gives parties the right to *present evidence* regarding these issues at a pre-election hearing. And based upon such evidence, the Act requires that the regional director and the Board consider requests to stay the election until such issues are resolved. See text accompanying note 627, *infra.* In addition to dramatically shortening the time period between petition-filing and the election, the Final Rule would impermissibly curtail the right to present any evidence at the pre-election hearing regarding many fundamental issues, which in turn would prevent the regional director and the Board even from considering whether the resolution of such issues is important enough to warrant staying the election. *Id.*

the presentation of evidence on these issues, is a keystone device in the Final Rule's acceleration of the pre-election timeline.[571]

This leads inevitably to a conclusion—relevant when conducting an inquiry under *Chevron* step one—that the Final Rule's exclusion of eligibility and unit-inclusion issues from the ''appropriate hearing'' requirement of Section 9(c)(1) of the Act directly and substantially contravenes Congress's clearly expressed intent in enacting and reenacting that requirement.[572]

Section 9(c)(1) states that, whenever a representation petition is filed, the Board ''shall investigate'' and, if there is ''reasonable cause'' to believe there is a ''question of representation,'' the Board ''shall provide for an appropriate hearing upon due notice.'' Section 9(c)(1) further states that the hearing ''may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto,'' and if the Board finds ''based on the record of such hearing'' that a question of representation exists, the Board ''shall direct an election by secret ballot and shall certify the results thereof.''

Contrary to our colleagues' discussion of this issue, Congress has directly addressed the scope of the requisite ''appropriate hearing,'' and has at least twice rejected the ''election now, hearing later'' and ''vote now, understand later'' approaches reflected in the Final Rule. In particular, Congress has clearly repudiated the notion that the Board may conduct so-called ''quickie elections'' *before* important issues such as eligibility and inclusion are the subject of an ''appropriate hearing.''

Based on the original Wagner Act (which did not require elections but provided for an ''appropriate hearing'' *if* an election was conducted), the Supreme Court decided in 1945 that the ''appropriate hearing'' requirement could be satisfied by a *post*-election hearing. *Inland Empire Dist. Council* v. *Millis,* 325 U.S. 697, 707 (1945). For about 19 months thereafter, the Board conducted a number of prehearing elections and relegated important election-related issues to a post-election hearing. In 1947, Congress explicitly prohibited this practice by adding the aforementioned language in Sections 9(c)(1) and (4) of the Act requiring the Board to conduct an ''appropriate hearing'' *before* any election, and permitting ''the waiving of hearings'' *only* ''by stipulation'' of all parties.[573] Thus, when the Taft-Hartley amendments explicitly prohibited elections without an ''appropriate hearing'' *before* the election, this not only repudiated a practice that had been adopted by the Board, it repudiated the Supreme Court's *Inland Empire* decision.[574]

In 1959, the resurrected concept of having expedited elections *followed* by the consideration of important issues in post-election hearings was part of President Eisenhower's original ''20-point program'' that prompted Congress to adopt the Landrum-Griffin Act. See S. Rep. 86–10, at 3 (1959), reprinted in 1 LMRDA Hist. 82 (''In order to speed up the orderly processes of election procedures, to permit the Board under proper safeguards to conduct representation elections without holding a prior hearing where no substantial objection to an election is made.''). Not only was this ''election first, hearing later'' concept considered throughout the 1959 legislative debates, it was *adopted* in the Senate version of the Landrum-Griffin amendments.[575] Significantly, though authorizing the Board to conduct elections on an expedited basis while deferring important issues to a post-election hearing, the Senate-passed bill explicitly prohibited elections from occurring fewer than 30 days after the filing of a petition. Then-Senator John F. Kennedy—who chaired the Conference Committee and was a proponent of the pre-hearing election concept—repeatedly stated that at least 30 days were required between the petition's filing and the election to ''safeguard *against rushing employees into an election where they are unfamiliar with the issues.''* [576]

Ultimately, Congress still refused to adopt the Senate-passed arrangement because *elections would take place too quickly.* Congress instead reaffirmed the requirement that the Board conduct an ''appropriate hearing'' before any contested election, and it precluded the Board from deferring litigation of voter eligibility and other issues to post-election hearings. Representative Graham Barden, when describing the Senate-passed bill's abandonment, explained that pre-election ''hearings have not been dispensed with. There is not any such thing as reinstating authority or procedure for a quicky election. Some were disturbed over that and the possibility of that is out. The right to a formal hearing before an election can be directed is preserved without limitation or qualification.'' [577]

As is obvious from the legislative record, the core concepts underlying the current Rule (''election now, hearing later'' and ''vote now, understand later'') were not simply matters of peripheral concern when Congress—in 1947 and again in 1959—rejected the notion of having expedited elections without a hearing regarding fundamental election issues like voter eligibility and supervisory status. Thus, from 1947

[571] Other amendments in the Final Rule that impermissibly implement this definition by limiting the presentation of evidence in a pre-election hearing—including the new preclusion standard, permitting offers of proof to substitute for testimonial evidence, and the discretionary 20 percent standard for the exclusion of evidence relating to eligibility and inclusion issues—are discussed in a subsequent section of this opinion.

[572] See also former Member Hayes' discussion of this point in his dissent to the vacated December 2011 rule at 77 FR 25560.

[573] 29 U.S.C. 159(c)(1), (4); 61 Stat. 136 (1947), 29 U.S.C. 141 *et seq.,* reprinted in 1 LMRA Hist. 1 *et seq.* (1974); *NLRB* v. *SW. Evans & Son,* 181 F.2d 427, 429–30 (3d Cir. 1950); H.R. Rep. 86–741, at 24 (1959), reprinted in 1 NLRB, Legislative History Of The Labor-Management Reporting And Disclosure Act, 1959, 782 (1974) (hereinafter ''LMRDA Hist.'') (''During the last 19 months of the Wagner Act * * * a form of prehearing election was used by the NLRB.''); S. Rep. 86–187, at 30 (1959), reprinted in 1 LMRDA Hist. 426 (the practice of holding prehearing elections ''was tried in the last year and a half prior to passage of the Taft-Hartley Act, but it was eliminated in that [A]ct'').

[574] In light of this and other clear expressions of Congress's intent on the precise question of the scope of the statutory term ''appropriate hearing'' *after* the Court's *Inland Empire* decision, we accord less weight to the Court's interpretation of that term in *Inland Empire* than do our colleagues.

[575] See S. 1555, 86th Cong. Section 705 (as passed by the Senate on April 25, 1959), reprinted in 1 LMRDA Hist. 581.

[576] 105 Cong. Rec. 5361 (1959), reprinted in 2 LMRDA Hist. 1024 (emphasis added). To the same effect, Senator Kennedy stated ''there should be at least a 30-day interval between the request for an election and the holding of the election,'' and he opposed proposals that, in his words, failed to provide ''at least 30 days in which both parties can present their viewpoints.'' 105 Cong. Rec. 5770 (1959), reprinted in 2 LMRDA Hist. 1085 (statement of Sen. Kennedy); see also H.R. Rep. 86–741, at 25 (1959), reprinted in 1 LMRDA Hist. 783 (minimum 30-day pre-election period was designed to ''guard[] against 'quickie' elections''). To repeat, Senator Kennedy was a principal proponent of pre-hearing elections. Contrary to our colleagues, we find that his remarks as to what would be required if pre-hearing elections were permitted are germane to the analysis of whether the changes they make to shorten the time from petition to election in all representation cases are rational or arbitrary.

[577] 105 Cong. Rec. 16629 (1959), reprinted in 2 LMRDA Hist. 1714. Cf. H.R. Rep. 86–741, at 76 (1959), reprinted in 1 LMRDA Hist. 834 (indicating that Representative Barden was Chairman of the House Committee on Education and Labor); H.R. Rep. 86–1147, at 42 (1959), reprinted in 1 LMRDA Hist. 946 (indicating that Representative Barden was the ranking House Conference Committee Manager). See also 105 Cong. Rec. A8062 (1959), reprinted in 2 LMRDA Hist. 1813 (opposing ''pre-hearing or so-called quickie election'' and affirming that the ''right to a hearing is a sacred right''); H.R. Rep. 86–741, at 24–25 (1959), reprinted in 1 LMRDA Hist. 782–83 (mandatory period between petition-filing and election ''guards against 'quickie' elections''); 105 Cong. Rec. A8522 (1959), reprinted in 2 LMRDA Hist. 1856 (referencing opposition to pre-hearing election proposal).

until today, the Board's long-established practice has been to conduct a full evidentiary hearing on contested issues prior to conducting an election and to permit the introduction of evidence on unit eligibility and inclusion issues in those hearings *as a matter of statutory right.* This is consistent with Congressional intent in the Taft-Hartley amendments in 1947. It is also consistent with the ultimate knowing determination by Congress not to alter that practice when enacting the Landrum-Griffin amendments in 1959. As to the latter legislative event, the Supreme Court has stated that in reviewing the Board's interpretation of the Act, ''a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation in 1959 is strongly supportive of our view that the longstanding interpretation is the one intended by Congress.'' [578] By this standard, it could not be clearer that the Final Rule's interpretation of ''appropriate hearing'' contravenes Congressional intent.[579]

Furthermore, not only is the Final Rule's interpretation of the scope of an ''appropriate hearing'' clearly contrary to Congress' expressed intent, it is especially objectionable from a policy standpoint to exclude from pre-election hearings evidence regarding *who is eligible to vote.* [580] To state the obvious, when people participate in an election, it is significant whether they actually have a right to vote, whether their vote will be counted, and whether the election's outcome will even affect them.[581] In this respect, the Final Rule's approach would be intolerable in every other voting context, whether it involved a national political election or high school class president. Thus, for good reason, the ''appropriate hearing'' requirement has consistently been deemed to require that pre-election hearings encompass evidence regarding voter eligibility and inclusion issues. The Board's recent decisions have highlighted the importance of determining what employees may be excluded from petitioned-for bargaining units, which prompted a Board majority in *Specialty Healthcare* to change the legal standard governing such determinations.[582]

(d) *The Final Rule curtails protected speech during representation election campaigns.* Section 8(c) and other provisions of the Act protect the free speech rights of employees, employers, and unions, consistent with similar guarantees afforded by the First Amendment. The Supreme Court has long recognized an employer's right to engage in free speech in the labor relations context. See *NLRB* v. *Virginia Electric & Power Co.,* 314 U.S. 469, 477–79 (1941) (nothing in the Act prohibits employers from expressing their views about unions). The Court has also characterized Section 8(c) as reflecting a ''policy judgment, which suffuses the NLRA as a whole, as 'favoring uninhibited, robust, and wide-open debate in labor disputes,' stressing that 'freewheeling use of the written and spoken word * * * has been expressly fostered by Congress and approved by the NLRB.' '' [583] Employers and unions have protected rights to engage in protected speech prior to an election. This right only has meaning if there is sufficient time for the parties to communicate with employees about the choice of representation. Employees should have enough time to listen to both sides of the debate about unionization, to inform their colleagues of their views on the subject, and to consider their options before voting on an issue that could impact their working lives for years to come.

[578] *NLRB* v. *Bell Aerospace Company, Division of Textron, Inc.,* 416 U.S. 267, 274–75 (1974).

[579] Congress's failure to pass electoral initiatives in the Labor Law Reform Act of 1977–78 represented yet another rejection of the ''vote now, understand later'' approach. See Cong. Res. Serv., Digest of Public General Bills and Resolutions, Final Issue, Part 1, 501–02 (95th Cong. 2d Sess. 1979) (recounting passage of bill in House on Oct. 6, 1977; failure of four cloture motions in Senate from June 13–22, 1978; closest votes 58–41 on June 14 and 58–39 on June 15).

[580] Regarding the Final Rule's provisions for Board-conducted elections without even permitting a pre-election hearing about who is eligible to vote, the Rule is on the wrong side of history and common sense. See NLRA Sec. 9(c)(1), (4) (requiring an ''appropriate hearing upon due notice'' before an election, unless there is a ''waiver * * * for the purpose of a consent election''). Addressing the Taft-Hartley Act's rejection of the ''election first, hearing later'' concept, Senator Taft—cosponsor of the legislation—stated, ''It is the *function of hearings in representation cases* to determine whether an election may properly be held at the time; and if so, to decide *questions of unit and eligibility to vote.''* 93 Cong. Rec. 7002 (1947), reprinted in 2 LMRA Hist. 1625 (supplemental analysis of LMRA by Senator Taft) (emphasis added). Addressing the Landrum-Griffin amendments adopted in 1959, Representative Graham Barden—Chairman of the House Committee on Education and Labor, and the ranking House conferee—stated that ''[t]he right to a *formal hearing before an election can be directed* is preserved *without limitation or qualification.''* 105 Cong. Rec. 16629 (1959), reprinted in 2 LMRDA Hist. 1714 (emphasis added), describing H.R. Rep. 86–1147, at 1 (1959), reprinted in 1 LMRDA Hist. 934 (conference report). Chairman Barden stated: ''The right to a hearing *is a sacred right.''* 105 Cong. Rec. A8062 (1959), reprinted in 2 LMRDA Hist. 1813 (emphasis added). Consistent with these requirements, the Board itself has repeatedly held that Section 9(c)(1) *requires* that pre-election hearings provide the opportunity to present evidence regarding who is eligible to vote and questions regarding supervisory status, among other things. See, *e.g., Barre-National, Inc.,* 316 NLRB 877 (1995) (finding that hearing officer's refusal to permit evidence regarding supervisory status ''did not meet the requirements of the Act'' even though the hearing officer—like the Final Rule—would have permitted the individual to vote under challenge, subject to post-election proceedings to determine supervisory status). Because, contrary to our colleagues' position, this requirement stems from the Act and not from our decisions, it cannot be evaded by overruling *Barre-National* and related cases. See also *Angelica Healthcare Services Group,* 315 NLRB 1320 (1995); *North Manchester Foundry, Inc.,* 328 NLRB 372 (1999); *Avon Prods., Inc.,* 262 NLRB 46, 48–49 (1982).

[581] An array of problems and incongruities stem from the broad exclusion of eligibility and inclusion issues from pre-election hearings. Because the Final Rule directs the exclusion of evidence regarding such issues, there will be more situations where many employees cast votes in NLRB-conducted elections where, based on the post-election resolution of eligibility issues, the employees learn their votes were not even counted and, even if the union prevailed, the ineligible employees are excluded from any bargaining. Without a pre-election hearing regarding whether certain individuals are eligible voters versus statutory supervisors, many employees will not know there is even a question about whether fellow voters—with whom they may have discussed many issues—will later be declared supervisor-agents of the employer. Many employers will be placed in an untenable situation regarding such individuals based on uncertainty about whether they could speak as agents of the employer or whether their individual actions—though not directed by the employer—could later become grounds for overturning the election. Also, employees ultimately included in the bargaining unit will not know—at the time they voted—whether they will have the support of other employees who, after the election, end up being excluded from the bargaining unit. Congress clearly intended that parties would have the right to present evidence regarding such issues in the ''appropriate hearing'' required before any non-stipulated election.

As indicated previously (see note 570, *supra*), the point here is not that such issues require *resolution* before every election; the Final Rule adopts the broad-based position that *evidence as to these issues* should be excluded and in many instances will be excluded from the pre-election hearing. This is all the more perplexing given that Congress repeatedly reaffirmed the need for a pre-election hearing to permit evidence regarding such important issues and, in every case, potential pre-election Board review of ''any action'' by regional directors. NLRA Sec. 3(b), 29 U.S.C. 153(b). This deficiency in the Final Rule is not cured by the possibility that hearing officers may, as a discretionary matter, permit evidence regarding some voter eligibility issues in isolated cases. The Final Rule redefines the limited purpose of the pre-election hearing to a determination of whether a ''question of representation'' exists, thereby providing for the deferral of voter eligibility issues until after the election. One cannot reasonably presume that hearing officers and regional directors will exercise ''discretion'' to act at variance with what the Final Rule requires.

[582] *Specialty Healthcare and Rehabilitation Center of Mobile, Inc.,* 357 NLRB No. 83 (2011), *affd. sub nom. Kindred Nursing Centers East, LLC* v. *NLRB,* 727 F.3d 552 (6th Cir. 2013).

[583] *Chamber of Commerce* v. *Brown,* 554 U.S. at 68 (quoting *Letter Carriers* v. *Austin,* 418 U.S. 264, 272–73 (1974)).

The Final Rule is intended to, and inevitably will, substantially shorten the time in all initial organizing representation elections from the filing of a petition, when support for unionization is often at its peak, to the day of the election.[584] The Final Rule will therefore necessarily curtail the ability of parties to exercise their rights to engage in protected speech during the critical pre-election campaign period. Particularly because the consequences of an election can be long-lasting—regardless of whether employees vote for or against union representation—the Final Rule limits the right of *all* parties to engage in protected speech at precisely the time when their free speech rights are most important. Thus, in most cases, parties and employees will have *less time* to share their respective views and engage in robust, lawful debate regarding the positive and negative aspects of union representation. This consequence alone is a matter of constitutional concern. That concern is magnified by the mandate that regional directors schedule an election ''at the earliest date practicable,'' which creates an unacceptably heightened risk parties and employees will have *too little time* at least in some cases, as measured by any reasonable standard, to engage in protected debate.

The majority makes much of the statement, in our dissent to the Proposed Rule, that we did not know the precise point in time when shortening the election timetable would impermissibly deny employers, unions, and employees the right to engage in speech protected by the Act and the First Amendment. The Final Rule dispels any question about this: it *does* effectively and impermissibly curtail the protected speech rights guaranteed to employers, unions and employees under the Act and the First Amendment. The Final Rule substantially abbreviates the time from petition to election in *all* representation cases; as previously stated,[585] the Board has determined that most unrepresented employees—and many employers and union officials—lack familiarity with important NLRA principles and the many complex principles that govern union representation and collective bargaining; the Final Rule explicitly adopts the requirement that elections take place as quickly as ''practicable''; the Rule squarely rejects any reasonable minimum time between petition-filing and election; and our colleagues explicitly disclaim responsibility even to identify an appropriate target time frame that should—or will—result from the Rule.

In short, in respect to free speech concerns, the Final Rule has two infirmities. First, the Rule single-mindedly accelerates the time from the filing of the petition to the date when employees must vote in representation elections (indeed, the Rule overtly requires election voting as soon as ''practicable'' after a petition is filed).[586] Second, the Rule irrationally ignores the self-evident proposition that, when one eliminates a reasonable opportunity for speech to occur, parties cannot engage in protected speech. In combination, these problems inescapably reflect the same uniform purpose and effect: To limit pre-election campaigning and curtail protected speech, contrary to the First Amendment, the Act and decades of case law establishing that all parties—and the Board—regard pre-election campaigns as vitally important.

The substantial body of judicial precedent that governs campaigning in political elections is also relevant here.[587] Numerous courts have ruled that all but the most narrowly drawn durational limitations on political electioneering are impermissible government restrictions of free speech.[588] Further, the Supreme Court has declared: ''It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign.'' [589] Neither should it be the Board's function to curtail opportunities for the identification and discussion of issues in a representation election.

Our colleagues assert that the Final Rule is permissible because it does not completely eliminate the opportunity for employees, employers and unions to communicate about unionization. They argue, for example, that some nonunion employers learn about union organizing *before* representation petitions are filed.[590] However, our colleagues' reliance on possible union-related discussions *before* petition-filing is misdirected because, first, the Final Rule's deleterious impact on speech obviously occurs *after* petition-filing (by dramatically shortening the window between petition-filing and the election), and second, the filing of the petition initiates what the Board and the courts consider the ''*critical period*'' prior to the election, a period during which the representation choice is imminent and speech bearing on that

[584] The majority argues that the Final Rule does not necessarily shorten the time between the petition and the election because it does not set any rigid timelines for the conduct of the election. If that were the case, then there is no point at all to the pre-election elements of the rule that abbreviate the timetable for conducting an election. Further, we have little doubt how regional directors—members of the career Senior Executive Service whose eligibility for annual performance awards depends in substantial part on how their regional office meets time targets—will construe the overriding imperative in the Final Rule that elections be scheduled ''at the earliest date practicable.''

[585] See discussion in text and accompanying footnotes in Sec. A.2, *supra.*

[586] To the extent that the majority relates its First Amendment argument to its claim that ''as soon as practicable'' is the Board's historical standard, we counter that the Rule radically revises what the Board has historically viewed as practicable and, by doing so, greatly increases the risk of free speech infringement.

[587] The majority rejects the analogy between Board elections and political elections. Their view cannot be reconciled with judicial precedent that has long recognized this analogy as apt. See *Wirtz* v. *Hotel, Motel & Club Emp. Union, Local 6,* 391 U.S. 492, 504 (1968) (when creating representation elections, ''Congress' model of democratic elections was political elections in this country''); *NLRB* v. *Hudson Oxygen Therapy Sales Co.,* 764 F.2d 729, 733 (9th Cir. 1985) (''Congress intended representation elections to follow the model of elections for political office.''). See also *NLRB* v. *A.J. Tower Co., supra* at 332 (rationale for opposing post-election challenges in political elections also applies to representation elections). Therefore, the courts' regulation of conduct in political elections may be particularly instructive in the Board's regulation of representation elections and provide support for the assertion that individual free choice in representation elections requires more time and information, not less.

[588] See, *e.g., Mills* v. *Alabama,* 384 U.S. 214 (1966) (invalidating state ban on election-day newspaper editorials); *Emineth* v. *Jaeger,* 901 F. Supp. 2d 1138 (D.N.D. 2012) (enjoining state ban on all electioneering on election day); *Curry* v. *Prince George's Cnty., Md.,* 33 F. Supp. 2d 447, 454–455 (D. Md. 1999) (invalidating county ban on display of political signage for all but 45 days before and 10 days after a political election).

[589] *Republican Party of Minnesota* v. *White,* 536 U.S. 765, 782 (2002) (citing *Brown* v. *Hartlage,* 456 U.S. 46, 60 (1982)).

[590] The Final Rule relies in large part on written comments and testimony submitted by Professor Kate Bronfenbrenner that purport to show that employers generally have knowledge of organizing campaigns before a petition is filed. However, the reliance on this research would be misplaced even if the research were objectively accurate. As the Final Rule emphasizes, ''[m]ost elections involve a small number of employees,'' with a quarter of elections held in units with 10 or fewer employees, half of elections held in units smaller than 25, and three-quarters of all Board elections held in units of 60 or fewer employees. However, the Bronfenbrenner study is based on a specialized sample of cases involving only *large* bargaining units containing at least 50 employees. If for no other reason than that the study is based on a population of statistical outliers, this study cannot legitimately support the Final Rule's claim that ''employers are very often aware of the organizing campaign before the petition is filed.'' See August 22, 2011 correspondence from Bronfenbrenner and Warren to the Board, enclosing *Empirical Case for Streamlining the NLRB Certification Process.* In addition, as has been noted elsewhere, there are far too many flaws in the current and past Bronfenbrenner studies to justify the Board's reliance on them for any purpose related to this rulemaking. See, *e.g., Chamber of Commerce, Responding to Union Rhetoric: The Reality of the American Workplace—Union Studies on Employer Coercion Lack Credibility and Integrity (*U.S. Chamber of Commerce White Paper 2009).

choice takes on heightened importance.[591] Indeed, our colleagues' argument reflects the hallmark characteristic associated with *every* infringement on free speech: the government simply determines the speech is not necessary. Rather than saving the Rule, this constitutes the most objectionable aspect of the Rule as it relates to protected speech.

It is not enough that employers and employees may communicate general observations regarding unions before the filing of an election petition, any more than it would be deemed permissible to limit political campaigning to generalized statements about a particular political party before actual candidates are selected. Again, the Board and the courts (for more than 50 years) have recognized that election petitions mark the commencement of a new ''critical'' phase in representation campaigns.[592] Only the filing of a petition means ''the Board's processes have been invoked,'' resulting in an election that can be ''anticipated pursuant to [the Board's] procedures.'' [593] Objectionable activity by employers or unions after petition-filing, *because* it occurs during this ''critical period,'' is deemed sufficient to invalidate the results of the election.[594] This belies the Final Rule's premise that eliminating post-petition opportunities for speech has no material adverse impact on elections and must be considered inconsequential.

Regarding the Final Rule's curtailment of opportunities for speech, the majority specifically disclaims being motivated by a desire to counter what they view as an employer's undue influence during representation campaigns. However, numerous union-side commenters rely on this justification in advocating the Rule's adoption. They contend that, under current representation procedures, employers have the upper hand in campaign communications. Further, as noted previously, our colleagues or commenters have observed that some employers may be well informed about union election procedures before a petition is filed; all employers have unlimited access to employees during the workday and can hold unlimited captive audience speeches in the workplace until 24 hours before the election; and they may still thereafter have the ''last word'' on election day in individual conversation with employees.

In our view, reliance on these factors is fundamentally flawed. First, it reflects a view that the Rule only adversely affects protected speech undertaken by employers. To the contrary, the Act and the First Amendment afford employees and unions, as well as employers, rights to engage in protected speech that the Rule impermissibly restricts or threatens.

Second, some of these factors (for example, the fact that employers have unique access to employees) are part and parcel of *every* employment relationship, and other factors (for example, limits on union access to the employer's property) arise from well-established prior decisions by the Board, the courts of appeals, and the Supreme Court, which impose different types of limitations on unions and employers, respectively.[595] But none of these factors and prior decisions authorizes the Board to disregard or adopt rules that impose undue restrictions on protected speech.

Third, although our colleagues disclaim the *intent* to redress an unfair balance of power between unions and employers by limiting employer speech, the Rule's provisions predictably and inescapably will have that *effect.* It is therefore contrary to the Supreme Court's holding that the Board is not vested with ''general authority to define national labor policy by balancing the competing interests of labor and management.'' *American Ship Building Co.* v. *NLRB,* 380 U.S. 300, 316 (1965).

Finally, even if not intended, the Final Rule essentially embraces an ''anti-distortion'' theory—justifying speech restrictions to prevent an ''unfair advantage'' in campaigning based on ''resources'' that are too favorable to one side. This theory has been squarely rejected by the Supreme Court in the political election context,[596] and the Final Rule has the same impermissible ''anti-distortion'' effect applied to the ''uninhibited, robust and wide-open debate in labor disputes'' that is fundamental to Federal labor policy.[597] By reducing the time for employer speech, the Rule enhances the relative voice of a union and its advocates. This restriction of speech far exceeds the ''narrow zone'' deemed permissible by the *Brown* Court.[598]

Our colleagues have made a policy choice to abbreviate the ''critical period'' deemed most important by the Board to the exercise of employee free choice.[599] The unavoidable consequence of this choice is the limiting of opportunities for speech and debate during that period. It is apparent from the statements of numerous commenters supporting the Rule that in this respect the Final Rule will specifically disadvantage anti-union speech more than pro-union speech, and will correspondingly enhance a petitioning union's chances of electoral success. This does not concern the majority. In the context of union speech, however, the Board has taken great care to avoid interpreting and applying the Act in a manner that raises serious constitutional concerns regarding free speech infringement. See *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.),* 355 NLRB 797, 807–11 (2010) (canon of constitutional avoidance requires Board to construe the Act's provisions in order to avoid serious constitutional questions arising from an otherwise acceptable construction of the statute, if an alternative interpretation is possible and not contrary to the intent of Congress). The Board has the same

[591] The Board held in *Ideal Electric & Mfg. Co.,* 134 NLRB 1275, 1277–78 (1961), that ''the date of filing of the petition * * * should be the cutoff time in considering alleged objectionable conduct,'' because that marks the time ''when the Board's processses have been invoked'' and an election ''may be anticipated pursuant to present procedures.'' This period between petition-filing and the election—during which objectionable conduct is deemed sufficient to invalidate the election—is called the ''critical period.'' *Goodyear Tire & Rubber Co.,* 138 NLRB 453 (1962); *E.L.C. Electric, Inc.,* 344 NLRB 1200, 1201 n.6 (2005); *NLRB* v. *Arkema, Inc.,* 710 F.3d 308, 323 n.16 (5th Cir. 2013); *Ashland Facility Operations, LLC* v. *NLRB,* 701 F.3d 983, 987 (4th Cir. 2012); *NLRB* v. *Curwood Inc.,* 397 F.3d 548, 553 (7th Cir. 2005).

[592] *Supra* note 591.

[593] See *Ideal Electric & Mfg. Co.,* 134 NLRB at 1278.

[594] *Supra* note 591.

[595] See, *e.g., Lechmere, Inc.* v. *NLRB,* 502 U.S. 527 (1992) (addressing limitations on union access rights to private property).

[596] *Citizens United* v. *Federal Election Commission,* 130 S. Ct. 876 (2010). See also 77 FR 25574 (Member Hayes, dissenting). In *Citizens United,* the Supreme Court overruled *Austin* v. *Michigan Chamber of Commerce,* 494 U.S. 652 (1990), and rejected the *Austin* ''anti-distortion theory,'' pursuant to which limitations on speech were ostensibly justified as preventing ''an unfair advantage in the political marketplace'' based on ''resources amassed in the economic marketplace.'' *Citizens United,* 130 S. Ct. at 904 (citations omitted). In *Citizens United,* the Court held that *Austin* ''interferes with the 'open marketplace' of ideas protected by the First Amendment.'' *Id.* at 907 (citing *New York State Bd. of Elections* v. *Lopez Torres,* 552 U.S. 196, 208 (2008)). And the Court concluded that '' 'the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others *is wholly foreign to the First Amendment.' '* *Id.* at 904 (emphasis added) (quoting *Buckley* v. *Valeo,* 424 U.S. 1, 48–49 (1976)).

[597] See *Chamber of Commerce* v. *Brown, supra* at 68. See 77 FR 25574 (Member Hayes, dissenting).

[598] ''The NLRB has policed a narrow zone of speech to ensure free and fair elections under the aegis of § 9 of the NLRA, 29 U.S.C. 159. Whatever the NLRB's regulatory authority within special settings such as imminent elections, however, Congress has clearly denied it the authority to regulate the broader category of noncoercive speech * * * .'' *Chamber of Commerce* v. *Brown, supra* at 74.

[599] *Supra* note 591.

interpretive obligation here. In our view, the Final Rule fails the test. It poses an unacceptable risk of infringing free speech rights guaranteed by Section 8(c) of the Act and the First Amendment.

(e) *Summary: the Final Rule's General Problems.* These general overarching problems with the Final Rule are reason enough to find that overall it contradicts the clear intent of Congress as to the Act's purpose, is ''arbitrary and capricious'' in failing to rationally relate to the Board's experience in administration of the Act and to facts adduced in rulemaking, and infringes or poses an impermissible risk of infringing free speech rights.[600] Inasmuch as these problems infect the Final Rule as a whole and all its parts, we do not approve of any aspect of the Rule, even if we fail to discuss some specific changes in these dissenting views. As we state at the outset, a fundamental problem with this rulemaking is its immense scope and highly technical nature. The majority has consciously adopted all of these changes simultaneously with the intention that they would function in conjunction with one another, which makes it unreasonable to suggest that any piece can be viewed in isolation. The manifold problems that we have identified throughout this dissent, in turn, mean the *entirety* of the new election process is beset with fatal infirmity. Our colleagues are therefore mistaken in suggesting that there exists a Board consensus on *any* specific provisions.

5. The Final Rule's Additional Specific Problems and Deficiencies

Even putting aside the above deficiencies, significant other detailed—and, in some respects, highly technical—provisions in the Final Rule are equally problematic, as fully discussed below.[601]

(a) Accelerating Elections While Imposing New Inflexible ''Pleading'' Requirements—The Final Rule impermissibly shortens the time from petition to hearing while simultaneously imposing substantial new mandatory notice and pleading obligations. Under current longstanding practice, an employer has no mandatory pre-hearing procedural obligations, although regions routinely request the voluntary submission of a written commerce questionnaire and oral communication of unit information to facilitate the negotiation of election agreements or to define issues to be contested at a hearing. In addition, if a hearing is necessary, regional directors possess and have exercised discretion in scheduling its starting date, generally scheduling hearings to begin from 7 to 12 days from notice of the petition, with postponements granted upon a showing of good cause.

Although the Final Rule delays the consideration of many fundamental eligibility and inclusion issues until after the election, it imposes significant new mandatory pre-hearing requirements. Specifically, the Final Rule now mandates that, in the absence of an election agreement, a non-petitioning party, usually the employer, must within 7 days of the Board's notice of petition file with the Region a written Statement of Position that must (1) include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit, and if the employer contends that the proposed unit is inappropriate, a separate list of the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit; (2) address any matter it wishes to litigate before the election; (3) state preferences as to the details of conducting the election; and (4) indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit.

Furthermore, a hearing must be scheduled to start the day after the statement's filing, 8 days from Board service of the notice of petition, absent undefined special or exceptional circumstances justifying extensions amounting to no more than 4 additional days.

As discussed hereafter, the new requirement to produce this written information prior to the hearing is unfairly placed only on non-petitioning parties, usually the employer, and the preclusive effect given to the statements is too broad. As an initial matter, we question the rational basis for imposing a uniform shorter timeline from petition to hearing date while at the same time demanding much more information from the employer.[602] The majority claims in the Final Rule that it merely codifies a best practice here. (Actually, the claim is that 7 days would be the best practice, but they are willing to extend the time period to 8 days.)

Assuming that there is any basis other than the need for speed for declaring 8 days to be a best practice or to limit a party's opportunity adequately to prepare for a hearing, that rationale would seem to apply only to a timeline in which employers had no more than the primarily informal, voluntary, and verbal pre-hearing tasks to attend to under the Board's longstanding pre-hearing practice.[603] In sharp contrast, under the Final Rule, employers now must post and distribute an initial election notice, more often than not obtain counsel,[604] interview managers

[600] Many commenters opposing the NPRM have contended that its provisions violate procedural due process rights. Necessarily, those Final Rule amendments that contravene Congressional guarantees of pre-election process or constitutional and Congressional guarantees of free speech rights are also invalid because they deprive affected persons of protected liberty interests without providing the mandatory due process.

[601] We note that the Final Rule does not include a provision permitting petitioning parties to use electronic signatures in support of a showing of interest. Although certain Federal statutes, including the Government Paperwork Elimination Act (GPEA), 44 U.S.C. 3504 (note), Pub. L. 105–277, Div. C, Title XVII, 112 Stat. 2681 (1998), and the Electronic Signatures in Global and National Commerce Act (E–SIGN), 15 U.S.C. 7001 *et seq.* ''evidence Congress's intent that Federal agencies, including the Board, accept and use electronic forms and signatures, *when practicable,''* the General Counsel—as suggested by our colleagues—should perform an analysis similar to that outlined in the Office of Management and Budget's guidance for implementing the GPEA, OMB Procedures and Guidance; Implementation of the Government Paperwork Elimination Act, 65 FR 25508 (May 2, 2000), which describes a specific, detailed framework for agencies to follow ''for deciding *whether* to use electronic signature technology for a particular application.'' *Id.* at 25514 (emphasis added). Absent the results of such an analysis, we cannot share our colleagues' confidence that a practicable way exists for the Board to accept electronic signatures to support a showing of interest while adequately safeguarding the important public interests involved. Inasmuch as the Final Rule itself contains no provision relating to electronic signatures, we do not further address the matter here.

[602] The requirement also applies to non-petitioning unions in RM and RD elections, but the range of potential contested issues in those elections is much narrower. In any event, the RC election petition is by far the petition filed most frequently. Thus, it is not accurate to state that in practice the burden imposed by the Final Rule's new Statement of Position requirements will fall equally on all non-petitioning parties.

[603] *Croft Metals, Inc.,* 337 NLRB 688 (2002), does not support the Final Rule's requirement that a hearing be held 8 days after the notice of petition. In *Croft,* the Board held that a party must receive at least 5 working days' notice of hearing. The hearing in *Croft* was, in fact, scheduled 10 days after the petition filing, but the employer did not receive the required notice until just 3 days before that hearing date. The Board was not required to consider and did not consider how soon a hearing should be scheduled after a petition is filed. Moreover, for reasons we state here, we believe *Croft's* minimum notice of hearing requirement would have to be adjusted to provide a reasonable minimum time for an employer to meet the additional pre-hearing burden imposed by the Final Rule.

[604] As many comments to the Final Rule state, for small employers without experienced labor counsel in house or on retainer, these time periods make it difficult to find competent counsel. See, *e.g.,* SHRM; Chamber II; AHA II; COLLE II.

and others,[605] fill out a new mandatory Statement of Position form within 7 days, prepare for a hearing on issues that it may still contest, and negotiate the possibility of a stipulated election agreement. This timing might work out in some instances, but it is predictable that employers in other circumstances—not falling within the Final Rule's ambiguous category of ''special'' or ''exceptional''—will legitimately require more time. For example, concepts of appropriate unit or statutory supervisory status are not readily understood by laypersons and in any event may require significant factual investigation before the required position can be taken. In such situations, the majority is wrong to assert that employers ''already know[] all those things.'' So even if an 8-day deadline would be a best practice for uniform application under current pre-hearing procedures, there is no basis for declaring it in advance to be a best practice under the amended procedures.

An even greater shortcoming of the Final Rule in this respect, however, is its failure to recognize that the practice of regional flexibility is the best practice, far preferable to a uniform restrictive standard in the timing of a hearing. There is no evidence in the considerable record before us that the Board's extremely competent regional personnel are manipulated and conned by employers into postponing hearings for unsound reasons. Regions currently have the flexibility to vary the starting time of a hearing on a case-by-case basis for good cause shown and often in pursuit of the desired outcome of concluding an election agreement before parties and witnesses are required to go through the expense and time of attending a hearing. Parties and witnesses will almost invariably have to do so under the Final Rule, unless such an agreement can be reached in 8 days. Inasmuch as the Final Rule relies so heavily in other respects on the expertise of regional personnel, it is inconsistent and arbitrary that the same confidence is not accorded to regions in the setting of hearing dates and the corollary adjustment of the date for submission of the Statement of Position.

(b) *Further Limitations on the Litigation of Pre-Election Issues—The Final Rule exacerbates inappropriate limitations on the scope of pre-election hearings by precluding the introduction of evidence on issues not initially raised in a Statement of Position, by permitting the exclusion of evidence pertaining to as much as 20 percent of a bargaining unit, and by encouraging the substitution of offers of proof for testimony.* As noted above, we believe the Final Rule contravenes the clear intent of Congress by eliminating the statutory requirement of an evidentiary hearing regarding contested voter eligibility and inclusion issues, among other things. These problems are compounded by the Final Rule's arbitrary limit on the introduction of testimony on those eligibility and inclusion issues as well as its imposition of formalistic barriers to the litigation even of those issues which the Final Rule recognizes as mandatory subjects for pre-election hearing.

• *Statements of Position.* The Rule requires all non-petitioning parties to arrange for preparation and submission of a comprehensive written Statement of Position no later than *7 days* after the notice of petition absent ill-defined ''special circumstances.'' While this requirement applies to all representation-case proceedings, the problems it presents arise most frequently in the context of *initial* representation (RC) elections, where only the employer (as the non-petitioning party) bears the burden to identify issues it wishes to contest in a written statement of position.[606]

Thus, the Final Rule states that, when ''the petition is filed by a labor organization in an initial organizing context,'' the ''employer's Statement of Position'' must address all of the following items, among other things: (a) ''whether the employer agrees that the Board has jurisdiction over it'' (and ''commerce information'' must be provided); (b) ''whether the employer agrees that the proposed unit is appropriate,'' and ''if the employer does not so agree,'' what is ''the basis for its contention that the proposed unit is inappropriate''; (c) ''the classifications, locations, or other employee groupings that must be added to, or excluded from, the proposed unit to make it an appropriate unit''; (d) ''any individuals whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention''; (e) ''any election bar'' (referring to complex Board doctrines that preclude the processing of representation petitions in various circumstances); (f) ''the eligibility period'' (referring to the time frame in which bargaining unit members may be employed in order to be eligible voters); (g) ''the type, dates, times, and location of the election''; (h) ''an alphabetized list of the full names, work locations, shifts, and job classifications of all individuals *in* the proposed unit'' (emphasis added); (i) ''an alphabetized list'' of the ''full names, work locations, shifts, and job classifications'' for ''all individuals that the employer contends must be *added to* the proposed unit to make it an appropriate unit'' (if the employer contends the proposed unit is not appropriate) (emphasis added); (j) ''those individuals, if any, whom it believes must be *excluded from* the proposed unit to make it an appropriate unit'' (emphasis added); and ''any other issues it intends to raise at hearing.'' Final Rule, Part VI B, *supra.*

It is worth pausing to appreciate just what the foregoing means in practice. Under the Final Rule, the employer Statement of Position *must address* all questions of statutory and discretionary jurisdiction, labor organization status,[607] contract bar and other election bars, appropriate unit, multi-facility and multi-employer unit scope, the statutory employee status of individuals constituting more than 20 percent of the petitioned-for unit, the use of eligibility standards other than the normal standard, whether the employer's business is about to close or whether it is expanding and does not yet have a substantial and representative employee complement, whether the employer is a seasonal operation, and whether there are any professional employees in the unit who must be accorded their statutory electoral option.[608] The Final Rule also requires an employer to include in the Statement of Position its position on eligibility and inclusion issues it wishes to contest at the pre-election stage, the newly required initial employees lists, and its preferences on election details. An employer's failure to timely file a statement will preclude it from litigating any issue that must be

[605] Preparation of the mandatory written Statement of Position obviously does not relieve an employer of the need to prepare witnesses to testify on issues that it seeks to contest at a hearing. Indeed, in light of the Final Rule's encouragement of offers of proof preliminary to or as a substitute for testimony, an employer may have to take the further substantial pre-hearing step of taking sworn witness affidavits for submission in support of potential offers relative to any unit eligibility and inclusion issues that it can anticipate.

[606] It is true that, under the Final Rule, the Statement of Position requirement will apply to unions in those cases when an employer files an RM election petition or when an individual employee files a petition seeking to decertify an incumbent union. The primary impact of the Final Rule, however, relates to initial representation elections where the union is the petitioning party, and in such cases, absent another union's intervention, the employer is the only party required to submit a comprehensive pre-election Statement of Position, and the employer is foreclosed from later raising any contentions or introducing evidence regarding mandatory pre-election issues not identified in the Statement of Position.

[607] This would include Section 9(b)(3) guard/nonguard labor organization issues.

[608] See *Sonotone Corp.,* 90 NLRB 1236 (1950).

contested at the pre-election stage. Even if a statement properly raising some litigable issues is timely filed, an employer cannot raise any additional issue in the hearing unless permitted to do so by the regional director for good cause.

By contrast, the Final Rule requires only that a petitioner provide some minimal information in the initial election petition and make an oral response at the hearing to the issues properly raised in a written Statement of Position from non-petitioning parties. The petitioner would be precluded from introducing evidence by failing to make a response to an issue, but it need not respond in writing or in advance of the hearing. The Final Rule also permits a petitioner to sua sponte amend its petition during the hearing.

We recognize that the information required by the Final Rule has routinely been sought in conversations between regional personnel and parties after a petition has been filed, and that the exchange of information has the salutary purpose of encouraging election agreements in lieu of a hearing or to refine and limit the areas of dispute to be explored in a hearing. However, parties have not previously been *required* to raise issues prior to the beginning of a hearing, there has been no forfeiture of the right to litigate based on the failure to do so, and the extremely onerous pleading-type standard governing amendments—applied only to the employer, and permitting amendments only for good cause—is completely foreign to Board litigation. Indeed, in this regard, we believe the Rule's demanding standard is substantially more restrictive than the pleading requirements applied in formal adversarial unfair labor practice proceedings, in which the Board freely permits amendments to the complaint through the conclusion of the hearing. Further, an administrative law judge may even permit the litigation of issues—nowhere mentioned in the pleadings—if the issue is closely connected to complaint allegations, and the Board will decide that issue if it agrees that it is closely connected and has been fully litigated. *Pergament United Sales,* 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

The mandatory written statement requirement, coupled with the preclusion of litigation on issues that are not raised in the statement (which must be filed just 7 days from the notice of a petition) are quantitatively and qualitatively different from the current longstanding practices. The Final Rule treats the employer Statement of Position like a formal pleading, binding on the employer as both admission and limitation and virtually precluding subsequent changes in position, and subject to restrictive standards regarding amendment. The Final Rule provides no rational basis for the imposition of such one-sided and onerous requirements with such severe consequences attendant on any failure to meet them.

Consider again the above litany of issues that must be raised in a timely written statement or the employer will be precluded from raising them. Many employers would have little knowledge of these issues and how they may apply to business operations. Employers will have little choice but to secure assistance from labor counsel or other consultants who, even with specialized expertise, may not be able to identify relevant issues without a reasonable period to review the employer's business operations. Putting aside the difficulty of preparing for a hearing, it is clearly unrealistic and unfair to impose an *inflexible* 7-day deadline for the start-to-finish preparation and submission of a comprehensive legal document, to which the Board will apply a rigorous ''pleading'' standard that will not permit later amendment, except in narrow circumstances, even as to concededly relevant issues that were fully and fairly litigated at the hearing. Meanwhile, the employer must also busy itself preparing the required employee lists and a written statement of preferences on election details that may be difficult to define in advance of resolving any appropriate unit or unit scope issues.

What does the petitioning union have to do during this period? Other than filing the petition with minimum details and simultaneously serving the petition and accompanying documents on the employer,[609] the union has no mandatory pleading obligation, nor are any selective ''amendment'' standards applicable to the union. The union's views on potential issues and preferences on election details may be orally solicited, but it does not have to provide them. Even if the union does not orally state *at* the hearing a position responding to issues raised by the employer in its written statement, the Final Rule does not preclude it from introducing evidence in response to evidence presented by the employer as to those issues, and it permits the union to amend the petition during the hearing sua sponte, even as to an issue not raised by the the employer. In other words, while the existing voluntary and informal regional practices in obtaining pre-hearing information from the petitioning union remain essentially the same, those practices are transformed into binding legalistic requirements for the employer, with significant adverse consequences for any failure to comply by the time the hearing opens.

Under the Final Rule, there is no question about the preclusive effect of omitting from the Statement of Position anything that must still be addressed in a pre-election hearing.[610] Here, the Final Rule provides:

- A party generally may not raise any issue, present evidence relating to any issue, cross-examine any witness concerning any issue, and present argument concerning any issue that the party failed to raise in its timely Statement of Position or failed to place in dispute in response to another party's Statement of Position or response.
- If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations or other employee groupings that must be added to, or excluded from, the proposed unit to make it an appropriate unit, the party may not raise any issue or present evidence or argument about the appropriateness of the unit.
- [I]f the employer fails to timely furnish the lists of employees required to be included as part of the Statement of Position, the employer also may not contest the appropriateness of the proposed unit at any time and may not contest the eligibility or inclusion of any individuals at the pre-election hearing.

The Final Rule plainly intends to strictly apply these waiver provisions, to the detriment of any employer whose Statement of Position fails to describe specific issues and contentions with sufficient particularity. For this reason, the Final Rule provides little comfort—and no adequate degree of fairness—when it states that ''the regional director

[609] One of the documents is the current Form 4812, a single page document that summarily notifies parties of certain election procedures. This document will have to be revised to reflect the Final Rule's amendments, and, as a matter of fundamental fairness, it must be expanded to include sufficient explanation of the issues that must be raised in a Statement of Position.

[610] As noted previously, the Act and its legislative history indicate that Congress clearly intended that the pre-election hearing would include evidence regarding voter eligibility and unit inclusion issues, which is the only means by which these issues can be afforded meaningful review by the regional director and, in the event of a pre-election request for review, by Board members. Because the Final Rule provides that evidence regarding such issues should be excluded until after the election, the Rule provides that there would not be a waiver of post-election review at least as to these issues based on the failure to include them in the pre-hearing Statement of Position. See Final Rule, part VI. D, *supra* (notwithstanding failure to submit Statement of Position, ''no party is precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction'' and ''no party is precluded from challenging the eligibility of any voter during the election on the ground that the voter's eligibility or inclusion was not contested at the pre-election hearing'').

has discretion to direct the receipt of evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the director determines that record evidence is necessary.'' If anything, this amplifies that the Rule's most onerous requirements are only applied to employers, in contrast to the ability of regional directors and other parties to address whatever election issues they deem relevant. Although the Rule also gives regional directors the ''discretion'' to permit parties to ''amend'' the Statement of Position, the Rule permits such requests only if made ''in a timely manner,'' such amendments will be granted only ''for good cause,'' and if an amendment is permitted, then all ''other parties'' are then given the opportunity to ''respond to each amended position.'' Here as well, the employer is the only party constrained by these onerous requirements, which, as noted above, are more restrictive than the liberal pleading requirements applicable to the Board's General Counsel in formal unfair labor practice proceedings. Such formal and restrictive pleading requirements are not only unprecedented in Board proceedings, they are especially unwarranted in representation cases, which have always been regarded as nonadversarial in nature.[611]

The Final Rule fails to provide any reasonable justification for its failure to require the same or similar written Statement of Position from the petitioning union in advance of the hearing. In the response to our dissent, the majority states that the position statement does not unfairly burden employers because petitioners are already required to state their position in the petition itself. But they draw a false equivalency. For example, the petition must only describe a unit, state that the unit is appropriate, provide some preferred election details, and identify perfunctory address and agent information. In contrast with what the employer is required to submit in the Statement of Position, a petitioning union is not required to state ''the basis for its contention that the proposed unit'' is appropriate; the union is not required to state any position regarding other matters likely to be in dispute—regardless of how foreseeable they may be—relating to included or excluded ''classifications, locations, or other employee groupings,'' ''individuals whose eligibility to vote'' may reasonably be in question, or the ''basis for each such contention''; nor is the union required to describe ''any other issues it intends to raise at hearing.'' As to these and other matters, no preclusion attaches to the information the union provides or does not provide in advance of the pre-election hearing. Further, the petitioner is permitted to amend the petition during the hearing without any showing of good cause. Moreover, although the Final Rule provides that a petitioner may not litigate any issue that it failed to ''place in dispute'' in response to a Statement of Position, the burden of placing an issue in dispute for the petitioner is satisfied by an oral statement or description at the hearing, and not before. This is obviously far less onerous than the burden placed primarily on employers to contest issues in a formal written statement of position submitted prior to the hearing. This inequality of treatment is yet an additional fundamental deficiency that makes the Final Rule impermissibly arbitrary. Moreover, it is a denial of due process to selectively make such requirements applicable only to one party in the proceedings and not to other parties.

We believe the Statement of Position and its preclusive effects should at least be no more onerous than the standards applied by the Board to the amendment of unfair labor practice complaint allegations during a more formal adversarial hearing,[612] and to the amendment of the petition itself in the pre-election hearing, so that a party retains the right to address issues not specifically identified in the Statement of Position that are responsive to another party's contentions and presentation of evidence. The absence of such provisions strongly undermines any suggestion that the Final Rule treats parties and important election issues in an even-handed manner.

• *Limiting ''Voter Eligibility'' and Unit Inclusion Evidence.* The Final Rule provides for hearing officers to exclude evidence regarding eligibility and inclusion issues involving up to 20 percent of the employees in a petitioned-for unit, absent a direction to the contrary from the regional director, which would normally defer any evidence regarding such voter eligibility issues until following the election.

There is no judicial or Board precedent for this exclusionary practice. All cases cited by the majority voice general approval of the Board's discretion to defer *deciding* eligibility and inclusion issues for a certain percentage of the unit. It has never been the Board's practice to defer *the taking of evidence* regarding such issues, if validly introduced in a pre-election hearing, which then permits a determination (by regional directors and the Board) of whether they must be resolved prior to the election. The majority reasons that if an issue's resolution is potentially going to be deferred, it is ''administratively irrational'' and a waste of time and expense to permit a party to litigate it. Further, they mistakenly declare that the 20 percent exclusionary rule is the applicable historical norm in Board practice and strikes an administratively appropriate balance between the public interest in prompt resolution of questions concerning representation (in other words, the majority's interest in holding an election ''as soon as practicable'') and employees' interests in knowing who would be in the unit should they choose representation.[613] As asserted proof of the reasonableness of this standard, our colleagues rely on the fact that ''more than 70% of elections in FY 2013 were decided by a margin greater than 20% of all unit employees, suggesting that deferral of up to 20% of potential voters in those cases (and thus allowing up to 20% of the potential bargaining unit to vote via challenged ballots, segregated from their coworkers' ballots) would not have compromised the Board's ability to immediately determine election results in the vast majority of cases.''

The majority has at least modified the NPRM proposal that the 20 percent exclusionary rule be mandatory. Regional directors will have the discretion to defer eligibility and inclusion issues for up to 20 percent of a unit, but they are not obligated to do so. We credit our colleagues for this modification, but any flexibility is clearly undermined by our colleagues' additional statement that they ''strongly believe that regional directors' discretion would be exercised wisely if

[611] See, *e.g., Solar International Shipping Agency, Inc.,* 327 NLRB 369, 370 n.2 (1998) (''[A] hearing in a representation proceeding 'is nonadversary in character [and] is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case.' Sec. 101.20(c) of the Board's Statements of Procedure.'').

[612] See *Pergament United Sales, supra,* 296 NLRB at 334.

[613] Notably, this articulation of a balancing test excludes any consideration of employer interests. That is consistent with the views expressed by some academicians and union advocates who maintain that—contrary to statutory language, clear Congressional intent, and well-established precedent and practice—employers should not have the status of a party in a representation election proceeding. See generally Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 Minn. L. Rev. 495 (1992–93).

regional directors typically chose not to expend resources on pre-election eligibility and inclusion issues amounting to less than 20% of the proposed unit.'' It seems likely, then, that there may be no practical difference between the NPRM's ''hard'' 20 percent rule and the Final Rule's nominally discretionary standard.

In our view, the majority's rationale for excluding and deferring evidence regarding voter eligibility until after the election—which would effectively ignore the interests of up to 20 percent of voters—is beset with irremediable problems.

First, it is unreasonable to conclude that hearing officers or regional directors should exclude evidence regarding who can vote or be part of a bargaining unit—affecting up to 20 percent of the unit—when nobody can determine prospectively how the exclusion may affect the future election. The Third Circuit long ago cogently observed that ''the problem of substantiality, in our view, is one to be determined prospectively'' because evidentiary rulings are not made from the ''vantage point of hindsight.'' [614] At the pre-election hearing stage, a regional director will not, absent mystical powers of clairvoyance, have any idea what the final vote margin will be in an election and whether particular eligibility and inclusion issues would not have an effect on the outcome. Indeed, under the Final Rule, the regional director will now necessarily be making the exclusionary ruling on a purely speculative basis, without the benefit of any actual evidence by which to judge the importance of contested issues.

Second, the majority's 20 percent standard is hopelessly arbitrary. The majority maintains it is acceptable to disregard and exclude evidence from the pre-election hearing regarding up to 20 percent of unit employees because—based on 2013 statistics—this would adversely affect *only* three of every 10 elections conducted. Even if one could accept the accuracy of this figure as a recurring annual norm,[615] it is not rational to conclude that adversely affecting 30 percent of elections is acceptable or reasonable, particularly since the Act requires the Board ''in *each* case'' to decide unit issues in order to ''assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act.'' [616] The majority's analysis also likely understates the scale of potential risk because it fails to consider the very real possibility that statutory eligibility issues will frequently relate as well to election objections, particularly when the alleged supervisory status of an individual or group of individuals is at issue. Consequently, the mere fact that an election vote margin exceeds 20 percent is no guarantee that the eligibility or inclusion issue will not have to be litigated and decided at the post-election stage.

Third, the 20 percent rule has not been the Board's historical standard for deferring resolution of pre-hearing eligibility and inclusion issues to the post-election stage of proceedings. In a handful of cases, the Board has held that it did not need to set aside an election based on post-election determinations resulting in as much as a 20 percent variation in unit size from that which was contemplated by the pre-election litigation and resolution of issues. However, several courts of appeals have invalidated elections based on these types of variations in unit size based on post-election Board rulings.[617]

The Board's actual historical standard has been not to defer *decision* on eligibility and inclusion issues if they potentially involve more than approximately 10 percent of a unit. Even this more limited deferral standard has not been applied as a general or per se rule. Moreover, although the Board has sometimes deferred making a *decision* on certain eligibility and inclusion issues that involve no more than 10 percent of a unit, such a practice has never been inflexibly applied, and—when the Board has deferred rendering a decision resolving such issues—*it has always been with the benefit of a pre-hearing evidentiary record* that includes evidence regarding these issues. Only with such an evidentiary record can regional directors and the Board determine whether and when these issues warrant resolution prior to the election and, if so, whether to stay the election until those issues have been resolved. See also notes 570 and 581, *supra.*

Fourth, we believe our colleagues clearly exaggerate the ''specter'' that employers may use the potential delay associated with a pre-election hearing to force unions to enter into stipulated election agreements. Here, our colleagues rely on anecdotal claims by some commenters that employers *generally* contest pre-election issues as a matter of gamesmanship and for the sole purpose of delay, rather than out of any genuine concern that the unit status of an individual or group of individuals be resolved at this early stage. However, the majority ignores the fact that the Board itself encourages *all* parties to enter into stipulated election agreements, and the Board has received comments from all sides that favor the high number of stipulated elections that have resulted from the Board's current procedures.

It cannot be the prospect of delay from a pre-election hearing itself that so compels unions to accept unwanted terms in an election agreement. A hearing conducted under current full litigation practices most often lasts only 1 day, and very rarely exceeds 3 days. Further, with the Final Rule's elimination of both the 7-day period for filing post-hearing briefs and the automatic 25-day waiting period to permit pre-election requests for review, the prospect of that cumulative delay will no longer ''loom'' over the negotiation of a pre-hearing election agreement in all cases, if it ever did. In any event, the deterrent effect of a 20 percent exclusionary rule is illusory. Employers and their legal counsel (or unions and theirs) who wish to ''extort'' concessions in an election agreement and/or to delay the election date can continue to do so simply by contesting issues on questions concerning representation that must still be litigated at a pre-election hearing.

We can readily agree that employers should not raise the possibility of frivolous pre-election litigation to

[614] *NLRB* v. *S.W. Evans & Son*, 181 F.2d 427, 431 (3d Cir. 1950).

[615] The 30 percent figure the majority cites is for all elections held in FY 2013. We do not know what the percentage was for the relevant subset of cases in which there were contested pre-election issues. Our colleagues further confound with their statistical analysis by contending that, because a party favoring the electoral result by any vote margin will not pursue litigation of nondeterminative challenges, this will eliminate ''about half of the remaining litigation, even in those cases where the vote margin is narrow. Thus, at most, only 15% of deferred issues will ever have to be addressed.'' Valid bases for this statistical assumption elude us. We do not know what percentage of elections involve nondeterminative challenges filed by a party favoring the election result. We do know that petitioning unions annually prevail in far more than 50 percent of initial organizing elections, so there is no basis for assuming an equal 50–50 mooting of challenges based on election results.

[616] Section 9(b) (emphasis added).

[617] These courts have reasoned that a difference of this magnitude impermissibly interferes with employee free choice because those who vote in the election do not have an accurate understanding of the bargaining relationship they must approve or reject. See *NLRB* v. *Beverly Health & Rehab. Servs., Inc.*, 120 F.3d 262 (4th Cir. 1997) (unpub., per curiam), *NLRB* v. *Parsons School of Design*, 793 F.2d 503 (2d Cir. 1986), *NLRB* v. *Lorimar Productions, Inc.*, 771 F.2d 1294 (9th Cir.1985), and *Hamilton Test Systems, New York, Inc.* v. *NLRB*, 743 F.2d 136 (2d Cir. 1984). As will be discussed later, we agree that the courts' reasoning presents a compelling rational argument against the 20 percent pre-election exclusionary rule as well, but the point we make here is that the cited Board precedent is inapposite to the issue of an historical practice.

leverage their position in bargaining for an election agreement, but the majority has failed utterly to show by objective evidence that this conduct routinely takes place.[618] Further, we have great confidence that regional personnel currently take an active role in post-petition negotiations and are fully capable of advising employers that frivolous issues will be swiftly dealt with as such. Election agreements are, after all, absolutely essential to the achievement of regional success in expeditiously processing petitions.

Fifth, the majority improperly disregards the fact that the early resolution of certain eligibility and inclusion issues is highly desirable and often extremely important. In this regard, our colleagues' view is contrary to common sense and it conflicts with longstanding Board and judicial precedent. The establishment of the *Excelsior* list requirement, which the Final Rule expands, is based on the fundamental proposition that the early identification of ''bona fide disputes between employer and union over voting eligibility'' may avoid resorting to ''the formal and time-consuming challenge procedures.'' [619] Further, as stated by the Ninth Circuit, while the need to avoid unnecessary delay in the electoral process is undisputedly important, ''it is at least of equal importance that employees be afforded the opportunity to cast informed votes on the unit certified.'' [620] It is plainly unreasonable to require employees to vote in an election, conducted on an extremely accelerated timetable, *before* the Board *even considers evidence* regarding (i) who is eligible to vote; (ii) whose votes will be counted, and whose will not; and (iii) what employees will be part of the unit—and thereby affected by the election—and what employees will not. In this regard, our colleagues also fail to appreciate that uncertainty as to these fundamental issues also adversely affects employees' informed choice in the election, and will unnecessarily create greater confusion and a potential need to set aside the election because parties will not know (i) what employees are non-unit supervisors who can act as agents of the employer and who cannot lawfully take certain actions for or against union representation; and (ii) what individuals are unit employees who, as eligible voters, can freely participate in campaigning without being subject to restrictions applicable to supervisors. Our colleagues' position on this point is no different from that of the Board majority that voted for the vacated December 2011 rule, as to which dissenting Member Hayes correctly observed:

> My colleagues may not think so, but *there are employees, employers, and unions who believe that there is value in the early resolution of individual issues* that do not bear on whether an election should be held at all. In particular, *employees quite reasonably would like to know if they are eligible to vote and will be part of a bargaining unit that the union seeks to represent.* Telling them they can cast a challenged ballot, with their eligibility possibly to be resolved later, is hardly an inducement to participate in the electoral process. Further, *individuals whose status as supervisors is disputed would reasonably like to have that issue resolved before an election,* as would their employer and the participating union. *It is unbecomingly blasé of my colleagues to state that, because resolution of this issue would in any event not undo the effect of antecedent actions taken in the election campaign, there is no problem with postponing such resolution until after the election, if then.*[621]

• *Offers of Proof.* The Final Rule gives hearing officers the discretion to require offers of proof on any issue, including those that must still be litigated under the majority's impermissibly restrictive interpretation of the scope of a pre-election hearing. The record fails to show that hearing officers have often required offers of proof under existing practices, and there is good reason for that.

We begin with the language of the Act. Section 9(c)(1) requires the Board to conduct an ''appropriate hearing'' before any election, and it is well established that one of the primary purposes of the hearing is to create a record—consisting of evidence (*i.e.*, oral testimony under oath and documents admitted into the record)—which provides the basis for decisions by regional directors, the Board, and possibly courts of appeals. See *North Manchester Foundry, Inc.*, 328 NLRB 372 (1999).

An ''offer of proof'' is not evidence.[622] Rather, when an advocate (usually an attorney) makes an ''offer of proof,'' this is an informal short-form description of *potential* evidence. For example, an ''offer of proof'' can be requested by a judge or hearing officer who believes the potential evidence will be irrelevant or cumulative—*i.e.*, not logically related to a contested material issue or clearly duplicative of evidence already in the record—and if the ''offer of proof'' reveals that the potential evidence would be irrelevant or cumulative, the potential ''evidence'' is not permitted.[623] When evidence is ruled inadmissible, a party can also make an ''offer of proof,'' which permits the evidentiary ruling to be reviewed on appeal.[624] In all cases, the ''offer of proof'' describes evidence that is *not* part of the ''record,'' which means the described matters—since they have been *excluded* from the record—cannot be

[618] We note that the reply comment of former Region 7 Field Examiner Michael D. Pearson describes a ''not uncommon'' scenario of employer tactics that allegedly force a petitioning union to concede to ''a significantly delayed election date in order to secure an election agreement.'' Pearson reply statement pp. 1–3. At several points in the Final Rule, our colleagues extrapolate from Mr. Pearson's multiple statements and testimony as to his regional experience, which ended in 2005, to generalize about representation casehandling practices nationwide. We do not believe this evidence is entitled to such weight. Among other things, it is difficult to reconcile with the facts concerning the Board's success rate in conducting elections in a median of 38 days.

[619] *Excelsior Underwear, supra*, 156 NLRB at 1243.

[620] *NLRB* v. *Lorimar Productions, supra*, 771 F.2d at 1302. Our colleagues are simply wrong in contending that the court's view in this case, and in cases cited above at note 83, represent a minority view among the courts of appeals. The decisions cited by the majority decline to set aside elections based on the facts of a particular case, but none of them disavow the fundamental principle that information regarding unit scope and composition—*i.e.*, understanding what other employees will be included or excluded—is fundamentally important when employees decide what vote to cast in a representation election.

[621] 77 FR at 25566.

[622] 75 Am. Jur. 2d Trial Section 353 (2014) (''A proffer is not evidence, ipso facto.'') (citing *Crawley* v. *Ford,* 43 Va. App. 308, 316 (2004)); *United States* v. *Reed,* 114 F.3d 1067, 1070 (10th Cir.1997) (same). See also cases cited in note 625, *infra.*

[623] The Federal Rules of Evidence (FRE) provide for the admission of all ''relevant'' evidence, FRE 402, and evidence is relevant whenever it ''has any tendency to make a fact more or less probable than it would be without the evidence'' and ''the fact is of consequence in determining the action.'' However, relevant evidence can be excluded, based on an offer of proof, if it would be cumulative. *Cedar Hill Hardware and Construction Supply, Inc.* v. *Insurance Corp. of Hanover,* 563 F.3d 329, 353 (8th Cir. 2009) (''Cedar Hill's offer of proof, if anything, showed that the court needed to impose limits to curtail the presentation of cumulative evidence.''); United States v. Stokes, 506 F.2d 771, 777 (5th Cir. 1975) (exclusion of testimony not prejudicial where the offer of proof showed the evidence would have been cumulative).

[624] FRE 103(a)(2) (a party may claim error based on the exclusion of evidence, in part, if the party ''informs the court of its substance by an offer of proof, unless the substance was apparent from the context''). See also *Kline* v. *City of Kansas City, Fire Department,* 175 F.3d 660, 665 (8th Cir. 1999) (''An offer of proof serves dual purposes,'' including ''to inform the trial court * * * of the substance of the excluded evidence'' and ''to provide an appellate court with a record allowing it to determine whether the exclusion was erroneous.'') (citation and internal quotation marks omitted); *Polys* v. *Trans-Colorado Airlines, Inc.,* 941 F.2d 1404, 1406–07 (10th Cir. 1991) (offers of proof are designed ''to allow the trial judge to make an informed evidentiary ruling'' and ''to create a clear record that an appellate court can review to 'determine whether there was reversible error in excluding the [testimony]' '') (citation omitted).

the basis for any decision or appeal on the merits.[625]

Under the Final Rule, offers of proof are made part of the record and treated as a *substitute* for record evidence.[626] While the Final Rule nominally gives hearing officers discretion to require offers of proof, it is patently clear that they are expected to do so more frequently, particularly on appropriate unit issues. This will preclude the existence of evidence needed to permit what the Act requires: Decisions by regional directors, the Board, and possibly the courts, based on a record developed in an ''appropriate hearing'' held before the election.[627]

Consider the requirement of an offer of proof under the *Specialty Healthcare* standard.[628] Almost any petitioned-for unit conforming to classification, department, craft, or group function may be viewed as presumptively appropriate under that standard. Thus, a hearing officer will likely fulfill the Final Rule's stated expectation by requiring an offer of proof on the issue. Having nominally preserved the right to contest the appropriateness of a petitioned-for unit in the prehearing Statement of Position, an employer will really have done no more than to preserve the right to make an offer of proof attempting to show an overwhelming community of interest between petitioned-for classifications and excluded classifications. It is unclear what offer would suffice for a regional director to permit the introduction of oral evidence. It is clear that the requirement of an offer would make an already difficult burden almost impossible to meet. If not met, then not only would the employer be precluded from further contesting the issue, but employees in excluded classifications would generally not even be permitted to cast challenged ballots.

Section 9(c)(1) also provides that pre-election hearings ''may be conducted by an officer or employee of the regional office, *who shall not make any recommendations*'' and ''[i]f the Board finds *upon the record of such hearing* that such a question of representation exists, it shall direct an election by secret ballot'' (emphasis added). As the statutory language makes clear, the hearing officer may conduct the pre-election hearing, but the evidentiary record constitutes the sole basis for the ultimate decisions made by the regional director and the Board. Again, an offer of proof is an informal summary, provided by a party's attorney or representative, which is most often used to prevent the introduction of irrelevant evidence. In contrast, the statute's ''appropriate hearing'' requirement—combined with the Act's careful delineation of responsibilities between and among the hearing officer, the regional director, and the Board—requires that decisions be based on an appropriate ''record'' *consisting of evidence.*

The majority's analogy of the Rule's pre-election offer of proof process to the use of that process by courts, administrative law judges, magistrate judges, and hearing officers fails for one fundamental reason. In these other contexts, offers of proof are elicited by a presiding official who has the authority to make evidentiary rulings and decide substantive issues. By contrast, as previously stated, the hearing officer in a pre-election Board hearing has no authority to make recommendations, much less factual findings or legal conclusions. See Section 9(c)(1).

(c) *Off-the-Record Consultation and Decisionmaking Between Hearing Officers and Regional Directors.* In an attempt to avoid conflict with express statutory language (id.), the Final Rule purports to vest regional directors, not hearing officers, with the exclusive authority to make substantive rulings and decisions. However, the Final Rule in this respect remains objectionable. Under the Act, although hearing officers may preside over the ''appropriate hearing'' (Section 9(c)(1)), Congress clearly intended that all decisions would be based on the hearing record. Here, the Final Rule departs from the statutory scheme by codifying and dramatically increasing reliance on private consultations between hearing officers and regional directors, in the absence of a record, with ''real time'' decisionmaking by regional directors while the hearing remains incomplete.

There are numerous deficiencies in this process, especially in relation to issue-determinative rulings and when combined with the Final Rule's other changes. First, the Rule relies on this process to resolve important election-related issues, including whether to exclude or defer evidence regarding voter eligibility and other matters. Second, decisions are made by an absentee regional director, who is *not* presiding over the hearing, and who is completely dependent on second-hand information conveyed by the hearing officer. Third, during these off-the-record consultations, the hearing officer has a near-impossible task, which is to refrain from making ''recommendations'' (based on the prohibition set forth in Section 9(c)(1)); to describe complex facts, some based

[625] *Libertarian Party of Ohio* v. *Husted,* 751 F.3d 403, 416 (6th Cir. 2014) (''proffer'' by party's attorney ''is not evidence''); *United States* v. *Wade,* 120 Fed. Appx. 638, 640–41 (7th Cir. 2005) (''counsel's proffer was not evidence''); *Campania Mgmt. Co.* v. *Rooks, Pitts, & Poust,* 290 F.3d 843, 853 (7th Cir. 2002) (''[I]t is universally known that statements of attorneys are not evidence.''); *United States* v. *Reed,* 114 F.3d 1067 (10th Cir. 1997) (reversing district court ruling that was based on party's ''proffer of its evidence,'' where the ''proffer was merely that, and in summary form as well,'' resulting in remand because court's decision ''should be based only on the facts as they emerge at trial''); *Fulton* v. *L&N Consultants, Inc.,* 715 F.2d 1413, 1416–21 (10th Cir. 1982) (remand required to admit relevant evidence where party's offer of proof revealed that the evidence was improperly excluded). Cf. *Luce* v. *United States,* 469 U.S. 38 (1984), where the Supreme Court stated that appellate review is ''handicapped''—even when an appeal involves evidentiary rulings—without a ''factual context,'' which requires the court to know ''the precise nature of the defendant's testimony, which is unknowable when * * * the defendant does not testify.'' *Id.* at 41 (footnote omitted). The Court differentiated between admitted evidence and a ''a proffer of testimony'' because ''trial testimony could, for any number of reasons, differ from the proffer.'' *Id.* at 41 n.5.

[626] Respectfully, we must point out that our colleagues are simply wrong when they state, in response to our dissent, that the Final Rule does ''not treat offers of proof as 'evidence' in decisions 'on the merits.' '' The Final Rule explicitly makes offers of proof the sole basis for deciding whether many issues have *merit,* whether the facts warrant pre-election *litigation,* and whether the evidence if admitted might warrant pre-election *resolution.* See, *e.g.,* Final Rule § 102.66(c) (''If the regional director determines that the evidence described in an offer of proof *is insufficient to sustain the proponent's position,* the evidence *shall not be received.*'') (emphasis added); § 102.69(c)(1)(ii) (the regional director shall deny post-hearing objections without a hearing if ''the evidence described in the accompanying offer of proof *would not constitute grounds for setting aside the election''*) (emphasis added).

As President Lincoln is reputed to have said, ''How many legs does a dog have if you call the tail a leg? Four. Calling a tail a leg doesn't make it a leg.'' Calling an offer of proof part of the ''record'' does not make it record evidence. And when an offer of proof is made the sole basis for deciding the merits (or deciding whether there will even be litigation), the offer of proof is being treated as a substitute for evidence. This infirmity is not cured by the possibility that, infrequently, a regional director or the Board might consider an offer of proof for the limited, proper purpose of determining whether evidence has wrongly been excluded, which can result in a remand and reopening of the record. Indeed, the fact that the Rule predictably will also cause an increase the number of remands and resulting delays, based on the improper exclusion of relevant evidence, is another reason the Final Rule should not be adopted.

[627] Section 9(c)(1). There is little question that the Final Rule contemplates hearing officers will substitute ''offers of proof'' for record evidence. How else is one to read the footnote comment that ''we would expect hearing officers to typically require an offer of proof from an employer arguing against the appropriateness of a unit considered presumptively appropriate under Board caselaw. If the employer's proffered evidence would be insufficient to rebut the presumption, then it would be appropriate for the regional director to foreclose receipt of the evidence without regard to the proposed 20% rule.''

[628] *Specialty Healthcare and Rehabilitation Center of Mobile, Inc.,* 357 NLRB No. 174 (2011), *enfd. sub nom. Kindred Nursing Centers East, LLC* v. *NLRB,* 727 F.3d 552 (6th Cir. 2013).

on admitted evidence, and others based on offers of proof; and to summarize the parties' competing arguments outside of the parties' presence. This makes hearing officers the agency equivalent of a one-man band: he or she makes all of the arguments for everyone and describes all of the evidence (real and potential), with all decisions ostensibly being made by someone else (who has observed nothing and cannot lawfully even receive recommendations from the hearing officer). And this entire process occurs without the parties' participation or presence, with no verbatim record being made of the consultation. Regional directors have no appropriate basis for making such decisions because they are absent from the hearing, and the Act's ''appropriate hearing'' requirement reflects Congress' intention to have disputed issues resolved based on the evidentiary record, not second-hand off-the-record descriptions provided outside of the parties' presence while the hearing remains incomplete. Conversely, hearing officers, though ostensibly without decisionmaking authority, have *exclusive* control over what is and is not conveyed to regional directors, and the absence of any record regarding these consultations precludes meaningful review by the parties or the Board.[629]

(d) *No Post-Hearing Briefs—The Final Rule impermissibly eliminates the right to file post-hearing briefs.* Reflecting longstanding practice, § 102.67(a) of the current Rules gives parties the right to submit post-hearing written briefs within 7 days of the hearing's conclusion, and parties nearly always do so. The Final Rule takes this right away. Instead, ''[t]he hearing will conclude with oral argument, and no written briefing will be permitted unless the regional director grants a motion to file such a brief.'' Although the majority does not define the range of discretion vested in the regional director to deny a motion, it clearly anticipates that briefing will *not* be necessary ''[i]n the majority of representation cases.''

Under the Final Rule, the stated justification for eliminating the right to file post-hearing briefs is twofold: (1) ''given the often recurring and uncomplicated legal and factual issues arising in pre-election hearings, briefs are not necessary in every case to permit the parties to fully and fairly present their positions or to facilitate prompt and accurate decisions;'' (2) ''[b]y exercising [the] right [to file] or even by simply declining to expressly waive that right until after the running of the 7-day period, parties could potentially delay the issuance of a decision and direction of election and the conduct of an election unnecessarily.''[630]

Current practice nearly always involves post-hearing briefs submitted by the parties, and these briefs—along with record evidence—are then the central focus when relevant issues are decided by regional directors, a practice which contradicts the Final Rule's suggestion that such briefs are unnecessary and unimportant. Even though there may be some cases—few in number—when parties may dispense with post-hearing briefing, this certainly does not justify a rule finding that briefs will presumptively not be permitted in ''the majority of cases.''[631]

The procedural context for this briefing issue is the same as for offers of proof. The regional director is the only person who, under the statute, is permitted to decide relevant election issues, subject to potential Board review. However, *neither the Board nor regional directors even preside over the hearing.* Rather, the only Board representative who conducts the actual hearing is a ''hearing officer'' and *hearing officers, under Section 9(c)(1) of the Act, are prohibited even from making any ''recommendations'' with respect to election-related issues* which, of course, must be resolved based on the record evidence combined with the parties' arguments and positions.

Here, the Final Rule operates in a world devoid of common sense. In comparison to current practice, eliminating post-hearing briefs will pare 7 days, at most, from the period between petition-filing and the election. Yet, on top of the Final Rule's other changes, eliminating post-hearing briefs will necessarily cause unfairness and confusion regarding (i) what arguments parties have made concerning what issues and based on what evidence; (ii) what arguments and issues can fairly be raised by the employer—and which ones have been waived—based on the pre-hearing Statement of Position. Moreover, the absence of post-hearing briefs will give parties an enormous incentive to file pre-election requests for Board review, including requests to stay

[629] In Member Miscimarra's view, the Final Rule's reliance on private off-the-record consultation and decisionmaking between hearing officers and regional directors—especially in conjunction with the Rule's other changes—is precluded under the Act. This does not involve any doubt about the integrity and competence of the Board's hard-working regional directors and hearing officers. Rather, in representation cases, Section 9(c)(1) permits regional hearing officers to preside over a representation hearing, but states they ''*shall not make any recommendations* with respect thereto'' (emphasis added). In unfair labor practice (ULP) cases, Section 10(c) provides for administrative law judges (originally called ''trial examiners'') to preside over the hearing, but Section 4(a) states ''*no administrative law judge shall advise or consult with the Board* with respect to exceptions taken to his findings, rulings, or recommendations'' (emphasis added). Member Miscimarra believes these restrictions, both part of the 1947 Taft-Hartley amendments, were designed to guarantee, first, that the Board would maintain a *bright-line separation* between decisionmakers, on the one hand, and the actions of hearing officers (in representation cases) and administrative law judges (in ULP cases) that are subject to review; and second, that hearing officers and judges would *absolutely refrain from attempting to influence,* by informal means, either the Board or regional directors (the latter inherited the Board's authority to decide representation cases pursuant to a delegation authorized by Sec. 3(b) of the Act). Both restrictions were explained in detail by Senator Taft—principal sponsor of the Taft-Hartley amendments in the Senate—when these amendments were adopted. See 93 Cong. Rec. 3953 (April 23, 1947), reprinted in 2 LMRA Hist. 1011 (statement of Sen. Taft) (stating, among other things, that the amendments preclude ''private'' or ''secret meetings'' between trial examiners and the Board, and provide that questions concerning representation are to be decided by the Board ''on the basis of the facts that are shown in the hearing'' to avoid decisions ''almost completely free from any review by the courts''). See also S. Rep. No. 80–105, at 25, reprinted in 1 LMRA Hist. 431 (''Regional office personnel now sit as hearing officers in representation cases and make a comprehensive report and recommendation to the Board at the close of such hearing. By the amendment, such hearing officer's duties are confined to presiding at the hearing.''). In Member Miscimarra's view, the Final Rule contemplates what the Act prohibits: the Rule improperly blurs the role of the hearing officer (whose duties, under the Act, should be ''confined to presiding at the hearing'') with the decisionmaking of the regional director (who, under the Act, should decide issues solely ''on the basis of the facts that are shown in the hearing''). Id. Although due process requires that disputed matters be addressed in open hearings, the Final Rule essentially provides for a ''private'' or ''secret meeting'' (id.), with increased reliance on off-the-record consultation between hearing officers and regional directors, outside the parties' presence, in which the hearing officer, rather than the parties, makes all relevant arguments and presents all relevant facts; and the lack of any verbatim record effectively means this off-the-record decisionmaking is ''almost completely free from any review'' by the Board or ''the courts.'' Id.

[630] We note that the majority also relies on the inapposite fact that the APA exempts the Board's representation case proceedings from its requirements for formal adjudication, including any requirement of the right to file a brief. Of course, the APA does not proscribe the Board from permitting post-hearing briefs as a matter of right in its own rules for representation proceedings, which is what the Board has done for many years. Moreover, we cannot help but note the majority's reliance on the APA's exemption, which is founded on the premise that our pre-election hearings are nonadversarial investigative proceedings, in a Final Rule that imposes unprecedented formal adversarial pleading requirements.

[631] The majority suggests that parties retain the right to file one post-hearing brief in every case because, even if denied permission to file an immediate post-hearing brief, they can still file a brief in support of a request for review of the regional director's subsequent decision. The right to file a brief directly with the regional director prior to his de novo review of the evidence and issues is fundamentally different from the right to file a brief seeking to persuade that there are ''compelling circumstances'' for Board review of an adverse regional director's determination. In the latter instance, the horse has most often left the barn.

the election, because this will provide the *only* opportunity for parties to file *any* briefs. In such circumstances, the Board will undoubtedly be confronted with an array of arguments that regional directors—without the benefit post-hearing briefs—*never considered.* Alternatively, the Board may conclude that many meritorious arguments have been waived by employers because the positions were not identified with sufficient particularity in the pre-hearing Statement of Position, or in the employer's end-of-hearing oral argument.

We have no lack of confidence in the ability of management- and union-side labor law practitioners to make effective closing arguments. However, with due respect for our colleagues, the Final Rule identifies nothing that justifies depriving those practitioners of a longstanding right to file briefs, adversely affecting their ability to frame parties' positions in light of the record evidence. Further, our decided cases over nearly 80 years demonstrate that some measure of factual and/or legal complexity is the norm, and not the exception, for issues contested in pre-election hearings. In this context, we have difficulty understanding why a regional director—even with the expertise, experience, and acumen of persons who typically occupy that office—would not benefit from the written definition of issues and supporting evidence in a brief in more than a few complex cases. The alternative of reviewing and deciding issues based on a cold transcript and ad hoc oral argument is far less likely to lead to the expeditious and reasoned resolution of those issues.

Take just one example of a recurring pre-election issue: a petitioner seeks to represent as an appropriate bargaining unit a group of workers whom the employer contends are independent contractors excluded from coverage. The employer bears the heavy burden of proving its contention. As recently described by the majority in *FedEx Home Delivery,* 361 NLRB No. 55 (2014), resolution of the issue whether the workers are independent contractors or statutory employees requires an analysis of evidence relevant to a nonexhaustive list of 11 factors. In *FedEx,* which involved a petitioned-for unit of approximately 20 truck drivers, the majority opinion consumed over 4 two-columned pages (3,732 words) describing the facts of the case, and another 3-plus pages (2,736 words) analyzing the facts under its multifactor test. With the elimination of post-hearing briefs, an employer's sole opportunity to persuade a regional director that it has met its burden under the *FedEx* test will be to accurately summarize all the relevant facts and their application to at least 11 factors of the legal test in semi-spontaneous oral argument at the conclusion of a hearing, usually without the benefit of a transcript; *i.e.,* the employer must accomplish in oral argument what the FedEx majority needed 6,468 written words to accomplish.[632] We fail to see how this approach facilitates the fair and accurate resolution of a question concerning representation.

If the Board's experience under its longstanding practice of generally permitting written briefs contradicted this supposition, then there might be a factual basis for amending the current rule. The Final Rule cites no such evidence, however. It acknowledges that a procedure already exists under the current practice for hearing officers to encourage the *voluntary* use of oral argument in lieu of a written brief, and that the General Counsel's 1998 best practices memo endorsed this voluntary approach as appropriate ''in some cases.'' [633]

The Final Rule's other rationale sounds a very familiar refrain, *i.e.,* speculation that a party could use the right to file a brief as an instrument of delay. Has that been shown to have happened with any frequency over decades of experience under the current Rules? No it has not, at least not based on the considerable record before us, which on this point is factually no different than in 2012 when dissenting Member Hayes cogently observed: ''In practical terms, the majority points to no evidence that the 7 days currently afforded parties to file briefs following pre-election hearings actually causes delay in the issuance of Regional directors' decisions. In real terms, this is already an extraordinarily short period of time. Our colleagues have presented no evidence that parties routinely file briefs in those cases in which the issues are so simple that a Regional director could routinely issue a decision in less than 7 days, and certainly no evidence that briefs in general have no utility. There is no reason why a Regional director or his decision writer cannot begin preparing a decision before the briefs arrive and, if the briefs raise no issues the Regional director has not considered, simply issue the decision immediately. In fact, the Agency's internal training program expressly instructs decision writers to begin drafting pre-election Regional directors' decisions before the briefs arrive. See 'NLRB Professional Development Program Module 5: Drafting Regional director Pre-Election Decisions, last updated May 23, 2004, Participants Guide and Instructors Guide.' '' [634]

In short, there is no valid justification for the briefing rule change. It is a solution in search of a problem. Properly managed under the existing regional practice, which represents the best practice, briefing should improve and expedite representation case decisions. Getting rid of briefs, on the other hand, is as likely to delay final resolution of representation issues as it is to facilitate it.

(e) *Eliminating Board Review—There is no rational reason to eliminate the right of Board member review regarding post-election issues.*[635] The Final Rule eliminates mandatory Board review of post-election disputes under a stipulated election agreement. It provides that post-election Board review—currently a guaranteed option—would become discretionary in all cases. Thus, the Final Rule contemplates that the Board may never review post-election reports of the hearing officer or decisions of the regional director. As set forth below, we find the elimination of mandatory Board review of post-election disputes to be arbitrary and capricious.

In recent years, about 90% or more of representation elections were promptly held pursuant to election agreements. Our statistics show that, under current regulations, parties are far more likely to enter into a stipulated election agreement than a consent election agreement, under which post-election issues are decided by the regional director.[636] Under the stipulated agreement, the parties negotiate resolution of all pre-election issues but preserve the automatic right to Board review of a regional director or hearing officer's resolution of post-election disputes. The Final Rule now eliminates that right, replacing mandatory review with a discretionary system of review that currently exists for the disposition

[632] Assuming a person speaks 2.5 words per second, it would take approximately 45 minutes just to read aloud the relevant sections of the *FedEx* majority opinion.

[633] See Representation Casehandling Manual Sec.11242 and G.C. Memo. 98–1, ''Report of Best Practices Committee—Representation Cases December 1997,'' at 10, 28.

[634] See 77 FR 25567.

[635] Much of the analysis in this section is drawn from former Member Hayes' dissent to the vacated December 2011 rule. See 77 FR 25566. In our view, the majority has yet to provide sufficient answers to the criticisms originally voiced there.

[636] According to the Office of Executive Secretary, in 2012, 1,401 elections were held pursuant to stipulation, while only 48 consent elections were held. In 2013, 1,411 elections were held pursuant to stipulation, while only 39 consent elections were held.

of pre-election disputes in the absence of any election agreement.[637]

Without any empirical support, our colleagues assert that eliminating automatic Board review will not result in fewer pre-election agreements. It seems obvious to us that parties would resolve known pre-election issues for the guarantee that the Board will be the final arbiter of any unforeseen election conduct and eligibility issues that occur during the critical election period. It also seems natural that the elimination of the right to agree to mandatory post-election Board review will adversely affect the parties' willingness to compromise on pre-election issues. Thus, making Board review of post-election disputes discretionary is likely to discourage parties from entering into stipulated election agreements, *the principal mechanism for shortening the pre-election timeline,* thereby resulting in an increase in pre- and post-election litigation.

Our colleagues disagree. They contend that the parties will take what little we give them, preferring an agreement that permits discretionary Board review over one that provides for final disposition of post-election disputes at the regional level. They maintain that the parties will continue to look at the same factors previously considered when deciding whether to enter into any pre-election agreement. Yet, our colleagues could be wrong, and it was their duty to give more than passing thought to this potential adverse consequence for a process utilized in 1,401 elections, comprising 97 percent of all election agreements executed, in FY 2013. The guarantee of mandatory, as opposed to discretionary, Board review of post-election disputes *could* be the main reason some employers give up the right to litigate pre-election issues. Even if the percentage of election agreements decreases by a few points, the resulting increase in pre- and post-election litigation will likely negate any reduction of purported delay due to the Final Rule's implementation. Our colleagues' willingness to make this change without considering the possible negative impact is attributable in significant part to their apparent agreement with comments that argue that employers use the election agreement procedure to extort unwarranted concessions from unions, who capitulate in order to prevent the delay due to litigation of pre-election disputes. This view stems from their belief that employers could not really have legitimate issues to raise in litigation. But we believe there are legitimate disputes, and thus, the process of negotiating an election agreement in which an employer foregoes its litigation rights in exchange for concessions on unit scope, unit placement, or election details seems to fairly mirror the give-and-take bargaining that takes place after a petitioning union wins an election and is certified.

In justifying the elimination of the automatic right of Board review of post-election challenge and objections issues, our colleagues also contend that ''the final rule will enable the Board to devote its limited time to cases of particular significance.'' Regardless of how insignificant the issues may seem to be in most post-election cases, it is our duty to give those cases the same consideration as in ''cases of particular significance.'' Moreover, we disagree with our colleagues that the Board does not have enough time to provide full consideration of post-election decisions. This is not 1959, when Congress adopted Section 3(b) to remedy the Board's undisputed inability to manage its pending caseload. At that time, there were 9,347 representation case filings, 8,840 case closings, and 2,230 cases pending at the end of the year. The Board itself decided 1,880 cases.[638]

In Fiscal Year 2013, 1,986 representation case petitions were filed in the regions, almost the same number as FY 2012, when 1,974 petitions were filed.[639] In other words, petition filings are down 80 percent from 1959. Moreover, the Board's pending caseload is near to historically low levels. Based on statistics prepared by the Board's Executive Secretary, as of October 1, 2014, there were 338 pending unfair labor practice cases and 48 pending representation cases.[640] Given the decline in case filings, this caseload is unlikely to increase. Thus, with *five times fewer* representation cases entering the system at the regional level, and a tiny fraction of all cases reaching the Board on exceptions, we clearly have the time to timely resolve all pending cases without abandoning stipulated election agreements for review of post-election decisions on a mandatory basis.

There is yet another problem with the new request for review standard for all post-election decisions. Under the existing rule, the Board engages in a *de novo* review of the entire record with respect to factual findings, other than credibility findings, of the decision maker below. Under the Final Rule's discretionary review standard, the Board will only grant review of regional factual findings where it is established that the finding is clearly erroneous and prejudicial. Based on statistics for cases covered by the current request-for-review practice,[641] this standard will predictably rarely be met.

Our colleagues contend that mandatory Board review is unnecessary because under the current *de novo* review standard the Board affirms the majority of post-election decisions made at the regional level. While this may be true as to decisional outcome, there have been many Board decisions reversing the hearing officer's or regional director's findings in post-election cases.[642] Also, in numerous cases, even if the Board has affirmed the decision below, it has modified or clarified the supporting factual findings.[643] There also have been several cases where a Board member or members dissent to the findings below.[644] The new Rule provides significantly less opportunity for reversal, clarification, or dissent with respect to such findings and their application to the controlling legal principles.[645] This is counter to the

[637] Even in the absence of an election agreement, the Final Rule also eliminates a regional director's choice of issuing a report and recommendations on post-election issues, to which there would be an automatic right to secure Board review by filing exceptions.

[638] Twenty-Fourth Annual Report of the National Labor Relations Board for Fiscal Year Ended June 30, 1959, Appendix A—Tables 1 and 3.

[639] Representation Petitions, National Labor Relations Board, available at *http://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-rc.*

[640] The pending caseload statistics would be even less were it not for a temporary'' bubble'' created by the need to decide anew cases in which prior decisions have been invalidated by the Supreme Court's decision in *NLRB* v. *Noel Canning,* 134 S. Ct. 2550 (2014).

[641] According the Board's internal casehandling statistics, the Board granted review, for *any* of four compelling circumstances defined in the Rules, on only 9 of 77 requests for review of regional directors' decisions and directions of election filed in FY2012, 7 of 57 filed in FY 2013, and 9 of 65 filed in FY 2014.

[642] See, *e.g., Labriola Baking Co.,* 361 NLRB No. 41(2014); *Sweetwater Paperboard and United,* 357 NLRB No. 142 (2011); *Go Ahead North America,* LLC, 357 NLRB No. 18 (2011); *Rivers Casino,* 356 NLRB No. 142. (2011); *Trustees of Columbia University,* 350 NLRB 574 (2007); *Madison Square Garden CT, LLC,* 350 NLRB 117 (2007); *In re Woods Quality Cabinetry Co.* 340 NLRB 1355 (2003); *Manhattan Crowne Plaza,* 341 NLRB 619 (2004).

[643] See, *e.g., Automatic Fire Systems,* 357 NLRB No. 190 (2012); *Enterprise Leasing Company-Southeast, LLC,* 357 NLRB No. 159 (2011).

[644] See, *e.g., Tekweld Solutions, Inc.,* 361 NLRB No. 18 (2014); *UniFirst Corp.,* 361 NLRB No. 1 (2014); *FJ Foodservice,* Case 21–RC–21310, 2011 WL 6936395 (December 30, 2011); *Mastec Direct TV,* 356 NLRB No. 110 (2011); *American Medical Response,* 356 NLRB No. 42 (2010).

[645] The majority cites *Mental Health Association, Inc.,* 356 NLRB No. 151 (2011), as an example of a case which did not require Board review because it involved the application of settled precedent. However, the Board modified the hearing officer's

Final Rule's assertion that it intends to improve transparency in decision making. The Board decisions addressed above may not ultimately be of precedential value, but because they involve a *de novo* review by the Board, they play an important role in assuring the public and reviewing courts that there is a uniform and consistent application of the law.

It has been the Board's long-held practice to develop and establish uniformity in representation case law. The Final Rule's discretionary review standard for all cases greatly increases the possibility that individual regions will reach different unreviewed results in factually identical or similar circumstances.[646] This presents an unacceptable risk of uncertainty and balkanization of substantive representation case law. It will likely lead to a system in which parties have to litigate issues in light of regional precedent, despite the well-settled Board principle that regional directors' decisions do not have precedential value.[647] There is a further risk that the ongoing development and understanding of labor law will be stunted inasmuch as the Board will be deciding few representation cases. It is particularly troubling that the Board will now be reviewing few appeals concerning election misconduct because the issues raised in these appeals go to the heart of employee free choice, and narrow factual distinctions have often determined whether specific conduct has had an objectionable effect on that choice. These cases warrant *de novo* Board review. In sum, the Final Rule will significantly impair the important central oversight function of the Board in making representation case law.

The elimination of mandatory post-election Board review is also likely to cause an increase in ''test of certification'' cases where employers engage in post-certification refusals to bargain as the only means of obtaining review of the Board's certification.[648] Whether or not an employer would secure judicial reversal of a regional director's decision is irrelevant. An employer will now be forced to litigate in an unfair labor practice case, before the Board and in Federal court, issues that are currently reviewed by the Board in a post-election appeal as a matter of right. Given the process an employer must go through to have a Federal court of appeals review any disputed issue regarding an election, there is often substantial delay in the final resolution of the representation case.

The collective effect of the Final Rule amendments, notably including the elimination of stipulation agreements providing for the automatic right to Board review of post-election issues, is the creation of a system in which the Board is an absentee overseer of the representation case process. This is taking our delegation authority under Section 3(b) to the extreme. Absent the singular factual circumstance that motivated Congress to create this authority—*i.e.,* that the Board in 1959 was overwhelmed by the task of deciding *all* contested representation case issues—or any other rational basis for taking this step, what we are left with is best described as agency ''delegation running riot,''[649] an impermissibly overbroad and arbitrary abdication of the Board's central role in the process.

(f) *Due Process—Collectively, the Final Rule's revisions constitute an impermissible deprivation of what has traditionally been regarded as necessary procedural due process in representation case proceedings.* ''The Board's duty to ensure due process for the parties in the conduct of the Board proceedings requires that the Board provide parties with the opportunity to present evidence and advance arguments concerning relevant issues.''[650] For decades, the due process accorded parties to representation proceedings has included adequate notice and time to prepare for a pre-election hearing, the opportunity to present oral testimony and cross-examine witnesses on all validly contested issues (including eligibility and inclusion issues), the opportunity to file a post-hearing brief, and the opportunity and incentive to enter into election agreements guaranteeing the automatic right to secure Board review of a regional director or hearing officer's findings on post-election objections and challenges. This is how the Board has traditionally complied with the Supreme Court's statement that '' '[t]he fundamental requisite of due process of law is the opportunity to be heard' '' at '' 'a meaningful time and in a meaningful manner.' ''[651]

Now, in one fell swoop of agency policymaking, those procedural rights are gone. In their place, the Final Rule (i) creates new inflexible prehearing ''pleading'' requirements –primarily and most severely affecting employers; (ii) greatly accelerates the timetable for scheduling the hearing; (iii) eliminates the right to contest eligibility and inclusion issues at a hearing; (iv) directs hearing officers to limit the introduction of evidence regarding both these issues as well as those that must still be litigated prior to an election; (v) eliminates post-hearing briefs except in unusual circumstances; and (vi) eliminates mandatory Board member review in all post-election cases.

The private interests affected by this extraordinary government action are substantial. They involve the potential deprivation in every election proceeding of the statutorily assured right of parties to full pre-hearing litigation, the paramount right of employee free choice, and the fundamental right of an employer to pursue its interests in maintaining autonomous control of a business operation in which it has a substantial capital investment (rather than sharing control in collective bargaining), and to ensure that a certified union truly represents a majority of employees in an appropriate bargaining unit.[652] Against this array of protected private interests, the Final Rule's primary asserted government interest is the need to conduct elections as soon as possible, with the notable exception of cases where a union's blocking charge allegedly justifies prolonged delay. In the foregoing sections, we have detailed the glaring lack of objective factual or policy grounds for the wholesale changes in representation case procedure founded on a perceived need for speed. Under that analysis, the Final Rule's revisions are shown to be collectively and individually invalid as arbitrary under the *State Farm* ''hard look'' test. Necessarily then, the asserted government interest in speed is inadequate to justify changes that deprive parties of previously enjoyed procedural rights and impose new procedural burdens that will inequitably

findings because it disagreed with part of the hearing officer's analysis and found it unnecessary to rely on another part. *Id.,* slip op. at 1 n.4.

[646] We note that our critique of this aspect of the Final Rule has nothing to do with the expertise and competence of regional directors and hearing officers, for whom we have great respect. However, like administrative law judges deciding unfair labor practice cases, expert and accomplished persons reviewing the same or similar sets of facts can reach different conclusions of law. It is the Board's role to reconcile those differences.

[647] E.g., *Rental Uniform Service, Inc.,* 330 NLRB 334, 336 n.10 (1999) (citing *S.H. Kress & Co.,* 212 NLRB 132 n.1 (1974)).

[648] *Id.*

[649] The phrase is best known for its articulation in *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

[650] *Bennett Industries, Inc.,* 313 NLRB 1363 (1994).

[651] *Goldberg* v. *Kelly,* 397 U.S. 254, 267 (1970) (quoting *Grannis* v. *Ordean,* 234 U.S. 385, 394 (1914), and *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965)).

[652] As we have noted elsewhere, the Final Rule also contravenes due process by impermissibly infringing free speech and privacy interests.

affect employers more than other parties to an election. Accordingly, in our view, the Final Rule must be invalidated on procedural due process grounds as well.

(g) *Expanded Mandatory Disclosures—The Revised Excelsior list requirements impose unreasonable compliance burdens and fail to adequately address privacy concerns.* In *Excelsior Underwear, Inc.,* 156 NLRB 1236, 1239–40 (1966), the Board established the requirement that an employer must file with the regional director an election eligibility list—containing the names and home addresses of all eligible voters—within 7 days after approval of an election agreement or issuance of a decision and direction of election. The regional director, in turn, makes the list available to all other parties to the representation case. Failure to comply with this requirement constitutes grounds for setting aside the election whenever proper objections are filed.[653] *Id.* at 1240.

The Final Rule substantially modifies the current *Excelsior* list requirements. It requires the employer to furnish to the regional director *and* to other parties not only a list of the full names and home addresses of eligible voters, but also their available[654] personal email addresses, home and personal cell telephone numbers, as well as their work locations, shifts, and job classifications. Employees who are to vote subject to challenge—either by direction or the agreement of the parties—must be enumerated with the same required information in a separate section of the list. Further, the Final Rule dramatically shortens the time for production of the *Excelsior* list from the current 7 calendar days to 2 business days after an election agreement or direction of election, absent agreement of the parties to the contrary or extraordinary circumstances specified in the direction. The employer must provide the voter list alphabetized (overall or by department) in an electronic format generally approved by the Board's General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form, and must serve the voter list on the other parties electronically, when feasible, at the same time the employer files the list with the regional director. Failure to file or serve the list and related information within the specified time and in the proper format will be grounds for setting aside the election whenever proper and timely objections are filed. Finally, the parties are restricted from using the voter list ''for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.''

We do not quarrel with the idea that it would be convenient for organizing unions to have some of the additional information that must now be provided under the Final Rule. However, it has long been established that the *Excelsior* requirements are satisfied based on the disclosure of employee home addresses, *and nothing more.* For instance, both the Board and the Supreme Court in *Excelsior* and *Wyman-Gordon,* respectively, refrained even from requiring the disclosure of employee home telephone numbers. Thus, the majority, by finding rights to additional information beyond what *Excelsio*r required, cannot then use *Excelsior* as the ''policy bootstrap'' to justify the additional information. Moreover, it is well established that the Act ''does not command that labor organizations as a matter of law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communications simply because the Employer is using it.'' *NLRB* v. *Steelworkers (Nutone),* 357 U.S. 357, 363–64 (1958). The question is whether the majority has established, based on the record in this proceeding or on our experience with the current *Excelsior* list, that it is necessary for unions to have this information in the absence of adequate protection of employees' legitimate privacy concerns and with the expedited compliance burden imposed on employers. We think that the majority has clearly failed to make such a showing, and we explain each of our concerns in turn.

• *Absence of Rational Justification.* The majority bears the burden of showing that the Final Rule's *Excelsior* rule revisions are rationally justified and consistent with the Act. In the Final Rule, our colleagues maintain that personal cell phone communications and texting are essential means by which employees engage in organizing and concerted activity, which is the reason our colleagues expand the *Excelsior* disclosure requirements to require employers to disseminate available personal telephone numbers and email addresses. For example, our colleagues call personal phones ''a universal point of contact today'' and cite the ''prevalence of cell phones, which are typically carried with adults on their person whether at home, at work or around town,'' which ''now allows callers' messages to reliably reach their recipients'' with ''shocking'' reliability and speed, ''enhanced through text messaging, . . . the preferred mode of communication for many young people.'' Yet our colleagues have taken precisely the opposite view in *Purple Communications,* 361 NLRB No. 126 (2014), where the majority insists that ''social media, texting, and personal email accounts'' are not even ''germane'' because they ''simply do *not* serve to facilitate communication among members of a particular workforce'' (emphasis added). Both justifications cannot be correct. Given the Board majority's holding in *Purple Communications,* supra, the Final Rule's justification for requiring the disclosure of personal employee phone numbers and personal email addresses cannot be considered rational.[655]

[653] The Supreme Court subsequently deferred to the Board's judgment, permitting the *Excelsior* list requirement to stand. See *NLRB* v. *Wyman-Gordon Co.,* 394 U.S. 759, 767 (1969).

[654] We take our colleagues at their word that ''available'' means an employer need only provide employee personal contact information already in the employer's possession and ''do[es] not require the employer to ask the employee for it.''

[655] Our colleagues reason that no inconsistency exists between the Final Rule and *Purple Communications*—regarding the role played by social media in union organizing and related protected activities—because the Rule (which emphasizes the importance of smartphones and texting, for example) deals with communications involving ''the union'' and ''other non-employer parties,'' whereas *Purple Communications* (which states these modes of communication are not even ''germane'') addresses ''employee communications among themselves.'' We respectfully disagree with this distinction. Electronic communications and social media function in the same manner regardless of whether the user is an employee, a union organizer, or someone else. These communications also facilitate discourse to the same degree and with the same effectiveness, which means they cannot be ''a universal point of contact'' (quote from the Final Rule majority as justification for expanding mandatory *Excelsior* disclosures) at the same time these communications ''simply do *not* serve to facilitate communication among members of a particular workforce'' (quote from *Purple Communications* majority as justification for giving employees a statutory right to use employer email systems) (emphasis added). Although our colleagues justify the Final Rule's expanded *Excelsior* disclosures on the basis that ''no practical way'' may exist for unions or employees to obtain ''email addresses, social media account information, or other information necessary to reach each other'' (Final Rule, supra, quoting *Purple Communications*), this has already been disproven by the widespread use of social media, emails and texting, both in the workplace and in shaping world events. See *Purple Communications, supra* (Member Miscimarra, dissenting, at fn. 5).

Because the Final Rule's justification is irreconcilable with the Board majority's holding in *Purple Communications, supra* (as discussed in the text), and because we believe these revisions lack adequate privacy safeguards and our colleagues have unreasonably shortened the existing 7-day deadline for providing *Excelsior* list disclosures (which, among other things, would provide adequate time for the opt-out procedure described in the text below), it is unnecessary to address whether the revisions otherwise have sufficient support in the administrative record.

• *Personal Email Addresses and Phone Numbers/Restriction on Use.* In sum, the majority's message to employees in a Board representation election is that ''the government wants your personal data—and we are going to compel it without your consent—and then we are giving it to someone else, too.'' To say the least, that is not a good message to give the citizenry in 2014.

The Final Rule fails to provide employees a reasonable opportunity to opt out from the disclosure of their personal contact information to other parties.[656] It also fails to provide that any petitioner-initiated electronic communications or phone calls would contain an ''unsubscribe'' feature that, if utilized, would prevent any further communications or calls from the petitioner and its agents. Finally, the Final Rule fails to provide, and cannot meaningfully provide, for specific appropriate restrictions and remedies regarding the use and misuse of voter list information. In declining to include these safeguards, the majority relies on the rationale set forth in *Excelsior* itself. There, the Board required the provision of employee names and home addresses to ''all parties'' (1) to ''maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation'' so employees may make a ''free and reasoned [electoral] choice,'' and (2) to ''further the public interest in the speedy resolution of questions of representation'' by ''eliminat[ing] the necessity for challenges based solely on lack of knowledge as to the voter's identity.'' *Excelsior,* 156 NLRB at 1240–43. According to the majority, advances in communications technology necessitate the provision of employees' available personal contact information to serve and further these dual purposes. Thus, despite ''employees' acknowledged privacy interests in the information that will be disclosed,''[657] our colleagues conclude that ''the public interests in fair and free elections and in the prompt resolution of questions of representation outweigh employee privacy interests'' and that it would be inconsistent with *Excelsior*'s concern for informed electoral choice ''to begin allowing employees to opt in or opt out of [the] disclosures.'' We disagree.

Our colleagues posit that any invasion of employees' privacy is minimized because the required disclosures are limited in scope, recipients, permissible usage, and duration of use. Thus, they conclude that because the Final Rule does not ''reveal employees' personal beliefs'' or require the disclosure of what they apparently regard as more important private information, such as medical records or aptitude test results, it is a permissible invasion of privacy. In these times, when new reports of computer hacking, identity theft, and phishing scams surface daily, we are astonished that the majority fails to recognize that employees who may have provided their personal contact information to their employer would otherwise not want to share that information with anyone they do not know and trust. We seriously doubt that their privacy concerns will be assuaged by our colleagues' assurances that personal contact information will be disclosed to representation case parties but not to the public at large. We note, for instance, that in a decertification election the employer would have to provide to the employee-petitioner the available personal contact information of fellow employees.[658] There are any number of reasons totally unrelated to the election campaign why those employees might be uncomfortable with this arrangement.[659]

Once the contact information is provided to a party, it does not disappear after election day. With respect to the limitations on its further permissible use and duration, the majority assumes the efficacy of its vague restriction limiting the use of disclosed personal contact information to ''the representation proceeding, Board proceedings arising from it, and related matters.'' Although we acknowledge our colleagues' attempt to list particular types of Board proceedings presumably covered by this language, we are nonetheless troubled by the vagueness and potential breadth of ''related matters.'' Beyond that, the Final Rule fails to specify any remedy for violating the restriction, promising only an ''appropriate remedy'' to be determined in case-specific adjudication ''if misconduct is proven and it is within the Board's statutory power to do so.'' Proving such misconduct may be difficult enough,[660] but the greater problem is that an effective remedy is probably not within the Board's statutory authority. The majority fails to guarantee—because it can't—to employees that the data won't be leaked or misused, whether intentionally or by error. In fact, in some cases, we know it will be leaked or misused, and the majority does not provide a serious sanction for doing so. Consequently, the Final Rule's restriction is meaningless. The opt-out and unsubscribe options we propose are therefore essential safeguards.

The majority counters with the argument that there is no evidence of voter lists being misused by non-employer parties in the nearly 50 years of the *Excelsior* requirement. Thus, they reason that our concerns and the need for safeguards are ''entirely speculative.'' To the contrary, it is apparent that requiring the provision of a new type of information poses a new type of risk. The majority's rationale is tantamount to arguing the low incidence of accidents involving horses in the 19th century proved there would be a low incidence of accidents involving cars in the 20th century. Their attitude is blasé at best. As previously mentioned, the news is full of daily abuse stories relating to, *e.g.,* disclosure of personal email addresses.[661]

[656] Several comments support the inclusion of an opt-out procedure. See, *e.g.,* Baker & McKenzie LLP; Council of Smaller Enterprises (COSE); Anchor Planning Group; SHRM II.

[657] The majority cites *Electronic Frontier Foundation* v. *Office of the Director of National Intelligence,* 639 F.3d 876, 888 (9th Cir. 2010), for its characterization of lobbyists' privacy interests in their email addresses as ''minor.'' However, the majority fails to mention the court's conclusion that it could ''easily envision possible privacy invasions resulting from public disclosure of the email addresses'' and that such email addresses should only be disclosed under Freedom of Information Act (''FOIA'') Exemption 6 when ''a particular email address is the *only* way to identify the [lobbyist] at issue from the disputed records.'' *Id.* (emphasis in original).

[658] Inasmuch as our colleagues assume that ''a union seeking to persuade employees to select it as a bargaining representative would tend [not] to act coercively toward those employees,'' this assumption—regardless of its merits—ignores the possibility that employee-petitioners could act coercively.

[659] For instance, the decertification petitioner may have had conflicts with other unit employees inside or even outside of the workplace (*e.g.,* domestic disputes/violence (HCP), stalking incidents, failed business dealings, etc.). Such other employees, fearing harassment, may therefore not want the petitioner to have their personal contact information. At least one commenter raised the concern that unqualified disclosure carries a general risk of employee harassment (IFA II). Another commenter expressed concern that the disclosure itself could cause intra-office conflicts (AAE).

[660] For example, the Indiana Chamber of Commerce observed that a party alleged to have misused a voter list may claim that it obtained the misused information independently from another source, and thus was not ''using'' the voter list at all, let alone for a restricted purpose (IN Chamber). Our colleagues miss the point in dismissing this concern as a ''question of fact for the factfinder'' in a particular case. The Indiana Chamber's valid concern is that an employer would find it extremely difficult, if not impossible, to prove misuse of a voter list to a fact finder.

[661] See, *e.g.,* Shelly Banjo, *Home Depot Hackers Exposed 53 Million Email Addresses,* Wall Street Journal, Nov. 6, 2014, *http://online.wsj.com/articles/home-depot-hackers-used-password-stolen-from-vendor-1415309282.* As for the majority's suggestion that employees' personal contact information is unlikely to be misused, see *Cedars-Sinai Medical Center,* 342 NLRB 596 (2004) (setting

Continued

Our colleagues also assume that providing an opt-out procedure for employees would be inconsistent with the Board's reasoning in *Excelsior* that ''the access of *all* employees to [election-related] communications can be insured only if all parties have the names and addresses of all the voters.'' *Excelsior, supra* at 1241 (emphasis in original). Of course, that basic assurance of communication access remains unchanged today. Employees' names and addresses are required to be disclosed without restriction, regardless of any privacy concerns that might apply. Further, those privacy concerns are fundamentally different from those attendant to email and phone contact information. A home is a readily identifiable, fixed physical point of geography that people in the public can typically visit, independent of the disclosure of address. An email address is a thing entirely created by the employee who thus has more of a privacy interest and it is typically not identifiable at all without the consent of the employee; and a personal phone number is also created, in part, by an employee, who gets to determine whether or not it is publicly listed and thus identifiable at all. Any limited and neutral opt-out provision for these additional means of access cannot be deemed to disrupt the balance struck in *Excelsior.*

Our colleagues' other objections to opt-out procedures are similarly misplaced. Thus, the majority speculates that an opt-out process would require too much ''extra time'' (a too-familiar refrain) for employees to decide whether to disclose their personal contact information and for employers to implement that decision, thereby exacerbating election delay. They further speculate that an employer-administered opt-out process would engender new areas of costly litigation arising from ''accusations of improper employer coercion'' in influencing employees to opt out of disclosure. Finally, the majority suggests that because an opt-out process ''could not be administered in a blind fashion,'' the resulting employer knowledge of who opted out would ''require the invasion of employee privacy in the name of protecting employee privacy.''

In our view, none of the majority's criticisms would preclude the administration of a workable opt-out procedure that we could support. The employer could be directed to post and provide notices and opt-out forms to all employees at the time initial and final election notices are distributed (recipients of the forms accompanying the initial election notice could be identified based on the preliminary voter list). Employees who wished to opt out could be directed to submit their completed forms to the Region prior to the existing 7-day *Excelsior* list deadline, which, in our view, should be retained without change. The Region could retain responsibility for distributing the *Excelsior* list, from which the Region, before serving the list on the petitioner and any intervenor, could easily redact personal contact information relating to those employees who opted out. The Region could administer the opt-out process in a simple, efficient manner that minimizes administrative burdens without delaying the election. And the employer would not know which employees, if any, had opted out. Federal and state courts commonly use nearly identical opt-out procedures, for example, to protect third parties' privacy interests in class action cases. In our view, no pejorative message would be associated with this type of procedure—administered by the neutral agency overseeing the election—and we believe the majority's argument otherwise is plainly without merit. Nor would such an opt-out procedure reveal either to the employer or union an employee's sentiments regarding representation, since the opt-out information would be available only to the Region, and there is no necessary correlation between an employee's sentiments regarding union representation and his or her individual preference regarding dissemination of personal contact information.

The majority sees no need to permit employees to ''unsubscribe'' from petitioner-initiated electronic communications or phone calls. They observe that such an option ''would do nothing to allay privacy concerns'' occasioned by the employer's initial mandated disclosure of employees' available personal contact information. This observation would be accurate were the unsubscribe option to be the sole means for protecting privacy interests. In our view, however, any such option would at least have to work in tandem with a reasonable initial opt-out procedure. Thus, employees who decided not to opt out of the initial disclosure could later decide to stop receiving a petitioner's messages by personal email or phone call. In any event, employees continue to have a privacy interest in their personal contact information even after the initial disclosure.

Our colleagues assure that an unsubscribe option is unnecessary because ''some'' unions voluntarily provide this option anyway. If this is the case, then we have before us proof that such a procedure is reasonable and can be workable. And if, as our colleagues claim, the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (''the CAN–SPAM Act'') [662] and Federal Trade Commission's Do-Not-Call Rule [663] ''may already impose'' a similar requirement for an unsubscribe option, we see no harm in making this requirement explicit and clear as applied to voter lists under Board law. Indeed, the Final Rule codifies the *Excelsior* rule's requirement that employers provide voters' names and home addresses even though this rule has stood for nearly 50 years without previously being codified.

• *Timing.* As stated above, the Final Rule dramatically shortens the time for production of the voter list from the current 7 calendar days to 2 business days, absent agreement of the parties to the contrary or extraordinary circumstances specified in the direction of election. The 2-business-day maximum time limit, with the possibility of setting aside an election for failing to comply, is far too short a time period for a number of reasons. First, this timeframe is insufficient given the significant variation that exists among different potential bargaining units (*e.g.,* large unit size,[664] multi-site units [665]). Second, certain industries and job classifications that have historically been recognized as involving substantial complexity (*e.g.,* construction,[666] education,[667] entertainment, and contingent or regular part-time or on-call employees in, *inter alia,* the healthcare industry [668]) will routinely need more than 2 business days to finalize a voter list. Third, the majority's timeframe is unrealistic given the cumulative effect of the other accelerated time frames included in the Final Rule.[669] Fourth, the rush to comply with the 2-day time limit for production of the *Excelsior* list can reasonably be expected to produce more inaccuracies in the substantially greater information that must now be provided.

aside election based on telephonic threats of violence).

[662] 15 U.S.C. 7704.

[663] 16 CFR part 310.

[664] See, *e.g.,* Sheppard Mullin; AHCA; AHA.

[665] Such units may commonly occur within employers with decentralized operations. See, *e.g.,* ACE; Con-Way.

[666] See, *e.g.,* ABC II; AGC II.

[667] See ACE.

[668] See, *e.g.,* AHA II.

[669] See, *e.g.,* Bluegrass Institute; GAM; Sheppard Mullin; AHA.

Inasmuch as inaccuracies can be the basis for setting aside an election upon the timely filing of an objection,[670] the Final Rule will likely make more rerun elections necessary when a union fails to secure a majority vote in the first election.[671]

Our colleagues largely dismiss these concerns. Primarily, they assume that advances in recordkeeping, retrieval, and record transmission technology warrant the reduction in time for production to 2 business days for all employers in the interest of ''expeditiously resolv[ing] questions of representation.'' We can readily concede that *some* employers may be able to comply with the new 2-day deadline for production of the expanded *Excelsior* list, but the record falls far short of establishing that all, or even most, employers will be able to do so, particularly those who lack modern technology or who operate in industries with complex eligibility formulae.

• *Excelsior Disclosures—Summary.* The majority relies on a bundle of assumptions to justify its rejection of the need for any privacy safeguards and its insistence that it is not onerous to require all employers to provide the expanded list in just 2 days. None of those assumptions bears a rational relation to the factual record before us or to statistically proven probabilities.

What remains of the majority's rationale is quite familiar. With respect to privacy concerns, they say that ''[w]ithout minimizing the legitimacy of the concerns underlying these comments, we conclude for the reasons that follow that the public interests in the fair and free choice of bargaining representatives *and in the expeditious resolution of questions of representation* outweigh the interests employees and employers have in keeping the information private.'' With respect to the 2-day deadline, they reason that ''[s]hortening the time period from 7 calendar days to 2 business days will help the Board *to expeditiously resolve questions of representation, because the election—which is designed to answer the question—cannot be held until the voter list is provided.''* It is readily apparent that the irrational need for speed in the pre-election period is the primary motivation for rejecting any impediment to shortening that period, even the allotment of a just a few extra days to allay significant privacy concerns and to facilitate employers' accurate and timely compliance with the new *Excelsior* list requirements.

(h) *No Change in Blocking Charges and Resulting Delays—The failure to change the Board's blocking charge policy perpetuates lengthy delays, and making it part of the Rule will impede future changes.* As fully discussed in Section B below, the Final Rule fails to address the statistical ''long tail'' of representation cases that have actually been shown to account for a large portion of overall delay in representation case processing. Cases involving application of the current blocking charge policy are a major part of this ''long tail.''[672] Also, as indicated in the NPRM, the blocking charge doctrine has not previously been codified in the Board's formal Rules. In the Final Rule, however, the blocking charge policy is being retained—with the most minimal modifications—and it is being embedded in the Final Rule itself. This is retrenchment, not progress.

As stated in Section 11730 of the Board's Casehandling Manual for Representation Proceedings, ''[t]he Agency has a general policy of holding in abeyance the processing of a petition where a concurrent unfair labor practice charge is filed by a party to the petition and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted.'' However, the manual admonishes that ''the policy is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition. Rather, the blocking charge policy is premised solely on the Agency's intention to protect the free choice of employees in the election process.''

The sense that the Board's blocking charge policy causes problems in case processing is hardly a new concept.[673] The Board has acknowledged the reality that its blocking charge policy can be improperly overutilized. See *Shaw's Supermarkets,* 350 NLRB 585, 589 (2007) (noting with respect to decertification petitions that ''in many cases, blocking charges are filed and delay the election until the charges are resolved one way or another''). Indeed, multiple comments describe experiences where unions filed unfair labor practice charges to block an upcoming decertification election that such unions concluded they were likely to lose.[674] Our colleagues thus rightly acknowledge that ''incumbent unions may abuse the policy by filing meritless charges in order to delay decertification elections.'' We would add that unions filing initial election (RC) petitions may likewise file meritless blocking charges to delay an election and buy additional time for campaigning and shoring up support where electoral defeat appears likely. Of course, many unfair labor practice charges that currently block an election may have merit, or at least warrant litigation, just as many unit eligibility and inclusion issues raised by employers may have merit or warrant litigation. We wish our colleagues paid as much attention to the potential for unacceptable election delay from the former as they do to the latter.

The Final Rule adopts from the NPRM and codifies certain evidentiary requirements applicable when a party requests than an unfair labor practice charge block the processing of an election petition. Specifically, the requesting party must ''simultaneously file [with the Board], but not serve on any other party, a written offer of proof in support of the charge * * * * provid[ing] the names of the witnesses who will testify in support of the charge and a summary of each witness's anticipated testimony.'' Further, the party must ''promptly make available to the regional director the witnesses identified in its offer of proof.'' The Final Rule does not otherwise modify the extant blocking charge policy. Our colleagues' stated purpose in adopting these requirements is ''to protect against abuse of the blocking charge policy by those who would use the unfair labor practice procedures to unnecessarily delay the conduct of elections.''

Although the Final Rule's modest reforms to the blocking charge policy are arguably improvements over the status quo in the pre-complaint investigatory stage,[675] they do not, standing alone, adequately address the frequent substantial delay in processing

[670] See, *e.g., Mod Interiors, Inc.,* 324 NLRB I64 (1997) (setting aside election where *Excelsior* list contained a significant number of inaccurate addresses).

[671] As previously noted with respect to the required posting of the initial election notice, our colleagues seem greatly concerned with expediting the electoral process in general, but the possibility of delay from this second-chance failsafe opportunity apparently escapes such concern.

[672] As noted by the majority, a study conducted by commenter and Professor Samuel Estreicher of data pertaining to blocking charges filed in 2008 determined that the filing of blocking charges in a case increased the time to an election, on average, by 100 days. Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change,* 25 ABA J. Lab. & Emp. L. 1, 9–10 (2009).

[673] See, *e.g.,* Subrin, *The NLRB's Blocking Charge Policy: Wisdom or Folly?* Labor Law Journal, Vol. 39, No. 10 (October 1988). The author was for many years director of the Board's Office of Representation Appeals.

[674] See, *e.g.,* NRTWLDF; Chamber II; COLLE; CDW II.

[675] We say ''arguably'' because, as the majority notes, the General Counsel already accords ''highest priority'' to investigating blocking charges.

election petitions caused by blocking charges. In particular, we believe that the overbreadth of the current policy causes unacceptable delay in the conduct of elections even when the charge filing is not itself abusive of process.

As indicated in Section 11730.1 of the Representation Casehandling Manual, ''[b]locking charges fall into two broad categories. The first, called Type I charges, encompasses charges that allege conduct that only interferes with employee free choice. The second, called Type II charges, encompasses charges that allege conduct that not only interferes with employee free choice but also is inherently inconsistent with the petition itself.'' [676] In the Type I situation, unless the filing party requests that the election proceed, a petition is held in abeyance until the charge is dismissed or withdrawn, or if found meritorious, until final resolution of the ensuing unfair labor practice complaint litigation, which could take years. In the Type II situation, a merit determination will ordinarily result in the petition's dismissal.

In our view, experience has shown the Board should refrain from holding petitions in abeyance for Type I blocking charges. Current policy represents an anomalous situation in which some conduct that would not be found to interfere with employee free choice if alleged in objections, because it occurs outside the critical election period, would nevertheless be the basis for substantially delaying holding any election at all.[677] Further, we find it paradoxical that the filing party, almost invariably a union in the blocking charge context, may control the timing of an election by requesting that it proceed. Objectively, if the Board's stated intention in the blocking charge policy is ''to protect the free choice of employees in the election process,'' [678] it does not make sense for one party—in this case, the union that chooses to file a charge—to control whether or when employees exercise that choice by participating in the election.

Even with the new pre-complaint evidentiary requirements, we also oppose having the blocking charge policy codified in the Board's formal Rules. In this regard, we do not believe the Final Rule articulates a sufficient basis for incorporating the blocking charge doctrine, particularly since the Final Rule does not otherwise adopt any of the substantial potential changes referenced in the Proposed Rule, and codifying the policy is likely to impede or preclude further changes or improvements in this important area. At a minimum, we favor keeping the blocking charge policy out of our formal Rules during a 3-year trial period in which petitions will be routinely processed and elections conducted in Type I blocking charge cases, with the votes thereafter impounded, even in cases where a regional director finds that there is probable cause to believe an unfair labor practice was committed that would require the processing of the petition to be held in abeyance under current policy. The Board would then have empirical evidence for evaluation of the need for permanent amendment of the policy, weighing any benefits in eliminating protracted delay in the conduct of elections against possible risk to the exercise of employee free choice.

Our colleagues decline to substantively modify the blocking charge policy principally because, as they claim, ''holding a tainted election results in damage beyond that caused by the employer's unfair labor practices, which damage cannot be fully remedied simply by conducting a rerun election.'' Again, speaking only in reference to Type I cases—those *not* involving conduct that necessarily taints the petition process—it remains possible, even if the election takes place, for the union to file post-election objections and charges, causing the election to be set aside, followed by a rerun election. This remains the standard Board approach to election-related misconduct during the critical period. Given our colleagues' relentless focus on conducting elections as soon as possible—in literally every other context addressed in the Final Rule—it is irrational and self-defeating to retain the blocking charge doctrine, which prevents many elections from taking place *for years.*

In sum, the Final Rule's incorporation of the current blocking charge policy with minimal pre-complaint changes provides nothing of meaningful value and leaves completely unaffected the enormous delays caused by this policy. Codifying the policy, without meaningful change, makes even more difficult the future prospect of giving this policy the serious attention and substantial reforms that, in our view, are warranted.

B. The Final Rule Still Fails To Target Election Cases That Involve Too Much Delay

The NLRA involves more than procedures in representation cases. The Act's *substance* consists of important election-related rights, obligations, and constraints, including the prohibition against restraint or coercion by employers or unions regarding any employee's exercise of protected rights.[679] In our NPRM dissent, we noted the absence of proposals directly addressing the commission of unfair labor practices during an election campaign. Still, the Final Rule makes no overt changes regarding the Board's treatment of unlawful election conduct by employers or unions. That is a matter for another day, say our colleagues. However, it is well known that many union advocates have argued for greatly expedited representation elections based on alleged employer misconduct that, it is claimed, adversely affects the outcome.[680] They maintain that the longer the pre-election period is, the greater is the potential for such misconduct to take place. Notwithstanding the majority's disclaimers, the absence of a rational justification for so many of the revisions discussed above that concentrate on the acceleration of the pre-election stage of representation case proceedings makes it difficult, if not impossible, to avoid the conclusion that the majority accepts the unions' argument and that the Final Rule's focus on the need for speed is compelled by this argument.

Furthermore, to the extent that the Final Rule seeks to address unacceptable election delay, the objective evidence shows such delay occurs, at most, in only a very small percentage of Board-conducted elections. These relatively few cases do not provide a rational basis for rewriting the procedures governing *all* elections.

The graph below, based on a breakdown of all NLRB initial elections conducted between 2008 and 2010, is republished from our Proposed Rule dissent and still illustrates this point. In more than 90 percent of those cases, elections occurred within 56 days after the filing of the petitions (these cases

[676] Casehandling Manual Sec. 11730.1.

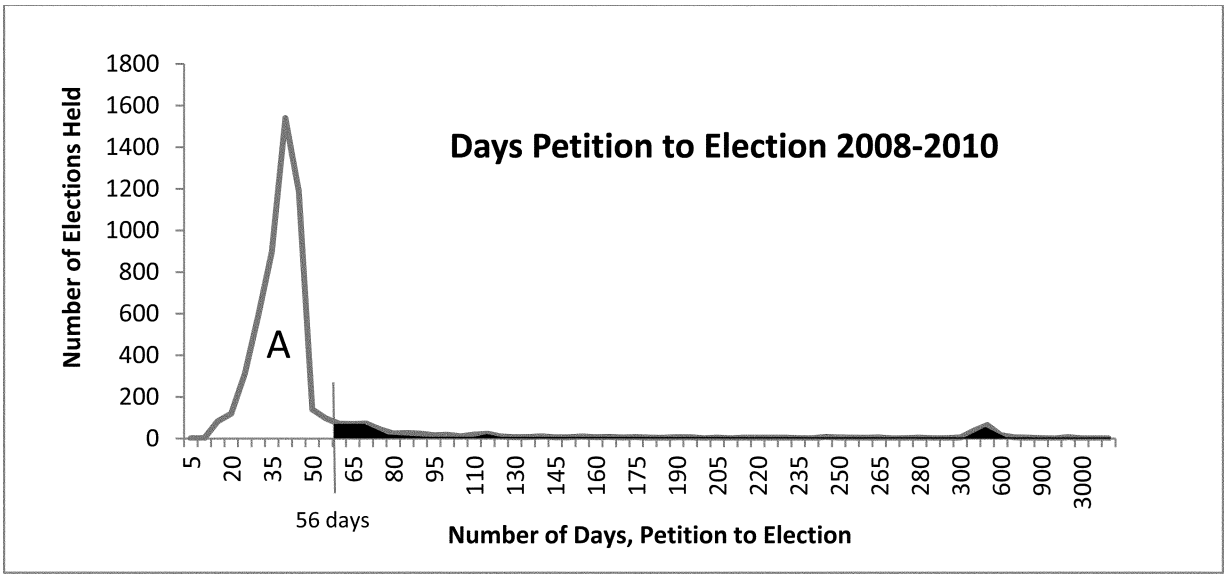
[677] *Ideal Electric Mfg. Co., supra* (to be found objectionable, alleged conduct must occur in critical period between petition and election dates).

[678] Casehandling Manual Sec. 11730.

[679] See Sec. A.2., *supra.*

[680] These arguments were referenced in the preamble accompanying the now-vacated final election rule issued in December 2011. See 76 FR 80138 (2011) (prior final rule regarding representation case procedures with explanatory preamble). The preamble noted that many labor organizations cited research studies indicating that shorter election periods would result in ''fewer unfair labor practices,'' although the preamble also acknowledged that various management-side organizations ''question[ed] the validity of such studies.'' *Id.* at 80149 n.33.

are reflected in the graph area appearing in white, marked ''A''). As noted previously, this represents a dramatic improvement over the Board's track record since the early 1960s. Conversely, less than 10 percent of the cases identified in the graph involved elections that occurred more than 56 days after petition-filing (these delayed cases are reflected in the graph area shaded in black, which is barely visible, to the right of the 56-day line).



The case distribution in the graph shows there is no evidence of delay evenly apportioned across the universe of Board-conducted elections, *i.e.,* delay affecting a large group of cases to a significant degree. In fact, the graph is far from a standard bell curve; it does not show *any kind of significant distribution of cases greater than 56 days* between petition-filing and election.[681] We are not the first to note this wildly uneven statistical distribution in the context of an asserted ''systemwide delay'' problem. An earlier study addressing the same distribution findings accurately described the scattering of cases along the extended time continuum beyond 56 days as the ''long tail'' of election cases.[682] In other words, empirical data seem to disprove the existence of a systemwide delay problem, and instead demonstrate that delay is only an issue confined to a discrete minority of cases, possibly for issues unique to those cases.

The Final Rule contains many references to increased speed and efficiency, but fails here by making no differentiation between the overwhelming majority of elections that already take place quickly and the relatively small number that do not. Instead, the Final Rule rewrites the procedures that govern *all cases,* the overwhelming number of which *already* take place quickly.

Suppose, for instance, that the U.S. Fish and Wildlife Service had a mandate to stop the poaching of manatees, which reside almost exclusively in Florida.[683] It would defy logic and common sense to deploy anti-poaching rangers in all 50 states, when most states do not even have bodies of water where manatees live. This is precisely the approach reflected in the Final Rule. It applies almost entirely to elections that do *not* involve significant delay, while failing to identify and target the specific causes of delay in those few cases where employees are denied the opportunity to vote in a timely manner.

As we have repeatedly stated in this opinion, every Federal agency has a legally mandated responsibility to take action that bears a rational relation to relevant facts and the matters being addressed.[684] In this respect, even putting aside the many ways in which the Final Rule is contrary to statutory mandates (see Part A above), it creates poor public policy and is not rationally related to the genuine problems of delay in case processing. At a minimum, there needs to be a better fit between rulemaking in this important area and any problems that ostensibly warrant Agency action.

In Section D below, we suggest rulemaking changes that would represent significant progress addressing the unacceptable delay in the ''long tail'' of representation cases. If our colleagues wish to immediately reduce the number of overage representation cases, they need look no further than the Board's own pending caseload. As of October 1, 2014, the beginning of Fiscal Year 2015, there were 33 pre-election representation cases pending before the Board *for over a year,* 4 of which have been pending *for over 3 years.* Nothing prevents the Board from adjusting its own internal procedures—combined with due diligence, effort, and commitment, rather than rulemaking—to resolve all of these cases, and to ensure that *every* future representation case is timely resolved. Indeed, the countless number of hours spent by Board personnel in rulemaking might much better have served the purpose of expeditiously processing representation cases by attending to this problem. In Part D below we identify measures that, in our view, would accomplish these objectives and otherwise improve representation procedures consistent with the Board's responsibilities under the Act.

[681] As noted previously, 56 days is the Board's own traditional target for conducting at least 90 percent of elections, a target that the Board has surpassed in recent years. See notes 560–562, *supra,* and accompanying text.

[682] See John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004,* 62 Indus. & Lab. Rel. Rev.3, 10 n.9 (Oct. 2008).

[683] Manatees, sometimes known as ''sea cows,'' are large aquatic marine mammals considered to be relatives of the elephant. *See http://en.wikipedia.org/wiki/Manatee*; *http://www.defenders.org/florida-manatee/basic-facts.* The Florida manatee is Florida's state marine mammal. *Id.*

[684] *State Farm, supra,* 463 U.S. at 43.

C. The Final Rule Still Does Not Reflect A Comprehensive De Novo Examination of Important Election Issues

We credit our colleagues for affording the opportunity to have renewed public comment on the republished NPRM. Further, we recognize that they have made some changes in the Final Rule that we support. For example, (1) the Final Rule abandons the proposal to eliminate pre-election requests for review and pre-election requests to stay the election, which the statute requires the Board to permit; (2) the Final Rule recognizes to some degree that the Act does not permit hearing officers even to make ''recommendations'' regarding election issues (although we believe these changes do not adequately cure the improper vesting of controlling authority in hearing officers);[685] (3) some restrictive provisions pertaining to the new Statement of Position and issue preclusion requirements have been modified;[686] (4) the 20 percent evidence-exclusion rule is no longer a mandatory standard; (5) the proposal to state in the Rule that parties have a maximum of 5 days to move to quash a subpoena has been abandoned;[687] and (6) the expanded *Excelsior* list disclosure requirements do not mandate employers to furnish the work email addresses and work phone numbers of eligible voters.[688]

However, the Final Rule clearly retains essential elements from the Proposed Rule that the Board issued in June 2011, which generated more than 65,000 sets of written public comments, with a further 66 individuals representing nearly as many different organizations making oral presentations to the Board. It is true that our colleagues incorporated by reference the entire administrative record of the 2011 rulemaking, including ''numerous arguments both for and against the proposals,''[689] rather than requiring the public to resubmit the same comments. And the Proposed Rule stated ''[a]ll of this material will be fully considered by the Board in deciding *whether* to issue any final rule'' (emphasis added).[690] However, we believe the Board should have considered this voluminous material *before* determining the contours of the 2014 Proposed Rule. Having reviewed the earlier material and more recent additional comments and oral presentations, we believe the Board should have published an amended Proposed Rule for further comment. Even putting aside our disagreements with the Final Rule, the scope of the proposed changes combined with the voluminous, diverse comments received by the Board make it advisable, at the least, to do now what we believe our colleagues should have done when, in February 2014, they republished the 2011 NPRM.

The Board is an independent agency, first and foremost. We would serve the public better by ''listening first, formulating later'' instead of ''formulating first, listening later.'' Once the NPRM issued anew, it necessarily reflected a conscious set of public policy choices or preferences. Just as the exchange of views during bargaining leads to improved outcomes and furthers industrial peace, so does engagement with the public in rulemaking. The Act itself disfavors the assumption that there is a ''perfect initial offer'' leaving nothing to discuss. See *General Electric,* 150 NLRB 192 (1964), *enfd.* 418 F.2d 736 (2d Cir. 1969), *cert. denied* 397 U.S. 965 (1970).

From the beginning of this particular era of a confirmed five-Member Board in August 2013, we already had before us an enormous record in this rulemaking proceeding. Further, there was an apparent commitment to proceed with rulemaking. Why, then, would it not have been preferable to review what was not definitively reviewed until later? In the 6 months before republication of the original NRPM in February 2014, there was ample opportunity to consider and include the revisions discussed above in a new, modified Proposed Rule. The modified NPRM would have represented an appreciable midpoint for further comment in this proceeding, a far preferable alternative to the first disclosure of revisions in the Final Rule without further opportunity for public comment. The republication of the original NPRM could not help but convey the impression that the Board majority was set on an intractable course. The issuance of this Final Rule, presenting no opportunity for revisions of the NPRM's proposals, does not alter that impression.

The conduct of elections lies at the heart of the Board's statutory responsibilities, and the rulemaking path taken by the current Board to this point is far too suggestive of a fait accompli. Inasmuch as there will be no opportunity for public comment on the Final Rule, it falls to us to discuss its provisions in the foregoing sections of this opinion and, in the next section, to explain why it would be far better to take a different approach.

D. The Path Not Taken

We support rulemaking if it is necessary to address relevant issues consistent with the Board's authority and the Act's requirements. We join our colleagues in their overall desire to more effectively protect and enforce the rights and obligations of parties subject to the Act. We fully agree that the Board should do everything within its power to conduct representation elections in a way that gives effect to employee free choice. And we agree that the Board should work aggressively in carrying out its statutory responsibilities to everyone covered by the Act.

Our opposition to the Final Rule stems from its variance from choices already made by Congress, in addition to provisions that predictably will cause unfairness and adverse consequences for many parties. The most important threshold question to answer—still not adequately explained in the Final Rule—is whether and why such expansive rulemaking is necessary at all. As the Supreme Court has stated, a ''settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.''[691]

[685] Section 9(c)(1). For example, the Final Rule ostensibly places authority in regional directors to exclude evidence (which conclusively precludes review by the regional directors and the Board regarding excluded matters), but it remains clear that hearing officers—not regional directors—preside over the hearing; and we believe the exclusion of evidence regarding issues like voter eligibility will improperly limit the scope of the hearing, contrary to Section 9(c)(1)'s ''appropriate hearing'' requirement. The Final Rule, therefore, will predictably cause litigation over hearing officer rulings that exceed what is permitted by Section 9(c)(1) and *Bennett Industries, Inc.,* 313 NLRB 1363, 1363 (1994).

[686] In the Final Rule, a non-petitioning party can now modify a Statement of Position ''for good cause''; the inapposite use of the term ''joinder'' is eliminated, as is inapposite reliance on language drawn from the summary judgment standard in Federal Rule of Civil Procedure 56; contested issue requirements are revised to expressly exempt from preclusive effect a party's ability to challenge the eligibility of any voter during the election; and the mandate to require offers of proof on a potential issue prior to the introduction of testimony is eliminated.

[687] We nevertheless strongly disagree with the suggestion that limited caselaw supports a Board practice permitting a region to regire the filing of a motion to quash in less than 5 days. Such a requirement would be in direct conflict with the express language of Section 11(1) of the Act, which mandates a minimum of 5 days for a motion to quash.

[688] The significance of this revision is limited, due to our colleagues' determination that employers must ordinarily allow their employees access to work email systems to engage in organizational activities. See *Purple Communications, supra.*

[689] 79 FR at 7318.

[690] *Id.*

[691] *Atchison, T. & S. FR Co.* v. *Wichita Bd. of Trade,* 412 U.S. 800, 807–08 (1973).

Regarding the substance of the Final Rule, we believe there would be broader support, substantially less opposition, and greatly enhanced prospects for judicial enforcement if the Final Rule took a more limited, better defined, and less potentially disruptive form that had unanimous support among Board members. We believe reasonable changes incorporating the following elements, had they been accepted by our colleagues, would also have broad-based support among scholars, practitioners, and advocates for employees, unions and employers.

1. *Address the ''Speed'' Issue.* For the reasons stated in our dissent to the Proposed Rule,[692] we believe it is important that the Board provide guidelines regarding reasonable minimum and maximum times between the filing of a representation petition and the holding of the election. The majority continues to reject this suggestion, focusing almost exclusively on their objection to the setting of a minimum time. In their view, such an action is not necessary to accord with Congressional intent or to assure against infringement of free speech rights. As we have discussed at length, we disagree with the majority on these critical points.

We believe it would be reasonable to have a *minimum* guideline time period between 30 and 35 days from petition-filing to election. This would be consistent with the indications that Congress intended that employees should have no fewer than 30 days between petition-filing and an election to become familiar with relevant issues.[693] This standard would also permit other reasonable efforts to streamline election procedures, while retaining the 7-day period for having post-hearing briefs and a reasonable time for parties to file pre-election requests for Board review of regional director decisions and actions.

We also believe to the Board should establish a *maximum* guideline period of 60 days from petition to election, unless the Board or the regional director (subject to Board review) determines that unusual circumstances preclude holding the election within this 60-day timeframe. As previously discussed, 90 percent of Board elections are already held within 56 days or less after a petition is filed. With few exceptions, we believe a 60-day maximum represents a rational and attainable standard for all elections.

2. *Address the Specific Issues Responsible for Delayed Elections.* As noted above, there have been particular cases—few in number—where elections and related issues have taken too long to resolve. Rather than engaging in a wholesale revision of the procedures applicable to all elections, the Final Rule should directly address the particular reasons that have contributed to those relatively few elections that have involved unacceptable delay (depicted as the statistical long ''tail'' in the above graph).

Again, a prime candidate is the Board's ''blocking charge'' doctrine (which permits parties to indefinitely delay an election by filing certain unfair labor practice charges, addressed in our recommendation no. 3 below). More generally, there is no lack of data regarding factors that may have contributed to the relatively small number of cases involving too much time. This data should be carefully examined, with a view towards targeting the problem cases, rather than reformulating the procedures governing all elections.

3. *Reform the Board's Internal Procedures So Election Issues Are Addressed More Quickly, and Eliminate Blocking Charge Deferrals for a Three-Year Trial Period.* One of the biggest contributors to the delays associated with resolving election-related issues is the time that particular cases are pending before the Board, rather than in regional offices. The Final Rule does not foreclose changes in the Board's internal election case-handling procedures, but the Final Rule's expansive rewriting of the rules govering all elections—before the Board explores improvement in its own election case-handling—obviously undermines any argument that the Final Rule's changes are necessary.

The far better approach, in our view, would be for the Board to exhaust—or at least attempt—reasonable improvements in its own election casehandling practices, possibly combined with targeted changes, such as the 3-year trial period for ''blocking charge'' reform that we advocate. This change and similar targeted improvements could result in having nearly all elections occur between 30 and 60 days after petition-filing, while obviating the need to change other election procedures that are well known and have well served parties and the Board for many decades.

4. *Aggressively Pursue Measures to Prevent and Remedy Unlawful Election Conduct.* To the extent that unlawful employer or union conduct occurs during any election, this is already prohibited by the Act, and we continue to support aggressive Board enforcement and the formulation of effective remedies, including the pursuit of civil and criminal contempt sanctions to the extent available under the Act and Federal law. We continue to believe one of the greatest deficiencies in the Final Rule is its failure to address these substantive issues in any meaningful way. The Act deserves to be enforced by the Board, and to be respected by the parties, as much as any other Federal or state legal requirements. See, *e.g., HTH Corp. d/b/a Pacific Beach Corp.,* 361 NLRB No. 65 (2014) (addressing enhanced remedies and various Board member views regarding recurring unfair labor practices). Of course, the Board may not presume the existence of unlawful conduct, and much of the Board's statutory responsibility involves the adjudication of unfair labor practices if they are alleged. However, when violations of the Act occur, including instances where they affect elections, they should be dealt with promptly and aggressively by the Board, and we support further consideration of ways in which employer or union violations can be more effectively remedied.

5. *Deal with the Need to Preserve and Enhance Privacy.* Although the Proposed Rule solicited public input concerning the safeguarding of privacy interests regarding personal information, and the possibility of giving employees the opportunity to choose whether and how any personal information might be disclosed, the Final Rule dispenses with any meaningful effort to address these concerns.

6. *Summary.* Under the *State Farm* ''arbitrary and capricious'' standard, an agency engaged in policymaking has ''a duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.''[694] This is particularly so where, as here, ''the choice embraced suffers from noteworthy flaws.''[695] To that end, we regret that our colleagues would not consider enacting a limited final rule and implement other procedural changes outside the rules.

Conclusion

The Final Rule represents the culmination of a rulemaking process characterized by discontinuity, a near-complete change in the Board's composition, an unprecedented number of comments espousing widely divergent views, and the rewriting of

[692] 79 FR 7340, 7344, 7347.

[693] See note 576, *supra,* and accompanying text.

[694] *Farmers Union Central Exchange, Inc.* v. *FERC,* 734 F.2d 1486, 1511 (D.C. Cir. 1984).

[695] *City of Brookings Municipal Telephone Co.* v. *FCC,* 822 F.2d 1153, 1169 (D.C. Cir. 1987).

virtually all procedures governing Board-conducted representation elections. The end result has been predictable only in its nearly complete conformity to what the Board originally proposed. In this regard, we believe the Final Rule is inconsistent with the Act and Congressional intent. It fails to provide adequate protection of employee rights of free choice and privacy and of all employees' and parties' rights of free speech and procedural due process. Although our colleagues go to great lengths to suggest the Final Rule's amendments do nothing more than reflect best practices and respond to changing times, we are not convinced. ''Any procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice.'' [696] Necessarily, the Board itself has a statutory obligation to ''remain 'wholly neutral' as between the contending parties in representation elections.'' [697] Unfortunately, the inescapable impression created by the Final Rule's overriding emphasis on speed is to require employees to vote as quickly as possible—at the time determined exclusively by the petitioning union—at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues.

The Board would better serve employees, unions and employers—and the public interest in general—by undertaking a more neutral, limited and even-handed approach, which would focus on specific problems in our representation procedures and formulate targeted solutions. Under our existing procedures, the Board has been extremely successful, with very few exceptions, in conducting elections and resolving all election issues without significant delay. We support reasonable efforts to make the Board's representation procedures as fair and effective as possible. However, we believe this is not accomplished by the Final Rule. Accordingly, for the reasons stated above, we respectfully dissent.

VIII. Comments on Other Statutory Requirements

The Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (''RFA''), 5 U.S.C. 601 *et seq.,* requires agencies to prepare a regulatory flexibility analysis if the regulations will have a significant economic impact on a substantial number of small entities. The purpose of the RFA is to ensure that agencies ''review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA].'' E.O. 13272, 67 FR 53461 (''Proper Consideration of Small Entities in Agency Rulemaking'').

The RFA only requires analysis of a rule, however, where notice and comment rulemaking is required. 5 U.S.C. 604(a). The provisions of this final rule are generally procedural and could have been promulgated without notice and comment under the APA, 5 U.S.C. 553(b)(3)(A) (''this subsection does *not* apply * * * to interpretative rules, general statements of policy, or *rules of agency organization, procedure, or practice*) (emphasis added).[698] These procedural provisions change the manner in which parties present themselves or their viewpoints to the Board in one category of cases, but do not alter the rights or interests of the parties. *Batterton* v. *Marshall,* 648 F.2d 694, 707 (D.C. Cir. 1980) (''A useful articulation of the [APA's] exemption's critical feature is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.''). Despite its use of notice-and-comment procedures, and RFA certification, to promulgate and amend the rules here, the Board has not waived the exemption, because voluntary compliance with procedures will not operate as a waiver of the exemptions. *Baylor Univ. Med. Ctr.* v. *Heckler,* 758 F.2d 1052, 1059 n.12 (5th Cir. 1985); *Malek-Marzban* v. *Immigration & Naturalization Serv.*, 653 F.2d 113, 116 (4th Cir. 1981); *Washington Hosp. Ctr.* v. *Heckler,* 581 F. Supp. 195, 199 (D.D.C. 1984).[699]

Nevertheless, in the interests of providing the public with additional information regarding the rule's effects, as a matter of discretion, the Board is providing the analysis contemplated by Section 605 of the RFA for the entire rule.

Under Section 605, an agency is not required to prepare a regulatory flexibility analysis if the agency head certifies that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). To so certify, the agency must publish the certification in the **Federal Register** and include ''a statement providing the factual basis for such certification.'' *Id.*

In its Notice of Proposed Rulemaking, the Board determined that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of 5 U.S.C. 605(b). 79 FR 7349–7350. There, the Board invited comments from the public regarding the entire rule, including this certification. *Id.* at 7318. The Board has reviewed those comments and has concluded that certification remains appropriate. Accordingly, the Board's Chairman hereby certifies to the Chief Counsel for Advocacy of the Small Business Administration (''SBA'') that the amendments will not have a significant economic impact on a substantial number of small entities.

The Chamber asks the Board to provide more detailed calculations and cost estimates for its certification. Similarly, other comments including those from NAM, CNLP, COLLE, COSE, NFIB, AEM, and NRF expressed concern that the Board underestimated the economic impact of the rule in its certification. The Board believes that the NPRM's certification was adequate, but seeks to be responsive to comments received. To that end, the Board will provide the more detailed analysis of the economic impact of the regulation below.

The analysis supports the Board's conclusion. As the analysis will show, the provisions of the final rule will cause less than one small entity per year to incur a significant economic impact.

[696] *NLRB* v. *Savair Mfg. Co.,* 414 U.S. 270, 278 (1973).

[697] *NLRB* v. *Action Automotive,* 469 U.S. 490, 498 (1985).

[698] In the Board's judgment, only the changes pertaining to contact information provided in the voter list may arguably be considered substantive. Cf. *NLRB* v. *Wyman-Gordon Co.,* 394 U.S. 759 (1969) (assuming *arguendo* that the *Excelsior* list requirement is a substantive rule). As discussed below, the cost of including additional information in the voter list is not significant under the RFA. The codification of extant blocking charge policy in the regulations may also be considered substantive, but mere codification imposes no costs on small business, and the only changes to blocking charge policy are clearly procedural.

[699] This conclusion is in contrast to those cases in which courts have found that agencies have expressly waived an APA exemption by publishing a rule or regulation stating that it will only use notice-and-comment procedures to promulgate or amend its regulations regardless of whether an APA exemption is applicable. See, *e.g., Yesler Terrace Cmty. Council* v. *Cisneros,* 37 F.3d 442, 447–448 (9th Cir. 1994) (Department of Housing and Urban Development adopted requirements for notice and comment rulemaking in 24 CFR 10.1 and expressly waived APA exemption); *Humana of South Carolina, Inc.* v. *Califano,* 590 F.2d 1070, 1084 nn.103 & 104 (D.C. Cir. 1978) (Department of Health, Education and Welfare expressly waived APA exemption in 36 FR 2532 adopting notice-and-comment procedures); *Rodway* v. *Dep't of Agriculture,* 514 F.2d 809, 814 (D.C. Cir.1975) (express waiver of APA exemption by Department of Agriculture at 36 FR 13804). The Board has published no such rule or regulation requiring such procedures for amendment of its rules.

This is not a substantial number of small entities.

We start with a few key definitions. The RFA does not define either ''significant economic impact'' or ''substantial number of small entities.'' 5 U.S.C. 601. In the absence of specific definitions, ''what is 'significant' or 'substantial' will vary depending on the problem that needs to be addressed, the rule's requirements, and the preliminary assessment of the rule's economic impact. The agency is in the best position to gauge the small entity impacts of its regulation.'' SBA Office of Advocacy, ''A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act'' (''SBA Guide'') at 18, *http://www.sba.gov/sites/default/files /rfaguide_0512_0.pdf.*

The Board has assessed ''significant economic impact'' upon a small entity by examining whether increased costs under the rule exceed 1% of that entity's estimated gross annual receipts. This determination is consistent with guidance from the SBA's Office of Advocacy, which indicates that a cost might be significant if ''the costs of the proposed regulation * * * exceeds 1 percent of the gross revenues of the entities in a particular sector.'' SBA Guide at 19.

The Board has determined that a rule impacts a substantial number of small entities when the total number of small entities impacted by the rule is equal to or exceeds 10 percent of the relevant universe of small entities. This determination is equal to assessments in regulations promulgated from the Department of Labor, see, *e.g., Temporary Non-Agricultural Employment of H–2B Aliens in the United States,* 77 FR 10038, 10144 (2012).

The Board has used the definitions of small entities promulgated by the United States SBA. See U.S. Small Business Administration, ''Small Business Size Standards,'' *http://www.sba.gov/content/small-business-size-regulations.* For this analysis, the Board applied information from the North American Industry Classification System (NAIC) to its most recent data on representation petitions.[700]

With these definitions in mind, we first consider the costs that entities that are not party to a representation case proceeding may choose to voluntarily incur. Second, we consider the changes generally relating to filing or responding to a petition, and the new costs associated with these changes. Third, we consider the costs impacting only a small number of proceedings. Finally, we summarize changes which impose no new costs. In each of these groups, the Board has reviewed the estimated costs and determined that the rule does not impose a significant economic impact on a substantial number of small entities.

Some background on the Board's representation case docket is in order. In FY2013, a total of 2,507 RC, RD, and RM representation proceedings were initiated.[701] A total of 205 pre-election hearings were held. Post-election litigation in some form also took place following the election in 216 cases, hearings were held in 54 cases, and exceptions were filed in 32 cases. Blocking charges were filed in 223 cases. We expect this data to be similar in future years.[702]

TABLE 1—FREQUENCY OF THE USE OF PARTICULAR PROCEDURES DURING ELECTION CASES

	Total	Percent ''R'' cases
Petitions	2507	n/a
Pre-election hearings	205	8.2
Challenges or objections	216	8.6
Post-election hearing	54	2.1
Post-election exceptions	32	1.3
Blocking charges	223	8.9

Certain changes to Board procedure instituted in the final rule will apply to all or most representation cases. Those provisions, however, are unlikely to impose a significant economic impact upon any regulated small entity. To the extent that the changes in the final rule have the potential to significantly increase costs for any small entities, those costs primarily occur in cases where post-election hearings are held, and parties appeal the hearing officer's report. Such cases are a small minority of all representation cases, and as we demonstrate below, the costs associated with those cases significantly affect less than 10% of the relevant small entities.

A. Entities That Are Not Party to a Representation Case Proceeding

In response to the Board's proposed rule, some of the comments assert that the rule would impose costs upon all employers subject to the jurisdiction of the Board, because each must, for example, read and understand the rule, train human resources and management staff concerning the rule, educate their employees about the rule, and find or hire labor counsel to provide advice concerning the rule. Comments of this type were submitted by the Chamber, NAM, NRF, and NFIB, among others. NRF, the Chamber, and COLLE posited that the rule would change employers' typical reactive approach to election petitions to proactive employee education about unionization and/or require employers to maintain a constant state of alert for union organization and create HR protocols to deal with potential future elections.

The Board disagrees that any of those costs are compelled by the rule where there is no representation case proceeding. The RFA does not require an agency to consider wholly discretionary employer expenditures. Rather, the RFA requires an agency to consider the direct burden that compliance with a new regulation will likely impose on small entities. *See Mid-Tex Elec. Co-op* v. *FERC,* 773 F.2d 327, 342 (D.C. Cir. 1985) (''[I]t is clear that Congress envisioned that the relevant 'economic impact' as the impact of compliance with the proposed rule on regulated small entities.''); accord *White Eagle Co-op. Ass'n* v. *Conner,* 553 F.3d 467, 478 (7th Cir. 2009); *Colo. State Banking Bd.* v. *Resolution Trust Corp.,* 926 F.2d 931, 948 (10th Cir. 1991). This construction of the RFA is supported by Sections 603 and 604 of the RFA, which list the items to be included in a regulatory flexibility analysis (if one is required). In describing the impact, agency analysis must contain ''a description of the projected *reporting, recordkeeping and other compliance requirements* of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record[.]'' E.g., 5 U.S.C. 604(a)(4) (emphasis added). Guidance from the SBA also supports this construction of the RFA because it cites only direct, compliance-

[700] In this analysis, the Board has relied on publically available data, particularly data from the United States Census Bureau's Survey of United States Businesses, as well as agency data and expertise to provide reasonable estimates. This agency data is included in the administrative record of this proceeding.

[701] There were 1986 RC, 472 RD, and 49 RM petitions. An additional 145 other petitions were filed (UD, UC, AC) but these matters are generally not impacted by the final rule and will not be included in this analysis. See NLRB Graphs & Data, Petitions and Elections, *http://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/* (last visited July 15, 2014).

[702] NAM claims that the rule will cause an increase in representation petitions. The Board considers that prediction to be speculative. Even if the number of representation petitions goes up, for the reasons discussed below, the Board reaffirms its certification, because only a very small percentage of regulated small entities are significantly affected by the costs of the final rule.

based costs as examples of financial burdens that agencies must consider:

> (a) Capital costs for equipment needed to meet the regulatory requirements; (b) costs of modifying existing processes and procedures to comply with the proposed rule; (c) lost sales and profits resulting from the proposed rule; (d) changes in market competition as a result of the proposed rule and its impact on small entities or specific submarkets of small entities; (e) extra costs associated with the payment of taxes or fees associated with the proposed rule; and (f) hiring employees dedicated to compliance with regulatory requirements.

SBA Guide at 37.[703]

Thus, nothing in the RFA, its prior construction, or SBA guidance suggests that the Board must consider the wholly discretionary expenditures that an employer which is not party to a representation proceeding may choose to incur. Instead, the ''impact'' analysis required under the RFA focuses on direct compliance costs. The final rule imposes no such costs on small entities not party to a representation proceeding. There will be no ''reporting, recordkeeping and other compliance requirements'' for these small entities. See 5 U.S.C. 603(b)(4), 604(a)(4). And the final rule imposes on them no mandatory capital costs, no mandatory costs of modifying existing processes, no costs of lost sales or profits, and no costs of changed market competition. See SBA Guide at 37. For small entities not party to representation proceedings, there are no costs associated with taxes or fees and no costs for additional employees dedicated to compliance, as no compliance requirements exist. See *id.* Finally, there is no reason why a small entity not party to a representation proceeding would hire or otherwise retain employees dedicated to compliance with the final rule any more than it would have under the current rules. Of course, employers may train their managerial and supervisory staff and educate their employees as they wish, but compliance with the final rule does not require such action.[704]

Similarly, the rule does not require employers that do not receive an election petition to educate their employees or conduct anti-union campaigns.[705] Under both existing regulations and the new final rule, employers have the right to non-coercively state their views (whether positive or negative) about unionization generally or about particular unions, at any time, whether or not an election petition has been filed. Employers also have the right to refrain from expressing any such views. This rule does not change any of that. Costs incurred in conducting such campaigns are discretionary and beyond the scope of RFA analysis. Thus, there is no direct economic impact within the meaning of the RFA to small entities not receiving an election petition in a given year.

B. Changes Relating To Filing or Responding to a Petition

1. Service of the Petition

We now analyze the final rule's economic impact on the parties to representation proceedings. We first consider petitioners. Each of the three kinds of ''R'' petitions is typically filed by a different kind of entity: RC petitions (1,986) are filed by unions, RM petitions (49) are filed by employers, and RD petitions (472) are filed by individuals. Unions[706] and employers are covered by the RFA, but individuals are not, thus, only RC and RM *petitioners* are considered. In assessing labor costs for compliance with the final rule, we have used the Bureau of Labor Statistics' estimated wage and benefit costs for certain classifications of workers, as shown in the following table:

TABLE 2—LABOR COSTS AS PER THE BUREAU OF LABOR STATISTICS

Employee	Wages	Plus Benefits
Labor Relations Specialist 13–1075	$26.27	$37.57
Gen'l & Op Mgr. 11–1021	46.36	66.29
Lawyer 23–1011	54.95	78.58

The final rule amends § 102.60 to require that petitioners serve all interested parties a copy of the petition, a form describing representation case procedures, and a blank Statement of Position form. Based on the Board's experience with the way petitions and other documents are filed with the Board in representation cases currently, we estimate that electronic service will be used in 1,670 RC and 41 RM cases; mail in 231 RC and 6 RM; fax in 46 RC and 1 RM; and in person in 31 RC and 1 RM.[707]

In most RC and RM cases, only one party must be served. Email, fax, phone and physical addresses for unions and employers are generally publically available. We estimate that electronic or fax service will take approximately 10 minutes. For unions, the task will likely be performed by an organizer or business agent costing $37.57 per hour.[708] Ten minutes at this rate is

[703] The same guidance requires agencies to consider the cost of professional expertise, including lawyers, *as needed to comply with any recordkeeping requirements imposed by the regulation.* Because this rule imposes no recordkeeping requirement, small entities need not retain such professional expertise to comply with this rule. SBA Guidance at 36.

[704] The rules do not assume pre-petition familiarity. Indeed, as discussed above, helping small businesses familiarize themselves with Board procedures is one of the important functions of the enhanced instructions and notice provided when the petition is served under the new rules. No monetary penalties or fines are assessed against employers who fail (for whatever reason) to comply with the rule, and the instructions given to the employer note that the Board agent at the regional office can provide assistance with a number of aspects of Board procedure. The cost estimates set forth below assume that an employer has not undertaken any preparation prior to receiving an election petition.

Nonetheless, the Board agrees that an employer who has not received a petition may voluntarily choose to read the rule. A labor compliance employee at a small employer who voluntarily undertook to generally familiarize him- or herself with the changes in this final rule may take at most 2 hours to read FAQ's and other explanatory documents published by the Board, and perhaps the summary of the rule in the introductory section of the preamble. It is also possible that a small employer might wish to consult with an attorney (est. 1 hour). Combined, this would cost [2 hr × $37.58 + 1 hr × 78.58] $153.71. See infra, discussing wage statistics. This would not be a significant impact on a substantial number of small entities.

[705] The Chamber states that it does ''not know how many employers would undertake such [education] efforts.'' Other similar comments also lack factual support or are conclusory, including NRF's assertion that this rule will require employers to preemptively educate their employees, COLLE's assertion that the NPRM's RFA certification was a ''fait accompli,'' and NAM's comment that the sheer number of comments indicates that small businesses dispute the Board's conclusion that they will not be significantly impacted by the rule. COLLE's suggestion that the Board must prove that employers will not engage in additional training in response to the final rule, is similarly not required by the RFA.

[706] The vast majority of all labor unions are small entities as defined by the SBA. The SBA's ''small business'' standard for ''Labor Unions and Similar Labor Organizations'' is $7.5 million dollars in annual revenue. 13 CFR 121.201. In 2007, the most recent year for which data on annual receipts are available, 322 out of 15,006 labor unions had receipts equal to or greater than $7.5 million. See *http://www2.census.gov/econ/susb/data/2007/us_6digitnaics_receipt_2007.xls*, NAICS classification #81393.

[707] We do not have information directly applicable to the method of service of the petition, but, by analogy to the electronic filing of briefs and other documents, we estimate that this procedure will be used approximately 84% of the time. In addition, data relating to the method of filing of the petition (where hitherto electronic filing has not been permitted) suggests that, in situations where electronic service will not be used, express mail will be used 73% of the time, fax 15%, and personal service 12%. This is the basis for the estimates above.

[708] ''Organizer'' and ''business agent'' job titles are not analyzed by the Bureau of Labor Statistics May 2013 Occupational Employment Survey; however, there is a listing for ''Labor Relations Specialist'' (13–1075), and the median hourly wage for such an employee is $26.27. Base wages, however, are only 69.9% of a private employer's costs according to June 2014 data from BLS Employer Costs for Employee Compensation. Thus, to account for the

$6.26. For an express mailing, the cost is ten minutes to prepare the mailing plus postage of $19.99, for a total of [$6.26 + $19.99] $26.25.[709] For in person service, we estimate an average of 20 miles round trip, requiring 2 hours. Using GSA's privately owned vehicle reimbursement rate for 2014 of $0.56 per mile as a benchmark for estimating fuel and other costs, we reach a total cost of [2 hr × $37.57 + 20 mi × $0.56] $86.33.[710]

2. Posting and Distributing the Notice

The final rule amends § 102.63 to require that the employer post a notice when an RC, RD, or RM petition is filed. In addition to posting paper copies of the notice, employers who customarily communicate with their employees electronically will be required to distribute the notice electronically. The notice and instructions will be served on the employer. We estimate that this will require at most 30 minutes of time for reading and understanding the instructions, followed by at most 60 minutes of time for posting paper copies of the notice and (if necessary) electronic posting. The cost is therefore [1.5 hr × $37.57] $56.35.

3. Completing the Statement of Position Form

In § 102.63, the final rule requires non-petitioners to complete a Statement of Position form. For RC petitions the employer will complete the form, and for RM and RD petitions both the union and employer will complete the form.[711] The form will be similar to the current form for filing a petition, and asks for a summary statement of what issues the employer does and does not contest. The task of investigating the issues and arriving at a position is a necessary predicate for either entering into an election agreement or litigating. Accordingly, reading the petition, gathering information, and formulating a legal position are not costs that flow from the Statement of Position requirement. The cost of completing the form is the primarily administrative one of committing the position to paper. This can be accomplished in approximately 1.5 hours of lawyer time. Using May 2013 BLS OES statistics, the median hourly wage for a lawyer (23–1011) is $54.95 per hour, which equals [$54.95 × 1.43 × 1.5] $117.87 in compensation including benefits.

The Chamber II commented that the requirement to file a Statement of Position will require employers to expend significantly more resources than under current regulations, particularly where preclusion would result.[712] We disagree. Under current rules, the parties must either enter a binding election agreement or must be prepared to litigate these very issues. Whichever choice is made, the results will bind the employer. In this context, a simple statement of position should not prove an onerous addition, as specifically discussed in connection with § 102.63 above.[713] (To the extent these arguments relate to the voter list or the timing of the statement of position, these matters are discussed separately below.)

4. Changes Related to the Timing of the Position Statement and Pre-election Hearing

Section 102.63 of the final rule provides that the statement of position will be due in most cases on the seventh day after notice of the hearing issues, and so the necessary investigation must take place in that time. In one sense, this not a significant change in the law in that the Board's decision in *Croft Metals* already requires that a party must receive notice of a hearing not less than 5 days prior to the hearing, excluding intervening weekends and holidays. Nonetheless, certain commenters have argued that this is faster than actual current practice, and will therefore result in increased costs to the parties. Several comments, including from the NFIB, the Chamber and ABC contend that this time compression will increase costs because legal work is more expensive when it must be done in a shorter period of time.[714] However, none of the comments which raised this issue provided any basis for an increased cost, or any source of information by which this cost could be estimated.

The comments overstate the argument; in fact, the timeline for stipulating or preparing to litigate is not meaningfully changed in the majority of Board cases. More than 75% of hearings were scheduled to open in 7 to 10 days in FY13, and 52% of stipulated election agreements were also reached in fewer than 10 days.[715] In addition, we note that the hearing can be postponed, and that, for example, a joint motion of the parties to postpone a hearing to permit them to continue productive discussions on an election agreement would be relevant in considering whether to do so. For this reason, and for those discussed in greater detail in connection with § 102.63 above, the Board concludes that costs of preparing for a pre-election hearing are unlikely to increase because of a compressed time frame.

Nonetheless, in the interest of providing a conservative estimate of the economic impact of this rule, we will assume that the cost of stipulating or preparing to litigate is increased in every case as a result of this change. One reasonable method for estimating the order of magnitude would be to assume that this additional time pressure would result, by analogy to overtime for hourly employees, in an increase in the base hourly rate (exclusive of fringe benefits) by 50%.

cost of benefits, the wage must be multiplied by 1.43. This results rate of $37.57 per hour.

[709] According to published USPS rates, this is the price of flat-rate envelope USPS Priority Mail Express, which is a common choice.

[710] In addition to requiring service, the final rule also amends § 102.61 to file the showing of interest at the same time as the petition, rather than thereafter. There is no cost associated with this change. Also, the rule amends § 102.114 to permit parties to file petitions (and certificates of service) electronically. This change is optional, and likely to save costs. Because these changes impose no new costs on the parties, they are not included in this analysis.

[711] We note that this cost will generally only be incurred in the subset of cases that do not reach an election agreement on or before the 7th day after the petition is filed. In FY13, 21% of petitions reach a stipulation on or before the 7th day. However, for the purposes of this analysis, the cost is being assessed to all petitions.

[712] See also National Meat Association; COSE; ALG; Bluegrass Institute.

[713] Other comments, like those from the Independent Electrical Contractors, and a form letter submitted by the NFIB, among others, specified that the Statement of Position requirement will significantly increase costs because it will cause small businesses to hire outside counsel. We disagree. There is no basis to conclude that parties which felt comfortable entering a binding election agreement or litigating these very matters without the advice of counsel will feel any differently under the new rules. And the instructions, like the current petition instructions, will state that the party can call the Board Agent in the Regional Office with questions or to obtain assistance in completing the form.

[714] One comment suggested that an effect of the final rule will be to increase the percentage of cases which go to pre-election hearings. Testimony of Jonathan Fritts on behalf of CDW II. The Board has already considered and rejected this view in detail, supra, and has concluded that the long term impact of the rules, taken as a whole, will be to slightly increase the rate at which election agreements are reached. In any event, any such change in agreement rates would be the result of the individual choices of litigants, and would thus be an indirect effect exempt from RFA analysis, as discussed above.

The same commenter argued that shortened time frames may impede discussions to reach election agreements because one or more parties will lack sufficient time to formulate a position. Testimony of Fritts on behalf of CDW II. As discussed in detail supra, the time frames are within the range of current practice, and the uniformity provided will likely encourage parties to expect more focused agreement discussions. The increased disclosures of the statement of position will also promote agreements. See Testimony of Caren Sencer on behalf of Weinberg, Roger & Rosenfeld II.

[715] If the 11th and 12th days are considered, the scheduled hearing date within that time rises to more than 95% of cases. Meanwhile, 81% of stipulations are reached in 14 or fewer days.

We estimate that the task of preparing for either stipulation or litigation requires an attorney to spend, in the average case, a total of 8 hours, and a general and operations manager to provide 4 hours of support and consultation. In other words, overtime would add a cost of [$54.95 × ½] $27.48 per hour for the attorney and [$46.36 × ½] $23.18 for the manager, for a total of [8 × $27.48 + 4 × $23.18] $312.52 increase for the hearing preparation.[716]

5. Employee Lists

We next consider the lists of employees required by the rule. Two lists are required: the initial employee list, filed with the statement of position, requires only names and job information; the voter list, due 2 business days after an election agreement or direction of election, additionally requires available contact information such as home addresses, personal phone numbers and email addresses. Current law also requires a voter list, which is due 7 days after an election agreement or direction and includes employee names and home addresses. Nonetheless, for the purposes of this cost analysis, we will conservatively estimate the cost of the lists as if the entire employee list requirement was wholly new, and applied to employers in all RC, RM, and RD cases (rather than only those which go to an election).[717]

Compilation of the lists required under the rule is an administrative task. The lists can be compiled by utilizing various already-existing resources. Small entities are already required to maintain employee records under other Federal employment laws, including the Fair Labor Standards Act, which mandates that employers keep records of various job information and wage and hour data for each employee, and the Immigration Reform Control Act, which mandates employers maintain I–9 records which include optional emails and personal phone numbers. We estimate that, even using paper records, and absent special circumstances, a labor relations specialist needs approximately 5 minutes per employee to compile all the information required for both the initial employee list and the voter list, and to place them in the required formats.[718] A total of 25% of elections have 11 or fewer names on the list, 50% of cases have 26 or fewer, and 75% of cases have 65 or fewer. We further estimate that an additional one minute per employee will be required at the time that the voter list is created, to recheck employer records to ensure that changes (such as departures or new hires) have not occurred between the date upon which that list was filed and the voter eligibility date. Thus, this task will take between 60 minutes and 6 hours to complete in most cases.[719]

The Board received comments from, among others, ABC, ALFA, Klein, NFIB, CNLP, COSE, stating that 2 days is insufficient to produce an eligibility list. In this regard, ABC suggests that determining which voters are eligible may be particularly difficult in the construction industry because complicated issues such as the *Steiny/Daniel* formula, disappearing units, multi-craft versus single craft unions, and Sections 8(f) and 9(a) require counsel and time. Testimony of Maury Baskin on behalf of ABC. The Board disagrees with these various comments. We do not believe that the economic impact will vary significantly across industries. And, due to the relatively short lists applicable in most cases, requiring the lists be produced in 2 days will not add to the cost. In addition, regional directors retain discretion to expand this time period.

Nonetheless, similar to the analysis for the reduction in time before hearings above, the Board will conservatively assume that, in every case, the employer will incur costs at the overtime rate. The cost will therefore be, in the median case, [25 (median employees) × 0.1 (hours required per employee) × $50.70] $126.75.[720]

6. Electronic Distribution of the Final Notice of Election

Under the current rules, the employer is required to post paper copies of a Notice of Election no less than 3 full working days before the opening of the election. This requirement is unchanged in the final rule. However, the final rule amends § 102.67(b) to provide that the Notice of Election will be transmitted to the employer by electronic mail rather than hard copy mail if the employer provided an email address. The time spent opening the email and printing the notice is likely to be approximately the same as time spent opening a physical mailing and extracting the printed notice within. The final rule additionally requires employers who customarily communicate electronically with their employees to distribute the final election notice electronically, which may require 15 minutes of a labor relations specialist's time, or [15 minutes × $37.57] $9.39.[721]

[716] The entities impacted by this change will vary depending on the type of petition filed. Logically, by completing the petition form itself, some of the petitioner's preparation will be done in advance, and as the petitioner is not typically required to file a statement of position, the petitioner will not incur increased costs as a result of the changes related to the timeline for the statement of position or the hearing.

Finally, we note that Stanley J. Penkala, president and part-owner of a small business, expressed concern that the shortened time frames could be problematic if a petition is filed when an owner is on vacation. But many types of unexpected events may occur when an owner is on vacation and businesses already make reasonable contingency plans to accommodate such possibilities.

[717] We note that the voter list will not be necessary where the petition is withdrawn or dismissed, and that no initial employee list will be necessary where the parties stipulate before the statement of position is due. However, for the purposes of this analysis, the cost is being assessed to all petitions.

[718] This estimate recognizes that the employer's files are not ''in the format required by the Board right now [and t]here's not a button they can push where the [voter] list just comes out.'' See Testimony of Elizabeth Milito on behalf of NFIB II.

[719] Some comments stated the time reduction is onerous because small employers often do not have a designated human resources employee to handle such issues, or readily available job descriptions or classifications, possibly necessitating expensive technological solutions. We note, however, that the format requirements of the rule need not be followed where the burden would be unreasonable. NFIB commented that only 12% of small employers have an employee dedicated to HR or personnel. Of course, this comment would not apply to employers with many employees because they, in light of other recordkeeping requirements, must keep sophisticated electronic records and dedicated human resources staff or contractors; meanwhile, the task of assembling a voter list with only a few score employees should not prove unduly burdensome for any size employer. See Testimony of Milito on behalf of NFIB II (testimony that the voter list requirement is typically not onerous where fewer than 50 employees are involved, and that employers with more than 50 employees typically already have professional human resources).

[720] This cost will be greater in units with more than 25 employees, but this does not change the result of the analysis here because such employers also typically have much higher revenues. The average employer with between 20 and 99 employees had revenues of $6.9 million, and the cost of compiling the voter list—even when added to all other costs which could be imposed by this rule—does not come close to the 1% threshold for such businesses discussed below. Furthermore, employers with greater than 25 employees are much more likely to use electronic recordkeeping, permitting this information to be compiled at a rate of less than 5 minutes per employee.

[721] CNLP commented that electronic filing and communication can be difficult for small employers because many do not have access to the Internet or use it in their business plan. We note that a 2010 survey by conducted by a contractor for the Office of Advocacy of the SBA in the spring of 2010, on the use of Internet connectivity by small businesses, called ''The Impact of Broadband Speed and Price on Small Business'' (*http://www.sba.gov/sites/default/files/rs373tot_0.pdf*), suggests that, as of four years ago, at least 90 percent of small businesses surveyed used the Internet at their business. The data show that it is rare for a business, no matter how small, to lack internet access. Nonetheless, to the extent that an employer or union lacks internet access, the Board has made the provisions relating to electronic filing and communication either optional or required only if the employer customarily communicates with employees electronically.

In addition, we note that this cost will generally only be incurred in the subset of cases that go to

7. The Significance of These Changes

We will now apply these cost estimates to parties in RC, RM, and RD proceedings to identify whether the costs exceed 1 percent of gross revenues for the small entities in any particular sector. The SBA maintains a table of small business size standards matched to the North American Industry Classification System (NAICS) for industries. The standards are based either on annual revenues or number of employees. SBA, Table of Small Business Size Standards, *http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf* (last visited July 24, 2014). Using NAICS, the Board categorized each RC, RM and RD petition into its proper industry.

The Board next reviewed election petitions to estimate the size of the employers. The Board examined data on petitions filed in 2010, the most recent year for which it has industry data matched to NAICS data and the unit size. Using this data, for each petition, the Board determined if the entity might qualify as small based on its estimated number of employees or estimated revenues. The Board used the petitioned-for unit size to estimate the number of employees,[722] and it estimated annual revenues based upon census data.[723] The Census Bureau classifies employers by number of employees in the following categories: 0–4; 5–9; 10–19; 20–99; 100–499; and 500 or above. For purposes of this analysis, the Board estimates that each business has revenues equal to the average revenue for a business in the same size/industry category. Thus, for example, where a petition is filed for a unit of 16 employees at a construction firm (NAICS industry 23), this analysis assumes that that employer has revenue equal to the average revenue for a business with 10–19 employees in NAICS category 23.

Based upon this data, the Board estimates that in 2010, approximately 2,480 petitions out of a total of 2,777, or 89.3%, were filed concerning employees of small entity employers. Applying this estimate to the Board's 2013 caseload, we estimate that approximately 2,239 petitions per year (89.3% of 2,507 petitions) going forward will be filed concerning employees of small entity employers. The Board then compared the size of the economic impacts in question to entity receipts and determined whether any size/industry classification of employers subject to a petition might be significantly impacted.

The Board does not possess comparable data by which to estimate the size of unions participating in NLRB elections, and so we must rely on reasonable assumptions. We will assume that the number of elections involving a particular union is proportional to that union's total receipts. We again refer to the same Census Bureau data described above, focusing specifically on unions (NAICS # 81393). This data shows, for example, that 9 percent of all labor union receipts in 2007 were received by labor unions with 0–4 employees, and so we are estimating that 9 percent of representation cases involve labor unions of this size (which have average receipts of $221,572). Using this method, we estimate that approximately 63% of representation cases, or about 1,559 cases, involve unions which are small entities as defined by SBA.

The economic impact of the final rule's procedures upon each type of entity is described in the following charts:

TABLE 3—ESTIMATED ADDITIONAL COSTS IN ALL REPRESENTATION CASES INITIATED BY UNIONS

[RC Cases]

RC Petitions	Employer	Union serving petition via email or fax	Union serving by mail	Union serving personally
No. of Cases	1986	1716	231	38
Service		$6.26	$26.25	$86.33
Notice of Petition	$56.35			
Statement of Position	$117.87			
Costs related to timeline	$312.52			
Voter Lists	$126.75			
Notice of Election	$9.39			
Total additional cost	$622.88	$6.26	$26.25	$86.33

TABLE 4—ESTIMATED ADDITIONAL COSTS IN ALL REPRESENTATION CASES INITIATED BY EMPLOYERS (RM CASES)

RM Petitions	Union	Employer serving petition via email or fax	Employer serving by mail	Employer serving personally
No. of Cases	49	42	6	1
Service		$6.26	$26.25	$86.33
Notice of Petition		$56.35	$56.35	$56.35
Statement of Position	$117.87	$117.87	$117.87	$117.87
Costs related to timeline	$312.52			
Voter Lists		$126.75	$126.75	$126.75
Notice of Election		$9.39	$9.39	$9.39

an election. However, for the purposes of this analysis, the cost is being assessed to all petitions.

[722] The Board used petitioned-for unit size as an extremely conservative estimate, since employers generally employ supervisors, managers, and other individuals that are not part of the bargaining unit. In addition, very few petitions are for ''wall-to-wall'' units, and in almost every case, the employer has many statutory employees which are not in the unit.

[723] The Census Bureau surveys businesses' receipts rather than their revenues. Receipts are a subset of revenues. United States Census, Statistics of U.S. Businesses, Definitions, *https://www.census.gov//econ/susb/definitions.html.* The Board conservatively estimates that revenues are equal to receipts. Census Bureau data on receipts are collected only every 5 years, and the most recent year for which data are available is 2007.

TABLE 4—ESTIMATED ADDITIONAL COSTS IN ALL REPRESENTATION CASES INITIATED BY EMPLOYERS (RM CASES)—Continued

RM Petitions	Union	Employer serving petition via email or fax	Employer serving by mail	Employer serving personally
Total additional cost	$430.39	$316.62	$336.61	$396.69

TABLE 5—ESTIMATED ADDITIONAL COSTS IN ALL REPRESENTATION CASES INITIATED BY INDIVIDUALS (RD CASES)

RD Petitions	Union	Employer
No. of Cases	472	472
Notice of Petition		$56.35
Statement of Position	$117.87	$117.87
Costs related to timeline	$312.52	$312.52
Voter Lists		$126.75
Notice of Election		$9.39
Total additional cost	$430.39	$622.88

The final rule will not impose a significant economic impact a substantial number of small entities who receive a representation petition but do not litigate post-election objections or ballot challenges. The estimated cost of the final rule to such entities does not exceed $622.88. The Census Bureau data referenced above show that no size/industry classification has average annual receipts of less than 100 times that number, or $62,288. Thus, few, if any, entities participating in NLRB representation cases will incur costs of greater than 1% of that entity's annual revenues due to the final rule.[724]

C. Costs Impacting a Very Small Number of Cases: Blocking Charges, Post-election Hearings, and Requests for Review of Decisions on Objections and Challenges

The final rule also makes changes to blocking charge procedure, post-election hearing timelines, and the steps necessary to obtain Board review of a decision on objections and challenges. These changes do not impact a substantial number of small employers. In FY13, parties filed 223 blocking charges, 54 post-election hearings were held, and 32 exceptions regarding objections and challenges were filed. Thus, none of these changes will impact more than a small percentage of small entities involved in a representation proceeding. By definition, none of these changes impact a substantial number of small entities, as none will impact 10% or more of the relevant universe. Nonetheless, we will briefly estimate the costs associated with these changes to come to a more precise figure for the number of small entities significantly impacted.

1. Blocking Charges

The final rule requires parties that file blocking charges to also file an offer of proof and make witnesses available. The information provided in the offer of proof must be collected regardless of the rule in order to support the charge itself, and providing the information to the Board in a written offer likely would require approximately an hour and a half of a lawyer's time, for a cost of [1.5 × $78.58] $117.87. Combining this cost with the maximum new costs a party might reasonably be expected to incur under other changes in the rule,[725] we reach the following result:

TABLE 6—ESTIMATED ADDITIONAL COSTS TO PARTIES FILING BLOCKING CHARGES[726]

No. of Cases	223
Maximum cost of changes without post-election litigation or blocking charges	$622.88
Blocking offer of proof	$117.87
Total additional cost	$740.75

Census Bureau data show that no size/industry classification has average annual receipts of less than $74,075. Using the same methodology discussed above for costs related to filing and receiving a petition, we estimate that few, if any, entities that file blocking charges will incur a cost of greater than 1% of their gross receipts as a result of the final rule.

2. Timeline for Post-Election Hearings

Under current practice, parties have a median of 14.5 days to prepare for the hearing once the notice of hearing is issued. Although this time might decrease by a few days, we do not expect that the change will be very large. Under the rule, the time for post-election hearings will generally be 21 days from the tally, and the objections and challenges are due in 7 days. The rule does not specify when the notice of hearing will be issued, but regional directors will be expected to assess the offer of proof and very promptly determine whether to hold a hearing so that the parties have time to prepare. Thus, we do not believe there will be any increased cost.

Nonetheless, using similar assumptions to those discussed above regarding the pre-election hearing, we will conservatively assume that costs for the 54 employers and unions subject to post election hearings will increase by $312.52. Combining this cost with the maximum new costs a party might reasonably be expected to incur under other changes in the rule, we reach the following result:

TABLE 7—ESTIMATED ADDITIONAL COSTS FOR PARTIES IN CASES WITH POST-ELECTION HEARINGS

No. of Cases	54

[724] Indeed, $622.88 is only 0.32% of average annual receipts for Educational Services (NAICS #61) employers with 0–4 employees, the size/industry category with the lowest volume of receipts per firm. Thus, even if the Board's estimate of final rule costs were tripled, the total cost of a representation petition without post-election litigation or blocking charges would less than 1% of average revenues for any size/industry classification. This large margin for error emphatically reinforces the Board's conclusion that a substantial number of small entities will not incur significant costs as a result of the rule.

[725] This is the maximum additional cost that an employer respondent in an RC or RD case might reasonably be expected to incur under the final rule. Employers in other kinds of cases will incur less cost but this does not change the final result here.

This cost does not include the other matters addressed in this section, (*i.e.*, post-election hearing costs or request for review costs). This is because each occurs so infrequently that they are unlikely to coincide in any particular case. For example, if the distribution is random, the number of cases involving both blocking and a post-election hearing would be [75 × 223/2507] 6 or 7 cases per year.

In addition, the amounts involved are sufficiently small as to make little difference in the final analysis. Even in the rare case where blocking, post-election hearings, and a request for review of a decision on objections and challenges all occurred in the same case in the same year, the rule would impose additional costs of [$740.75 + $117.87 + $312.52 + $1,257.26] $2,428.40.The only size/industry categories for which this amount represents a significant impact are the same four categories for which a request for review without a blocking charge represents a significant impact.

[726] The number of cases listed in the chart corresponds to the number of representation cases that were listed as blocked for some period of time by charges filed in FY 2013. The number does not correspond to elections held during FY 2013 that had previously been blocked for some period of time (including by charges filed in prior fiscal years).

TABLE 7—ESTIMATED ADDITIONAL COSTS FOR PARTIES IN CASES WITH POST-ELECTION HEARINGS—Continued

Maximum cost of changes without post-election litigation or blocking charges)	$622.88
Post election hearing preparation timeline	$312.52
Total additional cost	$935.40

Census Bureau data show that no industry/size classification has average annual receipts of less than $93,540. Thus, using the same methodology discussed above for costs related to filing and receiving a petition, we estimate that few, if any, entities that are involved in a post-election hearing, but do not file a request for review of the regional director's decision with the Board, will incur a cost of greater than 1% of their gross receipts as a result of the final rule.

3. Requests for Review of Decisions on Objections and Challenges

Section 102.69 of the final rule—just as § 102.69 of the current rules—allows the regional director to resolve any objections or challenges without conducting a post-election hearing. However, if a post-election hearing is held concerning the objections or challenges, § 102.69(c) of the final rule requires the regional director to issue a decision on any exceptions filed to the hearing officer's report. It further provides that the Board will exercise only discretionary review of regional directors' disposition of exceptions to hearing officers' decisions. Previously, these exceptions were decided directly by the Board in the vast majority of cases involving objections or determinative challenges. Thus, if a party files exceptions to the hearing officer's report, and the regional director affirms the hearing officer, the new rule requires the party to file a previously unnecessary request for review if the party desires review by the Board. Although there is no change in cost for cases in which the regional director disposes of objections or challenges without a hearing, we will nevertheless conservatively estimate that requests for Board review of a regional director's decision represent a new cost in all cases. We estimate that it will require 16 lawyer hours to prepare the request, for a cost of [16 × $78.58] $1,257.26. Combining this cost with the maximum new costs a party might reasonably be expected to incur under other changes in the rule, we reach the following result:

TABLE 8—ESTIMATED ADDITIONAL COSTS FOR PARTIES IN CASES WHERE PARTIES REQUEST BOARD REVIEW OF REGIONAL DIRECTORS' POST-ELECTION DISPOSITION OF OBJECTIONS AND CHALLENGES [727]

No. of Cases	32
Maximum cost of changes without post-election litigation or blocking charges	$622.88
Post election hearing preparation timeline	$ 312.52
Request for review of post-election decision	$1257.26
Total additional cost	$2192.66

Only 32 exceptions were resolved in FY13. In all likelihood, a sizeable number of these exceptions will be satisfactorily resolved by regional directors with no further appeal. However, in the interest of providing a conservative estimate, we will assume that this change will impact litigants in 32 cases per year, or approximately 1.3% of all NLRB representation cases. Assuming that small and large employers are equally likely to litigate post-election exceptions, these changes are projected to affect 29 small entity employers per year.

Four employer size/industry classifications have average annual receipts of less than $216,266.[728] Employers in those categories could incur a significant adverse economic impact as a result of the final rule if they litigate a representation petition through post-election hearing and file a request for review of a regional director's disposition of objections or challenges. However, only about 1.7% of NLRB petitions (in 2010, 52 out of 2,974 petitions) are filed in bargaining units with 2–4 employees in those industries. Thus, fewer than one case a year [729] will involve both a very small employer and a post-election request for Board review of a regional director's disposition of objections or challenges. The Board accordingly projects that the final rule's changes to post-election exceptions procedure will adversely affect less than one small entity employer per year. Meanwhile, the average annual receipts for a union with zero to four employees are $221,572, so the estimated cost of the rule is therefore less than 1% of receipts even for unions with 0–4 employees.

Thus, the number of significantly impacted small entities falls below the 10% threshold established by the Board. For these reasons we conclude that the rule's changes to post-election exceptions procedure will not impose a significant economic impact on a substantial number of small entities.

D. Other Changes

The remainder of the changes will not result in any direct cost on small entities, and will clearly not cause a substantial impact on a significant number of small entities. We first consider the changes to the litigation at the pre-election hearing. Ultimately, the statement of position form will provide cost savings to the parties in cases where hearings are held by preventing unnecessary litigation and leading to a more orderly process. The same is true for those portions of § 102.66 of the final rule which provide for the parties to begin the hearing by responding to the issues raised in the statement of position, and taking discretionary offers of proof. So too, the changes to § 102.64, focusing the hearing on its statutory purpose, and overruling *Barre-National*, will substantially reduce needless testimony. New provision § 102.64(c) provides that pre-election hearings shall be continued day to day absent extraordinary circumstances. Section 102.67 provides that summing up of pre-election hearing testimony usually will be done by means of closing arguments, rather than concluding written briefing. Section 102.67(b) specifies that the date and time of the election ordinarily will be set forth in the decision and direction of election. All of these changes will uniformly lead to efficiencies and savings for the parties and the Board, as discussed in detail in the relevant sections of this preamble. Therefore, these changes will not impose any costs on any small entities. In addition, such pre-election hearing procedures take place in fewer than 10% of cases, and so cannot impact a substantial number of small entities.

Second, § 102.67 of the final rule revises the deadline for seeking Board

[727] The 32 cases listed in the chart include cases from FY 2013 in which regional directors disposed of objections or challenges without a hearing. As explained above, these cases would not in fact result in additional costs if these circumstances were repeated under the final rule.

[728] These classifications are employers in the industries of Administrative and Support and Waste Management (#56), Educational Services (#61), Accommodation and Food Services (#72), and Other Services (Except Public Administration) (#81), with 0–4 employees.

[729] The Board determined this number by taking the estimated number of cases with a small employer respondent that go to a post-election hearing (29) and multiplying by the probability that the case will involve a unit in one of the four classifications noted above (0.017). This estimate conservatively assumes that small and large parties are equally likely to fully litigate election objections in any particular case.

review of a regional director's decision and direction of election at any time up to 14 days after a final disposition of the proceeding by the regional director. Existing law sets a shorter deadline, within 14 days of the decision and direction of election. This change in due date will potentially create savings for parties, and will impose no costs. Parties remain free to file their requests within the time frame provided under the former rules if they prefer. Such requests are also filed in fewer than 10% of cases.

Third, the final rule eliminates guidance which recommended waiting 25–30 days to hold the election after the direction of election. This change imposes no direct costs upon parties, as nothing in the rule requires any preparation for the election itself. The rule also directly impacts the fewer than 10% of cases which are subject to a direction of election. The final rule also eliminates automatic impounding of ballots where a request for review is pending. Impoundment only took place in a handful of cases each year, and the change imposes no cost.

Fourth, § 102.69(a) of the final rule requires parties to file simultaneous offers of proof with any post-election objections, whereas current rules give parties 7 additional days to file offers of proof. However, as previously discussed, filing offers of proof involves writing down the results of an investigation conducted before the objection was filed. Compressing the time frame for this administrative task will not impose increased costs. This change also impacts fewer than 10% of cases.

Finally, the final rule eliminates a rarely used procedure, formerly codified at § 102.67(h)–(k), whereby a case could be transferred from the region to the Board after the pre-election hearing. This procedure has not been used in approximately 15 years.

E. Conclusion

As the foregoing discussion shows, the bulk of the changes to this rule will impact less than 10% of the relevant universe of small entities. In addition, most of the changes here will not impose any new costs on the parties to representation cases. The few costs in the rule are either modest, or impact only a handful of cases, or both. For these reasons, the rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

In the NPRM, the Board explained that the ''proposed amendments would not impose any information collection requirements'' and accordingly, the proposed amendments ''are not subject to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*'' No substantive comments were received relevant to the Board's analysis of its obligations under the PRA.

The NLRB is an agency covered by the PRA. 44 U.S.C. 3502(1) and (5). The PRA establishes rules for such agencies' ''collection of information.'' 44 U.S.C. 3507.

The Board has considered whether any of the provisions of the final rule provide for a ''collection of information'' covered by the PRA. Specifically, the Board has considered the following provisions that contain petition and response requirements, posting requirements, and requirements that lists of employees, eligible voters or offers of proof be filed:

(1) Under the final rule, as under the current rules, parties seeking to initiate the Board's representation procedures are required to file a petition with the Board containing specified information relevant to the Board's adjudication of the specific question raised by the filing of the petition. Under the final rule, non-petitioning parties to such representation proceedings are required to file a Statement of Position setting forth the parties' positions and specified information relevant to the Board's adjudication of the question raised by the petition. Employers are currently asked to supply the portion of the information specified in the final rule relating to their participation in interstate commerce, and are typically asked to share their positions concerning many of the same issues covered by the form prior to the hearing or at a prehearing conference.

(2) Under the final rule, employers are required to post a notice about the filing of the petition and a notice about the election. The second posting requirement exists currently. Employers are currently asked but not required to post the first notice (in a different form).

(3) Under the final rule, as under current case law, employers are required to file a list of eligible voters prior to an election. Under the final rule, an initial list of employees is required before the pre-election hearing. Currently, employers are often asked but not required to provide an employee list with job classifications prior to the hearing or at a prehearing election conference. For the reasons given below, the Board believes that none of these actions constitutes a collection of information covered by the PRA.

(4) Under the final rule, a party filing an objection to the conduct of an election or to conduct affecting the results of an election is required to simultaneously file a written offer of proof with the objection, absent a showing of good cause to extend the time for filing an offer of proof. Currently, a party filing an objection is required to simultaneously file a short statement of reasons with the objection and file evidence in support of its objections within 7 days after filing its objections.

(5) Under the final rule, a party filing an unfair labor practice charge, together with a request that the charge block the processing of a representation petition, is required to simultaneously file a written offer of proof with the charge.

The PRA exempts from the definition of ''collection of information'' ''a collection of information described under section 3518(c)(1)'' of the Act. 44 U.S.C. 3502(3)(B).

Section 3518(c) provides:

- Except as provided in paragraph (2), this subchapter shall not apply to the collection of information—
  - during the conduct of—
  - an administrative action or investigation involving an agency against specific individuals or entities;
- This subchapter applies to the collection of information during the conduct of general investigations * * * undertaken with reference to a category of individuals or entities such as a class of licensees or an entire industry.

44 U.S.C. 3518(c). The legislative history of this provision makes clear that it is not limited to prosecutorial proceedings. The Senate Report on the PRA states, ''Section 3518(c)(1)(B) is not limited to agency proceedings of a prosecutorial nature but also include[s] any agency proceeding involving specific adversary parties.'' S. Rep. No. 96–930, at 56 (1980). See also 5 CFR 1320.4(c) (OMB regulation interpreting the PRA, providing that exemption applies ''after a case file or equivalent is opened with respect to a particular party.'').

The Board believes that all of the above-described provisions of the final rule fall within the exemption created by sections 3502(3)(B) and 3518(c)(1)(B)(ii). A representation proceeding under Section 9 of the NLRA is ''an administrative action or investigation involving an agency.'' That is, the filing of a petition together with a showing of interest triggers an administrative investigation into the sufficiency of the petition. A regional Board agent is assigned to investigate the petition and a case file is opened. A representation proceeding is also ''against specific individuals or entities'' within the meaning of section 3518(c)(1)(B)(ii). The Board's decisions

in representation proceedings are binding on and thereby alter the legal rights of the parties to the proceedings. For example, the employer of any employees who are the subject of a petition is a party to the resulting representation proceeding.[730] If the Board finds in a representation proceeding that a petition has been filed concerning an appropriate unit and that employees in that unit have voted to be represented, the Board will thereafter certify the petitioner as the employees' representative for purposes of collective bargaining with the employer. As a direct and automatic consequence of the Board's certification, the employer is legally bound to recognize and bargain with the certified representative. If the employer refuses to do so, it commits an unfair labor practice.[731] If such an employer is charged with a refusal to bargain, it is precluded from relitigating in the unfair labor practice proceeding any issues that were or could have been raised in the representation proceeding.[732] Finally, if such an employer seeks review of the Board's order in the unfair labor practice proceeding or the Board seeks to enforce its order in a court of appeals, the record from the representation proceeding must be filed with the court and ''the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.'' 29 U.S.C. 159(d); see also *Boire* v. *Greyhound Corp.* 376 U.S. 473, 477–79 (1964).[733]

Three limitations on the filing and posting requirements in the final rule lead to the conclusion that they fall within the statutory exemption. First, the final rule imposes requirements only on parties to the representation case proceeding, or in the case of blocking charges, charging parties in the unfair labor practice proceeding, an administrative action or investigation against specific individuals or entities within the scope of section 3518(c)(1)(B)(ii). Second, any adverse consequences for failing to provide the requested information are imposed only on persons and entities that are party to the administrative proceeding. Third, the possible adverse consequences that may result from noncompliance do not reach beyond the administrative case proceeding. The final rule imposes no consequences on any party based on its failure to file or provide information requested in a petition or statement of position form other than to prevent the party from initiating a representation proceeding or to restrict a party's rights to raise issues or participate in the adjudication of issues in the specific representation proceeding and any related unfair labor practice proceeding. Similarly, as is the case currently,[734] no consequences attach to a failure to post either notice or to file the eligibility list beyond the overturning of an election conducted as part of the specific proceeding. Finally, no consequences attach to a failure to file an offer of proof simultaneously with an election objection or a blocking charge beyond the regional director's dismissal of the election objection, refusal to block the election, or the possible dismissal of the charge.

Sections 102.62(e), 102.63(a) and 102.67(k) of the final rule require that an employer which is party to a representation proceeding post a Notice of Petition for Election subsequent to the filing of a petition and, if an election is agreed to or directed, a Notice of Election. The Board will make available both notices to the employer in paper and electronic form, and employers will be permitted to post exact duplicate copies of the notices. The Board does not believe these posting requirements are subject to the PRA for the reasons explained above. Moreover, the Board does not believe that the notice posting requirements constitute a ''collection of information'' as defined in section 3502(3) of the PRA for additional, independent reasons. The notice posting requirements do not involve answers to questions or any form of reporting. Nor do they involve a ''recordkeeping requirement'' as that term is defined in section 3502(13) of the PRA because the notice posting requirements do not require any party to ''maintain specified records.'' The Board notes that this construction is consistent with the Office of Management and Budget's regulations construing and implementing the PRA, which provide that ''[t]he public disclosure of information originally supplied by the Federal government to [a] recipient for the purpose of disclosure to the public'' is not considered a ''collection of information'' under the Act. See 5 CFR 1320.3(c)(2). For all of these reasons, the Board concludes that the posting requirements are not subject to the PRA.

Accordingly, the final rule does not contain information collection requirements that require approval of the Office of Management and Budget under the Paperwork Reduction Act.

Congressional Review Act

As explained in the discussion of the Regulatory Flexibility Act, only the provisions of this rule relating to voter lists and possibly blocking charges are substantive. Nevertheless, as a matter of its discretion, the Board has chosen to submit the entire rule to the process contained in the Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act), 5 U.S.C. 801–808.

Under Section 804 of that Act, this rule is not a major rule because it will not result in an annual effect on the economy of $100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets. The Board has, in any event, determined that the effective date of the rule will be 120 days after the rule is published in the **Federal Register**.

IX. Statement of the General Course of Proceedings Under Section 9(c) of the Act

A. Representation Case Petitions

Petitions may be filed in representation cases to resolve questions of representation in many different circumstances. For example, a union may file a petition for certification because it seeks to become the collective-bargaining representative of an employer's employees. An employer may file a petition to determine the majority status of a union demanding recognition as the representative of the employer's employees. If there is already a certified or currently recognized representative, an employee

[730] See, *e.g., Pace University* v. *NLRB,* 514 F.3d 19, 23 (D.C. Cir. 2008); *Kearney & Trecker Corp.* v. *NLRB,* 209 F.2d 782, 786–88 (7th Cir. 1953).

[731] See, *e.g., Country Ford Trucks, Inc.* v. *NLRB*, 229 F.3d 1184, 1191 (D.C. Cir. 2000); *C.J. Krehbiel Co.* v. *NLRB*, 844 F.2d 880, 882, 886 (D.C. Cir. 1988).

[732] See *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 162 (1941).

[733] Similarly, a union that has been certified or recognized as the representative of employees in an appropriate unit has a legal right to continue to be recognized as the exclusive representative of such employees. See *Scepter, Inc.* v. *NLRB*, 280 F.3d 1053, 1056 (D.C. Cir. 2002). However, if a petition is filed under section 9 seeking to decertify such a union, which is a party to the resulting representation proceeding, see *Brom Mach. & Foundry Co.* v. *NLRB*, 569 F.2d 1042, 1044 (8th Cir. 1978), and at the conclusion of the proceeding the Board certifies the results of an election finding that less than a majority of the voters cast ballots in favor of continued representation by the union, the union loses its legal right to represent the employees. *Retail Clerks Int'l Ass'n* v. *Montgomery Ward & Co.*, 316 F.2d 754, 756–57 (7th Cir. 1963).

[734] See John E. Higgins, Jr., The Developing Labor Law 595, 607 (5th ed. 2006) (noting that failure to provide *Excelsior* list or post notice of election constitutes grounds for setting aside election).

may file a decertification petition to oust the incumbent representative. Or, a party may file a petition for clarification of the bargaining unit or for amendment to reflect changed circumstances, such as changes in the incumbent representative's name or affiliation.

Petition forms are available on the Board's Web site and in the Board's regional offices. The petition must be in writing and signed, and must either be notarized or contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his or her knowledge and belief. The petition is filed with the regional director for the regional office in which the proposed or actual bargaining unit exists. Petition forms provide, among other things, for a description of the contemplated or existing appropriate bargaining unit, the approximate number of employees involved, the names of all labor organizations that claim to represent the employees, the type, date(s), time(s) and location(s) of the election sought, and the name and contact information of the individual who will serve as representative of the petitioner and accept service of papers in the representation proceeding. A petitioner seeking certification as the collective-bargaining representative or seeking to decertify an incumbent representative must supply, at the same time it files its petition, evidence of employee interest in an election (''showing of interest''). Such evidence is usually in the form of cards, which must be dated, authorizing the labor organization to represent the employees or providing that the employees no longer wish to be represented by the incumbent union. If a petition is filed by an employer, the petitioner must supply, at the same time it files its petition, proof of a demand for recognition by the labor organization named in the petition and, in the event the labor organization named is the incumbent representative of the unit involved, a statement of the objective considerations demonstrating reasonable grounds for believing that the labor organization has lost its majority status.

The petitioner may file the petition electronically, by fax, by mail or in person at one of the NLRB's regional offices. The petitioner must serve a copy of its petition on other interested parties along with a description of the Board's representation case procedures and the Board's Statement of Position form, both of which are available on the Board's Web site and in the Board's Regional Offices. However, the petitioner need not serve a copy of its showing of interest on any other party. If the petition and showing of interest are filed electronically or by fax, and the showing of interest consists of authorization cards with handwritten signatures, the petitioner must provide to the regional director the documents containing the original signatures constituting the showing of interest no later than 2 days after the electronic or facsimile filing.

B. Pre-Hearing Withdrawals and Dismissals; Notice of Hearing; Posting and Distribution of Notice of Petition for Election; Statement of Position Form

Upon receipt of the petition in the Regional Office, it is docketed and assigned to a Board agent to investigate (1) whether the employer's operations affect commerce within the meaning of the Act, (2) the existence of a bona fide question concerning representation in a unit of employees appropriate for the purposes of collective bargaining within the meaning of the Act, (3) whether the election would effectuate the policies of the Act and reflect the free choice of employees in the appropriate unit, and (4) whether, if the petitioner is a labor organization seeking recognition or an employee seeking decertification of an incumbent representative, there is sufficient evidence of employee interest in an election. The evidence of interest submitted by the petitioning labor organization or by the person seeking decertification is ordinarily checked to determine the number or proportion of employees who have demonstrated interest, it being the Board's administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has demonstrated interest among at least 30 percent of the employees. However, in the case of a petition by an employer, no proof of representation on the part of the labor organization claiming a majority is required, and the regional director proceeds with the case if other factors require it unless the labor organization withdraws its claim to majority representation. The Board agent attempts to ascertain from all interested parties whether the grouping or unit of employees described in the petition constitutes an appropriate bargaining unit. The petition may be amended at any time prior to hearing and may be amended during the hearing upon such terms as the regional director deems proper.

The petitioner may request to withdraw its petition if the investigation discloses, for example, that the petitioner lacks an adequate showing of interest. The regional director may request that the petitioner withdraw the petition if further processing at that time is inappropriate because, for example, a written contract covering the petitioned-for unit is currently in effect. If, despite the regional director's recommendations, the petitioner refuses to withdraw the petition, the regional director may dismiss it. The petitioner may within 14 days request review of the regional director's dismissal by filing such request with the Board in Washington, DC; if it accepts review, the Board may sustain the dismissal, stating the grounds of its affirmance, or may direct the regional director to take further action.

If, however, the regional director determines that the petition and supporting documentation establish reasonable cause to believe that a question of representation affecting commerce exists and that the policies of the Act will be effectuated, then the regional director serves a notice of a pre-election hearing on the parties named in the petition. Except in cases presenting unusually complex issues, the regional director sets the hearing for a date 8 days from the date of service of the notice excluding intervening Federal holidays. Along with the notice of hearing, the regional director serves a copy of the petition, a form describing representation case procedures, a ''Notice of Petition for Election,'' and a Statement of Position form on the unions and employer filing or named in the petition and on other known persons or labor organizations claiming to have been designated by employees involved in the proceeding. The director marks the correspondence containing these materials as ''Urgent.'' The Notice of Hearing also sets the due date for the parties to file and serve their Statements of Position. Ordinarily, the Statement of Position must be filed and served such that it is received by the regional director and the other parties at noon on the business day before the opening of the hearing.

The regional director may postpone the hearing for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. The regional director may also postpone the due date for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. If the hearing is set to open more than 8 days from service of the notice, the regional director may set the due date for the Statement of Position earlier than at noon on the

business day before the hearing is set to open.

The Notice of Petition for Election states the name of the party filing the petition, briefly describes the type of petition filed and the proposed unit, lists employee rights, and sets forth in understandable terms the central rules governing campaign conduct. This notice also lists the Board's Web site address, through which the employer's employees can obtain further information about the processing of petitions. The notice indicates that no final decisions have been made yet regarding the appropriate bargaining unit and whether an election will be conducted. Within 2 business days after service of the notice of hearing, the employer must post paper copies of the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and it must also distribute the notice electronically if it customarily communicates with its employees electronically. The employer must maintain the posting until the petition is dismissed or withdrawn, or the notice is replaced by the Notice of Election, discussed below. The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election if proper and timely objections are filed. However, a party may not object to the nonposting or nondistribution of the notices if it is responsible for the nonposting or nondistribution.

The Statement of Position form solicits information which will facilitate entry into election agreements or streamline the pre-election hearing in the event parties are unable to enter into an election agreement. Where the petition is filed by a labor organization in an initial organizing context, the employer's Statement of Position states whether the employer agrees that the Board has jurisdiction over it and provides the requested commerce information; states whether the employer agrees that the proposed unit is appropriate, and if the employer does not so agree, states the basis for its contention that the proposed unit is inappropriate, and states the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identifies any individuals whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention; raises any election bar; states the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date; states its position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describes any other issues it intends to raise at hearing. The employer also provides the name, title, and contact information of the individual who will serve as its representative and accept service of all papers for purposes of the representation proceeding.

As part of its Statement of Position, the employer also provides an alphabetized list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. If the employer contends that the proposed unit is not appropriate, the employer must separately list the same information for all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit, and must further indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. The list(s) of names must be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list(s) in the required form.

In cases involving employer-filed petitions, each individual or labor organization named in the petition states whether it agrees that the Board has jurisdiction over the employer; states whether the proposed unit is appropriate, and if it does not so agree, states the basis for its contention that the proposed unit is inappropriate, and states the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identifies any individuals whose eligibility to vote it intends to contest at the pre-election hearing and the basis of each such contention; raises any election bar; states its position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describes all other issues it intends to raise at hearing. Each individual or labor organization also provides the name, title, and contact information of the individual who will serve as its representative and accept service of papers for purposes of the representation proceeding. The employer's Statement of Position states whether it agrees that the Board has jurisdiction over it and provides the requested commerce information; identifies any individuals whose eligibility to vote it intends to contest at the pre-election hearing and the basis of each such contention; provides the list(s) of employees; and states the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date.

In cases involving decertification petitions, although the general rule is that the bargaining unit in which the decertification election is held must be coextensive with the certified or recognized bargaining unit, the Statements of Position of both the certified or recognized representative and the employer nevertheless must state whether each agrees that the proposed unit is appropriate, and if not, state the basis for the contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit. The Statements of Position of both the certified or recognized representative and the employer must also state whether each agrees that the Board has jurisdiction over the employer; identify any individuals whose eligibility to vote each party intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; and state each party's position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; describe all other issues each party intends to raise at hearing; and state the name, title, and contact information of the individual who will serve as each party's representative and accept service of all papers for purposes of the representation proceeding. The employer's Statement of Position must also state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date; and provide the requested commerce information and the employee list(s).

C. Voluntary Election Agreements; Notice of Election; Voter List

1. Voluntary Election Agreements

Elections can occur either by agreement of the parties or by direction of the regional director or the Board. In many cases, the parties, with Board agent assistance, are able to reach agreement regarding all election matters, thereby eliminating the need for the regional director or the Board to issue a formal decision and direction of election. By entering into an election agreement, the parties may, depending upon when the agreement is reached, avoid the time and expense of participating in a hearing (as well as having to complete the Statement of Position form).

The Board has devised and makes available to the parties three types of

informal voluntary procedures through which representation issues can be resolved without recourse to formal procedures. Forms for use in these informal procedures are available in the regional offices and on the Board's Web site. One type of informal procedure is the consent election agreement with final regional determination of post-election disputes. Here, the parties agree with respect to the appropriate unit, the payroll period to be used in determining which employees in the appropriate unit are eligible to vote in the election, and the type, place, date, and hours of balloting. The consent election is conducted under the direction and supervision of the regional director. This form of agreement provides that the rulings of the regional director on all questions relating to the election, such as the validity of challenges and objections, are final and binding. The regional director issues to the parties a certification of the results of the election, including a certification of representative where appropriate, with the same force and effect as if issued by the Board.

A second type of informal procedure is commonly referred to as the stipulated election agreement. Like the consent agreement above, the parties agree on the unit, payroll period to be used in determining voter eligibility, and election details, but provide that they may request Board review of the regional director's resolution of post-election disputes. The stipulated election is conducted under the direction and supervision of the regional director.

The third type of informal procedure is referred to as the full consent election agreement. Here, the parties agree that all pre-election and post-election disputes will be resolved with finality by the regional director. For example, the parties agree that if they are unable to informally resolve disputes arising with respect to the appropriate unit or other election details, those issues will be presented to, and decided with finality by, the regional director after a hearing. Upon the close of the hearing, the entire record in the case is forwarded to the regional director. After review of the record, the regional director issues a final decision, either dismissing the petition or directing that an election be held. In the latter event, the election is conducted under the supervision of the regional director. Similarly, all matters arising after the election, including determinative challenged ballots and objections to the conduct of the election, are decided with finality by the regional director. The regional director issues to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect as if issued by the Board.

2. Notice of Election

Upon approval of the election agreement or issuance of the direction of election pursuant to a full consent election agreement, the regional director promptly transmits to the parties and their designated representatives the Notice of Election, which publicizes the holding of the election. This notice reproduces a sample ballot and outlines such election details as the date(s) of the election, location(s) of polls, time of voting, and the eligibility rules. If the election agreement or direction of election provides for individuals to vote subject to challenge, the Notice of Election so states, and advises employees that such individuals are neither included in, nor excluded from, the bargaining unit, inasmuch as the election agreement or the direction of election has permitted them to vote subject to challenge. The Notice of Election further advises employees that the eligibility or inclusion of such individuals will be resolved, if necessary, following the election. The employer must post paper copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least 3 full working days prior to 12:01 a.m. of the date of the election. The employer must also distribute the notice electronically if it customarily communicates with employees in the unit electronically. The employer's failure properly to post or distribute the Notice of Election is grounds for setting aside the election whenever proper and timely objections are filed. However, a party may not object to the nonposting if it is responsible for the nonposting, and likewise may not object to the nondistribution of the notices if it is responsible for the nondistribution.

3. Voter List

Within 2 business days after the regional director's approval of the election agreement or issuance of the direction of election pursuant to a full consent election agreement, the employer must provide the regional director and the parties with an alphabetized list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters in order to allow the nonemployer parties to communicate with eligible employees about the upcoming election and to reduce the necessity for election-day challenges based solely on the nonemployer parties' lack of knowledge of voters' identities. The employer must also include in a separate section of that list the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge, including, for example, individuals in the classifications or other groupings that will be permitted to vote subject to challenge. In order to be timely filed and served, the list must be received by the regional director and the parties named in the agreement or direction within 2 business days after approval of the agreement or issuance of the direction of election unless a longer time is specified in the agreement or direction. When feasible, the employer must electronically file the list with the regional director and electronically serve the list on the other parties. The list must be in an approved electronic format, unless the employer certifies that it does not have the capacity to produce the list in the required format. The employer's failure to file or serve the list within the specified time or in the proper format is grounds for setting aside the election whenever proper and timely objections are filed. However, the employer may not object to the failure to file or serve the list in the specified time or in the proper format if it is responsible for the failure. The parties may not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Hearing

If the parties have not entered into a voluntary election agreement, a hearing must be held to determine if a question of representation affecting commerce exists before a regional director or the Board may direct an election to resolve that question. The hearing continues day to day until completed absent extraordinary circumstances. The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the regional office but may be another qualified agency employee. The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the hearing officer is to ensure that the record contains as full a statement of the pertinent facts as may

be necessary for determination of whether a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative. Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted. Such matters can be resolved, if necessary, following the election. Each party is afforded full opportunity to introduce evidence of the significant facts that support its contentions and are relevant to the existence of a question of representation. Witnesses are examined orally under oath. The rules of evidence prevailing in courts of law or equity are not controlling.

After the Statement of Position is received into evidence, the other parties respond to each issue raised in the Statement. Thus, for example, the petitioner may amend its petition to conform to an alternative unit proposed by the non-petitioning party. The regional director has discretion to permit parties to amend their Statements of Position or their responses in a timely manner for good cause. If the regional director permits a party to amend its Statement of Position, the other parties respond to each amended position. A party generally may not raise any issue, present evidence relating to any issue, cross-examine any witness concerning any issue, and present argument concerning any issue that the party failed to raise in its timely Statement of Position or failed to place in dispute in response to another party's Statement of Position or response. However, no party is precluded from challenging the eligibility of any voter during the election on the ground that the voter's eligibility or inclusion was not contested at the pre-election hearing. In addition, no party is precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction, and the regional director has discretion to direct the receipt of evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the director determines that record evidence is necessary. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party may not raise any issue or present evidence or argument about the appropriateness of the unit. And if the employer fails to timely furnish the lists of employees required to be included as part of the Statement of Position, the employer also may not contest the appropriateness of the proposed unit at any time and may not contest the eligibility or inclusion of any individuals at the pre-election hearing.

The regional director directs the hearing officer regarding the issues to be litigated at the hearing. The hearing officer may require parties to make offers of proof. If the regional director determines that the evidence described in an offer of proof is insufficient to sustain the proponent's position, the evidence is not received. In most cases a substantial number of the relevant facts are undisputed and stipulated.

Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objection, and included in the record. No such objection is waived by further participation in the hearing. A party need not seek special permission to appeal a hearing officer's ruling to preserve an issue for review after the hearing.

Before the hearing closes, the hearing officer solicits the parties' positions on the type, date(s), time(s), and location(s) of the election, and the eligibility period, but does not permit litigation of these issues. The hearing officer also advises the parties what their obligations will be if an election is directed, and solicits the name and contact information of the employer's on-site representative to whom the regional director should transmit the Notice of Election. At the close of the hearing, parties are permitted to make oral arguments on the record. Parties are permitted to file post-hearing briefs only with special permission of the regional director. The regional director specifies the time for filing such briefs, and may limit the subjects to be addressed in post-hearing briefs.

Upon the close of the hearing, the entire record in the case is forwarded to the regional director for decision. The hearing officer also transmits an analysis of the record, but makes no recommendations in regard to resolution of the issues.

E. Regional Director Pre-Election Determinations; Directions of Election; Notice of Election; Voter List; Requests for Review

1. Pre-Election Determinations; Direction of Election; Notice of Election

After the pre-election hearing closes, the regional director proceeds to review the record of the hearing and any post-hearing briefs to determine whether a question of representation affecting commerce exists concerning a unit appropriate for the purposes of collective bargaining or, in the decertification context, concerning a unit with an incumbent representative. The regional director may decide either to direct an election, dismiss the petition, or reopen the hearing.

The regional director's direction of election ordinarily specifies the type, date(s), time(s), and location(s) of the election and the eligibility period. The regional director sets the election for the earliest date practicable consistent with the Board's rules. The election is not scheduled for a date earlier than 10 days after the date by which the voter list must be filed and served unless the parties entitled to the list (for example, unions and decertification petitioners) waive the right to use the list for some or all of the 10-day period. The regional director directs (and conducts) the election where appropriate notwithstanding the pendency of an unfair labor practice charge covering the unit at issue and a request that the charge block the election if the regional director determines that the charging party's offer of proof in support of its charge does not describe evidence that, if proven, would interfere with employee free choice in an election or would be inherently inconsistent with the petition itself.

The regional director promptly transmits the direction of election to the parties and their designated representatives, and ordinarily will simultaneously transmit the Board's Notice of Election, which publicizes the holding of the election. This notice reproduces a sample ballot and outlines such election details as the date(s) of the election, location(s) of polls, time of voting, and the eligibility rules. If the direction of election provides for individuals to vote subject to challenge because their eligibility has not been determined, the Notice of Election so states, and advises employees that such individuals are neither included in, nor excluded from, the bargaining unit, inasmuch as the regional director has permitted them to vote subject to challenge. The election notice further advises employees that the eligibility or

inclusion of such individuals will be resolved, if necessary, following the election.

The employer must post paper copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least 3 full working days prior to 12:01 a.m. of the date of the election. The employer must also distribute the notice electronically if it customarily communicates with employees in the unit electronically. The employer's failure properly to post or distribute the Notice of Election is grounds for setting aside the election whenever proper and timely objections are filed. However, a party may not object to the nonposting if it is responsible for the nonposting, and likewise may not object to the nondistribution of the notices if it is responsible for the nondistribution.

2. Voter List

Within 2 business days after issuance of the direction of election, the employer must provide the regional director and the parties named in the direction with an alphabetized list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters in order to allow the nonemployer parties to communicate with eligible employees about the upcoming election and to reduce the necessity for election-day challenges based solely on the nonemployer parties' lack of knowledge of voters' identities. The employer must also include in a separate section of that list the same information for those individuals who, according to the direction of election, will be permitted to vote subject to challenge, including, for example, individuals in the classifications or other groupings that will be permitted to vote subject to challenge. In order to be timely filed and served, the list must be received by the regional director and the parties named in the direction of election within 2 business days after issuance of the direction of election, unless the direction specified a longer time for filing and service of the list. When feasible, the employer must electronically file the list with the regional director and electronically serve the list on the other parties. The list must be in an approved electronic format, unless the employer certifies that it does not have the capacity to produce the list in the required format. The employer's failure to file or serve the list within the specified time or in the proper format is grounds for setting aside the election whenever proper and timely objections are filed. However, the employer may not object to the failure to file or serve the list in the specified time or in the proper format if it is responsible for the failure. The parties may not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

3. Requests for Review

Any party may request that the Board review any action of a regional director delegated to the director under Section 3(b) of the Act unless the Board's rules provide otherwise. However, neither the filing of such a request nor the grant of such a request will operate as a stay of any action taken by the regional director, unless the Board orders otherwise. Any party may file with the Board a statement in opposition to the request for review. The Board will grant a request for review only where there are compelling reasons to do so. The regional director's actions are final unless the Board grants a request for review. The parties may, at any time, waive their right to request review. Failure to request review precludes such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue that was, or could have been, raised in the representation proceeding. Denial of a request for review constitutes an affirmance of the regional director's action, which also precludes relitigating any such issues in any related subsequent unfair labor practice proceeding. If the Board grants review, the Board shall make such disposition of the matter as it deems appropriate.

A party requesting review may also request expedited consideration. A party may also request that the Board stay some or all of its proceedings, including the election, or segregate and/or impound some or all of the ballots. Relief will be granted only upon a clear showing that it is necessary under the particular circumstances of the case. However, the pendency of a motion does not entitle a party to interim relief, and an affirmative ruling by the Board granting relief is required before the action of the regional director will be altered in any fashion.

The request for review may be filed at any time following the regional director's action until 14 days after a final disposition of the proceeding by the regional director. Accordingly, a party need not file a request for review of a decision and direction of election before the election in order to preserve its right to contest that decision after the election. Instead, a party can wait to see whether the election results have mooted the basis of an appeal, and a party may combine a request for review of the decision and direction of election with a request for review of the regional director's resolution of objections and challenged ballots, if the party has not previously requested review of the direction of election.

F. Election Procedure; Challenges and Election Objections; Processing of Challenges and Objections; Hearings; Regional Director Dispositions of Challenges and Objections; Appeals

1. Election Procedure; Challenges

Unless otherwise directed by the Board, all elections are conducted under the supervision of the regional director in whose region the proceeding is pending. All elections shall be by secret ballot. A Board agent usually arranges a pre-election conference at which the parties check the list of voters and attempt to resolve any questions of eligibility. When an election is conducted manually, any party may be represented by observers of its own selection, subject to such limitations as the regional director may prescribe, and the ballots are marked in the secrecy of a voting booth. Ballots cast by individuals whom the parties agree may vote subject to challenge, or whom the decision and direction of election permits to vote subject to challenge, are segregated and impounded. The parties' authorized observers and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. For example, the Board agent challenges anyone whose name is not on the list. If such a person is permitted to vote, his or her ballot is segregated, and, if the challenge is not resolved before the tally, impounded. Board agents, in the presence and with the assistance of the parties' authorized representatives, ordinarily count and tabulate the ballots promptly after the closing of the polls. Elections are decided by a majority of the valid votes cast. Voter challenges may be resolved by agreement. A complete tally of the ballots is made available to the parties upon the conclusion of the count. If the number of unresolved challenged ballots is insufficient to affect the results of an election in which an individual or labor organization is certified, the unit placement of any such individuals may be resolved by the parties in the course of collective bargaining or may be determined by the Board if a timely unit clarification petition is filed.

2. Objections

Within 7 days after the tally of ballots has been prepared, a party may file with the regional director objections to the conduct of the election or to conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. The party filing objections must simultaneously serve a copy of its objections, including the short statement of the reasons therefor, on all other parties to the representation case. The party filing objections must also simultaneously file a written offer of proof in support of its objections, but the offer of proof need not be served on the other parties. A party must timely file objections and the offer of proof even if there are determinative challenges. The regional director may grant additional time to file the offer of proof in support of election objections upon a showing of good cause.

3. Regional Director Action in Absence of Objections, Determinative Challenges and Runoff Elections

If no timely objections are filed, if the challenged ballots are insufficient in number to affect the results of the election, and if no runoff election is to be held, the regional director issues to the parties a certification of the results of the election, including certification of representative where appropriate.

4. Processing and Disposition of Objections and Determinative Challenges

The initial procedures for handling objections to the conduct of the election or to conduct affecting the results of the election, as well as determinative challenges, are the same regardless of whether the election was directed by a regional director or held pursuant to the parties' agreement. The regional director has discretion to conduct an investigation or set the matters for a hearing without an investigation.

If timely objections are filed and the regional director determines that the evidence described in the party's offer of proof would not constitute grounds for setting aside the election if introduced at a hearing, and the regional director determines that any determinative challenges do not raise substantial and material factual issues, the regional director issues a decision disposing of the objections and challenges and a certification of the results of the election, including certification of representative where appropriate.

If timely objections are filed to the conduct of the election or to conduct affecting the results of the election and the regional director determines that the evidence described in the party's offer of proof could be grounds for setting aside the election if introduced at a hearing, or if the challenged ballots are sufficient in number to affect the results of the election and raise substantial and material factual issues, the regional director transmits to the parties' and their designated representatives a notice of hearing before a hearing officer, unless the regional director consolidates the hearing concerning objections and determinative challenges with an unfair labor practice proceeding before an administrative law judge.

If the regional director consolidates the hearing concerning objections and determinative challenges with an unfair labor practice proceeding before an administrative law judge and the election was conducted pursuant to one of the two types of consent agreements, the administrative law judge, upon issuing a decision, severs the representation case and transfers it to the regional director for further processing. If, however, the regional director consolidates the hearing concerning objections and determinative challenges with an unfair labor practice proceeding before an administrative law judge and the election was conducted pursuant to a stipulated election agreement or a decision and direction of election, the provisions of § 102.46 of the Board's Rules and Regulations govern with respect to the filing of exceptions or an answering brief to the exceptions to the administrative law judge's decision, and a request for review of the regional director's decision and direction of election shall be due at the same time as the exceptions to the administrative law judge's decision are due.

If, on the other hand, the regional director issues a notice of hearing before a hearing officer, the hearing opens 21 days from the tally of ballots or as soon as practicable thereafter, unless the parties agree to an earlier date. The post-election hearing continues day to day until completed absent extraordinary circumstances. The hearing officer issues a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues following the hearing. Within 14 days after issuance of the hearing officer's report, any party may file exceptions to it with the regional director. A party opposing the exceptions may file an answering brief.

The regional director then decides the matter. The decision may include a certification of the results of the election, including certification of representatives where appropriate. The parties' appeal rights with respect to the regional director's decision on challenged ballots and/or objections depend upon whether the parties agreed to waive any appeal prior to the election. In cases where the election was conducted pursuant to either of the two types of consent election agreements, the regional director's decision regarding the election objections and determinative challenges is not subject to Board review.

If the election has been held pursuant to a stipulated election agreement or a direction of election, a party may request Board review, and may combine it with a request for review of the regional director's decision to direct the election if the party has not previously requested review of that decision. The request for review may be filed at any time after the regional director's decision on challenged ballots and/or objections until 14 days after a final disposition of the proceeding by the regional director. Any party may file with the Board a statement in opposition to the request for review. The Board will grant a request for review only where there are compelling reasons to do so. The regional director's actions are final unless the Board grants a request for review. The parties may, at any time, waive their right to request review. Failure to request review precludes such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue that was, or could have been, raised in the representation proceeding. Denial of a request for review constitutes an affirmance of the regional director's action, which also precludes relitigating any such issues in any related subsequent unfair labor practice proceeding. If the Board grants review, the Board shall make such disposition of the matter as it deems appropriate.

G. Runoff Elections

If the election involves two or more labor organizations and if the election results are inconclusive because no choice on the ballot received the majority of valid votes cast, a runoff election is held as provided in the Board's Rules and Regulations.

List of Subjects

29 CFR Part 101

Administrative practice and procedure, Labor management relations.

29 CFR Part 102

Administrative practice and procedure, Labor management relations.

29 CFR Part 103

Labor management relations.

In consideration of the foregoing, the National Labor Relations Board amends Chapter I of title 29, Code of Federal Regulations, as follows:

PART 101—STATEMENTS OF PROCEDURES

■ 1. The authority citation for part 101 continues to read as follows:

Authority: Sec. 6 of the National Labor Relations Act, as amended (29 U.S.C. 151, 156), and sec. 552(a) of the Administrative Procedure Act (5 U.S.C. 552(a)). Section 101.14 also issued under sec. 2112(a)(1) of Pub. L. 100–236, 28 U.S.C. 2112(a)(1).

Subpart C—[Removed and Reserved]

■ 2. Remove and reserve subpart C, consisting of §§ 101.17 through 101.21.

Subpart D—Unfair Labor Practice and Representation Cases Under Sections 8(b)(7) and 9(c) of the Act

■ 3. Revise § 101.23 to read as follows:

§ 101.23 Initiation and investigation of a petition in connection with a case under section 8(b)(7).

(a) A representation petition [1] involving the employees of the employer named in the charge is handled under an expedited procedure when the investigation of the charge has revealed that:

(1) The employer's operations affect commerce within the meaning of the Act;

(2) Picketing of the employer is being conducted for an object proscribed by section 8(b)(7) of the Act;

(3) Subparagraph (C) of that section of the Act is applicable to the picketing; and

(4) The petition has been filed within a reasonable period of time not to exceed 30 days from the commencement of the picketing. In these circumstances, the member of the regional director's staff to whom the matter has been assigned investigates the petition to ascertain further: the unit appropriate for collective bargaining; and whether an election in that unit would effectuate the policies of the Act.

(b) If, based on such investigation, the regional director determines that an election is warranted, the director may, without a prior hearing, direct that an election be held in an appropriate unit of employees. Any party aggrieved may file a request with the Board for special permission to appeal that action to the Board, but such review, if granted, will not, unless otherwise ordered by the Board, stay the proceeding. If it is determined that an election is not warranted, the director dismisses the petition or makes other disposition of the matter. Should the regional director conclude that an election is warranted, the director fixes the basis of eligibility of voters and the place, date, and hours of balloting. The mechanics of arranging the balloting, the other procedures for the conduct of the election, and the postelection proceedings are the same, insofar as appropriate, as those described in 29 CFR 102.69 and the statement of the general course of proceedings under Section 9(c) of the Act published in the **Federal Register**, except that the regional director's rulings on any objections to the conduct of the election or challenged ballots are final and binding unless the Board, on an application by one of the parties, grants such party special permission to appeal from the regional director's rulings. The party requesting such review by the Board must do so promptly, in writing, and state briefly the grounds relied on. Such party must also immediately serve a copy on the other parties, including the regional director. Neither the request for review by the Board nor the Board's grant of such review operates as a stay of any action taken by the regional director, unless specifically so ordered by the Board. If the Board grants permission to appeal, and it appears to the Board that substantial and material factual issues have been presented with respect to the objections to the conduct of the election or challenged ballots, it may order that a hearing be held on such issues or take other appropriate action.

(c) If the regional director believes, after preliminary investigation of the petition, that there are substantial issues which require determination before an election may be held, the director may order a hearing on the issues. This hearing is followed by regional director decision and direction of election, or other disposition. The procedures to be used in connection with such hearing and posthearing proceedings are the same, insofar as they are applicable, as those described in 29 CFR 102.63, 102.64, 102.65, 102.66, 102.67, 102.68, and 102.69, and the statement of the general course.

(d) Should the parties so desire, they may, with the approval of the regional director, resolve the issues as to the unit, the conduct of the balloting, and related matters pursuant to informal consent procedures, as described in 29 CFR 102.62(a) and the statement of the general course.

(e) If a petition has been filed which does not meet the requirements for processing under the expedited procedures, the regional director may process it under the procedures set forth in subpart C of 29 CFR part 102 and the statement of the general course.

■ 4. Revise § 101.25 to read as follows:

§ 101.25 Appeal from the dismissal of a petition, or from the refusal to process it under the expedited procedure.

If it is determined after investigation of the representation petition that further proceedings based thereon are not warranted, the regional director, absent withdrawal of the petition, dismisses it, stating the grounds therefor. If it is determined that the petition does not meet the requirements for processing under the expedited procedure, the regional director advises the petitioner of the determination to process the petition under the procedures described in subpart C of 29 CFR part 102 and the statement of the general course. In either event, the regional director informs all the parties of such action, and such action is final, although the Board may grant an aggrieved party permission to appeal from the regional director's action. Such party must request such review promptly, in writing, and state briefly the grounds relied on. Such party must also immediately serve a copy on the other parties, including the regional director. Neither the request for review by the Board, nor the Board's grant of such review, operates as a stay of the action taken by the regional director, unless specifically so ordered by the Board.

Subpart E—Referendum Cases Under Section 9(e)(1) and (2) of the Act

■ 5. Revise § 101.26 to read as follows:

§ 101.26 Initiation of rescission of authority cases.

The investigation of the question as to whether the authority of a labor organization to make an agreement requiring membership in a labor organization as a condition of employment is to be rescinded is initiated by the filing of a petition by an employee or group of employees on behalf of 30 percent or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization requiring membership in such labor organization. The petition must be in writing and signed, and either must be notarized or must contain a declaration by the

[1] The manner of filing of such petition and the contents thereof are the same as described in 29 CFR 102.60 and 102.61 and the statement of the general course of proceedings under Section 9(c) of the Act published in the **Federal Register**, insofar as they are applicable, except that the petitioner is not required to allege that a claim was made on the employer for recognition or that the union represents a substantial number of employees.

person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. It is filed with the regional director for the Region in which the alleged appropriate bargaining unit exists or, if the bargaining unit exists in two or more Regions, with the regional director for any of such Regions. The blank form, which is supplied by the Regional Office upon request or is available online, provides, among other things, for a description of the bargaining unit covered by the agreement, the approximate number of employees involved, the names of any other labor organizations which claim to represent the employees, the petitioner's position on the type, date(s), time(s), and location(s) of the election sought, and the name of, and contact information for, the individual who will serve as the petitioner's representative. The petition may be filed by facsimile or electronically. The petitioner must supply with the petition evidence of authorization from the employees.

■ 6. Revise § 101.28 to read as follows:

§ 101.28 Consent agreements providing for election.

(a) The Board makes available to the parties three types of informal consent procedures through which authorization issues can be resolved without resort to formal procedures. These informal agreements are the consent election agreement with final regional director determinations of post-election disputes, the stipulated election agreement with discretionary Board review, and the full consent election agreement with final regional director determinations of pre- and post-election disputes. Forms for use in these informal procedures are available in the Regional Offices.

(b) The procedures to be used in connection with a consent-election agreement with final regional director determinations of post-election disputes, a stipulated election agreement with discretionary Board review, and a full consent-election agreement with final regional director determinations of pre- and post-election disputes are the same as those described in subpart C of 29 CFR part 102 and the statement of the general course in connection with similar agreements in representation cases under Section 9(c) of the Act, except that no provision is made for runoff elections.

■ 7. Revise § 101.29 to read as follows:

§ 101.29 Procedure respecting election conducted without hearing.

If the regional director determines that the case is an appropriate one for election without formal hearing, an election is conducted as quickly as possible among the employees and upon the conclusion of the election the regional director makes available to the parties a tally of ballots. The parties, however, have an opportunity to make appropriate challenges and objections to the conduct of the election and they have the same rights, and the same procedure is followed, with respect to objections to the conduct of the election and challenged ballots, as is described in subpart C of 29 CFR part 102 and the statement of the general course in connection with the postelection procedures in representation cases under Section 9(c) of the Act, except that no provision is made for a runoff election. If no such objections are filed within 7 days and if the challenged ballots are insufficient in number to affect the results of the election, the regional director issues to the parties a certification of the results of the election, with the same force and effect as if issued by the Board.

■ 8. Revise § 101.30 to read as follows:

§ 101.30 Formal hearing and procedure respecting election conducted after hearing.

(a) The procedures are the same as those described in subpart C of 29 CFR part 102 and the statement of the general course respecting representation cases arising under Section 9(c) of the Act insofar as applicable. If the preliminary investigation indicates that there are substantial issues which require determination before an appropriate election may be held, the regional director will institute formal proceedings by issuance of a notice of hearing on the issues which, after hearing, is followed by regional director decision and direction of election or dismissal. The notice of hearing together with a copy of the petition is served on the petitioner, the employer, and any other known persons or labor organizations claiming to have been designated by employees involved in the proceeding.

(b) The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the Regional Office but may be another qualified Agency official. The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case. The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions that are relevant to the issue of whether the Board should conduct an election to determine whether the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3) of the Act, desire that such authority be rescinded. In most cases a substantial number of the relevant facts are undisputed and stipulated. The parties are permitted to argue orally on the record before the hearing officer.

(c) Upon the close of the hearing, the entire record in the case is then forwarded to the regional director, together with an informal analysis by the hearing officer of the issues and the evidence but without recommendations. Post-hearing briefs are filed only upon special permission of the regional director and within the time and addressing the subjects permitted by the regional director.

(d) The parties have the same rights, and the same procedure is followed, with respect to objections to the conduct of the election and challenged ballots as is described in connection with the postelection procedures in representation cases under Section 9(c) of the Act.

PART 102—RULES AND REGULATIONS, SERIES 8

■ 9. The authority citation for part 102 continues to read as follows:

Authority: Sections. 1, 6, National Labor Relations Act (29 U.S.C. 151, 156). Section 102.117 also issued under section 552(a)(4)(A) of the Freedom of Information Act, as amended (5 U.S.C. 552(a)(4)(A)), and Section 102.117a also issued under section 552a(j) and (k) of the Privacy Act of 1974 (5 U.S.C. 552a(j) and (k)). Sections 102.143 through 102.155 also issued under section 504(c)(1) of the Equal Access to Justice Act, as amended (5 U.S.C. 504(c)(1)).

Subpart C—Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees [2] And for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act

■ 10. Revise § 102.60 to read as follows:

§ 102.60 Petitions.

(a) *Petition for certification or decertification.* A petition for

[2] Procedure under the first proviso to sec. 8(b)(7)(C) of the Act is governed by subpart D of this part.

investigation of a question concerning representation of employees under paragraphs (1)(A)(i) and (1)(B) of Section 9(c) of the Act (hereinafter called a petition for certification) may be filed by an employee or group of employees or any individual or labor organization acting in their behalf or by an employer. A petition under paragraph (1)(A)(ii) of Section 9(c) of the Act, alleging that the individual or labor organization which has been certified or is being currently recognized as the bargaining representative is no longer such representative (hereinafter called a petition for decertification), may be filed by any employee or group of employees or any individual or labor organization acting in their behalf. Petitions under this section shall be in writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalty of perjury, that its contents are true and correct (see 28 U.S.C. 1746). One original of the petition shall be filed, and a copy served on all parties named in the petition. A person filing a petition by facsimile pursuant to § 102.114(f) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing by facsimile, if otherwise proper. A person filing a petition electronically pursuant to § 102.114(i) need not file an original. Except as provided in § 102.72, such petitions shall be filed with the regional director for the Region wherein the bargaining unit exists, or, if the bargaining unit exists in two or more Regions, with the regional director for any of such Regions. A certificate of service on all parties named in the petition shall also be filed with the regional director when the petition is filed. Along with the petition, the petitioner shall serve the Agency's description of procedures in representation cases and the Agency's Statement of Position form on all parties named in the petition. Prior to the transfer of the record to the Board, the petition may be withdrawn only with the consent of the regional director with whom such petition was filed. After the transfer of the record to the Board, the petition may be withdrawn only with the consent of the Board. Whenever the regional director or the Board, as the case may be, approves the withdrawal of any petition, the case shall be closed.

(b) *Petition for clarification of bargaining unit or petition for amendment of certification.* A petition for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question of representation, may be filed by a labor organization or by an employer. Where applicable the same procedures set forth in paragraph (a) of this section shall be followed.

■ 11. Revise § 102.61 to read as follows:

§ 102.61 Contents of petition for certification; contents of petition for decertification; contents of petition for clarification of bargaining unit; contents of petition for amendment of certification.

(a) *RC Petitions.* A petition for certification, when filed by an employee or group of employees or an individual or labor organization acting in their behalf, shall contain the following:

(1) The name of the employer.

(2) The address of the establishments involved.

(3) The general nature of the employer's business.

(4) A description of the bargaining unit which the petitioner claims to be appropriate.

(5) The names and addresses of any other persons or labor organizations who claim to represent any employees in the alleged appropriate unit, and brief descriptions of the contracts, if any, covering the employees in such unit.

(6) The number of employees in the alleged appropriate unit.

(7) A statement that a substantial number of employees in the described unit wish to be represented by the petitioner. Evidence supporting the statement shall be filed with the petition in accordance with paragraph (f) of this section, but shall not be served on any party.

(8) A statement that the employer declines to recognize the petitioner as the representative within the meaning of Section 9(a) of the Act or that the labor organization is currently recognized but desires certification under the Act.

(9) The name, affiliation, if any, and address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(10) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(11) Any other relevant facts.

(12) The type, date(s), time(s) and location(s) of the election sought.

(b) *RM Petitions.* A petition for certification, when filed by an employer, shall contain the following:

(1) The name and address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(2) The general nature of the petitioner's business.

(3) A brief statement setting forth that one or more individuals or labor organizations have presented to the petitioner a claim to be recognized as the exclusive representative of all employees in the unit claimed to be appropriate; a description of such unit; and the number of employees in the unit.

(4) The name or names, affiliation, if any, and addresses of the individuals or labor organizations making such claim for recognition.

(5) A statement whether the petitioner has contracts with any labor organization or other representatives of employees and, if so, their expiration date(s).

(6) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(7) Any other relevant facts.

(8) Evidence supporting the statement that a labor organization has made a demand for recognition on the employer or that the employer has good faith uncertainty about majority support for an existing representative. Such evidence shall be filed together with the petition, but if the evidence reveals the names and/or number of employees who no longer wish to be represented, the evidence shall not be served on any party. However, no proof of representation on the part of the labor organization claiming a majority is required and the regional director shall proceed with the case if other factors require it unless the labor organization withdraws its claim to majority representation.

(9) The type, date(s), time(s) and location(s) of the election sought.

(c) *RD Petitions.* Petitions for decertification shall contain the following:

(1) The name of the employer.

(2) The address of the establishments and a description of the bargaining unit involved.

(3) The general nature of the employer's business.

(4) The name and address of the petitioner and affiliation, if any, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the

representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(5) The name or names and addresses of the individuals or labor organizations who have been certified or are being currently recognized by the employer and who claim to represent any employees in the unit involved, and the expiration date of any contracts covering such employees.

(6) An allegation that the individuals or labor organizations who have been certified or are currently recognized by the employer are no longer the representative in the appropriate unit as defined in Section 9(a) of the Act.

(7) The number of employees in the unit.

(8) A statement that a substantial number of employees in the described unit no longer wish to be represented by the incumbent representative. Evidence supporting the statement shall be filed with the petition in accordance with paragraph (f) of this section, but shall not be served on any party.

(9) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(10) Any other relevant facts.

(11) The type, date(s), time(s) and location(s) of the election sought.

(d) *UC Petitions.* A petition for clarification shall contain the following:

(1) The name of the employer and the name of the recognized or certified bargaining representative.

(2) The address of the establishment involved.

(3) The general nature of the employer's business.

(4) A description of the present bargaining unit, and, if the bargaining unit is certified, an identification of the existing certification.

(5) A description of the proposed clarification.

(6) The names and addresses of any other persons or labor organizations who claim to represent any employees affected by the proposed clarifications, and brief descriptions of the contracts, if any, covering any such employees.

(7) The number of employees in the present bargaining unit and in the unit as proposed under the clarification.

(8) The job classifications of employees as to whom the issue is raised, and the number of employees in each classification.

(9) A statement by petitioner setting forth reasons why petitioner desires clarification of unit.

(10) The name, the affiliation, if any, and the address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(11) Any other relevant facts.

(e) *AC Petitions.* A petition for amendment of certification shall contain the following:

(1) The name of the employer and the name of the certified union involved.

(2) The address of the establishment involved.

(3) The general nature of the employer's business.

(4) Identification and description of the existing certification.

(5) A statement by petitioner setting forth the details of the desired amendment and reasons therefor.

(6) The names and addresses of any other persons or labor organizations who claim to represent any employees in the unit covered by the certification and brief descriptions of the contracts, if any, covering the employees in such unit.

(7) The name, the affiliation, if any, and the address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(8) Any other relevant facts.

(f) *Provision of original signatures.* Evidence filed pursuant to paragraphs (a)(7), (b)(8), or (c)(8) of this section together with a petition that is filed by facsimile or electronically, which includes original signatures that cannot be transmitted in their original form by the method of filing of the petition, may be filed by facsimile or in electronic form provided that the original documents are received by the regional director no later than 2 days after the facsimile or electronic filing.

■ 12. Revise § 102.62 to read as follows:

§ 102.62 Election agreements; voter list; Notice of Election.

(a) *Consent election agreements with final regional director determinations of post-election disputes.* Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of employees involved may, with the approval of the regional director, enter into an agreement providing for the waiver of a hearing and for an election and further providing that post-election disputes will be resolved by the regional director. Such agreement, referred to as a consent election agreement, shall include a description of the appropriate unit, the time and place of holding the election, and the payroll period to be used in determining what employees within the appropriate unit shall be eligible to vote. Such election shall be conducted under the direction and supervision of the regional director. The method of conducting such election shall be consistent with the method followed by the regional director in conducting elections pursuant to §§ 102.69 and 102.70 except that the rulings and determinations by the regional director of the results thereof shall be final, and the regional director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, and except that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

(b) *Stipulated election agreements with discretionary Board review.* Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement providing for the waiver of a hearing and for an election as described in paragraph (a) of this section and further providing that the parties may request Board review of the regional director's resolution of post-election disputes. Such agreement, referred to as a stipulated election agreement, shall also include a description of the appropriate bargaining unit, the time and place of holding the election, and the payroll period to be used in determining which employees within the appropriate unit shall be eligible to vote. Such election shall be conducted under the direction and supervision of the regional director. The method of conducting such election and the post-election procedure shall be consistent with that followed by the regional director in conducting elections pursuant to §§ 102.69 and 102.70.

(c) *Full consent election agreements with final regional director determinations of pre- and post-election disputes.* Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement, referred to as a full consent election agreement, providing that pre- and post-election disputes will be resolved by the regional director. Such agreement provides for a hearing pursuant to §§ 102.63, 102.64, 102.65,

102.66 and 102.67 to determine if a question of representation exists. Upon the conclusion of such a hearing, the regional director shall issue a decision. The rulings and determinations by the regional director thereunder shall be final, with the same force and effect, in that case, as if issued by the Board. Any election ordered by the regional director shall be conducted under the direction and supervision of the regional director. The method of conducting such election shall be consistent with the method followed by the regional director in conducting elections pursuant to §§ 102.69 and 102.70, except that the rulings and determinations by the regional director of the results thereof shall be final, and the regional director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, and except that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

(d) *Voter list.* Absent agreement of the parties to the contrary specified in the election agreement or extraordinary circumstances specified in the direction of election, within 2 business days after the approval of an election agreement pursuant to paragraphs (a) or (b) of this section, or issuance of a direction of election pursuant to paragraph (c) of this section, the employer shall provide to the regional director and the parties named in the agreement or direction a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular (''cell'') telephone numbers) of all eligible voters. The employer shall also include in a separate section of that list the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge, including, for example, individuals in the classifications or other groupings that will be permitted to vote subject to challenge. In order to be timely filed and served, the list must be received by the regional director and the parties named in the agreement or direction respectively within 2 business days after the approval of the agreement or issuance of the direction unless a longer time is specified in the agreement or direction. The list of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list shall be filed electronically with the regional director and served electronically on the other parties named in the agreement or direction. A certificate of service on all parties shall be filed with the regional director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a). The employer shall be estopped from objecting to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

(e) *Notice of election.* Upon approval of the election agreement pursuant to paragraphs (a) or (b) of this section or with the direction of election pursuant to paragraph (c) of this section, the regional director shall promptly transmit the Board's Notice of Election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided). The employer shall post and distribute the Notice of Election in accordance with § 102.67(k). The employer's failure properly to post or distribute the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

■ 13. Revise § 102.63 to read as follows:

§ 102.63 Investigation of petition by regional director; notice of hearing; service of notice; Notice of Petition for Election; Statement of Position; withdrawal of notice of hearing.

(a) *Investigation; notice of hearing; Notice of Petition for Election.* (1) After a petition has been filed under § 102.61(a), (b), or (c), if no agreement such as that provided in § 102.62 is entered into and if it appears to the regional director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the Act will be effectuated, and that an election will reflect the free choice of employees in an appropriate unit, the regional director shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein. Except in cases presenting unusually complex issues, the regional director shall set the hearing for a date 8 days from the date of service of the notice excluding intervening Federal holidays, but if the 8th day is a weekend or Federal holiday, the regional director shall set the hearing for the following business day. The regional director may postpone the hearing for up to 2 business days upon request of a party showing special circumstances. The regional director may postpone the opening of the hearing for more than 2 business days upon request of a party showing extraordinary circumstances. A copy of the petition, a description of procedures in representation cases, a ''Notice of Petition for Election'', and a Statement of Position form as described in paragraphs (b)(1) through (3) of this section, shall be served with such notice of hearing. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on the director's own motion.

(2) Within 2 business days after service of the notice of hearing, the employer shall post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and shall also distribute it electronically if the employer customarily communicates with its employees electronically. The Notice of Petition for Election shall indicate that no final decisions have been made yet regarding the appropriateness of the petitioned-for bargaining unit and whether an election shall be conducted. The employer shall maintain the posting until the petition is dismissed or withdrawn or the Notice of Petition for Election is replaced by the Notice of Election. The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of

notices if it is responsible for the nondistribution.

(b)(1) *Statement of Position in RC cases.* If a petition has been filed under § 102.61(a) and the regional director has issued a notice of hearing, the employer shall file with the regional director and serve on the parties named in the petition its Statement of Position such that it is received by the regional director and the parties named in the petition by the date and time specified in the notice of hearing, which shall be at noon on the business day before the opening of the hearing if the hearing is set to open 8 days from service of the notice. The regional director may set the date and time for filing and serving the Statement of Position earlier than at noon on the business day before the hearing in the event the hearing is set to open more than 8 days from service of the notice. The regional director may postpone the time for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances. The regional director may postpone the time for filing and serving the Statement of Position for more than 2 business days upon request of a party showing extraordinary circumstances. The regional director may permit the employer to amend its Statement of Position in a timely manner for good cause.

(i) The employer's Statement of Position shall state whether the employer agrees that the Board has jurisdiction over it and provide the requested information concerning the employer's relation to interstate commerce; state whether the employer agrees that the proposed unit is appropriate, and, if the employer does not so agree, state the basis for its contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date; state the employer's position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues the employer intends to raise at the hearing.

(ii) The Statement of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the employer and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the employer.

(iii) The Statement of Position shall include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing, and if the employer contends that the proposed unit is inappropriate, the employer shall separately list the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit. The employer shall also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. The list(s) of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form.

(2) *Statement of Position in RM cases.* If a petition has been filed under § 102.61(b) and the regional director has issued a notice of hearing, each individual or labor organization named in the petition shall file with the regional director and serve on the other parties named in the petition its Statement of Position such that it is received by the regional director and the parties named in the petition by the date and time specified in the notice of hearing, which shall be at noon on the business day before the opening of the hearing if the hearing is set to open 8 days from service of the notice. The regional director may set the date and time for filing and serving the Statement of Position earlier than at noon on the business day before the hearing in the event the hearing is set to open more than 8 days from service of the notice. The regional director may postpone the time for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances. The regional director may postpone the time for filing and serving the Statement of Position for more than 2 business days upon request of a party showing extraordinary circumstances. The regional director may permit each individual or labor organization named in the petition to amend its Statement of Position in a timely manner for good cause.

(i) *Individual or labor organization's Statement of Position.* Each individual or labor organization's Statement of Position shall state whether it agrees that the Board has jurisdiction over the employer; state whether it agrees that the proposed unit is appropriate, and, if it does not so agree, state the basis for its contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote the individual or labor organization intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; state its position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues it intends to raise at the hearing.

(ii) *Identification of representative for service of papers.* Each individual or labor organization's Statement of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as its representative and accept service of all papers for purposes of the representation proceeding and be signed by the individual or a representative of the individual or labor organization.

(iii) *Employer's Statement of Position.* Within the time permitted for filing the Statement of Position, the employer shall file with the regional director and serve on the parties named in the petition a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. The list(s) of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. The employer's Statement of Position shall also state whether the employer agrees that the Board has jurisdiction over it and provide the requested information concerning the employer's relation to interstate commerce; identify any individuals whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention; and state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date. The regional director may permit the employer to amend its Statement of Position in a timely manner for good cause.

(3) *Statement of Position in RD cases.* If a petition has been filed under

§ 102.61(c) and the regional director has issued a notice of hearing, the employer and the certified or recognized representative of employees shall file with the regional director and serve on the parties named in the petition their respective Statements of Position such that they are received by the regional director and the parties named in the petition by the date and time specified in the notice of hearing, which shall be at noon on the business day before the opening of the hearing if the hearing is set to open 8 days from service of the notice. The regional director may set the date and time for filing and serving the Statement of Position earlier than at noon on the business day before the hearing in the event the hearing is set to open more than 8 days from service of the notice. The regional director may postpone the time for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances. The regional director may postpone the time for filing and serving the Statement of Position for more than 2 business days upon request of a party showing extraordinary circumstances. The regional director may permit the employer and the certified or recognized representative of employees to amend their respective Statements of Position in a timely manner for good cause.

(i) The Statements of Position of the employer and the certified or recognized representative shall state each party's position concerning the Board's jurisdiction over the employer; state whether each agrees that the proposed unit is appropriate, and, if not, state the basis for the contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote each party intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; and state each party's respective positions concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues each party intends to raise at the hearing.

(ii) The Statements of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the employer or the certified or recognized representative of the employees and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the employer or the certified or recognized representative, respectively.

(iii) The employer's Statement of Position shall also include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing, and if the employer contends that the proposed unit is inappropriate, the employer shall separately list the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit. The employer shall also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. The list(s) of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. The employer's Statement of Position shall also provide the requested information concerning the employer's relation to interstate commerce and state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date.

(c) *UC or AC cases.* After a petition has been filed under § 102.61(d) or (e), the regional director shall conduct an investigation and, as appropriate, may issue a decision without a hearing; or prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein; or take other appropriate action. If a notice of hearing is served, it shall be accompanied by a copy of the petition. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on the director's own motion. All hearing and posthearing procedure under this paragraph (c) shall be in conformance with §§ 102.64 through 102.69 whenever applicable, except where the unit or certification involved arises out of an agreement as provided in § 102.62(a), the regional director's action shall be final, and the provisions for review of regional director's decisions by the Board shall not apply. Dismissals of petitions without a hearing shall not be governed by § 102.71. The regional director's dismissal shall be by decision, and a request for review therefrom may be obtained under § 102.67, except where an agreement under § 102.62(a) is involved.

■ 14. Revise § 102.64 to read as follows:

§ 102.64 Conduct of hearing.

(a) The purpose of a hearing conducted under Section 9(c) of the Act is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative. Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted. If, upon the record of the hearing, the regional director finds that a question of representation exists, the director shall direct an election to resolve the question.

(b) Hearings shall be conducted by a hearing officer and shall be open to the public unless otherwise ordered by the hearing officer. At any time, a hearing officer may be substituted for the hearing officer previously presiding. Subject to the provisions of § 102.66, it shall be the duty of the hearing officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under Section 9(c) of the Act.

(c) The hearing shall continue from day to day until completed unless the regional director concludes that extraordinary circumstances warrant otherwise. The regional director may, in the director's discretion, adjourn the hearing to a different place by announcement thereof at the hearing or by other appropriate notice.

■ 15. Revise § 102.65 to read as follows:

§ 102.65 Motions; intervention; appeals of hearing officer's rulings.

(a) All motions, including motions for intervention pursuant to paragraphs (b) and (e) of this section, shall be in writing or, if made at the hearing, may be stated orally on the record and shall briefly state the order or relief sought and the grounds for such motion. An original and two copies of written motions shall be filed and a copy thereof immediately shall be served on the other parties to the proceeding. Motions made prior to the transfer of the record to the Board shall be filed with the regional director, except that

motions made during the hearing shall be filed with the hearing officer. After the transfer of the record to the Board, all motions shall be filed with the Board. Such motions shall be printed or otherwise legibly duplicated. Eight copies of such motions shall be filed with the Board. Extra copies of electronically-filed papers need not be filed. The regional director may rule upon all motions filed with him, causing a copy of the ruling to be served on the parties, or may refer the motion to the hearing officer, except that if the regional director prior to the close of the hearing grants a motion to dismiss the petition, the petitioner may obtain a review of such ruling in the manner prescribed in § 102.71. The hearing officer shall rule, either orally on the record or in writing, upon all motions filed at the hearing or referred to the hearing officer as hereinabove provided, except that the hearing officer shall rule on motions to intervene and to amend the petition only as directed by the regional director, and except that all motions to dismiss petitions shall be referred for appropriate action at such time as the entire record is considered by the regional director or the Board, as the case may be. All motions, rulings, and orders shall become a part of the record, except that rulings on motions to revoke subpoenas shall become a part of the record only upon the request of the party aggrieved thereby as provided in § 102.66(f).

(b) Any person desiring to intervene in any proceeding shall make a motion for intervention, stating the grounds upon which such person claims to have an interest in the proceeding. The regional director, or the hearing officer at the specific direction of the regional director, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as the regional director may deem proper, and such intervenor shall thereupon become a party to the proceeding.

(c) Rulings by the hearing officer shall not be appealed directly to the regional director, except by special permission of the regional director, but shall be considered by the regional director when the director reviews the entire record. Requests to the regional director for special permission to appeal from a ruling of the hearing officer, together with the appeal from such ruling, shall be filed promptly, in writing, and shall briefly state the reasons special permission should be granted and the grounds relied on for the appeal. The moving party shall immediately serve a copy of the request for special permission and of the appeal on the other parties and on the regional director. Any statement in opposition or other response to the request and/or to the appeal shall be filed promptly, in writing, and shall be served immediately on the other parties and on the regional director. No party shall be precluded from raising an issue at a later time because it did not seek special permission to appeal. If the regional director grants the request for special permission to appeal, the regional director may proceed forthwith to rule on the appeal. Neither the filing nor the grant of such a request shall stay the proceedings unless otherwise ordered by the regional director. As stated in § 102.67, the parties may request Board review of regional director actions.

(d) The right to make motions or to make objections to rulings on motions shall not be deemed waived by participation in the proceeding.

(e)(1) A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision or report for reconsideration, for rehearing, or to reopen the record, but no such motion shall stay the time for filing a request for review of a decision or exceptions to a report. No motion for reconsideration, for rehearing, or to reopen the record will be entertained by the Board or by any regional director or hearing officer with respect to any matter which could have been but was not raised pursuant to any other section of these rules, except that the regional director may treat a request for review of a decision or exceptions to a report as a motion for reconsideration. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on for the motion. A motion for rehearing or to reopen the record shall specify briefly the error alleged to require a rehearing or hearing *de novo,* the prejudice to the movant alleged to result from such error, the additional evidence sought to be adduced, why it was not presented previously, and what result it would require if adduced and credited. Only newly discovered evidence—evidence which has become available only since the close of the hearing—or evidence which the regional director or the Board believes should have been taken at the hearing will be taken at any further hearing.

(2) Any motion for reconsideration or for rehearing pursuant to paragraph (e)(1) of this section shall be filed within 14 days, or such further period as may be allowed, after the service of the decision or report. Any request for an extension of time to file such a motion shall be served promptly on the other parties. A motion to reopen the record shall be filed promptly on discovery of the evidence sought to be adduced.

(3) The filing and pendency of a motion under this provision shall not unless so ordered operate to stay the effectiveness of any action taken or directed to be taken nor will a regional director or the Board delay any decision or action during the period specified in paragraph (e)(2) of this section, except that, if a motion for reconsideration based on changed circumstances or to reopen the record based on newly discovered evidence states with particularity that the granting thereof will affect the eligibility to vote of specific employees, the Board agent shall have discretion to allow such employees to vote subject to challenge even if they are specifically excluded in the direction of election and to challenge or permit the moving party to challenge the ballots of such employees even if they are specifically included in the direction of election in any election conducted while such motion is pending. A motion for reconsideration, for rehearing, or to reopen the record need not be filed to exhaust administrative remedies.

■ 16. Revise § 102.66 to read as follows:

§ 102.66 Introduction of evidence: rights of parties at hearing; preclusion; subpoenas; oral argument and briefs.

(a) *Rights of parties at hearing.* Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation. The hearing officer shall also have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses shall be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of fact may be introduced in evidence with respect to any issue.

(b) *Response to Statement of Position.* Issues in dispute shall be identified as follows: After a Statement of Position is received in evidence and prior to the introduction of further evidence, all other parties shall respond on the record to each issue raised in the Statement. The regional director may permit the Statement of Position to be amended in a timely manner for good cause, in which event the other parties shall

respond to each amended position. The regional director may also permit responses to be amended in a timely manner for good cause. The hearing officer shall not receive evidence concerning any issue as to which parties have not taken adverse positions, except that this provision shall not preclude the receipt of evidence regarding the Board's jurisdiction over the employer or limit the regional director's discretion to direct the receipt of evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the regional director determines that record evidence is necessary.

(c) *Offers of proof.* The regional director shall direct the hearing officer concerning the issues to be litigated at the hearing. The hearing officer may solicit offers of proof from the parties or their counsel as to any or all such issues. Offers of proof shall take the form of a written statement or an oral statement on the record identifying each witness the party would call to testify concerning the issue and summarizing each witness's testimony. If the regional director determines that the evidence described in an offer of proof is insufficient to sustain the proponent's position, the evidence shall not be received.

(d) *Preclusion.* A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§ 102.63(b)(1)(iii),(b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

(e) *Objections.* Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objection, and included in the record. No such objection shall be deemed waived by further participation in the hearing.

(f) *Subpoenas.* The Board, or any Member thereof, shall, on the written application of any party, forthwith issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. The Executive Secretary shall have the authority to sign and issue any such subpoenas on behalf of the Board or any Member thereof. Any party may file applications for subpoenas in writing with the regional director if made prior to hearing, or with the hearing officer if made at the hearing. Applications for subpoenas may be made ex parte. The regional director or the hearing officer, as the case may be, shall forthwith grant the subpoenas requested. Any person served with a subpoena, whether ad testificandum or duces tecum, if he or she does not intend to comply with the subpoena, shall, within 5 days after the date of service of the subpoena, petition in writing to revoke the subpoena. The date of service for purposes of computing the time for filing a petition to revoke shall be the date the subpoena is received. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer, except that if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer. Notice of the filing of petitions to revoke shall be promptly given by the regional director or hearing officer, as the case may be, to the party at whose request the subpoena was issued. The regional director or the hearing officer, as the case may be, shall revoke the subpoena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The regional director or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. The petition to revoke, any answer filed thereto, and any ruling thereon shall not become part of the record except upon the request of the party aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them.

(g) *Election details.* Prior to the close of the hearing, the hearing officer will:

(1) Solicit the parties' positions on the type, date(s), time(s), and location(s) of the election and the eligibility period, but shall not permit litigation of those issues;

(2) Solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative to whom the regional director should transmit the Notice of Election in the event the regional director directs an election;

(3) Inform the parties that the regional director will issue a decision as soon as practicable and that the director will immediately transmit the document to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided); and

(4) Inform the parties what their obligations will be under these rules if the director directs an election and of the time for complying with such obligations.

(h) *Oral argument and briefs.* Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Post-hearing briefs shall be filed only upon special permission of the regional director and within the time and addressing the subjects permitted by the regional director. Copies of the brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the regional director together with the brief. No reply brief may be filed except upon special permission of the regional director.

(i) *Hearing officer analysis.* The hearing officer may submit an analysis of the record to the regional director but shall make no recommendations.

(j) *Witness fees.* Witness fees and mileage shall be paid by the party at whose instance the witness appears.

■ 17. Revise § 102.67 to read as follows:

§ 102.67 Proceedings before the regional director; further hearing; action by the regional director; appeals from actions of the regional director; statement in opposition; requests for extraordinary relief; Notice of Election; voter list.

(a) *Proceedings before regional director.* The regional director may proceed, either forthwith upon the record or after oral argument, the submission of briefs, or further hearing, as the director may deem proper, to determine whether a question of representation exists in a unit appropriate for purposes of collective bargaining, and to direct an election, dismiss the petition, or make other disposition of the matter. A decision by the regional director upon the record shall set forth the director's findings, conclusions, and order or direction.

(b) *Directions of elections.* If the regional director directs an election, the direction ordinarily will specify the type, date(s), time(s), and location(s) of the election and the eligibility period. The regional director shall schedule the election for the earliest date practicable consistent with these rules. The regional director shall transmit the direction of election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided). The regional director shall also transmit the Board's Notice of Election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided), and it will ordinarily be transmitted simultaneously with the direction of election. If the direction of election provides for individuals to vote subject to challenge because their eligibility has not been determined, the Notice of Election shall so state, and shall advise employees that the individuals are neither included in, nor excluded from, the bargaining unit, inasmuch as the regional director has permitted them to vote subject to challenge. The election notice shall further advise employees that the eligibility or inclusion of the individuals will be resolved, if necessary, following the election.

(c) *Requests for Board review of regional director actions.* Upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under Section 3(b) of the Act except as the Board's rules provide otherwise, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action by the regional director. The request for review may be filed at any time following the action until 14 days after a final disposition of the proceeding by the regional director. No party shall be precluded from filing a request for review of the direction of election within the time provided in this paragraph because it did not file a request for review of the direction of election prior to the election.

(d) *Grounds for review.* The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

(i) The absence of; or

(ii) A departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(e) *Contents of request.* A request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record; however, the Board may, in its discretion, examine the record in evaluating the request. With respect to the ground listed in paragraph (d)(2) of this section, and other grounds where appropriate, the request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. Such request may not raise any issue or allege any facts not timely presented to the regional director.

(f) *Opposition to request.* Any party may, within 7 days after the last day on which the request for review must be filed, file with the Board a statement in opposition which shall be served in accordance with the requirements of paragraph (i) of this section. The Board may grant or deny the request for review without awaiting a statement in opposition.

(g) *Finality; waiver; denial of request.* The regional director's actions are final unless a request for review is granted. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

(h) *Grant of review; briefs.* The grant of a request for review shall not stay the regional director's action unless otherwise ordered by the Board. Except where the Board rules upon the issues on review in the order granting review, the appellants and other parties may, within 14 days after issuance of an order granting review, file briefs with the Board. Such briefs may be reproductions of those previously filed with the regional director and/or other briefs which shall be limited to the issues raised in the request for review. Where review has been granted, the Board may provide for oral argument or further hearing. The Board will consider the entire record in the light of the grounds relied on for review and shall make such disposition of the matter as it deems appropriate. Any request for review may be withdrawn with the permission of the Board at any time prior to the issuance of the decision of the Board thereon.

(i)(1) *Format of request.* All documents filed with the Board under the provisions of this section shall be filed in seven copies, double spaced, on 8½- by 11-inch paper, and shall be printed or otherwise legibly duplicated. Extra copies of electronically-filed papers need not be filed. Requests for review, including briefs in support thereof and any motions under paragraph (j) of this section; statements in opposition thereto; and briefs on review shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Board by motion, setting forth the reasons therefor, filed not less than 5 days, including Saturdays, Sundays, and holidays, prior to the date the document is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page authorities cited. A party may combine a request for review of the regional director's decision and direction of election with a request for review of a regional director's post-election decision, if the party has not previously

filed a request for review of the pre-election decision. Repetitive requests will not be considered.

(2) *Service.* The party filing with the Board a request for review, a statement in opposition to a request for review, or a brief on review shall serve a copy thereof on the other parties and shall file a copy with the regional director. A certificate of service shall be filed with the Board together with the document.

(3) *Extensions.* Requests for extensions of time to file requests for review, statements in opposition to a request for review, or briefs, as permitted by this section, shall be filed with the Board or the regional director, as the case may be. The party filing the request for an extension of time shall serve a copy thereof on the other parties and, if filed with the Board, on the regional director. A statement of such service shall be filed with the document.

(j) *Requests for extraordinary relief.* (1) A party requesting review may also move in writing to the Board for one or more of the following forms of relief:

(i) Expedited consideration of the request;

(ii) A stay of some or all of the proceedings, including the election; or

(iii) Impoundment and/or segregation of some or all of the ballots.

(2) Relief will be granted only upon a clear showing that it is necessary under the particular circumstances of the case. The pendency of a motion does not entitle a party to interim relief, and an affirmative ruling by the Board granting relief is required before the action of the regional director will be altered in any fashion.

(k) *Notice of election.* The employer shall post copies of the Board's Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least 3 full working days prior to 12:01 a.m. of the day of the election and shall also distribute it electronically if the employer customarily communicates with employees in the unit electronically. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the regional office in the mail. In all cases, the notices shall remain posted until the end of the election. The term working day shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays. The employer's failure properly to post or distribute the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

(l) *Voter list.* Absent extraordinary circumstances specified in the direction of election, the employer shall, within 2 business days after issuance of the direction, provide to the regional director and the parties named in such direction a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular (''cell'') telephone numbers) of all eligible voters. The employer shall also include in a separate section of that list the same information for those individuals who, according to the direction of election, will be permitted to vote subject to challenge, including, for example, individuals in the classifications or other groupings that will be permitted to vote subject to challenge. In order to be timely filed and served, the list must be received by the regional director and the parties named in the direction respectively within 2 business days after issuance of the direction of election unless a longer time is specified therein. The list of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list shall be filed electronically with the regional director and served electronically on the other parties named in the direction. A certificate of service on all parties shall be filed with the regional director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a). The employer shall be estopped from objecting to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

■ 18. Revise § 102.68 to read as follows:

§ 102.68 Record in pre-election proceeding; what constitutes; transmission to Board.

The record in a proceeding conducted pursuant to the foregoing section shall consist of: the petition, notice of hearing with affidavit of service thereof, statements of position, responses to statements of position, offers of proof made at the pre-election hearing, motions, rulings, orders, the stenographic report of the hearing and of any oral argument before the regional director, stipulations, exhibits, affidavits of service, and any briefs or other legal memoranda submitted by the parties to the regional director or to the Board, and the decision of the regional director, if any. Immediately upon issuance of an order granting a request for review by the Board, the regional director shall transmit the record to the Board.

■ 19. Revise § 102.69 to read as follows:

§ 102.69 Election procedure; tally of ballots; objections; certification by the regional director; hearings; hearing officer reports on objections and challenges; exceptions to hearing officer reports; regional director decisions on objections and challenges.

(a) *Election procedure; tally; objections.* Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the regional director in whose Region the proceeding is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the regional director, whose decision shall be final, have its name removed from the ballot, except that in a proceeding involving an employer-filed petition or a petition for decertification, the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties and the regional director, disclaiming any representation interest among the employees in the unit. A pre-election conference may be held at which the parties may check the list of voters and attempt to resolve any questions of eligibility or inclusions in the unit. When the election is conducted manually, any party may be represented by observers of its own selection, subject to such limitations as the regional director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election the ballots will be counted and a tally of ballots prepared and immediately made available to the parties. Within 7 days after the tally of ballots has been

prepared, any party may file with the regional director an original and five copies of objections to the conduct of the election or to conduct affecting the results of the election which shall contain a short statement of the reasons therefor and a written offer of proof in the form described in § 102.66(c) insofar as applicable, except that the regional director may extend the time for filing the written offer of proof in support of the election objections upon request of a party showing good cause. Such filing(s) must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. The party filing the objections shall serve a copy of the objections, including the short statement of reasons therefor, but not the written offer of proof, on each of the other parties to the case, and include a certificate of such service with the objections. A person filing objections by facsimile pursuant to § 102.114(f) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing if otherwise proper. In addition, extra copies need not be filed if the filing is by facsimile or electronically pursuant to § 102.114(f) or (i). The regional director will transmit a copy of the objections to each of the other parties to the proceeding, but shall not transmit the offer of proof.

(b) *Certification in the absence of objections, determinative challenges and runoff elections.* If no objections are filed within the time set forth in paragraph (a) of this section, if the challenged ballots are insufficient in number to affect the results of the election, and if no runoff election is to be held pursuant to § 102.70, the regional director shall forthwith issue to the parties a certification of the results of the election, including certification of representative where appropriate with the same force and effect as if issued by the Board.

(c)(1)(i) *Decisions resolving objections and challenges without a hearing.* If timely objections are filed to the conduct of an election or to conduct affecting the results of the election, and the regional director determines that the evidence described in the accompanying offer of proof would not constitute grounds for setting aside the election if introduced at a hearing, and the regional director determines that any determinative challenges do not raise substantial and material factual issues, the regional director shall issue a decision disposing of the objections and determinative challenges, and a certification of the results of the election, including certification of representative where appropriate.

(ii) *Notices of hearing on objections and challenges.* If timely objections are filed to the conduct of the election or to conduct affecting the results of the election, and the regional director determines that the evidence described in the accompanying offer of proof could be grounds for setting aside the election if introduced at a hearing, or if the challenged ballots are sufficient in number to affect the results of the election and raise substantial and material factual issues, the regional director shall transmit to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided) a notice of hearing before a hearing officer at a place and time fixed therein. The regional director shall set the hearing for a date 21 days after the preparation of the tally of ballots or as soon as practicable thereafter, unless the parties agree to an earlier date, except that the regional director may consolidate the hearing concerning objections and challenges with an unfair labor practice proceeding before an administrative law judge. In any proceeding wherein the election has been held pursuant to § 102.62(a) or (c) and the representation case has been consolidated with an unfair labor practice proceeding for purposes of hearing, the administrative law judge shall, after issuing a decision, sever the representation case and transfer it to the regional director for further processing.

(iii) *Hearings; hearing officer reports; exceptions to regional director.* The hearing on objections and challenges shall continue from day to day until completed unless the regional director concludes that extraordinary circumstances warrant otherwise. Any hearing pursuant to this section shall be conducted in accordance with the provisions of §§ 102.64, 102.65, and 102.66, insofar as applicable. Any party shall have the right to appear at the hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the objections and determinative challenges that are the subject of the hearing. The hearing officer may rule on offers of proof. Post-hearing briefs shall be filed only upon special permission of the hearing officer and within the time and addressing the subjects permitted by the hearing officer. Upon the close of such hearing, the hearing officer shall prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues. Any party may, within 14 days from the date of issuance of such report, file with the regional director an original and one copy of exceptions to such report, with supporting brief if desired. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the regional director. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the regional director may allow, a party opposing the exceptions may file an answering brief with the regional director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the regional director. Extra copies of electronically-filed papers need not be filed. The regional director shall thereupon decide the matter upon the record or make other disposition of the case. If no exceptions are filed to such report, the regional director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

(2) *Regional director decisions and Board review.* The decision of the regional director may include a certification of the results of the election, including certification of representative where appropriate, and shall be final unless a request for review is granted. If a consent election has been held pursuant to §§ 102.62(a) or (c), the decision of the regional director is not subject to Board review. If the election has been conducted pursuant to § 102.62(b), or by a direction of election issued following any proceeding under § 102.67, the parties shall have the right to Board review set forth in § 102.67, except that in any proceeding wherein a representation case has been consolidated with an unfair labor practice proceeding for purposes of hearing and the election was conducted pursuant to §§ 102.62(b) or 102.67, the provisions of § 102.46 shall govern with respect to the filing of exceptions or an answering brief to the exceptions to the administrative law judge's decision, and a request for review of the regional director's decision and direction of election shall be due at the same time as the exceptions to the administrative law judge's decision are due.

(d)(1)(i) *Record in case with hearing.* In a proceeding pursuant to this section in which a hearing is held, the record in the case shall consist of the notice of

hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exhibits, together with the objections to the conduct of the election or to conduct affecting the results of the election, offers of proof made at the post-election hearing, any briefs or other legal memoranda submitted by the parties, any report on such objections and/or on challenged ballots, exceptions, the decision of the regional director, any requests for review, and the record previously made as defined in § 102.68. Materials other than those set out above shall not be a part of the record.

(ii) *Record in case with no hearing.* In a proceeding pursuant to this section in which no hearing is held, the record shall consist of the objections to the conduct of the election or to conduct affecting the results of the election, any decision on objections or on challenged ballots and any request for review of such a decision, any documentary evidence, excluding statements of witnesses, relied upon by the regional director in his decision, any briefs or other legal memoranda submitted by the parties, and any other motions, rulings or orders of the regional director. Materials other than those set out above shall not be a part of the record, except as provided in paragraph (d)(3) of this section.

(2) Immediately upon issuance of an order granting a request for review by the Board, the regional director shall transmit to the Board the record of the proceeding as defined in paragraph (d)(1) of this section.

(3) In a proceeding pursuant to this section in which no hearing is held, a party filing a request for review of a regional director's decision on challenged ballots or on objections or on both, or any opposition thereto, may support its submission to the Board by appending thereto copies of any offer of proof, including copies of any affidavits or other documentary evidence, it has timely submitted to the regional director and which were not included in the decision. Documentary evidence so appended shall thereupon become part of the record in the proceeding. Failure to append that evidence to its submission to the Board in the representation proceeding as provided above, shall preclude a party from relying on such evidence in any subsequent unfair labor proceeding.

(e) *Revised tally of ballots.* In any case under this section in which the regional director or the Board, upon a ruling on challenged ballots, has directed that such ballots be opened and counted and a revised tally of ballots issued, and no objection to such revised tally is filed by any party within 7 days after the revised tally of ballots has been made available, the regional director shall forthwith issue to the parties certification of the results of the election, including certifications of representative where appropriate with the same force and effect as if issued by the Board.

(f) *Format of filings with regional director.* All documents filed with the regional director under the provisions of this section shall be filed double spaced, on 8½- by 11-inch paper, and shall be printed or otherwise legibly duplicated. Extra copies of electronically-filed papers need not be filed. Briefs in support of exceptions or answering briefs shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the regional director by motion, setting forth the reasons therefor, filed not less than 5 days, including Saturdays, Sundays, and holidays, prior to the date the brief is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited.

(g) *Extensions of time.* Requests for extensions of time to file exceptions, requests for review, supporting briefs, or answering briefs, as permitted by this section, shall be filed with the Board or the regional director, as the case may be. The party filing the request for an extension of time shall serve a copy thereof on the other parties and, if filed with the Board, on the regional director. A statement of such service shall be filed with the document.

■ 20. Revise § 102.71(c) to read as follows:

§ 102.71 Dismissal of petition; refusal to proceed with petition; requests for review by the Board of action of the regional director.

* * * * *

(c) A request for review must be filed with the Board in Washington, DC, and a copy filed with the regional director and copies served on all the other parties within 14 days of service of the notice of dismissal or notification that the petition is to be held in abeyance. The request shall be submitted in eight copies and shall contain a complete statement setting forth facts and reasons upon which the request is based. The request shall be printed or otherwise legibly duplicated. Extra copies of electronically-filed papers need not be filed. Requests for an extension of time within which to file the request for review shall be filed with the Board in Washington, DC, and a certificate of service shall accompany the requests.

Subpart D—Procedure for Unfair Labor Practice and Representation Cases Under Sections 8(b)(7) and 9(c) of the Act

■ 21. Revise § 102.76 to read as follows:

§ 102.76 Petition; who may file; where to file; contents.

When picketing of an employer has been conducted for an object proscribed by Section 8(b)(7) of the Act, a petition for the determination of a question concerning representation of the employees of such employer may be filed in accordance with the provisions of §§ 102.60 and 102.61, insofar as applicable, except that if a charge under § 102.73 has been filed against the labor organization on whose behalf picketing has been conducted, the petition shall not be required to contain a statement that the employer declines to recognize the petitioner as the representative within the meaning of Section 9(a) of the Act; or that the union represents a substantial number of employees; or that the labor organization is currently recognized but desires certification under the Act; or that the individuals or labor organizations who have been certified or are currently recognized by the employer are no longer the representative; or, if the petitioner is an employer, that one or more individuals or labor organizations have presented to the petitioner a claim to be recognized as the exclusive representative of the employees in the unit claimed to be appropriate.

■ 22. Revise § 102.77(b) to read as follows:

§ 102.77 Investigation of petition by regional director; directed election.

* * * * *

(b) If after the investigation of such petition or any petition filed under subpart C of this part, and after the investigation of the charge filed pursuant to § 102.73, it appears to the regional director that an expedited election under section 8(b)(7)(C) of the Act is warranted, and that the policies of the Act would be effectuated thereby, the regional director shall forthwith proceed to conduct an election by secret ballot of the employees in an appropriate unit, or make other disposition of the matter, except that in any case in which it appears to the regional director that the proceeding raises questions which cannot be decided without a hearing, the director may issue and cause to be served on the parties, individuals, and labor

organizations involved a notice of hearing before a hearing officer at a time and place fixed therein. In this event, the method of conducting the hearing and the procedure following shall be governed insofar as applicable by §§ 102.63 through 102.68 inclusive.

Subpart E—Procedure for Referendum Under Section 9(e) of the Act

■ 23. Revise § 102.83 to read as follows:

§ 102.83 Petition for referendum under Section 9(e)(1) of the Act; who may file; where to file; withdrawal.

A petition to rescind the authority of a labor organization to make an agreement requiring as a condition of employment membership in such labor organization may be filed by an employee or group of employees on behalf of 30 percent or more of the employees in a bargaining unit covered by such an agreement. The petition shall be in writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. One original of the petition shall be filed with the regional director wherein the bargaining unit exists or, if the unit exists in two or more Regions, with the regional director for any of such Regions. A person filing a petition by facsimile pursuant to § 102.114(f) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing by facsimile, if otherwise proper. A person filing a petition electronically pursuant to § 102.114(i) need not file an original. The petition may be withdrawn only with the approval of the regional director with whom such petition was filed. Upon approval of the withdrawal of any petition the case shall be closed.

■ 24. Amend § 102.84 by revising paragraph (i), redesignating paragraph (j) as paragraph (k), and adding new paragraphs (j), (l), (m), and (n) to read as follows:

§ 102.84 Contents of petition to rescind authority.

* * * * *

(i) The name and address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the proceeding.

(j) A statement that 30 percent or more of the bargaining unit employees covered by an agreement between their employer and a labor organization made pursuant to Section 8(a)(3) of the Act, desire that the authority to make such an agreement be rescinded.

* * * * *

(l) Evidence supporting the statement that 30 percent or more of the bargaining unit employees desire to rescind the authority of their employer and labor organization to enter into an agreement made pursuant to Section 8(a)(3) of the Act. Such evidence shall be filed together with the petition, but shall not be served on any other party.

(m) Evidence filed pursuant to paragraph (l) of this section together with a petition that is filed by facsimile or electronically, which includes original signatures that cannot be transmitted in their original form by the method of filing of the petition, may be filed by facsimile or in electronic form provided that the original documents are received by the regional director no later than 2 days after the facsimile or electronic filing.

(n) The type, date(s), time(s) and location(s) of the election sought.

■ 25. Revise § 102.85 to read as follows:

§ 102.85 Investigation of petition by regional director; consent referendum; directed referendum.

Where a petition has been filed pursuant to § 102.83, and it appears to the regional director that the petitioner has made an appropriate showing, in such form as the regional director may determine, that 30 percent or more of the employees within a unit covered by an agreement between their employer and a labor organization requiring membership in such labor organization desire to rescind the authority of such labor organization to make such an agreement, the director shall proceed to conduct a secret ballot of the employees involved on the question whether they desire to rescind the authority of the labor organization to make such an agreement with their employer, except that in any case in which it appears to the regional director that the proceeding raises questions which cannot be decided without a hearing, the director may issue and cause to be served on the parties a notice of hearing before a hearing officer at a time and place fixed therein. The regional director shall fix the time and place of the election, eligibility requirements for voting, and other arrangements of the balloting, but the parties may enter into an agreement, subject to the approval of the regional director, fixing such arrangements. In any such consent agreements, provision may be made for final determination of all questions arising with respect to the balloting by the regional director or, upon grant of a request for review, by the Board.

■ 26. Revise § 102.86 to read as follows:

§ 102.86 Hearing; posthearing procedure.

The method of conducting the hearing and the procedure following the hearing shall be governed, insofar as applicable, by §§ 102.63 through 102.68 inclusive.

Subpart I—Service and Filing of Papers

■ 27. Revise § 102.112 to read as follows:

§ 102.112 Date of service; date of filing.

The date of service shall be the day when the matter served is deposited in the United States mail, or is deposited with a private delivery service that will provide a record showing the date the document was tendered to the delivery service, or is delivered in person, as the case may be. Where service is made by electronic mail, the date of service shall be the date on which the message is sent. Where service is made by facsimile transmission, the date of service shall be the date on which transmission is received. The date of filing shall be the day when the matter is required to be received by the Board as provided by § 102.111.

■ 28. Revise § 102.113(d) to read as follows:

§ 102.113 Methods of service of process and papers by the Agency; proof of service.

* * * * *

(d) *Service of other documents.* Other documents may be served by the Agency by any of the foregoing methods as well as regular mail, electronic mail or private delivery service. Such other documents may be served by facsimile transmission with the permission of the person receiving the document.

* * * * *

■ 29. Revise § 102.114(a), (d), and (g) to read as follows:

§ 102.114 Filing and service of papers by parties; form of papers; manner and proof of filing or service; electronic filings.

(a) Service of documents by a party on other parties may be made personally, or by registered mail, certified mail, regular mail, electronic mail (if the document was filed electronically or if specifically provided for in these rules), or private delivery service. Service of documents by a party on other parties by any other means, including facsimile transmission, is permitted only with the consent of the party being served. Unless otherwise specified elsewhere in these rules, service on all parties shall

be made in the same manner as that utilized in filing the document with the Board, or in a more expeditious manner; however, when filing with the Board is done by hand, the other parties shall be promptly notified of such action by telephone, followed by service of a copy in a manner designed to insure receipt by them by the close of the next business day. The provisions of this section apply to the General Counsel after a complaint has issued, just as they do to any other party, except to the extent that the provisions of § 102.113(a) or (c) provide otherwise.

* * * * *

(d) Papers filed with the Board, General Counsel, Regional Director, Administrative Law Judge, or Hearing Officer shall be typewritten or otherwise legibly duplicated on 8½- by 11-inch plain white paper, shall have margins no less than one inch on each side, shall be in a typeface no smaller than 12 characters-per-inch (elite or the equivalent), and shall be double spaced (except that quotations and footnotes may be single spaced). Nonconforming papers may, at the Agency's discretion, be rejected.

* * * * *

(g) Facsimile transmissions of the following documents will not be accepted for filing: Answers to Complaints; Exceptions or Cross-Exceptions; Briefs; Requests for Review of Regional Director Decisions; Administrative Appeals from Dismissal of Petitions or Unfair Labor Practice Charges; Objections to Settlements; EAJA Applications; Motions for Default Judgment; Motions for Summary Judgment; Motions to Dismiss; Motions for Reconsideration; Motions to Clarify; Motions to Reopen the Record; Motions to Intervene; Motions to Transfer, Consolidate or Sever; or Petitions for Advisory Opinions. Facsimile transmissions in contravention of this rule will not be filed.

* * * * *

PART 103—OTHER RULES

■ 30. The authority citation for part 103 continues to read as follows:

Authority: 29 U.S.C. 156, in accordance with the procedure set forth in 5 U.S.C. 553.

Subpart B—Election Procedures

■ 31. Revise § 103.20 to read as follows:

§ 103.20 Election procedures and blocking charges; filing of blocking charges; simultaneous filing of offer of proof; prompt furnishing of witnesses.

Whenever any party to a representation proceeding files an unfair labor practice charge together with a request that it block the processing of the petition to the election, or whenever any party to a representation proceeding requests that its previously filed unfair labor practice charge block the further processing of a petition, the party shall simultaneously file, but not serve on any other party, a written offer of proof in support of the charge. The offer of proof shall provide the names of the witnesses who will testify in support of the charge and a summary of each witness's anticipated testimony. The party seeking to block the processing of a petition shall also promptly make available to the regional director the witnesses identified in its offer of proof. If the regional director determines that the party's offer of proof does not describe evidence that, if proven, would interfere with employee free choice in an election or would be inherently inconsistent with the petition itself, and thus would require that the processing of the petition be held in abeyance absent special circumstances, the regional director shall continue to process the petition and conduct the election where appropriate.

By direction of the Board.

Dated: Washington, DC, December 4, 2014.

William B. Cowen,

Solicitor.

[FR Doc. 2014–28777 Filed 12–12–14; 8:45 am]

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Part IV

Department of Energy

10 CFR Part 431

Energy Conservation Program: Energy Conservation Standards for Commercial Clothes Washers; Final Rule

DEPARTMENT OF ENERGY

10 CFR Part 431

[Docket Number EERE–2012–BT–STD–0020]

RIN 1904–AC77

Energy Conservation Program: Energy Conservation Standards for Commercial Clothes Washers

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rule.

SUMMARY: The Energy Policy and Conservation Act of 1975 (EPCA), as amended, prescribes energy conservation standards for various consumer products and certain commercial and industrial equipment, including commercial clothes washers (CCWs). EPCA also requires that any new or amended energy conservation standard must be designed to achieve the maximum improvement in energy efficiency that would be technologically feasible and economically justified, and would save a significant amount of energy. In this final rule, the U.S. Department of Energy (DOE) is adopting more stringent energy conservation standards for CCWs because DOE has determined that the amended energy conservation standards for CCWs would result in significant conservation of energy, and are technologically feasible and economically justified.

DATES: The effective date of this rule is February 13, 2015. Compliance with the amended standards established for CCWs in this final rule is required on January 1, 2018.

ADDRESSES: The docket, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at regulations.gov. All documents in the docket are listed in the regulations.gov index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

The docket for this rulemaking can be found at: *http://www.regulations.gov/#!docketDetail;D=EERE-2012-BT-STD-0020.* The regulations.gov Web page will contain simple instructions on how to access all documents, including public comments, in the docket.

For further information on how to review the docket, contact Ms. Brenda Edwards at (202) 586–2945 or by email: *Brenda.Edwards@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Bryan Berringer, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–5B, 1000 Independence Avenue SW., Washington, DC, 20585–0121. Telephone: (202) 586–0371. Email: *Bryan.Berringer@ee.doe.gov.*

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SUPPLEMENTARY INFORMATION:

Table of Contents

I. Summary of the Final Rule and Its Benefits
A. Benefits and Costs to Consumers
B. Impact on Manufacturers
C. National Benefits
D. Conclusion
II. Introduction
A. Authority
B. Background
1. Current Standards
2. History of Standards Rulemaking for Commercial Clothes Washers
III. General Discussion
A. General Rulemaking Issues
B. Equipment Classes and Scope of Coverage
C. Test Procedures
1. Appendix J2
2. Energy Metric
3. Water Metric
D. Technological Feasibility
1. General
2. Maximum Technologically Feasible Levels
E. Energy Savings
1. Determination of Savings
2. Significance of Savings
F. Economic Justification
1. Specific Criteria
a. Economic Impact on Manufacturers and Consumers
b. Savings in Operating Costs Compared to Increase in Price (LCC and PBP)
c. Energy Savings
d. Lessening of Utility of Equipment
e. Impact of Any Lessening of Competition
f. Need for National Energy Conservation
g. Other Factors
2. Rebuttable Presumption
IV. Methodology and Discussion of Related Comments
A. Market and Technology Assessment
1. Market Assessment
2. Technology Assessment
B. Screening Analysis
C. Engineering Analysis
1. General Approach
2. Technologies Unable to be Included in the Analysis
3. Appendix J2 Efficiency Level Translations
4. Baseline Efficiency Levels
5. Front-Loading Higher Efficiency Levels
6. Top-Loading Higher Efficiency Levels
7. Impacts on Cleaning Performance and Cycle Time
D. Markups Analysis
E. Energy and Water Use Analysis
F. Life-Cycle Cost and Payback Period Analysis
1. Equipment Costs
2. Installation Costs
3. Unit Energy Consumption
4. Energy and Water Prices
5. Repair and Maintenance Costs
6. Lifetime
7. Discount Rate
8. Compliance Date
9. Base Case Efficiency Distribution
10. Payback Period Inputs
11. Rebuttable-Presumption Payback Period
G. Shipments Analysis
H. National Impact Analysis
1. Efficiency Trends
2. National Energy and Water Savings
3. Net Present Value of Customer Benefit
a. Total Annual Installed Cost
b. Total Annual Operating Cost Savings
I. Customer Subgroup Analysis
J. Manufacturer Impact Analysis
1. Overview
2. Government Regulatory Impact Model
a. Government Regulatory Impact Model Key Inputs
b. Government Regulatory Impact Model Scenarios
3. Discussion of Comments
a. Cumulative Regulatory Burden
b. Conversion Costs
K. Emissions Analysis
L. Monetizing Carbon Dioxide and Other Emissions Impacts
1. Social Cost of Carbon
b. Development of Social Cost of Carbon Values
2. Valuation of Other Emissions Reductions
M. Utility Impact Analysis
N. Employment Impact Analysis
V. Analytical Results
A. Trial Standard Levels
B. Economic Justification and Energy Savings
1. Economic Impacts on Individual Customers
a. Life-Cycle Cost and Payback Period
b. Customer Subgroup Analysis
c. Rebuttable Presumption Payback
2. Economic Impacts on Manufacturers
a. Industry Cash-Flow Analysis Results
b. Impacts on Direct Employment
c. Impacts on Manufacturing Capacity
d. Impacts on Subgroups of Manufacturers
e. Cumulative Regulatory Burden
3. National Impact Analysis
a. Significance of Energy Savings
b. Net Present Value of Customer Costs and Benefits
c. Indirect Impacts on Employment
4. Impact on Utility
5. Impact of Any Lessening of Competition
6. Need of the Nation to Conserve Energy
7. Summary of National Economic Impacts
8. Other Factors
C. Conclusion
1. Benefits and Burdens of Trial Standard Levels Considered for Commercial Clothes Washers
2. Summary of Benefits and Costs (Annualized) of the Amended Standards
VI. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866 and 13563
B. Review Under the Regulatory Flexibility Act
1. Significant Alternatives to the Rule
C. Review Under the Paperwork Reduction Act
D. Review Under the National Environmental Policy Act of 1969
E. Review Under Executive Order 13132
F. Review Under Executive Order 12988
G. Review Under the Unfunded Mandates Reform Act of 1995
H. Review Under the Treasury and General Government Appropriations Act, 1999
I. Review Under Executive Order 12630
J. Review Under the Treasury and General Government Appropriations Act, 2001
K. Review Under Executive Order 13211
L. Review Under the Information Quality Bulletin for Peer Review
M. Congressional Notification
VII. Approval of the Office of the Secretary

I. Summary of the Final Rule and Its Benefits

Title III of the Energy Policy and Conservation Act of 1975 (42 U.S.C.6291, *et seq*; ''EPCA''), Pub. L. 94–163, sets forth a variety of provisions designed to improve energy efficiency.[1] Part C of title III[2] establishes the ''Energy Conservation Program for Certain Industrial Equipment.'' These include commercial clothes washers (CCWs), which are the subject of this rule. (42 U.S.C. 6311(1)(H))

Pursuant to EPCA, any new or amended energy conservation standard must be designed to achieve the maximum improvement in energy efficiency that DOE determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A) and 6316(a)) Furthermore, the new or amended standard must result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B) and 6316(a)). In accordance with these and other statutory provisions discussed in this notice, DOE is adopting amended energy conservation standards for CCWs. The amended standards, which are expressed for each equipment class in terms of a minimum modified energy factor (MEF_{J2})[3] and a maximum integrated water factor (IWF), are shown in Table I.1. These amended standards apply to all equipment listed in Table I.1 that are manufactured in, or imported into, the United States on or after January 1, 2018.

TABLE I.1—ENERGY CONSERVATION STANDARDS FOR COMMERCIAL CLOTHES WASHERS

[Compliance Starting January 1, 2018]

Equipment class	Minimum MEF_{J2}*	Maximum IWF†
Top-Loading	1.35	8.8
Front-Loading ...	2.00	4.1

* MEF_{J2} (appendix J2 modified energy factor) is calculated as the clothes container capacity in cubic feet divided by the sum, expressed in kilowatt-hours (kWh), of: (1) The total weighted per-cycle hot water energy consumption; (2) the total weighted per-cycle machine electrical energy consumption; and (3) the per-cycle energy consumption for removing moisture from a test load.

† IWF (integrated water factor) is calculated as the sum, expressed in gallons per cycle, of the total weighted per-cycle water consumption for all wash cycles divided by the clothes container capacity in cubic feet.

A. Benefits and Costs to Consumers

Table I.2 and Table I.3 present DOE's evaluation of the economic impacts of the amended standards on customers of CCWs in multi-family and laundromat applications, respectively, as measured by the average life-cycle cost (LCC) savings and the simple payback period (PBP).[4] In both applications, the average LCC savings are positive for both equipment classes. The PBPs near zero reflect the very small (or zero in the case of top-loading units) incremental cost necessary to achieve the amended standards.

TABLE I.2—IMPACTS OF AMENDED STANDARDS ON CUSTOMERS OF COMMERCIAL CLOTHES WASHERS: MULTI-FAMILY APPLICATION

Equipment class	Average LCC savings (2013$)	Simple payback period (years)
Front-loading	271.9	0.02
Top-Loading	294.5	0.00

TABLE I.3—IMPACTS OF AMENDED STANDARDS ON CUSTOMERS OF COMMERCIAL CLOTHES WASHERS: LAUNDROMAT APPLICATION

Equipment class	Average LCC savings (2013$)	Simple payback period (years)
Front-loading	212.3	0.02
Top-Loading	165.7	0.00

B. Impact on Manufacturers

The industry net present value (INPV) is the sum of the discounted cash flows to the industry from the base year through the end of the analysis period (2015 to 2047). Using a real discount rate of 8.6 percent, DOE estimates that the INPV for manufacturers of CCWs is $123.5 million in 2013$. Under the amended standards, DOE expects that the INPV may be reduced by up to 5.3 percent, which is a loss of approximately $6.6 million. However, based on DOE's interviews with the manufacturers of CCWs, DOE does not expect any plant closings or significant loss of employment.

C. National Benefits[5]

DOE's analyses indicate that the amended energy conservation standards for CCWs would save a significant amount of energy. The lifetime energy savings for CCWs purchased in the 30-year period that begins in the year of compliance with amended standards (2018–2047) amount to 0.07 quadrillion Btu (quads).[6] This amounts to energy savings of 7 percent, relative to the energy use of CCWs in the base case without amended standards.

The cumulative net present value (NPV) of total customer costs and savings of the amended standards for CCWs ranges from $243 million to $532 million at 7-percent and 3-percent discount rates, respectively. This NPV expresses the estimated total value of future operating-cost savings minus the estimated increased equipment costs for CCWs purchased in 2018–2047.

In addition, the amended CCW standards would have significant environmental benefits. The energy savings from the amended standards would result in cumulative emission reductions of 4.1 million metric tons (Mt)[7] of carbon dioxide (CO_2), 32.0

[1] All references to EPCA refer to the statute as amended through the American Energy Manufacturing Technical Corrections Act (AEMTCA), Pub. L. 112–210 (Dec. 18, 2012).

[2] Part C of Title III was re-designated as Part A–1 upon incorporation into the U.S. Code (42 U.S.C. 6311–6317, as codified) for editorial reasons.

[3] DOE uses the ''MEF_{J2}'' nomenclature to distinguish these new standards from the MEF metric used in the current energy conservation standards. MEF is calculated according to the test procedures at 10 Code of Federal Regulations (CFR) 430, subpart B, appendix J1; whereas MEF_{J2} is calculated according to the test procedures at 10 CFR 430, subpart B, appendix J2.

[4] The average LCC savings are measured relative to the base-case efficiency distribution, which depicts the market in the compliance year (see section IV.F.9). The simple PBP, which is designed to compare specific CCW efficiency levels, is measured relative to the baseline model (see section IV.C.4).

[5] All monetary values in this section are expressed in 2013 dollars and are discounted to 2014.

[6] A quad is equal to 10^{15} British thermal units (Btu).

[7] A metric ton is equivalent to 1.1 short tons. Results for NO_X and Hg are presented in short tons.

thousand tons of methane (CH_4), 1.9 thousand tons of sulfur dioxide (SO_2), 0.04 thousand tons of nitrous oxide (N_2O), 9.1 thousand tons of nitrogen oxides (NO_X) and 0.01 tons of mercury (Hg).[8] The cumulative reduction in CO_2 emissions through 2030 amounts to 1.18 Mt, which is equivalent to the emissions associated with the annual electricity use of more than 162 thousand homes.

The value of the CO_2 reductions is calculated using a range of values per metric ton of CO_2 (otherwise known as the Social Cost of Carbon, or SCC) developed by a Federal interagency process.[9] The derivation of the SCC values is discussed in section IV.L.1. Using discount rates appropriate for each set of SCC values, DOE estimates the present monetary value of the CO_2 emissions reduction is between $29.1 and $410 million. DOE also estimates the present monetary value of the NO_X emissions reduction is $6.1 million and $12.7 million at 7-percent and 3-percent discount rates, respectively.[10]

Table I.4 summarizes the national economic costs and benefits expected to result from the amended standards for CCWs.

TABLE I.4—SUMMARY OF NATIONAL ECONOMIC BENEFITS AND COSTS OF AMENDED ENERGY CONSERVATION STANDARDS FOR CCWS *

Category	Present value *million 2013$*	Discount rate (percent)
Benefits		
Operating Cost Savings	243	7
	533	3
CO_2 Reduction Monetized Value ($12.0/t case) **	29	5
CO_2 Reduction Monetized Value ($40.5/t case) **	133	3
CO_2 Reduction Monetized Value ($62.4/t case) **	210	2.5
CO_2 Reduction Monetized Value ($119/t case) **	410	3
NO_X Reduction Monetized Value (at $2,684/ton) **	6	7
	13	3
Total Benefits †	382	7
	678	3
Costs		
Incremental Installed Costs	0.24	7
	0.46	3
Total Net Benefits		
Including Emissions Reduction Monetized Value †	382	7
	677	3

* This table presents the costs and benefits associated with front-loading and top-loading CCW units shipped in 2018–2047. These results include benefits to customers which accrue after 2047 from the equipment purchased in 2018–2047. The results account for the incremental variable and fixed costs incurred by manufacturers due to the standard, some of which may be incurred in preparation for the rule.

** The CO_2 values represent global monetized values of the SCC, in 2013$, in 2015 under several scenarios of the updated SCC values. The first three cases use the averages of SCC distributions calculated using 5%, 3%, and 2.5% discount rates, respectively. The fourth case represents the 95th percentile of the SCC distribution calculated using a 3% discount rate. The SCC time series used by DOE incorporate an escalation factor. The value for NO_X is the average of the low and high values used in DOE's analysis.

† Total Benefits for both the 3% and 7% cases are derived using the series corresponding to average SCC with 3-percent discount rate.

The benefits and costs of the amended standards for CCWs sold from 2018–2047 can also be expressed in terms of annualized values. The annualized monetary values are the sum of (1) the annualized national economic value of the benefits from customer operation of CCWs that meet the amended standards (consisting primarily of operating cost savings from using less energy, minus increases in equipment purchase and installation costs, which is another way of representing customer NPV), and (2) the annualized monetary value of the benefits of emission reductions, including CO_2 emission reductions.[11]

Although combining the values of operating savings and CO_2 emission reductions provides a useful perspective, two issues should be considered. First, the national operating savings are domestic U.S. customer monetary savings that occur as a result of market transactions, whereas the value of CO_2 reductions is based on a global value. Second, the assessments of operating cost savings and CO_2 savings are performed with different methods that use different timeframes for analysis. The national operating cost savings is measured for the lifetime of CCWs shipped in 2018–2047. The SCC values, on the other hand, reflect the present value of some future climate-related impacts resulting from the emission of one ton of carbon dioxide in each year. These impacts continue well beyond 2100.

[8] DOE calculated emissions reductions relative to the *Annual Energy Outlook 2014* (*AEO 2014*) Reference case, which generally represents current legislation and environmental regulations for which implementing regulations were available as of October 31, 2013.

[9] *Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866.* Interagency Working Group on Social Cost of Carbon, United States Government. May 2013; revised November 2013. *http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/technical-update-social-cost-of-carbon-for-regulator-impact-analysis.pdf.*

[10] DOE is currently investigating valuation of avoided Hg and SO_2 emissions.

[11] To convert the time-series of costs and benefits into annualized values, DOE calculated a present value in 2014, the year used for discounting the NPV of total consumer costs and savings. For the benefits, DOE calculated a present value associated with each year's shipments in the year in which the shipments occur (*e.g.,* 2020 or 2030), and then discounted the present value from each year to 2014. The calculation uses discount rates of 3 and 7 percent for all costs and benefits except for the value of CO_2 reductions, for which DOE used case-specific discount rates, as shown in Table I.3. Using the present value, DOE then calculated the fixed annual payment over a 30-year period, starting in the compliance year that yields the same present value.

Estimates of annualized benefits and costs of the amended standards are shown in Table I.5. The results under the primary estimate are as follows. Using a 7-percent discount rate for benefits and costs other than CO_2 reduction, for which DOE used a 3-percent discount rate along with the average SCC series that uses a 3-percent discount rate ($40.5/t case), the cost of the standards amended in this rule is $0.02 million per year in increased equipment costs, while the benefits are $24 million per year in reduced equipment operating costs, $7 million per year in CO_2 reductions, and $0.60 million per year in reduced NO_X emissions. In this case, the net benefit amounts to $32 million per year. Using a 3-percent discount rate for all benefits and costs and the average SCC series, the cost of the CCW amended standards is $0.03 million per year in increased equipment costs, while the benefits are $30 million per year in reduced operating costs, $7 million per year in CO_2 reductions, and $0.71 million per year in reduced NO_X emissions. In this case, the net benefit amounts to $38 million per year.

TABLE I.5—ANNUALIZED BENEFITS AND COSTS OF AMENDED ENERGY CONSERVATION STANDARDS FOR COMMERCIAL CLOTHES WASHERS

	Discount rate	Primary estimate *	Low net benefits estimate *	High net benefits estimate *
		million 2013$/year		
Benefits:				
Operating Cost Savings	7%	24	21	30
	3%	30	26	38
CO_2 Reduction Monetized Value ($12.0/t case) *	5%	2	2	3
CO_2 Reduction Monetized Value ($40.5/t case) *	3%	7	7	9
CO_2 Reduction Monetized Value ($62.4/t case) *	2.5%	11	10	13
CO_2 Reduction Monetized Value ($119/t case) *	3%	23	21	28
NO_X Reduction Monetized Value (at $2,684/ton) **	7%	0.60	0.55	0.71
	3%	0.71	0.64	0.86
Total Benefits †	7% plus CO_2 range	27 to 47	24 to 43	33 to 58
	7%	32	29	39
	3% plus CO_2 range	33 to 53	29 to 47	41 to 66
	3%	38	33	48
Costs:				
Incremental Equipment Costs	7%	0.02	0.03	0.02
	3%	0.03	0.03	0.02
Net Benefits:				
Total †	7% plus CO_2 range	27 to 47	24 to 43	33 to 58
	7%	32	29	39
	3% plus CO_2 range	33 to 53	29 to 47	41 to 66
	3%	38	33	48

* This table presents the annualized costs and benefits associated with CCW equipment shipped in 2018–2047. These results include benefits to customers which accrue after 2047 from the equipment purchased in 2018–2047. The results account for the incremental variable and fixed costs incurred by manufacturers due to the standard, some of which may be incurred in preparation for the rule. The Primary, Low Benefits, and High Benefits Estimates utilize projections of energy prices from the *AEO2014* Reference case, Low Estimate, and High Estimate, respectively. In addition, incremental equipment costs reflect a flat rate for projected equipment price trends in the Primary Estimate, a low decline rate in the Low Benefits Estimate, and a high decline rate in the High Benefits Estimate. The methods used to derive projected price trends are explained in section IV.

** The CO_2 values represent global monetized values of the SCC, in 2013$, in 2015 under several scenarios of the updated SCC values. The first three cases use the averages of SCC distributions calculated using 5%, 3%, and 2.5% discount rates, respectively. The fourth case represents the 95th percentile of the SCC distribution calculated using a 3% discount rate. The SCC time series used by DOE incorporate an escalation factor. The value for NO_X is the average of the low and high values used in DOE's analysis.

† Total Benefits for both the 3-percent and 7-percent cases are derived using the series corresponding to average SCC with 3-percent discount rate. In the rows labeled ''7% plus CO_2 range'' and ''3% plus CO_2 range,'' the operating cost and NO_X benefits are calculated using the labeled discount rate, and those values are added to the full range of CO_2 values.

D. Conclusion

DOE has concluded that the amended standards represent the maximum improvement in energy efficiency that is technologically feasible and economically justified, and would result in the significant conservation of energy. DOE further notes that equipment achieving these standard levels are already commercially available for the equipment classes covered by this final rule. Based on the analyses described above, DOE has concluded that the benefits of the amended standards to the Nation (energy savings, positive NPV of customer benefits, customer LCC savings, and emission reductions) would outweigh the burdens (loss of INPV for manufacturers and LCC increases for some customers).

II. Introduction

The following section briefly discusses the statutory authority underlying the final rule, as well as some of the relevant historical background related to the establishment of amended standards for CCWs.

A. Authority

As noted in section I, Title III of EPCA establishes the ''Energy Conservation Program for Certain Industrial Equipment.'' This equipment includes CCWs, the subject of this rulemaking. (42 U.S.C. 6311(1)(H))

EPCA established energy conservation standards for CCWs and directed DOE to conduct two rulemakings to determine whether the established standards should be amended. (42 U.S.C. 6313(e)) DOE published its first final rule amending CCW standards on January 8, 2010 (''January 2010 final rule''), which apply to CCWs manufactured on or after January 8, 2013. The second final rule determining whether standards should be amended must be published by

January 1, 2015. Any amended standards would apply to CCWs manufactured three years after the date on which the final amended standard is published. (42 U.S.C. 6313(e)(2)(B)) This current rulemaking satisfies the requirement to publish the second final rule by January 1, 2015.

Pursuant to EPCA, DOE's energy conservation program for covered equipment consists essentially of four parts: (1) Testing; (2) labeling; (3) the establishment of Federal energy conservation standards; and (4) certification and enforcement procedures. Subject to certain criteria and conditions, DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered equipment. (42 U.S.C. 6314(a)(2)) Manufacturers of covered equipment must use the prescribed DOE test procedure as the basis for certifying to DOE that their equipment comply with the applicable energy conservation standards adopted under EPCA and when making representations to the public regarding the energy use or efficiency of those equipment. (42 U.S.C. 6314(d)) Similarly, DOE must use these test procedures to determine whether the equipment comply with standards adopted pursuant to EPCA.

DOE must follow specific statutory criteria for prescribing amended standards for covered equipment. As indicated above, any amended standard for covered equipment must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A) and 6316(a)) Furthermore, DOE may not adopt any standard that would not result in the significant conservation of energy. (42 U.S.C. 6295(o)(3) and 6316(a)) Moreover, DOE may not prescribe a standard: (1) For certain equipment, including CCWs, if no test procedure has been established for the equipment, or (2) if DOE determines by rule that the amended standard is not technologically feasible or economically justified. (42 U.S.C. 6295(o)(3)(A) (B) and 6316(a)) In deciding whether an amended standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i) and 6316(a)) DOE must make this determination after receiving comments on the proposed standard, and by considering, to the greatest extent practicable, the following seven factors:

1. The economic impact of the standard on manufacturers and consumers of the equipment subject to the standard;

2. The savings in operating costs throughout the estimated average life of the covered equipment in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered equipment that are likely to result from the imposition of the standard;

3. The total projected amount of energy, or as applicable, water, savings likely to result directly from the imposition of the standard;

4. Any lessening of the utility or the performance of the covered equipment likely to result from the imposition of the standard;

5. The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard;

6. The need for national energy and water conservation; and

7. Other factors the Secretary of Energy (Secretary) considers relevant. (42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII) and 6316(a))

EPCA, as codified, also contains what is known as an ''anti-backsliding'' provision, which prevents the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of covered equipment. (42 U.S.C. 6295(o)(1) and 6316(a)) Also, the Secretary may not prescribe an amended or new standard if interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States of any covered equipment type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States. (42 U.S.C. 6295(o)(4) and 6316(a))

Further, EPCA, as codified, establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing products or equipment complying with an energy conservation standard level will be less than three times the value of the energy savings during the first year that the consumer will receive as a result of the standard, as calculated under the applicable test procedure. (42 U.S.C. 6295(o)(2)(B)(iii) and 6316(a))

Additionally, 42 U.S.C. 6295(q)(1) specifies requirements when promulgating a standard for a type or class of covered product that has two or more subcategories. DOE must specify a different standard level than that which applies generally to such type or class of products or equipment for any group of covered products or equipment that have the same function or intended use if DOE determines that products or equipment within such group (A) consume a different kind of energy from that consumed by other covered products or equipment within such type (or class); or (B) have a capacity or other performance-related feature which other products or equipment within such type (or class) do not have and such feature justifies a higher or lower standard. (42 U.S.C. 6295(q)(1) and 6316(a)) In determining whether a performance-related feature justifies a different standard for a group of products or equipment, DOE must consider such factors as the utility to the consumer of such a feature and other factors DOE deems appropriate. *Id.* Any rule prescribing such a standard must include an explanation of the basis on which such higher or lower level was established. (42 U.S.C. 6295(q)(2) and 6316(a))

Federal energy conservation requirements generally supersede State laws or regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)–(c) 6316(a)) DOE may, however, grant waivers of Federal preemption for particular State laws or regulations, in accordance with the procedures and other provisions set forth under 42 U.S.C. 6297(d) and 6316(a)).

DOE has also reviewed this regulation pursuant to Executive Order 13563, issued on January 18, 2011 (76 FR 3281, Jan. 21, 2011). EO 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must

adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

DOE emphasizes as well that Executive Order 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. For the reasons stated in the preamble, DOE believes that the final rule is consistent with these principles, including the requirement that, to the extent permitted by law, benefits justify costs and that net benefits are maximized. Consistent with EO 13563, and the range of impacts analyzed in this rulemaking, the energy efficiency standard adopted herein by DOE achieves maximum net benefits.

B. Background

1. Current Standards

In the January 2010 final rule, DOE prescribed the current energy conservation standards for CCWs manufactured on or after January 8, 2013. The current standards are set forth in Table II.1.

TABLE II.1—CURRENT FEDERAL ENERGY EFFICIENCY STANDARDS FOR COMMERCIAL CLOTHES WASHERS

Equipment class	Minimum MEF* *cu.ft/kWh/cycle*	Maximum WF† *gal/cu.ft./cycle*
Top-Loading	1.60	8.5
Front-Loading	2.00	5.5

* MEF (appendix J1 modified energy factor) is calculated as the clothes container capacity in cubic feet divided by the sum, expressed in kilo-watt-hours (kWh), of: (1) The total weighted per-cycle hot water energy consumption; (2) the total weighted per-cycle machine electrical energy consumption; and (3) the per-cycle energy consumption for removing moisture from a test load.

† WF (water factor) is calculated as the weighted per-cycle water consumption for the cold wash/cold rinse cycle, expressed in gallons per cycle, divided by the clothes container capacity in cubic feet.

2. History of Standards Rulemaking for Commercial Clothes Washers

As described in Section II.A, EPCA established energy conservation standards for CCWs and directed DOE to conduct two rulemakings to determine whether the established standards should be amended. (42 U.S.C. 6313(e)) DOE published its first final rule amending CCW standards on January 8, 2010 (''January 2010 final rule''). 75 FR 1122. This current rulemaking satisfies the requirement to publish the second final rule determining whether the standards should be amended by January 1, 2015.

On August 13, 2012, DOE published a notice of public meeting and availability of the framework document for this rulemaking. DOE also requested public comment on the document. 77 FR 48108. The framework document described the procedural and analytical approaches that DOE anticipated using to evaluate energy conservation standards for CCWs and identified various issues to resolve during the rulemaking.

On September 24, 2012, DOE held the framework document public meeting and discussed the issues detailed in the framework document. DOE also described the analyses that it planned to conduct during the rulemaking. Through the public meeting, DOE sought feedback from interested parties on these subjects and provided information regarding the rulemaking process that DOE would follow. Interested parties discussed major issues at the public meeting, including the rulemaking schedule, test procedure revisions, equipment classes, technology options, efficiency levels, and approaches for each of the analyses performed by DOE as part of the rulemaking process.

On March 4, 2014, DOE published a notice of proposed rulemaking (hereafter, the ''March 2014 NOPR'') and notice of public meeting. 79 FR 12301. The March 2014 NOPR presented the results of DOE's initial analyses and proposed amended standards for CCWs. DOE also published an accompanying technical support document (TSD) that described the results of each analysis in greater detail.

On April 21, 2014, DOE held the March 2014 NOPR public meeting and discussed the issues detailed in the NOPR. Interested parties commented on various aspects of the proposed rule and submitted supplemental written comments. Following the public meeting, DOE gathered additional information and performed additional analysis to supplement the analyses presented in the March 2014 NOPR, including the engineering, LCC, PBP, manufacturer impact, and national impact analyses. The results of these analyses are detailed in a TSD accompanying this final rule, available in the docket at the regulations.gov Web site. DOE considered the comments received since publication of the March 2014 NOPR, including those received at the NOPR public meeting, in developing the amended standards for CCWs.

III. General Discussion

A. General Rulemaking Issues

In the March 2014 NOPR (79 FR 12301), DOE proposed a compliance date of January 1, 2015 for the amended standards resulting from this rulemaking. 79 FR 12301, 12351. As explained in the preamble to the March 2014 NOPR, and as explained in this final rule, EPCA requires that any amended standards as a result of this rulemaking would apply to CCWs manufactured three years after the date on which the final amended standard is published. (42 U.S.C. 6313(e)(2)(B))

The Association of Home Appliance Manufacturers (AHAM) and Alliance Laundry Systems (ALS) commented that the March 2014 NOPR erroneously listed the compliance date for this rulemaking as ''on or after January 1, 2015,'' and noted that the intended compliance data should be ''on or after January 1, 2018.'' (AHAM, No. 23 at p. 6; Whirlpool, No. 28 at p. 1; ALS, No. 26 at p. 3) [12] [13]

[12] A notation in this form provides a reference for information that is in the docket for DOE's rulemaking to develop energy conservation standards for CCWs (Docket No. EERE–2012–BT–STD–0020), which is maintained at *http://www.regulations.gov/#!docketDetail;D=EERE-2012-BT-STD-0020*. This notation indicates that AHAM's statement preceding the reference can be found in document number 23 in the docket, and appears at page 6 of that document.

[13] Whirlpool Corporation submitted a written comment stating that it worked closely with AHAM in the development of AHAM's submitted comments, and that Whirlpool strongly supports

Continued

The final rule corrects this error from the March 2014 NOPR and establishes a compliance date for amended standards as listed in the Summary section of this final rule.

B. Equipment Classes and Scope of Coverage

When evaluating and establishing energy conservation standards, DOE divides covered equipment into equipment classes by the type of energy used, or by capacity or other performance-related feature that justifies a different standard. DOE may not prescribe standards that are likely to result in the unavailability of a certain product class of performance characteristics, features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States at the time of the Secretary's finding. (42 U.S.C. 6294(o)(4) and 6316(a)) In making a determination whether a performance-related feature justifies a different standard, DOE must consider such factors as the utility to the consumer of the feature and other factors DOE determines are appropriate. (42 U.S.C. 6295(q) and 6316(a)) DOE creates product and equipment classes based on function or use and currently divides CCWs into two equipment classes: Top-loading and front-loading.

DOE tentatively concluded in the March 2014 NOPR that the axis of loading represents a distinct consumer utility-related feature that warrants retaining both top-loading and front-loading CCW equipment classes. 79 FR12301, 12309 (Mar. 4, 2014). DOE reached the same conclusion in prior rulemakings for residential clothes washers. 56 FR 22249, 22263 (May 14, 1991) and 77 FR 32307, 32319 (May 31, 2012).

DOE also preliminarily determined in the March 2014 NOPR that the longer average cycle time of front-loading machines warrants consideration of separate equipment classes. DOE presented data showing that top-loading cycle times for the maximum load size ranged from 29 to 31 minutes, with an average of 30 minutes.[14] 79 FR 12301, 12309. Front-loading cycle times, on the other hand, ranged from 30 to 37 minutes, with an average of 34 minutes. *Id.* DOE preliminarily determined that the longer average cycle time of front-loading CCWs results in fewer possible ''turns'' per day compared to top-loading CCWs. The longer average time is significant in a laundromat or multi-family laundry setting to end-users waiting on the machine to finish its cycle, as well as to laundromat owners and multi-family laundry route operators looking to maximize daily laundry throughput.

In addition, DOE's analysis in the March 2014 NOPR indicated that the technologies, designs, and operating characteristics of the max-tech top-loading residential clothes washers were not transferrable to CCWs. Since the efficiency levels of top-loading CCWs on the market do not overlap with those of front-loading clothes washers, a single energy efficiency standard applicable to both top-loading and front-loading CCWs would likely result in the elimination of top-loading clothes washers from the market.

For these reasons, DOE preliminarily concluded that separate equipment classes are justified for top-loading and front-loading CCWs based on the criteria established in EPCA. (42 U.S.C. 6295(o)(4) and (q)(1), 6316(a)) The proposal in the March 2014 NOPR thus maintained separate standards for top-loading and front-loading equipment classes. 77 FR 12309. DOE received comments in response to the March 2014 NOPR both in support of and opposed to establishing two equipment classes for CCWs. These comments are described in more detail in the following paragraphs.

The California Investor Owned Utilities (hereafter, ''California IOUs'') and, in a joint comment, the Natural Resources Defense Council (NRDC), Alliance to Save Energy, Northwest Power and Conservation Council, Appliance Standards Awareness Project (ASAP), and Northwest Energy Efficiency Alliance (hereafter, ''Joint Commenters''), support a single equipment class due to the similarity in cycle times between top-loaders and front-loaders. (California IOUs, Public Meeting Transcript, No. 30 at p. 14; Joint Commenters, No. 29 at pp. 1–4) In their comment, the California IOUs note that if a front-loader is able to get more water out of the clothing, the dryer time would be shorter and, thus, the overall cycle time associated with the end-user waiting at a laundromat would either be the same or less. (California IOUs, Public Meeting Transcript, No. 30 at pp. 61–62).

The California IOUs believe that a top-loading configuration does not offer distinct consumer utility. (California IOUs, No. 27 at pp. 1–2) The California IOUs believe increasing front-loading sales could imply that customers are becoming indifferent to distinctions between front-loading and top-loading CCWs, thus suggesting that the potential utility between the two is negligible in the market. (California IOUs, Public Meeting Transcript, No. 30 at pp. 91–92).

The Joint Commenters note that in the January 2010 final rule, DOE acknowledged that method of access is a ''feature'' within the meaning of 42 U.S.C. 6295(q), but that DOE rejected the contention that the top-loading configuration afforded any substantial consumer utility in a commercial setting. (Joint Commenters, No. 29 at pp. 1–3)

NRDC requests additional data, other than cycle time, upon which DOE based its conclusion about distinct consumer utility for separate equipment classes of CCWs. (NRDC, Public Meeting Transcript, pp. 34, 51–52) ASAP and NRDC also request that DOE provide an explanation of all the factors considered as justification for separating equipment classes based on location of access. (ASAP, Public Meeting Transcript, No. 30 at pp. 60–61; NRDC, Public Meeting Transcript, No. 30 at p. 132)

On the other hand, AHAM and ALS support DOE's conclusion in the March 2014 NOPR that separate equipment classes are justified for top-loading and front-loading CCWs. (AHAM, No. 23 at p. 2; ALS, No. 26 at p. 1) AHAM disagrees with the California IOUs that a 50/50 split in equipment class sales would indicate a negligible difference in the utility of each equipment class. (AHAM, Public Meeting Transcript, No. 30 at pp. 94–96) AHAM believes that since both types of equipment classes are sold on the market in equal amounts, there is consumer utility in each equipment class. AHAM supports maintaining two product classes now, as well as in the future. (AHAM, Public Meeting Transcript, No. 30 at pp. 94–96; AHAM, No. 23 at p. 2)

DOE views utility as an aspect of the product that is accessible to the layperson and is based on user operation, rather than performing a theoretical function. DOE does not separate equipment classes based on up-front costs that anyone, including the consumer, laundromat owner, or manufacturer, may bear. DOE determines consumer utility on a case-by-case basis and determines what value a product could have based on the consumer base and the associated technology.

With that in mind, DOE disagrees with the California IOUs that a 50/50

the positions taken by AHAM. Unless otherwise noted, throughout this final rule, reference to AHAM's written comments (document number 23 in the docket) should be considered reflective of Whirlpool's position as well.

[14] This excludes one outlier top-loading model with a cycle time of 50 minutes. DOE considers the model with a cycle time of 50 minutes to be unrepresentative of equipment typically used in coin laundry or multi-family housing laundry facilities.

split in top-loading versus front-loading sales would be an indication that the market is indifferent between the two, or that the potential utility between the two is negligible. DOE believes that a 50/50 split would indicate that 50 percent of the market expresses a preference for (*i.e.,* derives utility from) the top-loading configuration.

DOE acknowledges that the difference in cycle times between top-loading and front-loading CCWs has diminished due to improvements in front-loading technology. DOE also notes that at least one front-loading CCW model is available at the proposed standard level with a cycle time of approximately 30 minutes, which matches the average cycle time of all top-loading CCWs tested by DOE. Therefore, DOE understands that, as technology progresses cycle time may become a less meaningful differentiator between CCW equipment classes.

However, DOE disagrees with the Joint Commenters' characterization of the January 2010 final rule—that DOE had rejected the contention that the top-loading configuration afforded any substantial consumer utility in a commercial setting. In the January 2010 final rule, DOE described its preliminary conclusions from the October 17, 2008 NOPR (hereafter, the ''October 2008 NOPR'') and the November 9, 2009 SNOPR (hereafter, the ''November 2009 SNOPR''): That separate equipment classes for top-loading and front-loading CCWs were warranted because the method of loading had been previously determined to be a ''feature'' under rulemakings for residential clothes washers, and a single standard would eliminate top-loading CCWs from the market. 75 FR 1122, 1133. DOE did not reject this conclusion in the January 2010 final rule. DOE did note that access *without stooping* is not a specific consumer utility, because many manufacturers supply pedestals that would eliminate stooping in front-loading washers. *Id.* But method of loading encompasses more than stooping, and therefore, provides specific consumer utility that defines separate equipment classes.

For example, front-loading commercial clothes washers are stackable and can be useful in a concentrated laundromat or multi-family housing setting. On the other hand, top-loading washing machines provide the utility of adding clothes during the wash cycle. Furthermore, DOE notes that the separation of clothes washer equipment classes by location of access is similar in nature to the equipment classes for residential refrigerator-freezers, which include separate equipment classes based on the access of location of the freezer compartment (*e.g.* top-mounted, side-mounted, and bottom-mounted). The location of the freezer compartment on such equipment provides no additional performance-related utility other than consumer preference. In other words, the location of access itself provides distinct consumer utility.

Furthermore, DOE observes that top-loading residential clothes washers are available with the same efficiency levels, control panel features, and price points as front-loading residential clothes washers. Given the equivalence in efficiency, features, and price, the purchase of such top-loaders indicates a preference among certain consumers for the top-loading configuration; *i.e.,* the top-loading configuration itself provides unique consumer utility to those customers preferring one configuration over another, with all other product attributes being equal.

In this final rule analysis, DOE reiterates and confirms its conclusions from the May 14, 1991 final rule for residential clothes washers (56 FR 22250), the October 2008 NOPR, the September 2009 SNOPR, and the March 2014 NOPR that the method of loading is a feature that provides distinct consumer utility. The final rule maintains separate equipment classes for top-loading and front-loading CCWs.

C. Test Procedures

1. Appendix J2

The DOE test procedures for clothes washers are codified at title 10 of the Code of Federal Regulations (CFR) part 430, subpart B, appendix J1 and appendix J2 (hereafter, ''appendix J1'' and ''appendix J2''). Under EPCA, test procedures for CCWs must be the same as test procedures as residential clothes washers. (42 U.S.C. 6314(a)(8)) On December 3, 2014, DOE published a final rule (hereafter, the ''December 2014 final rule'') adopting appendix J2 to be used to determine compliance with any future revised energy conservation standards for CCWs. The December 2014 final rule also clarified the dates for which appendix J1 and appendix J2 must be used to determine compliance with existing energy conservation standards and any future revised energy conservation standards for CCWs. 79 FR 71642. Manufacturers of CCWs must use appendix J1 to demonstrate compliance with the current standards established by the January 2010 final rule. (10 CFR 431.156) Under this rulemaking, CCW manufacturers must use appendix J2, beginning January 1, 2018, to demonstrate compliance with the amended energy conservation standards.

For the purpose of understanding how the amended standards compare with the current standards for CCWs, the following two tables provide the equivalent appendix J1 and appendix J2 metrics for both. Table III.1 shows the equivalent appendix J1 and appendix J2 values for the current energy conservation standards for CCWs as set forth at the current 10 CFR 431.156. Table III.2 shows the equivalent appendix J1 and appendix J2 values for the amended energy conservation standards established by the final rule. These translations between appendix J1 and appendix J2 values are provided for comparison purposes only and will not be used to certify compliance with either the current or future energy conservation standards for CCWs. Manufacturers must use only appendix J1 values to certify compliance with the current energy conservation standards established the January 2010 final rule. Manufacturers must use only appendix J2 values to certify compliance with the amended standards beginning January 1, 2018.

As required by EPCA, the amended standards do not increase the maximum allowable energy and/or water use or decrease the minimum required energy efficiency of CCWs. (42 U.S.C. 6295(o) and 6316(a)).

TABLE III.1—CURRENT ENERGY CONSERVATION STANDARDS FOR COMMERCIAL CLOTHES WASHERS, EQUIVALENT APPENDIX J1 AND J2 VALUES

Equipment class	Minimum energy standards		Maximum water standards
	Appendix J1	Appendix J2	Appendix J1
	MEF*	Equivalent MEF_{J2}*	WF†
Top-Loading	1.60	1.15	8.5	8.9
Front-Loading	2.00	1.65	5.5	5.2

* MEF (appendix J1 modified energy factor) and MEF_{J2} (appendix J2 modified energy factor) are calculated as the clothes container capacity in cubic feet divided by the sum, expressed in kilowatt-hours (kWh), of: (1) The total weighted per-cycle hot water energy consumption; (2) the total weighted per-cycle machine electrical energy consumption; and (3) the per-cycle energy consumption for removing moisture from a test load.

† WF (appendix J1 water factor) is calculated as the weighted per-cycle water consumption for the cold wash/cold rinse cycle, expressed in gallons per cycle, divided by the clothes container capacity in cubic feet.

‡ IWF (appendix J2 integrated water factor) is calculated as the weighted per-cycle water consumption for all wash cycles, expressed in gallons per cycle, divided by the clothes container capacity in cubic feet.

TABLE III.2—AMENDED ENERGY CONSERVATION STANDARDS FOR COMMERCIAL CLOTHES WASHERS, EQUIVALENT APPENDIX J1 AND J2 VALUES

Equipment Class	Minimum energy standards		Maximum water standards
	Appendix J1	Appendix J2	Appendix J1
	Equivalent MEF*	MEF_{J2}*	Equivalent WF†
Top-Loading	1.70	1.35	8.4	8.8
Front-Loading	2.40	2.00	4.0	4.1

*MEF (appendix J1 modified energy factor) and MEF_{J2} (appendix J2 modified energy factor) are calculated as the clothes container capacity in cubic feet divided by the sum, expressed in kilowatt-hours (kWh), of: (1) The total weighted per-cycle hot water energy consumption; (2) the total weighted per-cycle machine electrical energy consumption; and (3) the per-cycle energy consumption for removing moisture from a test load.

† WF (appendix J1 water factor) is calculated as the weighted per-cycle water consumption for the cold wash/cold rinse cycle, expressed in gallons per cycle, divided by the clothes container capacity in cubic feet.

‡ IWF (appendix J2 integrated water factor) is calculated as the weighted per-cycle water consumption for all wash cycles, expressed in gallons per cycle, divided by the clothes container capacity in cubic feet.

AHAM does not object to the translations developed to quantify the difference between results based on appendix J1 and appendix J2 in the context of this standards rulemaking. (AHAM, No. 23 at pp. 2–3)

DOE received no comments objecting to the appendix J1 and appendix J2 translations it developed for the purpose of understanding how the amended standards compare with the current standards for CCWs. Therefore, for the reasons discussed above, DOE maintains these informative translations in the final rule. DOE notes that the quantitative analyses performed for this rulemaking were conducted using the appendix J2 metrics, MEF_{J2} and IWF.

2. Energy Metric

In the March 2014 NOPR, DOE proposed amended energy efficiency standards based on MEF as measured using appendix J2 (''MEF_{J2}''). 77 FR 12301, 12303, 12310 (Mar. 4, 2014). As defined in section 4.5 of appendix J2, MEF_{J2} is calculated as the clothes container capacity in cubic feet divided by the sum, expressed in kilowatt-hours (kWh), of: (1) The total weighted per-cycle hot water energy consumption; (2) the total weighted per-cycle machine electrical energy consumption; and (3) the per-cycle energy consumption for removing moisture from a test load.

As explained in the March 2014 NOPR, DOE evaluated the standby and off mode power characteristics of a representative sample of CCWs spanning a wide range of display types, payment systems, and communication features. DOE did not, however, propose amended standards for CCWs based on an integrated energy metric that would have included a measurement of standby and off mode power. 79 FR 12301, 12310 (Mar. 4, 2014).

AHAM supports DOE's proposal for amended standards for CCWs based on MEF, rather than an integrated modified energy factor (IMEF).[15] (AHAM, No. 23 at p. 3) ALS supports DOE's proposal to not amend CCW standards based on an integrated energy metric. ALS believes that standby power should not be included for CCWs, because the equipment needs an active visual display between active operating cycles to alert potential users that the equipment is ready and available to be used. (ALS, No. 26 at p. 2)

The Joint Commenters suggest that DOE consider establishing standards for standby and off mode operation. In their submitted comments, the Joint Commenters referenced data that DOE provided in the TSD for the March 2014 NOPR, and noted that standby energy consumption represents 7 to 44% of total annual machine energy consumption, depending on washer format and application. (Joint Commenters, No. 29 at p. 7) The Joint Commenters believe that, while machine energy comprises a fraction of the total energy consumed in the wash cycle, these data indicate that standby usage makes up a significant share of the electricity usage of CCWs. The Joint Commenters believe DOE acted without foundation in not using the IMEF metric and removing low-standby-power controls from the list of design options for consideration. (Joint Commenters, No. 29 at p. 7)

DOE notes that the current energy standard established by the January 2010 final rule is based on MEF, which

[15] In its comment, AHAM used the terms ''Energy Factor'' and ''Integrated Energy Factor.'' Based on the context of AHAM's comment, DOE assumes that AHAM intended to reference ''Modified Energy Factor'' and ''Integrated Modified Energy Factor.''

does not incorporate the measurement of standby and off-mode power. In order to amend the current standard in terms of IMEF, DOE would need to first translate the current standard of 1.60 MEF into an equivalent baseline IMEF level, and then establish higher efficiency levels.

As part of its market assessment and engineering analysis for this rulemaking, DOE performed an in-depth evaluation of the standby and off mode power characteristics of a representative sample of CCWs spanning a wide range of display types, payment systems, and communication features. The results from DOE's testing are provided in chapter 5 of the final rule TSD. Based on its evaluation (which considered the structure of CCW equipment classes), DOE determined that promulgating an amended standard based on IMEF could enable backsliding. DOE observed that manufacturers offer a variety of display and payment functionalities that can be selected independently from the basic model. The standby power associated with these different display and payment functionalities varies from 0.88 to 11.77 watts. The lowest standby power levels are associated with models having no vend price display and no coin or card payment options (often referred to as ''push-to-start'' models). These models are typically used in small multi-family housing facilities offering free laundry, or in other commercial applications not requiring fare payment. Such models are not suitable for coin-operated laundry or most other multi-family housing facilities. The highest standby power levels are associated with models having a digital vend price display, coin or debit card payment system, and advanced features such as dynamic or cycle-based pricing controls, built-in logging capabilities, and remote auditing features. These models are typically used in coin-operated laundries located in competitive markets.

The following example demonstrates one potential backsliding scenario: DOE testing indicates that a baseline top-loading CCW model rated at 1.60 MEF would have an equivalent IMEF rating ranging from 1.34 IMEF (for a CCW with the highest observed standby power usage) to 1.53 IMEF (for a CCW with the lowest observed standby power usage). If DOE were to establish the new equivalent baseline standard level at 1.34 IMEF—which would accommodate all display and payment types—a push-to-start baseline CCW with lower standby power usage, rated at 1.53 MEF, would be able to increase its active mode energy consumption over current levels to ''slide back'' to the 1.34 MEF level.

Alternatively, if DOE were to establish the new equivalent baseline standard level at 1.53 MEF—the level corresponding to the lowest standby power push-to-start models—manufacturers would be precluded from offering vend price displays, payment systems, or other advanced controls on new baseline CCWs. This would negatively impact consumer and end-user utility, since push-to-start models are not suitable for coin-operated laundries or most multi-family housing applications.

Finally, because of the wide variations in standby power, CCWs with significantly different active mode (*i.e.,* MEF) ratings could have similar IMEF ratings depending on their control panel functionalities, and *vice versa.* This would diminish the usefulness of the IMEF metric as a means for differentiating the active mode characteristics of different CCW models.

For these reasons, DOE has determined that establishing amended standards for CCWs based on IMEF would not be technically feasible. Instead, the final rule establishes amended standards based on MEF_{J2}, which does not incorporate standby and off mode power.

3. Water Metric

In the March 2014 NOPR, DOE proposed amended water efficiency standards based on IWF as measured using appendix J2. 77 FR 12301, 12303, 12310 (Mar. 4, 2014). As defined in section 4.2.13 of appendix J2, IWF is calculated as the weighted per-cycle water consumption for all wash cycles, expressed in gallons per cycle, divided by the clothes container capacity in cubic feet. DOE believes that the IWF metric provides a more representative measure of water consumption than the WF metric, which is based on the water consumption of only the cold wash/cold rinse temperature cycle.

ALS supports DOE's proposal to amend CCW water standards based on the IWF metric. (ALS, No. 26 at p. 2)

DOE received no comments objecting to its proposal to use the IWF metric for amended water efficiency standards for CCWs. Therefore, for the reasons discussed above, the amended water efficiency standards established by the final rule are based on the IWF metric.

D. Technological Feasibility

1. General

In each energy conservation standards rulemaking, DOE conducts a screening analysis based on information gathered on all current technology options and prototype designs that could improve the efficiency of the products or equipment that are the subject of the rulemaking. As the first step in such an analysis, DOE develops a list of technology options for consideration in consultation with manufacturers, design engineers, and other interested parties. DOE then determines which of those options for improving efficiency are technologically feasible. DOE considers technologies incorporated in commercially available equipment or in working prototypes to be technologically feasible. (10 CFR part 430, subpt. C, app.A, § 4(a)(4)(i))

After DOE has determined that particular technology options are technologically feasible, it further evaluates each technology option in light of the following additional screening criteria: (1) Practicability to manufacture, install, and service; (2) adverse impacts on equipment utility or availability; and (3) adverse impacts on health or safety. (10 CFR part 430, subpart C, app. A, sec. 4(a)(4)(ii)–(iv)) Additionally, it is DOE policy not to include in its analysis any proprietary technology that is a unique pathway to achieving a certain efficiency level. Section IV.B of this notice discusses the results of the screening analysis for CCWs—in particular, the designs DOE considered, those it screened out, and those that form the basis for the trial standard level (TSLs) in this rulemaking. For further details on the screening analysis for this rulemaking, see chapter 4 of the final rule TSD.

2. Maximum Technologically Feasible Levels

When DOE proposes to adopt an amended standard for a class of covered equipment, it must determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible for such equipment. (42 U.S.C. 6295(p)(1)) Accordingly, in the engineering analysis, DOE determined the maximum technologically feasible (''max-tech'') improvements in energy efficiency for CCWs, using the design parameters for the most efficient equipment available on the market or in working prototypes. The max-tech levels that DOE determined for this rulemaking are described in section IV.C of this final rule and in chapter 5 of the final rule TSD.

E. Energy Savings

1. Determination of Savings

For each TSL, DOE projected energy savings from the CCWs purchased in the

30-year period that begins in 2018. The savings are measured over the entire lifetime of the CCWs purchased in the 30-year period.[16] DOE quantified the energy savings attributable to each TSL as the difference in energy consumption between each standards case and the base case. The base case represents a projection of energy consumption in the absence of amended efficiency standards, and considers market forces and policies that affect demand for more efficient equipment.

DOE used its national impact analysis (NIA) spreadsheet model to estimate energy savings from amended standards for the equipment that are the subject of this rulemaking. The NIA spreadsheet model (described in section IV.H of this notice) calculates energy savings in site energy, which is the energy directly consumed by CCWs at the locations where they are used. For electricity, DOE reports national energy savings in terms of the savings in the primary energy that is used to generate and transmit the site electricity. To calculate this quantity, DOE derives annual conversion factors from the model used to prepare the Energy Information Administration's (EIA) *Annual Energy Outlook* (*AEO*).

DOE also estimates full-fuel-cycle energy savings in its energy conservation standards rulemakings. 76 FR 51282 (Aug. 18, 2011), as amended at 77 FR 49701 (August 17, 2012). The full-fuel-cycle (FFC) metric includes the energy consumed in extracting, processing, and transporting primary fuels (*i.e.,* coal, natural gas, petroleum fuels), and thus presents a more complete picture of the impacts of energy efficiency standards. DOE's approach is based on calculation of an FFC multiplier for each of the energy types used by covered equipment. For more information on FFC energy savings, see section IV.H.2.

2. Significance of Savings

As noted above, 42 U.S.C. 6295(o)(3)(B) prevents DOE from adopting a standard for a covered equipment unless such standard would result in ''significant'' energy savings. Although the term ''significant'' is not defined in the Act, the U.S. Court of Appeals, in *Natural Resources Defense Council* v. *Herrington,* 768 F.2d 1355, 1373 (D.C. Cir. 1985), indicated that Congress intended ''significant'' energy savings in this context to be savings that were not ''genuinely trivial.'' The energy savings for all of the TSLs considered in this rulemaking (presented in section V.C) are nontrivial, and, therefore, DOE considers them ''significant'' within the meaning of section 325 of EPCA.

F. Economic Justification

1. Specific Criteria

EPCA provides seven factors to be evaluated in determining whether a potential energy conservation standard is economically justified. (42 U.S.C. 6295(o)(2)(B)(i) and 6316(a)) The following sections discuss how DOE has addressed each of those seven factors in this rulemaking.

a. Economic Impact on Manufacturers and Consumers

In determining the impacts of an amended energy conservation standard on manufacturers, DOE first uses an annual cash-flow approach to determine the quantitative impacts. This step includes both a short-term assessment—based on the cost and capital requirements during the period between when a regulation is issued and when entities must comply with the regulation—and a long-term assessment over a 30-year period. The industry-wide impacts analyzed include: (1) INPV, which values the industry on the basis of expected future cash flows; (2) cash flows by year; (3) changes in revenue and income; and (4) other measures of impact, as appropriate. Second, DOE analyzes and reports the impacts on different types of manufacturers, including impacts on small manufacturers. Third, DOE considers the impact of standards on domestic manufacturer employment and manufacturing capacity, as well as the potential for standards to result in plant closures and loss of capital investment. Finally, DOE takes into account cumulative impacts of various DOE regulations and other regulatory requirements on manufacturers.

For individual consumers, measures of economic impact include the changes in LCC and PBP associated with new or amended standards. These measures are discussed further in the following section. For consumers in the aggregate, DOE also calculates the national net present value of the economic impacts applicable to a particular rulemaking. DOE also evaluates the LCC impacts of potential standards on identifiable subgroups of consumers that may be affected disproportionately by a national standard.

b. Savings in Operating Costs Compared To Increase in Price (LCC and PBP)

EPCA requires DOE to consider the savings in operating costs throughout the estimated average life of the covered equipment in the class compared to any increase in the price of the covered equipment that are likely to result from the imposition of the standard. (42 U.S.C. 6295(o)(2)(B)(i)(II) and 6316(a)) DOE conducts this comparison in its LCC and PBP analysis. The LCC is the sum of the purchase price of the equipment (including its installation) and the operating expense (including energy, maintenance, and repair expenditures) discounted over the lifetime of the equipment. To account for uncertainty and variability in specific inputs, such as equipment lifetime and discount rate, DOE uses a distribution of values, with probabilities attached to each value. For its analysis, DOE assumes that consumers will purchase the covered equipment in the first year of compliance with amended standards.

The PBP is the estimated amount of time (in years) it takes consumers to recover the increased purchase cost (including installation) of more-efficient equipment through lower operating costs. DOE calculates the PBP by dividing the increase in purchase cost due to a more-stringent standard by the change in annual operating cost for the year that standards are assumed to take effect.

The LCC savings and the PBP for the considered efficiency levels are calculated relative to a base case that reflects projected market trends in the absence of amended standards. DOE identifies the percentage of consumers estimated to experience an LCC increase, in addition to the average LCC savings associated with a particular standard level. In contrast, the PBP is measured relative to the baseline equipment.

DOE's LCC and PBP analyses are discussed in further detail in section IV.F.

c. Energy Savings

Although significant conservation of energy is a separate statutory requirement for imposing an energy conservation standard, EPCA requires DOE, in determining the economic justification of a standard, to consider the total projected energy savings that are expected to result directly from the standard. (42 U.S.C. 6295(o)(2)(B)(i)(III) and 6316(a)) As discussed in section IV.H.2, DOE uses the NIA spreadsheet to project national energy savings.

[16] In previous rulemakings, DOE presented energy savings results for only the 30-year period that begins in the year of compliance. In the calculation of economic impacts, however, DOE considered operating cost savings measured over the entire lifetime of products purchased in the 30-year period. DOE has modified its presentation of national energy savings consistent with the approach used for its national economic analysis.

d. Lessening of Utility of Equipment

In establishing equipment classes, and in evaluating design options and the impact of potential standard levels, DOE evaluates standards that would not lessen the utility of the considered equipment. (42 U.S.C. 6295(o)(2)(B)(i)(IV) and 6316(a)) Based on data available to DOE, the standards outlined in the final rule will not reduce the utility of the equipment under consideration in this rulemaking.

e. Impact of Any Lessening of Competition

EPCA directs DOE to consider any lessening of competition that is likely to result from standards. (42 U.S.C. 6295(o)(2)(B)(i)(V)) It also directs the Attorney General of the United States (Attorney General) to determine the impact, if any, of any lessening of competition likely to result from a proposed standard and to transmit such determination in writing to the Secretary within 60 days of the publication of a proposed rule, together with an analysis of the nature and extent of the impact. (42 U.S.C. 6295(o)(2)(B)(ii)) To assist the Attorney General in making such determination for these standards, DOE provided the Department of Justice (DOJ) with copies of the March 2014 NOPR and the accompanying TSD for review. In its assessment letter responding to DOE, DOJ concluded that the amended energy conservation standards for CCWs are unlikely to have a significant adverse impact on competition.[17]

f. Need for National Energy Conservation

DOE also considers the need for national energy conservation in determining whether a new or amended standard is economically justified. (42 U.S.C. 6295(o)(2)(B)(i)(VI) and 6316(a)) The energy savings from the amended standards are likely to provide improvements to the security and reliability of the nation's energy system. Reductions in the demand for electricity also may result in reduced costs for maintaining the reliability of the nation's electricity system. DOE conducts a utility impact analysis to estimate how standards may affect the nation's needed power generation capacity.

The amended standards also are likely to result in environmental benefits in the form of reduced emissions of air pollutants and greenhouse gases associated with energy production. DOE reports the emissions impacts from the standards, and from each TSL it considered, in section V.C.1 of this notice. DOE also reports estimates of the economic value of emissions reductions resulting from the considered TSLs, as discussed in section V.C.2.

g. Other Factors

EPCA allows the Secretary of Energy, in determining whether a standard is economically justified, to consider any other factors that the Secretary deems to be relevant. (42 U.S.C. 6295(o)(2)(B)(i)(VII) and 6316(a)) DOE did not consider any other factors for this final rule.

2. Rebuttable Presumption

As set forth in 42 U.S.C. 6295(o)(2)(B)(iii) and 6316(a), EPCA creates a rebuttable presumption that an energy conservation standard is economically justified if the additional cost to the consumer of the equipment that meets the standard is less than three times the value of the first year's energy savings resulting from the standard, as calculated under the applicable DOE test procedure. DOE's LCC and PBP analyses generate values used to calculate the effect that the energy conservation standards would have on the PBP for consumers. These analyses include, but are not limited to, the 3-year payback period contemplated under the rebuttable-presumption test. In addition, DOE routinely conducts an economic analysis that considers the full range of impacts to consumers, manufacturers, the nation, and the environment, as required under 42 U.S.C. 6295(o)(2)(B)(i). The results of this analysis serve as the basis for DOE's evaluation of the economic justification for a standard level (thereby supporting or rebutting the results of any preliminary determination of economic justification). The rebuttable presumption payback calculation is discussed in section V.B.1 of this final rule.

IV. Methodology and Discussion of Related Comments

This section addresses the analyses DOE has performed for this rulemaking with regard to CCWs. Separate subsections will address each component of DOE's analyses.

DOE used four analytical tools to estimate the impact of the amended standards. The first tool is a spreadsheet that calculates LCCs and PBPs of potential new energy conservation standards. The second tool includes a model that provides shipments forecasts, and a framework in a spreadsheet that calculates national energy savings and net present value resulting from potential amended energy conservation standards. DOE uses the third spreadsheet tool, the Government Regulatory Impact Model (GRIM), to assess manufacturer impacts.

Additionally, DOE used a fourth analytical tool, the latest version of EIA's National Energy Modeling System (NEMS) for the utility and emissions analyses, to estimate the impacts of energy conservation standards for CCW on air pollutant emissions and on utilities. NEMS is a public domain, multi-sector, partial equilibrium model of the U.S. energy sector.[18] EIA uses NEMS to prepare its *Annual Energy Outlook* (*AEO*), a widely known energy forecast for the United States.

A. Market and Technology Assessment

1. Market Assessment

In the March 2014 NOPR, DOE requested information on historical CCW shipments and market share efficiency data, disaggregated by equipment class, for 2012 and 2013, to supplement the data received in response to the framework document. NRDC also requested that DOE provide a breakdown of manufacturer market share within each equipment class. (NRDC, Public Meeting Transcript, No. 30 at pp. 97–99)

AHAM submitted revised data for 2012 and 2013, including total shipments disaggregated by equipment class, shipment-weighted average efficiency by equipment class, and market share efficiency data by equipment class. (AHAM, No. 32, pp. 4–6) AHAM did not provide a breakdown of manufacturer market shares within each equipment class as part of its data submission. Individual manufacturers did not provide such information in their individual comment submissions. DOE is unaware of any publicly available source for this information, and is therefore unable to provide a breakdown of manufacturer market shares in this final rule analysis.

2. Technology Assessment

In the March 2014 NOPR, DOE presented a table of design options that it believes represents the most viable options for CCWs to achieve higher efficiencies.

In response to comments received from the framework document, DOE

[17] The DOJ conclusion is available as document number 31 in the docket for this rulemaking, available at *http://www.regulations.gov/#!documentDetail;D=EERE-2012-BT–STD-0020-0031*.

[18] For more information on NEMS, refer to the DOE, EIA documentation. A useful summary is *National Energy Modeling System: An Overview*, DOE/EIA–0581(2009), (October 2009) (Available at: *http://www.eia.gov/oiaf/aeo/overview/*).

added temperature-differentiated pricing controls to the list of technology options for consideration. As explained in the March 2014 NOPR, DOE did not have any information regarding the degree to which this feature changes the temperature selection frequencies of end-users, and therefore was not able to consider this technology for further evaluation in its engineering analysis.

DOE did not receive any additional comments from interested parties regarding design options for inclusion in the final rule technology assessment. Chapter 3 of the final rule TSD contains the final table of design options considered by DOE for this rulemaking analysis.

B. Screening Analysis

Following the development of the initial list of design options, DOE conducts a screening analysis of each design option based on the following factors: (1) Technological feasibility; (2) practicability to manufacture, install and service; (3) adverse impacts on equipment utility or equipment availability; and (4) adverse impacts on health or safety. (10 CFR part 430, subpart C, app. A, sec. 4(a)(3) and (4))

As a result of its initial screening analysis, DOE proposed eliminating ozonated laundering and plastic particle cleaning from further consideration for this rulemaking.

ALS supports DOE's decision to remove the following technologies from consideration: ozonated laundering and residential clothes washer design options that DOE determined would provide negligible, if any, energy savings. (ALS, No. 26 at p. 2)

DOE received no comments objecting to its proposal to eliminate ozonated laundering and plastic particle cleaning from further consideration in this rulemaking. For the reasons discussed above, DOE eliminated these technologies accordingly in the final analysis conducted for the final rule. Chapter 4 of the final rule TSD provides further details of DOE's screening analysis.

C. Engineering Analysis

1. General Approach

The purpose of the engineering analysis is to characterize the relationship between the incremental manufacturing cost and efficiency improvements of CCWs. DOE used these cost-efficiency relationships as inputs to the PBP, LCC, and national energy savings (NES) analyses. As described in the March 2014 NOPR, DOE conducted the engineering analysis for this rulemaking using the efficiency-level approach supplemented with a design-option approach. Using the efficiency-level approach, DOE examined the aggregated incremental increases in manufacturer selling price at each of the efficiency levels analyzed. DOE also conducted a reverse-engineering analysis, including testing and teardowns of models at each efficiency level, to identify the incremental cost and efficiency improvement associated with each design option or design option combination, supplementing the efficiency-level approach with a design-option approach as needed. Chapter 5 of the final rule TSD contains a detailed discussion of the engineering analysis methodology.

2. Technologies Unable To Be Included in the Analysis

As described earlier, DOE investigated adding temperature-differentiated pricing controls to the list of design options for consideration. Such controls could potentially incentivize energy savings by providing favorable vend pricing for lower-temperature wash/rinse settings. DOE's market analysis confirmed that this option was available on multiple top-loading and front-loading CCW models from multiple manufacturers. However, DOE's test procedure at appendix J2 uses a fixed set of Temperature Use Factors (TUFs), which represent the assumed percentage of time an end-user would select each wash/rinse temperature (*i.e.,* cold, warm, hot) available on the clothes washer. (10 CFR part 430, app. J2, table 4.1.1) Because the TUFs in the test procedure are fixed, a clothes washer with temperature-differentiated pricing controls would be tested with the same weightings applied to each wash/rinse temperature selection as an identical clothes washer without temperature-differentiated pricing controls. Therefore, the energy savings of this technology cannot be measured according to the conditions and methods specified in the DOE clothes washer test procedure. Accordingly, DOE did not analyze this technology option in its NOPR analysis.

ALS supports DOE's decision to remove temperature-differentiated pricing controls from further consideration. (ALS, No. 26 at p. 2) DOE received no comments objecting to its proposal to eliminate temperature-differentiated pricing controls from further consideration in the engineering analysis. For the reasons discussed above, DOE eliminated this technology accordingly in the final analysis conducted for the final rule.

3. Appendix J2 Efficiency Level Translations

DOE proposed baseline and higher efficiency levels based on the MEF_{J2} and IWF metrics as measured using appendix J2. Since current equipment ratings are based on appendix J1 metrics, DOE performed testing on a representative sample of CCW models to determine, for each baseline and higher efficiency level considered in the analysis, the equivalent appendix J2 efficiency levels corresponding to each appendix J1 efficiency level. Chapter 5 of the final rule TSD describes the methodology DOE used to perform the translations between appendix J1 MEF/WF values and appendix J2 MEF_{J2}/IWF values.

4. Baseline Efficiency Levels

As stated in the March 2014 NOPR, DOE used the current energy conservation standards, which became effective January 8, 2013, to characterize the baseline models for both the top-loading and front-loading CCW equipment classes. 79 FR 12301, 12314 (Mar. 4, 2014). ALS supports DOE's proposed baseline efficiency levels for both top-loading and front-loading CCWs. (ALS, No. 26 at p. 2)

5. Front-Loading Higher Efficiency Levels

In the March 2014 NOPR, DOE proposed analyzing the higher efficiency levels shown in Table IV.1 for the front-loading equipment class. 79 FR 12301, 12314 (Mar. 4, 2014).

TABLE IV.1—FRONT-LOADING EFFICIENCY LEVELS

Level	Efficiency level source	Appendix J1 metrics		Appendix J2 metrics	
		MEF	WF	MEF_{J2}	IWF
Baseline	DOE Standard	2.00	5.5	1.65	5.2
1	Consortium for Energy Efficiency (CEE) Tier 2	2.20	4.5	1.80	4.5
2	CEE Tier 3	2.40	4.0	2.00	4.1

TABLE IV.1—FRONT-LOADING EFFICIENCY LEVELS—Continued

Level	Efficiency level source	Appendix J1 metrics		Appendix J2 metrics	
		MEF	WF	MEF_{J2}	IWF
3	Maximum Available	2.60	3.7	2.20	3.9

DOE noted in the March 2014 NOPR that it developed its list of front-loading efficiency levels based on a review of CCW equipment currently on the market. *Id.* DOE confirmed through its market assessment that CCWs are available for purchase at each of the identified efficiency levels. *Id.*

As described in the March 2014 NOPR, the California IOUs had suggested that DOE include two additional front-loading efficiency levels corresponding to the top two efficiency levels considered during the most recent residential clothes washer rulemaking: 2.60 MEF/3.8 WF and 2.89 MEF/3.7 WF, as measured using appendix J1. California IOUs, No. 8 at p. 4; 79 FR 12301, 12314 (Mar. 4, 2014). DOE noted that the 2.60 MEF/3.8 WF efficiency level suggested by the California IOUs corresponds closely with the maximum level proposed by DOE of 2.60 MEF/3.7 WF. DOE further explained that it did not believe that the more stringent level of 2.89 MEF/3.7 WF would be appropriate for consideration in this CCW rulemaking because (1) no CCW models are currently available on the market at that efficiency level, and (2) some of the design options that would be required to achieve that efficiency level could negatively impact wash basket size and cycle time.

Based on the results of its market and technology assessment and engineering analysis, DOE tentatively determined that the maximum available efficiency level presented in the March 2014 NOPR represented the maximum efficiency level that is technologically feasible for front-loading CCWs. 79 FR 12301, 12314 (Mar. 4, 2014).

AHAM and Whirlpool support DOE's decision not to evaluate the efficiency levels considered in the residential rulemaking in the commercial rulemaking context. (AHAM, No. 23 at p. 4; Whirlpool, No. 28 at p. 1) ALS supports DOE's proposed efficiency levels for front-loading CCWs. (ALS, No. 26 at p. 2)

DOE received no additional comments objecting to the front-loading efficiency levels proposed for analysis in the March 2014 NOPR. Therefore, for the reasons discussed above, DOE maintained these efficiency levels for the final rule analysis.

6. Top-Loading Higher Efficiency Levels

In the March 2014 NOPR, DOE proposed analyzing the higher efficiency levels shown in Table IV.2 for the top-loading equipment class. 79 FR 12301, 12315 (Mar. 4, 2014).

TABLE IV.2—TOP-LOADING EFFICIENCY LEVELS

Level	Efficiency level source	Appendix J1 metrics		Appendix J2 metrics	
		MEF	WF	MEF_{J2}	IWF
Baseline	DOE Standard	1.60	8.5	1.15	8.9
1	Gap Fill	1.70	8.4	1.35	8.8
2	Maximum Available	1.85	6.9	1.55	6.9

DOE developed its list of top-loading efficiency levels based on a review of CCW equipment currently on the market. DOE confirmed through its market assessment that CCWs are available for purchase at each of the identified efficiency levels.

As described in the March 2014 NOPR, the California IOUs had suggested that DOE analyze higher efficiency levels for top-loading CCWs corresponding to the higher efficiency levels that DOE had analyzed during the most recent residential clothes washer rulemaking. 79 FR 12301, 12315 (Mar. 4, 2014). The California IOUs recommended levels ranging from 1.72MEF/8.0WF to 2.47MEF/3.6WF at the residential clothes washer max-tech level, as measured using appendix J1. (California Utilities, No. 8 at p. 4)

In the March 2014 NOPR, DOE explained that it did not believe that more stringent levels above the identified max-tech level would be appropriate for consideration in this CCW rulemaking, for many of the same reasons DOE gave in the front-loading efficiency levels section. 79 FR 12315–12316. First, no CCW models were available on the market above 1.85MEF/6.9 WF, as measured using appendix J1. Second, some of the design options that would be required to achieve those higher efficiency levels, such as larger wash baskets and longer cycle times, could be perceived by the machine owners and/or end-users as negatively impacting equipment utility. Furthermore, the max-tech residential clothes washers use a circular wash plate instead of an agitator, requiring manufacturers to instruct users not to load garments directly over the center of the wash plate, so that the center of the wash plate remains visible when loaded. DOE believes these specialized loading instructions could not be effectively implemented in a commercial laundry environment such that the wash performance of the unit would be maintained.

Based on the results of its market and technology assessment and engineering analysis, DOE tentatively determined that the maximum available efficiency level presented in the March 2014 NOPR represented the maximum efficiency level that is technologically feasible for top-loading CCWs.

AHAM and Whirlpool support DOE's decision not to evaluate the efficiency levels considered in the residential rulemaking in the commercial rulemaking context. (AHAM, No. 23 at p. 4; Whirlpool, No. 28 at p. 1) ALS supports DOE's proposed efficiency levels for top-loading CCWs. ALS also supports DOE's determination that the technologies, designs and operating characteristics of the maximum efficiency top-loading residential clothes washers are not transferrable to CCWs. (ALS, No. 26 at pp. 2–3)

The California IOUs recommend that DOE evaluate one additional efficiency

level for top-loaders, which would utilize the same design features from Efficiency Level 1 (EL1), in addition to improved motor efficiency. (California IOUs, No. 27 at p. 4) Similarly, the Joint Commenters stated that if DOE determines that adopting Efficiency Level 2 (EL2) for top-loaders is not justified, DOE should consider an intermediate level between EL1 and EL2, based on the current CCWs available on the market. (Joint Commenters, No. 29 at p. 5)

DOE investigated the feasibility of analyzing one additional top-loading efficiency level between EL1 (1.70 MEF/1.35 MEF_{J2}) and EL2 (1.85 MEF/1.55 MEF_{J2}) by considering improved motor efficiency. As shown in chapter 7 of the final rule TSD, DOE determined that the typical top-loading CCW at EL1 uses 0.21 kWh/cycle of machine electrical energy, whereas the typical top-loading CCW at EL2 uses 0.10 kWh/cycle of machine electrical energy. DOE performed testing and teardowns on a range of top-loading CCWs that are built using the same platform construction as the typical EL1 clothes washer. Across the range of models tested, machine electrical energy usage varied from 0.18 to 0.22 kWh/cycle. DOE did not identify any commercially available motors with lower energy usage (*i.e.* higher-efficiency) that are designed for use in this platform style. At EL1, reducing machine electrical energy usage from 0.22 to 0.18 kWh/cycle would increase MEF_{J2} from 1.35 to 1.37. DOE does not consider this magnitude of improvement to be significant enough to warrant an added efficiency between EL1 and EL2. DOE did not identify any other incremental improvements that could be made to the EL1 equipment platform, either independently or in combination with a more efficient motor design, to similarly boost its efficiency without requiring a major design overhaul.

As discussed in greater detail in chapter 5 of the final rule TSD, DOE research suggests that improving efficiency beyond EL1 requires a significant overhaul to the design platform of a top-loading CCW. In other words, the overall system design on which the baseline unit is built can be incrementally improved (while maintaining adequate performance for the end-user) up until EL1, but at that level, the equipment platform is ''maxed out,'' and further improvements require a significant overhaul of the entire design. Because the overall designs are so significantly different, components from the higher-efficiency platform are not interchangeable with components from the lower-efficiency platform. DOE observed a similar shift in platforms with top-loading residential clothes washers between 1.72 MEF and 1.80 MEF,[19] which DOE notes is roughly the same efficiency level transition observed for top-loading CCWs.

For these reasons, DOE has determined that further improving the EL1 equipment platform using low-cost design options and different motors would not be technologically feasible. Therefore, for the final rule analysis, DOE maintained the top-loading efficiency levels as proposed in the March 2014 NOPR.

7. Impacts on Cleaning Performance and Cycle Time

DOE conducted performance testing to quantitatively evaluate potential impacts on cleaning performance, rinsing performance, and solid particle removal as a result of higher standard levels. As described in greater detail in chapter 5 of the final rule TSD, DOE tested a representative sample of CCWs at each efficiency level using AHAM's HLW–1–2010 test procedure. Specifically, DOE performed the soil/stain removal, rinsing effectiveness, and sand removal tests provided in HLW–1–2010.

For each clothes washer, DOE tested the maximum load size specified in appendix J2, rounded to the nearest pound, using the warm wash/cold rinse cycle. Manufacturers indicated that the maximum load size is particularly relevant to CCW owners and operators because end-users often overload the machines in order to limit their total laundry cost. DOE notes that the warm wash/cold rinse temperature selection has the highest usage factor in appendix J2. The test results indicate that units meeting the proposed new standard levels are capable of providing washing performance, rinsing performance, and solid particle removal results equivalent to current baseline equipment.

As discussed in the March 2014 NOPR, DOE consulted with a number of manufacturers who indicated that AHAM HLW–1–2010 would be the most appropriate test method to determine relative cleaning performance across different CCW models. DOE recognizes that AHAM HLW–1–2010 is typically used to measure the performance of residential clothes washers, but given the similarities in physical construction, DOE believes the test procedure is appropriate for CCWs. DOE also acknowledges that the CCW industry has not agreed upon acceptable ranges of performance characteristics; therefore, DOE's test results should be used for relative comparison purposes only.

AHAM stated that in addition to soil and stain removal, rinsing effectiveness, and sand removal, DOE should evaluate fabric care by performing the mechanical action test in HLW–1–2010. (AHAM, No. 23 at p. 4) AHAM explained that longevity of clothing is an important performance measure that could potentially be impacted by more stringent efficiency/water levels. *Id.* AHAM also responded to DOE's discussion in the March 2014 NOPR TSD, in which DOE indicated that it believes that using less wash water in high-efficiency models increases the concentration of detergent during the wash portion of the cycle, thus enhancing stain removal and leading to higher efficiency top-loading CCWs achieving better total cleaning scores. (March 2014 NOPR TSD, chapter 5, pp. 21–22) AHAM noted that it is not necessarily true that a higher concentration of detergent will result in better cleaning performance. AHAM explained that more detergent can actually result in worse performance, particularly if the consumer does not use the proper detergent. In addition, AHAM claimed that higher detergent concentrations are harder to remove, which can result in residual detergent and the gradual greying of the cloth over time. AHAM added that some of the detergent chemicals that can remain in clothes can build up and gradually break down fabric. (AHAM, No. 23 at p. 4) Finally, AHAM requested that DOE further address the front-loading test results that indicated a general trend of higher efficiency levels resulting in reduced cleaning performance scores. (AHAM, No. 23 at pp. 4–5)

ALS supports AHAM's comments regarding consumer utility and performance. (ALS, No. 26 at p. 2) ALS stated that the standards proposed in the March 2014 NOPR would not result in further lessening of utility and performance beyond the CCW equipment offerings. (ALS, No. 26 at pp. 2, 4) However, ALS also claims that more stringent CCW standards would result in a reduction of hot water consumption and total water consumption. ALS further commented that it takes four elements (thermal energy, mechanical energy, chemical energy and adequate time) to properly clean clothes to meet consumer expectations, and when thermal energy is depleted or nearly-depleted from the mix, the performance suffers. ALS

[19] See chapter 5 of the TSD accompanying the residential clothes washer direct final rule (May 31, 2012, 77 FR 32319), docket number EERE–2008–BT–STD–0019. Available at: *http://www.regulations.gov/#!docketDetail;D=EERE-2008-BT-STD-0019.*

added that thermal energy cannot be replaced by the remaining three elements. (ALS, No. 26 at pp. 2–3)

NRDC requests that DOE make available the actual integers that were the result of the cycle time tests, since the cycle time results were displayed graphically in the March 2014 NOPR. NRDC also requests that DOE elaborate on why it viewed the cycle time of one of the top-loading units as an outlier. (NRDC, Public Meeting Transcript, No. 30 at pp. 133–134)

DOE recognizes that mechanical action is an important performance measure that could be impacted by higher efficiency standards. For example, if higher efficiency standards require lower hot water temperatures to be used (*i.e.* less thermal energy), the clothes washer may need to ''compensate'' for this by increasing the amount of mechanical agitation performed on the clothing (*i.e.* more mechanical energy). Based on interviews with manufacturers, and comments from interested parties described above, DOE believes that the amended standards established by the final rule will not have a detrimental impact on mechanical action performance levels or limit selection beyond CCWs currently available on the market.

As described in further detail in chapter 5 of the final rule TSD, DOE's test results indicate that a front-loading CCW at the amended standard level (EL2, 2.00 MEF_{J2}) can provide the same cleaning performance as CCWs available at EL1 (1.80 MEF_{J2}). Within the sample of CCWs that DOE tested, the results at EL3 (2.20 MEF_{J2}) demonstrated lower (worse) cleaning performance than the best equipment available at EL1 and EL2. At this point in time, DOE test results are unable to demonstrate that CCWs reaching the amended standard level at EL3 could provide equivalent cleaning performance to CCWs available at EL1. However, DOE notes that the current max-tech cleaning performance levels could improve as front-loading CCW technology continues to evolve and improve.

Due to the small number of manufacturers of CCWs, equipment offerings, and the number of units tested, DOE does not provide the numerical values associated with the performance tests presented in chapter 5 of the final rule TSD.

In the March 2014 NOPR, DOE stated the top-loading cycle times for the maximum load size ranged from 29 to 31 minutes, with an average of 30 minutes, which excluded one outlier top-loading model with a cycle time of 50 minutes. 77 FR 12301, 12309. Based on conversations with CCW manufacturers, DOE believes that a cycle time range of 30 to 35 minutes is within the typical range of acceptable cycle times for coin-operated laundry owners and multi-family housing laundry operators.

DOE confirms its prior conclusion that CCW units meeting the amended standard levels established by the final rule are capable of providing equivalent consumer-relevant performance as compared to current baseline equipment.

D. Markups Analysis

The markups analysis develops appropriate markups in the distribution chain to convert the estimates of manufacturer selling price derived in the engineering analysis to customer prices. (''Customer'' refers to purchasers of the equipment being regulated.) DOE calculates overall baseline and incremental markups based on the equipment markups at each step in the distribution chain. The incremental markup relates the change in the manufacturer sales price of higher efficiency models (the incremental cost increase) to the change in the customer price.

For the three key CCW market segments—laundromats, private multi-family housing, and large institutions—data indicate that an overwhelming majority of CCWs are sold through either distributors or route operators. For this final rule, DOE used the same distribution channels as in the January 2010 final rule (10 CFR 431.152): Manufacturer to distributor to owner/lessee, and manufacturer to route operator to owner/lessee. For purposes of developing the markups for CCWs, DOE estimated that the markups and the resulting consumer products prices determined for the distribution channel involving distributors would be representative of the prices paid by customers acquiring their equipment from route operators.

DOE based the distributor markups for CCWs on financial data for the sector Machinery, Equipment and Supplies Merchant Wholesalers from the 2007 U.S. Census Business Expenses Survey (BES), which is the most recent available survey.[20] This sector includes the subsector Laundry Machinery, Equipment, and Supplies, Commercial, Merchant Wholesalers, which specifically sells CCWs. DOE calculated overall baseline and incremental markups based on the equipment markups at the intermediate step in the distribution chain. The incremental markup relates the change in the manufacturer sales price of higher efficiency models (the incremental cost increase) to the change in the customer price. Chapter 6 of the final rule TSD provides further detail on the estimation of markups.

E. Energy and Water Use Analysis

The energy and water use analysis provides estimates of the annual energy and water consumption of CCW units at the considered efficiency levels. DOE uses these values in the LCC and PBP analyses and in the NIA. DOE developed energy and water consumption estimates for all equipment classes analyzed in the engineering analysis. The analysis seeks to capture the range of CCW use in the field.

The DOE test procedure uses a single value for number of cycles, which is based on residential use. For the energy and water use analysis, DOE established an appropriate range of usage specific to CCWs in the field. Because the predominant applications of CCWs are in multi-family buildings and laundromats, DOE focused on these two building applications to determine appropriate values for number of CCW cycles per year. DOE acknowledges that the ''other commercial applications'' category in the statutory definition would include applications other than coin-operated laundry and multi-family housing laundry. However, DOE is not aware of any data indicating the prevalence of CCWs in other applications, such as on-premise laundries or in the hospitality industry. Furthermore, DOE is not aware of any data indicating how the usage patterns of such equipment would compare to the usage patterns of coin-operated and multi-housing laundries. Therefore, DOE has no information on which to base a separate analysis for ''other commercial applications.'' Further, discussions with manufacturers have supported DOE's understanding that applications other than coin-operated laundries and multi-family housing laundries constitute a small minority of installations of covered CCWs. For these reasons, DOE's analysis for this final rule focuses on the coin-operated laundry and multi-housing laundry applications, which represent the large majority of CCW usage.

DOE included all available studies on CCW usage to establish representative usage. For the final rule analysis, DOE relied on several research studies to

[20] U.S. Census Bureau, *Economic Census, Business Expenses Survey, Wholesale Trade, Machinery, Equipment and Supplies Merchant Wholesalers,* 2007, *available at http://www.census.gov/econ/* (last accessed November 30, 2014).

arrive at a range of annual use cycles. DOE found that the average number of cycles for multi-family and laundromat applications were 1,074 and 1,483, respectively. DOE received this data from many entities, including the Multi-Housing Laundry Association (MLA), Coin Laundry Association (CLA), Southern California Edison, and San Diego Gas and Electric. Chapter 7 of the final rule TSD describes the sources DOE received from these entities in detail.[21]

To determine the energy and water use per cycle, DOE used the new appendix J2 test procedure, as described in the paragraphs that follow. 77 FR 13887 (Mar. 7, 2012). DOE determined the total weighted per-cycle water consumption for all wash cycles based on test data performed using the appendix J2 test procedure. The energy use analysis for the final rule consists of three related parts—the machine energy use, the dryer energy use and the water heating energy use.

DOE determined the per-cycle machine energy use based on test data performed using the appendix J2 test procedure. The units selected for tests across efficiency levels varied in tub volume, so DOE adjusted the annual number of cycles to maintain consistent loading across all tub volumes. In their comments, the California IOUs asked why DOE assumed, in the case of max-tech front-loading washers, that only 50 percent of consumers would fill the tub to capacity instead of assuming that customers would self-select an appropriately sized washer in a laundromat and fill the washer to capacity. (CA IOU, Public Meeting Transcript, No. 30, at pp. 84–87) DOE based this assumption on the theory that if the standard were to require max-tech front-loading washers, units with large tub volume would be more common (or be the only option), so consumers would not fill the tub to capacity in many cases.

DOE determined the per-cycle clothes drying energy use by using the remaining moisture content (RMC) values for each efficiency level as measured using the appendix J2 test procedure. The energy required to remove moisture from clothes, *i.e.,* the dryer energy, represents the estimated energy that would be required to dry the clothing in a clothes dryer after completion of the wash cycle. DOE includes this as one of the factors in the MEF equation as a way to give ''credit'' to clothes washers with more effective final spin sequences, which results in less drying time required in the clothes dryer. The estimated drying energy is a significant component of total clothes washer energy consumption.

DOE's current approach for quantifying reduction in dryer energy use from an increase in CCW efficiency is based on the drying energy equation in appendix J2, which reflects residential clothes washer and dryer usage patterns. DOE acknowledges that operating conditions for commercial dryers may differ from the conditions of residential dryers, but DOE did not find any data to support changing the dryer energy use calculation. See chapter 7 and appendix 7–A of the final rule TSD for discussion.

DOE determined the per-cycle water-heating energy use by first determining the total per-cycle energy use (the clothes container volume divided by the MEF_{J2}) and then subtracting from it the per-cycle clothes-drying and machine energy.

F. Life-Cycle Cost and Payback Period Analysis

In determining whether an energy efficiency standard is economically justified, DOE considers the economic impact of potential standards on customers. The effect of new or amended standards on customers usually includes a reduction in operating cost and an increase in purchase cost.

The LCC is the total customer expense over the life of the equipment, consisting of equipment and installation costs plus operating costs over the lifetime of the equipment (expenses for energy use, maintenance, and repair). DOE discounts future operating costs to the time of purchase using customer discount rates. The PBP is the estimated amount of time (in years) it takes customers to recover the increased total installed cost (including equipment and installation costs) of a more efficient type of equipment through lower operating costs. DOE calculates the PBP by dividing the change in total installed cost due to a standard by the change in annual operating cost that results from the standard.

DOE typically develops a customer sample for determining PBPs and LCC impacts. However, because EIA's Commercial Building Energy Consumption Survey (CBECS) does not provide the necessary data to develop a customer sample for CCWs, DOE established the variability in energy and water use by defining the variability in the use by consumers (cycles per day) of the equipment. DOE characterized the variability in energy and water pricing by randomly assigning CCWs to regions with different energy and water prices.

DOE expresses the LCC and PBP results as the number of units experiencing economic impacts of different magnitudes. DOE models both the uncertainty and the variability in the inputs to the LCC and PBP analysis using Monte Carlo simulation and probability distributions.[22] As a result, the LCC and PBP results are displayed as distributions of impacts compared to the base case, which reflects the market in the absence of amended energy conservation standards, including the purchase of equipment that exceeds the current energy conservation standards.

DOE conducted LCC and PBP analysis separately for two applications in each of the equipment classes: (1) Laundromats and (2) multi-family buildings. These applications have different usage characteristics.

Inputs to the LCC and PBP analysis are categorized as: (1) Inputs for establishing the total installed cost and (2) inputs for calculating the operating costs. The following sections contain comments on the inputs and key assumptions of DOE's LCC and PBP analysis and explain how DOE took these comments into consideration.

1. Equipment Costs

To calculate the equipment prices faced by CCW purchasers, DOE multiplied the manufacturing costs developed from the engineering analysis by the supply chain markups it developed (along with sales taxes).

For the March 2014 NOPR (79 FR 12301), to project future CCW prices, DOE examined the commercial laundry and dry-cleaning machinery Producer Price Index (PPI) between 1993 and 2013. This index, adjusted for inflation, shows a rising trend. However, the inflation adjusted trend for household laundry equipment (which more closely matches CCW units because this rulemaking includes mostly residential-style CCW units and excludes the larger commercial laundry equipment) shows a long-term declining trend (see appendix 10–D of the final rule TSD). Given the uncertainty, DOE decided to take a conservative approach and used a constant price for the default case for CCW units.

[21] DOE did not rely on the Commercial Building Energy Consumption Survey (CBECS) conducted by DOE's Energy Information Administration (EIA) because energy and water consumption is not specified for buildings identified with laundry facilities in the CBECS dataset.

[22] The Monte Carlo process statistically captures input variability and distribution without testing all possible input combinations. Therefore, while some atypical situations may not be captured in the analysis, DOE believes the analysis captures an adequate range of situations in which CCWs operate.

In response to DOE's approach in the March 2014 NOPR, AHAM commented that DOE should not rely on experience curves for the same reasons that it expressed in comments for the microwave oven rulemaking. (AHAM, No. 23 at p. 5) DOE did not use experience curves for the March 2014 NOPR. For the final rule, it retained the approach used for the March 2014 NOPR. For the NIA, DOE also analyzed the sensitivity of results to alternative price forecasts. (See section IV.H)

In the previous CCW rulemaking (10 CFR 431.152), DOE based the LCC analysis on the assumption that any increase in the cost of a more efficient unit that is leased gets passed on to the building owners through the contracting arrangements between route operators and building owners. The assumption that any increase in the cost of a more efficient unit that is leased gets passed on is consistent with what one would expect in a competitive business environment. To the extent that costs are not passed on, the LCC savings for building owners from higher-efficiency CCWs would be larger than indicated in the final rule.

2. Installation Costs

Installation costs include labor, overhead, and any miscellaneous materials and parts. For the final rule, DOE used data from the 2013 RS Means *Mechanical Cost Data* [23] on labor requirements to estimate installation costs for CCWs. DOE estimated that installation costs do not increase with equipment efficiency. ALS suggests including the cost of concrete risers in place of metal risers for front-loading units as a more recent trend in laundromats. (ALS, No. 26, at p. 7) However, since DOE does not have estimates on the cost of these concrete risers, the installation costs do not include it. Furthermore, since the cost of the risers would be common to the baseline unit as well as more efficient units, its exclusion does not have any impact on the cost-effectiveness calculation.

3. Unit Energy Consumption

The calculation of annual per-unit energy consumption at each considered efficiency level is described in section IV.E.

4. Energy and Water Prices

DOE used commercial sector energy and water prices for both multi-family and laundromat applications. DOE assumes that common area laundry facilities are mainly found in large multi-family buildings that receive commercial energy and water rates.

a. Energy Prices

DOE derived average electricity and natural gas prices for 27 geographic areas. DOE estimated commercial electricity prices for each of the 27 areas based on 2012 data from EIA Form 861, Annual Electric Power Industry Report.[24] DOE first estimated an average commercial price for each utility, and then calculated an average price for each area by weighting each utility with customers in an area by the number of commercial customers served in that area.

DOE estimated average commercial natural gas prices in each of the 27 geographic areas based on 2012 data from the EIA publication Natural Gas Monthly.[25] DOE calculated an average natural gas price for each area by first calculating the average prices for each State, and then calculating a regional price by weighting each State in a region by its population.

To estimate the trends in electricity and natural gas prices, DOE used price forecasts in *AEO 2014*.[26] To arrive at prices in future years, DOE multiplied the average prices described above by the forecast of annual average changes in national-average commercial electricity and natural gas prices. Because the AEO forecasts prices only to 2040, DOE used the average rate of change between 2025 and 2040 to estimate the price trends beyond 2040.

The spreadsheet tools used to conduct the LCC and PBP analysis allow users to select either the AEO's high-growth case or low-growth case price forecasts to estimate the sensitivity of the LCC and PBP to different energy price forecasts.

b. Water and Wastewater Prices

DOE obtained commercial water and wastewater price data from the Water and Wastewater Rate Survey conducted by Raftelis Financial Consultants (RFC) and the American Water Works Association (AWWA).[27] The survey covers approximately 290 water utilities and 214 wastewater utilities from 44 States and the District of Columbia, with water and wastewater utilities analyzed separately. The samples that DOE obtained of the water and wastewater utilities are not large enough to calculate regional prices for the group of states. Hence, DOE calculated average values at the Census region level (Northeast, South, Midwest, and West) by weighting each State in a region by its population.

To estimate the future trend for water and wastewater prices, DOE used data on the historic trend in the national water price index (U.S. city average) provided by the Labor Department's Bureau of Labor Statistics (BLS),[28] adjusted for inflation. In keeping with prior practice, DOE extrapolated a future trend based on the linear growth from 1970 to 2012. However, DOE did not use a linear fit after 2012 because doing so would have resulted in a price decline in the near-term. This does not seem plausible because historically, water prices have not declined in the country. Therefore, rather than use the extrapolated trend to forecast the near-term trend after 2012, DOE pinned the annual price to the value in 2012 until 2020. Beyond 2020, DOE used the extrapolated trend to forecast prices.

5. Repair and Maintenance Costs

Repair costs are associated with repairing or replacing components that have failed in the appliance; maintenance costs are associated with maintaining the operation of the equipment. For the March 2014 NOPR (79 FR 12301), DOE included increased repair costs for higher efficiency CCWs based on an algorithm developed by DOE for central air conditioners and heat pumps. This algorithm calculates annualized repair and maintenance costs by dividing half of the equipment retail price over the equipment lifetime. (See Chapter 8 of the final rule TSD for details).[29] DOE requested industry input to estimate changes in repair and maintenance costs associated with an increase in efficiency of CCW units. ALS stated that their experience under the 3-year warranty period shows that

[23] RS Means, RS Means Mechanical Cost Data, 36st Annual Edition. 2013.

[24] 2012 EIA Form 861, Annual Electric Power Industry Report, available at *http://www.eia.gov/electricity/data/eia861/(last visited Nov. 20, 2014).*

[25] EIA, Natural Gas Monthly 2012 Report, available at *http://www.eia.gov/naturalgas/monthly/(last visited Nov. 20, 2014).*

[26] DOE–EIA, *Annual Energy Outlook 2014 with Projections to 2040* (available at: *http://www.eia.gov/forecasts/aeo/*).

[27] Raftelis Financial Consultants, Inc. 2012 RFC/AWWA Water and Wastewater Rate Survey, available at *http://www.awwa.org/portals/0/files/publications/documents/samples/2012waterandwastewaterratesurvey.pdf.*

[28] U.S. Department of Labor—Bureau of Labor Statistics, Consumer Price Indexes, Item: Water and sewerage maintenance, Series Id: CUUR0000SEHG01, U.S. city average (not seasonally adjusted), 2013. Washington, DC. Available at *http://www.bls.gov/cpi/home.htm#data*

[29] U.S. Department of Energy—Energy Efficiency and Renewable Energy, Technical Support Document: Energy Efficiency Standards for Consumer Products: Residential Central Air Conditioners and Heat Pumps Including: Regulatory Impact Analysis. Chapter 5, Life-Cycle Cost and Payback Analysis, May, 2002. Washington, DC. Available at *http://www1.eere.energy.gov/buildings/appliance_standards/residential/ac_central_1000_r.html*

front-loading washers cost 27 percent more to repair than top-loading units. (ALS, No. 26, at p.4) Since the potential increase in repair cost is in comparison to top-loading units rather than to more-efficient units in each equipment class, and DOE did not receive new input from other manufacturers specific to repair and maintenance costs, it continued with the approach used in the March 2014 NOPR for this final rule. This approach shows rising maintenance and repair costs as efficiency increases.

6. Lifetime

Equipment lifetime is the age at which the equipment is retired from service. In the March 2014 NOPR (79 FR 12301), DOE used a variety of sources to establish low, average, and high estimates for equipment lifetime in years. DOE characterized CCW lifetime with a Weibull probability distribution. ALS generally agrees with DOE on equipment lifetime characterization, although ALS believes that newer CCW models may have shorter lifetimes. (ALS, No. 26 at p. 4) Since DOE could not find any data to validate or quantify the potential decrease in average lifetimes of newer CCW models, it did not change the lifetime assumption for the newly shipped units. For this final rule, DOE updated its data sources (as described in chapter 8 of the final rule TSD), and calculated the same average CCW lifetimes (11.3 years for multi-family building applications and 7.1 years for laundromat applications) that DOE used in the March 2014 NOPR. DOE used the same lifetime for each equipment class.

7. Discount Rate

The discount rate is the rate at which future expenditures are discounted to estimate their present value. The cost of capital is commonly used to estimate the present value of cash flows to be derived from a typical company project or investment. Most companies use both debt and equity capital to fund investments, so the cost of capital is the weighted-average cost to the firm of equity and debt financing. DOE uses the capital asset pricing model (CAPM) to calculate the equity capital component, and financial data sources to calculate the cost of debt financing.

In the March 2014 NOPR (79 FR 12301), DOE estimated the weighted-average cost of capital of publicly traded firms in the key sectors that purchase CCWs (*i.e.,* personal services, educational services, hotels, and R.E.I.T—building and apartment complex owners).[30] For the final rule, DOE updated its data sources for calculating this cost. More details regarding DOE's estimates of customer discount rates are provided in chapter 8 of the final rule TSD.

8. Compliance Date

DOE calculated the LCC and PBP for all customers as if each were to purchase new equipment in the year that compliance with amended standards is required. EPCA, as amended, directs DOE to publish a final rule amending the standard for the equipment by January 1, 2015. Any amended standards would apply to CCWs manufactured three years after the date on which the final amended standard is published. (42 U.S.C. 6313(e)(2)(B)) Therefore, for purposes of its analysis, DOE used 2018 as the first year of compliance with amended standards.

9. Base Case Efficiency Distribution

To accurately calculate the percentage of customers that would be affected by a particular standard level, DOE estimates the distribution of equipment efficiencies that customers are expected to purchase under the base case (*i.e.,* the case without amended energy efficiency standards). DOE refers to this distribution of equipment energy efficiencies as a base-case efficiency distribution. This approach reflects the fact that some customers may already purchase equipment with efficiencies greater than the baseline equipment levels.

For the final rule, DOE utilized the shipment-weighted efficiency distributions between 2010 and 2013 (submitted by AHAM) to establish the base-case efficiency distributions. Because these data are not comprehensive enough to capture any definite trend in efficiency, DOE used the 2013 distribution to represent the market in the compliance year (2018). DOE found that the distribution based on ENERGY STAR qualified equipment matched closely with the data submitted by AHAM.[31] Table IV.3 presents the market shares of the efficiency levels in the base case for CCWs. See chapter 8 of the final rule TSD for further details on the development of CCW base-case market shares.

TABLE IV.3—COMMERCIAL CLOTHES WASHERS: BASE CASE EFFICIENCY DISTRIBUTION

Top-loading				Front-loading			
Standard level	MEF_{J2}	IWF	Market share (percent)	Standard level	MEF_{J2}	IWF	Market share (percent)
Baseline	1.15	8.9	62.11	Baseline	1.65	5.2	0
1	1.35	8.8	26.7	1	1.80	4.5	31
2	1.55	6.9	11.3	2	2.00	4.1	69
				3	2.20	3.9	0

[30] Ibbotson Associates, Cost of Capital 2009 Yearbook. 2009. Ibbotson Associates: Chicago, IL

[31] See U.S. Environmental Protection Agency, ENERGY STAR Certified Commercial Clothes Washer Models, available at *https://data.energystar.gov/Active-Specifications/ENERGY-STAR-Certified-Commercial-Clothes-Washers/9g6r-cpdt* (last accessed Nov. 20, 2014).

10. Payback Period Inputs

The PBP is the amount of time it takes the consumer to recover the additional installed cost of more efficient equipment, compared to baseline equipment, through energy cost savings. PBPs are expressed in years. PBPs that exceed the life of the equipment mean that the increased total installed cost is not recovered in reduced operating expenses.

The inputs to the PBP calculation are the total installed cost of the equipment to the customer for each efficiency level and the annual first year operating expenditures for each efficiency level. The PBP calculation uses the same inputs as the LCC analysis, except that discount rates are not needed.

11. Rebuttable-Presumption Payback Period

EPCA establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the customer of purchasing equipment complying with an energy conservation standard level will be less than three times the value of the energy (and, as applicable, water) savings during the first year that the consumer will receive as a result of the standard, as calculated under the test procedure in place for that standard. For each considered efficiency level, DOE determines the value of the first year's energy savings by calculating the quantity of those savings in accordance with the applicable DOE test procedure, and multiplying that amount by the average energy price forecast for the year in which compliance with the amended standards would be required.

G. Shipments Analysis

DOE uses projections of equipment shipments to calculate the national impacts of standards on energy use, NPV, and future manufacturer cash flows. DOE develops shipment projections based on historical data and an analysis of key market drivers for each equipment. Historical shipments data are used to build up an equipment stock and also to calibrate the shipments model.

Table IV.4 summarizes the approach and data DOE used to derive the inputs to the shipments analysis for the final rule. DOE projected CCW shipments (for both equipment classes) for the new construction and replacement markets, and also accounted for non-replacement of retired units.

TABLE IV.4—APPROACH AND DATA USED TO DERIVE THE INPUTS TO THE SHIPMENTS ANALYSIS

Inputs	Approach
Number of Equipment Classes	Two equipment classes: Top-loading washers and front-loading washers. Shipments forecasts established for all CCWs and then disaggregated into the two equipment classes based on the market share of top- and front-loading washers.
New Construction Shipments	Determined by multiplying multi-housing forecasts by forecasted saturation of CCWs for new multi-housing. Multi-housing forecasts with *AEO 2014.* Verified frozen saturations with data from the U.S. Census Bureau's *American Housing Survey* (AHS) for 1997–2011.
Replacements	Determined by tracking total equipment stock by vintage and establishing the failure of the stock using retirement functions from the LCC and PBP analysis. Retirement functions revised to be based on Weibull lifetime distributions.
Retired Units not Replaced (*i.e.,* non-replacements).	Used to calibrate shipments model to historical shipments data. Froze the percentage of non-replacements at 31.6 percent for the period 2012–2047 to account for the increased saturation rate of in-unit washers in the multi-family stock between 2000 and 2011 timeframe shown by the AHS.
Historical Shipments	Data sources include AHAM data submittal, *Appliance Magazine,* and U.S. Bureau of Economic Analysis' quantity index data for commercial laundry. Relative market shares of the two equipment applications, common-area laundry facilities in multi-family housing and laundromats, estimated to be 85 and 15 percent, respectively.

For the new construction market, DOE assumed shipments are driven solely by multi-family construction starts. Implicit in this assumption is the fact that a certain percentage of multi-family residents will need to wash their laundry in either a common-area laundry facility (within the multi-family building) or a laundromat.

For existing buildings replacing broken equipment, the shipments model uses a stock accounting framework. Given the equipment entering the stock in each year and a retirement function based on the lifetime distribution developed in the LCC analysis, the model predicts how many units reach the end of their lifetime in each year. DOE typically refers to new shipments intended to replace retired units as ''replacement'' shipments. Such shipments are usually the largest part of total shipments.

Historical data show a rise in shipments in the second half of the 1990s followed by a significant drop between 1999 and 2002, and a slower decline since then. DOE believes that a large part of the decline was due to growth of in-unit washers in multi-family housing (possibly due to conversions of rental property to condominiums), leading to non-replacement of failed CCWs in common-area laundry facilities.[32] To account for the decline and to reconcile the historical shipments with the accounting model, DOE assumed that every retired unit is not replaced. Starting in 1999 and extending to 2011, DOE estimated the share of retired units that were not replaced (as discussed in chapter 9 of the final rule TSD).

DOE allocated shipments to each of the two equipment classes based on the current market share of each class. Based on data submitted by AHAM, DOE estimated that top-loading washers comprise 64 percent of the market while front-loading washers comprise 36 percent. DOE implemented change in the market share for the projection period based on the historical trend that shows a gradual market shift towards front-loading units, with the market stabilizing at 52 percent and 48 percent for top-loading and front-loading units, respectively, by 2047. ALS suggested that DOE re-evaluate the front-loading market share increase during the analysis period based on new shipments data for 2012 and 2013 from AHAM. (ALS, No. 26, at p .5) After receiving new shipments data for 2012 and 2013, DOE re-evaluated the historical trends

[32] Data from the American Housing Survey as well as RECS indicate that there has been growth of in-unit washer saturation in the multi-family housing stock over the last 10–15 years. See chapter 9 of the final rule TSD for further discussion.

and adjusted the market share estimates accordingly.

DOE implemented a cross-price elasticity to capture the impact of a change in price of one equipment class on the demand of the other equipment class. Due to insufficient data on CCW units, DOE was not able to estimate cross-price impacts on the market share of top-loading and front-loading CCWs and instead relied on its analysis performed for the 2012 residential clothes washer rulemaking.[33] The price impact observed from residential clothes washer data indicate that a 10 percent increase in the price of front-loading washers would lead to a 10.7 percent decrease in top-loading washers' market share, holding other variables constant and measured as changes from the reference case using average values for each variable. This translates to the front-loading cross-price impact (percent change in top-loading market share over percent change in front-loading price) of 1.07. For further details on this estimation, please refer to chapter 9 and appendix 9A of the final rule TSD.

H. National Impact Analysis

The NIA assesses the NES and the national NPV of total customer costs and savings that would be expected to result from amended standards at specific efficiency levels.

DOE used an MS Excel spreadsheet model to calculate the energy savings and the national customer costs and savings from each TSL.[34] The NIA calculations are based on the annual energy consumption and total installed cost data from the energy use analysis and the LCC analysis. DOE projected the lifetime energy savings, energy cost savings, equipment costs, and NPV of customer benefits for each equipment class over the lifetime of equipment sold from 2018 through 2047.

DOE evaluated the impacts of potential amended standards for front-loading and top-loading CCW by comparing base-case projections with standards-case projections. The base-case projections characterize energy use and customer costs for each equipment class in the absence of amended energy conservation standards.

Table IV.5 summarizes the key inputs for the NIA. The sections following provide further details, as does chapter 10 of the final rule TSD.

TABLE IV.5—INPUTS FOR THE NATIONAL IMPACT ANALYSIS

Input	Description
Shipments	Annual shipments from shipments model.
Compliance date	January 1, 2018.
Base case efficiency	Based on the current market distribution of efficiencies, with the option of a frozen, 1%, and 2% growth in efficiency.
Standards case efficiency.	Based on a ''Roll up'' scenario to establish a 2018 shipment weighted efficiency.
Annual energy and water consumption per unit.	Calculated for each efficiency level and equipment class based on inputs from the energy and water use analysis.
Total installed cost per unit.	Calculated equipment prices by efficiency level using manufacturer selling prices and weighted-average overall mark-up values. Installation costs vary in direct proportion to the weight of the equipment.
Electricity and water expense per unit.	Annual energy use for each equipment class is multiplied by the corresponding average energy and water and waste-water price.
Escalation of electricity and water prices.	*AEO 2014* forecasts (to 2040) and extrapolation beyond 2040 for electricity and gas prices. BLS's historical Consumer Price Index for water for projecting the prices beyond 2020.
Electricity site-to-primary energy conversion.	A time series conversion factor; includes electric generation, transmission, and distribution losses.
Discount rates	3% and 7% real.
Present year	2014.

1. Efficiency Trends

A key component of DOE's estimates of NES and NPV is the equipment energy and water efficiencies forecasted over time. For the base case, DOE considered the lack of change in the historical trends and assumed that efficiency would remain constant at the 2018 levels derived in the LCC and PBP analysis. DOE provides 1 percent and 2 percent efficiency growth rates as options for sensitivities.

To estimate the impact that standards would have in the year compliance becomes required, DOE used a ''roll-up'' scenario, which assumes that equipment efficiencies in the base case that do not meet the standard level under consideration would ''roll up'' to meet the new standard level. Equipment shipments at efficiencies above the standard level under consideration are not affected. In each standards case, the efficiency distributions remain constant at the 2018 levels for the remainder of the shipments forecast period.

2. National Energy and Water Savings

For each year in the forecast period, DOE calculates the national energy and water savings for each standard level by multiplying the shipments of front-loading and top-loading by the per-unit annual energy and water savings. Cumulative energy and water savings are the sum of the annual energy and water savings over the lifetime of all equipment shipped during 2018–2047.

The annual energy consumption per unit depends directly on equipment efficiency. DOE used the shipment-weighted energy and water efficiencies associated with the base case and each standards case, in combination with the annual energy and water use data, to estimate the shipment-weighted average annual per-unit energy and water consumption under the base case and standards cases. The national energy consumption is the equipment of the annual energy consumption per unit and the number of units of each vintage, which depends on shipments. DOE calculates the total annual site energy savings for a given standards case by subtracting total energy use in the standards case from total energy use in

[33] See chapter 9 in Direct Final Rule Technical Support Document, available at *http://www.regulations.gov/#!documentDetail;D=EERE-2008-BT–STD-0019-0047*.

[34] DOE's use of MS Excel as the basis for the spreadsheet models provides interested parties with access to the models within a familiar context. In addition, the TSD and other documentation that DOE provides during the rulemaking help explain the models and how to use them, and interested parties can review DOE's analyses by changing various input quantities within the spreadsheet.

the base case. Note that total shipments are the same in the standards cases as in the base case.

DOE converted the site electricity consumption and savings to primary energy (power sector energy consumption) using annual conversion factors derived from the *AEO 2014* version of the NEMS. Cumulative primary energy and water savings are the sum of the national energy and water savings for each year in which equipment shipped during 2018–2047 continue to operate.

In response to the recommendations of a committee on ''Point-of-Use and Full-Fuel-Cycle Measurement Approaches to Energy Efficiency Standards'' appointed by the National Academy of Science, DOE announced its intention to use FFC measures of energy use and greenhouse gas and other emissions in the national impact analyses and emissions analyses included in future energy conservation standards rulemakings. 76 FR 51281 (August 18, 2011). After evaluating the approaches discussed in the August 18, 2011 notice, DOE published a statement of amended policy in the **Federal Register** in which DOE explained its determination that NEMS is the most appropriate tool for its FFC analysis and its intention to use NEMS for that purpose. 77 FR 49701 (August 17, 2012). The FFC factors incorporate losses in production and delivery in the case of natural gas (including fugitive emissions), and energy used to produce and deliver the fuels used by power plants. The approach used for the Final rule, and the FFC multipliers that were applied, are described in appendix 10–A of the final rule TSD.

3. Net Present Value of Customer Benefit

The inputs for determining the NPV of the total costs and benefits experienced by customers of the considered equipment are: (1) Total annual installed cost; (2) total annual savings in operating costs; and (3) a discount factor. DOE calculates the lifetime net savings for equipment shipped each year as the difference between the base case and each standards case in total savings in lifetime operating costs and total increases in installed costs. DOE calculates lifetime operating cost savings over the life of each front-loading and top-loading CCW unit shipped during the forecast period.

a. Total Annual Installed Cost

The total installed cost includes both the equipment price and the installation cost. For each equipment class, DOE calculated equipment prices by efficiency level using manufacturer selling prices and weighted-average overall markup values (weights based on shares of the distribution channels used). Because DOE calculated the total installed cost as a function of equipment efficiency, it was able to determine annual total installed costs based on the annual shipment-weighted efficiency levels determined in the shipments model.

As noted in section IV.F.1, DOE assumed no change in front-loading and top-loading CCW equipment prices over the analysis period. However, DOE conducted sensitivity analyses using alternative price trends: One in which prices decline after 2013, and one in which prices rise. These price trends, and the NPV results from the associated sensitivity cases, are described in appendix 10–B of the final rule TSD.

b. Total Annual Operating Cost Savings

The per-unit energy and water savings were derived as described in section IV.H.2. To calculate future electricity and natural gas prices, DOE applied the projected trend in national-average commercial electricity and natural gas price from the *AEO 2014* Reference case, which extends to 2040. To extrapolate prices beyond 2040, DOE applied the trend between 2030 and 2040 from the *AEO 2014* forecast, which yielded a growth rate of 0.5% per annum. To calculate future water prices, DOE applied the historical price trend based on the consumer price index of water, published by the BLS.

In addition, DOE analyzed scenarios that used the energy price projections in the *AEO 2014* Low Economic Growth and High Economic Growth cases. These cases have higher and lower energy price trends compared to the Reference case. These price trends and the NPV results from the associated cases are described in appendix 10–C of the final rule TSD.

DOE estimated that annual maintenance costs (including minor repairs) do not vary with efficiency within each equipment class, so they do not figure into the annual operating cost savings for a given standards case. In addition, DOE developed annualized repair costs by dividing half of the equipment retail price over the equipment lifetime as described in Section IV.F.5.

In calculating the NPV, DOE multiplies the net dollar savings in future years by a discount factor to determine their present value. DOE estimates the NPV using both a 3-percent and a 7-percent real discount rate, in accordance with guidance provided by the OMB to Federal agencies on the development of regulatory analysis.[35] The discount rates that determine the NPV are different than the discount rates used in the LCC analysis, which are designed to reflect a consumer's perspective. For instance, the 7-percent real value estimate the average before-tax rate of return to private capital in the U.S. economy, while the 3-percent real value represents the ''social rate of time preference,'' which is the rate at which society discounts future consumption flows to its present value.

I. Customer Subgroup Analysis

In analyzing the potential impacts of new or amended standards, DOE evaluates impacts on identifiable groups (*i.e.,* subgroups) of customers that may be disproportionately affected by a national standard. For the final rule, DOE evaluated impacts on a small business subgroup using the LCC spreadsheet model. The customer subgroup analysis is discussed in detail in chapter 11 of the final rule TSD.

J. Manufacturer Impact Analysis

1. Overview

DOE performed a Manufacturer Impact Analysis (MIA) to estimate the impacts of amended energy conservation standards on CCW manufacturers. The MIA has both quantitative and qualitative aspects and includes analyses of forecasted industry cash flows, the INPV, investments in research and development (R&D), and manufacturing capital, and domestic manufacturing employment. Additionally, the MIA seeks to determine how amended energy conservation standards might affect manufacturing capacity and competition, as well as how standards contribute to overall regulatory burden. Finally, the MIA serves to identify any disproportionate impacts on manufacturer subgroups.

The quantitative part of the MIA relies primarily on the GRIM, an industry cash flow model with inputs specific to this rulemaking. The key GRIM inputs include data on the industry cost structure, unit production costs, equipment shipments, manufacturer markups, and investments in R&D and manufacturing capital required to produce compliant equipment. The key GRIM outputs are the INPV, which is the sum of industry annual cash flows over the analysis period, discounted using the industry weighted average

[35] Office of Management and Budget, *Circular A–4,* section E (2003), available at *http://www.whitehouse.gov/omb/circulars_a004_a-4.*

cost of capital, and the impact to domestic manufacturing employment. The model estimates the impacts of amended energy conservation standards on a given industry by comparing changes in INPV and domestic manufacturing employment between a base case and the various TSLs in the standards case. To capture the uncertainty relating to manufacturer pricing strategy following amended standards, the GRIM estimates a range of possible impacts under different markup scenarios.

The qualitative part of the MIA addresses manufacturer characteristics and market trends. Specifically, the MIA considers such factors as manufacturing capacity, competition within the industry, the cumulative impact of other regulations, and impacts on manufacturer subgroups. The complete MIA is outlined in chapter 12 of the final rule TSD.

DOE conducted the MIA for this rulemaking in three phases. In Phase One, DOE prepared a profile of the CCW manufacturing industry. DOE used public sources of information to derive preliminary financial inputs for the GRIM (*e.g.,* revenues; materials, labor, overhead, and depreciation expenses; selling, general, and administrative expenses (SG&A); and R&D expenses). Sources of data used in this initial characterization of the CCW manufacturing industry included company filings of form 10–K from the Securities and Exchange Commission (SEC), corporate annual reports, the U.S. Census Bureau's Economic Census, and reports from Dun & Bradstreet.

In Phase Two, DOE prepared an industry cash flow analysis to quantify the impacts of new and amended energy conservation standards. The GRIM uses several factors to determine a series of annual cash flows, starting with the year in which the standards final rule is published, and extending over a 30-year period following the effective date of the standard. These factors include annual expected revenues, costs of sales, SG&A and R&D expenses, taxes, and capital expenditures. In general, energy conservation standards can affect manufacturer cash flow in three distinct ways by: (1) Creating a need for increased investment; (2) raising production costs per unit; and (3) altering revenue due to higher per-unit prices and changes in sales volumes.

In Phase Three of the MIA, DOE interviewed representative manufacturers. During these interviews, DOE discussed engineering, manufacturing, procurement, and financial topics to validate assumptions used in the GRIM and to identify key issues or concerns. The March 2014 NOPR described some of the key issues that manufacturers raised during the interviews. As part of Phase Three, DOE also evaluated subgroups of manufacturers that might be disproportionately impacted by amended standards or that might not be accurately represented by the average cost assumptions used to develop the industry cash flow analysis. In addition to small business manufacturers, such manufacturer subgroups might include low volume manufacturers (LVMs), niche players, and/or manufacturers exhibiting a cost structure that largely differs from the industry average. DOE identified two subgroups for which average cost assumptions may not hold: Small businesses and LVMs.

Based on the size standards published by the Small Business Administration (SBA) [36] to be categorized as a small business manufacturer of CCWs under North American Industry Classification System (NAICS) 333318, ''Other commercial and service industry machinery manufacturing,'' a commercial laundry equipment manufacturer and its affiliates may employ a maximum of 1000 employees. The 1000-employee threshold includes all employees in a business's parent company and any other subsidiaries. Using this classification in conjunction with a search of industry databases and the SBA member directory, DOE did not identify any manufacturers of CCWs that qualify as small businesses.

Unlike small business manufacturers, there is no employment limit associated with LVMs. Instead, LVMs are characterized by their low overall production volumes relative to their competitors, often associated with specialization within a singular industry. In the industry characterization from Phase One, DOE identified two manufacturers that represent over 90 percent of CCW shipments. DOE categorized one of these manufacturers as a LVM due to the concentration of its business in both laundry and CCWs, relative to its competitors. In 2012, the LVM derived 98 percent of its revenues from the sale of laundry equipment and service parts, while its main competitor derived 30 percent. Within the commercial and residential clothes washer segment, DOE estimates that the LVM derived 88 percent of its washer equipment revenues from the sale of CCWs covered by this rulemaking, while its major competitor is more focused on residential rather than commercial washer production. Because the CCW industry itself is characterized by low total shipments, with less than 200,000 units sold annually in the U.S., the concentration of this manufacturer's business in this industry qualifies them as an LVM. Since the LVM operates at a much smaller scale and does not manufacture equipment across a broad range of industries, this rulemaking could have disproportionate impacts on the LVM compared to its large, diversified competitors. Accordingly, DOE performed an in-depth analysis of the issues relating to the CCW LVM. The manufacturer subgroup analysis is discussed in greater detail in chapter 12 of the final rule TSD and in section V.B.2.d of this notice.

2. Government Regulatory Impact Model

DOE uses the GRIM to quantify the changes in industry cash flows resulting from amended energy conservation standards. The GRIM uses manufacturer costs, markups, shipments, and industry financial information to arrive at a series of base-case annual cash flows absent new or amended standards, beginning with the present year, 2014, and continuing through 2047. The GRIM then models changes in costs, investments, shipments, and manufacturer margins that may result from new or amended energy conservation standards and compares these results against those in the base-case forecast of annual cash flows. The primary quantitative output of the GRIM is the INPV, which DOE calculates by summing the stream of annual discounted cash flows over the full analysis period. For manufacturers of CCWs, DOE used a real discount rate of 8.6 percent, the weighted average cost of capital derived from industry financials and modified based on feedback received during confidential interviews with manufacturers.

The GRIM calculates cash flows using standard accounting principles and compares changes in INPV between the base case and the various TSLs. The difference in INPV between the base case and a standards case represents the financial impact of the amended standard on manufacturers at that particular TSL. As discussed previously, DOE collected the necessary information to develop key GRIM inputs from a number of sources, including publicly available data and interviews with manufacturers (described in the next section). The GRIM results are shown in section V.B.2.a. Additional details about the GRIM can be found in chapter 12 of the final rule TSD.

[36] U.S. Small Business Administration, *Small Business Size Standards, http://www.sba.gov/content/table-small-business-size-standards* (last visited Nov. 21, 2014).

a. Government Regulatory Impact Model Key Inputs

Manufacturer Production Costs

Manufacturing higher efficiency equipment is typically more expensive than manufacturing baseline equipment due to the use of more complex and typically more costly components. The changes in the manufacturer production costs (MPCs) of the analyzed equipment can affect the revenues, gross margins, and cash flow of the industry, making equipment cost data key GRIM inputs for DOE's analysis. For each efficiency level of each equipment class, DOE used the MPCs developed in the engineering analysis, as described in chapter 5 of the final rule TSD. Additionally, DOE used information from its teardown analysis, described in section IV.C to disaggregate the MPCs into material and labor costs. These cost breakdowns and equipment markups were validated with manufacturers during manufacturer interviews.

Base-Case Shipments Forecast

The GRIM estimates manufacturer revenues based on total unit shipment forecasts and the distribution of shipments by efficiency level. Changes in sales volumes and efficiency mix over time can significantly affect manufacturer finances. For this analysis, the GRIM uses the NIA's annual shipment forecasts derived from the shipments analysis from 2014, the base year, to 2047, the end of the analysis period. See chapter 9 of the final rule TSD for additional details.

Standards-Case Shipments Forecast

For each standards-case, the GRIM assumes that shipments of CCWs below the projected minimum standard levels would roll up to the standard efficiency levels in response to an increase in energy conservation standards. The GRIM also assumes that demand for high-efficiency equipment is a function of price, and is independent of the standard level. Additionally, the standards case shipments forecast includes a partial shift of shipments from one equipment class to another depending on the standard level, reflecting positive cross-price elasticity of demand, as one equipment class becomes relatively more expensive than the other to produce and for consumers to purchase. A decrease in shipments offsets the relative increase in costs to produce at a given TSL for a given equipment class. See chapter 9 of the final rule TSD for additional details.

Equipment and Capital Conversion Costs

Amended energy conservation standards may cause manufacturers to incur one-time conversion costs to bring their production facilities and equipment designs into compliance with the new standards. For the purpose of the MIA, DOE classified these one-time conversion costs into two major groups: (1) Equipment conversion and (2) capital conversion costs. Product conversion costs are investments in research, development, testing, and marketing, focused on making equipment designs comply with the new energy conservation standard. Capital conversion expenditures are investments in property, plant, and equipment to adapt or change existing production facilities so that new equipment designs can be fabricated and assembled.

Stranded Assets

If new or amended energy conservation standards require investment in new manufacturing capital, there also exists the possibility that they will render existing manufacturing capital obsolete. If this obsolete manufacturing capital is not fully depreciated at the time new or amended standards go into effect, this would result in the stranding of these assets, and would necessitate the expensing of the residual un-depreciated value.

DOE used multiple sources of data to evaluate the level of equipment and capital conversion costs and stranded assets manufacturers would likely face to comply with amended energy conservation standards. DOE used manufacturer interviews to gather data on the level of investment anticipated at each proposed efficiency level and validated these assumptions using estimates of capital requirements derived from the equipment teardown analysis and engineering model described in section IV.C. These estimates were then aggregated and scaled to derive total industry estimates of equipment and capital conversion costs and to protect confidential information.

In general, DOE assumes that all conversion-related investments occur between the year the final rule is published and the year by which manufacturers must comply with the new or amended standards. The investment figures used in the GRIM can be found in section V.B.2 of this notice. For additional information on the estimated equipment conversion and capital conversion costs, see chapter 12 of the final rule TSD.

Government Regulatory Impact Model Scenarios

Markup Scenarios

As discussed in section IV.D, manufacturing selling prices (MSPs) include direct manufacturing production costs (*i.e.,* labor, material, overhead, and depreciation estimated in DOE's MPCs) and all non-production costs (*i.e.* SG&A, R&D, and interest), along with profit. To calculate the MSPs in the GRIM, DOE applied manufacturer markups to the MPCs estimated in the engineering analysis. Modifying these markups in the standards-case yields different sets of impacts on manufacturers. For the MIA, DOE modeled two standards-case markup scenarios to represent the uncertainty regarding the potential impacts on prices and profitability for manufacturers following the implementation of amended energy conservation standards: (1) A preservation of gross margin percentage [37] scenario; and (2) a preservation of per-unit operating profits scenario. These scenarios lead to different markups values that, when applied to the MPCs, result in varying revenue and cash flow impacts.

Under the preservation of gross margin percentage scenario, DOE applied a single, uniform ''gross margin percentage'' markup across all efficiency levels. As production costs increase with efficiency, this scenario implies that the absolute dollar markup will increase as well. Based on publicly available financial information for manufacturers of CCWs and comments from manufacturer interviews, DOE assumed the industry average markup on production costs to be 1.285. Because this markup scenario assumes that manufacturers would be able to maintain their gross margin percentage as production costs increase in response to an amended energy conservation standard, it represents a lower bound of industry impacts (higher industry profitability) under an amended energy conservation standard.

In the per-unit operating profits scenario, manufacturer markups are calibrated so that per-unit operating profits in the year after the compliance date of the amended energy conservation standard is the same as in

[37] ''Gross margin'' is defined as revenues minus cost of goods sold. On a unit basis, gross margin is selling price minus manufacturer production cost. In the GRIM, markups determine the gross margin because various markups are applied to the manufacturer production costs to reach manufacturer selling price.

the base-case. Under this scenario, as the cost of production goes up, manufacturers are generally required to reduce the markups on their minimally compliant equipment to maintain a cost-competitive offering. DOE implicitly assumes that the industry can only maintain operating profits after compliance with the amended standard is required. Therefore, the gross margin (as a percentage) shrinks in the standards cases. This markup scenario represents an upper bound of industry impacts (lower profitability) under an amended energy conservation standard.

3. Discussion of Comments

During the March 2014 NOPR public meeting, interested parties commented on the assumptions and results of the March 2014 NOPR analysis TSD. Oral and written comments addressed conversion costs and cumulative regulatory burdens.

a. Cumulative Regulatory Burden

With regards to cumulative regulatory burdens, ALS commented that regulatory burden is increasing at an alarming rate. ALS's cumulative regulatory burdens include the U.S. Consumer Product Safety Improvement Act, Canada Consumer Product Safety Act, UL 2157/CAN CSA 22.2 No. 169, UL 2158/CAN CSA 22.2 No. 112, and ANSI Z21.5.1/CAN CSA 7.1. ALS is also burdened by California legislation imposing reporting and certification of substance usage, California Energy Commission commercial clothes dryer rulemaking, Canada Electro-Magnetic Compliance standards for appliances, European Union directives for Restriction of Hazardous Substances, Waste Electronic and Electronic Equipment, Registration, Evaluation and Authorization of Chemicals, and Energy Using Products. (ALS, No. 26 at p. 6)

DOE has conducted an analysis of cumulative regulatory burden impacts on CCW manufacturers, where DOE considers other DOE conservation standards affecting CCW manufacturers as well as other significant CCW-specific regulations that will take effect 3 years before or after the 2018 compliance date of the amended energy conservation standards for CCWs. While this analysis focuses on the impacts on manufacturers born of other Federal requirements, DOE's analysis also includes other non-Federal regulations that impact CCWs. A full list can be found in chapter 12 of the final rule TSD.

Most manufacturers interviewed also sell equipment to other countries with energy conservation and standby standards. Manufacturers may incur a substantial cost to the extent that there are overlapping testing and certification requirements in other markets besides the United States. Because DOE has authority to set standards on equipment sold in the United States, DOE accounts only for domestic compliance costs in its analysis of cumulative regulatory burdens impacting CCW manufacturers. For more details, see chapter 12 of the final rule TSD.

b. Conversion Costs

AHAM commented that it supports DOE's analysis regarding the conversion costs associated with a major platform change. (AHAM, No. 23, p. 3) The California IOUs ask that DOE provide greater transparency relating to the causes for the significant increase in conversion costs associated with the shift from EL 1 to EL 2 for top-loading CCWs. (CA IOUs, No. 27 at p. 3) Additionally, the California IOUs recommend that DOE conduct a sensitivity analysis of the conversion costs by removing the most expensive design options and recalculating what the efficiency level would be, as well as what the impact on the manufacturer would be. (CA IOUs, Public Meeting Transcript, No. 30 at p. 48–49, 51)

As discussed in section V.2 of this final rule, manufacturers provided high-level feedback during interviews regarding the design options that would be required at the max tech efficiency levels for both equipment classes. For top-loading units, the design options proposed at EL 2 include increased tub capacity, hung suspension, low-profile (non-traditional) agitator design, and improved motor and transmission efficiency. All of these upgrades require major platform overhauls and significant changes to manufacturing capital. In addition, in section V.2, DOE discusses how the existing efficiency distribution for currently available top-loading units contributes to the increase in industry conversion costs from EL 1 to EL 2 for top-loaders.

Regarding a sensitivity analysis, DOE notes that, in order to reach EL 2 for top-loaders, manufacturers will be required to make all the major changes (as above-specified) at once. As is a characteristic of a distinct ''platform,'' the equipment platform design at EL 2 for top-loaders is so different from that associated with baseline and EL 1 equipment that components from the EL 2 platform design are not interchangeable with components from the baseline and EL 1 platforms. Manufacturers will not be able to make just one or a portion of the major changes because they are designed to function together as a working system (see section VI.C. of this notice).

The California IOUs also request clarification as to why the equipment and capital conversion costs vary significantly between the residential and commercial clothes washer rulemakings. (CA IOU, No. 27 at p. 4).

In reference to the differences in product conversion costs for top-loading units at EL 2 between the residential and commercial clothes washer rulemakings, DOE points to the differences in base case efficiency distributions between the two top-loader markets at the time of the respective standards. In 2012, the residential clothes washer top-loading market was dominated by two major appliance manufacturers, both of which produced products with a range of efficiencies, including EL 2. Thus, these manufacturers had already incurred some product conversion costs in order to get a portion of their products to EL 2. Conversely, in the top-loading segment of the CCW market, although one of the two major players produces equipment only at the max tech level, the other manufacturer (the LVM) produces only baseline equipment. Thus, product conversion costs are relatively larger for this manufacturer and for the CCW industry as a whole (since product conversion costs are not a function of shipments volumes).

Regarding capital conversion costs, the costs associated with EL 2 for CCWs are much lower than that for residential clothes washers because, unlike product conversion costs, capital conversion costs are somewhat related to the size of the market. Given that the residential clothes washer market is substantially larger than the CCW market, it is logical that the capital conversion costs associated with shifting all lower efficiency equipment to EL 2 are higher.

NRDC stated that DOE should evaluate whether the investments that manufacturers will already be making to meet the 2018 standards for residential top-loaders would effectively reduce the conversion costs to meet EL 2 for commercial top-loaders. (NRDC, No. 29 at p. 5)

Given that the LVM does not currently produce residential clothes washers at EL 2, DOE cannot assume that the LVM will remain in the residential clothes washer market starting in 2018. Thus, DOE must evaluate conversion costs estimates for the CCW industry independently from the 2018 standards for residential clothes washers.

K. Emissions Analysis

In the emissions analysis, DOE estimated the reduction in power sector emissions of carbon dioxide (CO_2), nitrogen oxides (NO_X), sulfur dioxide (SO_2), and mercury (Hg) from potential energy conservation standards for CCWs. In addition, DOE estimated emissions impacts in production activities (extracting, processing, and transporting fuels) that provide the energy inputs to power plants. These are referred to as ''upstream'' emissions. Together, these emissions account for the FFC. In accordance with DOE's FFC Statement of Policy (76 FR 51282 (Aug. 18, 2011)),[38] the FFC analysis includes impacts on emissions of methane (CH_4) and nitrous oxide (N_2O), both of which are recognized as greenhouse gases.

DOE primarily conducted the emissions analysis using emissions factors for CO_2 and most of the other gases derived from data in *AEO 2014.*[39] Combustion emissions of CH_4 and N_2O were estimated using emissions intensity factors published by the U.S. Environmental Protection Agency (EPA), GHG Emissions Factors Hub.[40] Site emissions of CO_2 and NO_X (from gas water heaters) were estimated using emissions intensity factors from an EPA publication.[41] DOE developed separate emissions factors for power sector emissions and upstream emissions. The method that DOE used to derive emissions factors is described in chapter 13 of the final rule TSD.

For CH_4 and N_2O, DOE calculated emissions reduction in tons and also in terms of units of carbon dioxide equivalent (CO_2eq). Gases are converted to CO_2eq by multiplying the physical units by the gas global warming potential (GWP) over a 100-year time horizon. Based on the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC),[42] DOE used GWP values of 28 for CH_4 and 265 for N_2O.

EIA prepares the *Annual Energy Outlook* using NEMS.[43] Each annual version of NEMS incorporates the projected impacts of existing air quality regulations on emissions. *AEO 2014* generally represents current legislation and environmental regulations, including recent government actions, for which implementing regulations were available as of October 31, 2013.

SO_2 emissions from affected electric generating units (EGUs) are subject to nationwide and regional emissions cap-and-trade programs. Title IV of the Clean Air Act sets an annual emissions cap on SO_2 for affected EGUs in the 48 contiguous states and the District of Columbia (DC). (42 U.S.C. 7651 *et seq.*) SO_2 emissions from 28 eastern states and DC were also limited under the Clean Air Interstate Rule (CAIR) (70 FR 25162 (May 12, 2005)), which created an allowance-based trading program that operates along with the Title IV program. CAIR was remanded to the EPA by the U.S. Court of Appeals for the District of Columbia Circuit, but it remained in effect.[44] In 2011, EPA issued a replacement for CAIR, the Cross-State Air Pollution Rule (CSAPR). 76 FR 48208 (Aug. 8, 2011). On August 21, 2012, the DC Circuit issued a decision to vacate CSAPR.[45] The court ordered EPA to continue administering CAIR. The emissions factors used for the final rule, which are based on *AEO 2014,* assume that CAIR remains a binding regulation through 2040.[46]

The attainment of emissions caps is typically flexible among EGUs and is enforced through the use of emissions allowances and tradable permits. Beginning in 2016, however, SO_2 emissions will decline significantly as a result of the Mercury and Air Toxics Standards (MATS) for power plants. 77 FR 9304 (Feb. 16, 2012). In the final MATS rule, EPA established a standard for hydrogen chloride as a surrogate for acid gas hazardous air pollutants (HAP), and also established a standard for SO_2 (a non-HAP acid gas) as an alternative equivalent surrogate standard for acid gas HAP. The same controls are used to reduce HAP and non-HAP acid gas; thus, SO_2 emissions will be reduced as a result of the control technologies installed on coal-fired power plants to comply with the MATS requirements for acid gas. *AEO 2014* assumes that, in order to continue operating, coal plants must have either flue gas desulfurization or dry sorbent injection systems installed by 2016. Both technologies, which are used to reduce acid gas emissions, also reduce SO_2 emissions. Under the MATS, emissions will be far below the cap established by CAIR, so it is unlikely that excess SO_2 emissions allowances resulting from the lower electricity demand would be needed or used to permit offsetting increases in SO_2 emissions by any regulated EGU. Therefore, DOE believes that energy efficiency standards will reduce SO_2 emissions in 2016 and beyond.

CAIR established a cap on NO_X emissions in 28 eastern states and the District of Columbia.[47] Energy conservation standards are expected to have little effect on NO_X emissions in those states covered by CAIR because excess NO_X emissions allowances resulting from the lower electricity demand could be used to permit offsetting increases in NO_X emissions. However, standards would be expected to reduce NO_X emissions in the states not affected by the caps, so DOE estimated NO_X emissions reductions from the standards considered in the final rule for these states.

The MATS limit mercury emissions from power plants, but they do not include emissions caps. DOE estimated mercury emissions reduction using emissions factors based on *AEO 2014,* which incorporates the MATS.

L. Monetizing Carbon Dioxide and Other Emissions Impacts

As part of the development of this rule, DOE considered the estimated monetary benefits from the reduced emissions of CO_2 and NO_X that are expected to result from each of the TSLs considered. In order to make this calculation similar to the calculation of

[38] DOE's FFC was amended in 2012 for reasons unrelated to the inclusion of CH_4 and N_2O. 77 FR 49701 (Aug. 17, 2012).

[39] DOE–EIA, *Annual Energy Outlook 2014 with Projections to 2040* (*Available at: http://www.eia.gov/forecasts/aeo/*).

[40] EPA, GHG Emissions Factors Hub, *available at http://www.epa.gov/climateleadership/inventory/ghg-emissions.html* (last visited Nov. 21, 2014).

[41] EPA, Compilation of Air Pollutant Emission Factors, AP–42, Fifth Edition, Volume I: Stationary Point and Area Sources (1998), *available at http://www.epa.gov/ttn/chief/ap42/index.html.*

[42] Intergovernmental Panel on Climate Change, Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Chapter 8 (T.F. Stocker et al. eds.) (2013).

[43] *Annual Energy Outlook 2014. Available at http://www.eia.gov/forecasts/aeo/index.cfm*

[44] *See North Carolina* v. *EPA,* 550 F.3d 1176 (D.C. Cir. 2008); *North Carolina* v. *EPA,* 531 F.3d 896 (D.C. Cir. 2008).

[45] See *EME Homer City Generation, LP* v. *EPA,* 696 F.3d 7, 38 (D.C. Cir. 2012), *cert. granted,* 81 U.S.L.W. 3567, 81 U.S.L.W. 3696, 81 U.S.L.W. 3702 (2013) (No. 12–1182).

[46] On April 29, 2014, the U.S. Supreme Court reversed the judgment of the DC Circuit and remanded the case for further proceedings consistent with the Supreme Court's opinion. The Supreme Court held in part that EPA's methodology for quantifying emissions that must be eliminated in certain states due to their impacts in other downwind states was based on a permissible, workable, and equitable interpretation of the Clean Air Act provision that provides statutory authority for CSAPR. See *EPA* v. *EME Homer City Generation,* No 12–1182, slip op. at 32 (April 29, 2014). Because DOE is using emissions factors based on *AEO 2014* for this final rule, the rule assumes that CAIR, not CSAPR, is the regulation in force. The difference between CAIR and CSAPR is not relevant for the purpose of DOE's analysis of SO_2 emissions.

[47] CSAPR also applies to NO_X, and it would supersede the regulation of NO_X under CAIR. As stated previously, the current analysis assumes that CAIR, not CSAPR, is the regulation in force. The difference between CAIR and CSAPR with regard to DOE's analysis of NO_X is slight.

the NPV of consumer benefit, DOE considered the reduced emissions expected to result over the lifetime of equipment shipped in the forecast period for each TSL. This section summarizes the basis for the monetary values used for each of these emissions and presents the values considered in this rulemaking.

For the final rule, DOE is relying on a set of values for the SCC that was developed by an interagency process. A summary of the basis for these values is provided below, and a more detailed description of the methodologies used is provided as an appendix to chapter 14 of the final rule TSD.

1. Social Cost of Carbon

The SCC is an estimate of the monetized damages associated with an incremental increase in carbon emissions in a given year. It is intended to include (but is not limited to) changes in net agricultural productivity, human health, property damages from increased flood risk, and the value of ecosystem services. Estimates of the SCC are provided in dollars per metric ton of carbon dioxide. A domestic SCC value is meant to reflect the value of damages in the United States resulting from a unit change in carbon dioxide emissions, while a global SCC value is meant to reflect the value of damages worldwide.

Under section 1(b)(6) of Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (Oct. 4, 1993), agencies must, to the extent permitted by law, ''assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.'' The purpose of the SCC estimates presented here is to allow agencies to incorporate the monetized social benefits of reducing CO_2 emissions into cost-benefit analyses of regulatory actions. DOE acknowledges that there are many uncertainties involved in the estimates and understands that they should be updated over time to reflect increasing knowledge of the science and economics of climate impacts.

As part of the interagency process that developed the SCC estimates, technical experts from numerous agencies met on a regular basis to consider public comments, explore the technical literature in relevant fields, and discuss key model inputs and assumptions. The main objective of this process was to develop a range of SCC values using a defensible set of input assumptions grounded in the existing scientific and economic literatures. In this way, key uncertainties and model differences transparently and consistently inform the range of SCC estimates used in the rulemaking process.

a. Monetizing Carbon Dioxide Emissions

When attempting to assess the incremental economic impacts of carbon dioxide emissions, the analyst faces a number of challenges. A report from the National Research Council [48] points out that any assessment will suffer from uncertainty, speculation, and lack of information about: (1) Future emissions of greenhouse gases; (2) the effects of past and future emissions on the climate system; (3) the impact of changes in climate on the physical and biological environment; and (4) the translation of these environmental impacts into economic damages. As a result, any effort to quantify and monetize the harms associated with climate change will raise serious questions of science, economics, and ethics and should be viewed as provisional.

Despite the limits of both quantification and monetization, SCC estimates can be useful in estimating the social benefits of reducing carbon dioxide emissions. The agency can estimate the benefits from reduced (or costs from increased) emissions in any future year by multiplying the change in emissions in that year by the SCC values appropriate for that year. The NPV of the benefits can then be calculated by multiplying each of these future benefits by an appropriate discount factor and summing across all affected years.

It is important to emphasize that the interagency process is committed to updating these estimates as the science and economic understanding of climate change and its impacts on society improves over time. In the meantime, the interagency group will continue to explore the issues raised by this analysis and consider public comments as part of the ongoing interagency process.

b. Development of Social Cost of Carbon Values

In 2009, an interagency process was initiated to offer a preliminary assessment of how best to quantify the benefits from reducing carbon dioxide emissions. To ensure consistency in how benefits are evaluated across Federal agencies, the Administration sought to develop a transparent and defensible method, specifically designed for the rulemaking process, to quantify avoided climate change damages from reduced CO_2 emissions. The interagency group did not undertake any original analysis. Instead, it combined SCC estimates from the existing literature to use as interim values until a more comprehensive analysis could be conducted. The outcome of the preliminary assessment by the interagency group was a set of five interim values: global SCC estimates for 2007 (in 2006 dollars) of $55, $33, $19, $10, and $5 per metric ton of CO_2. These interim values represented the first sustained interagency effort within the U.S. government to develop an SCC for use in regulatory analysis. The results of this preliminary effort were presented in several proposed and final rules.

c. Current Approach and Key Assumptions

After the release of the interim values, the interagency group reconvened on a regular basis to generate improved SCC estimates. Specifically, the group considered public comments and further explored the technical literature in relevant fields. The interagency group relied on three integrated assessment models commonly used to estimate the SCC: the FUND, DICE, and PAGE models. These models are frequently cited in the peer-reviewed literature and were used in the last IPCC assessment. Each model was given equal weight in the SCC values that were developed.

Each model takes a slightly different approach to model how changes in emissions result in changes in economic damages. A key objective of the interagency process was to enable a consistent exploration of the three models while respecting the different approaches to quantifying damages taken by the key modelers in the field. An extensive review of the literature was conducted to select three sets of input parameters for these models: Climate sensitivity, socio-economic and emissions trajectories, and discount rates. A probability distribution for climate sensitivity was specified as an input into all three models. In addition, the interagency group used a range of scenarios for the socio-economic parameters and a range of values for the discount rate. All other model features were left unchanged, relying on the model developers' best estimates and judgments.

In 2010, the interagency group selected four sets of SCC values for use in regulatory analyses.[49] Three sets of

[48] National Research Council, *Hidden Costs of Energy: Unpriced Consequences of Energy Production and Use* (2009).

[49] *Interagency Working Group on Social Cost of Carbon, Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (2010), available at http://www.whitehouse.gov/*

values are based on the average SCC from three integrated assessment models, at discount rates of 2.5 percent, 3 percent, and 5 percent. The fourth set, which represents the 95th-percentile SCC estimate across all three models at a 3-percent discount rate, is included to represent higher-than-expected impacts from climate change further out in the tails of the SCC distribution. The values grow in real terms over time. Additionally, the interagency group determined that a range of values from 7 percent to 23 percent should be used to adjust the global SCC to calculate domestic effects,[50] although preference is given to consideration of the global benefits of reducing CO_2 emissions. Table IV.6 presents the values in the 2010 interagency group report, which is reproduced in appendix 14–A of the final rule TSD.

TABLE IV.6—ANNUAL SCC VALUES FROM 2010 INTERAGENCY REPORT, 2010–2050

[in 2007 dollars per metric ton CO_2]

Year	Discount Rate %			
	5	3	2.5	3
	Average	Average	95th percentile	Average
2010	4.7	21.4	35.1	64.9
2015	5.7	23.8	38.4	72.8
2020	6.8	26.3	41.7	80.7
2025	8.2	29.6	45.9	90.4
2030	9.7	32.8	50.0	100.0
2035	11.2	36.0	54.2	109.7
2040	12.7	39.2	58.4	119.3
2045	14.2	42.1	61.7	127.8
2050	15.7	44.9	65.0	136.2

The SCC values used for the final rule were generated using the most recent versions of the three integrated assessment models that have been published in the peer-reviewed literature.[51] Table IV.7 shows the updated sets of SCC estimates from the 2013 Report update in five-year increments from 2010 to 2050. Appendix 14–B of the final rule TSD provides the full set of values. The central value that emerges is the average SCC across models at 3-percent discount rate. However, for purposes of capturing the uncertainties involved in regulatory impact analysis, the interagency group emphasizes the importance of including all four sets of SCC values.

TABLE IV.7—ANNUAL SCC VALUES FROM 2013 INTERAGENCY UPDATE, 2010–2050

[in 2007 dollars per metric ton CO_2]

Year	Discount Rate %			
	5	3	2.5	3
				Average
2010	11	32	51	89
2015	11	37	57	109
2020	12	43	64	128
2025	14	47	69	143
2030	16	52	75	159
2035	19	56	80	175
2040	21	61	86	191
2045	24	66	92	206
2050	26	71	97	220

AHAM suggests that DOE rely on the 2010 estimates for SCC until it has resolved all comments on the derivation of the SCC estimates from the 2013 Report. (AHAM, No. 23, at pp. 5–6) The 2013 Report provides an update of the SCC estimates based solely on the latest peer-reviewed version of the models, replacing model versions that were developed up to ten years ago in a rapidly evolving field. It does not revisit other assumptions with regard to the discount rate, reference case socio-economic and emission scenarios, or equilibrium climate sensitivity. Improvements in the way damages are modeled are confined to those that have been incorporated into the latest versions of the models by the developers themselves in the peer-reviewed literature. Given the above, using the 2010 estimates would be inconsistent with DOE's objective of using the best available information in its analyses.

It is important to recognize that a number of key uncertainties remain, and that current SCC estimates should be treated as provisional and revisable since they will evolve with improved

sites/default/files/omb/inforeg/for-agencies/Social-Cost-of-Carbon-for-RIA.pdf ("The 2010 Report").

[50] It is recognized that this calculation for domestic values is approximate, provisional, and highly speculative. There is no *a priori* reason why domestic benefits should be a constant fraction of net global damages over time.

[51] Interagency Working Group on Social Cost of Carbon, United States Government, *Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866, (2013),* available at *http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/technical-update-social-cost-of-carbon-for-regulator-impact-analysis.pdf ("The 2013 Report").*

scientific and economic understanding. The interagency group also recognizes that the existing models are imperfect and incomplete. The National Research Council report describes tension between the goal of producing quantified estimates of the economic damages from an incremental ton of carbon and the limits of existing efforts to model these effects.[52] There are a number of analytical challenges that are being addressed by the research community, including research programs housed in many of the Federal agencies participating in the interagency process to estimate the SCC. The interagency group intends to periodically review and reconsider those estimates to reflect increasing knowledge of the science and economics of climate impacts, as well as improvements in modeling.

In summary, in considering the potential global benefits resulting from reduced CO_2 emissions, DOE used the values from the 2013 Report, adjusted to 2013$ using the Gross Domestic Product price deflator. For each of the four SCC cases specified, the values used for emissions in 2015 were $12.0, $40.5, $62.4, and $119 per metric ton avoided (values expressed in 2013 dollars). DOE derived values after 2050 using the relevant growth rates for the 2040–2050 period in the interagency update.

DOE multiplied the CO_2 emissions reduction estimated for each year by the SCC value for that year in each of the four cases. To calculate a present value of the stream of monetary values, DOE discounted the values in each of the four cases using the specific discount rate that had been used to obtain the SCC values in each case.

The Associations[53] believe the SCC should not be used in any rulemaking and/or policymaking until it undergoes a more rigorous notice, review and comment process. (The Associations, No. 25 at p. 3) ALS strongly opposes the application of SCC and the inclusion of the social benefit of CO_2 emission reductions in DOE's analysis for justification of standards for covered equipment. (ALS, No. 26 at p.6) The Cato Institute stated that the SCC is not supported by scientific literature, not in accordance with OMB guidelines, fraught with uncertainty, illogical and thus unsuitable and inappropriate for Federal rulemaking. The Cato Institute also argued that use of the SCC in cost/benefit analyses in the rulemaking should be suspended.

(Cato Institute, No. 24 at pp. 1–24)

DOE acknowledges the limitations of the SCC estimates, which are discussed in detail in the 2010 Report. Specifically, the 2010 Report discusses and explains the reasons for uncertainties in the assumptions regarding climate sensitivity, as well as other model inputs such as economic growth and emissions trajectories.[54] The three integrated assessment models used to estimate the SCC are frequently cited in the peer-reviewed literature and were used in the last assessment of the IPCC. In addition, new versions of the models that were used in 2013 to estimate revised SCC values were published in the peer-reviewed literature (see appendix 14B of the final rule TSD for discussion). Although uncertainties remain, the revised estimates in the 2013 Report are based on the best available scientific information on the impacts of climate change. The current SCC estimates have been developed over many years, using the best science available, and with input from the public. In November 2013, OMB announced a new opportunity for public comment on the interagency technical support document underlying the revised SCC estimates. 78 FR 70586. OMB is reviewing comments and considering whether further revisions to the SCC estimates are warranted. DOE stands ready to work with OMB and the other members of the interagency working group on further review and revision of the SCC estimates as appropriate.

In addition, it is important to note that the monetized benefits of carbon emission reductions are one factor that DOE considers in its evaluation of the economic justification of proposed standards. As shown in Table I.4, the benefits of the amended standards in terms of consumer operating cost savings exceed the incremental costs of the standards-compliant equipment. The benefits of CO_2 emission reductions were considered by DOE, but were not determinative in DOE's decision to adopt these standards.

2. Valuation of Other Emissions Reductions

As noted above, DOE has taken into account how amended energy conservation standards would reduce site NO_X emissions nationwide and increase power sector NO_X emissions in those 22 States not affected by the CAIR. DOE estimated the monetized value of net NO_X emissions reductions resulting from each of the TSLs considered for the final rule based on estimates found in the relevant scientific literature. Estimates of monetary value for reducing NO_X from stationary sources range from $476 to $4,893 per ton in 2013$.[55] DOE calculated monetary benefits using a medium value for NO_X emissions of $2,684 per short ton and real discount rates of 3 percent and 7 percent.

DOE is evaluating appropriate monetization of avoided SO_2 and Hg emissions in energy conservation standards rulemakings. It has not included monetization in the current analysis.

M. Utility Impact Analysis

The utility impact analysis estimates several effects on the power generation industry that would result from the adoption of new or amended energy conservation standards. In the utility impact analysis, DOE analyzes the changes in installed electricity capacity and generation that would result for each TSL. The utility impact analysis is based on published output from NEMS. Each year, NEMS is updated to produce the AEO reference case as well as a number of side cases that estimate the economy-wide impacts of changes to energy supply and demand. DOE uses those published side cases that incorporate efficiency-related policies to estimate the marginal impacts of reduced energy demand on the utility sector. The output of this analysis is a set of time-dependent coefficients that capture the change in electricity generation, primary fuel consumption, installed capacity and power sector emissions due to a unit reduction in demand for a given end use. These coefficients are multiplied by the stream of energy savings calculated in the NIA to provide estimates of selected utility impacts of new or amended energy conservation standards. Chapter 15 of

[52] National Research Council, *Hidden Costs of Energy: Unpriced Consequences of Energy Production and Use* (2009).

[53] ''The Associations'' include the U.S. Chamber of Commerce, American Chemistry Council, American Forest & Paper Association, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, Council of Industrial Boiler Owners, National Association of Manufacturers, and the National Mining Association.

[54] *Interagency Working Group on Social Cost of Carbon, Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (2010), available athttp://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/Social-Cost-of-Carbon-for-RIA.pdf (''The 2010 Report'').*

[55] U.S. Office of Management and Budget, Office of Information and Regulatory Affairs, *2006 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (2006) (Available at: *http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2006_cb/2006_cb_final_report.pdf*).

the final rule TSD describes the utility impact analysis in further detail.

N. Employment Impact Analysis

Employment impacts from new or amended energy conservation standards include direct and indirect impacts. Direct employment impacts are any changes in the number of employees of manufacturers of the equipment subject to standards; the MIA addresses those impacts. Indirect employment impacts are changes in national employment that occur due to the shift in expenditures and capital investment caused by the purchase and operation of more efficient equipment. Indirect employment impacts from standards consist of the jobs created or eliminated in the national economy, other than in the manufacturing sector being regulated, due to: (1) Reduced spending by end-users on energy; (2) reduced spending on new energy supply by the utility industry; (3) increased consumer spending on the purchase of new equipment; and (4) the effects of those three factors throughout the economy.

One method for assessing the possible effects on the demand for labor of such shifts in economic activity is to compare sector employment statistics developed by the Labor Department's Bureau of Labor Statistics (BLS). BLS regularly publishes its estimates of the number of jobs per million dollars of economic activity in different sectors of the economy, as well as the jobs created elsewhere in the economy by this same economic activity. Data from BLS indicate that expenditures in the utility sector generally create fewer jobs (both directly and indirectly) than expenditures in other sectors of the economy.[56] There are many reasons for these differences, including wage differences and the fact that the utility sector is more capital-intensive and less labor-intensive than other sectors. Energy conservation standards have the effect of reducing consumer utility bills. Because reduced consumer expenditures for energy likely lead to increased expenditures in other sectors of the economy, the general effect of efficiency standards is to shift economic activity from a less labor-intensive sector (*i.e.,* the utility sector) to more labor-intensive sectors (*e.g.,* the retail and service sectors). Thus, based on the BLS data alone, DOE believes net national employment may increase because of shifts in economic activity resulting from amended standards.

For the standard levels considered in the final rule, DOE estimated indirect national employment impacts using an input/output model of the U.S. economy called Impact of Sector Energy Technologies, Version 3.1.1 (ImSET). ImSET is a special-purpose version of the ''U.S. Benchmark National Input-Output'' (I–O) model, which was designed to estimate the national employment and income effects of energy-saving technologies. The ImSET software includes a computer-based I–O model having structural coefficients that characterize economic flows among the 187 sectors. ImSET's national economic I–O structure is based on a 2002 U.S. benchmark table, specially aggregated to the 187 sectors most relevant to industrial, commercial, and residential building energy use. DOE notes that ImSET is not a general equilibrium forecasting model, and understands the uncertainties involved in projecting employment impacts, especially changes in the later years of the analysis. Because ImSET does not incorporate price changes, the employment effects predicted by ImSET may over-estimate actual job impacts over the long run. For the final rule, DOE used ImSET only to estimate short-term employment impacts.

For more details on the employment impact analysis, see chapter 16 of the final rule TSD.

V. Analytical Results

The following section addresses the results from DOE's analyses with respect to potential energy conservation standards for the CCWs examined as part of this rulemaking. It addresses the trial standard levels examined by DOE, the projected impacts of each of these levels if adopted as energy conservation standards for CCWs, and the standard levels that DOE is adopting in this final rule. Additional details regarding the analyses conducted by DOE are contained in the publicly-available TSD supporting this final rule.

A. Trial Standard Levels

DOE analyzed the benefits and burdens of a number of TSLs for CCWs, the equipment that are the subject of the final rule. DOE attempted to limit the number of TSLs considered for the final rule by excluding efficiency levels that do not exhibit significantly different economic and/or engineering characteristics from the efficiency levels already selected as a TSL. Although DOE presents the results for only those efficiency levels in TSL combinations in the final rule, DOE presents the results for all efficiency levels that it analyzed in the final rule TSD.

California IOUs and NRDC requested DOE to consider including an additional TSL to represent efficiency level 2 for front-loading units and the max-tech level for top-loading units. (CA IOUs, Public Meeting Transcript, No. 30, at p. 78 and 100–101; NRDC, No. 29, at p. 4) DOE has included the additional TSL in the analysis for the final rule.

Table V.1 presents the TSLs analyzed and the corresponding efficiency level for each CCW equipment class. TSL 4 is comprised of the max-tech efficiency levels. TSL 3 is comprised of efficiency level two for front-loading and the max-tech level for top-loading units. TSL 2 is comprised of efficiency level two for front-loading CCWs and efficiency level one for top-loading CCWs. TSL 1 is comprised of efficiency level one for each equipment class.

TABLE V.1—SUMMARY OF TSLS FOR FRONT-LOADING AND TOP-LOADING COMMERCIAL CLOTHES WASHERS

Equipment Class	TSL 1	TSL 2	TSL 3	TSL 4
	Efficiency level*			
Front Loading CCW Units	1	2	2	3
Top Loading CCW Units	1	1	2	2

* For the MEF_{J2} and IWF that correspond to efficiency levels 1 through 4, see Table IV.3.

[56] See Bureau of Economic Analysis, *Regional Multipliers: A Handbook for the Regional Input-Output Modeling System (RIMS II)* (1992).

B. Economic Justification and Energy Savings

As discussed in section II.A, EPCA provides seven factors to be evaluated in determining whether a more stringent standard for front-loading and top-loading CCWs is economically justified. (42 U.S.C. 6313(a)(6)(B)(ii)) The following sections discuss how DOE addresses each of those factors in this rulemaking.

1. Economic Impacts on Individual Customers

DOE analyzed the economic impacts on front-loading and top-loading CCWs customers by looking at the effects potential standards would have on the LCC and PBP. DOE also examined the impacts of potential standards on customer subgroups. These analyses are discussed below.

a. Life-Cycle Cost and Payback Period

To evaluate the economic impact of potential amended energy conservation standards on customers of CCWs, DOE conducted LCC and PBP analyses for each TSL. In general, higher-efficiency equipment would affect customers in two ways: (1) Purchase price would increase, and (2) annual operating costs would decrease. Inputs used for calculating the LCC and PBP include total installed costs (*i.e.,* equipment price plus installation costs), and operating costs (*i.e.,* annual energy savings, energy prices, energy price trends, repair costs, and maintenance costs). The LCC calculation also uses equipment lifetime and a discount rate. Chapter 8 of the final rule TSD provides detailed information on the LCC and PBP analyses.

Tables V.2 through V.9 show the LCC and PBP results for both front-loading and top-loading CCW units. In the first of each pair of tables, the simple payback is measured relative to the baseline equipment. In the second tables, the LCC savings are measured relative to the base-case efficiency distribution in the compliance year (see section IV.F.9 of this notice).

TABLE V.2—SUMMARY LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS FOR FRONT-LOADING, MULTI-FAMILY APPLICATION COMMERCIAL CLOTHES WASHER UNITS

TSL	Efficiency level	Average costs *2013$*				Simple payback *years*	Average lifetime *years*
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
.....	Baseline	1,817	409	2,915	4,732	—	11.3
1	1	1,817	384	2,695	4,512	0.0	11.3
2	2	1,818	364	2,519	4,337	0.0	11.3
3	2	1,818	364	2,519	4,337	0.0	11.3
4	3	1,848	381	2,659	4,507	1.1	11.3

Note: The results for each TSL are calculated assuming that all customers use equipment with that efficiency level. The PBP is measured relative to the baseline equipment.

TABLE V.3—LCC SAVINGS RELATIVE TO THE BASE CASE EFFICIENCY DISTRIBUTION FOR FRONT-LOADING, MULTI-FAMILY APPLICATION COMMERCIAL CLOTHES WASHER UNITS

TSL	Efficiency level	Life-cycle cost savings	
		% of customers that experience	Average savings *
		Net cost	*2013$*
1	1	0	221.37
2	2	0	271.91
3	2	0	271.91
4	3	55	(2.67)

* The calculation includes households with zero LCC savings (no impact).

TABLE V.4—SUMMARY LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS FOR FRONT-LOADING, LAUNDROMAT APPLICATION COMMERCIAL CLOTHES WASHER UNITS

TSL	Efficiency level					Simple payback *years*	Average lifetime *years*
	Average costs *2013$*	Installed cost	First year's operating cost	Lifetime operating cost	LCC		
.....	Baseline	1,817	524	2,452	4,267	—	7.1
1	1	1,817	493	2,266	4,082	0.0	7.1
2	2	1,818	471	2,133	3,951	0.0	7.1
3	2	1,818	471	2,133	3,951	0.0	7.1
4	3	1,848	491	2,243	4,092	1.0	7.1

Note: The results for each TSL are calculated assuming that all customers use equipment with that efficiency level. The PBP is measured relative to the baseline equipment.

TABLE V.5—LCC SAVINGS RELATIVE TO THE BASE CASE EFFICIENCY DISTRIBUTION FOR FRONT-LOADING, LAUNDROMAT APPLICATION COMMERCIAL CLOTHES WASHER UNITS

TSL	Efficiency level	Life-cycle cost savings	
		% of Cutomers that experience	Average savings *
		Net cost	*2013$*
1	1	0	184.29
2	2	0	212.31
3	2	0	212.31
4	3	65	(10.22)

* The calculation includes households with zero LCC savings (no impact).

TABLE V.6—SUMMARY LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS FOR TOP-LOADING, MULTI-FAMILY APPLICATION COMMERCIAL CLOTHES WASHER UNITS

TSL	Efficiency level	Average costs *2013$*				Simple payback *years*	Average lifetime *years*
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
.....	Baseline	1,229	556	4,453	5,682	.....	11.3
1	1	1,229	522	4,159	5,388	0.0	11.3
2	1	1,229	522	4,159	5,388	0.0	11.3
3	2	1,293	459	3,580	4,873	0.7	11.3
4	2	1,293	459	3,580	4,873	0.7	11.3

Note: The results for each TSL are calculated assuming that all customers use equipment with that efficiency level. The PBP is measured relative to the baseline equipment.

TABLE V.7—LCC SAVINGS RELATIVE TO THE BASE CASE EFFICIENCY DISTRIBUTION FOR TOP-LOADING, MULTI-FAMILY APPLICATION COMMERCIAL CLOTHES WASHER UNITS

TSL	Efficiency level	Life-cycle cost savings	
		% of customers that experience	Average savings *
		Net cost	*2013$*
1	1	0	294.48
2	1	0	294.48
3	2	0	807.36
4	2	0	807.36

* The calculation includes households with zero LCC savings (no impact).

TABLE V.8—SUMMARY LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS FOR TOP-LOADING, LAUNDROMAT APPLICATION COMMERCIAL CLOTHES WASHER UNITS

TSL	Efficiency level	Average costs *2013$*				Simple payback *years*	Average lifetime *years*
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
.....	Baseline	1,229	678	3,638	4,867	.....	7.1
1	1	1,229	651	3,472	4,701	0.0	7.1
2	1	1,229	651	3,472	4,701	0.0	7.1
3	2	1,293	568	2,950	4,243	0.6	7.1
4	2	1,293	568	2,950	4,243	0.6	7.1

Note: The results for each TSL are calculated assuming that all customers use equipment with that efficiency level. The PBP is measured relative to the baseline equipment.

TABLE V.9—LCC SAVINGS RELATIVE TO THE BASE CASE EFFICIENCY DISTRIBUTION FOR TOP-LOADING, LAUNDROMAT APPLICATION COMMERCIAL CLOTHES WASHER UNITS

TSL	Efficiency level	Life-cycle cost savings	
		% of customers that experience	Average savings *
		Net cost	*2013$*
1	1	0	165.67
2	1	0	165.67
3	2	0	622.36
4	2	0	622.36

* The calculation includes households with zero LCC savings (no impact).

b. Customer Subgroup Analysis

In the customer subgroup analysis, DOE estimated the impacts of the considered TSLs on small business customers. The LCC savings and PBPs for small business customers are similar to the impacts for all customers. Chapter 11 of the final rule TSD presents detailed results of the customer subgroup analysis.

c. Rebuttable Presumption Payback

As discussed in section III.E.2, EPCA establishes a rebuttable presumption that an energy conservation standard is economically justified if the increased purchase cost for equipment that meets the standard is less than three times the value of the first-year energy savings resulting from the standard. DOE calculated a rebuttable-presumption PBP for each TSL based on average usage profiles. As a result, DOE calculated a single rebuttable presumption payback value, and not a distribution of PBPs, for each TSL. Table V.10 and Table V.11 show the rebuttable-presumption PBPs for the considered TSLs.

In addition to the rebuttable presumption analysis, however, DOE routinely conducts an economic analysis that considers the full range of impacts to the customer, manufacturer, nation, and environment, as required by EPCA. The results of that analysis serve as the basis for DOE to evaluate the economic justification for a potential standard level (thereby supporting or rebutting the results of any three-year PBP analysis). Section V.B.2 addresses how DOE considered the range of impacts to select these amended standards.

TABLE V.10—REBUTTABLE-PRESUMPTION PAYBACK PERIODS (YEARS) FOR FRONT-LOADING AND TOP-LOADING COMMERCIAL CLOTHES WASHER UNITS: MULTI-FAMILY APPLICATION

Trial standard level	1	2	3	4
Efficiency Level	FL:EL1 TL:EL1	FL:EL2 TL:EL1	FL:EL2 TL:EL2	FL:EL3 TL:EL2
Front Loading CCW Units	0.0	0.1	0.1	11.2
Top Loading CCW Units	0.0	0.0	2.6	2.6

TABLE V.11—REBUTTABLE-PRESUMPTION PAYBACK PERIODS (YEARS) FOR FRONT-LOADING AND TOP-LOADING COMMERCIAL CLOTHES WASHER UNITS: LAUNDROMAT APPLICATION

Trial standard level	1	2	3	4
Efficiency Level	FL:EL1 TL:EL1	FL:EL2 TL:EL1	FL:EL2 TL:EL2	FL:EL3 TL:EL2
Front Loading CCW Units	0.0	0.1	0.1	11.1
Top Loading CCW Units	0.0	0.0	3.1	3.1

2. Economic Impacts on Manufacturers

DOE performed an MIA to estimate the impact of amended energy conservation standards on CCW manufacturers. The following section describes the expected impacts on manufacturers at each TSL. Chapter 12 of the final rule TSD explains the analysis in further detail.

a. Industry Cash-Flow Analysis Results

The following tables depict the financial impacts (represented by changes in INPV) of amended energy conservation standards on manufacturers of CCWs as well as the conversion costs that DOE estimates manufacturers would incur for each equipment class at each TSL. To evaluate the range of cash flow impacts on the CCW manufacturing industry, DOE used two different markup assumptions to model scenarios that correspond to the range of anticipated market responses to amended energy conservation standards.

To assess the lower (less severe) end of the range of potential impacts, DOE modeled a preservation of gross margin percentage markup scenario, in which a uniform gross margin percentage markup is applied across all efficiency levels. In this scenario, DOE assumed that a manufacturer's absolute dollar markup would increase as production costs increase in the amended energy conservation standards case. Manufacturers have indicated that it is optimistic to assume that they would be able to maintain a constant gross margin percentage markup if their production costs increase in response to an amended energy conservation standard, particularly at higher TSLs.

To assess the higher (more severe) end of the range of potential impacts, DOE modeled the preservation of per-unit

operating profit markup scenario, which assumes that manufacturers would not be able to preserve the same overall gross margin, but instead cut their markup for marginally compliant equipment to maintain a cost-competitive equipment offering and keep the same overall level of operating profit as in the base-case. Table V.12 and Table V.13 show the range of potential INPV impacts for manufacturers of CCWs. Table V.12 reflects the lower bound of impacts (higher profitability) and Table V.13 represents the upper bound of impacts (lower profitability).

Each scenario results in a unique set of cash flows and corresponding industry values at each TSL. In the following discussion, the INPV results refer to the sum of discounted cash flows through 2047, the difference in INPV between the base case and each standards case, and the total industry conversion costs required for each standards case.

TABLE V.12—MANUFACTURER IMPACT ANALYSIS UNDER THE PRESERVATION OF GROSS MARGIN PERCENTAGE MARKUP SCENARIO

	Units	Base case	Trial standard level			
			1	2	3	4
INPV	2013$ Millions	123.5	117.1	116.9	56.0	23.9
Change in INPV	2013$ Millions		(6.4)	(6.6)	(67.5)	(99.6)
	%		(5.2%)	(5.3%)	(54.6%)	(80.7%)
Product Conversion Costs	2013$ Millions		9.9	10.2	50.9	62.4
Capital Conversion Costs	2013$ Millions				38.7	63.1
Total Conversion Costs	2013$ Millions		9.9	10.2	89.5	125.6
Free Cash Flow [1]	2013$ Millions	8.9	6.2	6.1	(22.8)	(37.2)
Free Cash Flow	% Change		(30.7%)	(31.7%)	(355.6%)	(516.2%)

Note: Scenario reflected above corresponds with Reference Case shipments and Constant Learning Curve; Values in parentheses are negative values.

[1] Free Cash Flow figures are for the year before standards go into effect (*i.e.* 2017).

TABLE V.13—MANUFACTURER IMPACT ANALYSIS UNDER THE PRESERVATION OF PER-UNIT OPERATING PROFIT MARKUP SCENARIO

	Units	Base case	Trial standard level			
			1	2	3	4
INPV	2013$ Millions	123.5	117.1	116.9	53.0	19.7
Change in INPV	2013$ Millions		(6.4)	(6.6)	(70.5)	(103.8)
	%		(5.2%)	(5.3%)	(57.1%)	(84.1%)
Product Conversion Costs	2013$ Millions		9.9	10.2	50.9	62.4
Capital Conversion Costs	2013$ Millions				38.7	63.1
Total Conversion Costs	2013$ Millions		9.9	10.2	89.5	125.6
Free Cash Flow [1]	2013$ Millions	8.9	6.2	6.1	(22.8)	(37.2)
Free Cash Flow	% Change		(30.7%)	(31.7%)	(355.6%)	(516.2%)

Note: Scenario reflected above corresponds with Reference Case shipments and Constant Learning Curve; Values in parentheses are negative values.

[1] Free Cash Flow figures are for the year before standards go into effect (*i.e.* 2017).

To provide perspective on short-run cash flow impacts, DOE also included a comparison of free cash flow between the base case and the standards case at each TSL in the year before amended standards take effect. At TSL 1, DOE estimated the impact for manufacturers of CCWs to be a decrease in INPV of $6.4 million, or 5.2 percent, under either markup scenario. At TSL 1, industry free cash flow is estimated to decrease by approximately 30.7 percent to $6.2 million, compared to the base-case value of $8.9 million in the year before the compliance date (2017).

TSL 1 represents an improvement in MEF_{J2} (as determined using appendix J2) from the baseline level of 1.65 to 1.80 (ft^3/kWh/cycle) for front-loading equipment and an improvement in MEF_{J2} from the baseline level of 1.15 to 1.35 (ft^3/kWh/cycle) for top-loading equipment. The results for the two markup scenarios are identical at TSL 1 because the baseline MPCs and the MPCs at TSL 1 are the same for both equipment classes. For front-loading CCWs, the 1.8 MEF_{J2} (as determined using appendix J2) equipment (on which the EL 1 standard is based) are the lowest efficiency front-loading equipment available on the market. As such, TSL 1 would have no impact on the front-loading market. Similarly, the design options associated with EL 1 for top-loading equipment relate to control changes and different cycle options, rather than material changes to the equipment itself. While there are product conversion costs associated with the research and development needed to make these changes, there are no changes in the per unit production costs. Given these conditions, the impacts on INPV at TSL 1 can be attributed solely to the $9.9 million in product conversion costs for top-loading equipment.

At TSL 2, DOE estimates a decrease in INPV of $6.6 million, or 5.3 percent, under either markup scenario. At TSL 2, industry free-cash flow is estimated to decrease by approximately 31.7 percent to $6.1 million, compared to the base-case value of $8.9 million in the year before the compliance date (2017).

TSL 2 represents an improvement in MEF_{J2} from the baseline level of 1.65 to 2.00 (ft^3/kWh/cycle) for front-loading equipment and an improvement in MEF_{J2} from the baseline level of 1.15 to 1.35 (ft^3/kWh/cycle) for top-loading equipment. Much like TSL 1, the results for the two markup scenarios at TSL 2 are identical because the baseline MPCs and the MPCs at TSL 2 are very close

for both front-loading and top-loading equipment. For front-loading equipment, the 2.0 MEF_{J2} EL (as determined using appendix J2) requires only minor changes to baseline equipment needed to enable slightly faster spin speeds. The standard level for top-loading equipment at TSL 2 is the same at TSL 1, and again relates to control changes and different cycle options, rather than material changes to the equipment. Because there are no substantive changes to MPCs for either equipment class, nearly all of the impacts on INPV at TSL 2 can be attributed to the $10.2 million in product conversion costs.

At TSL 3, DOE estimates decreases in INPV for CCW manufacturers to range $67.5 million (or 54.6 percent) to $70.5 million (or 57.1 percent). At TSL 3, industry free cash flow is estimated to decrease by over 356 percent to -$22.8 million, compared to the base-case value of $8.9 million in the year before the compliance date (2017).

TSL 3 represents an improvement in MEF_{J2} from the baseline level of 1.65 to 2.00 (ft^3/kWh/cycle) for front-loading CCWs and an improvement in MEF_{J2} from the baseline level of 1.15 to 1.55 (ft^3/kWh/cycle) for top-loading CCWs. Unlike TSL 1 and TSL 2, the efficiency level specified at TSL 3 would require substantial redesigns of top-loading CCWs. The design options proposed at efficiency level 2 for top-loading units include increased tub capacity, hung suspension, low-profile (non-traditional) agitator design, and improved motor and transmission efficiency—all of which require major platform overhauls and significant changes to manufacturing capital. These design options do not contribute to substantially different MPCs, but the conversion costs associated with equipment development and testing, as well as the investments in manufacturing capital, including retooling of tubs and agitators, significantly impact the INPV. Additionally, the significant increase in industry aggregate equipment and capital conversion costs due to the shift to max tech efficiency level for top-loaders is explained by that fact that a larger proportion of top-loading units would require upgrades. As estimated in the shipments analysis, approximately 90% of top-loading units currently on the market are below EL 2 (by contrast, approximately 70% of current top-loading units are below EL 1).

At TSL 4, DOE estimates decreases in INPV for CCW manufacturers to range from $99.6 million (or 80.7 percent) to $103.8 million (or 84.1 percent). At TSL 4, industry free-cash flow is estimated to decrease by over 516 percent to -$37.2 million, compared to the base-case value of $8.9 million in the year before the compliance date (2017).

TSL 4 represents an improvement in MEF_{J2} from the baseline level of 1.65 to 2.20 (ft^3/kWh/cycle) for front-loading CCWs and an improvement in MEF_{J2} from the baseline level of 1.15 to 1.55 (ft^3/kWh/cycle) for top-loading CCWs. The efficiency level specified at TSL 4 would require substantial CCW redesigns in both equipment classes. For front-loading units, the design options associated with EL 3 include increased capacity and switching to direct drive motors. For top-loading units, the design options proposed at EL 2 include increased tub capacity, hung suspension, low-profile (non-traditional) agitator design, and improved motor and transmission efficiency. All of these upgrades require major platform overhauls and significant changes to manufacturing capital. These design options do not contribute to substantially different MPCs, but the conversion costs associated with equipment development and testing, as well as the investments in manufacturing capital including retooling of tubs and agitators, significantly impact the INPV.

b. Impacts on Direct Employment

DOE used the GRIM to estimate the domestic labor expenditures and number of domestic production workers in the base-case and at each TSL from 2014 to 2047. DOE used statistical data from the most recent U.S Census Bureau's Economic Census,[57] the results of the engineering analysis, and interviews with manufacturers to determine the inputs necessary to calculate industry-wide labor expenditures and domestic employment levels. Labor expenditures for the manufacture of equipment are a function of the labor intensity of the equipment, the sales volume, and an assumption that wages in real terms remain constant.

DOE notes that the MIA's analysis detailing impacts on employment focuses specifically on the production workers manufacturing the covered equipment in question, rather than a manufacturer's broader operations. Thus, the estimated number of impacted employees in the MIA is separate from the total number of employees used to determine whether a manufacturer is a small business for purposes of analysis under the Regulatory Flexibility Act.

The estimates of production workers in this section cover only those up to and including the line-supervisor level, who are directly involved in fabricating and assembling equipment within the original equipment manufacturer (OEM) facility. In addition, workers that perform services closely associated with production operations are included. Employees above the working-supervisor level are excluded from the count of production workers. Thus, the labor associated with non-production functions (*e.g.,* factory supervision, advertisement, sales) is explicitly not covered.[58] In addition, DOE's estimates account for production workers that manufacture only the specific equipment covered by this rulemaking. For example, a worker on a clothes dryer production line would not be included in the estimate of the number of CCW production workers. Finally, this analysis also does not factor in the dependence of some manufacturers on production volume to make their operations viable. For example, should a major line of business cease or move, a production facility may no longer have the manufacturing scale to obtain volume discounts on its purchases, nor be able to justify maintaining major capital equipment. Thus, the impact on a production facility due to a line closure may affect more employees than just the production workers, but as stated previously, this analysis focuses only on the production workers impacted directly. The aforementioned scenarios, however, are considered relative to employment impacts specific to the LVM at the end of this section.

In the GRIM, DOE used the labor content of the equipment and the manufacturing production costs from the engineering analysis to estimate the annual labor expenditures in the CCW manufacturing industry. DOE used information gained through interviews with manufacturers to estimate the portion of the total labor expenditures that is attributable to domestic labor.

The employment impacts shown in Table V.14 represent the potential

[57] The U.S. Census Bureau's 2012 Economic Census data (form EC1231I1) for NAICS code 333318 can be found at: *http://factfinder2.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t.* Enter ''333318'' in the Industry Codes search option (left).

[58] The U.S. Census Bureau provides the following definition: ''The 'production workers' number includes workers (up through the line-supervisor level) engaged in fabricating, processing, assembling, inspecting, receiving, storing, handling, packing, warehousing, shipping (but not delivering), maintenance, repair, janitorial and guard services, product development, auxiliary production for plant's own use (*e.g.,* power plant), recordkeeping, and other services closely associated with these production operations at the establishment covered by the report. Employees above the working-supervisor level are excluded from this item.'' *https://ask.census.gov/faq.php?id=5000&faqId=6953.*

production employment that could result following amended energy conservation standards. These impacts are independent of the employment impacts from the broader U.S. economy, which are documented in chapter 16 of the final rule TSD.

DOE estimates that, in the absence of amended energy conservation standards, there would be 301 domestic production workers involved in manufacturing CCWs in 2018. Table V.14 shows the range of the impacts of potential amended energy conservation standards on U.S. production workers in the CCW manufacturing industry. The upper end of the results in this table estimates the total potential increase in the number of production workers after amended energy conservation standards come into effect. To calculate the total potential increase, DOE assumed that manufacturers continue to produce the same scope of covered equipment in domestic production facilities and domestic production is not shifted to lower-labor-cost countries. Because there is a risk of manufacturers evaluating sourcing decisions in response to amended energy conservation standards, the lower end of the range of employment results in Table V.14 includes the estimated total number of U.S. production workers in the industry who could lose their jobs if all existing production was moved outside of the United States.

TABLE V.14—CHANGE IN TOTAL NUMBER OF DOMESTIC PRODUCTION EMPLOYEES IN 2018 IN THE CCW INDUSTRY

	Base case	TSL 1	TSL 2	TSL 3	TSL 4
Total Number of Domestic Production Workers in 2018	301	301	301	327	328
Potential Changes in Domestic Production Workers in 2018*		0–(301)	0–(301)	28–(301)	30–(301)

* Values in parentheses are negative values.

Because production employment expenditures are assumed to be a fixed percentage of Cost of Goods Sold (COGS) and the MPCs typically increase with more efficient equipment, labor tracks the increased prices in the GRIM. As efficiency of CCWs increases, so does the complexity of the machines, generally requiring more labor to produce. As previously discussed, for TSL 1, there is no change in MPCs from the base case, and for TSL 2, there is a small increase in MPCs for front-loaders that would be offset by a shift in shipments from front-loaders to top-loaders. As a result, DOE expects that there would be no employment impacts among domestic CCW manufacturers for TSL 1 and TSL 2. For TSL 3 and TSL 4, the GRIM predicts an increase in domestic employment, based on the increase in complexity and relative price of the equipment.

From interviews with manufacturers, DOE estimates that approximately 83 percent of CCWs are currently produced domestically. In the CCW industry, 100 percent of top-loaders are manufactured domestically, while a much larger share of front-loaders are produced internationally. As illustrated in Table V.14, the actual impacts on domestic employment after standards would be different than estimated if any U.S. manufacturer decided to shift remaining U.S. production to lower-cost countries. The proposed standard could result in losing all 301 production workers if all U.S. manufacturers source standards-compliant washers or shift U.S. production internationally. However, feedback from manufacturers during NOPR interviews supports the notion that top-loading CCWs will continue to be produced domestically following amended energy conservation standards, unless the max-tech level is chosen.

c. Impacts on Manufacturing Capacity

According to the majority of CCW manufacturers, new energy conservation standards could potentially impact manufacturers' production capacity, depending on the efficiency level required. For TSL 1 and TSL 2, the most significant conversion costs are the research and development, testing, and certification of equipment with more-efficient components, which does not affect production line capacity. Available information indicates that manufacturers will be able to maintain manufacturing capacity levels and continue to meet market demand under new energy conservation standards as long as manufacturers continue to offer top-loading and front-loading washers.

However, a very high efficiency standard for top-loading clothes washers could cause certain manufacturers to abandon further domestic production of top-loading clothes washers after the effective date, and choose instead to relocate manufacturing internationally or to source from a foreign manufacturer, which could lead to a permanently lower production capacity within the CCW industry.

d. Impacts on Subgroups of Manufacturers

Using average cost assumptions to develop an industry cash flow estimate is not adequate for assessing differential impacts among subgroups of manufacturers. Small manufacturers, niche players, or manufacturers exhibiting a cost structure that differs significantly from the industry average could be affected differently. DOE used the results of the industry characterization to group manufacturers exhibiting similar characteristics.

As outlined earlier, one LVM of CCWs would be disproportionately affected by any energy efficiency regulation in the CCW industry. This business is focused on one specific market segment and is at least ten times smaller than its diversified competitors. Due to this combination of market concentration and size, this LVM is at risk of material harm to its business, depending on the TSL chosen.

The LVM indicated that it could not manufacture top-loading or front-loading washers at the proposed max-tech level (MEF_{J2} of 1.55 and 2.20, respectively, as determined using appendix J2) with its existing manufacturing capital and platform constraints. If DOE were to set the standard at the max-tech level, the LVM believes that a ''green field'' design for front-loaders would likely be required. For top-loaders, the LVM asserts that it does not have the technology to reach the max-tech level, and it would be forced to develop an entirely new business model, possibly ceasing CCW production altogether, sourcing internationally, shifting production internationally, or some combination thereof, which could negatively impact employment in the CCW industry. If the LVM no longer offers top-loading washers, it would likely cease CCW production altogether, resulting in significant impacts to the industry. Currently, the LVM's top-loading washers account for more than half of the company's CCW revenues and three-quarters of its CCW shipments. To shift all top-loading CCWs to front-loading

washers at current production volumes would require substantial investments that the LVM may not be able to justify. In addition, relative to its residential and commercial washer production, the LVM derives an estimated 88 percent of its clothes washer revenue from CCWs, so its sales in the residential clothes washer market would be too low to justify continuing any top-loading clothes washer manufacturing. Further detail and separate analysis of impacts on the LVM are found in chapter 12 of the final rule TSD.

e. Cumulative Regulatory Burden

One aspect of assessing manufacturer burden is the cumulative impact of multiple DOE standards and the regulatory actions of other Federal agencies and states that affect the manufacturers of covered equipment. While any one regulation may not impose a significant burden on manufacturers, the combined effects of several existing or impending regulations may have serious consequences for some manufacturers, groups of manufacturers, or an entire industry.

Companies that produce a wider range of regulated equipment may be faced with more capital and equipment development expenditures than their competitors. This can prompt those companies to exit the market or reduce their equipment offerings, potentially reducing competition. LVMs can be especially affected, since they have lower sales volumes over which to amortize the costs of compliance with new regulations.

In addition to DOE's energy conservation regulations for CCWs, several other existing regulations apply to CCWs and other equipment produced by the same manufacturers. The most significant of these additional regulations include several additional existing or proposed Federal and State energy conservation and environmental standards, consumer equipment safety standards, the Green Chemistry law in California, and standards impacting CCW suppliers such as the Conflict Minerals directive contained within the Dodd-Frank Act of 2010. For more details, see chapter 12 of the final rule TSD.

3. National Impact Analysis

Projections of shipments are an important part of the NIA. Table V.15 presents the estimated cumulative shipments in 2018–2047 in the base-case and under each TSL. Because DOE found CCW units to be relatively price inelastic, DOE estimated that the potential standards would not affect total shipments. However, DOE applied a cross-price elasticity to estimate how the market would shift between front-loading and top-loading units in response to a change in price of the unit. At higher TSLs, there is a shift toward front-loading units.

TABLE V.15—PROJECTED CUMULATIVE SHIPMENTS OF FRONT- AND TOP-LOADING COMMERCIAL CLOTHES WASHER UNITS IN 2018–2047

[Million units]

	Base case	TSL1	TSL2	TSL3	TSL 4 Max tech
		FL:EL1 TL:EL1	FL:EL2 TL:EL1	FL:EL2 TL:EL2	FL:EL3 TL:EL2
Front Loading	2.55	2.55	2.55	2.68	2.61
Top Loading	3.74	3.74	3.74	3.61	3.68
Total	6.29	6.29	6.29	6.29	6.29

a. Significance of Energy Savings

For each TSL, DOE projected energy savings for front-loading and top-loading CCW units purchased in the 30-year period that begins in the year of anticipated compliance with amended standards (2018–2047). The savings are measured over the entire lifetime of equipment purchased in the 30-year period. DOE quantified the energy savings attributable to each TSL as the difference in energy consumption between each standards case and the base case. Table V.16 presents the estimated primary energy savings for each considered TSL, and Table V.17 presents the estimated FFC energy savings for each TSL. The approach for estimating national energy savings is further described in section IV.H. The negative savings for front-loading units in TSLs 3 and 4 are a consequence of the projected increase in shipments relative to the base case.

TABLE V.16—CUMULATIVE PRIMARY ENERGY SAVINGS FOR FRONT-LOADING AND TOP-LOADING COMMERCIAL CLOTHES WASHERS TRIAL STANDARD LEVELS FOR UNITS SOLD IN 2018–2047

Equipment class	Trial standard level			
	1	2	3	4
	Quads			
Front Loading CCW Units	0.000	0.007	−0.005	−0.007
Top Loading CCW Units	0.060	0.060	0.136	0.127
Total All Classes	0.060	0.067	0.131	0.120

TABLE V.17—CUMULATIVE FULL-FUEL-CYCLE ENERGY SAVINGS FOR FRONT-LOADING AND TOP-LOADING COMMERCIAL CLOTHES WASHERS TRIAL STANDARD LEVELS FOR UNITS SOLD IN 2018–2047

Equipment class	Trial standard level			
	1	2	3	4
	Quads			
Front Loading CCW Units	0.000	0.007	−0.005	−0.008
Top Loading CCW Units	0.065	0.065	0.145	0.136
Total All Classes	0.065	0.072	0.140	0.128

OMB Circular A–4 [59] requires agencies to present analytical results, including separate schedules of the monetized benefits and costs that show the type and timing of benefits and costs. Circular A–4 also directs agencies to consider the variability of key elements underlying the estimates of benefits and costs. For this rulemaking, DOE undertook a sensitivity analysis using nine instead of 30 years of equipment shipments. This choice reflects the timeline in EPCA for the review of certain energy conservation standards and potential revision of and compliance with such revised standards.[60] The review timeframe established in EPCA is generally not synchronized with the equipment lifetime, equipment manufacturing cycles, or other factors specific to CCWs. Thus, this information is presented for informational purposes only and is not indicative of any change in DOE's analytical methodology. The NES results based on a nine-year analytical period are presented in Table V.18. The impacts are counted over the lifetime of CCWs purchased in 2018–2026.

TABLE V.18—CUMULATIVE PRIMARY ENERGY SAVINGS FOR FRONT-LOADING AND TOP-LOADING COMMERCIAL CLOTHES WASHERS TRIAL STANDARD LEVELS FOR UNITS SOLD IN 2018–2026

Equipment class	Trial standard level			
	1	2	3	4
	Quads			
Front Loading CCW Units	0.0	0.002	−0.001	−0.001
Top Loading CCW Units	0.019	0.019	0.042	0.039
Total All Classes	0.019	0.021	0.041	0.038

b. Net Present Value of Customer Costs and Benefits

DOE estimated the cumulative NPV of the total costs and savings for customers that would result from the TSLs considered for CCWs. In accordance with OMB's guidelines on regulatory analysis,[61] DOE calculated the NPV using both a 7-percent and a 3-percent real discount rate. The 7-percent rate is an estimate of the average before-tax rate of return on private capital in the U.S. economy, and reflects the returns on real estate and small business capital as well as corporate capital. This discount rate approximates the opportunity cost of capital in the private sector. The 3-percent rate reflects the potential effects of standards on private consumption (*e.g.,* through higher prices for equipment and reduced purchases of energy). This rate represents the rate at which society discounts future consumption flows to their present value. It can be approximated by the real rate of return on long-term government debt (*i.e.,* yield on United States Treasury notes), which has averaged about 3 percent for the past 30 years.

Table V.19 shows the customer NPV results for each TSL considered for CCWs. In each case, the impacts cover the lifetime of equipment purchased in 2018–2047.

TABLE V.19—NET PRESENT VALUE OF CUSTOMER BENEFITS FOR FRONT-LOADING AND TOP-LOADING COMMERCIAL CLOTHES WASHERS TRIAL STANDARD LEVELS FOR UNITS SOLD IN 2018–2047

Equipment class	Discount rate %	Trial standard level			
		1	2	3	4
		billion 2013$			
Front Loading CCW Units	3	0.0	0.1	−0.1	−0.3

[59] U.S. Office of Management and Budget, *Circular A–4: Regulatory Analysis* (2003), available at *http://www.whitehouse.gov/omb/circulars_a004_a-4/.*

[60] Section 325(m) of EPCA requires DOE to review its standards at least once every 6 years, and requires, for certain products, a 3-year period after any new standard is promulgated before compliance is required, except that in no case may any new standards be required within 6 years of the compliance date of the previous standards. While adding a 6-year review to the 3-year compliance period adds up to 9 years, DOE notes that it may undertake reviews at any time within the 6 year period and that the 3-year compliance date may yield to the 6-year backstop. A 9-year analysis period may not be appropriate given the variability that occurs in the timing of standards reviews and the fact that for some consumer products, the compliance period is 5 years rather than 3 years.

[61] OMB Circular A–4, section E, *supra* note 52.

TABLE V.19—NET PRESENT VALUE OF CUSTOMER BENEFITS FOR FRONT-LOADING AND TOP-LOADING COMMERCIAL CLOTHES WASHERS TRIAL STANDARD LEVELS FOR UNITS SOLD IN 2018–2047—Continued

Equipment class	Discount rate %	Trial standard level			
		1	2	3	4
Top Loading CCW Units		0.4	0.4	2.0	1.9
Total All Classes		0.4	0.5	1.9	1.6
Front Loading CCW Units	7	0.0	0.0	−0.1	−0.1
Top Loading CCW Units		0.2	0.2	0.9	0.8
Total All Classes		0.2	0.2	0.9	0.7

The NPV results based on the nine-year analytical period discussed in section V.B.3.a are presented in Table V.20. The impacts are counted over the lifetime of equipment purchased in 2018–2026. As mentioned previously, this information is presented for informational purposes only and is not indicative of any change in DOE's analytical methodology or decision criteria.

TABLE V.20—NET PRESENT VALUE OF CUSTOMER BENEFITS FOR FRONT-LOADING AND TOP-LOADING COMMERCIAL CLOTHES WASHERS TRIAL STANDARD LEVELS FOR UNITS SOLD IN 2018–2026†

Equipment class	Discount rate %	Trial standard level			
		1	2	3	4
					billion 2013$
Front Loading CCW Units	3	0.0	0.0	0.0	(0.1)
Top Loading CCW Units		0.2	0.2	0.7	0.7
Total All Classes		0.2	0.2	0.7	0.6
Front Loading CCW Units	7	0.0	0.0	0.0	0.0
Top Loading CCW Units		0.1	0.1	0.4	0.4
Total All Classes		0.1	0.1	0.4	0.4

† Values in parentheses are negative values.

c. Indirect Impacts on Employment

DOE expects energy conservation standards for front-loading and top-loading CCWs to reduce energy costs for equipment owners, and the resulting net savings to be redirected to other forms of economic activity. Those shifts in spending and economic activity could affect the demand for labor. As described in section IV.N, DOE used an input/output model of the U.S. economy to estimate indirect employment impacts of the TSLs that DOE considered in this rulemaking. DOE understands that there are uncertainties involved in projecting employment impacts, especially changes in the later years of the analysis. Therefore, DOE generated results for near-term time frames, where these uncertainties are reduced.

The results suggest that the standards are likely to have negligible impact on the net demand for labor in the economy. The net change in jobs is so small that it would be imperceptible in national labor statistics and might be offset by other, unanticipated effects on employment. Chapter 16 of the final rule TSD presents detailed results.

4. Impact on Utility

As discussed in section IV.C, DOE has determined that the amended standards will not lessen the utility of front-loading and top-loading CCWs.

5. Impact of Any Lessening of Competition

EPCA directs DOE to consider any lessening of competition that is likely to result from standards. It also directs the Attorney General of the United States (Attorney General) to determine the impact, if any, of any lessening of competition likely to result from amended standard and to transmit such determination in writing to the Secretary within 60 days of the publication of amended rule, together with an analysis of the nature and extent of the impact. (42 U.S.C. 6295(o)(2)(B)(i)(V) and (ii))

To assist the Attorney General in making such determination for these standards, DOE provided the DOJ with copies of the March 2014 NOPR and the TSD for review. In its assessment letter responding to DOE, DOJ concluded that the amended energy conservation standards for CCWs are unlikely to have a significant adverse impact on competition.

6. Need of the Nation to Conserve Energy

Enhanced energy efficiency, where economically justified, improves the nation's energy security, strengthens the economy, and reduces the environmental impacts or costs of energy use and production. Reduced electricity demand due to energy conservation standards is also likely to reduce the cost of maintaining the reliability of the electricity system, particularly during peak-load periods. As a measure of this reduced demand, chapter 15 in the final rule TSD presents the estimated reduction in generating capacity for the TSLs that DOE considered in this rulemaking.

Energy savings from standards for CCWs could also produce environmental benefits in the form of reduced emissions of air pollutants and greenhouse gases. Table V.21 provides DOE's estimate of cumulative emissions reductions projected to result from the TSLs considered in this rulemaking. DOE reports annual emissions reductions for each TSL in chapter 13 of the final rule TSD.

TABLE V.21—CUMULATIVE EMISSIONS REDUCTION ESTIMATED FOR FRONT-LOADING AND TOP-LOADING COMMERCIAL CLOTHES WASHERS TRIAL STANDARD LEVELS

	Trial standard level			
	1	2	3	4
Power Sector and Site Emissions*				
CO_2 (million metric tons)	3.4	3.8	7.5	6.9
SO_2 (thousand tons)	1.8	1.9	4.2	4.2
NO_X (thousand tons)	3.5	4.0	7.4	6.5
Hg (tons)	0.0	0.0	0.0	0.0
N_2O (thousand tons)	0.0	0.0	0.1	0.1
CH_4 (thousand tons)	0.2	0.2	0.5	0.5
Upstream Emissions				
CO_2 (million metric tons)	0.3	0.3	0.6	0.5
SO_2 (thousand tons)	0.0	0.0	0.1	0.1
NO_X (thousand tons)	4.5	5.1	9.2	8.0
Hg (tons)	0.0	0.0	0.0	0.0
N_2O (thousand tons)	0.0	0.0	0.0	0.0
CH_4 (thousand tons)	27.7	31.8	56.6	48.8
Total Emissions				
CO_2 (million metric tons)	3.7	4.1	8.1	7.4
SO_2 (thousand tons)	1.8	1.9	4.3	4.3
NO_X (thousand tons)	8.0	9.1	16.6	14.5
Hg (tons)	0.0	0.0	0.0	0.0
N_2O (thousand tons)	0.0	0.0	0.1	0.1
N_2O (thousand tons CO_2eq)**	8.8	9.3	20.5	20.1
CH_4 (thousand tons)	28.0	32.0	57.2	49.3
CH_4 (thousand tons CO_2eq)**	783.1	897.3	1600.6	1380.3

* Includes site emissions from gas water heaters.
** CO_2eq is the quantity of CO_2 that would have the same GWP.

As part of the analysis for this rule, DOE estimated monetary benefits likely to result from the reduced emissions of CO_2 and NO_X that DOE estimated for each of the TSLs considered. As discussed in section IV.L, DOE used the most recent values for the SCC developed by an interagency process. The four sets of SCC values resulting from that process (expressed in 2013$) are represented by $12.0/metric ton (the average value from a distribution that uses a 5-percent discount rate), $40.5/metric ton (the average value from a distribution that uses a 3-percent discount rate), $62.4/metric ton (the average value from a distribution that uses a 2.5-percent discount rate), and $119/metric ton (the 95th-percentile value from a distribution that uses a 3-percent discount rate). These values correspond to the value of emission reductions in 2015; the values for later years are higher due to increasing damages as the projected magnitude of climate change increases.

Table V.22 presents the global value of CO_2 emissions reductions at each TSL. For each of the four cases, DOE calculated a present value of the stream of annual values using the same discount rate as was used in the studies upon which the dollar-per-ton values are based. DOE calculated domestic values as a range from 7 percent to 23 percent of the global values, and these results are presented in chapter 14 of the final rule TSD.

TABLE V.22—ESTIMATES OF PRESENT VALUE OF CO_2 EMISSIONS REDUCTION UNDER FRONT-LOADING AND TOP-LOADING COMMERCIAL CLOTHES WASHERS TRIAL STANDARD LEVELS

TSL	SCC Case*			
	5% discount rate, average*	3% discount rate, average*	2.5% discount rate, average*	3% discount rate, 95th percentile*
				Million 2013$
Power Sector and Site Emissions				
1	24.3	110.7	175.4	342.0
2	26.7	121.9	193.3	376.8
3	52.9	240.9	381.9	744.4
4	48.8	222.1	352.1	686.2
Upstream Emissions				
1	2.1	9.5	15.0	29.3
2	2.3	10.8	17.1	33.3

TABLE V.22—ESTIMATES OF PRESENT VALUE OF CO_2 EMISSIONS REDUCTION UNDER FRONT-LOADING AND TOP-LOADING COMMERCIAL CLOTHES WASHERS TRIAL STANDARD LEVELS—Continued

TSL	SCC Case*			
	5% discount rate, average*	3% discount rate, average*	2.5% discount rate, average*	3% discount rate, 95th percentile*
				Million 2013$
3	4.2	19.5	31.0	60.4
4	3.7	17.1	27.1	52.8
Total Emissions				
1	26.4	120.2	190.5	371.3
2	29.1	132.7	210.4	410.1
3	57.1	260.4	413.0	804.8
4	52.5	239.2	379.2	739.0

*For each of the four cases, the corresponding global SCC value for emissions in 2015 is $12.0, $40.5, $62.4, and $119 per metric ton (2013$).

DOE is well aware that scientific and economic knowledge about the contribution of CO_2 and other greenhouse gas (GHG) emissions to changes in the future global climate and the potential resulting damages to the world economy continues to evolve rapidly. Thus, any value placed on reducing CO_2 emissions in this rulemaking is subject to change. DOE, together with other Federal agencies, will continue to review various methodologies for estimating the monetary value of reductions in CO_2 and other GHG emissions. This ongoing review will consider the comments on this subject that are part of the public record for this and other rulemakings, as well as other methodological assumptions and issues. However, consistent with DOE's legal obligations, and taking into account the uncertainty involved with this particular issue, DOE has included in this final rule the most recent values and analyses resulting from the interagency process.

DOE also estimated the cumulative monetary value of the economic benefits associated with NO_X emissions reductions anticipated to result from amended standards for CCWs. The dollar-per-ton values that DOE used are discussed in section IV.L. Table V.23 presents the cumulative present values for each TSL calculated using seven-percent and three-percent discount rates.

TABLE V.23—ESTIMATES OF PRESENT VALUE OF NO_X EMISSIONS REDUCTION UNDER FRONT-LOADING AND TOP-LOADING COMMERCIAL CLOTHES WASHERS TRIAL STANDARD LEVELS

TSL	3% discount rate	7% discount rate
		Million 2013$
Power Sector and Site Emissions		
1	5.0	2.5
2	5.6	2.7
3	10.5	5.1
4	9.4	4.6
Upstream Emissions		
1	6.2	3.0
2	7.1	3.3
3	12.7	6.0
4	11.1	5.3
Total Emissions		
1	11.2	5.4
2	12.7	6.1
3	23.2	11.2

TABLE V.23—ESTIMATES OF PRESENT VALUE OF NO_X EMISSIONS REDUCTION UNDER FRONT-LOADING AND TOP-LOADING COMMERCIAL CLOTHES WASHERS TRIAL STANDARD LEVELS—Continued

TSL	3% discount rate	7% discount rate
		Million 2013$
4	20.4	9.9

7. Summary of National Economic Impacts

The NPV of the monetized benefits associated with emissions reductions can be viewed as a complement to the NPV of the customer savings calculated for each TSL considered in this rulemaking. Table V.24 presents the NPV values that result from adding the estimates of the potential economic benefits resulting from reduced CO_2 and NO_X emissions in each of four valuation scenarios to the NPV of customer savings calculated for each TSL considered in this rulemaking, at both a seven-percent and three-percent discount rate. The CO_2 values used in the columns of each table correspond to the four sets of SCC values discussed above.

TABLE V.24—NET PRESENT VALUE OF CUSTOMER SAVINGS COMBINED WITH PRESENT VALUE OF MONETIZED BENEFITS FROM CO_2 AND NO_X EMISSIONS REDUCTIONS

TSL	Customer NPV at 3% Discount Rate added with:			
	SCC Case $12.0/t and NO_X medium value*	SCC Case $40.5/t and NO_X medium value*	SCC Case $62.4/t and NO_X medium value*	SCC Case $119/t and NO_X medium value*
	Billion 2013$			
1	0.5	0.6	0.6	0.8
2	0.6	0.7	0.8	1.0
3	2.0	2.2	2.4	2.8

TABLE V.24—NET PRESENT VALUE OF CUSTOMER SAVINGS COMBINED WITH PRESENT VALUE OF MONETIZED BENEFITS FROM CO_2 AND NO_X EMISSIONS REDUCTIONS—Continued

TSL	Customer NPV at 3% Discount Rate added with:			
	SCC Case $12.0/t and NO_X medium value*	SCC Case $40.5/t and NO_X medium value*	SCC Case $62.4/t and NO_X medium value*	SCC Case $119/t and NO_X medium value*
4	1.6	1.8	2.0	2.3
Customer NPV at 7% Discount Rate added with:				
1	0.2	0.3	0.4	0.6
2	0.3	0.4	0.5	0.7
3	0.9	1.1	1.3	1.7
4	0.8	1.0	1.1	1.5

* These label values represent the global SCC in 2015, in 2013$. For NO_X emissions, each case uses the medium value, which corresponds to $2,684 per ton.

Although adding the value of customer savings to the values of emission reductions provides a valuable perspective, two issues should be considered. First, the national operating cost savings are domestic U.S. customer monetary savings that occur as a result of market transactions, while the value of CO_2 reductions is based on a global value. Second, the assessments of operating cost savings and the SCC are performed with different methods that use different time frames for analysis. The national operating cost savings is measured for the lifetime of equipment shipped in 2018–2047. The SCC values, on the other hand, reflect the present value of future climate-related impacts resulting from the emission of one metric ton of CO_2 in each year. These impacts continue well beyond 2100.

8. Other Factors

The Secretary of Energy, in determining whether a standard is economically justified, may consider any other factors that the Secretary deems to be relevant. (42 U.S.C. 6313(a)(6)(B)(ii)(VII)) No other factors were considered in this analysis.

C. Conclusion

EPCA requires that the new or amended energy conservation standard that DOE adopts for any type (or class) of covered equipment shall be designed to achieve the maximum improvement in energy efficiency that the Secretary of Energy determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A) and 6316(a)) In determining whether a standard is economically justified, the Secretary must determine whether the benefits of the standard exceed its burdens to the greatest extent practicable, considering the seven statutory factors discussed previously. (42 U.S.C. 6295(o)(2)(B)(i) and 6316(a)) The new or amended standard must also ''result in significant conservation of energy.'' (42 U.S.C. 6295(o)(3)(B) and 6316(a))

For this final rule, DOE considered the impacts of standards at each TSL, beginning with the maximum technologically feasible level, to determine whether that level was economically justified. Where the max-tech level was not justified, DOE then considered the next most efficient level and undertook the same evaluation until it reached the highest efficiency level that is technologically feasible, economically justified and saves a significant amount of energy.

To aid the reader in understanding the benefits and/or burdens of each TSL, tables in this section summarize the quantitative analytical results for each TSL, based on the assumptions and methodology discussed herein. The efficiency levels contained in each TSL are described in section V.A. In addition to the quantitative results presented in the tables, DOE also considers other burdens and benefits that affect economic justification. These include the impacts on identifiable subgroups of customers who may be disproportionately affected by a national standard (see section V.B.1.b), and impacts on employment. DOE discusses the impacts on employment in front-loading and top-loading CCW equipment manufacturing in section V.B.2, and discusses the indirect employment impacts in section V.B.3.c.

1. Benefits and Burdens of Trial Standard Levels Considered for Commercial Clothes Washers

Table V.25 and Table V.26 summarize the quantitative impacts estimated for each TSL for CCWs.

TABLE V.25—SUMMARY OF ANALYTICAL RESULTS FOR COMMERCIAL CLOTHES WASHERS: NATIONAL IMPACTS

Category	TSL 1	TSL 2	TSL 3	TSL 4
National FFC Energy Savings *quads*				
	0.065	0.072	0.140	0.128
NPV of Customer Benefits *2013$ billion*				
3% discount rate	0.4	0.5	1.9	1.6
7% discount rate	0.2	0.2	0.9	0.7
Cumulative Emissions Reduction (Total FFC Emissions)				
CO_2 *million metric tons*	3.73	4.13	8.09	7.41
NO_X *thousand tons*	8.01	9.10	16.60	14.54
Hg *tons*	0.01	0.01	0.01	0.01
N_2O *thousand tons*	0.03	0.04	0.10	0.10

TABLE V.25—SUMMARY OF ANALYTICAL RESULTS FOR COMMERCIAL CLOTHES WASHERS: NATIONAL IMPACTS—Continued

Category	TSL 1	TSL 2	TSL 3	TSL 4
N_2O *thousand tons* CO_2eq*	8.79	9.32	20.55	20.08
CH_4 *thousand tons*	27.97	32.05	57.17	49.29
CH_4 *thousand tons* CO_2eq*	783.1	897.3	1600.6	1380.3
SO_2 *thousand tons*	1.80	1.88	4.29	4.26
Value of Emissions Reduction (Total FFC Emissions)				
CO_2 *2013$ million***	26—371	29—410	57—805	53—739
NO_X—3% discount rate *2013$ million*	11.2	12.7	23.2	20.4
NO_X—7% discount rate *2013$ million*	5.4	6.1	11.2	9.9

* CO_2eq is the quantity of CO_2 that would have the same GWP.
** Range of the economic value of CO_2 reductions is based on estimates of the global benefit of reduced CO_2 emissions.

TABLE V.26—SUMMARY OF ANALYTICAL RESULTS FOR FRONT-LOADING AND TOP-LOADING COMMERCIAL CLOTHES WASHERS: MANUFACTURER AND CUSTOMER IMPACTS

Category	TSL 1	TSL 2	TSL 3	TSL 4
Manufacturer Impacts				
Change in INPV (*2013$ million*)†	(6.4)	(6.6)	(67.5)	(99.6)
Change in INPV (*%*)†	(5.2%)	(5.3%)	(54.6%)	(80.7%)
Customer Mean LCC Savings *2013$*				
Front-Loading, Multi-family†	221.4	271.9	271.9	(2.7)
Front-Loading, Laundromat†	184.3	212.3	212.3	(10.2)
Top-Loading, Multi-family	294.5	294.5	807.4	807.4
Top-Loading, Laundromat	165.7	165.7	622.4	622.4
Weighted Average*	251.4	270.3	573.0	466.3
Customer Simple PBP *years*				
Front-Loading, Multi-family	0.0	0.0	0.0	1.1
Front-Loading, Laundromat	0.0	0.0	0.0	1.0
Top-Loading, Multi-family	0.0	0.0	0.7	0.7
Top-Loading, Laundromat	0.0	0.0	0.6	0.6
Weighted Average*	0.0	0.0	0.4	0.8
Customers with Net Cost *%*				
Front-Loading, Multi-Family	0	0	0	55
Front-Loading, Laundromat	0	0	0	65
Top-Loading, Multi-Family	0	0	0	0
Top-Loading, Laundromat	0	0	0	0
Weighted Average*	0	0	0	23

* Weighted by shares of each equipment class in total projected shipments in 2018.
† Values in parentheses are negative values.

First, DOE considered TSL 4, the max tech level, which would save an estimated total of 0.128 quads of energy, an amount DOE considers significant. TSL 4 has an estimated NPV of customer benefit of $0.71 billion using a 7 percent discount rate, and $1.58 billion using a 3 percent discount rate.

The cumulative emissions reductions at TSL 4 are 7.41 million metric tons of CO_2, 14.54 thousand tons of NO_X, 4.26 thousand tons of SO_2, 49.29 thousand tons of CH_4, 0.08 thousand tons of N_2O, and 0.01 tons of Hg (see Table V.25). The estimated monetary value of the CO_2 emissions reductions at TSL 4 ranges from $53 million to $739 million.

For front-loading CCWs at TSL 4, the mean LCC savings decreases by $3 and $10 for multi-family and laundromat applications, respectively. The simple payback period is 1.1 years and 1.0 years for multifamily and laundromat applications, respectively. On the other hand, top-loading CCWs have a mean LCC savings of $807 and $622 for multi-family and laundromat applications, respectively, and the simple PBP is 0.7 years and 0.6 years for multi-family and laundromat applications, respectively. The share of customers that would experience a net LCC cost (*i.e.,* LCC increase) is 55 percent and 65 percent for multifamily and laundromat applications of front-loading CCW units, respectively. For top-loading CCW units, no customers would experience a net LCC cost.

At TSL 4, the projected change in INPV ranges from a decrease of $99.6 million to a decrease of $103.8 million, equivalent to 80.7 percent and 84.1 percent, respectively. CCWs that meet the efficiency standards specified by this TSL are forecast to represent only

8 percent of shipments in the year leading up to amended standards. As such, manufacturers would have to redesign nearly all equipment by the 2018 compliance date to meet demand. Redesigning all units to meet the current max tech efficiency levels would require considerable capital and equipment conversion expenditures. At TSL 4, the capital conversion costs total $63.1 million, 13.7 times the industry annual capital expenditure in the year leading up to the standards compliance year of 2018. DOE estimates that complete platform redesigns would cost the industry $62.4 million in product conversion costs. These conversion costs largely relate to the research programs required to develop new equipment that meet the efficiency standards set forth by TSL 4. These costs are equivalent to 14.9 times the industry annual budget for research and development. Total capital and product conversion costs associated with the changes in equipment and manufacturing facilities required at TSL 4 would require significant use of manufacturers' financial reserves (manufacturer capital pools), impacting other areas of business that compete for these resources, and significantly reducing INPV. In addition, manufacturers could face a substantial impact on profitability at TSL 4. Because manufacturers are more likely to reduce their margins to maintain a price-competitive equipment at higher TSLs, DOE expects that TSL 4 would yield impacts closer to the high end of the range of INPV impacts (*i.e.* most severe). If the high end of the range of impacts is reached, as DOE expects, TSL 4 could result in a net loss of 84.1 percent in INPV to CCW manufacturers. As a result, at TSL 4, DOE expects that some companies would be forced to exit the CCW market or shift production abroad, both which would negatively impact domestic manufacturing capacity and employment.

More specifically, DOE expects that the level of investments that the LVM would be required to make at TSL 4 would be unmanageable and may result in the LVM exiting the top-loading market or the CCW market altogether. This would negatively impact competition in the industry by reducing the number of market actors. Relative to the LVM's major competitor, disproportionate impacts are high at the max tech level for top-loading CCW units. This is due to the fact that the LVM's major competitor already produces at the max tech level for top-loading units. Thus, for the major competitor, there is no conversion cost burden associated with a standard for top-loading units. Conversely, for reasons mentioned in the preceding paragraph, the LVM will have high conversion costs at the max tech level for top-loading units.

Therefore, for TSL 4, DOE concludes that the benefits of energy savings, positive NPV of total customer benefits, customer average LCC savings for two of the four applications, emission reductions and the estimated monetary value of the emissions reductions would be outweighed by the negative customer impacts for front-loading CCWs in multi-family and laundromat applications, the large reduction in industry value at TSL 4, as well as the potential for loss of domestic manufacturing. Consequently, DOE concludes that TSL 4 is not economically justified.

Next, DOE considered TSL 3, which would save an estimated total of 0.14 quads of energy, an amount DOE considers significant. TSL 3 has an estimated NPV of customer benefit of $0.87 billion using a 7 percent discount rate, and $1.93 billion using a 3 percent discount rate.

The cumulative emissions reductions at TSL 3 are 8.09 million metric tons of CO_2, 16.60 thousand tons of NO_X, 4.29 thousand tons of SO_2, 57.17 thousand tons of CH_4, 0.08 thousand tons of N_2O, and 0.01 tons of Hg. The estimated monetary value of the CO_2 emissions reductions at TSL 3 ranges from $57 million to $805 million.

At TSL 3, the average LCC savings is $272 and $212 for front-loading CCW units for multi-family and laundromat applications, respectively. For top-loading CCW units, the average LCC savings are $807 and $622 for multi-family and laundromat applications, respectively. The simple PBP is close to zero years for both applications of front-loading CCW units, 0.7 and 0.6 years for multi-family and laundromat applications of top-loading CCW units. DOE estimates that no customer would experience a net LCC cost for both front-loading and top-loading CCW units.

At TSL 3, the projected change in INPV ranges from a decrease of $67.5 million to a decrease of $70.5 million, equivalent to 54.6 percent and 57.1 percent, respectively. CCWs that meet the efficiency standards specified by this TSL are forecast to represent only 29 percent of shipments (11% for top-loading CCW units only) in 2017 (the year leading up to amended standards). As such, manufacturers would have to redesign a large portion of CCWs by the 2018 compliance date to meet demand. Redesigning all top-loading units to meet the current max tech efficiency level would require considerable capital and equipment conversion expenditures. At TSL 3, the capital conversion costs total $38.7 million, 8.4 times the industry annual capital expenditure in the year leading up to amended standards. DOE estimates that complete platform redesign for top-loading units and upgrades to front-loading units would cost the industry $50.9 million in product conversion costs. These conversion costs largely relate to the research programs required to develop new equipment that meet the efficiency standards set forth by TSL 3. These costs are equivalent to 12.1 times the industry annual budget for research and development. In addition, total capital and product conversion costs associated with the changes in equipment and manufacturing facilities required at TSL 3 would require significant use of manufacturers' financial reserves, impacting other areas of business that compete for these resources, and significantly reducing INPV. In addition, manufacturers could face a substantial impact on profitability at TSL 3. Because manufacturers are more likely to reduce their margins to maintain a price-competitive CCW at higher TSLs, DOE expects that TSL 3 would yield impacts closer to the high end of the range of INPV impacts. If the high end of the range of impacts is reached, as DOE expects, TSL 3 could result in a net loss of 84.1 percent in INPV to CCW manufacturers. As a result, at TSL 3, DOE expects that some companies would be forced to exit the CCW market or shift production internationally, both which would negatively impact domestic manufacturing capacity and employment.

In terms of the LVM, DOE expects the level of investments that the LVM would be required to make at TSL 3 would be unmanageable and may result in the LVM exiting the top-loading market. In terms of disproportionate impacts relative to the LVM's major competitor, disproportionate impacts are high at the max tech level for top-loading CCW units. This is due to the fact that the LVM's major competitor already produces at the max tech level for top-loading units. Thus, for the major competitor, there is no conversion cost burden associated with a standard for top-loading units. Conversely, for reasons mentioned in the preceding paragraph, the LVM will have high conversion costs at TSL 3 for top-loading units.

In view of the foregoing, DOE concludes that, at TSL 3 for front-loading and top-loading CCW equipment, the benefits of energy

savings, positive NPV of customer benefit, positive impacts on customers, emission reductions, and the estimated monetary value of the emissions reductions would not outweigh the large reduction in industry value at TSL 3, as well as the potential for loss of domestic manufacturing. Consequently, DOE concludes that TSL 3 is not economically justified.

Next, DOE considered TSL 2, which would save an estimated total of 0.072 quads of energy, an amount DOE considers significant. TSL 2 has an estimated NPV of customer benefit of $0.24 billion using a 7 percent discount rate, and $0.53 billion using a 3 percent discount rate.

The cumulative emissions reductions at TSL 2 are 4.13 million metric tons of CO_2, 9.10 thousand tons of NO_X, 1.88 thousand tons of SO_2, 32.05 thousand tons of CH_4, 0.04 thousand tons of N_2O, and 0.01 tons of Hg. The estimated monetary value of the CO_2 emissions reductions at TSL 2 ranges from $29 million to $410 million.

At TSL 2, the average LCC savings is $272 and $212 for front-loading CCW units for multi-family and laundromat applications, respectively. For top-loading CCW units, the average LCC savings are $294 and $166 for multi-family and laundromat applications. The simple PBP is close to zero years for both applications of front-loading as well as top-loading CCW units. DOE estimates that no customer would experience a net LCC cost for both front-loading and top-loading CCW units.

At TSL 2, the projected change in INPV is a decrease of $6.6 million, or a decrease of 5.3 percent. Although CCWs that meet the efficiency standards specified by this TSL are forecast to represent only 39 percent of shipments in the year leading up to amended standards, DOE's testing and reverse-engineering analyses indicate that manufacturers can achieve TSL 2 at little or no additional capital cost compared to models at the current baseline levels. Through its analyses, DOE observed that manufacturers generally employ control strategies to achieve the TSL 2 efficiency levels (*e.g.,* changes in water levels, water temperatures, and cycle settings available to the end-user). Accordingly, this level corresponds more to incremental equipment conversions rather than platform redesigns. Thus, DOE estimates that compliance with TSL 2 would not require any upfront capital investments. TSL 2 will require an estimated $10.2 million in product conversion costs primarily relating to the research and development programs needed to improve upon existing platforms to meet the specified efficiency levels. This represents 2.4 times the industry budget for research and development in 2017 (the year leading up to amended standards), as indicated in the GRIM and described in greater detail in chapter 12 of the final rule TSD. The substantial reduction in conversion costs corresponding to compliance with TSL 2 (relative to TSL 3 and TSL 4) greatly mitigates the operational risk and impact on INPV.

After considering the analysis and weighing the benefits and the burdens, DOE concludes that at TSL 2 for front-loading and top-loading CCW equipment, the benefits of energy savings, positive NPV of customer benefit, positive impacts on customers (as indicated by positive average LCC savings, favorable PBPs, and the large percentage of customers who would experience LCC benefits), emission reductions, and the estimated monetary value of the emissions reductions would outweigh the potential reductions in INPV for manufacturers. DOE concludes that TSL 2 would save a significant amount of energy and is technologically feasible and economically justified.

Based on the above considerations, DOE adopts the energy conservation standards for front-loading and top-loading CCWs at TSL 2.

Table V.27 presents the amended energy conservation standards for CCW equipment.

TABLE V.27—AMENDED ENERGY CONSERVATION STANDARDS FOR COMMERCIAL CLOTHES WASHERS

Equipment class	Minimum MEF_{J2}*	Maximum IWF †
Top-Loading	1.35	8.8
Front-Loading	2.00	4.1

* MEF_{J2} (appendix J2 modified energy factor) is calculated as the clothes container capacity in cubic feet divided by the sum, expressed in kilo-watt-hours (kWh), of: (1) the total weighted per-cycle hot water energy consumption; (2) the total weighted per-cycle machine electrical energy consumption; and (3) the per-cycle energy consumption for removing moisture from a test load.

† IWF (integrated water factor) is calculated as the sum, expressed in gallons per cycle, of the total weighted per-cycle water consumption for all wash cycles divided by the clothes container capacity in cubic feet.

2. Summary of Benefits and Costs (Annualized) of the Amended Standards

For equipment sold between 2018 and 2047, the benefits and costs of the amended standards can also be expressed in terms of annualized values. The annualized monetary values are the sum of (1) the annualized national economic value of the benefits from customer operation of equipment that meet the amended standards (consisting primarily of operating cost savings from using less energy, minus increases in equipment purchase and installation costs, which is another way of representing customer NPV), and (2) the annualized monetary value of the benefits of emission reductions, including CO_2 emission reductions.[62]

Although combining the values of operating savings and CO_2 emission reductions provides a useful perspective, two issues should be considered. First, the national operating savings are domestic U.S. customer monetary savings that occur as a result of market transactions while the value of CO_2 reductions is based on a global value. Second, the assessments of operating cost savings and CO_2 savings are performed with different methods that use different time frames for analysis. The national operating cost savings is measured for the lifetime of front-loading and top-loading CCWs shipped between 2018 and 2047. The SCC values, on the other hand, reflect the present value of some future climate-related impacts resulting from the emission of one ton of carbon

[62] DOE used a two-step calculation process to convert the time-series of costs and benefits into annualized values. First, DOE calculated a present value in 2014, the year used for discounting the NPV of total customer costs and savings, for the time-series of costs and benefits using discount rates of three and seven percent for all costs and benefits except for the value of CO_2 reductions. For the latter, DOE used a range of discount rates. From the present value, DOE then calculated the fixed annual payment over a 30-year period (2018 through 2047) that yields the same present value. The fixed annual payment is the annualized value. Although DOE calculated annualized values, this does not imply that the time-series of cost and benefits from which the annualized values were determined is a steady stream of payments.

dioxide in each year. These impacts continue well beyond 2100.

Estimates of annualized benefits and costs of the amended standards for front-loading and top-loading CCWs are shown in Table V.28. Using a 7-percent discount rate for benefits and costs [63] the cost of the standards amended in the rule is $0.02 million per year in increased equipment costs; while the estimated benefits are $24 million per year in reduced equipment operating costs, $7 million in CO_2 reductions, and $0.60 million in reduced NO_X emissions. In this case, the net benefit would amount to $32 million per year. Using a 3-percent discount rate for all benefits and costs and the average SCC series, the estimated cost of the standards amended in the rule is $0.03 million per year in increased equipment costs; while the estimated benefits are $30 million per year in reduced operating costs, $7 million in CO_2 reductions, and $0.71 million in reduced NO_X emissions. In this case, the net benefit would amount to approximately $38 million per year.

TABLE V.28—ANNUALIZED BENEFITS AND COSTS OF AMENDED STANDARDS FOR FRONT-LOADING AND TOP-LOADING COMMERCIAL CLOTHES WASHERS (TSL 2)

	Discount rate (%)	Primary estimate *	Low net benefits Estimate *	High net benefits estimate *
		million 2013$/year		
Benefits:				
Operating Cost Savings	7	24	21	30.
	3	30	26	38.
CO_2 Reduction Monetized Value ($12.0/t case) *.	5	2	2	3.
CO_2 Reduction Monetized Value ($40.5/t case) *.	3	7	7	9.
CO_2 Reduction Monetized Value ($62.4/t case) *.	2.5	11	10	13.
CO_2 Reduction Monetized Value ($119/t case) *.	3	23	21	28.
NO_X Reduction Monetized Value (at $2,684/ton) **.	7	0.60	0.55	0.71.
	3	0.71	0.64	0.86.
Total Benefits †	7 plus CO_2 range	27 to 47	24 to 43	33 to 58.
	7	32	29	39.
	3 plus CO_2 range	33 to 53	29 to 47	41 to 66.
	3	38	33	48.
Costs:				
Incremental Equipment Costs.	7	0.02	0.03	0.02.
	3	0.03	0.03	0.02,
Net Benefits:				
Total †	7 plus CO_2 range	27 to 47	24 to 43	33 to 58.
	7	32	29	39.
	3 plus CO_2 range	33 to 53	29 to 47	41 to 66.
	3	38	33	48.

* This table presents the annualized costs and benefits associated with front-loading and top-loading CCW units shipped in 2018–2047. These results include benefits to customers which accrue after 2047 from the equipment purchased in 2018–2047. The results account for the incremental variable and fixed costs incurred by manufacturers due to the standard, some of which may be incurred in preparation for the rule. The Primary, Low Benefits, and High Benefits Estimates utilize projections of energy prices from the *AEO2014* Reference case, Low Economic Growth case, and High Economic Growth case, respectively. In addition, incremental equipment costs reflect no change for projected equipment price trends in the Primary Estimate, an increasing trend for projected equipment prices in the Low Benefits Estimate, and a decreasing trend for projected equipment prices in the High Benefits Estimate. The methods used to derive projected price trends are explained in section IV.F.

** The interagency group selected four sets of SCC values for use in regulatory analyses. Three sets of values are based on the average SCC from the three integrated assessment models, at discount rates of 2.5, 3, and 5 percent. The fourth set, which represents the 95th percentile SCC estimate across all three models at a 3-percent discount rate, is included to represent higher-than-expected impacts from temperature change further out in the tails of the SCC distribution. The values in parentheses represent the SCC in 2015. The SCC time series incorporate an escalation factor. The value for NO_X is the average of the low and high values used in DOE's analysis.

† Total Benefits for both the 3-percent and 7-percent cases are derived using the series corresponding to average SCC with 3-percent discount rate. In the rows labeled "7% plus CO_2 range" and "3% plus CO_2 range," the operating cost and NO_X benefits are calculated using the labeled discount rate, and those values are added to the full range of CO_2 values.

[63] DOE used a 3-percent discount rate for CO2 reduction, along with the average SCC series that uses a 3-percent discount rate ($40.5/t in 2015).

VI. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866 and 13563

Section 1(b)(1) of Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (Oct. 4, 1993), requires each agency to identify the problem that it intends to address, including, where applicable, the failures of private markets or public institutions that warrant new agency action, as well as to assess the significance of that problem. The problems that these standards address are as follows:

(1) Insufficient information and the high costs of gathering and analyzing relevant information leads some consumers to miss opportunities to make cost-effective investments in energy efficiency.

(2) In some cases the benefits of more efficient equipment are not realized due to misaligned incentives between purchasers and users. An example of such a case is when the equipment purchase decision is made by a building contractor or building owner who does not pay the energy costs.

(3) There are external benefits resulting from improved energy efficiency of CCWs that are not captured by the users of such equipment. These benefits include externalities related to public health, environmental protection and national security that are not reflected in energy prices, such as reduced emissions of air pollutants and greenhouse gases that impact human health and global warming.

In addition, DOE has determined that this regulatory action is not a ''significant regulatory action'' under section 3(f)(1) of Executive Order 12866. Therefore, DOE did not present for review to the OIRA in the OMB the draft rule and other documents prepared for this rulemaking, including a regulatory impact analysis (RIA).

DOE has also reviewed this regulation pursuant to Executive Order 13563, issued on January 18, 2011. 76 FR 3281 (Jan. 21, 2011). EO 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in EO 12866. To the extent permitted by law, agencies are required by EO 13563 to: (1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

DOE emphasizes as well that EO 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, OIRA has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. For the reasons stated in the preamble, DOE believes that this final rule is consistent with these principles, including the requirement that, to the extent permitted by law, benefits justify costs and that net benefits are maximized.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of a final regulatory flexibility analysis (FRFA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site (*http://energy.gov/gc/office-general-counsel*).

DOE reviewed this final rule pursuant to the FRFA and the policies and procedures discussed above. DOE certifies that the standards established in this final rule will not have a significant impact on a substantial number of small entities. The factual basis for this certification is set forth below.

For manufacturers of CCWs, the SBA has set a size threshold, which defines those entities classified as ''small businesses'' for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of the rule. 65 FR 30836, 30848 (May 15, 2000), as amended at 65 FR 53533, 53544 (Sept. 5, 2000) and codified at 13 CFR part 121.[64] CCW manufacturing is classified under NAICS 333318, ''Other commercial and service industry machinery manufacturing.'' The SBA sets a threshold of 1,000 employees or less for an entity to be considered as a small business for this category.

To estimate the number of small businesses which could be impacted by the amended energy conservation standards, DOE conducted a market survey using available public information to identify potential small manufacturers. DOE's research included the AHAM membership directory, equipment databases (CEE, California Energy Commission (CEC), and ENERGY STAR databases) and individual company Web sites to find potential small business manufacturers. DOE also asked interested parties and industry representatives if they were aware of any other small business manufacturers during manufacturer interviews and at DOE public meetings. DOE reviewed all publicly available data and contacted various companies, as necessary, to determine whether they met the SBA's definition of a small business manufacturer of covered CCWs. DOE screened out companies that did not offer equipment covered by this rulemaking, did not meet the definition of a ''small business,'' or are foreign owned and operated.

All top-loading CCWs and approximately 40 percent of front-loading CCWs are currently manufactured in the United States, accounting for 83 percent of overall domestic CCW shipments. Three U.S.-based companies are responsible for this 83 percent domestic production and over 95 percent of CCW industry market share. Although one of these manufacturers has been identified and analyzed separately as an LVM, none of these manufacturers meet the definition of a small business manufacturer, as they all have more than 1,000 employees. The small portion of the

[64] The size standards are listed by NAICS code and industry description and are available at *http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.*

remaining CCW market (approximately 5,800 shipments) is supplied by a combination of three international companies, all of which have small market shares. These companies are all foreign owned and operated, and exceed the SBA's employment threshold for consideration as a small business under the appropriate NAICS code. Therefore, DOE did not identify any small business manufacturers of CCWs.

Based on the discussion above, DOE certifies that the standards for CCWs set forth in this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a FRFA for this rulemaking. DOE will transmit the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the SBA for review under 5 U.S.C. 605(b).

1. Significant Alternatives to the Rule

The discussion above analyzes impacts on small businesses that would result from DOE's final rule. In addition to the other TSLs being considered, the final rule TSD includes a regulatory impact analysis (RIA). For CCWs, the RIA discusses the following policy alternatives: (1) No change in standard; (2) consumer rebates; (3) consumer tax credits; (4) manufacturer tax credits; (5) voluntary energy efficiency targets; (6) voluntary early replacement programs; and (7) bulk government purchases. While these alternatives may mitigate to some varying extent the economic impacts on small entities compared to the standards, DOE determined that the energy savings of these alternatives are significantly smaller than those that would be expected to result from adoption of the amended standard levels. Accordingly, DOE is declining to adopt any of these alternatives and is enacting the standards set forth in this rulemaking. See chapter 17 of the final rule TSD for further detail on the policy alternatives DOE considered.

C. Review Under the Paperwork Reduction Act

Manufacturers of CCWs must certify to DOE that their equipment complies with any applicable energy conservation standards. In certifying compliance, manufacturers must test their equipment according to the DOE test procedures for CCWs, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including CCWs. 76 FR 12422 (March 7, 2011). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 20 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.

AHAM commented that 20 hours is an underestimation of the certification burden, particularly for large companies with a large number of models to certify. AHAM stated that for CCWs, the certification reporting burden varies significantly by companies. According to AHAM, for some companies, 20 hours may be a fairly accurate average estimate. But for others, the burden could be significantly more than that. Thus, AHAM requested that DOE revise its public reporting burden estimate for CCWs. (AHAM, No. 34 at p. 6).

As required by the PRA, all collections of information from the public by a Federal agency must receive prior approval from OMB. An ongoing collection must be approved by OMB at least once every three years. DOE plans to investigate the public reporting burden raised by AHAM separately as part of the three-year review process.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act of 1969

Pursuant to the National Environmental Policy Act (NEPA) of 1969, DOE has determined that the rule fits within the category of actions included in Categorical Exclusion (CX) B5.1 and otherwise meets the requirements for application of a CX. See 10 CFR part 1021, App. B, B5.1(b); 1021.410(b) and Appendix B, B(1)–(5). The rule fits within the category of actions because it is a rulemaking that establishes energy conservation standards for consumer products or industrial equipment, and for which none of the exceptions identified in CX B5.1(b) apply. Therefore, DOE has made a CX determination for this rulemaking, and DOE does not need to prepare an Environmental Assessment or Environmental Impact Statement for this rule. DOE's CX determination for this rule is available at *http://cxnepa.energy.gov/.*

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (Aug. 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the equipment that is the subject of this final rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297 and 6316(a)) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard and (4) promote simplification and burden reduction. 61 FR 4729 (Feb. 7, 1996). Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney

General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Pub. L. 104–4, sec. 201 (codified at 2 U.S.C. 1531) For an amended regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. DOE's policy statement is also available at *http://energy.gov/gc/office-general-counsel.*

DOE examined this final rule according to UMRA and its statement of policy. This final rule does not contain a Federal intergovernmental mandate, and DOE expects it will not require expenditures of $100 million or more by the private sector. Such expenditures may include: (1) Investment in research and development and in capital expenditures by CCW manufacturers in the years between the final rule and the compliance date for the new standards, and (2) incremental additional expenditures by consumers to purchase higher-efficiency CCWs, starting at the compliance date for the applicable standard. Therefore, the analytical requirements of UMRA do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

Pursuant to Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights'' 53 FR 8859 (March 18, 1988), DOE has determined that this final rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for Federal agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has concluded that this regulatory action, which sets forth energy conservation standards for CCWs, is not a significant energy action because the amended standards are not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects on the final rule.

L. Review Under the Information Quality Bulletin for Peer Review

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (OSTP), issued its Final Information Quality Bulletin for Peer Review (the Bulletin). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are ''influential scientific information,'' which the Bulletin defines as scientific information the agency reasonably can determine will have, or does have, a clear and substantial impact on important public policies or private sector decisions. 70 FR 2667.

In response to OMB's Bulletin, DOE conducted formal in-progress peer reviews of the energy conservation standards development process and analyses and has prepared a Peer Review Report pertaining to the energy conservation standards rulemaking analyses. Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. The ''Energy Conservation Standards Rulemaking Peer Review Report'' dated February 2007 has been disseminated and is available at the following Web site: *www1.eere.energy.gov/buildings/appliance_standards/peer_review.html.*

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is a ''major rule'' as defined by 5 U.S.C. 804(2).

VII. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects in 10 CFR Part 431

Administrative practice and procedure, Confidential business information, Energy conservation, Reporting and recordkeeping requirements.

Issued in Washington, DC, on December 5, 2014.

David T. Danielson,

Assistant Secretary, Energy Efficiency and Renewable Energy.

For the reasons set forth in the preamble, DOE amends part 431 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for Part 431 continues to read as follows:

Authority: 42 U.S.C. 6291 – 6317.

■ 2. Section 431.156 is amended by revising paragraph (b) and adding paragraph (c) to read as follows:

§ 431.156 Energy and water conservation standards and their effective dates.

* * * * *

(b) Each commercial clothes washer manufactured on or after January 8, 2013, and before January 1, 2018, shall have a modified energy factor no less than and a water factor no greater than:

Equipment class	Modified energy factor (MEF), *cu. ft./kWh/cycle*	Water factor (WF), *gal./cu. ft./cycle*
Top-Loading	1.60	8.5
Front-Loading	2.00	5.5

(c) Each commercial clothes washer manufactured on or after January 1, 2018 shall have a modified energy factor no less than and an integrated water factor no greater than:

Equipment class	Modified energy factor (MEF_{J2}), *cu. ft./kWh/cycle*	Integrated water factor (IWF), *gal./cu. ft./cycle*
Top-Loading	1.35	8.8
Front-Loading	2.00	4.1

[FR Doc. 2014–29197 Filed 12–12–14; 8:45 am]

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Part V

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Chapter 1, et al.

Federal Acquisition Regulations; Interim Final Rules and Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR 2014–0051, Sequence No. 7]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–79; Introduction

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of interim rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2005–79. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at *http://www.regulations.gov.*

DATES: For effective dates and comment dates see separate documents, which follow.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below in relation to the FAR case. Please cite FAC 2005–79 and the specific FAR case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755.

RULES LISTED IN FAC 2005–79

Item	Subject	FAR case	Analyst
I	Establishing a Minimum Wage for Contractors	2015–003	Loeb.
II	Prohibition on Contracting with Inverted Domestic Corporations	2014–017	Jackson.

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these rules, refer to the specific item numbers and subjects set forth in the documents following these item summaries. FAC 2005–79 amends the FAR as specified below:

Item I—Establishing a Minimum Wage for Contractors (FAR Case 2015–003)

DoD, GSA, and NASA are issuing an interim rule amending the FAR to implement Executive Order (E.O.) 13658 and a Department of Labor (DOL) final rule issued on October 7, 2014, both entitled Establishing a Minimum Wage for Contractors. The interim rule establishes a new minimum wage for covered service and construction contracts of $10.10 per hour, which will be adjusted annually, by the DOL. Contracting officers will include a clause in covered contracts and, if requested by the contractor and if appropriate, will adjust contract prices for the annual adjustments in the E.O. minimum wage. Contractors shall consider any subcontractor request, including requests by small businesses subcontractors, for a subcontract price adjustment due to the annual adjustment in the E.O. minimum wage.

Item II—Prohibition on Contracting With Inverted Domestic Corporations (FAR Case 2014–017)

This interim rule amends the provisions of the FAR that address the continuing Governmentwide statutory prohibition (in effect since fiscal year (FY) 2008) on the award of contracts using appropriated funds to any foreign incorporated entity that is an inverted domestic corporation (under section 835 of the Homeland Security Act of 2002, codified at 6 U.S.C. 395) or to any subsidiary of such entity. In particular, this rule amends FAR 9.108 to revise the FAR coverage, including the language of solicitation provisions and contract clauses, so that it more clearly reflects the ongoing, continuing nature of the statutory prohibition on contracting with inverted domestic corporations and their subsidiaries.

This rule is not expected to have an effect on small business because this rule will only impact an offeror that is a foreign incorporated entity that is treated as an inverted domestic corporation and wants to do business with the Government. Small business concerns are unlikely to have been incorporated in the United States and then reincorporated in a tax haven.

Dated: December 5, 2014.

William Clark,

Acting Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Federal Acquisition Circular (FAC) 2005–79 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005–79 is effective December 15, 2014.

Dated: December 4, 2014.

Richard Ginman,

Director, Defense Procurement and Acquisition Policy.

Dated: December 5, 2014.

Jeffrey A. Koses,

Senior Procurement Executive/Deputy CAO, Office of Acquisition Policy, U.S. General Services Administration.

Dated: December 4, 2014.

Ronald A. Poussard,

Director, Contract and Grant Policy Division, Office of Procurement, National Aeronautics and Space Administration.

[FR Doc. 2014–29139 Filed 12–12–14; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 22, and 52

[FAC 2005–79; FAR Case 2015–003; Item I; Docket No. 2014–0050; Sequence No. 1]

RIN 9000–AM82

Federal Acquisition Regulation; Establishing a Minimum Wage for Contractors

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement the Executive Order, Establishing a Minimum Wage for Contractors, and a final rule issued by the Department of Labor.

DATES: *Effective:* February 13, 2015.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat Division on or before February 13, 2015 to be considered in the formation of the final rule.

Applicability: This rule applies to solicitations issued on or after the effective date of the rule. Applicability of the clause at 52.222–55, Minimum Wages Under Executive Order 13658, to existing contracts that do not contain a class deviation clause implementing the Executive Order (E.O.), is as follows—

(1) Contracting officers shall include the clause in bilateral modifications extending the contract when such modifications are individually or cumulatively longer than six months.

(2) In accordance with FAR 1.108(d)(3), contracting officers are strongly encouraged to include the clause in existing indefinite-delivery indefinite-quantity contracts, if the remaining ordering period extends at least six months and the amount of remaining work or number of orders expected is substantial.

ADDRESSES: Submit comments identified by FAC 2005–79, FAR Case 2015–003 by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for ''FAR Case 2015–003''. Select the link ''Comment Now'' that corresponds with ''FAR Case 2015–003''. Follow the instructions provided at the ''Comment Now'' screen. Please include your name, company name (if any), and ''FAR Case 2015–003'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Ms. Hada Flowers, 1800 F Street NW., 2nd Floor, Washington, DC 20405–0001.

Instructions: Please submit comments only and cite ''FAR Case 2015–003'' in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Loeb, Procurement Analyst, at 202–501–0650 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2005–79, FAR Case 2015–003.

SUPPLEMENTARY INFORMATION:

Applicability

I. Background

DoD, GSA, and NASA are issuing an interim rule amending the FAR to implement E.O. 13658, Establishing a Minimum Wage for Contractors. The E.O. was signed February 12, 2014, and published in the **Federal Register** at 79 FR 9851, on February 20, 2014. The FAR is also implementing a final rule issued by the Wage and Hour Division of the Department of Labor (DOL), published at 79 FR 60634, on October 7, 2014, also entitled ''Establishing a Minimum Wage for Contractors.'' The DOL rule added a new 29 CFR part 10. The DOL rule covers both FAR-based contracts, and non-FAR-based contracts and contract-like instruments; this interim rule only applies to FAR-based contracts.

The E.O. seeks to increase efficiency and cost savings in the work performed by parties who contract with the Federal Government by raising the hourly minimum wage paid to workers on specified Federal contracts. Beginning January 1, 2015, the hourly rate will be $10.10, and beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary of Labor. The E.O. explains that ''[r]aising the pay of low-wage workers increases their morale and the productivity and quality of their work, lowers turnover and accompanying costs, and reduces supervisory costs,'' and that ''[t]hese savings and quality improvements will lead to improved economy and efficiency in Government procurement.'' The E.O. directed DOL to issue regulations by October 1, 2014, and for the FAR Council to issue regulations within 60 days of the DOL regulations.

Section 8(c) of the E.O. strongly encouraged agencies to take all reasonable and legally permissible steps to ensure individuals working on Federal contracts subject to the E.O. would be paid an hourly wage of at least $10.10 as of January 1, 2015. This paragraph intended that agencies would apply the E.O. minimum wage to contracts awarded between the issuance of the E.O. and the effective date of the FAR rule. OMB and DOL issued a joint memorandum on June 12, 2014 to the Executive Departments and Agencies providing guidance for implementing the requirements of the E.O. prior to January 1, 2015 and prior to the issuance of final DOL regulations. This memorandum requested that the FAR Council provide standard wording for a clause to be included in solicitations and contracts pursuant to a deviation from the FAR pending issuance of a FAR rule implementing DOL regulations. The FAR Council, in coordination with DOL, drafted matching class deviations with a contract clause to implement Section 8(c) of the E.O. DoD and NASA issued the class deviations. GSA issued CAAC Letter 2014–03 on June 25, 2014 to the Civilian Agency Acquisition Council (CAAC) agencies which constituted consultation with the CAAC Chair, as required by FAR 1.404(a)(1), for use of a model deviation clause.

Discussion and Analysis

A. This FAR interim rule only applies to acquisitions subject to the FAR. The DOL rule applies to FAR acquisitions as described in FAR 1.104, and actions that are not governed by the FAR such as contracts for concessions and contracts entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

B. The DOL regulatory requirements included in the FAR rule:

1. Require that the minimum hourly wage rate paid to workers performing on, or in connection with, contracts and subcontracts covered by the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute, is at least $10.10 per hour beginning January 1, 2015, and beginning January 1, 2016, and annually thereafter an amount determined by the Secretary of Labor (Secretary) (29 CFR 10.1) (FAR 22.1902 and 52.222–55(b)).

2. Define a ''worker'' to whom the rule applies (29 CFR 10.2) (FAR 22.1901 and 52.222–55(a)).

3. Apply to construction contracts covered by the Wage Rate Requirements (Construction) statute (formerly known as the Davis Bacon Act, FAR subpart 22.4), and to contracts for services covered by the Service Contract Labor Standards statute (formerly known as the Service Contract Act, FAR subpart 22.10), and workers whose wages are governed by those statutes or the Fair Labor Standards Act (FLSA) (29 CFR 10.2 and 10.3) (FAR 22.1903, 22.1906 and 52.222–55(c)).

4. Only apply to contracts with the Federal Government requiring performance in whole or in part within the United States (the 50 states and the District of Columbia) (29 CFR 10.2 and 10.3) (FAR 22.1903, 22.1906 and 52.222–55 (a), (b)(1), and (k)).

5. Provide that the rule does not excuse a contractor's noncompliance with any applicable Federal or State prevailing wage law or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum established under the E.O. (29 CFR 10.5 and 10.22) (FAR 22.1902(b) and 52.222–55(b)(8)).

6. Exempt the following individuals from the requirements of the rule (29 CFR 10.2 and 10.4) (FAR 22.1901 and 22.1903(b)(2), and 52.222–55(a) and (c)):

a. Employees who are not entitled to the minimum wage set forth at 29 U.S.C. 206(a)(1) of the FLSA pursuant to 29 U.S.C. 213(a) and 214(a)–(b), except for workers who are otherwise covered by the Wage Rate Requirements (Construction) statute and the Service Contract Labor Standards statute. These individuals include but are not limited to:

i. Learners, apprentices, or messengers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(a).

ii. Students whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(b).

iii. Individuals employed in a bona fide executive, administrative, or professional capacity as those terms are defined in 29 CFR part 541.

b. FLSA-covered individuals performing in connection with covered contracts, *i.e.,* those workers who perform work duties necessary to the performance of the contract but who are not directly engaged in performing the specific work called for by the contract, and who spend less than 20 percent of their hours worked in a particular workweek performing in connection with such contracts.

7. Prohibit any person from discriminating against any worker because the worker has filed a complaint, instituted or caused to be instituted a proceeding under the DOL rule, or has testified or is about to testify in any such proceeding (29 CFR 10.6 and 10.44) (FAR 22.1905(d) and 52.222–55(i)).

8. Provide that the clause flows down to all covered subcontracts at any tier. The DOL rule provides that the contractor and any upper-tier subcontractor are responsible for the compliance by any subcontractor or lower-tier subcontractor with the E.O. minimum wage requirements, whether or not the contract clause was included in the subcontract (29 CFR 10.21) (52.222–55(j) and (k)).

9. Provide that the Government may withhold payment from the contractor to reimburse unpaid wages and shall withhold payment for failure to comply with the recordkeeping requirement under the contract or any other Federal contract with the same contractor (29 CFR 10.11, 10.44, and Appendix A(g)(3)) (FAR 22.1905(a) and (d) and 52.222–55(e) and (g)).

10. Provide that a contracting agency is responsible for forwarding relevant information to the DOL, within 14 calendar days of receipt of a complaint alleging contractor noncompliance with the E.O. or the DOL rule or of being contacted by DOL (29 CFR 10.11) (FAR 22.1905(b)).

11. Describe the methodology for determining the new E.O. minimum wage and for notifying the public of the new applicable minimum wage rate on an annual basis at least 90 days before any new minimum wage is to take effect. (29 CFR 10.5(b) and 10.12) (FAR 22.1904 and 52.222–55(b)).

12. Prohibit a contractor from discharging any part of minimum wage obligation under the E.O. by furnishing fringe benefits or, with respect to workers whose wages are governed by the Service Contract Labor Standards statute, the cash equivalent thereof. (29 CFR 10.22(b)) (FAR 52.222–55(b)).

13. Provide that a contractor may satisfy the wage payment obligation to a tipped employee through a combination of an hourly cash wage (which, in accordance with the E.O. and DOL's regulation, must be at least $4.90 an hour, beginning January 1, 2015, and an amount determined in accordance with the E.O. in future years) and a credit based on tips received by such employee. (29 CFR 10.24(b) and 10.28) (FAR 22.1902(c) and 52.222–55(b)).

14. Permit a contractor to make deductions that reduce a worker's wages below the E.O. minimum wage rate only if the deduction qualifies as a deduction required by Federal, State, or local law, such as Federal or State withholding of income taxes, or in other limited circumstances specified in the DOL rule. (29 CFR 10.23) (FAR 52.222–55(b)).

15. Establish that wage payments to workers are to be made no later than one pay period following the end of the regular pay period in which the wages were earned, and that a pay period under the E.O. may not be longer than semi-monthly. (29 CFR 10.25) (FAR 52.222–55(b)).

16. Delineate the records to be kept by contractors. These requirements are consistent with existing requirements under the Service Contract Labor Standards statute and the Wage Rate Requirements (Construction) statute. (29 CFR 10.26) (FAR 52.222–55(e)).

17. Require the contractor to notify all workers performing work on, or in connection with, a covered contract of the applicable minimum wage rate under the E.O. The rule details the authorized means of doing so. (29 CFR 10.29) (FAR 52.222–55(d)).

18. Address enforcement of the E.O. requirements and details the process for filing complaints, investigating complaints, and the remedies and sanctions available for violations. (29 CFR 10.41–10.44) (FAR 22.1905 and 52.222–55(f) and (g)).

19. Address the handling of disputes concerning contractor compliance and identifies the DOL procedures for adjudication. (29 CFR 10.51–10.58) (FAR 52.222–55(h)).

C. FAR implementation of the DOL rule by DoD, GSA, and NASA is discussed below, as well as those instances where the FAR rule differs from the DOL rule, and the rationale for those differences:

1. A new part 22 subpart, FAR 22.19, Establishing a Minimum Wage for Contractors, is added to include the following sections:

a. Scope of subpart. FAR 22.1900 gives the authority citations for the E.O. and DOL regulation.

b. Definition of ''Worker''. FAR 22.1901 incorporates the DOL definition, updating the statutory references to reflect the recodification of Titles 40 and 41 of the United States Code (see FAR 1.110).

c. Policy. FAR 22.1902 describes the E.O. minimum wage requirements and the relationship to other wage rates, including other Federal or State prevailing wage rates and collective bargaining agreements that provide a higher wage rate, and to wages of tipped workers. The DOL preamble discussed the relationship of the E.O. minimum wage to minimum wages required in collective bargaining agreements. DoD, GSA, and NASA determined that this information is critical to both contractors and contracting officers and included this information in this policy section and in the contract clause. This issue is addressed, although not in the same manner, in the clause for Service contracts, 52.222–41, Service Contract Labor Standards, but it is not addressed in the clause for Construction contracts, 52.222–6, Construction Wage Rate Requirements.

The DOL rule included a definition of ''tipped employees'' at 29 CFR 10.2 as well as a discussion of treatment of tipped employees at 29 CFR 10.28. DoD, GSA, and NASA determined that a detailed discussion of tipped employees or a definition is not needed because tipped employees are infrequently employed under FAR-based contracts, and concluded that reference to 29 CFR

10.24(b) and 10.28 in the FAR rule is adequate coverage.

d. Applicability. FAR 22.1903(a) provides applicability to contracts governed by the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute, and to performance in whole or in part in the United States. The FAR 2.101 definition of ''United States,'' as used in the geographic sense, is used in this rule—the 50 states and the District of Columbia.

FAR 22.1903(b) delineates individuals to whom the subpart applies or does not apply. The subpart does not apply to an individual who performs solely ''in connection with'' covered contracts for less than 20% of hours worked in a given work week. DOL, in its final rule preamble (79 FR 60634 at 60661), gave helpful examples.

e. Annual Executive Order Minimum Wage Rate. FAR 22.1904, describes DOL's processes to notify the public of the annual E.O. minimum wage rates. The coverage at 22.1904 establishes FAR policy for how price adjustments will be made by contracting officers, when appropriate, after requests for such price adjustments are received from contractors. This coverage provides detail and direction, including examples of how price adjustments are calculated.

The price adjustment language used in the class deviations, which were crafted prior to formal DOL rulemaking, was adequate for that purpose. However, given the fully developed DOL regulation, the price adjustment language in this rule is significantly revised from the deviation language.

The language in this rule will ensure price adjustments under the E.O. minimum wage clause do not duplicate other price adjustments made under the same contract. Only those labor costs, associated labor costs, and relevant subcontract costs directly resulting from the increase in the E.O. minimum wage will be subject to adjustment.

f. Enforcement of Executive Order Minimum Wage Requirements. FAR 22.1905 provides information on enforcement authority, filing complaints, reporting and investigating complaints, remedies and sanctions, and retroactive inclusion of the contract clause when an agency fails to include the clause in a contract to which the E.O. applies.

g. FAR 22.1906 establishes a contract clause prescription for clause 52.222–55, Minimum Wages under Executive Order 13658, when the contracts include 52.222–6, Construction Wage Rate Requirements, ($2,000 threshold), or 52.222–41, Service Contract Labor Standards, ($2,500 threshold) and performance is in whole or in part in the United States.

2. Coverage is added to 22.403–5 and 22.1002–5 by adding new sections discussing the new minimum wage subpart.

3. Coverage is added to part 52 to—

a. Revise the clause at 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, to include 52.222–55, Minimum Wages Under Executive Order 13658;

b. Revise the clause at 52.213–4, Terms and Conditions—Simplified Acquisitions (Other than Commercial Items), to include 52.222–55, Minimum Wages Under Executive Order 13658; and

c. Add 52.222–55, Minimum Wages Under Executive Order 13658. This includes coverage of the following:

i. Paragraph (a) definitions of ''Worker'' and ''United States'' are provided.

ii. Paragraph (b) includes particular requirements regarding payment to workers of the E.O. minimum wage. It informs contractors that the minimum wage rate may be adjusted annually, beginning January 1, 2016 and that they are required to pay workers the adjusted rate. The Contractor may request a price adjustment to reflect an increase in wages due to the annual wage rate adjustment. The Contractor must warrant that the prices in the contract do not include any allowance for contingency to cover increased costs for such adjustments. Language for warranting contract price is adapted from existing price adjustment clauses applicable to Service Contract Labor Standards and the FLSA. Other subjects covered in this paragraph (b) are: subcontractor price adjustments, length of pay period, deductions, fringe benefits, relationship to higher minimum wages imposed by other statutes, ordinances, or collective bargaining agreements, and workers who regularly receive tips.

iii. Paragraph (c) informs the contractor which workers the E.O. minimum wage requirement applies to, and to which individuals it does not apply.

iv. Paragraph (d) addresses the requirement for the contractor to notify employees of the E.O. minimum wage rate.

v. Paragraph (e) identifies payroll recordkeeping requirements. It includes a requirement to make such records available to DOL and the contracting officer; noncompliance with this requirement will result in withholding of contract payment.

vi. Paragraph (f) informs the contractor that it must permit access to DOL to conduct investigations.

vii. Paragraphs (g), (h), and (i) provides information on enforcement of E.O. Minimum Wage requirements including withholding of payment for unpaid wages, resolution of disputes, and a prohibition on retaliation.

viii. Paragraph (j) states that the contractor is responsible for subcontractor compliance with the requirements of the clause and may be held liable for unpaid wages due subcontractor workers. Although the DOL regulation, at 29 CFR 10.21(b) states that the contractor and any upper-tier subcontractors are responsible for subcontractor compliance and shall be liable for any unpaid wages for its workers or its subcontractor workers, DoD, GSA, and NASA have not placed this responsibility on upper-tier subcontractors in this rule because the Government does not have privity of contract with subcontractors.

ix. Paragraph (k) states that the Contractor shall include the substance of the clause, including this paragraph (k) in all subcontracts, regardless of dollar value, that are subject to Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute, and are to be performed in whole or in part in the United States. The requirement to include the substance of the clause allows only for ministerial changes to the clause. The substance of the clause will be consistent with the requirements of the clause, and will not permit substantive changes such as to the rights and responsibilities of the parties.

4. DoD, GSA, and NASA reviewed the regulations at 29 CFR part 10 including the Appendix A contract clause and determined that adequate coverage for the following issues is accomplished by existing FAR coverage and clauses that are applied to contracts subject to the E.O., therefore inclusion of the following items into FAR clause 52.222–55, Minimum Wages Under Executive Order 13658, is unnecessary:

a. Appendix A, paragraph (d) Contract Suspension/Contract Termination/Contractor Debarment. Suspension and debarment is independently covered in FAR subpart 9.4. Termination is addressed in individual applicable contract clauses.

b. Appendix A, paragraph (i), Certification of Eligibility. This paragraph duplicates coverage in paragraph (p) of FAR clause 52.222–41, Service Contract Labor Standards, for service and 52.222–15, Certification of Eligibility, for construction contracts. 41

U.S.C. 1304 discourages adding certifications to the FAR.

c. Waiver of Rights, states that rights under the DOL rule at 29 CFR 10.7, Waiver of rights, cannot be waived or induced to be waived. With respect to the FAR, the FAR clause requirements become contract requirements, which likewise cannot be waived, thus separate inclusion is unnecessary.

d. 29 CFR 10.24, Overtime payments, restates requirements of the Fair Labor Standards Act and the Contract Work Hours and Safety Standards Acts and thus, it is unnecessary to restate existing requirements.

e. Terms defined in 29 CFR 10.2, Definitions, include ''new contract''. The FAR rule did not adopt this definition as not all the elements of the definition apply to or are consistent with FAR principles. When FAR rules apply to existing contracts, application is addressed in the Effective Date/Applicability section of the preamble, not in the Code of Federal Regulations; treatment of bilateral modifications to existing contracts is addressed in the Applicability section at the beginning of this preamble. In discussing treatment of existing contracts DOL stated in the preamble of its rule, ''if parties bilaterally negotiate a modification that is outside the scope of the contract, the agency will be required to create a new contract, triggering solicitation and/or justification requirements, and thus such a modification after January 1, 2015 should be addressed as a new contract subject to the Executive Order''. We understand this to refer to the long-standing requirement for any out-of-scope modification to be addressed as a new procurement and conducted in accordance with the requirements of FAR part 6, Competition Requirements.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* However, an Initial Regulatory Flexibility Analysis (IRFA) has been performed, and is summarized as follows:

This rule revises the Federal Acquisition Regulation (FAR) to include procurement policy implementing Executive Order 13658, Establishing a Minimum Wage for Contractors, dated February 12, 2014, and associated Department of Labor regulatory requirements at 29 CFR Part 10. The Department of Labor (DOL) published an initial regulatory flexibility analysis of the minimum wage requirement in its Notice of Proposed Rulemaking (79 FR 34568 at 34602) June 17, 2014. On October 7, 2014 DOL published the final regulatory flexibility analysis in the final rule (79 FR 60634 at 60704).

This rule applies to contracts awarded under FAR procedures and covered by the Service Contract Labor Standards statute (41 U.S.C. chapter 67; see FAR subpart 22.10), including contracts for the acquisition of commercial services, and the Wage Rate Requirements (Construction) statute (40 U.S.C. chapter 31 subchapter IV; see FAR subpart 22.4). The FAR rule does not apply to certain contracts, such as concession contracts, which may be covered by the DOL rule and the E.O. but are not FAR contracts. FAR 1.104 addresses the applicability of the FAR to Federal acquisitions. FAR 2.101 states ''acquisition'' means the ''acquiring by contract with appropriated funds of supplies or services . . .''.

The objective of this rule is to implement Executive Order 13658, Establishing a Minimum Wage for Contractors, dated February 12, 2014, and associated Department of Labor regulatory requirements at 29 CFR part 10.

The rule establishes requirements for contractors under contracts containing the clauses at 52.222–6, Construction Wage Rate Requirements, or 52.222–41, Labor Standards, *i.e.* ''covered contracts'', to pay no less than the applicable E.O. minimum wage to workers for all hours worked on or in connection with a covered contract. Contractors must also include a minimum wage contract clause in covered subcontracts and require covered subcontractors to include the substance of the clause in covered lower-tier contracts.

This rule applies to contracts and subcontracts at all tiers covered by the Service Contract Labor Standards statute, or the Wage Rate Requirements (Construction) statute, which require performance in whole or in part within the United States. When performance is in part within and in part outside the United States, the rule applies to the part of the contract or subcontract performed within the United States.

This rule applies to workers as defined at 22.1901. As provided in that definition—

1. Workers are covered regardless of the contractual relationship alleged to exist between the contractor or subcontractor and the worker;

2. Workers with disabilities whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c) are covered; and

3. Workers who are registered in a bona fide apprenticeship program or training program registered with the Department of Labor's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship, are covered.

This rule does not apply to—

Fair Labor Standards Act (FLSA)-covered individuals performing in connection with covered contracts, *i.e.* those individuals who perform duties necessary to the performance of the contract, but who are not directly engaged in performing the specific work called for by the contract, and who spend less than 20 percent of their hours worked in a particular workweek performing in connection with such contracts;

Individuals exempted from the minimum wage requirements of the FLSA under 29 U.S.C. 213(a) and 214(a) and (b), unless otherwise covered by the Service Contract Labor Standards statute, or the Wage Rate Requirements (Construction) statute. These individuals include but are not limited to—

a. Learners, apprentices, or messengers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(a);

b. Students whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(b); and

c. Those employed in a bona fide executive, administrative, or professional capacity (29 U.S.C. 213(a)(1) and 29 CFR part 541).

Small businesses in the service or construction industry with FAR-based contracts or subcontracts awarded after the effective date of this rule will be impacted unless an exclusion listed above applies. The rule will require these contractors and subcontractors to raise their employees' minimum hourly rate to $10.10 per hour, beginning January 1, 2015, then annually adjust it thereafter, if necessary, based on the annual minimum wage rate determined by the DOL.

Data available through the Federal Procurement Data System (FPDS) for Fiscal Year 2013, reveals 16,264 contracts were awarded to unique small business vendors for services which contained the clause at 52.222–41, Labor Standards. Additionally, 5,211 contracts were awarded to unique small business vendors for construction which contained the clause at 52.222–6, Construction Wage Rate Requirements, for a total of 21,475 unique small businesses. Subcontract data is available from the USASpending Federal Funding Accountability and Transparency Act Subaward Reporting System (FSRS), however this system does not distinguish small businesses from other than small businesses. Data for Fiscal Year 2013 shows there were a total of 20,127 subcontracts for services and construction reported and of those 5,391 were unique DUNS. These 5,391 first tier

unique subcontracts are approximately 25% of the 21,475 unique contracts. Given that first tier subcontracts account for 25%, then for estimating purposes, 20% of subcontracts have a second-tier, 10% of second tier have a third tier, and 5% of third tier have a fourth tier. This calculation estimates the total number of subcontracts is 6,631. However, since the FSRS does not distinguish small businesses, this number is overestimated. Data from FPDS has shown that typically, approximately 60% of a contractor population is small.

The DOL noted in their final rule (79 FR 60634 at 60691) that the rule did not impose any additional notice or recordkeeping requirements on contractors and therefore, the burden for complying with the recordkeeping requirements was not adjusted. However, DOL submitted a revised information collection request (ICR), to OMB to revise the existing ICR for control number 1235–0018 to incorporate the recordkeeping regulatory citations in its final rule.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternatives to the rule that would meet the requirements of the E.O. and DOL regulation and minimize any significant economic impact of the rule on small entities.

DOL, in its final rule, estimated the average wage for affected employees is $8.79; thus affected firms must raise the hourly wage for affected employees by $1.31 per hour. Additionally, contractors must adjust related payroll and unemployment taxes and fringe benefits. Under covered contracts, contractors are entitled to recover increases in labor costs resulting from the E.O. minimum wage requirements by including such costs in offers and when requesting contract price adjustment under existing and future contracts for the additional costs related to the increase in the minimum wage rate for workers performing under the contract. DOL notes increases in economy and efficiency and expects these added costs to be offset by an increase in employee morale and productivity, reduced absenteeism, reduced supervisory costs, and reduced turnover.

To remind contractors of their obligation in ensuring subcontractor workers are paid in compliance with the minimum wage requirement, the following was added at the FAR clause 52.222–55:

1. The contractor is responsible for subcontractor compliance with the requirements of this subpart, and may be held liable for unpaid wages due subcontractor's workers.

2. The rule provides that subcontractors may be entitled to adjustments due to the new minimum wage and that contractors shall consider any subcontractor(s) requests for such price adjustment.

The rule does not address late payments to small business subcontractors, however pending FAR case 2014–004 implements section 1334 of the Small Business Jobs and Credit Act of 2010 (Public Law 111–240) and the Small Business Administration's final rule at 78 FR 42391. The rule will require a contractor to self-report to the contracting officer when the contractor makes late or reduced payments to small business subcontractors.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (FAR Case 2015–003), in correspondence.

V. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C chapter 35) does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved for the DOL regulations under OMB Control Number 1235–0018, Records to be kept by Employers—Fair Labor Standards Act.

VI. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the E.O. requires DoD, GSA, and NASA to issue regulations within 60 days of the DOL rule, and include a clause which specifies the new $10.10 per hour minimum wage will be paid to workers beginning January 1, 2015. The DOL final rule was published October 7, 2014. The DOL rule was published for public comment prior to publication of the final rule. However, pursuant to 41 U.S.C. 1707, DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 1, 22, and 52

Government procurement.

Dated: December 5, 2014.

William Clark,

Acting Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, the DoD, GSA, and NASA amend 48 CFR parts 1, 22, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 22, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL AQUSITION REGULATIONS SYSTEM

1.106 [Amended]

■ 2. Amend section 1.106, in the table following the introductory text, by—

■ a. Removing the FAR Segment ''52.222–8'' and its corresponding OMB control numbers ''1215–0149 and 1215–0017'' and adding ''52.222–8'' and ''1235–0008 and 1235–0018'' in their places, respectively;

■ b. Removing the FAR segment ''52.222–41'' and its corresponding OMB control numbers ''1215–0017 and 1215–0150'' and adding ''52.222–41'' and ''1235–0018 and 1235–0007'' in their places, respectively; and

■ c. Adding in numerical sequence, FAR segment ''52.222–55'' and its corresponding OMB Control No. ''1235–0018''.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 3. Amend section 22.001 by adding, in alphabetical order, the definition ''Agency labor advisor'' to read as follows:

22.001 Definitions.

* * * * *

Agency labor advisor means an individual responsible for advising contracting agency officials on Federal contract labor matters.

* * * * *

■ 4. Amend section 22.403 by revising the heading to read as follows:

22.403 Statutory, Executive Order, and regulatory requirements.

* * * * *

■ 5. Add section 22.403–5 to read as follows:

22.403–5 Executive Order 13658.

Executive Order 13658 establishes minimum wages for certain workers. The wage rate is subject to annual increases by an amount determined by the Secretary of Labor. See subpart 22.19. The clause at 52.222–55,

Minimum Wages under Executive Order 13658, requires the Executive Order 13658 minimum wage rate to be paid if it is higher than other minimum wage rates, such as the subpart 22.4 statutory wage determination amount.

22.1001 [Amended]

■ 6. Amend section 22.1001 by removing the definition ''Agency labor advisor.''

■ 7. Amend section 22.1002 by revising the section heading to read as follows:

22.1002 Statutory and Executive Order requirements.

* * * * *

■ 8. Add section 22.1002–5 to read as follows:

22.1002–5 Executive Order 13658.

Executive Order 13658 establishes minimum wages for certain workers. The wage rate is subject to annual increases by an amount determined by the Secretary of Labor. See subpart 22.19. The clause at 52.222–55, Minimum Wages under Executive Order 13658, requires the Executive Order 13658 minimum wage rate to be paid if it is higher than other minimum wage rates, such as the subpart 22.10 statutory wage determination amount.

■ 9. Add subpart 22.19 to read as follows:

Subpart 22.19—Establishing a Minimum Wage for Contractors

Sec.
22.1900 Scope of subpart.
22.1901 Definition.
22.1902 Policy.
22.1903 Applicability.
22.1904 Annual Executive Order Minimum Wage Rate.
22.1905 Enforcement of Executive Order Minimum Wage Requirements.
22.1906 Contract clause.

Subpart 22.19—Establishing a Minimum Wage for Contractors

22.1900 Scope of subpart.

This subpart prescribes policies and procedures to implement Executive Order (E.O.) 13658, Establishing a Minimum Wage for Contractors, dated February 12, 2014, and Department of Labor (DOL) implementing regulations at 29 CFR part 10.

22.1901 Definition.

Worker, as used in this subpart, (in accordance with 29 CFR 10.2)—

(1) Means any person engaged in performing work on, or in connection with, a contract covered by Executive Order 13658, and

(i) Whose wages under such contract are governed by the Fair Labor Standards Act (29 U.S.C. chapter 8), the Service Contract Labor Standards statute (41 U.S.C. chapter 67), or the Wage Rate Requirements (Construction) statute (40 U.S.C. chapter 31, subchapter IV),

(ii) Other than individuals employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541,

(iii) Regardless of the contractual relationship alleged to exist between the individual and the employer.

(2) Includes workers performing on, or in connection with, the contract whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c).

(3) Also includes any person working on, or in connection with, the contract and individually registered in a bona fide apprenticeship or training program registered with the Department of Labor's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship.

22.1902 Policy.

(a) Pursuant to Executive Order 13658, the minimum hourly wage rate required to be paid to workers performing on, or in connection with, contracts and subcontracts subject to this subpart is at least $10.10 per hour beginning January 1, 2015, and beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary of Labor. The Administrator of the Wage and Hour Division (the Administrator) will notify the public of the new E.O. minimum wage rate at least 90 days before it is to take effect. (See 22.1904.)

(b) *Relationship with other wage rates.* (1) Nothing in this subpart shall excuse noncompliance with any applicable Federal or State prevailing wage law or any applicable law or municipal ordinance establishing a minimum wage higher than the E.O. minimum wage. However, wage increases under such other laws or municipal ordinances are not subject to price adjustment under this subpart.

(2) The E.O. minimum wage rate applies whenever it is higher than any applicable collective bargaining agreement(s) wage rate.

(c) *Application to tipped workers.* Policies and procedures in DOL regulations at 29 CFR 10.24(b) and 10.28 address the relationship between the E.O. minimum wage and wages of workers engaged in an occupation in which they customarily and regularly receive more than $30 a month in tips.

22.1903 Applicability.

(a) This subpart applies to contracts covered by the Service Contract Labor Standards statute (41 U.S.C. chapter 67, formerly known as the Service Contract Act, subpart 22.10), or the Wage Rate Requirements (Construction) statute (40 U.S.C. chapter 31, Subchapter IV, formerly known as the Davis Bacon Act, subpart 22.4), that require performance in whole or in part within the United States (the 50 states and the District of Columbia). When performance is in part within and in part outside the United States, this subpart applies to the part of the contract that is performed within the United States.

(b)(1) This subpart applies to workers as defined at 22.1901. As provided in that definition—

(i) Workers are covered regardless of the contractual relationship alleged to exist between the contractor or subcontractor and the worker;

(ii) Workers with disabilities whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c) are covered; and

(iii) Workers who are registered in a bona fide apprenticeship program or training program registered with the Department of Labor's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship, are covered.

(2) This subpart does not apply to—

(i) Fair Labor Standards Act (FLSA)-covered individuals performing in connection with contracts covered by the E.O., *i.e.,* those individuals who perform duties necessary to the performance of the contract, but who are not directly engaged in performing the specific work called for by the contract, and who spend less than 20 percent of their hours worked in a particular workweek performing in connection with such contracts;

(ii) Individuals exempted from the minimum wage requirements of the FLSA under 29 U.S.C. 213(a) and 214(a) and (b), unless otherwise covered by the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute. These individuals include but are not limited to—

(A) Learners, apprentices, or messengers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(a);

(B) Students whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(b); and

(C) Those employed in a bona fide executive, administrative, or

professional capacity (29 U.S.C. 213(a)(1) and 29 CFR part 541).

(c) Agency Labor Advisors, as defined at 22.001, are listed at *http://wdol.gov,* and are available to provide guidance and assistance with the application of this subpart.

22.1904 Annual Executive Order Minimum Wage Rate.

(a) For the E.O. minimum wage rate that becomes effective on January 1, 2016, and annually thereafter, the Administrator will—

(1) Notify the public of the new E.O. minimum wage rate at least 90 days before it becomes effective by publishing a notice in the **Federal Register**;

(2) Publish and maintain on Wage Determinations OnLine (WDOL), *http://www.wdol.gov,* or any successor site, the E.O. minimum wage rate; and

(3) Include a general notice on wage determinations which are issued under the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute. The notice will provide information on the E.O. minimum wage and how to obtain annual updates.

(b)(1) The contractor may request a price adjustment only after the effective date of a new annual E.O. minimum wage determination published pursuant to paragraph (a). Prices will be adjusted only if labor costs increase as a result of the annual E.O. minimum wage, and for associated labor costs and relevant subcontract costs. Associated labor costs shall include increases or decreases that result from changes in social security and unemployment taxes and workers' compensation insurance, but will not otherwise include any amount for general and administrative costs, overhead, or profit.

(2) The wage rate price adjustment under this clause is the amount calculated by subtracting from the new E.O. wage rate the highest of the following: the previous E.O. minimum wage rate; the current Service or Construction wage determination rate under the contract; or the actual wage paid the worker prior to the new minimum wage. If the amount is zero or below, there will be no price adjustment for this worker.

(i) Example 1—New E.O. wage rate is $11.10.	
Previous E.O. wage rate is $10.70 The current Service or Construction wage determination rate under the contract is $10.75. The actual wage paid to the worker prior the new minimum wage is $10.80.	Analysis: The calculation is $11.10 − $10.80 = $.30. The price adjustment for this worker is $.30.

(ii) Example 2—New E.O. wage rate is $10.50.	
Previous E.O. wage rate is $10.10 The current Service or Construction wage determination rate under the contract is $10.75. The actual wage paid to the worker prior to the new minimum wage is $10.80.	Analysis: The calculation is $10.50 − $10.80 = −$.30. There is no price adjustment for this worker.

(3) The contracting officer shall not adjust the contract price for any costs other than those identified in paragraph (b)(1) of this section, and shall not provide duplicate price adjustments with any price adjustment under clauses implementing the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute.

22.1905 Enforcement of Executive Order Minimum Wage Requirements.

(a) *Authority.* (1) Section 5 of the E.O. grants the authority for investigating potential violations of, and obtaining compliance with, the E.O. to the Secretary of Labor. The Secretary of Labor, in promulgating the implementing regulations required by Section 4 of the E.O., has assigned this authority to the Administrator. Contracting agencies do not have authority to conduct compliance investigations under 29 CFR part 10 as implemented in this subpart. This does not limit the contracting officer's authority to otherwise enforce the terms and conditions of the contract.

(2) Contracting officers shall withhold payment at the direction of the Administrator, or upon the contracting officer's own action, if the contractor fails to comply with the requirements in paragraph (e)(2) of 52.222–55, Minimum Wages Under Executive Order 13658, until such time as the noncompliance is corrected.

(b) *Complaints.* (1) Complaints may be filed with the contracting officer or the Administrator by any person, entity, or organization that believes a violation of this subpart has occurred.

(2) The identity of any individual who makes a written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would reveal the individual's identity, shall not be disclosed in any manner to anyone other than Federal officials without the prior consent of the individual, unless otherwise authorized by law.

(3) Upon receipt of a complaint, or if notified that the Administrator has received a complaint, the contracting officer shall report the following information, within 14 days, if available without conducting an investigation, to the Department of Labor, Wage and Hour Division, Office of Government Contracts, 200 Constitution Avenue NW., Room S3006, Washington, DC 20210.

(i) The complaint or description of the alleged violation;

(ii) Available statements by the worker, contractor, or any other person regarding the alleged violation;

(iii) Evidence that clause 52.222–55, Minimum Wages Under Executive Order 13658, was included in the contract;

(iv) Information concerning known settlement negotiations between the parties, if applicable; and

(v) Any other relevant facts known to the contracting officer or other information requested by the Wage and Hour Division.

(c) *Investigations.* Complaints will be investigated by the Administrator, if warranted, in accordance with the procedures in 29 CFR part 10.43.

(d) *Remedies and sanctions*—(1) *Unpaid wages.* When the Administrator's investigation reveals that a contractor has failed to pay the applicable E.O. minimum wage, the Administrator will notify the contractor and the contracting agency of the unpaid wage violation, and request that the contractor remedy the violation. If the contractor does not remedy the

violation, the Administrator may direct withholding of payments due on the contract or any other contract between the contractor and the Federal Government. Upon final decision and direction of the Administrator, the contracting agency shall transfer the withheld funds to the Department of Labor for disbursement in accordance with the procedures at 22.406–9(c).

(2) *Antiretaliation.* When a contractor has been found to have violated paragraph (i) of clause 52.222–55, Minimum Wages Under Executive Order 13658, the Administrator may provide for relief to the worker in accordance with 29 CFR 10.44.

(3) *Debarment.* (i) The Department of Labor may initiate debarment proceedings under 29 CFR 10.52 whenever a contractor is found to have disregarded its obligations under 29 CFR part 10.

(ii) Contracting officers shall consider notifying the agency suspending and debarring official in accordance with agency procedures when a contractor commits significant violations of contract terms and conditions related to this subpart.

(4) *Retroactive inclusion of contract clause.* If a contracting agency fails to include the contract clause in a contract to which the E.O. applies, the contracting agency, on its own initiative or within 15 calendar days of notification by an authorized representative of the Department of Labor, shall incorporate the contract clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation and termination).

22.1906 Contract clause.

Insert the clause at 52.222–55, Minimum Wages Under Executive Order 13658, in solicitations and contracts that include the clause at 52.222–6, Construction Wage Rate Requirements, or 52.222–41, Service Contract Labor Standards, where work is to be performed, in whole or in part, in the United States (the 50 States and the District of Columbia).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 10. Amend 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Adding paragraph (c)(10);

■ c. Adding paragraph (e)(1)(xvii); and

■ d. Revising the date of Alternate II; and adding paragraph (e)(1)(ii)(O).

The revisions and additions read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items DEC 2014)

* * * * *

(c) * * *

(10) 52.222–55, Minimum Wages Under Executive Order 13658 DEC 2014) (Executive Order 13658).

* * * * *

(e)(1) * * *

(xvii) 52.222–55, Minimum Wages Under Executive Order 13658 (DEC 2014) (Executive Order 13658).

* * * * *

Alternate II (DEC 2014)

* * * * *

(e)(1)(ii) * * *

(O) 52.222–55, Minimum Wages Under Executive Order 13658 (DEC 2014) Executive Order 13658).

* * * * *

■ 11. Amend 52.213–4 by revising the date of the clause; and adding paragraph (b)(1)(xv) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other than Commercial Items)

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (DEC 2014)

* * * * *

(b)(1) * * *

(xv) 52.222–55, Minimum Wages Under Executive Order 13658 (DEC 2014) (Executive Order 13658) (Applies when 52.222–6 or 52.222–41 are in the contract and performance in whole or in part is in the United States (the 50 States and the District of Columbia.)

* * * * *

■ 12. Add section 52.222–55 to read as follows:

52.222–55, Minimum Wages Under Executive Order 13658.

As prescribed in 22.1906, insert the following clause:

Minimum Wages Under Executive Order 13658 (DEC 2014)

(a) *Definitions.* As used in this clause—

''United States'' means the 50 states and the District of Columbia.

''Worker''—

(1) Means any person engaged in performing work on, or in connection with, a contract covered by Executive Order 13658, and

(i) Whose wages under such contract are governed by the Fair Labor Standards Act (29 U.S.C. chapter 8), the Service Contract Labor Standards statute (41 U.S.C. chapter 67), or the Wage Rate Requirements (Construction) statute (40 U.S.C. chapter 31, subchapter IV),

(ii) Other than individuals employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541,

(iii) Regardless of the contractual relationship alleged to exist between the individual and the employer.

(2) Includes workers performing on, or in connection with, the contract whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c).

(3) Also includes any person working on, or in connection with, the contract and individually registered in a bona fide apprenticeship or training program registered with the Department of Labor's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship.

(b) *Executive Order Minimum Wage rate.* (1) The Contractor shall pay to workers, while performing in the United States, and performing on, or in connection with, this contract, a minimum hourly wage rate of $10.10 per hour beginning January 1, 2015.

(2) The Contractor shall adjust the minimum wage paid, if necessary, beginning January 1, 2016 and annually thereafter, to meet the Secretary of Labor's annual E.O. minimum wage. The Administrator of the Department of Labor's Wage and Hour Division (the Administrator) will publish annual determinations in the **Federal Register** no later than 90 days before the effective date of the new E.O. minimum wage rate. The Administrator will also publish the applicable E.O. minimum wage on *www.wdol.gov* (or any successor Web site) and on all wage determinations issued under the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute. The applicable published E.O. minimum wage is incorporated by reference into this contract.

(3)(i) The Contractor may request a price adjustment only after the effective date of the new annual E.O. minimum wage determination. Prices will be adjusted only if labor costs increase as a result of an increase in the annual E.O. minimum wage, and for associated labor costs and relevant subcontract costs. Associated labor costs shall include increases or decreases that result from changes in social security and unemployment taxes and workers' compensation insurance, but will not otherwise include any amount for general and administrative costs, overhead, or profit.

(ii) Subcontractors may be entitled to adjustments due to the new minimum wage, pursuant to paragraph (b)(2). Contractors shall consider any subcontractor requests for such price adjustment.

(iii) The Contracting Officer will not adjust the contract price under this clause for any costs other than those identified in paragraph (b)(3)(i) of this clause, and will not provide

duplicate price adjustments with any price adjustment under clauses implementing the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute.

(4) The Contractor warrants that the prices in this contract do not include allowance for any contingency to cover increased costs for which adjustment is provided under this clause.

(5) A pay period under this clause may not be longer than semi-monthly, but may be shorter to comply with any applicable law or other requirement under this contract establishing a shorter pay period. Workers shall be paid no later than one pay period following the end of the regular pay period in which such wages were earned or accrued.

(6) The Contractor shall pay, unconditionally to each worker, all wages due free and clear without subsequent rebate or kickback. The Contractor may make deductions that reduce a worker's wages below the E.O. minimum wage rate only if done in accordance with 29 CFR 10.23, Deductions.

(7) The Contractor shall not discharge any part of its minimum wage obligation under this clause by furnishing fringe benefits or, with respect to workers whose wages are governed by the Service Contract Labor Standards statute, the cash equivalent thereof.

(8) Nothing in this clause shall excuse the Contractor from compliance with any applicable Federal or State prevailing wage law or any applicable law or municipal ordinance establishing a minimum wage higher than the E.O. minimum wage. However, wage increases under such other laws or municipal ordinances are not subject to price adjustment under this subpart.

(9) The Contractor shall pay the E.O. minimum wage rate whenever it is higher than any applicable collective bargaining agreement(s) wage rate.

(10) The Contractor shall follow the policies and procedures in 29 CFR 10.24(b) and 10.28 for treatment of workers engaged in an occupation in which they customarily and regularly receive more than $30 a month in tips.

(c)(1) This clause applies to workers as defined in paragraph (a). As provided in that definition—

(i) Workers are covered regardless of the contractual relationship alleged to exist between the contractor or subcontractor and the worker;

(ii) Workers with disabilities whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c) are covered; and

(iii) Workers who are registered in a bona fide apprenticeship program or training program registered with the Department of Labor's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship, are covered.

(2) This clause does not apply to—

(i) Fair Labor Standards Act (FLSA)-covered individuals performing in connection with contracts covered by the E.O., *i.e.* those individuals who perform duties necessary to the performance of the contract, but who are not directly engaged in performing the specific work called for by the contract, and who spend less than 20 percent of their hours worked in a particular workweek performing in connection with such contracts;

(ii) Individuals exempted from the minimum wage requirements of the FLSA under 29 U.S.C. 213(a) and 214(a) and (b), unless otherwise covered by the Service Contract Labor Standards statute, or the Wage Rate Requirements (Construction) statute. These individuals include but are not limited to—

(A) Learners, apprentices, or messengers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(a).

(B) Students whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(b).

(C) Those employed in a bona fide executive, administrative, or professional capacity (29 U.S.C. 213(a)(1) and 29 CFR part 541).

(d) *Notice.* The Contractor shall notify all workers performing work on, or in connection with, this contract of the applicable E.O. minimum wage rate under this clause. With respect to workers covered by the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute, the Contractor may meet this requirement by posting, in a prominent and accessible place at the worksite, the applicable wage determination under those statutes. With respect to workers whose wages are governed by the FLSA, the Contractor shall post notice, utilizing the poster provided by the Administrator, which can be obtained at *www.dol.gov/whd/govcontracts,* in a prominent and accessible place at the worksite. Contractors that customarily post notices to workers electronically may post the notice electronically provided the electronic posting is displayed prominently on any Web site that is maintained by the contractor, whether external or internal, and customarily used for notices to workers about terms and conditions of employment.

(e) *Payroll Records.* (1) The Contractor shall make and maintain records, for three years after completion of the work, containing the following information for each worker:

(i) Name, address, and social security number;

(ii) The worker's occupation(s) or classification(s);

(iii) The rate or rates of wages paid;

(iv) The number of daily and weekly hours worked by each worker;

(v) Any deductions made; and

(vi) Total wages paid.

(2) The Contractor shall make records pursuant to paragraph (e)(1) of this clause available for inspection and transcription by authorized representatives of the Administrator. The Contractor shall also make such records available upon request of the Contracting Officer.

(3) The Contractor shall make a copy of the contract available, as applicable, for inspection or transcription by authorized representatives of the Administrator.

(4) Failure to comply with this paragraph (e) shall be a violation of 29 CFR 10.26 and this contract. Upon direction of the Administrator or upon the Contracting Officer's own action, payment shall be withheld until such time as the noncompliance is corrected.

(5) Nothing in this clause limits or otherwise modifies the Contractor's payroll and recordkeeping obligations, if any, under the Service Contract Labor Standards statute, the Wage Rate Requirements (Construction) statute, the Fair Labor Standards Act, or any other applicable law.

(f) *Access.* The Contractor shall permit authorized representatives of the Administrator to conduct investigations, including interviewing workers at the worksite during normal working hours.

(g) *Withholding.* The Contracting Officer, upon his or her own action or upon written request of the Administrator, will withhold funds or cause funds to be withheld, from the Contractor under this or any other Federal contract with the same Contractor, sufficient to pay workers the full amount of wages required by this clause.

(h) *Disputes.* Department of Labor has set forth in 29 CFR 10.51, Disputes concerning contractor compliance, the procedures for resolving disputes concerning a contractor's compliance with Department of Labor regulations at 29 CFR part 10. Such disputes shall be resolved in accordance with those procedures and not the Disputes clause of this contract. These disputes include disputes between the Contractor (or any of its subcontractors) and the contracting agency, the Department of Labor, or the workers or their representatives.

(i) *Antiretaliation.* The Contractor shall not discharge or in any other manner discriminate against any worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under or related to compliance with the E.O. or this clause, or has testified or is about to testify in any such proceeding.

(j) *Subcontractor compliance.* The Contractor is responsible for subcontractor compliance with the requirements of this clause and may be held liable for unpaid wages due subcontractor workers.

(k) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (k) in all subcontracts, regardless of dollar value, that are subject to the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute, and are to be performed in whole or in part in the United States.

(End of clause)

[FR Doc. 2014–29137 Filed 12–12–14; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR 2014–0052, Sequence No. 7]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–79; Small Entity Compliance Guide

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of DOD, GSA, and NASA. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rules appearing in Federal Acquisition Circular (FAC) 2005–79, which amends the Federal Acquisition Regulation (FAR). An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2005–79, which precedes this document. These documents are also available via the Internet at *http://www.regulations.gov*.

DATES: December 15, 2014.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact the analyst whose name appears in the table below. Please cite FAC 2005–79 and the FAR case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755.

Item	Subject	FAR Case	Analyst
*I	Establishing a Minimum Wage for Contractors	2015–003	Loeb
II	Prohibition on Contracting with Inverted Domestic Corporations	2014–017	Jackson

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these rules, refer to the specific item numbers and subjects set forth in the documents following these item summaries. FAC 2005–79 amends the FAR as specified below:

Item I—Establishing a Minimum Wage for Contractors (FAR Case 2015–003)

DoD, GSA, and NASA are issuing an interim rule amending the FAR to implement Executive Order (E.O.) 13658 and a Department of Labor (DOL) final rule issued on October 7, 2014, both entitled Establishing a Minimum Wage for Contractors. The interim rule establishes a new minimum wage for covered service and construction contracts of $10.10 per hour, which will be adjusted annually, by the DOL. Contracting officers will include a clause in covered contracts and, if requested by the contractor and if appropriate, will adjust contract prices for the annual adjustments in the E.O. minimum wage. Contractors shall consider any subcontractor request, including requests by small businesses subcontractors, for a subcontract price adjustment due to the annual adjustment in the E.O. minimum wage.

Item II—Prohibition on Contracting With Inverted Domestic Corporations (FAR Case 2014–017)

This interim rule amends the provisions of the FAR that address the continuing Governmentwide statutory prohibition (in effect since fiscal year (FY) 2008) on the award of contracts using appropriated funds to any foreign incorporated entity that is an inverted domestic corporation (under section 835 of the Homeland Security Act of 2002, codified at 6 U.S.C. 395) or to any subsidiary of such entity. In particular, this rule amends FAR 9.108 to revise the FAR coverage, including the language of solicitation provisions and contract clauses, so that it more clearly reflects the ongoing, continuing nature of the statutory prohibition on contracting with inverted domestic corporations and their subsidiaries.

This rule is not expected to have an effect on small business because this rule will only impact an offeror that is a foreign incorporated entity that is treated as an inverted domestic corporation and wants to do business with the Government. Small business concerns are unlikely to have been incorporated in the United States and then reincorporated in a tax haven.

Dated: December 5, 2014.

William Clark,

Acting Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

[FR Doc. 2014–29148 Filed 12–12–14; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 9 and 52

[FAC 2005–79; FAR Case 2014–017; Item II; Docket No. 2014–0017, Sequence No. 1]

RIN 9000–AM70

Federal Acquisition Regulation; Prohibition on Contracting with Inverted Domestic Corporations

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the provisions of the Federal Acquisition Regulation (FAR) that address the continuing Governmentwide statutory prohibition on the use of appropriated (or otherwise made available) funds for contracts with any foreign incorporated entity that is an inverted domestic corporation or any subsidiary of such entity.

DATES: *Effective:* December 15, 2014.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before February 13, 2015 to be considered in the formation of the final rule.

ADDRESSES: Submit comments identified by FAC 2005–79, FAR Case

2014–017, by any of the following methods:

• *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for ''FAR Case 2014–017'' Select the link ''Comment Now'' that corresponds with ''FAR Case 2014–017''. Follow the instructions provided at the ''Comment Now'' screen. Please include your name, company name (if any), and ''FAR Case 2014–017'' on your attached document.

• *Fax:* 202–501–4067.

• *Mail:* General Services Administration, Regulatory Secretariat (MVCB), ATTN: Ms. Flowers, 1800 F Street NW., 2nd floor, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–79, FAR Case 2014–017, in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–79, FAR Case 2014–017.

SUPPLEMENTARY INFORMATION:

I. Background

This interim rule amends the provisions of the FAR that address the continuing Governmentwide statutory prohibition (in effect since Fiscal Year (FY) 2008) on the use of appropriated (or otherwise made available) funds for contracts with any foreign incorporated entity that is an inverted domestic corporation (under section 835 of the Homeland Security Act of 2002, codified at 6 U.S.C. 395) or to any subsidiary of such entity. By separate notice, DOD, GSA, and NASA are issuing a proposed rule (FAR Case 2015–006) that would require additional actions by contractors to assist contracting officers in ensuring compliance with the statutory prohibition. An inverted domestic corporation is a corporation that meets the criteria specified in 6 U.S.C. 395(b) and (c).

In particular, this rule amends FAR 9.108 and the associated solicitation provisions and contract clauses, so that it more clearly reflects the ongoing, continuing nature of the statutory prohibition on contracting with inverted domestic corporations and their subsidiaries.

Beginning with section 745 of Division D of the Consolidated Appropriations Act, 2008 (Pub. L. 110–161), and in all subsequent fiscal years, Congress in the annual appropriations acts and continuing resolutions (CRs) has imposed a continuous Governmentwide statutory prohibition against using appropriated funds to contract with either an inverted domestic corporation (as defined in section 835 of the Homeland Security Act of 2002, codified at 6 U.S.C. 395) or a subsidiary of an inverted domestic corporation.

• In FY 2009, the statutory prohibition was continued by the FY 2009 short-term CR (Pub. L. 110–329, as extended by Pub. L. 111–6), under the general terms of the CR, and by section 743 of Division D of the Omnibus Appropriations Act, 2009 (Pub. L. 111–8).

• In FY 2010, the statutory prohibition was continued by the FY 2010 short-term CR (Pub. L. 111–68, as extended by Pub. L. 111–88), under the general terms of the CR, and by section 740 of Division C of the Consolidated Appropriations Act, 2010 (Pub. L. 111–117).

• In FY 2011, the statutory prohibition was continued by the FY 2011 short-term CR (Pub. L. 111–242, as extended by Public Laws 111–290, 111–317, 111–322, 112–4, 112–6, and 112–8) and full-year CR (Pub. L. 112–10), under the general terms of the CRs.

• In FY 2012, the statutory prohibition was continued by the FY 2012 short-term CR (Pub. L. 112–33, as extended by Public Laws 112–36, 112–67, and 112–68), under the general terms of the CR, and by section 738 of Division C of the Consolidated Appropriations Act, 2012 (Pub. L. 112–74).

• In FY 2013, the statutory prohibition was continued by the FY 2013 short-term CR (Pub. L. 112–175) and full-year CR (Pub. L. 113–6), under the general terms of the CRs.

• In FY 2014, the statutory prohibition was continued by the FY 2014 short-term CR (Pub. L. 113–46), under the general terms of the CR, and by section 733 of Division E of the Consolidated Appropriations Act, 2014 (Pub. L. 113–76).

• In FY 2015, the statutory prohibition is currently being continued by the FY 2015 short-term CR (the Continuing Appropriations Resolution, 2015; Pub. L. 113–164), under the general terms of the CR.

The prohibition on contracting with inverted domestic corporations is addressed at FAR 9.108. In the years since the Governmentwide prohibition was first enacted in FY 2008, the FAR Council has sought to update this FAR section to reflect the enactment of new appropriations acts. See FAR Case 2008–009 which was published as an interim rule in the **Federal Register** at 74 FR 31561 on July 1, 2009, and as a final rule at 76 FR 31410 on May 31, 2011, and FAR Case 2012–013 published as an interim rule at 77 FR 27547 on May 10, 2012, and as a final rule at 78 FR 6185 on January 29, 2013.

Insofar as Congress has retained the statutory prohibition in place since FY 2008, this interim rule amends FAR 9.108–2, 9.108–3, and 9.108–5 to reflect the ongoing nature of the prohibition for as long as Congress extends the prohibition in its current form through subsequent appropriations action (in full-year appropriations acts and in short-term and full-year CRs).

This interim rule also makes several technical revisions to the coverage in FAR 9.108 to state more clearly when a corporation is covered by the prohibition. In particular, it eliminates unclear discussion and references in the definition of ''inverted domestic corporation''.

In addition, the interim rule simplifies the coverage addressing exceptions. Specifically, the interim rule deletes a long listing of exceptions that accurately reflected exceptions set forth in the applicable appropriations acts, but had become increasingly difficult to understand with the passage of each appropriations act. Instead, the interim rule explains that each appropriations provision addressing the prohibition included an exception stating that the section shall not apply to any Federal Government contract entered into before the date of the enactment of the Act, or to any task order issued pursuant to such contract. Effectively, the prohibition does not extend to additional work that is performed under the contract if that additional work is funded by appropriations that are provided in a subsequent FY's appropriations. In light of this exception, contracting officers are instructed, as a precaution, to consult with legal counsel if a contractor becomes an inverted domestic corporation (or a subsidiary of one) during contract performance to ensure appropriate application of the prohibition.

Finally, the interim rule makes conforming changes to solicitation provisions and contract FAR clauses at 52.204–8, 52.209–2, 52.209–10, 52.213–3, and 52.212–5 so that offerors and contractors have clearer notice of the ongoing and continuing nature of the statutory prohibition on contracting

with inverted domestic corporations and their subsidiaries.

II. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

III. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because this rule will only impact an offeror that is an inverted domestic corporation and wants to do business with the Government. It is expected that the number of small entities impacted by this rule will be minimal. Small business concerns are unlikely to have been incorporated in the United States (or, if a partnership, established in the United States) and then subsequently incorporated in a foreign country; the major participants in these transactions are reportedly large multinational corporations. No domestic entities will be impacted by this rule. For the definition of ''small business'', the Regulatory Flexibility Act refers to the Small Business Act, which in turn allows the U.S. Small Business Administration (SBA) Administrator to specify detailed definitions or standards (5 U.S.C. 601(3) and 15 U.S.C. 632(a)). The SBA regulations at 13 CFR 121.105 discuss who is a small business: ''(a)(1) Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor''. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2014–017), in correspondence.

IV. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. Chapter 35).

V. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. While the revisions in the interim rule do not change the scope or meaning of the statutory prohibition, they will help to better ensure agency compliance with the Continuing Appropriations Resolution, 2015 (Pub. L. 113–164) (continuing the prohibition found in section 733 of Division E of the Consolidated Appropriations Act, 2014 (Pub. L. 113–76)). However, pursuant to 41 U.S.C. 1707 and FAR 1.501–3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 9 and 52

Government procurement.

Dated: December 5, 2014.

William Clark,

Acting Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 9 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 9 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 9—CONTRACTOR QUALIFICATIONS

■ 2. Amend section 9.108–1 by revising the definition ''Inverted domestic corporation'' to read as follows:

9.108–1 Definitions.

* * * * *

Inverted domestic corporation means a foreign incorporated entity that meets the definition of an inverted domestic corporation under 6 U.S.C. 395(b), applied in accordance with the rules and definitions of 6 U.S.C. 395(c).

* * * * *

■ 3. Revise section 9.108–2 to read as follows:

9.108–2 Prohibition.

(a) Section 745 of Division D of the Consolidated Appropriations Act, 2008 (Pub. L. 110–161) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions) prohibit, on a Governmentwide basis, the use of appropriated (or otherwise made available) funds for contracts with either an inverted domestic corporation, or a subsidiary of such a corporation, except as provided in paragraph (b) of this section and in 9.108–4 Waiver.

(b)(1) Section 745 and its successor provisions include the following exception: This section shall not apply to any Federal Government contract entered into before the date of the enactment of this Act, or to any task order issued pursuant to such contract.

(2) To ensure appropriate application of the prohibition and this exception, contracting officers should consult with legal counsel if, during the performance of a contract, a contractor becomes an inverted domestic corporation or a subsidiary of one.

■ 4. Amend section 9.108–3 by revising paragraph (a) to read as follows:

9.108–3 Representation by the offeror.

(a) In order to be eligible for contract award, an offeror must represent that it is neither an inverted domestic corporation, nor a subsidiary of an inverted domestic corporation. Any offeror that cannot so represent is ineligible for award of a contract, unless waived in accordance with the procedures at 9.108–4.

* * * * *

■ 5. Amend section 9.108–5 by revising the introductory text to read as follows:

9.108–5 Solicitation provision and contract clause.

The contracting officer shall—

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 6. Amend section 52.204–8 by revising the date of the provision and paragraph (c)(1)(v) to read as follows:

52.204–8 Annual Representations and Certifications.

* * * * *

Annual Representations and Certifications (Dec 2014)

* * * * *

(c)(1) * * *

(v) 52.209–2, Prohibition on Contracting with Inverted Domestic Corporations—Representation.

* * * * *

■ 7. Amend section 52.209–2 by revising the date of the provision and paragraphs (a) and (b) to read as follows:

52.209–2 Prohibition on Contracting with Inverted Domestic Corporations—Representation.

* * * * *

Prohibition on Contracting With Inverted Domestic Corporations—Representation (Dec 2014)

(a) *Definitions. Inverted domestic corporation* and *subsidiary* have the meaning given in the clause of this contract entitled Prohibition on Contracting with Inverted Domestic Corporations (52.209–10).

(b) Government agencies are not permitted to use appropriated (or otherwise made available) funds for contracts with either an inverted domestic corporation, or a subsidiary of an inverted domestic corporation, unless the exception at 9.108–2(b) applies or the requirement is waived in accordance with the procedures at 9.108–4.

* * * * *

■ 8. Amend section 52.209–10 by revising the date of the clause and in paragraph (a), the definition ''Inverted domestic corporation'' to read as follows:

52.209–10 Prohibition on Contracting with Inverted Domestic Corporations.

* * * * *

Prohibition on Contracting With Inverted Domestic Corporations (Dec 2014)

(a) * * *

Inverted domestic corporation means a foreign incorporated entity that meets the definition of an inverted domestic corporation under 6 U.S.C. 395(b), applied in accordance with the rules and definitions of 6 U.S.C. 395(c).

* * * * *

■ 9. Amend section 52.212–3 by revising the date of the provision; in paragraph (a), the definition ''Inverted domestic corporation'' and paragraph (n)(1) to read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (Dec 2014)

(a) * * *

* * * * *

Inverted domestic corporation means a foreign incorporated entity that meets the definition of an inverted domestic corporation under 6 U.S.C. 395(b), applied in accordance with the rules and definitions of 6 U.S.C. 395(c).

* * * * *

(n) *Prohibition on Contracting with Inverted Domestic Corporations.* (1) Government agencies are not permitted to use appropriated (or otherwise made available) funds for contracts with either an inverted domestic corporation, or a subsidiary of an inverted domestic corporation, unless the exception at 9.108–2(b) applies or the requirement is waived in accordance with the procedures at 9.108–4.

* * * * *

■ 10. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraphs (a)(1) through (3) as paragraphs (a)(2) through (4), respectively;

■ c. Adding a new paragraph (a)(1); and

■ d. Removing and reserving paragraph (b)(10).

The revision and addition read as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (Dec 2014)

(a) * * *

(1) 52.209–10, Prohibition on Contracting with Inverted Domestic Corporations (Dec 2014)

* * * * *

[FR Doc. 2014–29153 Filed 12–12–14; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 52

[FAR Case 2015–006; Docket No. 2014–0051; Sequence No. 1]

RIN 9000–AM85

Federal Acquisition Regulation; Prohibition on Contracting With Inverted Domestic Corporations—Representation and Notification

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to require additional actions by contractors to assist contracting officers in ensuring compliance with the Governmentwide statutory prohibition on the use of appropriated (or otherwise made available) funds for contracts with any foreign incorporated entity that is an inverted domestic corporation or to any subsidiary of such entity.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before February 13, 2015 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2015–006 by any of the following methods:

- Regulations.gov: *http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for ''FAR Case 2015–006''. Select the link ''Comment Now'' that corresponds with ''FAR Case 2015–006''. Follow the instructions provided at the ''Comment Now'' screen. Please include your name, company name (if any), and ''FAR Case 2015–006'' on your attached document.
- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Ms. Hada Flowers, 1800 F Street NW., 2nd Floor, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR Case 2015–006, in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAR Case 2015–006.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to revise the provisions of the FAR that address the continuing Governmentwide statutory prohibition (in effect since fiscal year 2008) on the use of appropriated (or otherwise made available) funds for contracts with any foreign incorporated entity that is an inverted domestic corporation (under section 835 of the Homeland Security Act of 2002, codified at 6 U.S.C. 395) or any subsidiary of such entity. By separate notice, DOD, GSA, and NASA have issued an interim rule (FAR Case 2014–017) that more clearly reflects the ongoing and continuing nature of this statutory prohibition.

An inverted domestic corporation is a corporation that meets the criteria specified in 6 U.S.C. 395(b) and (c). To date, an offeror has been required to include a statement in its offer (found at FAR 52.209–2(c) and 52.212–3(n)(2)) representing that by signing the offer, the offeror is representing that it is not an inverted domestic corporation or a subsidiary of an inverted domestic corporation. To increase the Government's ability to identify an offeror's status as an inverted domestic corporation, this rule proposes to change the representation to require an affirmative act by the offeror to complete two yes/no check-off boxes on whether it is an inverted domestic corporation, or a subsidiary of one, so that the Government will know which corporations are subject to the contracting prohibition. (Contracting officers would be allowed to continue relying on the offeror's representation unless there is an independent reason to question it.)

In accordance with FAR 4.1201(b)(1), 52.204–8, and 52.212–3, offerors would continue to be required to represent their current status at the earlier of an offer submission or the annual anniversary of their registration in the System for Award Management (SAM). This existing requirement, coupled with the proposed new more specific representation, will better ensure clear, current, accurate, and complete disclosure by offerors of whether or not they are an inverted domestic corporation, for consideration by a contracting officer before making a new contract award.

In addition, the rule proposes to add a new paragraph to FAR clause 52.209–10 that would require the contractor, when the contractor becomes an inverted domestic corporation during contract performance, to give written notification of its change in status as an inverted domestic corporation to the contracting officer within five business days from the date of the inversion event.

II. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

III. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because this rule will only impact an offeror that is an inverted domestic corporation and wants to do business with the Government. It is expected that the number of small entities impacted by this rule will be minimal. Small business concerns are unlikely to have been incorporated in the United States (or, if a partnership, established in the United States) and then subsequently incorporated in a foreign country; the major participants in these transactions are reportedly large multinational corporations. No domestic entities will be impacted by this rule. For the definition of ''small business,'' the Regulatory Flexibility Act refers to the Small Business Act, which in turn allows the U.S. Small Business Administration (SBA) Administrator to specify detailed definitions or standards (5 U.S.C. 601(3) and 15 U.S.C. 632(a)). The SBA regulations at 13 CFR 121.105 discuss who is a small business: ''(a)(1) Except for small agricultural

cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.'' Therefore, an Initial Regulatory Flexibility Analysis has not been performed. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (FAR Case 2015–006), in correspondence.

IV. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies because the proposed rule contains information collection requirements. Accordingly, the Regulatory Secretariat Division will submit a request for approval of a new information collection requirement concerning Prohibition on Contracting with Inverted Domestic Corporations to the Office of Management and Budget.

A. Public Reporting Burden

The public reporting burden for this collection of information is estimated to average .2 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.

The annual reporting burden estimated as follows:

Respondents: 352,000.

Responses per respondent: Approximately 1.

Total annual responses: 352,002.

Preparation hours per response: Approximately .2.

Total response Burden Hours: 70,410.

B. Request for Comments Regarding Paperwork Burden.

Submit comments, including suggestions for reducing this burden, not later than February 13, 2015 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Ms. Hada Flowers, 1800 F Street NW., 2nd Floor, Washington, DC 20405.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requesters may obtain a copy of the supporting statement from the General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Ms. Hada Flowers, 1800 F Street NW., 2nd Floor, Washington, DC 20405.

Please cite OMB Control Number 9000–00XX, Prohibition on Contracting with Inverted Domestic Corporations, in all correspondence.

List of Subject in 48 CFR Part 52

Government procurement.

Dated: December 5, 2014.

William Clark,

Acting Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR part 52 as set forth below:

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 1. The authority citation for 48 CFR part 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

■ 2. Amend section 52.209–2 by revising the date of the provision and paragraph (c) to read as follows:

52.209–2 Prohibition on Contracting with Inverted Domestic Corporations—Representation.

* * * * *

Prohibition on Contracting With Inverted Domestic Corporations—Representation (Date)

* * * * *

(c) *Representation.* The offeror represents that—

(1) It ❑ is, ❑ is not an inverted domestic corporation; and

(2) It ❑ is, ❑ is not a subsidiary of an inverted domestic corporation.

(End of Provision)

■ 3. Amend section 52.209–10 by revising the date of the clause; and adding paragraph (d) to read as follows:

52.209–10 Prohibition on Contracting with Inverted Domestic Corporations.

* * * * *

Prohibition on Contracting With Inverted Domestic Corporations (DATE)

* * * * *

(d) In the event the Contractor becomes either an inverted domestic corporation, or a subsidiary of an inverted domestic corporation during contract performance, the Contractor shall give written notice to the Contracting Officer within five business days from the date of the inversion event.

* * * * *

■ 4. Amend section 52.212–3 by revising the date of the provision; and paragraph (n)(2) to read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (DATE)

* * * * *

(n) * * *

(2) *Representation.* The offeror represents that—

(i) It ❑ is, ❑ is not an inverted domestic corporation; and

(ii) It ❑ is, ❑ is not a subsidiary of an inverted domestic corporation.

* * * * *

■ 5. Amend section 52.212–5 by revising the date of the clause and paragraph (a)(1) to read as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (DATE)

(a) * * *

(1) 52.209–10, Prohibition on Contracting with Inverted Domestic Corporations (DATE)(section 745 of Division D of Pub. L. 110–161 and its successor provisions in subsequent appropriations acts and continuing resolutions).

* * * * *

[FR Doc. 2014–29151 Filed 12–12–14; 8:45 am]

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Part VI

Department of Agriculture

Farm Service Agency
7 CFR Part 718
Commodity Credit Corporation
7 CFR Parts 1412, 1416, and 1437
Noninsured Crop Disaster Assistance Program; Interim Rule

DEPARTMENT OF AGRICULTURE

Farm Service Agency

7 CFR Part 718

Commodity Credit Corporation

7 CFR Parts 1412, 1416, and 1437

RIN 0560–AI20

Noninsured Crop Disaster Assistance Program

AGENCY: Commodity Credit Corporation and Farm Service Agency, USDA.

ACTION: Interim rule.

SUMMARY: This rule implements changes to the Noninsured Crop Disaster Assistance Program (NAP) as required by the Agricultural Act of 2014 (the 2014 Farm Bill), including changes to eligible crops, provisions governing eligibility of native sod acreage, additional coverage levels, and waivers of service fees and premium reductions for beginning, limited resource, and socially disadvantaged producers. This rule also clarifies requirements for eligible types and causes of loss and expands coverage for eligible mollusk and other aquaculture losses. This rule clarifies that the Farm Service Agency (FSA) may set separate market prices for organic crops and for direct to consumer sales. The changes are relatively minor and do not change the core purpose of NAP, which is to provide financial assistance to producers of non-insurable crops when low yield, loss of inventory, or prevented planting occurs due to a natural disaster.

DATES: *Effective Date:* December 15, 2014.

Comment Date: We will consider comments that we receive by February 13, 2015.

ADDRESSES: We invite you to submit comments on this interim rule. In your comment, include the Regulation Identifier Number (RIN) and the volume, date, and page number of this issue of the **Federal Register**. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *Mail, hand delivery, or courier:* Steve Peterson, Production, Emergencies and Compliance Division, Farm Service Agency (FSA), United States Department of Agriculture (USDA), Stop 0517, 1400 Independence Avenue SW., Washington, DC 20250–0517.

Comments will be available online at *http://www.regulations.gov*. In addition, comments will be available for public inspection at the above address during business hours from 8 a.m. to 5 p.m., Monday through Friday, except holidays. A copy of this interim rule is available through the FSA home page at *http://www.fsa.usda.gov/*.

FOR FURTHER INFORMATION CONTACT: Steve Peterson, telephone: (202) 720–7641. Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.) should contact the USDA Target Center at (202) 720–2600 (voice).

SUPPLEMENTARY INFORMATION:

Background

FSA administers NAP for the Commodity Credit Corporation (CCC) as authorized by section 196 of the Federal Agriculture Improvement and Reform Act of 1996, as amended (7 U.S.C. 7333). The NAP regulations are in 7 CFR part 1437. NAP is administered under the general supervision of the FSA Administrator (who also serves as the CCC Executive Vice-President) and is carried out by FSA State and county committees. NAP coverage is limited to crops other than livestock that are commercially produced for food and fiber, and to other specific crops for which catastrophic coverage under section 508(b) or additional coverage under sections 508(c) or 508(h) under the Federal Crop Insurance Act (7 U.S.C. 1508(b), (c), and (h)) is not available. Qualifying losses to eligible NAP crops must be due to an eligible cause of loss as specified in 7 CFR part 1437, which includes damaging weather (drought, hurricane, freeze, etc.) or adverse natural occurrence (volcanic eruption, flood, etc.). NAP coverage is not automatic; producers must first apply for NAP coverage by an application closing date. That application is not filed unless it is accompanied by the service fee. The producer must file the application for coverage accompanied by the appropriate service fee (or service fee waiver) at their FSA county office in order to be eligible for NAP coverage. It is important producers understand that the law specifies that an application for coverage must be accompanied by the service fee and be filed no later than 30 days before the beginning of any coverage period. Therefore, the NAP application for coverage and payment of the service fee must be completed before any coverage can begin or attach. In addition, in the event a loss claim is filed for which premium fees are due premium fees will be first deducted from the NAP payment earned. Losses occurring outside a coverage period are not eligible for NAP coverage. Producers who choose not to obtain NAP coverage for a crop or commodity are not eligible for NAP assistance on the crop or commodity. The core provisions of NAP are not changing with this rule.

The 2014 Farm Bill (Pub. L. 113–79) made a number of changes to NAP. This rule amends the NAP regulations to be consistent with those changes made by the 2014 Farm Bill. The changes include revised NAP eligibility requirements for tilled native sod, added coverage eligibility for sweet sorghum and biomass sorghum, and modified coverage for industrial crops. Beginning, limited resource, and socially disadvantaged farmers and ranchers will be eligible for service fee waivers. New ''buy up'' provisions will allow producers to buy additional NAP coverage for a premium, resulting in a risk management product that has equivalent coverage levels to some types of crop insurance offered by the Risk Management Agency (RMA).

This rule makes discretionary changes to clarify eligible losses, and to redefine coverage for mollusks. Another discretionary change adds a requirement for NAP participants to notify FSA of losses within 72 hours for certain crops, including hand-harvested crops, which require a timely assessment of loss before the damaged crop deteriorates. This rule clarifies that FSA may set separate market prices for the same crop in a state based on farming practices (conventional or organic) or sales to different markets (wholesale or direct to consumer).

NAP Assistance for 2012 Fruit Crop Losses

The 2014 Farm Bill requires USDA to provide retroactive 2012 NAP assistance for losses to fruit crops grown on trees or bushes in counties that had Secretarial disaster designations due to frost or freeze. The eligibility provisions for that assistance were previously announced in a Notice of Funds Availability (79 FR 42493–42499) and are not addressed in this rule.

Definitions Added or Revised in This Rule

The changes required by the 2014 Farm Bill and the clarifying discretionary changes require new definitions. This rule adds the following definitions to 7 CFR 1437.3, ''Definitions:'' ''acres devoted to the crop,'' ''agricultural experts,'' ''application for coverage,'' ''bypass year,'' ''buffer zone,'' ''buy-up coverage,'' ''buy-up coverage yield,''

''certified organic acreage,'' ''certifying agent,'' ''conventional farming practice,'' ''feedstock,'' ''generally recognized,'' ''guarantee,'' ''maximum dollar value for coverage sought,'' ''organic agricultural experts,'' ''organic crop,'' ''organic system plan,'' ''organic standards,'' ''prohibited substance,'' ''short rotation woody crops,'' and ''transitional acreage.'' This rule revises the definitions for ''application closing date,'' ''catastrophic coverage,'' ''crop year,'' ''good farming practices,'' ''industrial crop,'' and ''native sod.'' These new and revised terms are needed to clarify the new provisions of this rule. For example, the definitions for ''feedstock,'' ''industrial crop,'' and ''short rotation woody crops'' are needed to implement the changes required by the 2014 Farm Bill to add certain biomass feedstocks as eligible crops and to clarify the existing provisions for industrial crops. Definitions of ''agricultural experts'' and ''organic agricultural experts'' are needed because those terms are used in the context of determining appropriate farming practices for specific crops and locations. The new provisions concerning specific market prices and practices for organic crops requires adding definitions for ''buffer zone,'' ''certified organic acreage,'' ''certifying agent,'' ''organic crop,'' ''organic system plan,'' ''organic standards,'' ''prohibited substance,'' and ''transitional acreage.'' The new ''buy-up coverage'' required several additional terms to clarify the provision on premium calculations.

NAP Eligibility for Crops and Practices Not Covered by Federal Crop Insurance

This rule implements changes required by the 2014 Farm Bill with regard to NAP crop eligibility. Before the 2014 Farm Bill, NAP coverage was available on certain eligible crops for which a catastrophic risk protection plan of insurance (CAT) was unavailable from RMA. (A CAT-level of Federal crop insurance offered by RMA pays 55 percent of the price of the commodity established by RMA on crop losses in excess of 50 percent.) NAP was offered at CAT-levels only on those crops. Prior to the required changes made by the 2014 Farm Bill, in some cases, NAP could be made available to certain eligible crops that had other forms of insurance (additional coverage under sections 508(c) or 508(h)) available under the Federal Crop Insurance Act. The 2014 Farm Bill amends NAP crop eligibility. As amended, NAP is not available for crops for which CAT under section 508(b) or additional coverage under sections 508(c) or 508(h) of the Federal Crop Insurance Act are available. Therefore, if either CAT or additional coverage (excluding pilot policies or plans of insurance) is available for a crop, NAP is not available.

In addition to the mandatory change just described, FSA is making a discretionary clarification that NAP coverage may be made available for certain eligible crops for certain practices not covered under CAT or additional coverage under sections 508(c) or (h). An example of this could be where CAT or additional coverage is available for irrigated corn grain crop acreage in a county but CAT and additional coverage is unavailable for non-irrigated corn crop acreage. In this example, if FSA determines that producing non-irrigated corn in the county is a good farming practice and that Federal crop insurance is unavailable because of a lack of actuarial data, NAP can be made available to non-irrigated corn acreage in the county. This discretionary decision to make NAP available to corn that is not irrigated will provide producers with risk management protection. Coverage under NAP under this exception will be limited to situations when the unavailability of CAT coverage is due to a lack of actuarial data and not due to an absence of good farming practices or due to hardiness zones.

Native Sod

This rule makes mandatory changes to the eligibility of producers who grow crops on native sod as required by section 11014 of the 2014 Farm Bill. Prior to this rule, the regulations allowed that the Governor of a State in the Prairie Pothole National Priority Area (specific counties within the States of Iowa, Minnesota, Montana, North Dakota, and South Dakota) could elect that producers newly tilling native sod (specifically, that was tilled for the production of an annual crop) would have been ineligible for Federal crop insurance and for NAP benefits during the first 5 crop years of planting that annual crop. However, the governors were not required to make that decision and the producers of tilled native sod would have continued to be eligible for both Federal crop insurance and NAP in those States, as such decision was discretionary. The 2014 Farm Bill requires a reduction of benefits for native sod acreage in Iowa, Minnesota, Montana, Nebraska, North Dakota, and South Dakota. There is no longer any discretion given to governors of those States. The reduced eligibility period is now the first four crop years of planting.

Under the 2014 Farm Bill and this rule, for the first four years of planting on native sod acreage, the NAP service fee and premiums for crops planted on that acreage will be 200 percent of the amount calculated according to 7 CFR 1437.6, although the premium cannot exceed the maximum premium amount of 5.25 percent times the payment limitation. The payment limit is $125,000, so the maximum premium amount is $6,562.50. In addition, the approved yield will be equal to 65 percent of the T-yield for the crop. (The T-yield, as specified in 7 CFR 1437.3, is the estimated county yield that is used when a producer does not have 4 years of actual production history.) This rule also amends the definition of ''native sod'' to conform to the amended definition established by the 2014 Farm Bill to specify that it includes land that a producer cannot substantiate has ever been tilled as of February 7, 2014. The 2014 Farm Bill does not change the de minimis acreage exemption, which applies to areas of 5 acres or less and is clarified in this rule to be consistent with the RMA provisions.

Eligible NAP Crops

Eligible NAP crops currently include commercial crops: Crops grown for food (excluding livestock and their by-products); crops planted and grown for livestock consumption; crops grown for fiber (excluding trees grown for wood, paper, or pulp products); aquaculture species crops (including ornamental fish); floriculture; ornamental nursery; Christmas tree crops; turf grass sod; industrial crops; seed crops; and sea grass and sea oats. As required by the 2014 Farm Bill, this rule adds sweet sorghum and biomass sorghum as eligible crops.

The 2014 Farm Bill and this rule clarify that ''industrial crops'' include crops grown expressly for the purpose of producing a feedstock for renewable biofuel, renewable electricity, or biobased products. For the purpose of implementing this clarification to ''industrial crops,'' this rule also adds a definition of ''feedstock'' in § 1437.3 to include only crops grown expressly for biofuel; residues and by-products of crops grown for a purpose other than biofuel are not eligible for NAP coverage. This rule excludes crops that are invasive or noxious plants from ''industrial crops'' to be consistent with Executive Order 13112, which prohibits Federal agencies from funding or carrying out actions that ''are likely to cause or promote the introduction or spread of invasive species in the United States.'' The determination of whether a species is invasive or noxious varies by

State, and FSA State committees will consult with the State technical committees for recommendations concerning the invasive and noxious status for otherwise eligible crops for the purposes of NAP. Information on ineligible species will be available in FSA county offices.

Eligible Causes of Loss

This rule specifies that in limited instances, insufficient chill hours is an eligible cause of loss by itself for specific crops and locations for which FSA has determined, in advance of a coverage period, based on its review of sufficient scientific evidence, that chill hours are required for the crop to produce and a lack of chill hours is detrimental to crop production irrespective of management. In cases where FSA makes the decision to include insufficient chill hours as an eligible cause of loss by itself for a crop and location, the crop and location and subsequent crop year coverage period for which the decision will apply will be specified in a list maintained by FSA and available at FSA county offices. If the crop and location is not on that list, then insufficient chill hours can only be an eligible cause of loss if the insufficient chill hours was related to damaging weather or an adverse natural occurrence (as specified in § 1437.10(b)(1) or (b)(2)). This is consistent with current policy.

FSA is also making discretionary changes to clarify and specify additional ineligible causes of loss under this rule. Causes of loss that were previously ineligible will continue to be ineligible under this rule, except for insufficient chill hours as discussed above. This rule also clarifies that ineligible causes of loss include: Failure to carry out a good irrigation practice; variance of temperatures from average normal temperatures that are not otherwise specified as eligible causes of loss; managerial decisions to attempt to grow or produce a crop in an area that is not suited for successful commercial production of that crop; for aquaculture, loss of inventory or missing non-containerized inventory resulting from a managerial decision not to seed or raise the crop in containers, net pens, or wire baskets, on ropes, or using similar devices (except as provided for mollusks in this rule); failure to follow organic farming practices or contamination by application or drift of prohibited substances onto organic crops; weeds; and any cause of loss that results in damage that is not evident or would not have been evident during the NAP coverage period. The addition of these causes of loss is discretionary and is intended to provide clarification and consistency with the intent of NAP to provide coverage only for losses due to drought, flood, or other natural disaster, as determined by the Secretary, which has been interpreted to include damaging weather and adverse natural occurrences and related conditions. FSA is adding ropes as a device on which aquacultural species are raised because aquacultural species, including mussels and other aquatic organisms such as kelp, are seeded and raised on ropes. FSA is adding ropes as an example of a containment device. The Deputy Administrator for Farm Programs will determine on a species by species, area by area, and practice by practice basis whether ropes provide the necessary containment and protection.

Buy-Up Coverage Levels and Premiums

Prior to the passage of the 2014 Farm Bill, NAP provided only one level of coverage, equivalent to CAT risk protection available under section 508(b) of the Federal Crop Insurance Act. This CAT-level protection covers losses due to low yield that are greater than 50 percent of expected production. As specified in current regulations in 7 CFR part 1437, NAP payments for low yield are calculated based on the amount of loss that exceeds 50 percent of expected production at 55 percent of the average market price for the crop. This means that the maximum NAP payment for a total loss under CAT-level coverage is 27.5 percent (50 percent of 55 percent) of the value of the covered crop or commodity. Under NAP, prevented planting was calculated not on a loss of expected yield, but based on acreage prevented from being planted based on total acreage intended to be planted in a crop year. A NAP prevented planting payment was issued based on the eligible approved prevented planted crop acreage in excess of 35 percent of total planted and prevented planted acreage times 55 percent of the average market price of the crop. NAP CAT-level coverage is available for a service fee of $250 per crop per county, up to $750 per county, not to exceed $1,875 per producer—this rule does not change the service fee for CAT-level coverage.

NAP will continue to offer CAT-level coverage for eligible crops. For the 2015 through 2018 crop years, the 2014 Farm Bill authorizes additional levels of coverage equivalent to coverage under subsections (c) and (h) of section 508 of the Federal Crop Insurance Act. This means that producers may select buy-up coverage ranging from 50 to 65 percent of production, in 5 percent increments, and for 100 percent of the average market price. In other words, all buy-up coverage levels are at 100 percent of the average market price. If a producer elects buy-up coverage for a crop, prevented planting on that crop will be calculated as it was before but with 100 percent of the average market price. Payment factors (for acres prevented from being planted, planted and not harvested, and planted and harvested) will continue to be applied as they were before. Crops and grasses intended for grazing are specifically excluded from buy-up coverage by the 2014 Farm Bill. To obtain buy-up coverage, producers are required to pay a premium, equal to 5.25 percent times the level of coverage, in addition to the NAP service fee. The coverage levels and premium calculations are specified in the 2014 Farm Bill and FSA has no discretion to offer different coverage levels or premiums.

Premiums for additional coverage will be calculated as the product of the producer's share of the NAP covered crop, times the number of eligible acres devoted to the crop, times the approved yield per acre, times the coverage level, times the average market price, times a 5.25 percent premium fee. The maximum premium per producer, as specified in the 2014 Farm Bill, is $6,562.50 (the product of the applicable payment limitation of $125,000 times a 5.25 percent premium fee for the maximum level of coverage).

For example, if Farmer Smith has a 100 percent share interest in 20 acres of apple trees intended for the fresh market, and the approved yield per acre for that crop is 450 bushels, and the average fresh market price is $10.00 per bushel, and the coverage level is 65 percent, the premium will be 1.000 (100 percent share) times 20 (acres) times 450 (bushels per acre) times 0.65 (coverage level of 65 percent) times $10.00 (price per bushel) times 0.0525 (premium factor), which equals $3,071.25. If Farmer Smith suffers a 100 percent loss, the payment would be calculated as 1.000 (100 percent share) times 20 (acres) times 450 (bushels per acre) times 0.65 (coverage level) minus 0 bushels (actual production) times $10.00 (price per bushel), which equals a NAP payment of $58,500.

Buy-up coverage will also be available for value loss crops. NAP payments for value loss crops are based on the field market value of the crop before the disaster rather than on an approved yield. Examples of value loss crops include aquaculture, floriculture and ornamental nursery. The value of a crop before a potential disaster will be unknown at the time of premium calculation due to variations in

inventory and field value throughout the crop year. As a result, premiums for value loss crop will be based on the maximum dollar value for which a producer requests coverage, subject to applicable payment limitation, times the 5.25 percent premium. In the event of a loss, the NAP payment will be calculated using the lesser of the field market value of the crop before the disaster or the maximum dollar value for which the producer requested coverage at the time of application.

The regulations discuss application closing dates. Because 2015 application closing dates for some crops have already passed before FSA published this rule and made buy-up coverage available, with this rule producers may still nonetheless obtain buy-up coverage for those crops for the 2015 crop year by submitting an application for coverage requesting buy-up coverage and paying the service fee, even if the producer did not previously obtain CAT-level coverage and pay the service fee for the crop, by January 14, 2015. FSA needed time to develop the regulatory changes required to implement the new provisions as required by the 2014 Farm Bill, including completing additional necessary work, such as updating handbooks and training staff. Therefore, it seemed reasonable to provide this retroactive option because producers did not know what the changes or available options would be when they typically would have been required to purchase NAP coverage. In addition, if there are application closing dates near the publication of this rule, those producers will also be given 30 days from the date of publication of this rule to submit an application for coverage to ensure they are able to make their decision to purchase NAP coverage based on consideration of these regulatory changes.

CAT-level coverage for the 2015 crop year was available prior to the application closing date prior to this rule; therefore, the deadline to apply for CAT-level coverage is not extended.

Coverage Periods

This rule clarifies that, regardless of when the coverage period generally begins for any crop, a producer's own individual coverage for a crop that must fall within the general coverage period can start no earlier than 30 calendar days after the producer's application for coverage is filed, except as discussed below. FSA is making this change to be consistent with the requirements of 7 U.S.C. 7333.

This rule provides an exception for the 2015 crop year for crops with application closing dates that have passed prior to publication of this rule. For those crops, if a producer did not apply for NAP coverage prior to the application closing date but files an application for coverage and elects buy-up coverage by January 14, 2015, the coverage period will begin as specified for the crop in 7 CFR 1437.6, without regard to the date the application for coverage is filed. Under this exception, producers must elect buy-up coverage, but such coverage can be for any level available under such buy-up coverage. Producers who previously purchased CAT-level coverage prior to the application closing date for those crops may also elect buy-up coverage until January 14, 2015. As noted above, if there are application closing dates near the publication of this rule, those producers will also be given 30 days following the publication of this rule to ensure they have the same period in which to make a decision to purchase NAP coverage based on consideration of these regulatory changes.

Service Fee Waiver and Premium Reduction

Prior to this rule, the NAP regulations waived the service fee for producers who met the definition of ''limited resource farmer'' in 7 CFR 457.8. The 2014 Farm Bill continues to waive service fees for limited resource farmers and ranchers and now waives service fees for beginning and socially disadvantaged farmers and ranchers as well. In addition to the service fee waiver, beginning, limited resource, and socially disadvantaged farmers and ranchers who elect buy-up coverage are also eligible for a 50 percent premium reduction. For the purpose of this rule, ''beginning,'' ''limited resource,'' and ''socially disadvantaged farmer and rancher'' are defined in 7 CFR part 718. To be eligible for the service fee waiver or premium reduction, persons or legal entities must provide a certification of their status as beginning, limited resource, or socially disadvantaged at the time they file an application for coverage, if they have not already filed that certification with FSA.

For the 2014 crop year, the expanded service fee waiver will apply retroactively. In the extension of authorization document published on March 28, 2014 (79 FR 17388–17390), FSA announced that beginning and socially disadvantaged farmers and ranchers who paid the service fee for the 2014 crop year before enactment of the 2014 Farm Bill would be refunded the service fee.

Notice of Loss and Completion of Harvest

This rule clarifies requirements for filing a notice of loss. As specified in the NAP regulations, a written notice of loss must be filed for prevented planting claims within 15 calendar days after the final planting date, or for yield claims or value loss, by the earlier of 15 calendar days after the disaster occurrence or date of loss or damage to the crop first becomes apparent, or the normal harvest date. These requirements for a written notice of loss are not changing with this rule.

In addition to the written notice of loss, FSA is making a discretionary change to add a requirement to provide notice to the administrative county office within 72 hours for certain crops, including hand-harvested crops and other crops as determined by FSA, if earlier notice is needed in order to conduct an accurate loss assessment of the crop because of the rate at which certain crops (these crops ordinarily include hand harvested fruit and vegetable crops that can rapidly deteriorate and confound loss adjustment work) decompose in the field after a loss event and the reduced ability to discern if alleged damage occurred due to an eligible cause of loss as opposed to other factors. For example, if a freeze damages a crop of tomatoes, the participant is required to provide notice to FSA of damage or loss to the tomatoes within 72 hours of when damage is first apparent to the NAP covered producer. The earlier notice, which is not required to be in writing, provides FSA an opportunity to assess the loss before the damaged crop deteriorates and while the amount of loss attributable to a specific eligible cause of loss is still apparent. This provision is consistent with RMA's notification requirements for crop insurance.

Producers of hand-harvested crops, under the prior rule, were required to provide FSA with notification that harvest is complete within 15 days of when damage or loss was first apparent. This rule changes that deadline from 15 days to within 72 hours. This discretionary change allows FSA to make a more accurate appraisal before the crop deteriorates or before evidence of the crop suffering a loss due to an eligible of loss diminishes or is lost in order to differentiate between legitimate losses versus production left in a field because of quality or unmarketable because of the lack of market.

Late-Planted Acreage

This rule makes discretionary changes to the late planting provisions in 7 CFR 1437.103 to add an exception to the rule that crops having multiple planting periods and value loss crops are not eligible for reduced coverage for late planting. The exception added by this rule makes reduced NAP coverage available for the last planting period of multiple planted crops and multiple-planting periods having a defined gap of 60 days or more between the harvest date of the previous planting period and beginning of the immediately following planting period.

Average Market Prices

This rule makes discretionary changes to clarify how average market prices are established as specified in 7 CFR 1437.12. NAP payments are calculated using average market prices, which are determined by FSA. Prior to this rule, an average market price was established for each crop and, if practicable, for each intended use of a crop on a harvested basis without the inclusion of transportation, storage, processing, marketing, or other post-harvest expenses. Prices should reflect the average market price actually received by producers, which may vary by state. The average market price has been typically established on a state-by-state basis, meaning that all NAP payments for a crop and, if applicable, for an intended use within a state would be based on the same average market price. Average market prices are based on the best available data (including National Agricultural Statistics Service (NASS) data, National Institute of Food and Agriculture (NIFA) data, knowledge of local markets, etc.) and are comparable (though not required to be equal) to established Federal Crop Insurance Corporation (FCIC) prices. In this rule, FSA details how it will determine, average market prices of eligible NAP crops for subsequent crop years.

This rule clarifies that FSA may establish separate prices within a state to reflect the different prices producers receive based on differences due to different farming practices (conventional or organic) and sales to different markets (wholesale, direct sales to consumers at farm stands or farmer's markets, etc.). These changes to average market price provisions do not extend NAP coverage to additional producers or crops; changes made by this rule will allow an eligible producer to obtain NAP coverage for eligible crops grown with organic farming practices or intended to be marketed directly to consumers. This rule simply clarifies that when sufficient data is available, FSA may establish separate average market prices within a State that more closely reflect the prices obtained by producers based on the specific situations.

To be eligible to receive payment based on an organic price, producers must report their organic acreage of the crop. Producers reporting organic acreage of a crop must be certified or exempt from certification according to the National Organic Program regulations at 7 CFR part 205 and must provide a copy of their organic system plan to FSA. Yields will be adjusted as needed to reflect yields for crops using organic production methods. This rule also adds definitions related to organic acreage and production in order to implement these changes.

All of the definitions in this rule related to organic production and certification are consistent with definitions used by AMS and with the basic provisions for Federal crop insurance used by RMA. Specifically, the definitions for ''buffer zone,'' ''certified organic acreage,'' ''certifying agent,'' conventional farming practice,'' the specification of organic farming practices within the definition for ''good farming practices,'' ''organic agricultural experts,'' ''organic crop,'' ''organic farming practice,'' ''organic standards,'' ''prohibited substance,'' and ''transitional acreage'' are identical to or consistent with those terms as used in the Federal crop insurance basic provisions. The terms ''certified organic acreage,'' ''good farming practices,'' ''organic crop,'' ''organic farming practice,'' ''organic system plan,'' ''organic standards,'' and ''prohibited substance'' reference the AMS National Organic Program regulations, the Organic Foods Production Act of 1990 (7 U.S.C. 6501–6523), or both.

When prices are established by intended use, producers with buy-up coverage, but without sufficient evidence of the historical intended and actual use or market as reflected in production records and final disposition, and those with CAT-level coverage will have NAP payments calculated using the average market price of the predominant final use of the crop. If a producer elects buy-up coverage and provides sufficient evidence of the intended use percentages of the crop in prior crop years, the NAP payment will be calculated based on those percentages instead of using only the price from the predominant final use. Premiums for producers who elect buy-up coverage will be based on the intended use of the crop based on the acreage report.

If different prices are established for crops intended for different markets of an intended use of a crop, such as wholesale or directly to consumers through farmers markets or farm stands, and where FSA has established average market prices based on different markets, producers who elect buy-up coverage and provide acceptable documentation may elect NAP assistance calculated based on those prices.

Approved Yields

Prior to this rule, when a producer reported acreage for a crop year, but failed to certify a report of production, regardless of whether that producer obtained NAP coverage for that year, an assigned yield or zero-credited yield was used in the producer's actual production history for calculation of that producer's approved yield in later years. This rule defines ''bypass year'' to include years when the producer did not obtain coverage for the crop and does not file a report of acreage or production. The rule makes a discretionary change to stop using assigned yields and zero-credited yields for bypass years in the calculation of a producer's approved yield. This change is intended to encourage increased participation in NAP by preventing an adverse impact on producers who choose not to report production during years when they do not have NAP coverage but choose to elect NAP coverage in later years. The policy regarding assigned yields and zero-credited yields for producers who have NAP coverage, but do not report production, is not changing under this rule.

This rule allows replacement of assigned yields and zero-credited yields in a producer's actual production history (APH) for the 1995 through 2014 crop years with yields equal to the higher of 65 percent of the current crop year T-yield (as defined 7 CFR 1437.3) or the missing crop year's actual yield. As with the change discussed above for bypass years, this discretionary change is intended to encourage increased participation in NAP and to avoid penalizing producers who did not report production in a year in which they did not have NAP coverage.

Adjustment of Production for Quality Losses

To provide improved risk protection that addresses losses in a similar manner to some past ad hoc disaster programs, the NAP payment calculation for yield losses will allow an adjustment of net production due to quality losses for crops and locations approved by

FSA. This change allows NAP to provide risk protection for quality losses in limited situations when a specific crop in a given location typically does not suffer yield losses large enough to result in NAP payments, but does suffer significant quality losses due to eligible causes of loss. The requests for quality adjustments for crops and locations may be processed through any of the FSA State offices. The crops and locations eligible for quality adjustments will be determined by the Deputy Administrator for Farm Programs in advance of the coverage period, only if supporting documentation of industry accepted standards for quality discounts are available. Net production will be adjusted only if buy-up coverage is elected and the covered producer elects to have the quality loss option; no adjustment will be made if a producer elects only CAT-level coverage for a crop. Evidence to support making a quality loss adjustment must be from records acceptable to FSA and are subject to disapproval if FSA is not satisfied that the alleged loss of quality occurred as a result of an eligible cause of loss in the coverage period. If a producer opts for quality loss adjustment and an adjustment to the unit's net production is made, FSA will enter the adjusted net production into the producer's actual production history database for the loss year. In other words, the lower actual yield that results after adjustment for quality will be used to compute future year approved yields.

Aquaculture Coverage

NAP regulations required that for aquaculture losses to be eligible for payment, the aquaculture species must be kept in a controlled environment and that such species must be planted or seeded in containers, net pens, wire baskets, or similar devices designed for protection and containment. This rule makes discretionary changes for aquaculture producers who raise aquacultural species on a rope and certain mollusk producers.

As noted above, under changes made by this rule for eligible causes of loss, NAP coverage will be available for aquaculture producers who plant or seed aquatic species in or on certain specifically named devices, which now includes ropes, when it is determined by the Deputy Administrator for Farm Programs that the ropes provide the necessary containment and protection for the species, area, and practice.

Under changes made by this rule, with respect to mollusks not planted or seeded in devices such as containers, net pens, or wire baskets, on ropes, or using similar devices designed for protection and containment, NAP coverage for such mollusks will only cover losses caused by a named tropical storm, typhoon, or hurricane. This change is intended to encourage additional NAP participation by mollusk producers who do not use containers or similar devices, while maintaining integrity in NAP by covering those producers' losses only when their losses are caused by certain types of natural disasters. Mollusk producers who continue to seed or raise mollusks in devices such as containers, net pens, or wire baskets, on ropes, or using similar devices designed for protection and containment as well as meet all other required conditions remain eligible for all NAP qualifying causes of loss for such value loss crops. For these mollusk producers, the principal elements of the rule are not changing.

Certain oyster producers and other stakeholders requested this change because the use of containers or similar devices for the protection and containment of the species is inconsistent with certain customary or ordinary mollusk industry production methods, particularly for oyster production on the U.S. East Coast. USDA data from the 2005 Census of Aquaculture confirms that about 70 percent of mollusk producers use the ''on bottom'' production method, without containers or pens. In 2011 and 2012, hurricanes caused significant losses for mollusk aquaculture crops. Mollusk producers who had NAP coverage in those years and met the current requirements were compensated for their losses, but the majority of mollusk producers did not have NAP coverage and if they had, they would not have had any losses that would have met the NAP eligibility requirements at that time. (See the Cost Benefit Analysis Summary section for details about the impacts.)

The purpose of NAP is to provide risk management for agricultural operations as they normally or ordinarily exist and operate. Removing the requirement to use containers or similar devices benefits mollusk producers by offering NAP coverage for their operations, independent of how those producers choose to manage their production. FSA is therefore amending the regulations to cover eligible losses of mollusks that are not grown in containers, net pens, or wire baskets, on ropes, or using similar devices. This change permits mollusk producers who accept the risks of raising mollusks without containers, net pens, ropes, wire baskets, or similar devices to be eligible for NAP coverage; however, under such coverage, eligible losses can only be caused by a named tropical storm, typhoon, or hurricane. It would likely benefit primarily U.S. East Coast oyster producers, as well as producers of other mollusk aquaculture crops such as clams and mussels. Mollusk producers who plant or seed mollusks in containers, net pens, or wire baskets, on ropes or using similar devices designed for protection and containment and meet all other required conditions remain eligible for NAP coverage for all NAP causes of loss. For these mollusk producers, the principal elements of the rule are not changing.

As specified in 7 U.S.C. 7333, NAP is authorized to provide benefits only for losses that are the result of natural disaster; 7 U.S.C. 7333 also specifies that NAP cannot cover losses due to ''the failure of the producer to follow good farming practices.'' FSA has determined that a producer's decision to not use containers, net pens, ropes, wire baskets, or similar devices is not an example of a poor farming practice or an example of something that is not a good farming practice. However, given that NAP can only pay for losses stemming from an eligible cause of loss (and not a decision not to use containers, net pens, ropes, wire baskets, or similar devices), this rule specifies that for mollusks not grown in containers, net pens, or wire baskets, on ropes, or using similar devices, only losses caused by named hurricanes, typhoons, or tropical storms would be eligible for payment. NAP coverage does not cover a loss of mollusks if the producer does not to use containers to protect the mollusks from loss caused by other types of adverse weather, tidal surges, or predators, or other similar events or causes. Missing mollusk inventory reported by a producer that does not use containers, net pens, ropes, wire baskets, or similar devices will not be eligible for a NAP payment unless FSA can determine that the loss of inventory was a direct result of a named hurricane, typhoon, or tropical storm. All other aquaculture species are still subject to the requirement to use protective devices. Additionally, as previously mentioned, mollusk producers that choose to grow mollusks in an environment that consists of containers, net pens, ropes, wire baskets, or similar devices designed for protection and containment remain eligible for all NAP qualifying losses.

Aquaculture species are considered a ''value loss'' crop under NAP, which means that NAP coverage is based on the market value of the inventory before the loss event, rather than an expected yield. This rule does not change NAP

regulations regarding compensation of eligible aquaculture losses using a value loss calculation or the documentation that must be provided to prove an eligible loss. Mollusk producers, whether they choose to keep their mollusks in controlled environments or not, are still required to have control of the waterbed where the mollusks are grown, as specified in the NAP regulations, meaning that they must own or lease the waterbed. The change being made by this rule merely eliminates the requirement that a NAP-covered participant seed or raise the eligible mollusk inventory in containers or similar devices to be eligible for NAP coverage. It will not change any of the requirements for other aquaculture species.

Forage

This rule makes discretionary changes to methods used by FSA to establish losses for grazed acreage. Prior to being amended by this rule, grazed acreage losses have been established using two methods:

(1) Based on the percentages of loss of similar mechanically-harvested forage acreage on the farm or on similar farms in the area when approved yields have been calculated to determine loss; or

(2) When there is no similar mechanically-harvested forage acreage on the farm or similar farms in the area, on the collective percentage of loss as determined by FSA for the geographical region after consideration of at least two independent assessments of grazed forage acreage conditions.

This rule specifies additional methods that FSA may use to establish a collective percentage of loss based on independent assessments of grazed forage acreage conditions; the U. S. Drought Monitor; information obtained from loss adjusters with sufficient forage knowledge to provide grazing loss assessments; data from approved areas where clippings are obtained on a regular basis to compare with expected levels of production in a geographical region; and information from Natural Resources Conservation Service technical service providers having specialized knowledge. Additionally, because the 2014 Farm Bill did not authorize buy-up coverage for grazed forage, this rule clarifies how FSA will treat forage crop acreage intended for mechanical harvest or grazing when such acreage is actually put to another use for producers who either select catastrophic coverage or buy-up coverage. The rule specifies that forage acreage reported to FSA as intended to be mechanically harvested, but which is instead, subsequently grazed, will be considered for crop definition purposes as mechanically harvested. The rule also amends how FSA will determine loss for acreage intended to be grazed, including in some cases acreage intended to be mechanically harvested, but instead is subsequently grazed for producers with catastrophic coverage. The rule also removes a prior requirement that producers show a history of forage production in order to obtain coverage.

Payment and Income Limitation

Section 1605 of the 2014 Farm Bill establishes payment and income limitations that apply to 2014 and subsequent crop, program, or fiscal year benefits. FSA previously implemented these payment and income limitations through the final rule published on April 14 (79 FR 21086–21118). The payment and income limitations are specified in 7 CFR part 1400.

NAP assistance is limited to $125,000 per person or legal entity, directly or indirectly. Attribution of payments under 7 CFR part 1400 applies in administering the payment limitation. The average AGI limit for most FSA and CCC programs, including NAP, is $900,000. The $900,000 limit is for total average AGI, as opposed to the prior multiple limits for farm and non-farm income, and the separate limit for conservation programs.

Consistency With Basic Provisions

When a producer signs up for NAP coverage, they receive a copy of the ''basic provisions,'' which is a document that explains in detail what is covered by NAP and how to file a claim. As part of the application process, the producer acknowledges that they have received and agree to the ''basic provisions.'' This rule amends 7 CFR 1437.2, ''Administration,'' to specify that when the NAP basic provisions are less restrictive than regulations that were in effect at the time of signup (such as the situation that may occur in 2015 where the NAP basic provisions were provided to participants prior to amendment and publication of this rule for the 2015 crop year), the Deputy Administrator may determine that the less restrictive provision applies. This amendment is needed to prevent adverse results for participants that relied on the less restrictive basic provisions provided by FSA when they applied for NAP coverage. This rule also amends 7 CFR 1437.3, ''Definitions,'' to add a definition of ''basic provisions.''

Miscellaneous Conforming and Editorial Changes

In addition to the changes required by the 2014 Farm Bill and the substantive discretionary changes discussed above, this rule makes a number of non-substantive changes to make the regulations clear and consistent.

Because this rule expands waivers to beginning farmers and ranchers and that term is used for several FSA programs, this rule defines the term in 7 CFR part 718 and makes a conforming change to remove the term and definition from the Emergency Assistance for Livestock, Honeybees, and Farm-Raised Fish Program (ELAP) regulations in 7 CFR part 1416. The definition is revised slightly to match the definition on the form FSA presents to persons or legal entities who claim they are beginning farmers or ranchers and is consistent with what FSA has determined is a beginning farmer or rancher. FSA is making this discretionary change to provide consistency in the use of the term among FSA programs.

Because this program requires a few terms that are also needed for other FSA and CCC programs, this rule adds those terms to 7 CFR part 718 and removes them from parts 1416 and 1412. These terms are ''planted and prevented planted,'' ''controlled environment,'' and ''United States.'' This rule adds the terms ''intended use'' to part 718, because it is needed for both NAP and other FSA programs. It removes the term ''State'' from 718, because it is redundant with the definition of ''United States.''

This rule replaces ''CCC'' with ''FSA'' where relevant in 7 CFR part 1437 to clarify that NAP is administered by FSA for CCC. It also amends the provisions regarding requests to waive or modify deadlines or other provisions, except where specified by law, to clarify that such requests may be considered at the discretion of the Deputy Administrator for Farm Programs (''Deputy Administrator''). Participants do not have a right to a decision on a request for waiver or on such a request, and a refusal to consider a waiver or such a request is not a failure to act under any law or regulation.

Notice and Comment

In general, the Administrative Procedure Act (APA, 5 U.S.C. 553) requires that a notice of proposed rulemaking be published in the **Federal Register** and interested persons be given an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral

presentation, except when the rule involves a matter relating to public property, loans, grants, benefits, or contracts. Although FSA could use the APA exemption and publish this rule as a final rule without the opportunity for public comment, FSA is implementing the regulatory changes through an interim rule to provide an opportunity for public comment while also implementing the rule without unnecessary delay to benefit FSA customers with the additional flexibility provided by the changes.

Executive Orders 12866 and 13563

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

The Office of Management and Budget (OMB) designated this rule as significant under Executive Order 12866, ''Regulatory Planning and Review,'' and therefore, OMB has reviewed this rule. The costs and benefits of this rule are summarized below. The full cost benefit analysis is available on regulations.gov.

Clarity of the Regulation

Executive Order 12866, as supplemented by Executive Order 13563, requires each agency to write all rules in plain language. In addition to your substantive comments on this rule, we invite your comments on how to make the rule easier to understand. For example:

- Are the requirements in the rule clearly stated? Are the scope and intent of the rule clear?
- Does the rule contain technical language or jargon that is not clear?
- Is the material logically organized?
- Would changing the grouping or order of sections or adding headings make the rule easier to understand?
- Could we improve clarity by adding tables, lists, or diagrams?
- Would more, but shorter, sections be better? Are there specific sections that are too long or confusing?
- What else could we do to make the rule easier to understand?

Cost Benefit Analysis Summary

The changes to the NAP regulations are expected to have a net economic impact of $39.4 million per year. This includes $39.4 million for the ''buy up'' coverage provisions required by the 2014 Farm Bill, $250,000 for changes to mollusk coverage, $45,000 for aquaculture on ropes coverage, and $1.4 million for organic price coverage. As noted below, the net impact of $39.4 million includes a partial offset due to the $9.8 million increase in annual premium and fee revenue.

The 2014 Farm Bill NAP ''buy up'' coverage changes are estimated to have a net economic cost of $39.4 million annually. This number is based on estimating the three largest effects of the new ''buy-up'' provisions: The shift of existing CAT level NAP participants to buy-up NAP coverage levels, an increase in new NAP participants (not formerly in CAT) who purchase buy-up NAP coverage, and the expected NAP payment increases due to the greater liability associated with added buy-up coverage levels for both existing and new participants. (The greater liability effect factors in the payment rate increase from 55 percent to 100 percent of the market value of eligible lost production.) These three effects together are expected to account for nearly $49.2 million in additional payments to producers annually. However, these additional payments are expected to be partially offset by a $9.8 million increase in annual premium and fee revenue, for a net impact of $39.4 million annually.

The impact on costs from fee waivers for socially disadvantaged and beginning farmers is expected to be negligible. This is because the persons who are eligible for the waivers added by the 2014 Farm Bill for socially disadvantaged farmers and ranchers, (SDA), and beginning farmers and ranchers were mostly already eligible for the waivers for limited resource farmers and ranchers that were in place prior to this rule. The participation of these groups is expected to increase in proportion with the overall rate of 44.3 percent increase in new participation estimated for buy-up coverage.

Because the total number of eligible mollusk producers in the United States is relatively small, fewer than 800 producers, the total impact of the changes in eligibility for mollusks is expected to be relatively small, around $250,000 in additional outlays per year. The aquaculture grown on ropes cost impact is even smaller, at an estimated $45,000 in additional outlays per year. The coverage for organic prices is estimated at $1.4 million per year, based on the assumption that the organic crops for which RMA has enough price data to provide an organic price election in at least one state, but limited enough RMA coverage that they fall within the scope of NAP, are primarily specialty fruit crops.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), generally requires an agency to prepare a regulatory flexibility analysis of any rule whenever an agency is required by APA or any other law to publish a proposed rule, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule is not subject to the Regulatory Flexibility Act because as noted above, this rulemaking is exempt from the notice and comment rulemaking requirements of APA and no other law requires that a proposed rule be published for this rulemaking initiative.

Environmental Review

FSA has determined that the administrative expansion of coverage for mollusks under NAP, identified in this rule, and the participation in NAP itself do not constitute major Federal actions that would significantly affect the quality of the human environment because Section 196 of 7 U.S.C. 7333 requires that the Secretary of Agriculture operate NAP to provide coverage equivalent to the catastrophic risk protection otherwise available under section 508(b) of the Federal Crop Insurance Act (7 U.S.C. 1508(b)).

In addition to adding coverage for mollusks, the other discretionary changes proposed include coverage for organic crops and clarifications regarding eligible losses and causes of loss (types of natural disasters). FSA has likewise determined that these discretionary efforts do not constitute major Federal actions that would significantly affect the quality of the human environment, individually or cumulatively, because of their context and the anticipated intensity of impacts.

Therefore, in accordance with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and FSA regulations for compliance with NEPA (7 CFR part 799), no environmental assessment or environmental impact statement will be prepared.

Executive Order 12372

Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' requires consultation with State and local officials that would be directly affected by proposed federal financial assistance. The objectives of the Executive Order are to foster an intergovernmental partnership and a strengthened Federalism, by relying on State and local processes for State and local government coordination and review of proposed Federal Financial assistance and direct Federal development. For reasons set forth in the final rule related notice regarding 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983), the programs and activities within this rule are excluded from the scope of Executive Order 12372.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, ''Civil Justice Reform.'' This rule will not preempt State or local laws, regulations, or policies unless they represent an irreconcilable conflict with this rule. The rule has retroactive effect in that for the 2014 crop year, the expanded service fee waiver will apply retroactively, and for the 2015 crop year the date coverage begins will be retroactive as long as the application for coverage is filed by the application closing date as specified in § 1437.7(i). Before any judicial action may be brought regarding the provisions of this rule, the administrative appeal provisions of 7 CFR parts 11 and 780 are to be exhausted.

Executive Order 13132

This rule has been reviewed under Executive Order 13132, ''Federalism.'' The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government, except as required by law. Nor does this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

Executive Order 13175

This rule has been reviewed in accordance with the requirements of Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that 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.

FSA has assessed the impact of this rule on Indian tribes and determined that this rule does not, to our knowledge, have tribal implications that require tribal consultation under Executive Order 13175. If a Tribe requests consultation, FSA will work with the USDA Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions, and modifications identified in this rule are not expressly mandated by the 2014 Farm Bill.

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, Pub. L. 104–4) requires Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments or the private sector. Agencies generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures of $100 million or more in any year for State, local, or Tribal governments, in the aggregate, or to the private sector. UMRA generally requires agencies to consider alternatives and adopt the more cost effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates, as defined in Title II of UMRA, for State, local, and Tribal governments or the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)

This rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act of 1996, (Pub. L. 104–121, SBREFA). Therefore, FSA is not required to delay the effective date for 60 days from the date of publication to allow for Congressional review. Accordingly, this rule is effective on the date of publication in the **Federal Register**.

Federal Assistance Programs

The title and number of the Federal Assistance Program, as found in the Catalog of Federal Domestic Assistance, to which this rule applies, is: Noninsured Assistance 10.451.

Paperwork Reduction Act of 1995

FSA added the changes required for the buy-up for additional coverage, organic crops, and mollusks described in this rule to a currently approved information collection by OMB under the control number of 0560–0175, Noninsured Crop Disaster Assistance Program. The collection of information from the respondents remains the same except the new respondents with organic crops and mollusks. FSA described the revision of information collection activities and the changes to the burden hours due to the new respondents in the request for public comment that was published in the **Federal Register** on October 15, 2014 (79 FR 61484–61489). FSA confirmed that neither AMS nor RMA collect the information that FSA will be collecting, so there is no duplication of information collection.

E-Government Act Compliance

FSA and CCC are committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects

7 CFR Part 718

Acreage allotments, Drug traffic control, Loan programs-agriculture, Marketing quotas, Price support programs, Reporting and recordkeeping requirements.

7 CFR Part 1412

Cotton, Feed grains, Oilseeds, Peanuts, Price support programs, Reporting and recordkeeping requirements, Rice, Soil conservation, Wheat.

7 CFR Part 1416

Dairy products, Indemnity payments, Pesticide and pests, Reporting and recordkeeping requirements.

7 CFR Part 1437

Agricultural commodities, Crop insurance, Disaster assistance, Fraud, Penalties, Reporting and recordkeeping requirements.

For the reasons discussed above, FSA amends 7 CFR part 718 and CCC amend 7 CFR parts 1412, 1416, and 1437 as follows:

PART 718—PROVISIONS APPLICABLE TO MULTIPLE PROGRAMS

■ 1. Revise the authority citation for part 718 to read as follows:

Authority: 7 U.S.C. 1501–1508, 1921–2008, 7201–7302, and 15 U.S.C. 714b.

■ 2. Amend § 718.2 as follows:

■ a. Remove the definition for ''State''; and

■ b. Add, in alphabetical order, definitions for ''Beginning farmer and rancher'', ''Controlled environment'', ''Intended use'', ''Planted and considered planted (P&CP)''; and ''United States''.

The additions read as follows:

§ 718.2 Definitions.

* * * * *

Beginning farmer or rancher means a person or legal entity (for legal entities to be considered a beginning farmer or rancher, all members must be related by blood or marriage and all members must be beginning farmers or ranchers) for which both of the following are true for the farmer or rancher:

(1) Has not operated a farm or ranch for more than 10 years; and

(2) Materially and substantially participates in the operation.

* * * * *

Controlled environment means, with respect to those crops for which a controlled environment is required or expected to be provided, including but not limited to ornamental nursery, aquaculture (including ornamental fish), and floriculture, as applicable under the particular program, an environment in which everything that can practicably be controlled with structures, facilities, growing media (including but not limited to water, soil, or nutrients) by the producer, is in fact controlled by the producer.

* * * * *

Intended Use means for a crop or a commodity, the end use for which it is grown and produced.

* * * * *

Planted and considered planted (P&CP) means with respect to an acreage amount, the sum of the planted and prevented planted acres on the farm approved by the FSA county committee for a crop. P&CP is limited to initially planted or prevented planted crop acreage, except for crops planted in an FSA approved double-cropping sequence. Subsequently planted crop acreage and replacement crop acreage are not included as P&CP.

* * * * *

United States means all 50 States of the United States, the District of Columbia, the Commonwealth of Puerto Rico and any other territory or possession of the United States.

* * * * *

§ 718.102 [Amended]

■ 3. Amend § 718.102 as follows:

■ a. In paragraph (b)(3), add the word ''intended'' immediately before the word ''use'';

■ b. In paragraph (b)(4), remove the words ''in the country of the eligible crop'' and add the words ''and intended use of the eligible crop in the country'' in their place; and

■ c. In paragraph (b)(6), add the word ''intended'' immediately before the word ''use''.

PART 1412—AGRICULTURE RISK COVERAGE, PRICE LOSS COVERAGE, AND COTTON TRANSITION ASSISTANCE PROGRAMS

■ 4. The authority citation for part 1412 continues to read as follows:

Authority: 7 U.S.C. 1508b, 7911–7912, 7916, 8702, 8711–8712, 8751–8752, and 15 U.S.C. 714b and 714c.

§ 1412.3 [Amended]

■ 5. In § 1412.3, remove the definition for ''Planted and considered planted (P&CP)''.

PART 1416—EMERGENCY AGRICULTURAL DISASTER ASSISTANCE PROGRAMS

■ 6. Revise the authority citation for part 1416 to read as follows:

Authority: Title III, Pub. L. 109–234, 120 Stat. 474; and 16 U.S.C. 3801, note.

§ 1416.102 [Amended]

■ 7. In § 1416.102, remove the definitions for ''Beginning farmer and rancher''; ''Controlled environment''; ''County committee or county office''; ''Secretary''; ''State committee, State office, county committee, or county office''; and ''United States''.

PART 1437—NONINSURED CROP DISASTER ASSISTANCE PROGRAM

■ 8. The authority citation for part 1437 continues to read as follows:

Authority: 7 U.S.C. 1501–1508 and 7333; 15 U.S.C. 714–714m; 19 U.S.C. 2497, and 48 U.S.C. 1469a.

Subpart A—General Provisions

■ 9. Revise § 1437.1 to read as follows:

§ 1437.1 Applicability.

(a) The purpose of the Noninsured Crop Disaster Assistance Program (NAP) is to help manage and reduce production risks faced by producers of eligible commercial crops or other agricultural commodities during a coverage period. NAP reduces financial losses that occur when natural disasters (damaging weather or adverse natural occurrence that is an eligible cause of loss) cause a loss of expected production or actual value for value loss crops, or where producers are prevented from planting an eligible crop because of an eligible cause of loss in a coverage period.

(b) The provisions in this part are applicable to eligible producers and eligible crops for which catastrophic coverage under section 508(b) or additional coverage of sections 508(c) or 508(h) under the Federal Crop Insurance Act (7 U.S.C. 1508) (excluding pilot policies or plans of insurance) is not available.

(c) The regulations in this part are applicable to the 2015 and subsequent crop years.

■ 10. Revise § 1437.2 to read as follows:

§ 1437.2 Administration.

(a) NAP is administered under the general supervision of the Administrator, Farm Service Agency (FSA) (who also serves as the Commodity Credit Corporation (CCC) Executive Vice President), and the Deputy Administrator for Farm Programs, FSA, (referred to as ''Deputy Administrator'' in this part). NAP is carried out by FSA State and county committees (State and county committees) with instructions issued by the Deputy Administrator.

(b) State and county committees, and representatives and their employees, do not have authority to modify or waive any of the provisions of the regulations in this part, NAP's basic provisions, or instructions issued by the Deputy Administrator.

(c) The State committee will take any action required by the regulations in this part that the county committee has not taken. The State committee will also:

(1) Correct, or require a county committee to correct, any action taken by such county committee that is not in accordance with the regulations in this part; or

(2) Require a county committee to withhold taking any action that is not in accordance with this part.

(d) No delegation to a State or county committee precludes the FSA Administrator, the Deputy Administrator, or a designee, from determining any question arising under NAP or from reversing or modifying any determination made by a State or county committee.

(e) The Deputy Administrator has the authority to permit State and county committees to waive or modify deadlines (except deadlines specified in a law) and other requirements or

program provisions not specified in law, in cases where lateness or failure to meet such other requirements or program provisions do not adversely affect operation of NAP.

(1) Producers and participants have no right to a decision in response to a request to waive or modify deadlines or program provisions. The Deputy Administrator's refusal to consider such a request or a decision not to exercise this discretionary authority under this section is not an adverse decision and is not appealable.

(2) FSA's decision not to consider a case under this section is not a failure to act under any law or regulation because participants have no right to a decision on a request for waiver or modification.

(f) Items including, but not limited to, application periods, application deadlines, basic provisions, internal operating guidelines issued to FSA State and county offices, coverage periods, fees, prices, yields, and payment factors established for NAP in accordance with this part that are used for similarly situated participants and eligible crops are not to be construed to be individual program eligibility determinations or extent of eligibility determinations and are, therefore, not subject to administrative review.

(g) Where there is any conflict between the basic provisions and the regulations, the regulations apply except when the Deputy Administrator determines that because of the timing of issuance of the regulations, the basic provisions applicable to the specific crop year or coverage period that may be less restrictive will apply.

■ 11. Amend § 1437.3 as follows:

■ a. Revise the introductory text;

■ b. Revise the definitions for ''Application closing date'' and ''Catastrophic coverage'';

■ c. In the definition for ''Crop year'', third sentence, add the words ''or buy-up coverage'' immediately after the words ''catastrophic coverage'';

■ d. Revise the definitions for ''Good farming practices'', ''Industrial crop'', and ''Native sod'';

■ e. Remove the definitions for ''Controlled environment '' and ''Intended Use''; and

■ f. Add, in alphabetical order, definitions for ''Acres devoted to the eligible crop'', ''Additional coverage'', ''Agricultural experts'', ''Application for coverage'', ''Basic provisions'', ''Bypass year'', ''Buffer zone'', ''Buy-up coverage'', ''Buy-up coverage yield'', ''Certified organic acreage'', ''Certifying agent'', ''Conventional farming practice'', ''Feedstock'', ''Generally recognized'', ''Guarantee'', ''Hand-harvested'', ''Maximum dollar value for coverage sought'', ''Organic agricultural experts'', ''Organic crop'', ''Organic farming practice'', ''Organic system plan'', ''Organic standards'', ''Prohibited substance'', ''Secondary use'', ''Short rotation woody crops'', and ''Transitional acreage''.

The revisions and additions read as follows:

§ 1437.3 Definitions.

The terms and definitions in this section apply to NAP. The terms and definitions in part 718 of this title and part 1400 of this chapter also apply to NAP, except where those same terms are defined in this section. In that case, the terms and definitions of this section apply.

Acres devoted to the eligible crop means the total planted and considered planted (P&CP) acres of the eligible crop.

Additional coverage means insurance coverage offered by the Federal Crop Insurance Corporation under sections 508(c) or 508(h) of the Federal Crop Insurance Act.

* * * * *

Agricultural experts means persons who are employed by the National Institute of Food and Agriculture, or the agricultural departments of universities, or other persons approved by FSA, whose research or occupation is related to the specific crop or practice for which such expertise is sought.

* * * * *

Application closing date means the last date, as determined by FSA, producers can submit an application for coverage for noninsured crops for the specified crop year and coverage period.

Application for coverage means the form specified by FSA to be completed by a producer applying for NAP coverage for an eligible crop that is accompanied by the service fee or service fee waiver form in the administrative county office by the application closing date.

Basic provisions means the document summarizing the terms and conditions of NAP coverage for a crop year that are acknowledged as having been received by the person or legal entity who signs an application for coverage according to this part.

Bypass year means a year that the producer did not obtain NAP coverage for the crop and did not file a report of acreage or production, or obtained NAP coverage for the crop and had reported or determined zero acres devoted to the eligible crop.

Buffer zone means a parcel of land, as designated in an organic system plan, that separates agricultural commodities grown under organic practices from agricultural commodities grown under non-organic practices and is used to minimize the possibility of unintended contact by prohibited substances or organisms.

Buy-up coverage means NAP assistance that is available for all eligible NAP covered crops (other than for crops and grasses intended for grazing) at a payment amount that is equal to an indemnity amount calculated for buy-up coverage computed under section 508(c) or (h) of the Federal Crop Insurance Act and equal to the amount that the buy-up coverage yield for the crop exceeds the actual yield for the crop.

Buy-up coverage yield means not less than 50 percent nor greater than 65 percent of the approved yield for the crop, as elected by the NAP covered participant and specified in 5-percent increments.

Catastrophic coverage means:

(1) For insured crops, the coverage offered by the Federal Crop Insurance Corporation (FCIC) under section 508(b) of the Federal Crop Insurance Act.

(2) For eligible NAP crops, coverage at the following levels due to an eligible cause of loss impacting the NAP covered crop during the coverage period:

(i) Prevented planting in excess of 35 percent of the intended acres;

(ii) A yield loss in excess of 50 percent of the approved yield;

(iii) A value loss in excess of 50 percent; or

(iv) An animal-unit-days (AUD) loss greater than 50 percent of expected AUD.

Certified organic acreage means acreage in the certified organic farming operation that has been certified by a certifying agent as conforming to organic standards specified in part 205 of this title.

Certifying agent means a private or governmental entity accredited by the United States Department of Agriculture (USDA) Secretary for the purpose of certifying a production, processing or handling operation as organic.

Conventional farming practice means any good farming practice that is not an organic farming practice.

* * * * *

Feedstock means a crop including, but not limited to, grasses or legumes, algae, cotton, peanuts, coarse grains, small grains, oil seeds, or short rotation woody crops, that is grown expressly for the purpose of producing a biobased material or product, and does not

include residues and by-products of crops grown for any other purpose.

* * * * *

Generally recognized means when agricultural experts or organic agricultural experts, as applicable, are aware of the production method or practice and there is no genuine dispute regarding whether the production method or practice allows the crop to make normal progress toward maturity and produce at least the yield used to determine the production guarantee or amount of insurance.

Good farming practices means the cultural practices generally recognized as compatible with agronomic and weather conditions and used for the crop to make normal progress toward maturity and produce at least the individual unit approved yield, as determined by FSA. These practices are:

(1) For conventional farming practices, those generally recognized by agricultural experts for the area, which could include one or more counties; or

(2) For organic farming practices, those generally recognized by the organic agricultural experts for the area or contained in the organic system plan that is in accordance with the National Organic Program specified in part 205 of this title.

Guarantee means the level of coverage provided based on the application for coverage and buy-up coverage elected under the provisions of this part.

Hand-harvested crop means a non-forage crop that is not harvested mechanically and is removed from a field by hand.

* * * * *

Industrial crop means a commercial crop, or other agricultural commodity used in manufacturing or grown expressly for the purpose of producing a feedstock for renewable biofuel, renewable electricity, or biobased products. Industrial crops include castor beans, chia, crambe, crotalaria, cuphea, guar, guayule, hesperaloe, kenaf, lesquerella, meadowfoam, milkweed, plantago ovato, sesame, and other crops specifically designated by FSA. Industrial crops exclude any plant that FSA has determined to be either a noxious weed or an invasive species. A list of plants that are noxious weeds and invasive species will be available in the FSA county office.

Maximum dollar value for coverage sought means the total dollar amount elected by the NAP covered participant for which buy-up coverage may be considered for a value loss crop in a coverage period. The amount is set by the NAP covered participant for each value loss crop and represents the highest amount of field market value of the crop before disaster in a coverage period.

* * * * *

Native sod means land on which the natural state plant cover before tilling was composed principally of native grasses, grass-like plants, forbs, or shrubs suitable for grazing and browsing and is land that has never been tilled (determined in accordance with information collected and maintained by an agency of the USDA or other verifiable records that are provided by a producer and acceptable to FSA) for the production of an annual crop through February 7, 2014.

* * * * *

Organic agricultural experts means persons who are employed by the following organizations: Appropriate Technology Transfer for Rural Areas, Sustainable Agriculture Research and Education, or the National Institute of Food and Agriculture, the agricultural departments of universities, or other persons approved by FSA, whose research or occupation is related to the specific practice for which such expertise is sought.

Organic crop means an agricultural commodity that is organically produced consistent with section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502).

Organic farming practice means a system of plant production practices used to produce an organic crop that is approved by a certifying agent in accordance with 7 CFR part 205.

Organic system plan means a plan of management of an organic production or handling operation that has been agreed to by the producer or handler and the certifying agent and that includes written plans concerning all aspects of agricultural production or handling described in the Organic Foods Production Act and the regulations in 7 CFR part 205, subpart C.

Organic standards means standards in accordance with the Organic Foods Production Act of 1990 (7 U.S.C. 6501–6523) and 7 CFR part 205.

Prohibited substance means any biological, chemical, or other agent that is prohibited from use or is not included in the organic standards for use on any certified organic, transitional, or buffer zone acreage. Lists of such substances are specified in §§ 205.602 and 205.604 of this title.

Secondary use means the harvested production bears little resemblance to, or has a different unit of expression than, the unit of expression for the reported intended use. It does not apply to fresh and processed harvested production; is not salvage; not counted as production of the crop for the following purposes, including, but not limited to:

(1) The determination of whether the unit suffered requisite loss; and

(2) APH and approved yield.

* * * * *

Short rotation woody crops means fast-growing trees that reach their economically optimum size between 4 and 20 years old.

* * * * *

Transitional acreage means acreage on which organic farming practices are being followed that does not yet qualify to be designated as organic acreage.

* * * * *

■ 12. Amend § 1437.4 as follows:

■ a. Revise paragraph (a) introductory text;

■ b. Revise paragraph (a)(4);

■ c. In paragraph (b)(2), remove the words and punctuation ''except for the 2001 and preceding crop years assistance for forage produced on Federal- and State-owned lands is available only for seeded forage.'';

■ d. Revise paragraphs (b)(4)(vi), (vii), and (viii), and add paragraphs (b)(4)(ix) and (x); and

■ e. Revise paragraphs (c) and (d).

The revisions and addition read as follows:

§ 1437.4 Eligibility.

(a) Noninsured crop disaster assistance is available during the coverage period specified in § 1437.6 for loss of production or loss of value for value loss crops or prevented planting of eligible commercial crops or other eligible agricultural commodities:

* * * * *

(4) Determined by FSA to be eligible crops for which:

(i) Catastrophic risk protection under the Federal Crop Insurance Act (7 U.S.C. 1508(b)) is not available;

(ii) Additional coverage under the Federal Crop Insurance Act (7 U.S.C. 1508(c) or (h)) is not available (excluding pilot policies or plans of insurance) and for which the Deputy Administrator determines are appropriate for NAP coverage; or

(iii) These specific practices for these crops are not included under the Federal Crop Insurance Act (7 U.S.C. 1508), but only when the Deputy Administrator determines in advance of a coverage period that the specific practice is appropriate for NAP coverage and is not available for coverage under Federal crop insurance.

(iv) The producer applies good farming practices.

(b) * * *

(4) * * *

(vi) Sweet sorghum;

(vii) Biomass sorghum;

(viii) Industrial crops (including those grown expressly for the purpose of producing a feedstock for renewable biofuel, renewable electricity, or biobased products);

(ix) Seed crops, including propagation stock such as non-ornamental seedlings, sets, cuttings, rootstock, and others, as determined by FSA; and

(x) Sea grass and sea oats.

(c) Except as specified in paragraph (d) of this section, during the first 4 crop years of planting, as determined by the Secretary, native sod acreage in Iowa, Minnesota, Montana, Nebraska, North Dakota, and South Dakota that has been tilled for the production of an annual crop after February 7, 2014, will be subject to the following:

(1) The approved yield will be determined by using a yield equal to 65 percent of the producer's T-yield for the annually planted crop; and

(2) The service fee or premium for the annual covered crop planted on native sod will be equal to 200 percent of the amount determined in § 1437.7, as applicable, but the premium will not exceed the maximum amount specified in § 1437.7(d)(2).

(d) If the producer's total native sod acreage that is tilled in a crop year is 5 acres or less, the approved yield, service fee, and premium provisions specified in paragraph (c) of this section will not apply.

* * * * *

§§ 1437.5 through 1437.15 [Redesignated as §§ 1437.6 through 1437.16]

■ 13. Redesignate §§ 1437.5 through 1437.15 as §§ 1437.6 through 1437.16, respectively.

■ 14. Add § 1437.5 to read as follows:

§ 1437.5 Coverage levels.

(a) NAP coverage for prevented planting is provided for approved prevented planting of an eligible NAP covered crop due to an eligible cause of loss in the coverage period. Payment is based on the approved prevented planted acreage in excess of 35 percent of the total intended acres to be planted.

(b) Except as provided in paragraph (d) of this section, NAP coverage is equal to 50 percent of the yield or inventory value specified in paragraph (c) of this section at 55 percent of the average market price established by FSA.

(c) Except as provided in paragraph (d) of this section, to be eligible for a NAP payment a producer must have suffered a yield or inventory value loss greater than 50 percent as the result of an eligible cause of loss in the coverage period as follows:

(1) For yield-based crops, a yield loss in excess of 50 percent of the approved yield;

(2) For value loss crops, a loss of value in excess of 50 percent of the total value of eligible inventory at the time of disaster;

(d) For 2015 through 2018 crop years, producers of eligible NAP crops, other than crops and grasses intended for grazing, may elect buy-up coverage at 100 percent of the average market price in amounts of 50 percent to 65 percent, in 5 percent increments, of:

(1) For yield-based crops, your approved yield; and

(2) For value loss crops, the lesser of the total value of eligible inventory at the time of disaster or the maximum dollar value for coverage sought.

(e) The quantity or value of any eligible NAP crop will not be reduced for any quality consideration unless a zero value is established based on a total loss of quality, except as specified in § 1437.105.

(f) For crop acreage intended to be grazed, to be eligible for a NAP payment, a producer must have suffered a loss of AUD in excess of 50 percent of expected AUD determined on the basis of acreage, carrying capacity, and grazing period.

■ 15. Revise newly redesignated § 1437.6 to read as follows:

§ 1437.6 Coverage period.

(a) *Coverage period.* The coverage period is the time during which coverage is available against prevented planting, a loss of production, or loss of value, as applicable, of the eligible crop as a result of an eligible cause of loss specified in § 1437.10. Except as provided in paragraph (h) of this section, coverage periods start no earlier than 30 days after date of filing of a valid application for coverage as specified in § 1437.7.

(1) Relief provisions cannot be used to change or modify the date an application is filed.

(2) If an application for coverage is filed within 30 days of the end of a coverage period, the application for coverage is invalid and will not be processed by FSA. In the event the application for coverage is invalid as discussed in this paragraph, service fees will not be refunded.

(3) Except as provided in paragraph (h) of this section, coverage is never retroactive.

(b) *Annual crops.* Except as provided in paragraph (h) of this section, the coverage period for annual crops, including annual forage crops,

(1) Begins the later of:

(i) 30 calendar days after the date the application for coverage is filed; or

(ii) The date the crop is planted, not to exceed the late planting period; and

(2) Ends on the earlier of:

(i) The date harvest is complete;

(ii) The normal harvest date of the crop in the area;

(iii) The date the crop is abandoned; or

(iv) The date the crop is destroyed.

(c) *Biennial and perennial crops.* Except as otherwise specified in this part, the coverage period for biennial and perennial crops begins the later of 30 calendar days after the date the application for coverage is filed or 30 calendar days after the application closing date. The coverage ends as determined by FSA.

(d) *Value loss crops.* Except as otherwise specified in this part, the coverage period for value loss crops, including ornamental nursery, aquaculture, Christmas tree crops, ginseng, and turfgrass sod; and other eligible crops, including floriculture and mushrooms begins the later of 30 calendar days after the date the application for coverage is filed or 30 calendar days after the application closing date. The coverage ends the last day of the crop year, as determined by FSA.

(e) *Honey.* Except as provided in paragraph (h) of this section, the coverage period for honey begins the later of 30 calendar days after the date the application for coverage is filed or 30 calendar days after the application closing date. The coverage ends the last day of the crop year, as determined by FSA.

(f) *Maple sap.* Except as provided in paragraph (h) of this section, the coverage period for maple sap begins the later of 30 calendar days after the date the application for coverage is filed or 30 calendar days after the application closing date. The coverage ends on the earlier of the date harvest is complete; or the normal harvest date.

(g) *Biennial and perennial forage crops.* Except as provided in paragraph (h) of this section, for biennial and perennial forage crops the coverage period begins the later of 30 calendar days after the date the application for coverage is filed or 30 days after the application closing date; for first year seedings, the date the crop was planted; or the date following the normal harvest date. The coverage ends on the normal harvest date of the subsequent year.

(h) *2015 crop year.* For the 2015 crop year only, if a crop's application closing date is before January 14, 2015, the coverage period of the crop will be as

specified in paragraphs (a) through (g) of this section except that the date coverage begins will be retroactive as long as the application for coverage is filed by the application closing date as specified in § 1437.7(i). This limited retroactive coverage for the 2015 crop year only will begin 30 days after the established application date, which would be the same as if they had filed by the deadlines as specified in paragraphs (a) through (g) of this section.

■ 16. Revise newly redesignated § 1437.7 to read as follows:

§ 1437.7 Application for coverage, service fee, premium, and transfers of coverage.

(a) Except as provided in paragraph (i) of this section, with respect to each crop, commodity, or acreage, producers must file an application for coverage under this part in the administrative county office by the application closing date.

(b) The service fee or request for service fee waiver under paragraph (g) of this section must accompany the application for coverage in order for it to be considered filed. The service fee is $250 per crop per administrative county, up to $750 per producer per administrative county, not to exceed $1,875 per producer.

(c) The service fee will be applied per administrative county by crop and by planting period, as determined by FSA.

(d) Producers who elect buy-up coverage must pay a premium, in addition to the service fee, equal to the lesser of:

(1) The product obtained by multiplying:

(i) A 5.25-percent premium fee; and

(ii) The applicable payment limit; or

(2) The sum of the premiums for each eligible crop, with the premium for each eligible crop obtained by multiplying:

(i) The producer's share of the eligible crop;

(ii) The number of acres devoted to the eligible crop;

(iii) The approved yield;

(iv) The coverage level elected by the producer;

(v) The average market price; and

(vi) A 5.25-percent premium fee.

(e) For value loss crops, premiums will be calculated based on the maximum dollar value for which coverage is sought by the applicant, subject to applicable payment limitation, times the 5.25 percent premium.

(f) Premiums will be calculated separately for each crop, type, and intended use as reported on the acreage report and as specified in the basic provisions.

(g) Beginning farmers and ranchers, limited resource farmers and ranchers, and socially disadvantaged farmers or ranchers will receive, upon certification, a waiver of the service fee and a 50 percent premium reduction. The certification is required on or before the time the application for coverage is filed using the form specified by FSA.

(h) Transfers of NAP coverage are governed by the basic provisions.

(i) For the 2015 crop year, if a crop's application closing date is before January 14, 2015, FSA will accept applications for coverage without regard to whether or not the application for coverage was filed by the crop's application closing date, provided that the application for coverage includes buy-up coverage according to § 1437.5(d) and is filed by January 14, 2015. Except as specifically stated in this rule, the provisions of this paragraph (i) do not apply to crops having an application closing date established on or after December 15, 2014 or to applications for coverage that do not include buy-up coverage as an option selected by the applicant. The coverage period for applications for coverage filed according to this paragraph (i) will be as specified in § 1437.6.

■ 17. Amend newly redesignated § 1437.8 as follows:

■ a. Revise paragraph (a) introductory text, add paragraph (a)(3), and revise paragraphs (b)(1) and (2) and (c) introductory text;

■ b. In paragraph (d), revise the introductory text, redesignate paragraphs (d)(6) through (8) as paragraphs (d)(7) through (9), respectively, and add paragraph (d)(6); and

■ c. Add paragraphs (i), (j), and (k).

The revisions and additions read as follows:

§ 1437.8 Records.

(a) Producers must maintain records of crop acreage, acreage yields, and production for the crop for which an application for coverage is filed in accordance with § 1437.7. For those crops or commodities for which it is impractical, as determined by FSA, to maintain crop acreage, yields, or production data, producers must maintain records, in addition to the available records required by this section, as may be required in subparts C, D, and E of this part. Producers must retain records of the production and acreage yield for a minimum of 3 years for each crop for which an application for coverage is filed in accordance with § 1437.7. Producers may be selected and be required to provide records acceptable to FSA to support any certification provided. For each harvested crop for which producers file an application for payment in accordance with § 1437.11, producers must provide documentary evidence acceptable to FSA of production and the date harvest was completed, including production of crops planted after the planting period or late planting period. Such documentary evidence must be provided no later than the acreage reporting date for the crop in the subsequent crop year or, for crops with a coverage period of more than 12 months, no later than 60 days after the normal harvest date. Records of a previous crop year's production for inclusion in the actual production history database used to calculate an approved yield for the current crop year must be certified by the producer no later than the acreage reporting date for the crop in the current crop year. Production data provided after the acreage reporting date in the current crop year for the crop may be included in the actual production history data base for the calculation of subsequent approved yield calculations if accompanied by acceptable records of production as determined by FSA. Records of production acceptable to FSA may include:

* * * * *

(3) For quality losses specified in § 1437.105, verifiable records substantiating a quality loss due to an eligible cause of loss in the coverage period. The record submitted must come from tests or analysis substantiating that the loss of quality occurred from an eligible cause of loss during the coverage period. FSA will disapprove quality adjustments under § 1437.105 if FSA determines the evidence does not substantiate a loss of quality occurred due to an eligible cause of loss in the coverage period. For example, if FSA determines the tests or analysis of the specific crop's production were taken too late to determine if the measured loss of quality occurred from an eligible cause of loss in the coverage period (regardless whether a loss of quality was in fact measured or determined), no quality loss adjustment will be made or permitted. There is no presumption that a measured loss of quality occurred due to an eligible cause of loss in the coverage period. It is a NAP covered producer's burden to present evidence, satisfactory to FSA, substantiating that the alleged quality loss occurred to the NAP covered crop in the coverage period.

(b) * * *

(1) Producers of hand-harvested crops must, in addition to providing acceptable production records according to this part, notify the administrative county office that harvest is complete. This notification must be made within 72 hours of when harvest is complete. If an appraisal of the crop acreage is requested by the producer or determined necessary by FSA, the producer must not destroy the crop residue until the crop acreage is released by an FCIC- or FSA-qualified loss adjustor. Producers may, at their expense, request that an appraisal by certified FCIC or FSA loss adjusters of hand-harvested crop acreage be completed during non-loss crop years in order to maintain accurate actual production history.

(2) Producers must not allow the gathering (gleaning) of any produce left in the field following normal harvest of the crop acreage until the crop acreage is released by a qualified FSA or FCIC loss adjustor, as determined by FSA. Except, crop acreage may be released by an authorized FSA representative for acceptable gleaning operations, as determined by FSA, when producers and gleaners agree to provide acceptable records, as determined by FSA, of the quantity of the crop gleaned.

(c) Producers must provide acceptable evidence, as determined by FSA, of:

* * * * *

(d) Reports of acreage planted or intended but prevented from being planted must be provided to FSA at the administrative county office for the acreage no later than the date specified by FSA for each crop and location. Reports of acreage filed beyond the date specified by FSA for the crop and location may, however, be processed and used for determining acres devoted to the eligible crop if all the provisions of 7 CFR part 718 are met. In the case of a crop-share arrangement, all producers will be bound by the acreage report filed by the landowner or operator unless the producer files a separate acreage report by the date specified by FSA for the crop and location. Reports of acreage planted or intended and prevented from being planted must include all of the following information:

* * * * *

(6) For organic crops with an average market price established under § 1437.12(b), the identity of the crop planted on:

(i) Acreage using conventional farming practices;

(ii) Certified organic acreage;

(iii) Transitional acreage being converted to certified organic acreage;

(iv) Buffer zone acreage;

* * * * *

(i) Producers requesting payment under this part for a crop grown on certified organic acreage for which a price and T-yield are established, as provided in §§ 1437.12(b) and 1437.102, must provide, no later than the acreage reporting date specified by FSA for the crop and location:

(1) A written certification in effect from a certifying agency indicating the name of the entity certified, effective date of certification, certificate number, types of commodities certified, and name and address of the certifying agent (a certificate issued to a tenant may be used to qualify a landlord or other similar arrangement); and

(2) Records from the certifying agent showing the specific location of certified organic, transitional, and buffer zone acreage, and acreage not subject to organic farming practices according to an organic system plan.

(j) Producers providing reports of acreage that include transitional acreage being converted to certified organic acreage in accordance with an organic system plan must provide, no later than the acreage reporting date specified by FSA for the crop and location:

(1) Written documentation from a certifying agent indicating an organic system plan is in effect for the acreage; and

(2) Records from the certifying agent showing the specific location of certified organic, transitional, and buffer zone acreage, and acreage not subject to organic farming practices according to an organic system plan.

(k) Producers who are exempt from National Organic certification requirements, as specified in § 205.101 of this title, and are requesting payment under this part for a crop grown on organic acreage for which a price and T-yield is established, as provided in §§ 1437.12(b) and 1437.102, must provide, no later than the acreage reporting date specified by FSA for the crop and location, a copy of their organic system plan, which must be developed with an organic certifying agent.

■ 18. Revise newly redesignated § 1437.10 to read as follows:

§ 1437.10 Causes of loss.

(a) To qualify for assistance, production losses or prevented planting must occur as a result of an eligible cause of loss during the coverage period. Not all causes of loss are eligible causes of loss for all crops or all commodities.

(b) An eligible cause of loss is:

(1) Damaging weather, including, but not limited to:

(i) Drought;

(ii) Hail;

(iii) Excessive moisture;

(iv) Freeze;

(v) Tornado;

(vi) Hurricane;

(vii) Excessive wind;

(viii) Insufficient chill hours, but only for specific crops and locations for which FSA has determined in advance of a coverage period, based on FSA's review of sufficient scientific evidence that a requisite amount of chill hours is required for the crop to produce and a lack of chill hours is adverse to the crop's production without any regard to any management. In this context, ''without regard to any management'' means if a crop's inability to produce due to lack of chill hours can be mitigated by any managerial practices, application of chemical, or other management intervention, the lack of chill hours will not be included as an eligible cause of loss for the crop, In cases where FSA makes the decision to include insufficient chill hours as a cause of loss by itself for a crop and location, the crop and location and subsequent crop year coverage period for which the decision will apply will be specified in a list maintained by FSA. If the crop and location is not on that list, then insufficient chill hours can only be an eligible cause of loss if the insufficient chill hours were related to a damaging weather event or an adverse natural occurrence included in paragraphs (b)(1) or (2) of this section; or

(ix) Any combination of paragraphs (b)(1)(i) through (viii) of this section;

(2) Adverse natural occurrence, including, but not limited to:

(i) Earthquake;

(ii) Flood; or

(iii) Volcanic eruption; or

(3) A condition related to an eligible cause of loss in paragraphs (b)(1) or (2) of this section (in this context, the related condition must result from the damaging weather or adverse natural occurrence; it is not eligible if it occurs on its own) including, but not limited to:

(i) Heat;

(ii) Insect infestation;

(iii) Disease;

(iv) Insufficient chill hours; or

(v) Any combination thereof.

(c) The damaging weather, adverse natural occurrence, or related condition as specified in paragraph (b) of this section must occur in the coverage period before or during harvest and directly cause, accelerate, or exacerbate destruction or deterioration of the eligible crop as determined by the county committee.

(d) NAP coverage is provided against only eligible causes of loss. All specified causes of loss must be due to a naturally occurring event during the coverage period. All other causes of loss, including, but not limited to, the following, are not covered:

(1) Negligence, mismanagement, or wrongdoing by the NAP covered producer or anyone else;

(2) Failure to follow recognized good farming practices for the eligible crop;

(3) Water contained or released by any governmental, public, or private dam or reservoir project, if an easement exists on the acreage affected for the containment or release of the water;

(4) Failure or breakdown of the irrigation equipment facilities, unless the failure or breakdown is due to an eligible cause of loss. If damage is due to an eligible cause of loss, the producer must make all reasonable efforts to restore the equipment or facilities to proper working order within a reasonable amount of time unless FSA determines it is not practical to do so. Cost will not be considered when determining whether it is practical to restore the equipment or facilities;

(5) Failure to carry out a good irrigation practice for the covered crop, if applicable;

(6) Any cause of loss that results in damage that is not evident or would not have been evident during the NAP coverage period. Even though FSA may not inspect the damaged crop until after the end of the NAP coverage period, only damage due to eligible causes that would have been evident during the NAP coverage period will be covered;

(7) Except for lack of chill hours as specified in paragraph (b)(1)(viii) of this section, normal variance of temperatures from average normal temperatures including, but not limited to, cyclic yield variations that occur for a crop that are not causes of loss included in paragraphs (b)(1) or (2) of this section;

(8) Any managerial decision to attempt to grow or produce a crop in an area that is not suited for successful commercial production of the eligible NAP crop as determined by FSA;

(9) Failure of the producer to reseed to the same crop during the same planting period in those areas and under such circumstances where it is customary to do so;

(10) Except for tree crops and perennials and as provided for in § 1437.201, inadequate irrigation resources at time of planting;

(11) Except as specified in § 1437.303, a loss of inventory or yield of aquaculture (including ornamental fish), floriculture, or ornamental nursery stemming from drought or any failure to provide water, soil, or growing media to such crop for any reason;

(12) Any failure to provide a controlled environment or exercise good nursery practices when such controlled environment or practices are a condition of eligibility under this part;

(13) Except as provided for mollusks in § 1437.303, any alleged or actual loss of inventory or missing non-containerized inventory resulting from a managerial decision not to seed or raise the eligible NAP crop in containers, net pens, or wire baskets, on ropes, or using similar devices;

(14) For crops grown using organic farming practices, failure to comply with organic standards;

(15) Contamination by application or drift of prohibited substances onto land on which crops are grown using organic farming practices; or

(16) Weeds.

(e) The lack of an eligible cause of loss during a coverage period is not a compliance matter or issue. NAP will not provide assistance for crops that do not suffer from an eligible cause of loss during a coverage period. The relief provisions of these regulations and of 7 CFR part 718 cannot be used to pay producers of crops that did not suffer from an eligible cause of loss during the coverage period.

■ 19. Amend newly redesignated § 1437.11 as follows:

■ a. Revise paragraphs (a) through (c) and (e) through (g);

■ b. In paragraphs (d)(3) remove the words ''FSA administrative county office'' and add the words ''administrative county office'' in their place;

■ c. In paragraph (d)(4) remove the words ''FSA administrative county office'' and add the words ''administrative county office'' in their place, and remove the acronym ''CCC'' and add the acronym ''FSA'' in its place both times it appears;

■ d. In paragraph (d)(5) remove the words ''FSA administrative county office'' and add the words ''administrative county office'' in their place; and

■ e. Add paragraph (h).

The revisions and addition read as follows:

§ 1437.11 Notice of loss, appraisal requirements, and application for payment.

(a) In addition to the written notice of loss requirements specified for all crops in paragraphs (b) and (c) of this section, for hand-harvested crops and for other crops determined by FSA, at least one producer having a share in the unit must notify FSA of the damage or loss through the administrative county office for the unit within 72 hours of the date damage or loss on the unit first becomes apparent. Notification required under this paragraph may be via telephone to the administrative county office during business hours or via written notice on a form prescribed by FSA as specified in paragraph (c) of this section.

(b) Unless written notice for hand-harvested crops has already been provided within 72 hours of date of damage or loss as specified in paragraphs (a) and (c) of this section, in case of damage to any NAP covered crop, at least one producer having a share in the unit must file a notice of loss in the administrative county office:

(1) For prevented planting claims, within 15 days after the final planting date;

(2) For low yield claims, the earlier of:

(i) 15 days after the disaster occurrence or date of loss or damage to the crop first becomes apparent; or

(ii) 15 days after the normal harvest date.

(c) The notice of loss specified in paragraph (b) of this section must be for each crop and be in writing on a form prescribed by FSA and include:

(1) The alleged cause of crop damage;

(2) Date the disaster occurred and when the damage or loss first became apparent;

(3) A copy of the contract or agreement if a contract or agreement of a guaranteed payment for planted acreage exists;

(4) The type of loss that occurred, for example, prevented planting or low yield;

(5) Practices used, for example, irrigated or non-irrigated;

(6) For prevented planting:

(i) Total intended planted acreage of the crop on the unit;

(ii) Total acreage of the crop planted on the unit;

(iii) Whether seed, chemicals, fertilizer, etc. was purchased, delivered, or an arrangement for purchase or delivery was made for the intended to be planted crop;

(iv) What and when land preparation measures were completed, and

(v) What has been done or will be done with the acreage, for example, abandoned, replanted, etc.;

(7) For low yield:

(i) Total acreage devoted to the crop in the unit;

(ii) Total acreage of the crop affected;

(iii) What and when land preparation measures and practices were completed before and after the loss; and

(iv) What will be done with the affected crop acreage, for example, harvested, destroyed, replanted to a different crop, abandoned, etc.; and

(8) Any other information requested by an FSA authorized representative.

* * * * *

(e) Crop acreage for which an application for coverage has been filed, that is intended for production of forage seed and for which a notice of loss is filed indicating the crop acreage will not be harvested as seed, will be appraised for potential production of seed when producers provide FSA acceptable evidence of a contract to produce seed for the current crop year or acceptable records of acreage and seed production for three or more of the last 5 consecutive crop years, as determined by FSA.

(f) Forage acreage for which a notice of loss is filed and:

(1) Catastrophic coverage was obtained for forage intended to be grazed will have NAP benefits calculated based on § 1437.401(f);

(2) Catastrophic coverage was obtained for forage that was intended to be mechanical harvested but will be grazed and not mechanical harvested;

(i) Must have an appraisal and release for the unit to have NAP benefits calculated based on mechanical harvested forage; or

(ii) For which an appraisal or release was not obtained, will have a loss calculated as specified in § 1437.401(f).

(3) Buy-up coverage was obtained for forage intended to be mechanically harvested but will be grazed and not mechanically harvested:

(i) Must have an appraisal and release in order for the unit to have NAP benefits calculated based on the loss of expected mechanically harvested forage; or

(ii) For which an appraisal or release was not obtained is ineligible for payment consideration and will have the unit guarantee assigned to the forage crop acreage.

(g) Producers must file an application for payment on a form specified by FSA to apply for NAP payments within 60 days of the last day of coverage for the crop year for any NAP covered crop in the unit.

(h) A notice of loss under paragraph (a) of this section filed beyond the time specified in this section or notification provided under paragraph (b) of this section may satisfy the requirements of these provisions, if, at the discretion of FSA, the notice is filed at such time that permits:

(1) An authorized FSA representative to verify information on the notice of loss by inspecting the affected acreage or the crop or commodity involved; and

(2) The county committee or an authorized FSA representative the opportunity to determine that eligible disaster conditions caused the damage or loss.

■ 20. Amend newly redesignated § 1437.12 as follows:

■ a. Redesignate paragraph (b) as paragraph (e);

■ c. Remove paragraphs (c) and (d); and

■ d. Add paragraphs (b) through (d) and (f) through (i).

The additions read as follows:

§ 1437.12 Average market price and payment factors.

* * * * *

(b) For each crop and location (State or county or other location as determined appropriate by FSA), FSA will establish an average market price using the following method:

(1) Obtaining market prices for each crop for the 5 consecutive crop years immediately preceding the crop year of coverage, if available; then

(2) Dropping the crop years in the 5 consecutive crop years with the highest and lowest prices; and then

(3) Averaging the prices for the remaining 3 crop years in the 5 consecutive crop years; and

(4) If 5 crop years of data is not available for determining the average market price, FSA will use the best data available, as determined by FSA, for as many crop years of average market price data as possible within the 5 consecutive crop years immediately preceding the previous crop year and determine an average market price for the crop by computing a simple average of the prices for those years.

(c) FSA will disregard small differences in prices for a crop based on different types or varieties or various intended uses. If FSA determines there is a significant amount of production being marketed in a location or region at significantly different prices, FSA will determine whether or not to establish different average market prices for subsequent crop years.

(d) Separate average market prices may be established within a State based on conventional or organic practices or the intended market, as determined by FSA.

* * * * *

(f) Payment factors will be used to calculate assistance for crops produced with significant and variable harvesting expenses that are not incurred because the crop acreage was prevented planted, or planted but not harvested, as determined by FSA. The imposition of payment factors is based on the acre status and disposition not whether a NAP participant actually incurs or does not incur expenses.

(g) The average market price used to determine the amount of NAP assistance for crop acreage reported with a specific intended use will be based on the smaller of the approved average market price established for either the specific intended use reported on the acreage report or actual market or actual use for which more than 50 percent of the acreage's harvested production is marketed. For example: A producer reports 50 acres of carrots intended for fresh market and the producer suffers a 70 percent loss of production on the acreage. Additionally, more than 50 percent of the carrots actually produced from the 50 acres are sold as processed carrots. Because the established average market price for processed carrots is less than fresh carrots and more than 50 percent of the harvested crop was marketed as processed carrots, the established average market price for processed carrots will be used to compute the producer's NAP assistance. If an average market price had not been established for processed carrots in this example before the coverage period, then the average market price for fresh carrots would be used.

(1) The provisions of this paragraph do not apply to secondary use, peanuts, seed intended uses, and small grain intended for use as forage.

(2) [Reserved]

(h) For crops with an established yield and market price for multiple intended uses, the average market price will be as provided in paragraph (g) of this section except that for producers who choose buy-up coverage under § 1437.5(d), the average market price used to determine assistance may be based on historical production and acreage evidence provided by the participant. The evidence of actual final use of historical production must come from the 3 previous crop years immediately preceding the coverage year. Only years in which the producer had acreage and production harvested will be counted. In other words, if a producer only marketed a crop in 1 previous year, FSA will review the evidence of final use in that year and based on the evidence for that year, determine a percent of production attributable to each use. Based on that determined percentage, an appropriate average market price and use will be calculated and determined, respectively. If more than 1 and up to 3 years of final use evidence are available, FSA will count all years and production and determine the average. If a producer had crop acreage and evidence of final use for any year in the 3-year period, but the producer does not submit evidence for any other year in the 3-year period for

which the producer also had acreage, the average market price will be as provided in paragraph (g) of this section.

(i) A final payment price will be determined by multiplying, as appropriate, the average market price determined in this section by the applicable payment factor (that is, harvested, unharvested, or prevented planting).

§ 1437.14 [Amended]

■ 21. Amend newly redesignated § 1437.14 as follows:

■ a. In paragraph (a), remove the word ''shall'' and add the word ''will'' in its place;

■ b. Remove paragraph (b)(2);

■ c. Redesignate paragraphs (b)(3) through (5) as paragraphs (b)(2) through (4), respectively;

■ d. In newly redesignated paragraphs (b)(2) through (4) remove the reference ''part 760 of this title'' and add the reference ''part 1416 of this chapter'' in its place each time it appears; and

■ e. In paragraph (d), remove the word ''FSA'' and add the word ''county'' in its place.

§ 1437.15 [Amended]

■ 22. Amend newly redesignated § 1437.15 as follows:

■ a. Remove paragraph (b); and

■ c. Redesignate paragraph (c) as paragraph (b).

■ 23. Amend newly redesignated § 1437.16 as follows:

■ a. In paragraph (b), remove the word ''shall'';

■ b. In paragraph (c) introductory text, remove the words ''shall be'' and add the word ''is'' in their place;

■ c. In paragraph (e), remove the words ''shall be'' and add the word ''are'' in their place, and remove the acronym ''CCC'' and add the acronym ''FSA'' in its place;

■ d. In paragraph (f), remove the word ''shall'' and add the word ''will'' in its place;

■ e. Revise paragraph (g);

■ f. In paragraph (i), remove the word ''shall'' and add the word ''will'' in its place;

■ g. Revise paragraph (j); and

■ h. Add paragraphs (m) through (p).

The additions and revisions read as follows:

§ 1437.16 Miscellaneous provisions.

* * * * *

(g) The liability of any person for any penalty under this part is in addition to any other liability under any civil or criminal fraud statute or any other provision of law.

* * * * *

(j) For the purposes of 28 U.S.C. 3201(e), the Secretary waives the ineligibility to receive benefits under this program but only for beneficiaries who as a condition of such waiver agree to apply the benefits to reduce the amount of the judgment lien.

* * * * *

(m) Any person or legal entity who has a debt from nonpayment of the premium for coverage levels specified in § 1437.5(c) will be ineligible for assistance under any subsequent crop year NAP coverage on any crop from the crop year of nonpayment of premium until the debt is paid in full.

(1) If a person or legal entity is ineligible for NAP assistance due to the debt because of the nonpayment of premium, FSA will permit the person or legal entity to file an application for coverage together with payment of any service fees; however, that application and payment of service fees will not make the person or legal entity eligible for any assistance until the premium debt is paid in full.

(2) Service fees paid with applications for coverage that are filed by persons or legal entities who are ineligible for NAP assistance as specified in paragraph (m) of this section will not be credited to any unpaid premium debt nor are they refundable.

(n) A person or legal entity ineligible for NAP assistance under paragraph (m) of this section may become eligible for future NAP assistance if they remit all unpaid debt related to the nonpayment of premium before the application for payment filing deadline (see § 1437.11(g)).

(o) Any NAP payment that was not issued for a prior NAP crop year due to an outstanding debt as specified in paragraph (m) of this section will not be issued.

(p) Unpaid debt related to the failure to pay any premium satisfied by administrative offset will reinstate the eligibility of a person or legal entity from the date the offset satisfies all the unpaid premium debt with interest.

■ 24. Add § 1437.17 to read as follows:

§ 1437.17 Matters of general applicability.

(a) The regulations in this part and FSA's interpretation of the regulations in this part, the basic provisions, and internal agency directives issued to FSA State and county offices are matters of general applicability and are not individually appealable in administrative appeals according to §§ 11.3 and 780.5 of this title. Additionally, the regulations in this part and any FSA decisions that are not based on specific facts derived from an individual participant's application, contract, or file are not appealable under parts 11 or 780 of this title. Examples of such decisions include how NAP is generally administered, signup deadlines, payment rates, or any other generally applicable matter or determination that is made by FSA for use in all similarly situated applications. The only extent to which the matters referenced in this section are reviewable administratively in an appeal forum is whether FSA's determination of facts incidental to the case and decision to apply the generally applicable matter is in conformance with the regulations in this part.

(b) The relief provisions of 7 CFR part 718 are applicable only to participant ineligibility and noncompliance decisions. The relief provisions cannot be used to extend a benefit or assistance not otherwise available under law or not otherwise available to others who have satisfied or complied with all the eligibility and compliance requirements of this part. Equitable relief provisions of part 718 of this title cannot be used to obtain a review of either these regulations, the requirements of this part, the agency's interpretations of this part, or compliance provisions of this part.

Subpart B—Determining Yield Coverage Using Actual Production History

■ 25. Amend § 1437.102 as follows:

■ a. In paragraph (b)(1), remove the year ''2005'' and add the year ''2015'' in its place, and remove the term ''1999 through 2003'' and add the term ''2009 through 2013'' in its place;

■ b. In paragraph (b)(5)(i), remove the words ''irrigated, non-irrigated, and organic practices'' and add the words ''irrigated and non-irrigated'' in their place;

■ c. Redesignate paragraphs (b)(6) through (8) as paragraphs (b)(8) through (10), respectively;

■ d. Add paragraphs (b)(6) and (7);

■ e. In paragraphs (c)(1) and (2), add the words ''in a crop year that is not a bypass year'' immediately after the words ''report of production'';

■ f. In paragraph (c)(3), remove the reference ''§ 1437.7'' and add the reference ''§ 1437.8'' in its place;

■ g. In paragraph (d)(1), remove the words ''production, as determined by CCC'' add the words ''production in a crop year that is not a bypass year, as determined by CCC'' in their place;

■ h. In paragraph (d)(2), remove the reference ''§ 1437.7'' and add the reference ''§ 1437.8'' in its place;

■ i. In paragraph (e)(3), remove the word ''Shall'' and add the word ''Will'' in its place;

■ j. In paragraph (g), remove the year ''2000'' and add the year ''2014'' in its place and remove the acronym ''CCC'' and add the acronym ''FSA'' in its place;

■ k. In paragraph (h), remove the words ''50 percent of the initial approved yield'' and add the words ''the unit guarantee'' in their place, and remove the acronym ''CCC'' each time it appears and add the acronym ''FSA'' in its place; and

■ l. Revise paragraph (j).

The additions and revision read as follows:

§ 1437.102 Yield determinations.

* * * * *

(b) * * *

(6) Will be adjusted on a State-wide basis, for crops grown on certified organic and transitional acreage for which FSA has established a separate organic price as specified in § 1437.12(b), based on an average of FCIC organic yield reductions, as determined by FSA, for the same crop in the same State.

(7) May be adjusted on a county-wide or regional basis for crops grown on certified organic and transitional acreage for which FSA has established a separate organic price as specified in § 1437.12(b), based on the most representative available historical information, as determined by FSA.

* * * * *

(j) A producer who has not shared in the risk of the production of the crop for more than two crop years during the base period, as determined by FSA, will have an approved yield calculated based on a combination of 100 percent of the applicable T-yield and any actual yield for the minimum crop years of the producer's APH base period. Producers who have produced the crop for one or more crop years must provide FSA, at the administrative county office serving the area in which the crop is located, a certification of production and production records for the applicable crop years as specified in § 1437.8.

* * * * *

■ 26. Revise § 1437.103 to read as follows:

§ 1437.103 Late-planted acreage.

(a) Producers planting crop acreage after the final planting date and during the late planting period, as determined by FSA, may be eligible for reduced coverage as specified in paragraphs (b) and (c) of this section.

(b) Crops with multiple planting periods and value loss crops are not eligible for reduced coverage for late planting. Exceptions to this are the last planting period of multiple planted crops and multiple-planting periods having a defined gap of 60 days or more between harvest date of the previous planting period and beginning of the immediately following planting period.

(c) For crops with a growing period of:

(1) 60 days or less and planted:

(i) From 1 to 5 calendar days after the final planting date, production will be assigned equal to 5 percent of unit expected production for each day the crop is actually planted after the final planting date;

(ii) From 6 days after the final planting date, production will be assigned equal to the unit guarantee for the late planted crop acreage.

(2) 61 to 120 calendar days and planted:

(i) From 1 to 5 calendar days after the final planting date, production will be assigned equal to 5 percent of expected unit production of the applicable late-planted crop acreage and for days 6 through 20 an additional 1 percent for each day the crop is planted after the final planting date;

(ii) From 21 days after the final planting date, production will be assigned equal to the unit guarantee for the late planted crop acreage.

(3) 121 calendar days or more and planted:

(i) From 1 to 5 calendar days after the final planting date, production will be assigned equal to 5 percent of expected production of the applicable late-planted crop acreage and for days 6 through 25 an additional 1 percent for each day the crop is planted after the final planting date.

(ii) From 26 or more calendar days after the final planting date, production will be assigned equal to unit guarantee of the producer's expected production of the applicable late-planted crop acreage.

§ 1437.104 [Amended]

■ 27. In § 1437.104(a)(2) remove the reference ''§ 1437.10(d)'' and add the reference ''§ 1437.11(e)'' in its place.

■ 28. Amend § 1437.105 as follows:

■ a. In paragraph (a) introductory text, remove the word ''shall'' and add the word ''will'' in its place;

■ b. In paragraph (a)(1), remove the words ''eligible acreage planted'' and add the words ''acres devoted'' in their place;

■ c. In paragraph (a)(2), remove the words ''50 percent'' and add the words and punctuation ''50, 55, 60, or 65 percent, as selected by the producer as specified in § 1437.5;'' in their place; and

■ d. Revise paragraph (a)(5); and

■ e. Add paragraphs (c), (d), (e), and (f).

The revision and additions read as follows:

§ 1437.105 Determining payments for low yield.

(a) * * *

(5) Multiplying the amount calculated as specified in paragraph (a)(4) of this section by 55 or 100 percent (selected by the producer as specified in § 1437.5) of the final payment price calculated as specified in § 1437.12; and

* * * * *

(c) The crops and locations eligible for quality adjustments will be determined by the Deputy Administrator in advance of the coverage period, only if supporting documentation of industry standards for quality adjustments are available. For specific crops and locations determined by the Deputy Administrator for which buy-up coverage under § 1437.5(d) is elected and for which adjustments to net production based on quality losses will be authorized for a coverage period in accordance with this paragraph, producers may opt for an adjustment of net production of a covered crop as specified in paragraph (a)(3) of this section based on a specific measure of quality against a set of standards that are acceptable to FSA. The standards and permissible adjustments to net production based on alleged quality losses stemming from eligible causes of loss in a coverage period will be based on FSA's review of sufficient documentation and are subject to FSA acceptance and State committee recommendation to the Deputy Administrator. The crops and locations where quality adjustments will be permitted will be as specified on a list maintained by FSA.

(d) Production will not be adjusted under this section unless all other provisions of this section are met and the crop and location are included on a list of approved crops and locations before the beginning of the coverage period for the crop.

(e) A producer of a NAP covered crop in a location and coverage period approved by FSA as specified in paragraphs (c) and (d) of this section who opts for the quality loss adjustment option must submit verifiable records obtained by testing or analysis of the specific crop's production and the alleged loss of quality stemming from an eligible cause of loss in the coverage period. Records must meet requirements of § 1437.8(a)(3).

(f) If a quality adjustment option is sought by a producer and approved for a crop year, FSA will enter the adjusted

value of net production into the producer's actual production history yield database for the loss year. The lower actual yield that results from the quality adjustment will be used for future approved yield calculations.

■ 29. Amend § 1437.106 as follows:
■ a. Revise paragraph (d);
■ b. In paragraph (e), remove the words ''shall consist'' and add the word ''consists'' in its place;
■ c. In paragraph (g) introductory text, remove the words ''Administrative FSA'' and add the words ''administrative county'' in their place;
■ d. In paragraph (g)(2), remove the reference ''§ 1437.10'' and add the reference ''§ 1437.11'' in its place;
■ e. In paragraph (i), remove the words ''in excess of a 50 percent loss level'' and add the words ''based on the applicable guarantee'' in their place; and
■ f. Add paragraph (j).

The revision and addition read as follows:

§ 1437.106 Honey.

* * * * *

(d) In addition to filing a report of acreage in accordance with § 1437.8, honey producers must provide a record of colonies to FSA. The report of colonies must be filed before the crop year for which producers seek to maintain coverage. The report of colonies must include:

* * * * *

(j) Premiums for coverage levels specified in § 1437.5(c) will be calculated based on the highest number of colonies reported during the program year.

■ 30. Amend § 1437.107 as follows:
■ a. In paragraph (c), remove the reference ''§ 1437.6'' and add the reference ''§ 1437.7'' in its place, and remove the acronym ''CCC'' and add the acronym ''FSA'' in its place;
■ b. In paragraph (d) introductory text, remove the reference ''§ 1437.7'' and add the reference ''§ 1437.8'' in its place;
■ c. In paragraph (e), remove the words ''shall be'' and add the word ''is'' in their place, and remove the acronym ''CCC'' in both places it appears and add the acronym ''FSA'' in its place;
■ d. In paragraph (f), remove the words ''shall be'' and add the word ''is'' in their place;
■ e. In paragraph (g), remove the words ''shall be'' and add the word ''will'' in their place;
■ f. In paragraph (i), remove the words ''in excess of a 50 percent loss level'' and add the words ''based on the applicable guarantee'' in its place; and
■ g. Add paragraph (j).

The addition reads as follows:

§ 1437.107 Maple sap.

* * * * *

(j) Premiums for coverage levels specified in § 1437.5(c) will be calculated based on the number of taps reported by the producer.

Subpart C—Determining Coverage For Prevented Planted Acreage

§ 1437.201 [Amended]

■ 31. In § 1437.201(a), remove the word ''shall''.

§ 1437.202 [Amended]

■ 32. Amend § 1437.202 as follows:
■ a. In paragraph (a)(7), remove the words ''by the final'' and add the words ''by 55 or 100 percent, as selected by the producer as specified in § 1437.5, of the final'' in their place, and remove the reference ''§ 1437.11'' and add the reference ''§ 1437.12'' in its place; and
■ b. In paragraph (b), remove the word ''shall'' and add the word ''will'' in its place.

Subpart D—Determining Coverage Using Value

■ 33. Amend § 1437.301 as follows:
■ a. Revise paragraph (a);
■ b. In paragraph (c) introductory text, remove the reference ''§ 1437.6'' and add the reference ''§ 1437.7'' in its place; and
■ c. Add paragraph (d).

The revision and addition read as follows:

§ 1437.301 Value loss.

(a) Special provisions are required to assess losses and calculate assistance for a few crops and commodities that do not lend themselves to yield loss situations. Assistance for these commodities is calculated based on the loss of value at the time of disaster. FSA determines which crops are value-loss crops, but unless otherwise announced, value-loss crops are those identified in §§ 1437.303 through 1437.309. Lost production of value loss crops is eligible for payment only as specified in this subpart.

* * * * *

(d) For coverage levels specified in § 1437.5(c), producers must pay a premium equal to the lesser of:

(1) The producer's share, times the maximum dollar value for coverage sought, times the coverage level, times the average market price, times a 5.25 percent premium fee; or

(2) A 5.25 percent premium fee times the applicable payment limitation.

■ 34. Revise § 1437.302 to read as follows:

§ 1437.302 Determining payments.

(a) Subject to all restrictions and the availability of funds, value loss payments for qualifying losses will be determined by:

(1) Multiplying the field market value of the crop before the disaster, or for buy-up coverage specified in § 1437.5(c), the lesser of the field market value of the crop before the disaster or the maximum dollar value for coverage sought, by 50, 55, 60, or 65 percent, as selected by the producer as specified in § 1437.5;

(2) Subtracting the sum of the field market value after the disaster and value of ineligible causes of loss from the result from paragraph (a)(1) of this section;

(3) Multiplying the result from paragraph (a)(2) of this section by the producer's share;

(4) Multiplying the result from paragraph (a)(3) of this section by 55 or 100 percent, as selected by the producer as specified in § 1437.5, plus whatever appropriate factor reflects savings from non-harvesting of the damaged crop or other factors as appropriate; and

(5) Subtracting the producer's share of any salvage value, if applicable.

(b) [Reserved]

■ 35. Amend § 1437.303 as follows:
■ a. In paragraph (a) introductory text, remove the words ''is compensable'' and add the words ''will have NAP assistance calculated'' in their place, and remove the world ''shall'';
■ b. In paragraph (d)(3), add the words and punctuation ''on ropes,'' immediately after ''net pens,'';
■ c. Redesignate paragraphs (e) and (f) as paragraphs (f) and (g); and
■ d. Add paragraph (e).

The addition reads as follows:

§ 1437.303 Aquaculture, including ornamental fish.

* * * * *

(e) For mollusks that are not planted or seeded in containers, net pens, on ropes, wire baskets, or similar device designed for the containment and protection of the mollusks, the only eligible cause of loss of mollusks or missing mollusk inventory will be a direct result of a National Oceanic and Atmospheric Administration-determined tropical storm, typhoon, or hurricane.

* * * * *

§ 1437.304 [Amended]

■ 36. Amend § 1437.304 as follows:
■ a. In paragraph (a) introductory text, remove the words ''shall be'' and add the word ''is'' in their place; and

■ b. In paragraph (g), remove the words ''shall be'' and add the word ''are'' in their place both times they appear.

§ 1437.305 [Amended]

■ 37. In § 1437.305(e), remove the word ''shall'' and add the word ''will'' in its place.

§ 1437.306 [Amended]

■ 36. In § 1437.306(c), remove the word ''shall'' and add the word ''will'' in its place.

§ 1437.308 [Amended]

■ 39. In § 1437.308(d)(3), remove the words ''a CCC-certified'' and add the words ''an FSA-certified'' in their place.

§ 1437.309 [Amended]

■ 40. Amend § 1437.309 as follows:
■ a. In paragraph (c), remove the words ''shall be'' and add the word ''is'' in their place;
■ b. In paragraph (d), removed the word ''shall'' and add the word ''will'' in its place; and
■ c. In paragraph (e), remove the reference ''§ 1437.7'' and add the reference ''§ 1437.8'' in its place, and remove the acronym ''CCC'' and add the acronym ''FSA'' in its place.

§ 1437.310 [Amended]

■ 41. Amend § 1437.310 as follows:
■ a. In paragraph (b)(1), remove the word ''shall'' and add the word ''will'' in its place;
■ b. In paragraphs (c)(1) and (2), remove the reference ''§ 1437.11'' and add the reference ''§ 1437.12'' in its place both times it appears; and
■ c. In paragraph (h), remove the word ''shall'' and add the word ''will'' in its place both times it appears.

Subpart E—Determining Coverage of Forage Intended for Animal Consumption

■ 42. Revise § 1437.401 to read as follows:

§ 1437.401 Forage.

(a) Forage eligible for benefits under this part is limited to mature vegetation, as determined by FSA, produced in a commercial operation. Benefits are not available for first-year seeding of alfalfa and similar vegetation when production is not produced in the seeding year, as determined by FSA. The commercial operation must use acceptable farming, pasture, and range management practices for the location necessary to sustain sufficient quality and quantity of the vegetation so as to be suitable for grazing livestock or mechanical harvest as hay or seed. Forage to be mechanically harvested will be treated under the rules for low-yield crops as calculated under § 1437.103, except claims on forage for grazing benefits will be determined according to paragraph (f) of this section. The provisions in this subpart apply to all claims including forage for mechanical harvest.

(b) Producers of forage must, in addition to the records required in § 1437.8, specify the intended method of harvest of all acreage intended as forage for livestock consumption as either mechanically or grazed.

(c) Producers must request an appraisal from the administrative county office for the unit prior to the onset of grazing of any intended mechanically harvested forage acreage that will be both mechanically harvested and grazed.

(d) Forage acreage reported to FSA as intended to be mechanically harvested, but which is instead subsequently grazed, will be considered for crop definition purposes as mechanically harvested. Expected production of the specific acreage for which catastrophic coverage was obtained will be calculated on the basis of carrying capacity. The loss of such grazed forage will be determined according to paragraph (f) of this section. For acreage intended to be mechanically harvested which is instead subsequently grazed, the loss of intended mechanically harvested forage may alternatively be determined based on a review of acceptable production evidence or appraisal of the specific crop acreage. As part of the payment computation for this loss, intended mechanically harvested forage crop acreage that is not mechanically harvested but instead grazed will be deemed to be un-harvested for the purposes of determining a payment factor.

(e) Small grain forage is the specific acreage of wheat, barley, oats, triticale, or rye intended for use as forage. Small grain forage is a separate crop and distinct from any other forage commodities and other intended uses of the small grain commodity. In addition to the records required in § 1437.8, producers must specify whether the intended forage crop is intended for fall and winter, spring, or full season forage. In addition to other eligibility requirements, FSA will consider other factors, such as water sources and available fencing, and adequate fertilization to determine small grain forage eligibility, yields, and production.

(f) FSA will establish forage losses of acreage intended to be grazed including, in some cases, acreage intended to be mechanically harvested but instead subsequently grazed for producers with catastrophic coverage, on the basis of:

(1) The percentage of loss of similar mechanically-harvested forage acreage on the farm, or on similar farms in the area when approved yields have been calculated to determine loss; or

(2) Where there is no similar mechanically-harvested forage acreage on the farm or similar farms in the area, the collective percentage of loss as determined by FSA for the geographical region after consideration of at least two independent assessments of grazed forage acreage conditions.

(i) The assessments must be completed by forage or range specialists in Federal, State, and local government agencies, educational institutions, and private companies not having a financial interest in the outcome of the assessment. Collective percentage of loss determined by FSA for the geographical region may be based on any or all the following methods as may be available and as determined appropriate by the Deputy Administrator:

(A) Independent assessments of grazed forage acreage conditions;

(B) The U.S. Drought Monitor;

(C) Information obtained from loss adjusters with sufficient forage knowledge to provide grazing loss assessments;

(D) Data obtained from approved areas where clippings are obtained on a regular basis to compare with expected levels of production in a geographical region; or

(E) Information from Natural Resources Conservation Service technical service providers having a specialized knowledge.

(ii) Neither the assessments themselves, nor collective loss percentages established in accordance with this section are subject to appeal. FSA's determinations of geographical area for assessments and collective grazing loss are generally applicable to all similarly situated participants farming in such defined geographical region.

§ 1437.402 [Amended]

■ 43. In § 1437.402(b) introductory text, add the words ''with catastrophic coverage'' immediately after the word ''acreage'', and remove the acronym ''CCC'' and add the acronym ''FSA'' in its place.
■ 44. Revise § 1437.403 to read as follows:

§ 1437.403 Determining payments.

(a) Subject to payment limits, availability of funds, and other limits as may apply, payments for catastrophic

coverage of losses of forage reported to FSA as intended to be grazed will be determined by:

(1) Multiplying the eligible acreage by the producer's share;

(2) Dividing the result from paragraph (a)(1) of this section by the carrying capacity or adjusted per day carrying capacity established for the specific catastrophic coverage acreage, as determined by FSA;

(3) Multiplying the result from paragraph (a)(2) of this section by the number of days established as the grazing period;

(4) Adding adjustments of AUD for practices and production to the product of paragraph (a)(3) of this section;

(5) Multiplying the result from paragraph (a)(4) of this section by the applicable percentage of loss established by FSA;

(6) Multiplying the amount of assigned AUD, as determined by FSA, by the producer's share;

(7) Subtracting the result from paragraph (a)(6) of this section from the result from paragraph (a)(5) of this section;

(8) Multiplying the result from paragraph (a)(4) of this section by 0.50;

(9) Subtracting the result from paragraph (a)(8) of this section from the result from paragraph (a)(7) of this section; and

(10) Multiplying the result from paragraph (a)(9) of this section by 55 percent of the final payment price established in accordance with § 1437.12.

(b) [Reserved]

Subpart F—Determining Coverage in the Tropical Region

■ 45. Amend § 1437.501 as follows:

■ a. Revise paragraph (a);

■ b. Remove paragraph (b)(2); and

■ c. Redesignate paragraph (b)(3) as paragraphs (b)(2).

The revision reads as follows:

§ 1437.501 Applicability; definition of ''tropical region'' and additional definitions.

(a) This subpart applies to covered tropical crops in the tropical region, as those terms are defined in this subpart. Benefits under this part may be extended to those crops only to the extent that they are otherwise eligible for assistance under this part. Covered crops do not include ''value loss'' crops, as defined elsewhere in this part. For those crops that are covered by this subpart, loss and payment determinations for NAP covered in this part are determined by the rules that otherwise apply to NAP subject to the modifications provided by this subpart. The rules that otherwise apply include, but are not limited to, limitations on payments that are specified in part 1400 of this chapter.

* * * * *

§ 1437.502 [Amended]

■ 46. Amend § 1437.502 as follows:

■ a. In paragraph (a), remove the words ''beginning in 2006 through subsequent years'';

■ b. Redesignate paragraphs (d)(1) and (2) as paragraphs (d) and (e), respectively; and

■ c. In newly redesignated paragraph (d), remove the word ''shall'' and add the words ''will be interpreted to'' in its place.

§ 1437.504 [Amended]

■ 47. Amend § 1437.504 as follows:

■ a. In paragraph (a), remove the reference ''§ 1437.10(c)'' and add the reference ''§ 1437.11(d)'' in its place; and

■ b. In paragraph (b) introductory text, remove the reference ''§ 1437.10'' and add the reference ''§ 1437.11'' in its place.

§ 1437.505 [Amended]

■ 48. In § 1437.505(a) and (b)(1), remove the reference ''§ 1437.10'' and add the reference ''§ 1437.11'' in its place both times it appears.

§§ 1437.3, 1437.4, 1437.8, 1437., 1437.11, 1437.12, 1437.13, 1437.16, 1437.102, 1437.104, 1437.201, 1437.301, 1437.304, 1437.305, 1437.307, 1437.308, 1437.309, 1437.310, 1437.402, 1437.502, 1437.503, 1437.504 [Amended]

■ 49. In addition to the amendments set forth above, in 7 CFR part 1437, remove the word ''CCC'' and add, in its place, the word ''FSA'' in the following places:

■ a. In § 1437.3, in the definitions of ''Fiber'', ''Final planting date'', ''Food'', ''Multiple planted'', and ''Normal harvest date'';

■ b. In § 1437.4(a)(1) and (3);

■ c. In newly redesignated § 1437.8(a)(1) and (2), (e), both times it appears, and (f);

■ d. In newly redesignated § 1437.11(d) introductory text and (d)(2)(ii) and (iii);

■ e. In newly redesignated § 1437.12(a)(2) and (4);

■ f. In newly redesignated § 1437.13, each time it appears;

■ g. In newly redesignated § 1437.16(d), each time it appears;

■ h. In § 1437.102(b)(4), newly redesignated paragraph (b)(9), (c)(4) introductory text, (c)(4)(ii), (c)(5)(i) and (ii), and (f), both times it appears;

■ i. In § 1437.104(a) introductory text;

■ j. In § 1437.201(c)(2)(i) and (ii);

■ k. In § 1437.301(c)(1) and (3);

■ l. In § 1437.304(a)(1), (c), and (f);

■ m. In § 1437.305(f);

■ n. In § 1437.307(e);

■ o. In § 1437.308(d)(1) and (4), and (e);

■ p. In § 1437.310(d), (e)(3), (g)(1), and (i);

■ q. In § 1437.402(a) introductory text, (a)(2), and (b)(3);

■ r. In § 1437.502(c)(1) and (2);

■ s. In § 1437.503(c)(2); and

■ t. In § 1437.504(f).

Signed on December 5, 2014.

Val Dolcini,

Executive Vice President, Commodity Credit Corporation, and Administrator, Farm Service Agency.

[FR Doc. 2014–29082 Filed 12–12–14; 8:45 am]

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Federal Register

Vol. 79, No. 240

Monday, December 15, 2014

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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**
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FEDERAL REGISTER PAGES AND DATE, DECEMBER

70995–71294 1
71295–71620 2
71621–71954 3
71955–72106 4
72107–72538 5
72539–72966 8
72967–73190 9
73191–73460 10
73461–73800 11
73801–74014 12
74015–74584 15

CFR PARTS AFFECTED DURING DECEMBER

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

Proposed Rules:
2700 73853

3 CFR

Proclamations:
9198 72539
9214 71621
9215 .....71951, 72541
9216 .....71953, 72543
9217 72537
9218 73799
9219 74013
Executive Orders:
13682 73459
Administrative Orders:
Presidential Determinations:
No. 2015–02 of November 21, 2014 71619
No. 2015–03 of December 3, 2014 74009

5 CFR

2641 71955
Proposed Rules:
430 73239
532 72997
534 73239
890 71695
892 71695

7 CFR

15c 73191
718 74561
987 72967
1412 74561
1416 74561
1423 70995
1437 74561
1466 73954
3550 74015
Proposed Rules:
15c 73245
318 71973
319 .....71703, 71973
915 71031

9 CFR

93 70997
94 70997
95 70997
145 71623
146 71623
317 71007
381 71007

10 CFR

50 73461
52 71295
429 71624
431 .....71624, 74491
1708 71009
Proposed Rules:
430 .....71705, 71894, 73503
431 .....71710, 73246

12 CFR

46 71630
210 .....72107, 72112
1238 72120
Proposed Rules:
1024 74175
1026 74175

13 CFR

121 71296
Proposed Rules:
103 73853
124 73853
134 73853

14 CFR

25 .....73462, 73469
39 .....71296, 71300, 71302, 71304, 71308, 72121, 72124, 72127, 72132, 72968, 73801, 73803, 73805, 73808, 73812, 73814
61 71634
71 .....71309, 71310, 71311, 71312, 72135
73 74016
95 73472
97 .....71639, 71641, 71646, 71652
117 72970
121 72970
141 71634
Proposed Rules:
39 .....71031, 71033, 71037, 71363, 72562, 72564, 73252, 74032, 74035, 74037, 74038
71 .....71364, 71365, 71710, 72998, 73853, 73854, 74042

15 CFR

730 71013
734 71013
736 71013
742 71013
744 71013
745 71013
748 71014
902 .....71313, 71510

16 CFR

Proposed Rules:
1422 71712

17 CFR

240 72252
242 72252

249 72252
420 73408
Proposed Rules:
1 71973
15 71973
17 71973
19 71973
32 71973
37 71973
38 71973
140 71973
150 71973

21 CFR

11 ....71156, 71259
101 ....71156, 71259, 73201
201 72064
510 74018
520 ....74018, 74021
522 74018
558 74018

24 CFR

Proposed Rules:
891 73507
892 73507

26 CFR

1 73817

28 CFR

551 72545

29 CFR

101 74038
102 74038
103 74038
4022 74021
4044 ....71019, 74021

30 CFR

553 73832

31 CFR

210 73841
347 74023
Proposed Rules:
1010 74073

33 CFR

110 71654
117 ....72140, 72975, 73474, 73842, 74025
165 ....71020, 71022, 74025, 74028, 74030
Proposed Rules:
101 73255
104 73255
105 73255
117 72154
120 73255
128 73255
165 ....72155, 74044
167 72157

34 CFR

600 71957
668 71957
Proposed Rules:
263 71930
612 71820
686 71820

37 CFR

381 71319
Proposed Rules:
201 73856

38 CFR

12 71319
17 71653
Proposed Rules:
3 71366

40 CFR

51 71663
52 ....71025, 71663, 71672, 72548, 72552, 72976, 72979, 73202, 73203, 73205, 73842
81 ....72552, 72981
97 ....71663, 71674
98 73750
180 ....71676, 72140, 73210, 73214, 73218, 73224
300 ....71679, 73475, 73478
766 72984
Proposed Rules:
52 ....71040, 71057, 71061, 71369, 71712, 72999, 73272, 73508, 73512, 73525, 73872, 74046
60 73872
63 ....72160, 72874, 72914, 73273, 73872
80 73007
81 73525
98 73148
122 71066
123 71066
127 71066
180 71713
300 ....73538, 73539
403 71066
501 71066
503 71066

41 CFR

60–1 72985
60–2 72985
60–3 72985
60–4 72985
60–5 72985

42 CFR

405 72500
409 71320
424 72500
447 71679
498 72500
Proposed Rules:
136 72160
409 71081
410 71081
416 73873
418 ....71081, 73873
425 72760
440 71081
482 73873
483 73873
484 71081
485 ....71081, 73873
488 71081

44 CFR

67 73482

46 CFR

Proposed Rules:
401 71082

47 CFR

1 ....72143, 73844
2 ....71321, 73486
15 73486
22 72143
64 73227
73 ....72153, 73237
90 71321
300 73486
Proposed Rules:
1 73008
25 71714
90 73009

48 CFR

Ch. 1 ....74544, 74554
1 74544
9 74554
22 74544
52 ....74544, 74554
203 73487
204 ....73488, 73490, 73492
209 73488
212 ....73488, 73490
215 73493
225 ....73488, 73490, 73498, 73499
235 73500
236 73498
237 73500
252 ....73488, 73490, 73492, 73499, 73500
Proposed Rules:
1 71975
4 71975
9 71975
22 71975
52 ....71975, 74558
Ch. 2 73539
1609 74054
1615 74054
1632 74054
1652 74054

49 CFR

Proposed Rules:
380 73273

50 CFR

17 73706
224 73978
229 73848
300 71327
622 ....71959, 72556, 72996
635 ....71029, 71331, 71510, 72557
648 ....71339, 71960, 72560
660 71340
679 ....71313, 71344, 71350
697 73848
Proposed Rules:
17 ....71373, 72450
226 ....71714, 73010
300 71729
622 ....72566, 72567
648 74056
679 ....72571, 72593
680 74058

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 December 10, 2014

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