



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1217

[Document Number AMS-SC-16-0066]

Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order; De Minimis Quantity Exemption Threshold

AGENCY: Agricultural Marketing Service.

ACTION: Final rule.

SUMMARY: This rule establishes a de minimis quantity exemption threshold under the U.S. Department of Agriculture's (USDA) Agricultural Marketing Service (AMS) regulations regarding a national research and promotion program for softwood lumber. In response to a 2016 federal district court decision, the U.S. Department of Agriculture (USDA) conducted a new analysis to determine a reasonable and appropriate de minimis threshold. Based on that analysis, this rule establishes the de minimis quantity threshold at 15 million board feet (mmbf) and entities manufacturing (and domestically shipping) or importing less than 15 mmbf per year will be exempt from paying assessments under the regulations.

DATES: Effective Date: [INSERT DATE 30 DAY AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Maureen T. Pello, Marketing Specialist, Promotion and Economics Division, Specialty Crops Program, AMS, USDA, P.O. Box 831, Beavercreek, Oregon, 97004; telephone: (503) 632-8848; facsimile (503) 632-8852; or electronic mail: Maureen.Pello@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This rule, affecting 7 CFR part 1217, is authorized under the Commodity Promotion, Research and Information Act of 1996 (1996 Act) (7 U.S.C. 7411-7425).

Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules and promoting flexibility. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. Additionally, because this rule does not meet the definition of a significant regulatory action it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled "Interim Guidance Implementing

Section 2 of the Executive Order of January 30, 2017, titled
`Reducing Regulation and Controlling Regulatory Costs’”
(February 2, 2017).

Executive Order 13175

This action has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review reveals that this rule will not have substantial and direct effects on Tribal governments and will not have significant Tribal implications.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. Section 524 of the 1996 Act (7 U.S.C. 7423) provides that it shall not affect or preempt any other Federal or State law authorizing promotion or research relating to an agricultural commodity.

Under section 519 of the 1996 Act (7 U.S.C. 7418), a person subject to an order may file a written petition with USDA stating that an order, any provision of an order, or any obligation imposed in connection with an order, is not established in accordance with the law, and request a modification of an order or an exemption from an order. Any

petition filed challenging an order, any provision of an order, or any obligation imposed in connection with an order, shall be filed within two years after the effective date of an order, provision, or obligation subject to challenge in the petition. The petitioner will have the opportunity for a hearing on the petition. Thereafter, USDA will issue a ruling on the petition. The 1996 Act provides that the district court of the United States for any district in which the petitioner resides or conducts business shall have the jurisdiction to review a final ruling on the petition, if the petitioner files a complaint for that purpose not later than 20 days after the date of the entry of USDA's final ruling.

Background

This rule establishes a de minimis quantity exemption threshold under the Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order (Order), codified at 7 CFR part 1217. This part is administered by the Softwood Lumber Board (Board) with oversight by USDA's Agricultural Marketing Service (AMS). In Resolute Forest Products Inc., v. USDA, et al. (Resolute), the court found that, on the basis of the estimates and information submitted by the government to the court for review, the selection of 15 mmbf as the de minimis quantity (to be exempted) under part 1217 was

arbitrary and capricious and that part 1217 was therefore promulgated unlawfully. The court did not vacate (or terminate) part 1217; the court remanded the matter to USDA and program requirements remain in effect.

To address the court's decision, USDA conducted a new analysis to determine a reasonable and appropriate de minimis quantity exemption. USDA analyzed various thresholds of exemption: 10, 15, 20, 25, and 30 mmbf. USDA also considered proposing no de minimis exemption. USDA's analysis of the data resulted in a determination that a de minimis level of 15 mmbf is reasonable and appropriate. The analysis was published in a proposed rule on May 30, 2017 (82 FR 24583). This final rule establishes the de minimis quantity threshold under part 1217 at 15 mmbf.

Authority in the 1996 Act

The 1996 Act authorizes USDA to establish agricultural commodity research and promotion orders which may include a combination of promotion, research, industry information, and consumer information activities funded by mandatory assessments. These programs are designed to maintain and expand markets and uses for agricultural commodities. As defined under section 513(1)(D) of the 1996 Act, agricultural commodities include the products of forestry, which includes softwood lumber.

The 1996 Act provides for a number of optional provisions that allow the tailoring of orders for different commodities. Section 516 of the 1996 Act provides permissive terms for orders. Section 516 states that an order may include an exemption of de minimis quantities of an agricultural commodity. Further, section 516(g) of the 1996 Act provides authority for other action that is consistent with the purpose of the statute and necessary to administer a program.

Overview of the Softwood Lumber Program

The softwood lumber program took effect in August 2011 (76 FR 46185) and assessment collection began in January 2012. Under part 1217, assessments are collected from domestic (U.S.) manufacturers and importers and are used by the Board for projects that promote market growth for softwood lumber products used in single and multi-family dwellings as well as commercial construction. The Board is composed of 19 industry members (domestic manufacturers and importers) who are appointed by the Secretary of Agriculture. The purpose of the program is to strengthen the position of softwood lumber in the marketplace, maintain and expand markets for softwood lumber, and develop new uses for softwood lumber within the United States.

Relevant Order Provisions

Domestic Manufacturers

The term 'domestic manufacturer' is defined in § 1217.8 to mean any person who is a first handler engaged in the manufacturing, sale and shipment of softwood lumber in the United States during a fiscal period and who owns, or shares in the ownership and risk of loss of manufacturing of softwood lumber or a person who is engaged in the business of manufacturing, or causes to be manufactured, sold and shipped such softwood lumber in the United States beyond personal use. The term does not include persons who re-manufacture softwood lumber that has already been subject to assessment. The term 'manufacture' is defined in § 1217.13 to mean the process of transforming (or turning) softwood logs into softwood lumber.

Domestic manufacturers are essentially sawmills that turn softwood logs into lumber. A domestic manufacturer may be a company that is a single sawmill, or it may be a company that is composed of multiple sawmills.

Importers

The term 'importer' is defined in § 1217.11 to mean any person who imports softwood lumber from outside the United States for sale in the United States as a principal or as an agent, broker, or consignee of any person who manufactures

softwood lumber outside the United States for sale in the United States, and who is listed in the import records as the importer of record for such softwood lumber. Import records are maintained by the U.S. Customs and Border Protection (Customs or CBP). Both domestic manufacturers and importers may be referred to in this rulemaking as "entities."

Expenses and Assessments

Pursuant to § 1217.50, the Board is authorized to incur expenses for research and promotion projects as well as administration. The Board's expenses are paid by assessments upon domestic manufacturers and importers. Pursuant to § 1217.52(b), and subject to the exemptions specified in § 1217.53, each domestic manufacturer and importer must pay an assessment to the Board at the rate of \$0.35 per thousand board feet of softwood lumber, except that no entity has to pay an assessment on the first 15 mmbf of softwood lumber otherwise subject to assessment in a fiscal year. Domestic manufacturers pay assessments based on the volume of softwood lumber shipped within the United States and importers pay assessments based on the volume of softwood lumber imported to the United States. Pursuant to paragraphs (d) and (j) in § 1217.52, respectively, domestic manufacturers and importers who pay their assessments to the Board must do so no later than the 30th calendar day of

the month following the end of the quarter in which the softwood lumber was shipped or imported.

Exemptions

Section 1217.53 prescribes exemptions from assessment. Pursuant to paragraph (a) of that section, the original de minimis quantity exemption threshold under part 1217 was 15 mmbf. Thus, U.S. manufacturers and importers that domestically ship and/or import less than 15 mmbf feet annually have been exempt from paying assessments. Domestic manufacturers and importers that ship or import less than the de minimis quantity of softwood lumber must apply to the Board each year for a certificate of exemption and provide documentation as appropriate to support their request.

Pursuant to paragraph (b) of § 1217.53, domestic manufacturers and importers that ship or import 15 mmbf or more annually do not pay assessments on their first 15 mmbf domestically shipped or imported. This exemption is intended for the purpose of creating an equality amongst those within the industry with regard to the program's assessment. Just as those that manufacture or import under 15 mmbf do not have to pay assessments, those at or above this level may reduce their

assessable volume by 15 mmbf.¹ For example, an entity that ships or imports 20 mmbf annually only has to pay assessments on 5 mmbf of softwood lumber. This exemption creates fairness; it levels the playing field because all entities, regardless of size, do not have to pay assessments on their first 15 mmbf shipped or imported. For purposes of this document, this exemption is referred to as the "equity exemption." Pursuant to paragraphs (c) and (d) of § 1217.53, respectively, exports of softwood lumber from the United States and organic softwood lumber are also exempt from assessment.

Reports and Records

Pursuant to § 1217.70, domestic manufacturers and importers who pay their assessments directly to the Board must submit with their payment a report that specifies the quantity of softwood lumber domestically shipped or imported. Pursuant to § 1217.71, all domestic manufacturers and importers must maintain books and records necessary to verify reports for a period of 2 years beyond the fiscal year to which they apply, including those exempt. These records must be made available during normal business hours for inspection by Board staff or USDA.

Other Relevant Order Provisions

¹ USDA notes that the de minimis level and the equity exemption are purposefully aligned and any change in the de minimis would result in a corresponding modification to the equity exemption.

The original 15 mmbf quantity exemption threshold is referenced in other Order provisions. Section 1217.40 specifies that the Board is composed of domestic manufacturers and importers who domestically ship or import 15 mmbf or more of softwood lumber annually. Section 1217.41 specifies that persons interested in serving on the Board must also domestically ship or import 15 mmbf or more softwood lumber annually. Finally, § 1217.101 regarding referendum procedures specifies that eligible domestic manufacturers and importers that can vote in referenda must domestically ship or import 15 mmbf or more of softwood lumber annually.

Initial Referendum and Summary of Board Activities

The softwood lumber program was implemented after notice and comment rulemaking and a May 2011 referendum demonstrating strong support for the program. Pursuant to § 1217.81(a), the program had to pass by a majority of those voting in the referendum who also represented a majority of the volume voted. Sixty-seven percent of the entities who voted, who together represented 80 percent of the volume, in the referendum favored implementation of the program. Entities that domestically shipped or imported 15 mmbf or more of softwood lumber annually were eligible to vote in the referendum. As previously

mentioned, the program took effect in August 2011 and assessment collection began in January 2012.

The softwood lumber program has continued to operate at the 15 mmbf exemption threshold since its inception. During these years, the Board has funded a variety of activities designed to increase the demand for softwood lumber. The Board funded a U.S. Tall Wood Building Prize Competition that is helping to showcase the benefits of building tall structures with wood. The Board also funds research on wood standards; a communications program, which includes continuing education courses for architects and engineers; and a construction and design program that provides technical support to architects and structural engineers about using wood.

Summary of USDA's Analysis of the De Minimis Quantity under the Softwood Lumber Program

The Secretary has authority under section 516 of the 1996 Act to exempt any de minimis quantity of an agricultural commodity otherwise covered by an order: "An order issued under this subchapter may contain ... authority for the Secretary to exempt from the order any de minimis quantity of an agricultural commodity otherwise covered by the order...." 7 U.S.C. 7415(a). A de minimis quantity exemption allows an industry to exempt from assessment small entities that could be unduly burdened

from an order's requirements (i.e., assessment and quarterly reporting obligations). Because the 1996 Act does not prescribe the methodology or formula for computing a de minimis quantity, the Secretary has discretion to determine a reasonable and appropriate quantity and establish this level through notice and comment rulemaking. Pursuant to section 525 of the 1996 Act, 7 U.S.C. 7424, the Secretary may issue such regulations as may be necessary to carry out an order.

In evaluating the merits of a de minimis quantity for the softwood lumber program, USDA considered several factors. These factors include: an estimate of the total quantity of softwood lumber covered under part 1217 (quantity assessed and quantity exempted); available funding to support a viable program; free rider implications; and the impact of program requirements on entities (above and below a de minimis threshold). USDA reviewed such factors in light of all available data and information to determine whether a de minimis quantity is reasonable. USDA balanced the multiple factors to assess whether one exemption threshold would work better than another when the factors are considered collectively. The analysis was

based on the current assessment rate of \$0.35 per thousand board feet.²

The following tables are republished from USDA's analysis of the de minimis quantity under the softwood lumber program contained in the May 2017 proposed rule (82 FR 24583).

Table 1 shows the estimate of the supply of U.S. softwood lumber used in the analysis, accounting for both U.S. shipments and imports. U.S. shipments were estimated using capacity³ data from Forest Economic Advisors (FEA). Total imports was estimated using data from CBP.

Table 1: Supply of Softwood Lumber in the U.S. (MMBF)		
Shipments ¹	Imports ²	Supply ³
28,754	12,495	41,249
¹ FEA; ² CBP; ³ The sum of U.S. Shipments and Imports.		

Table 2 shows assessable volume and revenue at exemption levels of 30, 25, 20, 15 and 10 mmbf, as well as with no exemptions. The table accounts for both the de minimis and equity exemptions under part 1217, and an assessment rate of \$0.35 per thousand board feet.

² If the assessment rate changes significantly, USDA could revisit the de minimis threshold.

³ A sawmill's operating capacity is the total amount of softwood lumber that it could manufacture (or produce) if fully utilizing all of its resources (such as labor and equipment).

Volume Equal to or Greater Than	De Minimis Exemption Only	De Minimis and Equity Exemptions	Assessment Revenue (\$) ²
30	37,965	32,805	11,481,698
25	38,319	33,694	11,792,941
20	38,990	34,690	12,141,349
15	39,679	35,854	12,548,792
10	40,013	37,183	13,014,059
No exemptions	41,249	41,249	14,437,099

¹2015 data from FEA and CBP were used to construct this table; ²The product of total assessable volume, accounting for both de minimis and equity exemptions, and the assessment rate of \$0.35 per thousand board feet.

Table 3 is the inverse of Table 2 in that it shows exempt volume at de minimis and equity exemptions of 30, 25, 20, 15 and 10 mmbf.

Volume Less Than	De Minimis Exemption Only		De Minimis and Equity Exemptions	
	Volume	% Exempt ²	Volume	% Exempt ²
30	3,284	8%	8,444	20%
25	2,930	7%	7,555	18%
20	2,259	5%	6,559	16%
15	1,570	4%	5,395	13%
10	1,236	3%	4,066	10%

¹2015 data from FEA and CBP were used to construct this table; ²The quotient of total exempt volume and total 2015 U.S. supply (the sum of U.S. shipments and U.S. imports) of 41,249 MMBF.

Table 4 shows the number of entities (domestic manufacturers and importers) that would be assessed and the number of entities that would be exempt at the exemption thresholds of 30, 25, 20, 15 and 10 mmbf.

Table 4: Assessed and Exempt Entities at Exemption Levels¹					
Volume (MMBF)	Assessed		Exempt		
	No. of Entities	% Assessed ²	No. of Entities	% Exempt ²	
30	172	16%	882	84%	
25	185	18%	869	82%	
20	215	20%	839	80%	
15	255	24%	799	76%	
10	283	27%	771	73%	
None	1,054	100%	-	0%	

¹2015 data from FEA and CBP were used to construct this table; ²The quotient of No. of Entities and total domestic manufacturers and importers recorded in the industry (1,054) in 2015.

Based on its analysis, USDA determined the following: Exemption thresholds of 10 to 15 mmbf would exempt 10 to 13 percent of the total volume of softwood lumber (taking into account both the de minimis and equity exemptions). This is close to the range exempt under other research and promotion programs. While all of the exemption thresholds analyzed would generate sufficient revenue for a viable program, the additional revenue that could be collected if the de minimis level were reduced much lower than 15 mmbf would likely not be worth the additional costs. At this threshold, free rider implications would be minimal because only 4 percent of the volume of softwood lumber would be exempted as de minimis. Applying both the de minimis and equity exemptions at 15 mmbf would allow the program to assess almost 90 percent of the total volume of softwood lumber.

Further, the program functioned successfully in 2015 with assessment revenue of \$12.905 million with de minimis and equity exemptions of 15 mmbf. The Board has conducted activities at this level of funding that have helped build demand for softwood lumber, including a prize competition for tall wood buildings, research on wood standards, and an education program for architects and engineers on building with wood. An independent evaluation completed in 2016 concluded that activities of the Board increased sales of softwood lumber between 2011 and 2015 by 1.683 bbf or \$596 million. This equates to a return on investment of \$15.55 of additional sales for every \$1 spent on promotion by the Board.⁴

Therefore, when considering all of the factors collectively, USDA concludes that 15 mmbf is a reasonable and most appropriate de minimis quantity under part 1217.⁵ Accordingly, this rule establishes the de minimis quantity threshold under part 1217 at 15 mmbf. Thus, no amendment to part 1217 is necessary.

Final Regulatory Flexibility Act Analysis

In accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), AMS is required to examine the impact of this

⁴ Prime Consulting, Softwood Lumber Board, Comprehensive Program ROI, 2012-2015, February 2016.

⁵ As stated previously, the de minimis level and the equity exemption are purposefully aligned, and therefore this conclusion accounts for the equity exemption at 15 mmbf.

final rule on small entities as defined by the Small Business Administration (SBA). The classification of a business as small, as defined by the SBA, varies by industry. If a business is defined as "small" by SBA size standards, then it is "eligible for government programs and preferences reserved for 'small business' concerns."⁶ Accordingly, AMS has considered the economic impact of this action on such entities.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be disproportionately burdened. The SBA defines, in 13 CFR part 121, small agricultural producers as those having annual receipts of no more than \$750,000 and small agricultural service firms (domestic manufacturers and importers) as those having annual receipts of no more than \$7.5 million.⁷

Using an average price of \$330 per thousand board feet,⁸ a domestic manufacturer or importer who ships less than about 23

⁶ <https://www.sba.gov/contracting/getting-started-contractor/make-sure-you-meet-sba-size-standards/small-business-size-regulations>.

⁷ SBA does have a small business size standard for "Sawmills" of 500 employees (see https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf). Based on USDA's understanding of the lumber industry, using this criteria would be impractical as sawmills often use contractors rather than employees to operate and, therefore, many mills would fall under this criteria while being, in reality, a large business. Therefore, USDA used agricultural service firm as a more appropriate criteria for this analysis.

⁸ Random Lengths Publications, Inc.; www.randomlengths.com.

mmbf per year would be considered a small entity for purposes of the RFA. As shown in Table 4, there were 1,054 domestic manufacturers and importers of softwood lumber based on 2015 data. Of these, 864 entities shipped or imported less than 23 mmbf and would be considered to be small entities under the SBA definition. Thus, based on the \$7.5 million threshold, the majority of domestic manufacturers and importers of softwood lumber would be considered small entities for purposes of the RFA.

This action establishes a de minimis quantity exemption threshold under part 1217. Part 1217 is administered by the Board with oversight by USDA. In response to a federal district court decision in Resolute, USDA conducted a new analysis to determine a reasonable and appropriate de minimis threshold. Based on this analysis, this final rule establishes the de minimis quantity threshold at 15 mmbf and entities manufacturing (and domestically shipping) or importing less than 15 mmbf per year would be exempt from paying assessments under part 1217. Authority for this action is provided in sections 516(a)(2), 516(g) and 525 of the 1996 Act.

Regarding the economic impact of the de minimis exemption, the exemption allows the Board to exempt from assessment small entities that would be unduly burdened by the program's

obligations. At the 15 mmbf exemption threshold, small manufacturers and importers that domestically ship or import less than 15 mmbf of softwood lumber will not have to pay assessments under the program.

Additionally, larger manufacturers and importers will not have to pay assessments on the first 15 mmbf of softwood lumber domestically shipped or imported each year. This exemption is intended for the purpose of equity, whereby all entities who must pay assessments may reduce their assessable volume by 15 mmbf. This exemption benefits smaller manufacturers and importers whose annual shipments or imports are above the de minimis threshold of 15 mmbf. With this exemption, an entity that ships or imports a quantity of softwood lumber equal to the RFA-small business definition of 23 mmbf, would only pay assessments on no more than 8 mmbf of softwood lumber.

To calculate the impact of the assessment rate on the revenue of an assessment payer, the assessment rate is divided by an average price. Using an average 2015 price of \$330 per thousand board feet, the assessment rate as a percentage of price could range from 0.106 percent at the current assessment rate to 0.151 percent at the maximum assessment rate. This analysis helps identify the impact of the assessment rate on the revenues of assessment payers. At the current assessment rate

of \$0.35 per thousand board feet to the maximum assessment rate of \$0.50 per thousand board feet, assessment payers would owe between 0.106 percent and 0.151 percent of their revenues, respectively.

In its analysis of alternatives, USDA evaluated five different exemption thresholds - 30, 25, 20, 15 and 10 mmbf using 2015 data - accounting for both the de minimis and equity exemptions, as well as having no exemptions under the program. USDA evaluated these alternatives based on the following factors: an estimate of quantity of softwood lumber covered under the program (quantity assessed and quantity exempted); available funding to support a viable program; free rider implications; and the impact of program requirements on entities (above and below a de minimis threshold). USDA conducted a balancing test among these factors to assess whether one exemption threshold works better than another when the factors are considered collectively.

In reviewing the quantity of assessable versus exempt softwood lumber at the alternative exemption thresholds, USDA found that at an exemption threshold of 30 mmbf, a total of 32.805 bbf would be assessed with 3.284 bbf, or 8 percent, exempt as de minimis, plus an additional 5.16 bbf exempt as equity for 20 percent of total volume exempt; at 25 mmbf, a

total of 33.694 bbf would be assessed with 2.93 bbf, or 7 percent, exempt as de minimis, plus an additional 4.625 bbf exempt as equity for 18 percent total volume exempt; at a threshold of 20 mmbf, a total of 34.69 bbf would be assessed with 2.259 bbf, or 5 percent, exempt as de minimis, plus an additional 4.3 bbf exempt as equity for 16 percent total volume exempt; at a threshold of 15 mmbf, a total of 35.854 bbf would be assessed with 1.57 bbf, or 4 percent, exempt as de minimis, plus an additional 3.825 bbf exempt as equity for 13 percent total volume exempt; at a threshold of 10 mmbf, a total of 37.183 bbf would be assessed, with 1.236 bbf, or 3 percent, exempt as de minimis, plus an additional 2.83 bbf exempt as equity for 10 percent total volume exempt; and with no exemptions, a total of 41.249 bbf would be assessed. In reviewing the total volume exempt under the softwood lumber program (taking into account both the de minimis and equity exemptions), thresholds of 10 to 15 mmbf exempt between 10 and 13 percent of the volume, which is close to the range exempt under other programs.

In reviewing available funding to support a viable program at the alternative exemption thresholds, at an exemption threshold of 30 mmbf, estimated assessment revenue is \$11.482 million; at 25 mmbf, estimated assessment revenue is \$11.793

million (an additional \$311,243); at a threshold of 20 mmbf, estimated assessment revenue is \$12.141 million (an additional \$348,408); at a threshold of 15 mmbf, estimated assessment revenue is \$12.549 million (an additional \$407,444); at a threshold of 10 mmbf, estimated assessment revenue is \$13.014 million (an additional \$465,267); and with no exemptions, estimated assessment revenue is \$14.437 million (an additional \$1.423 million).

Assessment revenue under the current softwood lumber program has ranged from about \$10.638 million in 2012 to \$12.905 million in 2015. At this level of revenue, the current program has seen success. The revenues reviewed at the different exemption thresholds are comparable to these levels or higher. Thus, all of the exemption thresholds analyzed would generate sufficient revenue for a viable program.

Regarding free riders, USDA notes that the key to assessing the free rider implications of a de minimis quantity is not the number of entities exempt under a program but rather the volume of product exempt. This is because assessments are based on volume shipped or imported and not on the number of entities; assessments are not paid by entities on a pro rata basis. In evaluating free rider implications at the alternative exemption thresholds, at an exemption threshold of 30 mmbf, 84 percent of

the number of entities (or 882) would be exempt but only 8 percent of the volume would be exempt as de minimis; at a threshold of 25 mmbf, 82 percent of the number of entities (or 869) would be exempt, but only 7 percent of the volume would be exempt as de minimis; at a threshold of 20 mmbf, 80 percent of the number of entities (or 839) would be exempt, but only 5 percent of the volume would be exempt as de minimis; at a threshold of 15 mmbf, 76 percent of the number of entities (or 799) would be exempt, but only 4 percent of the volume would be exempt as de minimis; and at a threshold of 10 mmbf, 73 percent of the number of entities (or 771) would be exempt, but only 3 percent of the volume would be exempt as de minimis.

In evaluating the impact of the program's requirements at the alternative exemption thresholds, entities that ship or import at or above the de minimis threshold must pay assessments to the Board. Assessment payers must also submit a report to the Board each quarter of the volume of softwood lumber shipped or imported for the respective quarter. Entities that ship or import below the de minimis threshold must apply to the Board each year for a certificate of exemption and provide documentation as appropriate to support their request. The reporting and recordkeeping requirements are detailed in the section below titled **Paperwork Reduction Act**.

At an exemption threshold of 30 mmbf, 172 entities would pay assessments and 882 would be exempt; at 25 mmbf, 185 entities would pay assessments and 869 would be exempt; at 20 mmbf, 215 entities would pay assessments and 839 would be exempt; at 15 mmbf, 255 entities would pay assessments and 799 would be exempt; at 10 mmbf, 283 entities would pay assessments and 771 would be exempt. Thus, as the exemption threshold is reduced, more entities would be subject to the assessment and quarterly reporting obligation under part 1217.

Further, in considering program compliance costs, USDA estimates the cost of an on-site audit of a single entity at \$5,000 or more. Thus, the cost to pursue a compliance case against an entity that shipped less than 10 mmbf, 9 mmbf for example, would outweigh the revenue that would be collected from that entity of \$3,150. Similarly, the assessment revenue that would be collected from an entity that shipped less than 15 mmbf, 12 mmbf for example, would amount to \$4,200. The benefit of assessing smaller manufacturers, \$3,150 at 9 mmbf and \$4,200 at 12 mmbf, does not outweigh the cost of pursuing compliance cases against them at \$5,000 per entity. The point at which the assessment revenue that would be collected from an entity outweighs the estimated cost of \$5,000 to pursue a compliance case is an entity with volume equal to or greater than 14.3

mmbf.⁹ This level is close to 15 mmbf. By this analysis, the selection of 15 mmbf as the de minimis quantity is reasonable.

Analysis of the 23 mmbf-RFA small business threshold as a reasonable option for de minimis shows that 190 entities would be subject to assessment and 864 entities would be exempt. In terms of volume, 38.44 bbf would be assessed, or 93 percent of total volume, and 2.809 bbf would be exempt, or 7 percent of total volume.

Based upon the analysis contained herein, any of the exemption thresholds reviewed would be reasonable because they would exempt from 3 to 8 percent of the volume of softwood lumber as de minimis. However, when the total volume exempt under the softwood lumber program is considered (taking into account both the de minimis and equity exemptions), thresholds of 10 to 15 mmbf exempt between 10 and 13 percent of the volume, which is close to the range exempt under other programs. While all of the exemption thresholds analyzed would generate sufficient revenue for a viable program, the additional revenue that could be collected if the de minimis level were reduced much lower than 15 mmbf would likely not be worth the additional

⁹ This figure is computed by dividing the estimated cost to pursue a compliance case against an entity of \$5,000 by the assessment rate of \$0.35 per thousand board feet.

costs. The softwood lumber program operated successfully since its inception at an exemption threshold of 15 mmbf.¹⁰

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and recordkeeping requirements imposed by part 1217 have been approved previously under OMB control number 0581-0093. This rule imposes no additional reporting and recordkeeping burden on domestic manufacturer and importers of softwood lumber. The reporting requirements pertaining to this rule are described in the following paragraphs.

As previously mentioned, pursuant to § 1217.53(a), domestic manufacturers and importers who domestically ship or import less than the de minimis threshold must apply to the Board each year for a certificate of exemption and provide documentation as appropriate to support their request. The reporting burden for this collection of information is estimated to average 0.25 hours per domestic manufacturer or importer per report, or 0.25 hours per year (1 request per year per exempt entity). This computes to a total annual burden of 199.75 hours (0.25 hours

¹⁰ An independent evaluation of the softwood lumber program showed that the activities of the Board increased sales of softwood lumber between 2011 and 2015 by 1.683 bbf or \$596 million. This equates to a return on investment of \$15.55 of additional sales for every \$1 spent on promotion by the Board. By this metric, part 1217 to date has been effective. USDA therefore finds that 15 mmbf is a reasonable exemption level for de minimis.

times 799 exempt entities at the 15 mmbf de minimis exemption threshold from Table 4).

Further, pursuant to § 1217.70, domestic manufacturers and importers that ship or import at or over the de minimis exemption level and pay their assessments directly to the Board must submit a shipment/import report for each quarter when assessments are due. The reporting burden for this collection of information is estimated to average 0.5 hours per domestic manufacturer or importer per report, or 2 hours per year (4 reports per year times 0.5 hours per report). This computes to a total annual burden of 510 hours (255 assessed entities (from Table 4 - No. of Assessed Entities at 15 mmbf) at 2 hours each equals 510 hours).

All domestic manufacturers and importers must also maintain records sufficient to verify their reports. The recordkeeping burden for keeping this information is estimated to average 0.5 hours per record keeper maintaining such records, or 527 hours (1,054 total entities assessed (from Table 4 - No. of Assessed Entities at no exemption) times 0.5 hours).

As with all Federal promotion programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. Finally,

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

USDA 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.

Regarding outreach efforts, USDA initiated this action in response to a May 2016 federal court decision in Resolute. This rule establishes the de minimis quantity exemption under part 1217.

A proposed rule concerning this action was published in the **Federal Register** on May 30, 2017 (82 FR 24583). The Board distributed copies of the proposed rule via email to domestic manufacturers and importers. The proposal was also made available through the internet by USDA and the Office of the Federal Register. A 60-day comment period ending July 31, 2017, was provided to allow interested persons to submit comments.

Analysis of Comments

Thirty-three comments were received in response to the proposed rule. Of those 33 comments, one was outside the scope of the rulemaking and the remaining 32 supported the 15 mmbf

exemption threshold. The following is an analysis of those 32 comments.

Several commenters reiterated the data presented in the proposed rule. They cited Table 3 which shows that, at the 15 mmbf threshold, entities that pay into the program account for 96 percent of the U.S. softwood lumber market volume. Thus, free rider concerns are minimal. Reducing the exemption level by a third (down to 10 mmbf) would only increase that number to 97 percent of the U.S. market and would not be worth the additional effort. There are a large number of small manufacturers and importers who account for a small percentage of the softwood lumber shipped in the United States. The commenters opined that the cost of collecting an assessment from such a large number of entities outweighs the revenue that could be collected from such a small amount of volume. They agreed that Board staff time would be better spent on promotion activities than trying to collect a small amount of revenue from several small entities.

One commenter opined that the methodology used by USDA to determine the de minimis threshold was comprehensive and explored tradeoffs involved in setting a threshold below which it is counterproductive to the collection of assessments to further the program. The commenter stated that ". . . USDA

dealt with a large amount of data on imports that it appropriately scrubbed to exclude obvious errors and outliers.” Within the populations of domestic manufacturers and importers categorized based on volume, USDA conducted a series of “what if” analyses to determine the impact of various de minimis levels on revenue in terms of “. . . administrative costs, the compliance burden on respondents and the potential for “free rider” benefits.” The commenter also observed that USDA compared the results to other federal promotion programs authorized under the 1996 Act and overseen by USDA where it found that 8 of 10 programs exempt a de minimis quantity from assessment, and that half of those programs exempt between 3 and 11 percent of the total quantity covered by the program as de minimis. Among the range of alternatives that USDA analyzed, the 10 and 15 mmbf thresholds came closest to this range. The commenter stated that USDA also compared the benefits derived from these thresholds with the likely compliance costs incurred, which USDA estimated at \$5,000 per entity. The point at which revenues collected from entities that would fall below the compliance cost was found to be at 14.3 mmbf, which is closest to the 15 mmbf threshold. The combination of these results led USDA to conclude that 15 mmbf is the most appropriate benchmark between volumes assessed and not assessed. The commenter

concluded that, “. . . while there is no special formula for computing a de minimis threshold . . . ,” the commenter believes that USDA selected a reasonable exemption amount based on the industry’s structure and the program’s benefits and costs.

Six commenters opined that the 15 mmbf threshold appropriately separates the high production manufacturers from small entities that manufacture specialty products and sell into mostly local and niche markets. They agreed that specialty products do not benefit as much from a national promotion program, and that growth in market share benefits entities that manufacture larger volumes to a greater degree than those that fall below the 15 mmbf threshold.

Several commenters expressed concern with the administrative burden that complying with a mandatory promotion program could place on small entities below the 15 mmbf threshold. One commenter stated that, on a per board foot ratio, the costs to participate in the program are lower for larger entities than smaller entities. Many small entities still record their shipments by hand. Larger entities, on the other hand, can afford to invest in automated computer reporting systems and can have personnel dedicated to efficiently analyzing their reporting. Thus, the administrative costs for

smaller entities to participate in the program are higher than the costs for larger entities.

Two commenters also referenced the part's 8 percent cap on administrative expenses. They opined that the revenue gained from collecting assessments from numerous small entities would not be sufficient to justify the additional costs and administrative complexities.

Three commenters expressed support for the equity exemption. They opined that the equity exemption makes the program fair for everyone. One commenter opined that the equity exemption mitigates the free rider problem because larger entities do not have to pay assessments on their first 15 mmbf shipped. Without the equity exemption, assessment payers would pay more, thereby increasing the free rider impact.¹¹

Two commenters discussed the efforts of the Blue Ribbon Commission (BRC), the proponent group, in promulgating the program. They stated that the BRC surveyed the industry on issues related to the program, including the de minimis

¹¹ For example, as explained in the May 2017 proposed rule, if the thresholds for de minimis and equity exemptions were 10 mmbf, Company A that ships 8 mmbf annually would pay no assessments, and Company B that ships 30 mmbf annually would have to pay assessments on 20 mmbf of softwood lumber. At an assessment rate of \$0.35 per thousand board feet, this would compute to \$7,000 in assessments. Without the equity exemption, Company A would still pay no assessments but Company B would have to pay assessments on 30 mmbf. This would compute to \$10,500 in assessments, which is an additional burden of \$3,500. Thus, the equity exemption reduces the burden of free riders on entities funding the program. It creates fairness because it exempts from assessment an equal volume from all entities, regardless of their size.

exemption threshold. They stated that the BRC sought a level that would generate maximum revenue for the program while being mindful of the cost of administering the program and collecting assessments. The BRC's survey found that 15 mmbf was the appropriate level that was broadly accepted by the industry.

Several commenters also expressed their overall support for the softwood lumber program. They agreed that the program provides a strong, unified voice for the industry. One commenter stated that the program has contributed significantly to strengthening the position of softwood lumber in the market place as well as expanding and developing new markets for softwood lumber. The commenters also agreed that funding for the program has been appropriate since assessment collection began in 2012. None of the commenters supported increasing the exemption threshold thereby reducing funding for the program.

No changes have been made to the proposed rule based on the comments received.

After consideration of all relevant matters presented, including the available information and comments received, it is hereby found that this rule, is consistent with and will effectuate the purposes of the 1996 Act.

List of Subjects in 7 CFR Part 1217

Administrative practice and procedure, Advertising,
Consumer information, Marketing agreements, Promotion, Reporting
and recordkeeping requirements, Softwood lumber.

The authority citation for 7 CFR part 1217 continues to read as
follows:

Authority: 7 U.S.C. 7411-7425; 7 U.S.C. 7401.

Dated: October 19, 2017.

Bruce Summers,
Acting Administrator.

BILLING CODE 3410-02 P

[FR Doc. 2017-23094 Filed: 10/25/2017 8:45 am; Publication Date: 10/26/2017]