



**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:** Proposed rule.

**SUMMARY:** This action proposes to establish a de minimis quantity exemption threshold under the Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order (Order). The Order is administered by the Softwood Lumber Board (Board) with oversight by the U.S. Department of Agriculture (USDA). In response to a 2016 federal district court decision, USDA conducted a new analysis to determine a reasonable and appropriate de minimis threshold. Based on that analysis contained herein, this proposal would establish 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 would be exempt from paying assessments under the Order.

**DATES:** Comments must be received by [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Interested persons are invited to submit written comments concerning this proposal. Comments may be submitted on the internet at: <http://www.regulations.gov> or to the Promotion and Economics Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue, SW., Room 1406-S, Stop 0244, Washington, DC 20250-0244; facsimile: (202) 205-2800. All comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection, including name and address, if provided, in the above office during regular business hours or it can be viewed at <http://www.regulations.gov>.

**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](mailto:Maureen.Pello@ams.usda.gov).

**SUPPLEMENTARY INFORMATION:** This proposal is issued under the Order (7 CFR part 1217). The Order 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 proposal would not have substantial and direct effects

on Tribal governments and would not have significant Tribal implications.

### **Executive Order 12988**

This proposal 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 proposed rule would establish a de minimis quantity exemption threshold under the Order. The Order, codified at 7 CFR part 1217, is administered by the 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 the Order was arbitrary and capricious and that the Order was therefore promulgated unlawfully. The court did not vacate (or terminate) the Order; 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. Therefore, this proposal would establish the de minimis quantity threshold under the Order 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 the Order, 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 section 1217.8 of the Order 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 section 1217.13 of the Order 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 section 1217.11 of the Order 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 section 1217.50 of the Order, 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 section 1217.52(b), and subject to the exemptions specified

in section 1217.53 of the Order, 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 section 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 of the Order prescribes exemptions from assessment. Pursuant to paragraph (a) of that section, the original de minimis quantity exemption threshold under the Order 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 section 1217.53 of the Order, 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.<sup>1</sup> 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 section 1217.53, respectively, exports of softwood lumber from the United States and organic softwood lumber are also exempt from assessment.

### **Reports and Records**

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<sup>1</sup> 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.

Pursuant to section 1217.70 of the Order, 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 section 1217.71 of the Order, 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**

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 of the Order specifies that persons interested in serving on the Board must also domestically ship or import 15 mmbf or more softwood lumber annually. Finally, section 1217.101 of the Order 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 section 1217.81(a) of the Order, 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.

**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 the Order (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 balances the multiple factors to assess whether one exemption threshold would work better than another when the factors are considered collectively. The analysis contained herein is based on the current assessment rate of \$0.35 per thousand board feet.<sup>2</sup>

#### **Estimate of Total Quantity of Commodity Covered Under the Order**

The first factor considered to determine a de minimis quantity that would be reasonable for the softwood lumber program was an examination of how much of the product covered by the program would be assessed versus how much of the product would be exempted. Issues of fairness and potential issues related to free riders may also be of concern. The lower the de minimis threshold, the greater the number of entities that would be subject to assessment under the program. At some point, a de minimis threshold can be "too low" whereby the assessment

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<sup>2</sup> If the assessment rate changes significantly, USDA could revisit the de minimis threshold.

revenue that would be collected from very small entities is not worth the administration and compliance costs of including them under the order. Conversely, a higher de minimis quantity results in fewer entities being subject to assessment under the order. This means that a greater number of entities would benefit from the activities of the program without paying assessment as the de minimis level increases. USDA's goal is to identify a level that reasonably balances these competing issues.

To evaluate the first factor, USDA estimated the quantity of softwood lumber that would be assessed versus the quantity that would be exempt under a program with de minimis exemptions at different levels: 10, 15, 20, 25, and 30 mmbf. USDA also estimated the quantity of softwood lumber assessed if there were no de minimis exemption. To accomplish this, USDA first estimated the volume of softwood lumber domestically shipped by domestic manufacturers and the volume imported by importers.

#### Volume of Domestic Softwood Lumber

To estimate the volume of domestic softwood lumber, USDA utilized data from Forest Economic Advisors, LLC (FEA), which publishes data on aggregate softwood lumber shipments in the U.S. (for the industry as a whole) and operating capacity by individual sawmill. A sawmill is a business operation that

converts raw forest products into lumber. A domestic manufacturer can be composed of one sawmill or multiple sawmills. A sawmill's operating capacity is the total amount of softwood lumber that it could manufacture (or produce) if it fully utilized all of its resources (such as labor and equipment).

FEA is a U.S.-based company that studies market trends in the forest products industry in North America.<sup>3</sup> In the absence of a government data source, USDA identified FEA as a reputable source in the softwood lumber industry with data depicting a reliable and accurate representation of U.S. sawmills and domestic manufacturers.<sup>4</sup> Among the credentials of FEA are reviews of U.S. Forest Service publications, and citations in trade journals such as Canadian Journal of Forest Research; Biomass and Bioenergy; Forest Policy and Economics; and Forest Products Journal.

To USDA's knowledge, there is no one, complete source of individual shipment data for domestic manufacturers of softwood lumber. While the Board has shipment data for domestic manufacturers that pay assessments (ship 15 mmbf or more

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3 <http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapid=106682714>.

4 The final rule (76 FR 46185; August 2, 2011) utilized data from the USDA-Forest Service document "Profile 2009: Softwood Sawmills in the United States and Canada." There have been no recent updates to this publication; therefore, USDA has instead utilized data from FEA to conduct this analysis.

annually), it does not have shipment data for exempt manufacturers. Thus, USDA used FEA data to estimate individual shipments for each manufacturer. USDA requests comments specifically on whether there are other reliable sources that the agency should consider in its analysis of domestic manufacturing. All data in this analysis is for the year 2015, which is the most recent year for which complete data is available.

Using FEA data to estimate shipments of softwood lumber by domestic manufacturers, USDA found that domestic shipments totaled 28.754 billion board feet (bbf) in 2015.<sup>5</sup> According to FEA, the total number of domestic manufacturers was 343, which encompassed 509 total sawmills in the U.S. Estimated shipments by domestic manufacturer were calculated by applying an operating rate of 76 percent to the capacities of each sawmill listed in FEA data. The domestic manufacturers that owned each sawmill were also identified in the FEA data. This allowed USDA to assign the estimated shipments of each sawmill to the domestic manufacturer that owned the sawmill.

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<sup>5</sup> <https://www.getfea.com/data-center>.

To calculate the sawmill operating rate, USDA divided total shipments in the U.S.<sup>6</sup> by total capacity of U.S. sawmills, according to data published by FEA (see Equation 1 below).

$$\text{Equation 1. Sawmill Operating Rate} = \frac{\text{Softwood Lumber Shipments}}{\text{Softwood Lumber Capacity}} = \frac{31.702 \text{ bbf}}{41.720 \text{ bbf}} = 76\%$$

USDA recognizes that some sawmills may operate at a lower or higher rate than 76 percent; this rate is meant to serve as a midpoint to estimate the individual shipments of domestic manufacturers.

Total U.S. softwood lumber shipments in Equation 1 above differs from the total estimated shipments noted previously and shown later in Table 1. The reason for this is that the figure for total U.S. shipments in Equation 1 represents aggregate shipments for all sawmills in the U.S. in 2015. The figure shown in Table 1 is the sum of estimated shipments using the 76 percent sawmill operating rate. In order to estimate shipments by domestic manufacturer, USDA applied the sawmill operating rate, as determined in Equation 1, to the capacities of each sawmill listed in FEA data. The sum of these estimated shipments is 28.754 bbf. The difference between estimated total shipments (28.754 bbf) and actual total shipments (31.702 bbf) of softwood lumber in 2015 is about 9 percent. This difference

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<sup>6</sup> Total shipments in the U.S. includes domestic production for export markets.

represents the actual capacities of some sawmills being larger than the estimated sawmill operating rate of 76 percent.

#### Volume of Imported Softwood Lumber

Pursuant to section 1217.52(g) of the Order, imports of softwood lumber are subject to the same assessment as domestic product. Section 1217.52(h) of the Order specifies the categories of softwood lumber that are assessed under the program as identified via the Harmonized Tariff Schedule (HTS) code. Imported commodities are assigned codes via the HTS with the first numbers denoting the heading, which is a broad description of the commodity, and the subsequent numbers denoting the subheadings, which specify the commodity in greater detail. A list of softwood lumber products subject to assessment and their HTS headings and subheadings are listed below.<sup>7</sup>

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<sup>7</sup> Harmonized Tariff Schedule of the United States (2015): Chapter 44: Wood and Articles of Wood; Wood Charcoal.

HTS Code		HTS Description
Heading	Subheading	
4407	10.01	Wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or end-jointed, of a thickness exceeding 6 mm (.236 inch) (lumber) Coniferous
4409	10.05	Wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rebated, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges, ends or faces, whether or not planed, sanded or end-jointed Coniferous: Wood continuously shaped along any of its ends, whether or not also continuously shaped along any of its edges or faces, all the foregoing whether or not planed, sanded or end-jointed
	10.10	Coniferous: Other: Wood siding
	10.20	Coniferous: Other: Wood flooring
	10.90	Coniferous: Other: Other
4418	90.25	Builders' joinery and carpentry of wood, including cellular wood panels and assembled flooring panels; shingles and shakes Other: Drilled or notched lumber studs

To estimate imports of softwood lumber into the U.S. for 2015, USDA utilized data collected by CBP via the agency's Automated Commercial Environment (ACE) database. CBP disseminates the statistical trade data that it collects to the U.S. Census Bureau (Census), which then aggregates the data and supplies it to USDA's Foreign Agricultural Service (FAS) for publication on FAS' Global Agricultural Trade System (GATS).<sup>8</sup> The data collected by CBP is extensive but may be subject to nonsampling error.<sup>9</sup>

<sup>8</sup> <https://apps.fas.usda.gov/gats/>.

<sup>9</sup> The source for this citation is <http://www.census.gov/foreign-trade/guide/sec2.html#source>. Census states the following on its website: "Import and export data are a complete enumeration of documents collected by U.S. Customs and Border Protection and are not subject to sampling errors. However, while quality

For the purpose of this analysis, USDA excluded from the CBP data imports with country of origin listed as the U.S. because such information would already be represented in the domestic shipment data previously discussed. USDA also summed import volumes for entities listed as separate companies, but which are one and the same. In addition, USDA excluded the Customs entries for which the computed price (the quotient of value and quantity) of the commodity was less than the lowest reported monthly price for the year 2015, according to FEA data.<sup>10</sup> The lowest monthly price for a softwood lumber product recorded by FEA was \$203 per thousand board feet in December of 2015. USDA excluded any Customs entry with a computed price of less than \$203 per thousand board feet to help eliminate potential data issues associated with misplaced decimal points.<sup>11</sup> This resulted in a reduction of 17,026 entries and 3.417 bbf in

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assurance procedures are performed at every stage of collection, processing, and tabulation, the data are still subject to several types of nonsampling errors. The most significant of these include reporting errors, undocumented shipments, timeliness, data capture errors, transiting goods, and underestimation of low-valued transactions."

10 Customs data includes quantity of the imported product and its total value. By dividing value by quantity, USDA finds a price per thousand board feet of every import entry, referred to above as a "computed price." Finding the price for every entry allows USDA a way to find entries whose quantities may have been entered incorrectly.

11 A misplaced decimal point in the quantity imported could cause the quantity of an import to be much larger than its associated value would warrant. A larger quantity relative to its value would result in a price that is much lower than expected, given other prices in the data. This low price would indicate that the quantity figure may have been entered incorrectly. For this reason, USDA found the minimum per thousand board foot price according to FEA data and removed the entries whose computed price was lower.

volume from the original data set that had a total of 247,049 entries and total volume of 15.912 bbf.

Using this modified CBP data, USDA estimated the total volume of softwood lumber imports for 2015 at 12.495 bbf, which aligns more closely to import figures published on FAS' GATS (13.809 bbf) and used by FEA (13.963 bbf) for 2015. Using the 12.495 bbf figure, USDA's estimate of assessment revenue for 2015 at the 15 mmbf exemption threshold was within 3 percent of what the Board recorded for assessment revenue in 2015. (This is explained in detail later in this document.) If USDA used the 15.912 bbf figure instead, USDA's estimates for 2015 assessment revenue and the number of assessed entities would be inflated. Thus, USDA used the modified CBP figure of 12.495 bbf in its analysis as a reasonable estimate of 2015 softwood lumber imports.

The import statistics that result from aggregation by Census cover "goods valued at more than \$2,000 per commodity shipped by individuals and organizations (including importers and customs brokers) into the U.S. from other countries."<sup>12</sup> For this reason, the total import volume of softwood lumber that results from using the ACE portal through CBP differs from that of using GATS through FAS and Census.

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<sup>12</sup> <http://www.census.gov/foreign-trade/about/index.html#importstatistics>.

Similar to the import statistics described above, the aggregated export statistics cover "goods valued at more than \$2,500 per commodity shipped by individuals and organizations (including exporters, freight forwarders, and carriers) from the U.S. to other countries."<sup>13</sup> In conducting this analysis, USDA relied on aggregate U.S. export data published by FAS via GATS.<sup>14</sup> Pursuant to section 1217.53(c) of the Order, U.S. exports of softwood lumber are not subject to assessment. While it is possible to subtract exports in aggregate from total U.S. supply in order to find U.S. utilization and total volume assessed under no de minimis threshold, USDA cannot deduct export volume by entity because the data is not publically available. This means that estimates of assessed volume may be slightly inflated; however, the impact would not be significant as total exports of softwood lumber products in 2015 amounted to 1.562 bbf, which is less than 4 percent of total U.S. supply.

#### **Quantity Assessed and Quantity Exempt**

Table 1 shows total U.S. supply of softwood lumber, which is the sum of domestic shipments and imports in 2015. As mentioned previously, shipments per entity were estimated using the sawmill operating rate shown in Equation 1. Total shipments

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<sup>13</sup> <http://www.census.gov/foreign-trade/about/index.html#exportstatistics>.

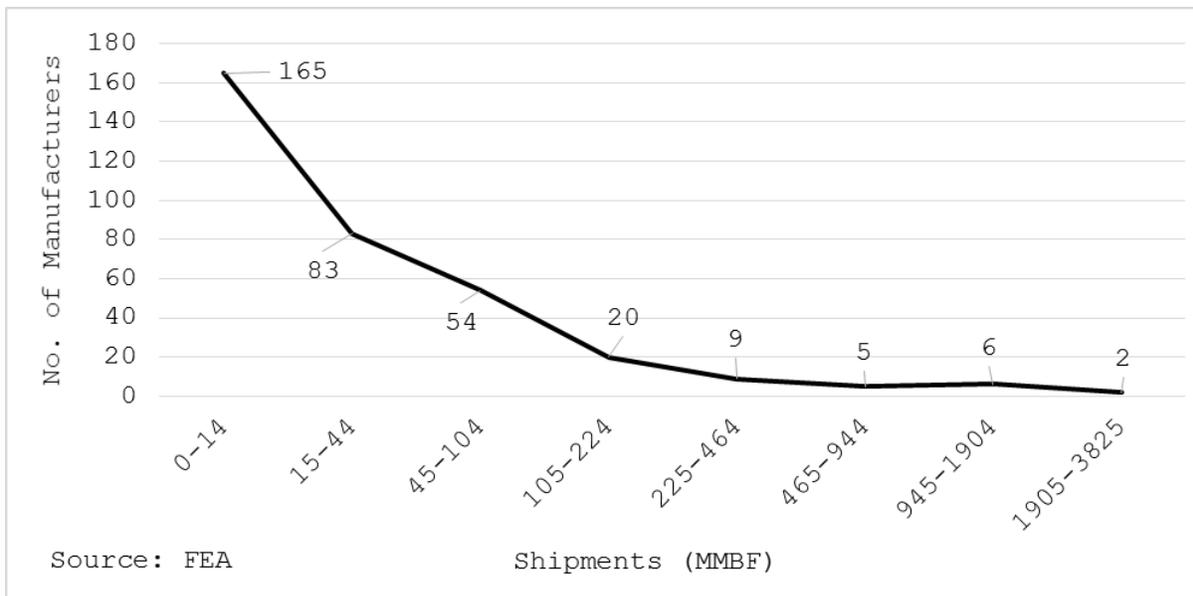
<sup>14</sup> USDA does not currently have access to CBP U.S. export data with volume and value detailed by exporting entity.

in Table 1 represent the sum of shipments by entity. Imports in Table 1 are the sum of the imported commodities assigned the formerly described HTS codes. Summing domestic shipments and imported products of softwood lumber results in a U.S. total supply of 41.249 bbf.

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

Using 2015 FEA sawmill capacity data and the estimated operating rate of 76 percent, Figure 1 below shows the number of softwood lumber manufacturers in the U.S. in 2015 by estimated shipments. As stated previously, USDA calculated estimated shipments by applying the estimated industry-wide 76 percent operating rate to the sawmill capacity of each manufacturer.

**Figure 1. Frequency Distribution of U.S. Manufacturers by Estimated Shipments, 2015**



As the graph shows, there were 165 manufacturers with estimated shipments of less than 15 mmbf in the U.S. in 2015, almost half of the 344 total U.S. manufacturers. Of these, 150 manufacturers had shipments of less than 10 mmbf according to USDA's analysis of FEA data.<sup>15</sup> The scale on the x-axis of the graph begins with a range of 15 mmbf. The ranges then double each time, with the next covering a range of 30 mmbf, then 60, 120, 240, 480, 960, and 1,920 mmbf for the last six ranges. There were a large number of manufacturers with relatively small estimated shipments. For example, as the data in Figure 1 show, there were 248 U.S. manufacturers that shipped of less than 45 mmbf in 2015, which is more than 72 percent of the total number

<sup>15</sup> <https://www.getfea.com/data-center>.

of U.S. manufacturers. Furthermore, of these, almost 67 percent shipped less than 15 mmbf of softwood lumber.

USDA considered the impacts of five different de minimis thresholds on the softwood lumber industry and program operations, as well as the impact of having no de minimis exemption. An analysis of these different de minimis exemption levels follows in Tables 2 and 3 in this section, and in Table 4 in the section of this document titled **Free Rider Implications**.

<b>Table 2: Assessable Volume and Assessment Revenue at Exemption Levels (MMBF)</b> <sup>1</sup>			
Volume Equal to or Greater Than	De Minimis Exemption Only	De Minimis and Equity Exemptions	Assessment Revenue (\$) <sup>2</sup>
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

<sup>1</sup>2015 data from FEA and CBP were used to construct this table; <sup>2</sup>The 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 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 the Order, and an assessment rate of \$0.35 per thousand board feet.

With de minimis and equity exemptions of 30 mmbf, total assessable volume would be 32.805 bbf which would provide \$11.482 million in assessment revenue. At exemptions of 25

mmbf, total assessable volume would increase by 0.889 bbf, providing an additional \$311,243 in assessment revenue. At exemptions of 20 mmbf, total assessable volume would increase by 0.996 bbf, providing an additional \$348,408 in assessment revenue. At exemptions of 15 mmbf, total assessable volume would increase by 1.164 bbf, providing an additional \$407,444 in assessment revenue. At exemptions of 10 mmbf, total assessable volume would increase by 1.329 bbf, providing an additional \$465,267 in assessment revenue.

Thus, for all exemption levels considered, assessable volume ranged between almost 33 bbf and a little more than 37 bbf. Assessment revenue ranged between nearly \$11.5 million and about \$13 million. From its inception in 2012, the softwood lumber program has operated with assessment revenue ranging from \$10.638 million in 2012<sup>16</sup> to \$12.905 million in 2015.<sup>17</sup> These revenue figures represent the total assessments collected from domestic entities and importers with the 15 mmbf de minimis exemption and the 15 mmbf equity exemption in place. The range of actual assessment revenue received by the Board from 2012 to 2015 at de minimis and equity exemptions of 15 mmbf is similar to the estimates of assessment revenue collected at de minimis

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16 Softwood Lumber Board, Financial Statements and Supplementary Information for the Year Ending December 31, 2012; Councilor Buchanan Mitchell, CPAs and Business Advisors; May 30, 2013; p. 12.

17 Letter from E. Albert Weber, CPA, Partner, RSM US LLC, dated February 22, 2017.

and equity exemptions of 30, 25, 20, 15, and 10 shown in Table 2. This is discussed further in the section titled **Funding for a Viable Program**. With no exemptions, total assessable volume would increase to 41.249 bbf, providing an additional \$1.423 million in assessment income (\$14.437 million total).

Table 3 below 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.

<b>Table 3: Exempt Volume at Exemption Levels (MMBF)<sup>1</sup></b>					
Volume Less Than	De Minimis Exemption Only		De Minimis and Equity Exemptions		
	Volume	% Exempt <sup>2</sup>	Volume	% Exempt <sup>2</sup>	
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%	

<sup>1</sup>2015 data from FEA and CBP were used to construct this table; <sup>2</sup>The quotient of total exempt volume and total 2015 U.S. supply (the sum of U.S. shipments and U.S. imports) of 41,246 MMBF.

At an exemption level of 30 mmbf, 8 percent of the softwood lumber volume would be exempt as de minimis and 20 percent would be exempt in total (de minimis and equity exemptions); at an exemption of 25 mmbf, 7 percent would be exempt as de minimis and 18 percent would be exempt in total; at an exemption of 20 mmbf, 5 percent would be exempt as de minimis and 16 percent would be exempt in total; at an exemption of 15 mmbf, 4 percent would be exempt as de minimis and 13 percent would be exempt in total; and at an exemption of 10 mmbf, 3 percent would be exempt

as de minimis and 10 percent would be exempt in total. Thus, the differences in the percent of softwood lumber exempt as de minimis at these different exemption thresholds ranges from 3 to 8 percent, and the percent exempt in total ranges from 10 to 20 percent. The percent of volume assessed, taking into account the de minimis and equity exemptions, ranges from 80 to 90 percent at the different exemption thresholds.

In its analysis, USDA reviewed other programs with de minimis exemptions operating under the 1996 Act. There are ten programs, including softwood lumber, that are authorized under the 1996 Act. Eight of these ten programs exempt a de minimis quantity from assessment, with half currently exempting between 3 and 11 percent of total quantity covered by the program as de minimis. Thus, there is a demonstrated history of de minimis exemptions working in other industries. In reviewing the total volume exempt under the softwood lumber program (taking into account both the de minimis and equity exemptions), the exemption threshold of 10 mmbf would exempt 10 percent of total volume, which is comparable to other programs and the exemption threshold of 15 mmbf would exempt 13 percent which is not much higher than other programs. The higher exemption thresholds of

20 to 30 mmbf exempt a higher total volume when compared with other programs.<sup>18</sup>

### **Funding for a Viable Program**

The second factor used in evaluating a de minimis threshold for the softwood lumber program is the available funding to support a viable program. As shown in Table 2, assessment revenue would range from \$11.482 million at an exemption threshold of 30 mmbf to \$14.437 million with no exemption (a total difference of about \$3 million). Lowering the exemption threshold creates more revenue for program activities because a greater volume of softwood lumber is subject to assessment. As stated previously, 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, funding various programs to increase the use of softwood lumber in the built environment. The revenues estimated in Table 2 are comparable to these levels or higher. Thus, all of the exemption thresholds analyzed would generate sufficient revenue for a viable program.

### **Free Rider Implications**

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18 USDA's review of other programs with a de minimis exemption was done only for the purpose of comparison, and not to imply that a de minimis exemption must be within a certain range. The 1996 Act specifies no methodology or formula for computing a de minimis threshold. A de minimis threshold must be appropriate for a respective industry.

Another factor used by USDA in determining a reasonable de minimis quantity for the softwood lumber program is consideration of free rider implications. Under a national research and promotion program, free riders are entities that benefit from the research and promotion activities of the program without paying assessments. Under this definition, free riders are the entities whose shipment or import volume is below the de minimis level and are exempt from paying assessments into the program.

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

<b>Table 4: Assessed and Exempt Entities at Exemption Levels<sup>1</sup></b>				
Volume (MMBF)	Assessed		Exempt	
	No. of Entities	% Assessed <sup>2</sup>	No. of Entities	% Exempt <sup>2</sup>
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%

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

At an exemption level of 30 mmbf, 16 percent of domestic manufacturers and importers would pay assessments while 84 percent would be exempt; at 25 mmbf, 18 percent of entities would pay assessments while 82 percent would be exempt; at 20

mmbf, 20 percent would pay assessments while 80 percent would be exempt; at 15 mmbf, 24 percent would pay assessments, while 76 percent would be exempt; at 10 mmbf, 27 percent would be pay assessments while 73 percent would be exempt. With no exemption, all 1,054 entities, regardless of size, would pay assessments.

This analysis shows that a small portion of softwood lumber manufacturers and importers ship or import the majority of the volume of softwood lumber in the industry. Most domestic manufacturers and importers ship or import relatively small volumes of product.

The key to assessing the free rider implications of a de minimis quantity is not the number of entities exempt under a program (as shown in Table 4), but rather the volume of product exempt (as shown in Table 3). This is because the statute authorizes the exemption of a quantity of a commodity, not a number of entities. 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. At the 30 mmbf exemption level, 84 percent of the number of entities would be exempt, but only 8 percent of the volume would be exempt as de minimis. At the 25 mmbf exemption level, 82 percent of the number of entities would be exempt, but only 7 percent of the volume would

be exempt as de minimis. At the 20 mmbf exemption level, 80 percent of the number of entities would be exempt, but only 5 percent of the volume would be exempt as de minimis. At the 15 mmbf exemption level, 76 percent of the number of entities would be exempt, but only 4 percent of the volume would be exempt as de minimis. At the 10 mmbf exemption level, 73 percent of the number of entities would be exempt, but only 3 percent of the volume would be exempt as de minimis. With no de minimis, all 1,054 entities would pay assessment on all 41.249 bbf volume of softwood lumber.

The equity exemption would reduce the impact of free riders on the program because it reduces the assessment burden on assessment payers. Without this exemption, assessment payers would pay more, thereby increasing the free rider impact. For example, 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.

Thus, based upon this analysis of free rider implications, 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. The equity exemption helps to reduce the free rider impact on the program by reducing the assessment burden equally on assessment payers.

Further, generic promotion, research and information activities for agricultural commodities play a unique role in advancing the demand for such commodities, since such activities increase the total market for a product to the benefit of consumers and all producers. These generic activities can be of particular benefit to small producers who lack the resources or market power to advertise on their own. As contemplated by the 1996 Act, generic activities increase the general market demand for an agricultural commodity. For small manufacturers and importers, the benefit of increased market demand for softwood lumber would only be as great as their production capacities. Therefore, while generic promotion activities are of particular benefit to small manufacturers and importers, increased demand

will also disproportionately benefit large manufacturers and importers as they will have greater resources (production capacity) to take full advantage of that increased demand.

### **Impact of Program Requirements**

The fourth factor analyzed by USDA in determining a reasonable de minimis quantity for this program is consideration of the impact of program requirements on entities covered under a research and promotion program. As previously mentioned, the softwood lumber Order prescribes assessment and reporting obligations for domestic manufacturers and importers of softwood lumber. Entities that domestically ship or import at or above the de minimis threshold must pay assessments to the Board. The current assessment rate is \$0.35 per thousand board feet; it can be increased to a maximum rate of \$0.50 per thousand board feet by notice and comment rulemaking.

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<sup>19</sup>, 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

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19 Random Lengths Publications, Inc.; [www.randomlengths.com](http://www.randomlengths.com).

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.

Entities that pay assessments must also submit a report to the Board each quarter of the volume of softwood lumber shipped or imported for the respective quarter. Further, entities that 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 and record keeping burdens are detailed later in this document in the section titled **Paperwork Reduction Act**.

Additionally, the Board has implemented a process under the Order to help ensure compliance with Order provisions. Board staff reviews and analyzes Customs data provided by USDA to verify import assessments.<sup>20</sup> For domestic manufacturers, the Board conducts periodic mail audits whereby manufacturers must submit documents to Board staff to verify assessments paid. Entities that ship or import less softwood lumber than the de

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<sup>20</sup> Pursuant to a Memorandum of Understanding between USDA and Customs, USDA provides Board staff raw, unmodified Customs data. Board staff identifies the data for each importing entity that should pay assessments, makes modifications as appropriate, and compares that volume with the volume for which the importer paid assessments.

minimis threshold and have received a certificate of exemption from the Board are relieved of this audit burden.

As shown in Table 4, at an exemption threshold of 30 mmbf, 172 entities would pay assessments and 882 would be exempt; at 25 mmbf, 13 additional entities would pay assessments and the number of exempt entities would be reduced by 13; at 20 mmbf, 30 additional entities would pay assessments and the number of exempt entities would be reduced by 30; at 15 mmbf, an additional 40 entities would pay assessments and the number of exempt entities would be reduced by 40; at 10 mmbf, an additional 28 entities would pay assessments and the number of exempt entities would be reduced by 28. Thus, as the exemption threshold is reduced, more entities would be subject to the Order's assessment and quarterly reporting obligation, and the Board's mail audit program. Conversely, as the exemption threshold increases, fewer entities would have to pay assessments, submit quarterly reports, and participate in the Board's audit program.

Further, a de minimis quantity exemption helps to reduce compliance costs under a research and promotion program. Compliance costs are an administrative cost to the Board, and section 1217.50(h) of the softwood lumber Order limits the Board's administrative expenses to 8 percent of the assessment

and other income received by and available to the Board for a fiscal year. According to the Board, for 2015, compliance costs totaled \$226,240 which computes to less than 2 percent of the Board's assessment revenue. These compliance costs are routine and include the amount of time the Board spends tracking and verifying assessments paid as well as educating industry members on program obligations. The costs of pursuing a compliance case against an entity that owes assessments to the Board varies depending upon the complexity of the case.

Under the softwood lumber program, the de minimis threshold exempts the small manufacturer that, according to FEA, typically sells into markets that are specialized or very local. Based on its knowledge of other research and promotion programs, USDA estimates the current cost of an on-site audit of a single entity at \$5,000 or more, depending upon travel and time involved. 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.<sup>21</sup> 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

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<sup>21</sup> This figure is computed by multiplying the assessment rate of \$0.35 per thousand board feet by 9 mmbf.

equal to or greater than 14.3 mmbf.<sup>22</sup> This level is close to 15 mmbf. As can be determined from the data in Table 2, the total additional revenue that would be collected from exempt entities that ship or import less than the 15 mmbf de minimis would be \$1.888 million. The compliance costs to pursue these additional payments, however, would be more than double the sum of additional assessment revenue that would be collected.

#### **USDA's Proposed 15 MMBF De Minimis Exemption Threshold**

Because no de minimis quantity is specified in the 1996 Act, it is within the Secretary's discretion to determine an appropriate level for each program. There is no formula or economic framework that points to a single de minimis threshold. Thus, USDA considers a range of quantities that could be de minimis. Table 3, for example, shows a range of volumes from 10 to 30 mmbf that could be considered de minimis under the softwood lumber Order because they only exempt 3 to 8 percent of the total volume, respectively, as de minimis. USDA evaluated these volumes using four factors - an estimate of the quantity assessed versus the quantity exempted; funding to support a viable program; free rider implications; and the impact of program requirements. USDA's goal is to identify a de minimis

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<sup>22</sup> 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.

quantity that reasonably balances these factors, and to assess whether one exemption threshold would work better than another when the factors are considered collectively.

Based on the analysis contained herein, USDA has 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.<sup>23</sup>

Therefore, when considering all of the factors collectively, USDA has determined that a de minimis quantity of 15 mmbf would work better than the other thresholds reviewed. USDA concludes that 15 mmbf is a reasonable de minimis quantity under the softwood lumber Order. Accordingly, this proposed rule would establish the de minimis quantity threshold under the Order at 15 mmbf. Thus, USDA is not proposing any amendment to part 1217.

#### **Initial 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 proposed 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

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<sup>23</sup> Prime Consulting, Softwood Lumber Board, Comprehensive Program ROI, 2012-2015, February 2016.

is defined as "small" by SBA size standards, then it is "eligible for government programs and preferences reserved for 'small business' concerns."<sup>24</sup> 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.<sup>25</sup>

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

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

25 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](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.

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 proposes to establish a de minimis quantity exemption threshold under the Order. The Order 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 proposal would establish 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 the Order. 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 from the program's obligations. At the proposed exemption threshold, small manufacturers and importers that domestically ship or import less than 15 mmbf of softwood lumber would not have to pay assessments under the program.

Additionally, larger manufacturers and importers would 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, for example, would only pay assessments on no more than 8 mmbf of softwood lumber.

As previously stated, 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 Order's assessment and quarterly reporting obligation.

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.<sup>26</sup> This level is close to 15 mmbf. By this analysis, the selection of 15 mmbf as the de minimis quantity is reasonable.

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<sup>26</sup> 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.

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 threshold 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 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. The softwood lumber program operated successfully since its inception at an exemption threshold of 15 mmbf.<sup>27</sup>

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<sup>27</sup> 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, the Order to-date has been effective. USDA therefore finds that 15 mmbf is a reasonable exemption level for

## **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 the Order have been approved previously under OMB control number 0581-0093. This proposal imposes no additional reporting and recordkeeping burden on domestic manufacturer and importers of softwood lumber. The reporting requirements pertaining to this proposed rule are described in the following paragraphs.

As previously mentioned, pursuant to section 1217.53(a) of the Order, 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 times 799 exempt entities at the 15 mmbf de minimis exemption threshold from Table 4).

Further, pursuant to section 1217.70 of the Order, domestic manufacturers and importers that ship or import at or over the

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de minimis.

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 proposed 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. USDA proposes to establish the de minimis quantity exemption under the softwood lumber Order as contained herein.

We have performed this initial RFA analysis regarding the impact of the proposed action on small entities and we invite comments concerning the potential effects of this action.

USDA has determined that this proposed rule is consistent with and would effectuate the purposes of the 1996 Act.

A 60-day comment period is provided to allow interested persons to respond to this proposed rule. All written comments received in response to this proposed rule by the date specified will be considered.

**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: May 23, 2017

Bruce Summers  
Acting Administrator

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